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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable Steven C Kirven
Case Nos. 2019CP3700687 and 2020CP3700188

Appellate Case No. 2022-001189

Montgomery Holdings, LLC d/b/a IBI Builders,..... Respondent,

v.

Christopher J. Merlo and Grandsouth Bank, Defendants

AND

Christopher J. Merlo,..... Appellant,

v.

Gregory K. Grissinger, Jr. and John Montgomery, ...Respondents.

SECOND REVISED RECORD ON APPEAL - VOLUME I

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STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

v.

CHRISTOPHER J. MERLO; BANK OF TRAVELERS
REST; and GRANDSOUTH BANK

Defendants,

_____ /

CHRISTOPHER J. MERLO,

Third Party Plaintiff,

v.

GREGORY K. GRISSINGER, JR., and JOHN
MONTGOMERY,

Third Party Defendants,

_____ /

**ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL ANSWERS TO
INTERROGATORIES AND RESPONSES AND DOCUMENTS TO REQUESTS FOR
PRODUCTION AND GRANTING THIRD PARTY DEFENDANTS' MOTION TO
STRIKE/DISMISS THIRD PARTY COMPLAINT IN ITS ENTIRETY**

THIS CAUSE having come before this Court on February 6, 2020 upon Plaintiff's Motion to Compel Answers to Interrogatories and Responses and Documents to Requests for Production and Third Party Defendants' Motion to Strike/Dismiss Third Party Complaint in its Entirety, and the Court otherwise being fully advised in the premises, it is,

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion to Compel Answers to Interrogatories and Responses and Documents to Requests for Production is **GRANTED**.
2. Defendant, CHRISTOPHER J. MERLO, shall serve full and complete answers made under oath to Plaintiff's Interrogatories on the Plaintiff by 5:00pm on February 14, 2020.

3. Defendant, CHRISTOPHER J. MERLO, shall serve full and complete responses and all responsive documents to Plaintiff's First Set of Request of Production of Documents on the Plaintiff by 5:00pm on February 14, 2020. All responsive documents served in response to Plaintiff's Interrogatories and Requests for Production shall be bates-stamped, and responses referencing or referring to a specific document or documents shall specifically identify the bates-stamp number(s) of that/those document(s). Additionally, Defendant shall serve a privilege log for each objection to Plaintiff's Interrogatories and Requests for Production based on privilege, including those objections made pursuant to the attorney-client and attorney work product privileges.
4. The Court will consider awarding the Plaintiff's its attorney's fees incurred in connection with its motion to compel against the Defendant. Accordingly, Plaintiff's counsel shall file an affidavit of the attorney's fees incurred in connection with its motion to compel.
5. The Third Party Defendants' Motion to Strike/Dismiss Third Party Complaint in its Entirety is **GRANTED**.
6. The Third Party Complaint is hereby stricken and dismissed in its entirety. Should Defendant, CHRISTOPHER J. MERLO, desire to pursue any claim(s) against Gregory K. Grissinger, Jr., and/or John Montgomery, the Defendant must file a new action and pay the clerk's filing fee and be assigned a new case number.

DONE and ORDERED in OCONEE County, South Carolina this _____ day of February, 2020.

CIRCUIT COURT JUDGE



Oconee Common Pleas

Case Caption: Montgomery Holdings, Llc D/B/A Ibi Builders , plaintiff, et al VS
Christopher J. Merlo , defendant, et al

Case Number: 2019CP3700687

Type: Order/Compel

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

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STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2020-CP-37-00188

CHRISTOPHER J. MERLO,

Plaintiff,

**CONSENT ORDER FOR
CONSOLIDATION**

v.

GREGORY K. GRISSINGER, JR., and JOHN
MONTGOMERY,

Defendants,

_____/

Pursuant to Rule 42 of the South Carolina Rules of Civil Procedure, and upon motion and consent of all parties through their undersigned counsel, the parties request the within Consent Order for Consolidation be adopted on the basis that this action involves common questions of law or fact as in the pending action of *Montgomery Holdings, LLC D/B/A IBI Builders v. Christopher J. Merlo; et. al.*; Oconee County Court of Common Pleas Case # 2019-CP-37-00687, and consolidation of these cases may tend to avoid unnecessary costs or delay.

Therefore:

1. This action is hereby consolidated with *Montgomery Holdings, LLC D/B/A IBI Builders v. Christopher J. Merlo; et. al.*; Oconee County Court of Common Pleas Case # 2019-CP-37-00687.
2. This action is hereby removed from the week of September 13, 2021 jury trial roster.

AND IT IS SO ORDERED.

I SO MOVE:

/s/ Jason M. Tarokh
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Tarokh Law, PLLC
PO Box 10827
Tampa, FL 33679

I SO CONSENT:

/s/ Townes B. Johnson, III
Townes B. Johnson, III
Townes B. Johnson, III, LLC
PO Box 9246
Greenville, SC 29604



Oconee Common Pleas

Case Caption: Christopher J Merlo VS Gregory K Grissinger Jr , defendant, et al

Case Number: 2020CP3700188

Type: Order/Consolidate

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2021-08-30 09:28:45 page 2 of 2

0005

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

**CONSENT ORDER FOR ORDER
OF REFERENCE TO MASTER-
IN-EQUITY**

v.

CHRISTOPHER J. MERLO;
and GRANDSOUTH BANK

Defendants,

_____ /

Pursuant to the Rules 53 and 71 of the South Carolina Rules of Civil Procedure, and upon motion and consent of all parties through their undersigned counsel, the parties request the within Consent Order of Reference to Master-in-Equity be hereby adopted:

That this action be, and the same hereby is, referred to the Honorable Steven C. Kirven, Master-in-Equity for the within county to take the testimony arising under the pleadings and to make his/her findings of fact and conclusions of law, with authority to rule on all matters related to this action, including but not limited to, the authority to enter a final judgment in the cause and said Master-in-Equity shall and must specifically retain jurisdiction to hear and shall and must hear on the merits any issues after sale or judgment, including but not limited to issues involving appraisal proceedings under Section 29-3-680, et. seq., and evictions as well as Rule 60 or Rule 61 Motions and/or similar matters including but not limited to the sufficiency of the successful bid as well as the marketability of title and/or matters relating to omitted lienholders or claimants; and with the further authority to sell the subject property at public auction on some convenient sales day hereafter as ordered with any appeal therefrom being directed and mandated to the South Carolina Court of Appeals.

AND IT IS SO ORDERED.

0006

I SO MOVE:

/s/ Jason M. Tarokh
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Tampa, FL 33679

I SO CONSENT:

/s/ Townes B. Johnson, III
Townes B. Johnson, III
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I SO CONSENT:

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James H. Cassidy
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Greenville, SC 29603



Oconee Common Pleas

Case Caption: Montgomery Holdings, Llc D/B/A Ibi Builders , plaintiff, et al VS
Christopher J. Merlo , defendant, et al
Case Number: 2019CP3700687
Type: Order/Referred to Master or Special Referee

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

v.

CHRISTOPHER J. MERLO;
and GRANDSOUTH BANK

Defendants,

CHRISTOPHER J. MERLO,

CASE #: 2020-CP-37-00188

Plaintiff,

v.

GREGORY K. GRISSINGER, JR., and JOHN
MONTGOMERY,

Defendants,

MASTER-IN-EQUITY'S ORDER AND JUDGMENT OF FORECLOSURE AND SALE

Pursuant to Rules 53 and 71, SCRCP, the above-entitled consolidated matters were referred to the undersigned by consent to make appropriate findings of fact and conclusions of law with authority to enter a final judgment. Accordingly, a multi-day non-jury trial was held before me on May 24, 2022 through and including May 27, 2022, in Anderson County, South Carolina, by consent of the parties, in which testimony was taken and evidence offered.

These consolidated cases concern the construction of a custom home on Lake Keowee in Oconee County, South Carolina. Although many claims and defenses have been pled, to

generally summarize the basic nature of the dispute: The builder alleges that the owner breached a contract for the construction of a custom home by terminating it and failing to pay the total amount owed, and the owner alleges the builder breached the contract by failing to properly and timely construct the home.

The following attorneys and parties were in attendance throughout the entirety of the trial:

Jason M. Tarokh – Attorney for Plaintiff, Montgomery Holdings, LLC d/b/a IBI Builders (herein “IBI”) in Case # 2019-CP-37-00687, and for Defendants, John J. Montgomery and Gregory K. Grissinger, Jr., in Case # 2020-CP-37-00188.

Townes B. Johnson, III – Attorney for Defendant, Christopher J. Merlo in Case # 2019-CP-37-00687, and for Plaintiff, Christopher J. Merlo in Case # 2020-CP-37-00188.

John J. Montgomery (herein “Montgomery”) – representative and agent of Plaintiff, IBI in Case # 2019-CP-37-00687, and Defendant in Case # 2020-CP-37-00188.

Gregory K. Grissinger, Jr. (herein “Grissinger”) – representative and agent of Plaintiff, IBI in Case # 2019-CP-37-00687, and Defendant in Case # 2020-CP-37-00188.

Christopher J. Merlo (herein “Merlo”) – Defendant in Case # 2019-CP-37-00687 and Plaintiff in Case # 2020-CP-37-00188.

THE MOTIONS FOR DIRECTED VERDICT

At the conclusion of IBI’s case in chief, Merlo made a motion for directed verdict, which was denied. At the conclusion of Merlo’s case in chief, IBI, Montgomery and Grissinger made a motion for directed verdict. I denied IBI’s motion for directed verdict as to Merlo’s negligence counterclaim. However, I hereby grant Montgomery and Grissinger’s motion for directed verdict as to all of Merlo’s claims against them, including the negligence claim. I also

hereby grant IBI's motion for directed verdict as to Merlo's claims for fraud, negligent misrepresentation, violation of the South Carolina Unfair Trade Practices Act (herein "SCUTPA") and breach of fiduciary duty.

IBI's, Grissinger's and Montgomery's motion for directed verdict sought a verdict in their favor against Merlo's claims against them for negligence, negligent misrepresentation, fraud, violation of the SCUTPA and breach of fiduciary duty in both cases. The primary basis of IBI's, Grissinger's and Montgomery's motion for directed verdict was the lack of evidence to support Merlo's claims of negligence, fraud, negligent misrepresentation and a violation of the SCUTPA based on alleged fraudulent or deceptive conduct on the part of IBI, Grissinger and Montgomery during the course of the subject construction project. I also find that there was a lack of evidence to support Merlo's claim that IBI, Grissinger and Montgomery were in a fiduciary relationship with Merlo during the course of the subject construction project.

Negligence

"In order to recover in a negligence action, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." *Crolley v. Hutchins*, 300 S.C. 355, 356 (Ct.App. 1989). Merlo presented no evidence establishing the duty of care owed Montgomery and Grissinger to Merlo. Furthermore, the economic loss rule bars Merlo's claims in tort because there was no evidence presented that Grissinger and Montgomery violated an applicable building code, deviated from industry standards, or constructed a home that they knew or should have known would pose serious risks of physical harm. *See, Kennedy v. Columbia Lumber and Manufacturing Company, Inc.*, 299 S.C. 335, 347 (1989). I also find that there was no evidence that Montgomery and Grissinger were acting in their individual capacities during the course of

the construction project. Accordingly, I find that Montgomery and Grissinger were acting as representatives and agents for IBI at all times during the course of the project.

Fraud

“Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence. In order to prove fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.” *Ardis v. Cox*, 431 S.E.2d 267, 269 (Ct.App. 1993). There was no evidence presented that IBI, Grissinger or Montgomery intentionally or recklessly misrepresented anything to Merlo during the course of the Merlo project.

Negligent Misrepresentation

“To prove a claim for the common law tort of negligent misrepresentation, [Merlo] was required to establish the following elements: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.” *Quail Hill, LLC v. County of Richland*, 287 S.C. 223, 240 (2010). There was no evidence presented that IBI, Grissinger and Montgomery falsely represented anything to Merlo during the course of the subject project. "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Id.* (internal citations omitted).

Violation of the South Carolina Unfair Trade Practices Act

The South Carolina Unfair Trade Practices Act is set forth in S.C. Code § 39-5-10 et seq. “The statute clearly requires that in order to recover pursuant to the UTPA one must prove each of the following three elements by the greater weight or preponderance of the evidence: 1) a violation of the Act, 2) proximate cause, and 3) damages.” *Charleston Lumber Co., Inc., v. Miller Housing Corp.*, 458 S.E.2d 431, 438 (Ct.App. 1995), *rev’d on other grounds*, 525 S.E.2d 869 (2000). There was no evidence presented that IBI, Grissinger and Montgomery engaged in any unfair or deceptive act or practice that adversely affected the public interest or was capable of repetition during the course of the subject project.

Breach of Fiduciary Duty

“Whether there is a fiduciary relationship between two people is an equitable issue. Generally, legal issues are for the determination of the jury and equitable issues are for the determination of the court. A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. This Court has recognized certain relationships are by nature fiduciary, such as the attorney client relationship.” *Hendricks v. Clemson University*, 353 S.C. 449, 458-9 (2003) (internal citations and quotation marks omitted). Merlo presented no evidence that the parties were in a fiduciary relationship during the course of the subject project.

Furthermore, based on the evidence presented at the trial, which included testimony from Montgomery; Grissinger; Merlo; Lee Matthew West, III; Ronald Fred Marchant, III; Michel F. Laplante; and Karen N. Merlo, I hereby find, conclude and order as follows as to IBI’s claims

against Merlo for foreclosure of its mechanic's lien, breach of contract, unjust enrichment and quantum meruit, and also as to Merlo's breach of contract and negligence claims against IBI.

FINDINGS OF FACT

1. I find that the parties were duly served with process and are properly before this Court.

2. I find that IBI and Merlo entered into a valid and enforceable written contract titled "Home Contract" and dated November 17, 2017, wherein IBI agreed to construct a custom home for Merlo for the base price of \$625,000 on Merlo's real property (herein "Home Contract").

Merlo's real property, the subject property, is more particularly described as follows:

All that certain piece, parcel or lot of land, situate, lying and being in the State of South Carolina, County of Oconee, being shown and designated as Lot No. 12 on a Plat entitled Marina Bay, dated August 26, 2016 and recorded in Plat Book B560 at Page 5, Oconee County ROD. Reference is hereby made to said plat for a more complete description of metes and bounds.

This being a portion of the same property conveyed to MT Investments, LLC by deed of Crescent Communities, LLC, recorded October 30, 2015 in Deed Book 2140 at Page 198-205, Oconee County ROD.

This being the same property conveyed to Christopher J. Merlo by deed of MT Investments, LLC, recorded November 4, 2016 in Deed Book 2222 at Page 145, Oconee County ROD.

**Owner of Property: Christopher J. Merlo
Property Address: 548 Marina Bay Dr., Seneca, South Carolina 29762
TMS#: 520-82-01-012**

3. I find that Merlo received a loan from GrandSouth Bank (herein "GSB"), which was secured by a mortgage in the amount of \$752,000, to finance the project. The mortgage is recorded in Mortgage Book 3687, Page 216, in the office of the Oconee County Register of Deeds. The mortgage constitutes a first lien position on the property.

4. I find that IBI was to be paid by periodic loan draws based upon the GSB's draw

inspection schedule pursuant to the Home Contract.

5. I find that GSB hired Lee Matthew West, III, to perform periodic draw inspections for the purpose of paying IBI loan draws when requested. I find that the purpose of the inspections was to verify IBI's completion of certain aspects of the project as set forth in the nine draw inspection reports that he prepared, which were all admitted into evidence. I find that Mr. West accurately assigned percentages to represent the level of completion of various project categories during the course of his nine separate inspections of the project after each inspection. I find that Mr. West would also accurately calculate the overall percentage of completion of the project after each inspection, which are reflected in the nine draw inspection reports. I find the testimony of Mr. West was credible and trustworthy.

6. I find that Merlo was obligated to pay IBI for any change orders and allowance overages pursuant to the Home Contract, which were in addition to the \$625,000 base price.

7. I find that Merlo approved of all change orders reflected on IBI's "balance sheet". I find that all change orders were accurately monetized and documented on IBI's balance sheet.

8. I find that IBI was very thorough and accurate in its accounting of the project by virtue of its balance sheet. I find that during the course of construction, IBI would periodically send Merlo the balance sheet via e-mail. The balance sheet is a document prepared by IBI in the normal and usual course of its business that reflected the balance owed by Merlo at any given time. I find that the balance sheet was periodically updated by IBI from time to time based upon charges for change orders and allowance overages, which were added to the balance sheet at or near the time they were incurred, and also for payments received, which likewise were added to the balance sheet at or near the time payments were received. Naturally, throughout the project, the total balance Merlo owed to IBI would fluctuate based upon charges for change orders and

allowance overages, and the payments that were made directly by Merlo or as loan draws from GSB.

9. I find that the Home Contract was supplemented and modified by that certain instrument dated May 3, 2019, that was signed by Merlo and delivered to IBI, which was referred to at the trial as the “Guaranty”. I find that both the Home Contract and Guaranty together constituted the entire agreement between the Merlo and IBI. I find that Merlo unquestionably agreed to all items and terms set forth in the Guaranty, which included but is not limited to Merlo’s agreement that the balance sheet as of April 30, 2019, consisted of a total balance Merlo owed to IBI of \$183,382. The Guaranty provides that, among other things, Merlo was seeking a separate source for funding “the additional items agreed to be added to the construction of the home”, that “the current conventional loan does not cover the current overages due to IBI”, and that “a HELOC is being sourced to fund the current balance of overages”. I find that by virtue of the Guaranty, Merlo unequivocally agreed to pay IBI for all past and pending change orders that were reflected on the April 30, 2019 balance sheet, in addition to agreeing that all future change orders and allowance overages would be added to the balance sheet and paid, such as “Boulder Retaining walls, plumbing overages, etc”, prior to “move in completion of home and or Certificate of Occupancy request”. I further find that the Guaranty also provided reasonable assurance by Merlo to IBI that Merlo would pay IBI for all past, pending and future change orders and overage allowances prior to IBI requesting a certificate of occupancy because Merlo’s construction loan with GSB did not cover the “current overages due” to IBI.

10. I find that the project had been substantially completed by IBI immediately prior to Merlo’s unjustified termination of the contract, which occurred on October 12, 2019. I find that

at that point only normal punch list items remained and IBI was prevented from doing so by the termination. I find that IBI substantially performed its duties and obligations under the contract.

11. I find that the ninth draw inspection was on August 26, 2019, at which time Mr. West calculated the project was at 93% completion. The remaining items at that time were the appliances (2%) and five categories showing 1% each, with 1% percent being the smallest rounding utilized. Thus, even if a particular category was only one or two tenths from completion it was shown as 1%. So, likely the actual percentage of completion at that point would have been significantly greater and possibly up to 97% as of the last draw inspection and possibly 99% or more after delivery of appliances and at termination, which is consistent with only punch list items remaining at that point. Those five categories included kitchen cabinets, electrical, landscaping, floors and storm windows/gutters. The photographs included in the ninth inspection report are not comprehensive, but they do show a house which is nearing completion and appears to be of good quality. Some unfinished items which can be discerned from those photographs include hardware for the kitchen cabinets, absent switch plates on electrical outlets, stickers on the windows and final cleanup and touch up needed on the landscaping, all of which fall in the categories remaining and are normal finishing touches or punch list items.

12. I find that work continued on the project after the August 26, 2019 inspection, which included the furnishing of labor and materials for the installation of the downstairs kitchen backsplash, and up until the termination on October 12, 2019. I find that IBI last furnished labor and materials at the project on October 11, 2019, the day before termination. I find that most of the 5% remaining work would have been addressed during the period from August 26, 2019 through October 11, 2019. Testimony indicated that discussion between IBI and Merlo about October 9, 2019, was to the effect that once the appliances were installed and the punch list

addressed a certificate of occupancy could be requested probably during the week of October 14, 2019. However, IBI insisted that Merlo pay the balance due including significant amounts for change orders before the certificate of occupancy would be requested. I find that the driving force leading to the termination was the insistence by IBI that Merlo make payment pursuant to the contract rather than any issues with the construction. Accordingly, I find that Merlo's October 12, 2019 termination of the contract was wrongful, unjustified and in bad faith.

13. I find that IBI's "final" balance sheet shows the base price of \$625,000 at line 3. I find that everything following from lines 4 through 54 were added to base price at the request of Merlo for change orders and allowance overages. I find that lines 56 through 68 show the payments in the total amount of \$606,050 were received by IBI through loan draws and direct payments, leaving the amount of \$255,534.86 at line 70, which is the final balance owed by Merlo to IBI under the contract. I find that the balance sheet accurately reflected all change orders and allowance overages, which were added to Home Contract price. I find that the balance sheet accurately reflected all payments that IBI received, which were accurately credited.

14. I find that IBI timely recorded its mechanic's lien in the amount of \$255,534.86, on October 17, 2019, in Volume 8, Page 68, in the office of the Oconee County, South Carolina, Register of Deeds. I find that IBI's mechanic's lien was timely served on Merlo on November 7, 2019, and also on GSB and Bank of Travelers Rest on November 8, 2019. Bank of Travelers Rest was dismissed as a party defendant by consent order on December 23, 2019. I find the IBI's lien accurately reflects the amount it is owed by Merlo under the contract. I find that IBI timely filed its Lis Pendens on November 8, 2019, and timely brought its action to foreclose its mechanic's lien on the same day.

15. I find that Merlo's breach of contract claim against IBI is without merit, which is

summarized to include encroachments onto the neighboring property of the driveway and the boulder wall, the downstairs ceiling height, the lack of poured concrete walls at certain locations, and the assertion that the work performed by IBI was of substandard quality. I find that Merlo has failed to establish that the aforementioned items were directly and solely caused by IBI and has also failed to establish the amount of damage attributable directly to those items. I find that the encroachments (drive and boulder wall) were the direct result of a failure to have the property lines properly identified and marked, which was not the responsibility of IBI. IBI's expert, Laplante, who was qualified as an expert witness, testified that identifying and marking the property lines for a construction project is always the responsibility of the owner. In addition, there was testimony that Merlo was directly involved in the placement of these items. I find that IBI's construction of the project was proper and was performed in a good and workmanlike manner, in accordance with the plans and specifications, and in compliance with the standard of care of the residential construction industry. I find that IBI's management and supervision of the construction of the project was proper and in compliance with the standard of care of the residential construction industry. I find that the house was constructed in accordance with the plans selected by Merlo and that the difference between the nominal ceiling height of 10' and the actual height of 9'8" was the thickness of the floor and ceiling materials. Additionally, I find that Merlo failed to present any evidence that the resulting ceiling height caused him any damage or that the house was worth any less upon completion because of the 9'8" ceiling height. I find that the poured concrete walls complained about were part of the foundation installation. I find that the plans selected were not specific to the Merlo lot and were dictated by the lay of the land and were largely determined and specified by the foundation contractors in the field. IBI's expert, Laplante, testified that the walls as constructed were within acceptable industry standards

and consistent with the plans. I find that the various photographs presented by Merlo and relied upon by him as showing substandard work were all taken during the midst of construction and do not represent the final product. They are certainly not consistent with the photos attached to the ninth draw inspection report. IBI's expert, Laplante, further testified that the house was built by IBI to acceptable industry standards in terms of quality. Accordingly, I find that IBI's work on the project to be of good and acceptable quality and well within the industry standards.

16. I find that IBI did not unreasonably or negligently delay the project. I find that IBI substantially completed the project in a reasonable period of time. I find that the building period for this project was extremely rainy causing excessive mud, which was exacerbated by the absence of the drive and retaining wall during much of the construction period much of which is exhibited in the Merlo photographs. Merlo argued extensively about the duration of IBI work on the project and that it greatly exceeded the 12-month period in the Home Contract as set forth in Paragraph I (A)(B) therein. However, I find that a reading of the Home Contract language in that regard to be without merit and erroneous because the language indicates that the 12-month figure was neither mandatory nor absolute, because it specifically states that it was an estimate and that multiple variables could impact that time frame including weather and change orders, both of which were significant factors in this project.

17. Credibility is a significant factor in this case. I find that Merlo was inconsistent, at best, in his statements about the project. Overall, I find that Merlo was not credible in his testimony. In February 2019, Merlo sent a surprise gift to IBI and expressed his appreciation for IBI on the house (Pl. Ex. 81). A series of emails from Merlo to GSB is telling (PL. Exs. 62-68). In a January 6, 2019 e-mail to GSB, Merlo notes that construction was slow due to continuing rain, but added that the end-product should be exceptional. In a March 8, 2019 e-mail to GSB,

Merlo states that he was satisfied with the project but expressed his impatience due to the pace of construction and stated that he was certain the final appraisal would soothe his anxiety. In an April 25, 2019 e-mail to GSB, Merlo states that construction was moving briskly and that the appraisal should be favorable. In an April 30, 2019 e-mail to GSB, Merlo acknowledges that he owed his builder \$150,000 at that point. In a May 3, 2019 e-mail to GSB, Merlo again acknowledges owing the builder \$150,000. In a May 29, 2019 e-mail to GSB, Merlo again acknowledges owing the builder \$150,000 and suggests an appraisal of \$1,250,000 or higher. In an August 20, 2019 email to GSB, Merlo states that the house is almost finished and that the house exceeds initial expectations.

18. Along these same lines, comments by Ron Marchant of GSB in a November 13, 2019 e-mail are noteworthy (PL. Ex. 69). I find Mr. Marchant's testimony to be credible and trustworthy. Mr. Marchant indicated in an e-mail that he visited the project on November 12, 2019 and it looked good. In the e-mail, Mr. Marchant states, "Needs to be punched out and appliances installed, etc. Other than that it is ready to go." On November 8, 2019, in comments submitted to Marchant for his approval, another GSB employee states that based on discussion with Merlo he terminated the IBI contract due to "timing, etc". *Id.* This was several days before Mr. Marchant visited the project as referenced above and was at a time when Merlo had not yet obtained another builder for the project after terminating IBI. I find that only after IBI filed and served its mechanic's lien did Merlo start raising issues related to construction quality and compliance with plans.

19. I find that Merlo engaged in a disturbing pattern of conduct. After IBI was wrongfully and unjustifiably terminated, Merlo hired Joy Construction (herein "Joy") whose principal owner was Dustin Rampy. Merlo eventually fell out with Joy/Rampy. In both

situations (IBI and Joy/Rampy), I find that Merlo attempted to build leverage to negotiate a reduced price or concession from the other party regarding payment. In the IBI matter, on November 20, 2019, shortly after IBI's mechanic's lien was filed, Merlo filed a complaint about IBI with the South Carolina Department of Labor, Licensing and Regulation (herein "SCLLR"), which was investigated and dismissed. Subsequently in August 2020, Merlo pursued a claim against Grissinger's bond company making numerous disparaging remarks about Grissinger and stating that his complaint to the SCLLR was for the purpose of getting Grissinger's contractor's license revoked. (Pl. Ex. 82). Merlo also communicated to GSB that the bank should remove IBI from their approved list. After Joy/Rampy left the project (resigning on April 6, 2020), Merlo called the police at some point claiming Joy/Rampy had stolen his property. On April 8, 2020, Merlo sent Joy/Rampy a threatening email seeking a refund and stating that he had spoken to a governmental agency and a criminal complaint was being considered and ending with "The ball is in your court, proceed with caution." (Pl. Ex. 76). Ultimately a settlement was reached with Joy/Rampy under which Rampy returned \$13,000 to Merlo.

20. Merlo presented evidence that he paid Joy substantial sums for work at his property after IBI was terminated, however, Merlo never presented any definitive evidence of the scope of work for which Joy was hired other than generally stating that it was for remediation of the IBI work, which is inconsistent with the other evidence regarding the state of completion when IBI was terminated. I find that significant changes and additions to the project were made by Merlo after IBI was terminated. I find there was insufficient evidence to establish a nexus between any specific items claimed by Merlo to be defective work by IBI with any specific amount to cure.

21. In addition to actual damages Merlo claimed consequential damages based on his sale of Myrtle Beach property to fund the project and his mortgage payments on his residence

prior to the new project. Consequential damages are those which do not flow directly from the contract breach, but which were within the contemplation of the parties at the time the contract was made. *See, Goodwin v. The Hilton Head Company*, 273 S.C. 758, 761 (1979). I find there was no evidence admitted supporting a determination that these items claimed by Merlo were contemplated to any degree at all at the time the contract was made.

22. I find that Merlo's negligence claim against IBI is for economic loss only and would sound in contract as opposed to tort. Although a builder may be liable to an owner in tort where only economic loss is involved, the owner must establish that the builder has violated an applicable building code, has deviated from industry standards, or has constructed a house which he knows or should know will pose serious risks of physical harm. *See, Kennedy v. Columbia Lumber and Manufacturing Company, Inc.*, 299 S.C. 335, 347 (1989). I find the evidence presented by Merlo fails to establish those elements.

23. I find that Merlo's breach of contract claim against IBI is without merit as the evidence presented failed to establish that IBI breached the contract.

24. I find that all of Merlo's affirmative defenses against IBI's claims are without merit as the evidence presented by Merlo failed to establish each affirmative defense.

Conclusions of Law

1. This Court has jurisdiction over these consolidated cases and over all parties.
2. "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Regions Bank v. Schmauch*, 354 S.C. 648, 660 (Ct. App. 2003). "Where instruments entered into by the same parties at different times relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. If the provisions of one instrument limit, explain, or

otherwise affect the provisions of the other, they will be given effect to accomplish the entire agreement between the parties.” *Bishop Realty and Rentals, Inc., v. Perk, Inc.*, 292 S.C. 182, 185 (Ct. App. 1987) (internal citations omitted). Based on the evidence presented, I conclude that the Home Contract and Guaranty together constituted the contract between IBI and Merlo.

3. “In order to prevail on [a] claim of breach of contract, [a] plaintiff bears the burden of establishing the existence and terms of the contract, defendant's breach of one or more of the contractual terms, and damages resulting from the breach.” *Taylor v. Cummins Atl., Inc.*, 852 F. Supp. 1279, 1286 (D.S.C. 1994), *aff'd*, 48 F.3d 1217 (4th Cir. 1995), *cert. denied*, 516 U.S. 864, 116 (1995). “It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time able, ready and willing so to perform it.” *Parks v. Lyons*, 219 S.C. 40, 48 (1951). Based on the evidence presented, I conclude that Merlo breached the contract with IBI by wrongfully and unjustifiably terminating the contract after IBI substantially completed the project. I also find that Merlo breached the contract by failing to pay IBI the balance of \$255,534.86 owed under the contract, which caused IBI to suffer damages in the amount of **\$255,534.86**, plus prejudgment interest, attorney’s fees and costs. Furthermore, I include that IBI performed its duties and obligations under the contract and did not breach the contract.

4. “A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate...by virtue of an agreement with, or by consent of, the owner of the building or structure...shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated to secure the payment of the

debt due to him.” S.C. Code Ann. § 29-5-10(a). “The purpose of the mechanic's lien statute is to aid both builders and owners. It enables a builder to supply labor and materials with the assurance of being paid without the necessity of a conventional note and mortgage.

Simultaneously, it provides the owner with an easy method of obtaining credit while receiving the benefit of labor and materials supplied to his property.” *A.V.A. Construction Corporation v. Santee Wando Construction*, 303 S.C. 333, 336. (Ct. App. 1991).

5. “The right to a lien arises inchoate; i.e., when the labor is performed or material is furnished, the right exists but the lien has not been perfected.” *Butler Contracting v. Court Steet, LLC*, 369 S.C. 121, 128 (2006) (citations omitted).

6. “In order to perfect and enforce a mechanic's lien, the person asserting the lien (1) must serve upon the owner or person in possession and file with the register of deeds or clerk of court a notice or certificate of lien containing the lien amount, a description of the real property, and other required information ‘within ninety days after he ceases to labor on or furnish labor or materials for such building or structure’; (2) must commence a lawsuit seeking to enforce the lien within six months after ceasing to provide labor or materials for such real property; and (3) must file a notice of the pending action (lis pendens) within six months after ceasing to provide labor or materials for such real property. If these steps are taken, the person claiming the lien may foreclose against the property to satisfy the debt.” *Id.* at 129 (internal citations omitted). I conclude that IBI perfected its mechanic’s lien in accordance with the law and is therefore entitled to foreclosure of its lien. Accordingly, I conclude that the subject property should be sold at public auction after due advertisement to satisfy the debt owed to IBI.

7. “The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is

demandable, if the sum is certain or capable of being reduced to certainty. Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties. Prejudgment interest is not allowed on an unliquidated claim in the absence of an agreement or statute. The fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. The right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.” *Id.* at 133-4. (internal citations omitted). Accordingly, I conclude that IBI’s claim under the contract was “liquidated” as it was capable of being reduced to certainty based upon mathematical calculation by virtue of the “final” balance sheet. Therefore, I conclude that IBI is entitled to prejudgment interest on \$255,534.86, the balance owed, which began accruing on October 12, 2019, the date of termination. S.C. Code Ann. § 34-31-20(A), sets forth the prejudgment interest rate as eight and three-fourth percent (8.75%) per annum. Therefore, as of July 20, 2022, prejudgment interest in the amount of **\$61,993.46** has accrued on the \$255,534.86 balance owed, which is calculated at \$61.26 per day multiplied by 1012 days.

8. “The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party. The fee must be determined by the court in which the action is brought but the fee and the court costs may not exceed the amount of the lien.” S.C. Code Ann. § 29-5-10(a). *See, T.W. Morton*

Builders, Inc., v. von Buedingen, 316 S.C. 388 (Ct. App. 1994) (holding the court must award attorney fees to the prevailing party in an action to enforce or defend against a mechanic's lien). Merlo filed and served an offer of settlement in the amount of \$150,000, pursuant to S.C. Code Ann. § 29-5-10. IBI filed an offer of settlement in the amount of \$200,000 pursuant to S.C. Code Ann. § 29-5-10. Because IBI's offer of settlement was closer to the verdict reached in this case, I conclude that IBI is entitled to an award of attorney's fees against Merlo as the prevailing party. *See*, S.C. Code Ann. § 29-5-10(b). I further conclude that because the Guaranty specifically provides that "[Merlo] will reimburse [IBI] for all expenses incurred in connection with enforcement including without limitation, reasonable attorneys' fees", IBI is entitled to an award of attorney's fees and costs against Merlo in the prosecution of its claims and in defense against Merlo's claims against it. Therefore, based upon IBI's counsel, Jason M. Tarokh, Affidavit of Attorney's Fees and Costs, I find and conclude that IBI incurred attorney's fees in the amount of **\$72,733.87**, and costs in the amount of **\$12,599.47**, to enforce its lien and the contract, which I find and conclude were reasonable and necessary.

9. Because I find that a valid and enforceable contract existed between Merlo and IBI by virtue of the Home Contract and Guaranty, I conclude that IBI's claims for unjust enrichment and quantum meruit, which were pled in the alternative to IBI's breach of contract claim, are moot. *See, Blanton v. Friedberg*, 819 F.2d 489, 491 n.2 (4th Cir. 1987) ("Normally, damages for breach of contract and recovery for *quantum meruit* are mutually exclusive remedies.") (emphasis original). "This Court has recognized quantum meruit as an equitable doctrine to allow recovery for unjust enrichment. Absent an express contract, recovery under quantum meruit is based on quasicontract. . . ." *Columbia Wholesale Company, Inc., v. Scudder May N.V.*, 440 S.E.2d 129, 130 (1994).

10. “In order to recover in a negligence action, [Merlo] must show (1) a duty of care owed by [IBI] to [Merlo]; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach.” *Crolley v. Hutchins*, 300 S.C. 355, 356 (Ct.App. 1989). I find that Merlo’s negligence claim against IBI are for economic loss only and would sound in contract as opposed to tort. Although a builder may be liable to an owner in tort where only economic loss is involved, the owner must establish that the builder has violated an applicable building code, has deviated from industry standards, or has constructed a house which he knows or should know will pose serious risks of physical harm. *See, Kennedy v. Columbia Lumber and Manufacturing Company, Inc.*, 299 S.C. 335, 347 (1989). I find the evidence presented by Merlo fails to establish those elements. Accordingly, I conclude that Merlo’s negligence claim against IBI is not supported by the evidence and is otherwise without merit.

11. I conclude that GSB’s mortgage in the amount of \$752,000, and recorded in Mortgage Book 3687, Page 216, in the office of the Oconee County Register of Deeds, constitutes a first lien position on the property and the foreclosure sale of the subject property will be subject to said mortgage.

12. Therefore, for the reasons set forth above, I conclude that IBI is due \$255,534.86 on the contract and on its mechanic’s lien, plus prejudgment interest in the amount of \$61,993.46, plus attorney’s fees in the amount of \$72,733.87, plus costs in the amount of \$12,599.47, for a total due of **\$402,861.66**, which represents the total debt due to IBI.

13. I conclude that because IBI’s mechanic’s lien has been established, the subject property shall be sold pursuant to law to satisfy the indebtedness owed to IBI. *See*, S.C. Code Ann. § 29-5-260 (“If the lien is established in favor of any of the creditors whose claims are

presented the court shall order a sale of the property to be made by such officer as may be authorized by law to make sales of property.”).

Accordingly, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** as follows:

1. Merlo’s counterclaims for fraud, negligent misrepresentation, violation of the SCUTPA and breach of fiduciary duty against IBI in Oconee County Court of Common Pleas Case # 2019-CP-37-00687 are hereby **DISMISSED WITH PREJUDICE BY DIRECTED VERDICT**.

2. All of Merlo’s claims against Grissinger and Montgomery in Oconee County Court of Common Pleas Case # 2020-CP-37-00188, which are for negligence, fraud, negligent misrepresentation, violation of the SCUTPA and breach of fiduciary duty, are hereby **DISMISSED WITH PREJUDICE BY DIRECTED VERDICT**.

3. As to IBI’s breach of contract claim against Merlo in Oconee County Court of Common Pleas Case # 2019-CP-37-00687, after due and thorough consideration of the evidence presented, the Court hereby grants judgment in favor of IBI against Merlo in the amount of \$255,534.86, plus prejudgment interest in the amount of \$61,993.46, plus attorney’s fees in the amount of \$72,733.87, plus costs in the amount of \$12,599.47, for a total judgment of **\$402,861.66**. Post-judgment interest shall accrue at the rate of 7.25% per annum, from the date of this judgment until paid in full.

4. As to IBI’s foreclosure of mechanic’s lien claim in Oconee County Court of Common Pleas Case # 2019-CP-37-00687, after due and thorough consideration of the evidence presented, the Court hereby grants judgment in favor of IBI in the sum of **\$402,861.66**,

representing the total debt due the Plaintiff on its lien, together with post-judgment interest that shall accrue at the rate of 7.25% per annum.

5. Because a valid and enforceable contract existed between IBI and Merlo, IBI's claims for quantum meruit and unjust enrichment are **MOOT**.

6. After due and thorough consideration of the evidence presented, the Court hereby enters judgment in favor of IBI on Merlo's breach of contract and negligence counterclaims in Oconee County Court of Common Pleas Case # 2019-CP-37-00687.

7. The party liable for the aforesaid debt, Merlo, shall, on or before the date of sale of the property herein after described, pay to IBI or its attorney the amount of the debt owed as aforesaid, together with the costs and disbursements of this action.

8. Upon default of payment at or before the time herein indicated, the property be sold by the Oconee County Clerk of Court, at public auction, at the Oconee County Courthouse, in the City of Walhalla, County and State aforesaid, on some convenient sales day hereafter as set by the Court, on the following terms, that is to say:

a. FOR CASH: The Oconee County Clerk of Court will require a deposit of five (5%) on the amount of the bid, in cash or its equivalence, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days same to be forfeited and applied to the costs and Plaintiff's (IBI's) debt.

b. The sale shall be subject to the mortgage owned and held by GSB, which is recorded in Mortgage Book 3687, Page 216, in the office of the Oconee County Register of Deeds, taxes, assessments, existing easements, and easements and restrictions of record.

c. Purchaser to pay for deed stamps and cost of recording the deed.

d. If Plaintiff (IBI) is the successful bidder at the foreclosure sale for a sum

not exceeding the amount of costs, expenses and the indebtedness of the Plaintiff (IBI) in full, the Plaintiff (IBI) may pay to the Oconee County Clerk of Court only the amount of the costs and expenses, crediting the balance of the bid on its indebtedness.

9. The Oconee County Clerk of Court will, by advertisement according to law, give notice of the time and place of such sale, and the terms thereof, and will execute to the purchaser or purchasers a deed to the property sold. The Plaintiff (IBI) or any other party to this action may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within thirty (30) days after date of sale, then the Oconee County Clerk of Court may advertise the said property for sale on the next or some other subsequent sales day, as set by the Court, at the risk of the former highest bidder, and so from to time thereafter until a full compliance shall be secured.

10. The Oconee County Clerk of Court shall apply the proceeds of the sale of the property as follows:

FIRST: To payment of the amount of costs and expenses in this action;

NEXT: To the payment to Plaintiff (IBI) or its attorney of the amount of debt owed to Plaintiff (IBI) and interest, so much thereof as the purchase money will pay on the same; and

NEXT: Any surplus should be held pending further Order of this Court and pursuant to S.C. Code Ann. § 29-5-310.

11. The amount generated from the foreclosure sale shall be credited against the above-described in personam judgment granted against Merlo and in favor of IBI on its breach of contract claim. If the amount generated from the foreclosure sale is insufficient to pay off the in personam judgment in its entirety, then the balance shall remain in place as a judgment lien against Merlo, which shall continue to accrue interest at the rate of 7.25% per annum.

11. The defendants named herein, with the exception of GSB, and all persons whosever claiming under the defendants be barred and foreclosed of all right, title, interest and equity of redemption in the subject property, or any part thereof.

12. The deed of conveyance made pursuant to said sale shall contain the names of only the Plaintiff, the defendant who was the titleholder of the property at the time of the filing of the Lis Pendens, and the grantee; and the Register of Deeds is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in such deeds.

13. A description of the property encumbered by IBI's mechanic's lien and herein ordered to be sold is as follows:

All that certain piece, parcel or lot of land, situate, lying and being in the State of South Carolina, County of Oconee, being shown and designated as Lot No. 12 on a Plat entitled Marina Bay, dated August 26, 2016 and recorded in Plat Book B560 at Page 5, Oconee County ROD. Reference is hereby made to said plat for a more complete description of metes and bounds.

This being a portion of the same property conveyed to MT Investments, LLC by deed of Crescent Communities, LLC, recorded October 30, 2015 in Deed Book 2140 at Page 198-205, Oconee County ROD.

This being the same property conveyed to Christopher J. Merlo by deed of MT Investments, LLC, recorded November 4, 2016 in Deed Book 2222 at Page 145, Oconee County ROD.

**Owner of Property: Christopher J. Merlo
Property Address: 548 Marina Bay Dr., Seneca, South Carolina 29762
TMS#: 520-82-01-012**

14. IT IS FURTHER ORDERED that if Plaintiff (IBI) or its representative does not appear at the scheduled sale of the above-described property, then the sale of the property will be null, void and of no force and effect. In such event, the sale will be rescheduled for the next available sales date as ordered by this court.

15. Merlo has not established any claims or defenses, legal or equitable, for relief against

Plaintiff (IBI), and therefore no relief, be it legal or equitable, shall be granted to Merlo. In addition, all persons who may be entitled to claim through or under the title or interest of Merlo in the subject property shall likewise be absolutely barred and forever foreclosed.

16. The undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure and to hear any post-judgment matters, including, but not limited to, the issuance of a Writ of Assistance.

AND IT IS SO ORDERED.

DONE and ORDERED in OCONEE County, South Carolina this _____ day of July, 2022.

The Honorable Steven C. Kirven
Master-in-Equity for Oconee County



Oconee Common Pleas

Case Caption: Montgomery Holdings, Llc D/B/A Ibi Builders , plaintiff, et al VS
Christopher J Merlo , defendant, et al
Case Number: 2019CP3700687
Type: Master/Order/Other

And it is so ordered

s/ Steven C. Kirven, Master in Equity, #3081

Electronically signed on 2022-07-20 15:02:30 page 26 of 26

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

NOTICE OF SALE

v.

CHRISTOPHER J. MERLO;
and GRANDSOUTH BANK

Defendants,

BY VIRTUE of a judgment heretofore granted in the case of Montgomery Holdings, LLC D/B/A IBI Builders vs. Christopher J. Merlo and GrandSouth Bank, I Melissa "Lisa" Burton, Clerk of Court, for Oconee County, will sell on Tuesday, September 6th, 2022 at 11:00 AM, at the Oconee County Courthouse, 205 W. Main Street, Walhalla, SC 29691, to the highest bidder:

All that certain piece, parcel or lot of land, situate, lying and being in the State of South Carolina, County of Oconee, being shown and designated as Lot No. 12 on a Plat entitled Marina Bay, dated August 26, 2016 and recorded in Plat Book B560 at Page 5, Oconee County ROD. Reference is hereby made to said plat for a more complete description of metes and bounds.

This being a portion of the same property conveyed to MT Investments, LLC by deed of Crescent Communities, LLC, recorded October 30, 2015 in Deed Book 2140 at Page 198-205, Oconee County ROD.

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**Property Address: 548 Marina Bay Dr., Seneca, South Carolina 29762
TMS#: 520-82-01-012**

TERMS OF SALE: The successful bidder, other than the Plaintiff, will deposit with the Clerk of Court at conclusion of the bidding, five (5%) of his bid, in cash or equivalent, as evidence of good faith, the same to be applied to purchase price in case of compliance, but to be forfeited and applied first to costs and then to Plaintiff's debt in the case of non-compliance. Should the last

and highest bidder fail or refuse to make the required deposit at the time of the bid or comply with the other terms or the bid within thirty (30) days, then the Clerk of Court may resell the property on the same terms and conditions on some subsequent Sales Day (at the risk of the former highest bidder).

Should the Plaintiff, or one of its representatives, fail to be present at the time of sale, the property is automatically withdrawn from said sale and sold at the next available sales day upon the terms and conditions as set forth in the Master-in-Equity's Order and Judgment of Foreclosure and Sale or any supplemental order.

The sale will be final as a deficiency judgment is not applicable. The bidding will not remain open after the date of sale, but compliance with the bid may be made immediately.

Purchaser to pay for deed stamps and cost of recording the deed. The successful bidder will be required to pay interest on the balance of the bid from the date of sale to compliance with the bid at the rate of 7.25% per annum.

The sale shall be subject to the mortgage owned and held by GrandSouth Bank, which is recorded in Mortgage Book 3687, Page 216, in the office of the Oconee County Register of Deeds, taxes, assessments, existing easements, and easements and restrictions of record.

NOTICE: Neither the Plaintiff nor its counsel make representations as to the integrity of the title or the fair market value of the property offered for sale. Interested bidders should satisfy themselves as to the quality of title to be conveyed by obtaining an independent title search well before the foreclosure sale date.

TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679
813-922-5510
jason@tarokhlaw.com
JASON M. TAROKH
Attorney for Plaintiff

SIGNATURE PAGE TO FOLLOW



Oconee Common Pleas

Case Caption: Montgomery Holdings, Llc D/B/A Ibi Builders , plaintiff, et al VS
Christopher J Merlo , defendant, et al
Case Number: 2019CP3700687
Type: Master/Order/Notice of Foreclosure Sale

So Ordered

Lisa C Burton

Electronically signed on 2022-07-28 09:20:01 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

v.

CHRISTOPHER J. MERLO;
and GRANDSOUTH BANK

Defendants,

CHRISTOPHER J. MERLO,

CASE #: 2020-CP-37-00188

Plaintiff,

v.

GREGORY K. GRISSINGER, JR., and JOHN
MONTGOMERY,

Defendants,

ORDER DENYING MOTION TO ALTER OR AMEND

THIS CAUSE having come before this Court on August 11, 2022, at a hearing upon Defendant's in case # 2019-CP-37-00687 and Plaintiff's in case # 2020-CP-37-00188, CHRISTOPHER J. MERLO (herein "Merlo"), Motion to Alter or Amend filed on July 29, 2022, and the Court after consideration of the subject motion, IBI's, Grissinger's and Montgomery's Response in Opposition to Merlo's Motion to Alter or Amend filed on August 9, 2022, and the argument of counsel, and otherwise being fully advised in the premises, it is,

ORDERED AND ADJUDGED as follows:

1. Merlo's Motion to Alter or Amend filed on July 29, 2022, is hereby DENIED.

DONE and ORDERED in OCONEE County, South Carolina this _____ day of
August, 2022.

The Honorable Steven C. Kirven
Master-in-Equity for Oconee County



Oconee Common Pleas

Case Caption: Montgomery Holdings, Llc D/B/A Ibi Builders , plaintiff, et al VS
Christopher J Merlo , defendant, et al
Case Number: 2019CP3700687
Type: Order/Other

And it is so ordered

s/ Steven C. Kirven, Master in Equity, #3081

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

v.

CHRISTOPHER J. MERLO;
and GRANDSOUTH BANK

Defendants,

CHRISTOPHER J. MERLO,

CASE #: 2020-CP-37-00188

Plaintiff,

v.

GREGORY K. GRISSINGER, JR., and JOHN
MONTGOMERY,

Defendants,

**ORDER DENYING MERLO'S MOTION AND [PROPOSED] ORDER PURSUANT TO
SOUTH CAROLINA CODE ANN. § 18-9-130(2)**

THIS CAUSE having come before this Court upon Defendant's, CHRISTOPHER J. MERLO (herein "Merlo"), Motion and [Proposed] Order Pursuant to South Carolina Code Ann. § 18-9-130(2)[sic], which was filed on August 23, 2022, and the Court after consideration of the subject motion, and IBI's Second Amended Response in Opposition to Merlo's Motion and Order Pursuant to South Carolina Code Ann. § 18-9-130(2)[sic], IBI's Supplemental Response to its Second Amended Response in Opposition to Merlo's Motion and Order Pursuant to South

Carolina Code Ann. § 18-9-130(2)[sic], and the argument of counsel, and otherwise being fully advised in the premises, it is,

ORDERED AND ADJUDGED as follows:

1. Merlo's Motion and [Proposed] Order Pursuant to South Carolina Code Ann. § 18-9-130(2)[sic], filed on August 23, 2022, is hereby DENIED.

2. IBI shall not be required to post any bond in order to proceed with the foreclosure sale as ordered in the Master-in-Equity's Order and Judgment of Foreclosure and Sale, which was filed on July 20, 2022. *See, Carsten v. Wilson*, 241 S.C. 516, 129 (1963); South Carolina Code Ann. § 18-9-170.

DONE and ORDERED in OCONEE County, South Carolina this _____ day of August, 2022.

The Honorable Steven C. Kirven
Master-in-Equity for Oconee County



Oconee Common Pleas

Case Caption: Montgomery Holdings, Llc D/B/A Ibi Builders , plaintiff, et al VS
Christopher J Merlo , defendant, et al
Case Number: 2019CP3700687
Type: Master/Order/Other

And it is so ordered

s/ Steven C. Kirven, Master in Equity, #3081

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

v.

CHRISTOPHER J. MERLO;
and GRANDSOUTH BANK

Defendants,

**PLAINTIFF'S MOTION AND ORDER CANCELLING THE FORECLOSURE SALE
SCHEDULED FOR SEPTEMBER 6, 2022**

COMES NOW, Plaintiff, MONTGOMERY HOLDINGS, LLC, D/B/A IBI BUILDERS (herein "IBI"), by and through its undersigned attorney, hereby moves to cancel the foreclosure sale currently scheduled for September 6, 2022, and in support thereof states as follows:

1. The Master-in-Equity's Order and Judgment of Foreclosure and Sale was entered on July 20, 2022 (herein "Judgment").
2. The Judgment ordered the sale of the subject real property to satisfy the indebtedness owed to IBI on its mechanic's lien.
3. Accordingly, a foreclosure sale of the subject property is currently scheduled for September 6, 2022.

4. A satisfaction of judgment was filed on the same date of this motion.

NOW, THEREFORE, on motion of IBI, by and through its undersigned attorney:

IT IS ORDERED that the foreclosure sale scheduled for September 6, 2022, in the above-captioned case is hereby CANCELLED.

IT IS FURTHER ORDERED that the Oconee County Clerk of Court shall withdraw the above-captioned case from the Clerk's September 6, 2022 foreclosure sale roster.

AND IT IS SO ORDERED!

(JUDGE'S SIGNATURE PAGE TO FOLLOW)

I SO MOVE:

s/ Jason M. Tarokh

JASON M. TAROKH

S. CAROLINA BAR # 72837

TAROKH LAW, PLLC

PO BOX 10827

TAMPA, FL 33679

813-922-5510

jason@tarokhlaw.com

Attorney for Plaintiff, Montgomery Holdings, LLC d/b/a IBI Builders

August 29, 2022



Oconee Common Pleas

Case Caption: Montgomery Holdings, Llc D/B/A Ibi Builders , plaintiff, et al VS
Christopher J Merlo , defendant, et al
Case Number: 2019CP3700687
Type: Master/Order/Other

And it is so ordered

s/ Steven C. Kirven, Master in Equity, #3081

Electronically signed on 2022-08-29 11:53:12 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: _____

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

v.

SUMMONS
(Jury Trial Requested)

Deficiency Judgment Requested

CHRISTOPHER J. MERLO; BANK OF TRAVELERS
REST; and GRANDSOUTH BANK

Defendants,

_____/

TO: CHRISTOPHER J. MERLO; BANK OF TRAVELERS REST; and GRANDSOUTH BANK

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 to the Complaint upon the subscribers, at their office, TAROKH LAW, PLLC, PO Box 10827, Tampa, FL 33679, within thirty (30) days, after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint in the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679
813-922-5510

/s/ Jason M. Tarokh
JASON M. TAROKH
SOUTH CAROLINA BAR # 72837

November 8, 2019

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: _____

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

(Jury Trial Requested)

v.

Deficiency Judgment Requested

CHRISTOPHER J. MERLO; BANK OF TRAVELERS
REST; and GRANDSOUTH BANK

Defendants,

_____ /

COMPLAINT

COMES NOW THE PLAINTIFF, MONTGOMERY HOLDINGS, LLC D/B/A IBI BUILDERS, and sues the Defendants, CHRISTOPHER J. MERLO; BANK OF TRAVELERS REST; and GRANDSOUTH BANK (herein "Defendants"), and alleges as follows:

GENERAL ALLEGATIONS

1. Plaintiff, MONTGOMERY HOLDINGS, LLC D/B/A IBI BUILDERS, is a limited liability company organized and existing under the laws of the State of South Carolina, and is authorized to do business therein, and did business as IBI BUILDERS during all relevant times.

2. Defendant, CHRISTOPHER J. MERLO (herein "Defendant"), is an individual and is believed to be residing in Anderson County, South Carolina.

3. At all times material herein, Defendant owned (and continues to own) real estate located in Oconee County, South Carolina, at 548 Marina Bay Dr., Seneca, South Carolina 29762 (herein "Property").

4. This Court has jurisdiction over the parties and the subject of this lawsuit.

Furthermore, venue is appropriate in Oconee County, South Carolina.

5. Plaintiff has retained TAROKH LAW, PLLC, to initiate and maintain this action and

is obligated to pay it a reasonable fee for its services in bringing this action.

6. On or about November 17, 2017, Plaintiff and Defendant entered into a written contract wherein Plaintiff would furnish labor, services and materials for the improvement of the Property (herein "Contract"). A true and correct copy of the Contract is attached hereto and incorporated herein as an exhibit.

7. On or about May 3, 2019, Defendant agreed, affirmed, assured and guaranteed to Plaintiff in writing that full payment would be made under the Contract and also for additional items as set forth therein (herein "Guaranty"). A true and correct copy of the Guaranty is attached hereto and incorporated herein as an exhibit. The Guaranty constitutes an enforceable contract, which was intended by the Plaintiff and Defendant to supplement and/or modify the Contract.

8. Plaintiff provided valuable labor, services, and materials for the improvement of the Property pursuant to the Contract and Guaranty, for which Plaintiff remains unpaid in the amount of \$255,534.86, plus interest, costs and reasonable attorney's fees.

9. Plaintiff timely recorded its Notice and Certificate of Mechanic's Lien against the Property on October 17, 2019 in the office of the Oconee County Register of Deeds in Volume 8, Page 68. A true and correct copy of the Notice and Certificate of Mechanic's Lien is attached hereto and incorporated herein as an exhibit.

10. Defendant, BANK OF TRAVELERS REST, is a banking institution doing business in Oconee County, South Carolina, and has an interest in the Property by virtue of a certain mortgage recorded on November 4, 2016 in the office of the Oconee County Register of Deeds in Book 3550, Page 121.

11. Defendant, GRANDSOUTH BANK, is a banking institution doing business in Oconee County, South Carolina, and has an interest in the Property by virtue of a certain

mortgage recorded on January 18, 2018 in the office of the Oconee County Register of Deeds in Book 3687, Page 216.

COUNT I – FORECLOSURE OF MECHANIC’S LIEN

12. Plaintiff re-alleges Paragraphs 1 through 11 above as though fully set forth verbatim herein.

13. Plaintiff timely recorded a valid and enforceable mechanic’s lien against the Property as described herein above, which was timely served on the defendants.

14. Plaintiff remains unpaid for the labor, services and materials it provided to the Property.

15. Less than six months have elapsed since Plaintiff last furnished labor, services and materials for the benefit of the Property.

16. By virtue of the filing of its mechanic’s lien and the unpaid indebtedness for labor, services and materials furnished for the improvement of the Property, Plaintiff respectfully submits that it is entitled to judgment of foreclosure on its mechanic’s lien in the amount of \$255,534.86, plus interest, costs and reasonable attorney’s fees.

17. Plaintiff further moves the Court to foreclose its mechanic’s lien to satisfy the debt owned by Defendant.

18. This action is brought subject to such mortgages or other claims or encumbrances on the Property that may be determined to be superior to Plaintiff’s lien.

19. Plaintiff specifically requests a deficiency judgment against Defendant in the event the sale of the Property is insufficient to satisfy the total amount due Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this Court declare the Plaintiff’s mechanic’s lien to be a valid lien upon the Property; after determination of the rights and priorities of other interests in the Property, grant judgment of foreclosure against the Defendant

in the amount of \$255,534.86, plus interest, costs and reasonable attorney's fees; order that the Property be sold and the proceeds of the sale, after deducting all lawful charges, and expenses, be applied to discharge the amount owed Plaintiff, together with Plaintiff's costs, interest and reasonable attorney's fees; and grant such further relief as this Court deems equitable and just, including a deficiency judgment against the Defendant in the event the sale of the Property is insufficient to satisfy the total amount due Plaintiff.

COUNT II – BREACH OF CONTRACT

20. Plaintiff re-alleges Paragraphs 1 through 8 above as though fully set forth verbatim herein.

21. The Defendant breached his duty to Plaintiff under the Contract and Guaranty in failing to make full payment to Plaintiff and/or wrongfully and in bad faith terminating and repudiating the Contract and Guaranty.

22. Plaintiff remains unpaid in the amount of \$255,534.86 under the Contract and Guaranty.

23. As a result of Defendant's breach of the Contract and Guaranty, Plaintiff has suffered damages.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment for damages in the amount of \$255,534.86 against the Defendant, plus interest and including an award of costs and reasonable attorney's fees, and such further relief as this Court deems equitable just and proper.

COUNT III – UNJUST ENRICHMENT

24. This count for unjust enrichment is plead in the alternative to Count II.

25. Plaintiff re-alleges Paragraphs 1 through 5 above as though fully set forth herein verbatim.

26. Plaintiff conferred a benefit upon the Defendant by furnishing labor, services and/or materials for the improvement of the Property

27. The Defendant has knowledge of that benefit.

28. The Defendant has voluntarily accepted or retained the benefit conferred upon him

by Plaintiff without paying for it.

29. The circumstances are such that it would be inequitable for the Defendant to retain the benefit without paying the reasonable value thereof.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment for damages against the Defendant in the amount of \$255,534.86, plus interest and including an award of costs against the Defendants, and such further relief as this Court deems equitable just and proper.

COUNT IV – QUANTUM MERUIT

30. This count for quantum meruit is plead in the alternative to Count II.

31. Plaintiff re-alleges Paragraphs 1 through 5 above as though fully set forth herein verbatim.

32. At the request of Defendant, Plaintiff furnished labor, services and materials for the improvement of the Property.

33. The reasonable value of the labor, services and materials provided by Plaintiff which remains unpaid is \$255,534.86.

34. As a result of said non-payment by Defendant, Plaintiff has been damaged.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment for damages against the Defendant, plus interest and including an award of costs against the Defendants, and such further relief as this Court deems equitable just and proper.

JURY TRIAL REQUEST

35. Plaintiff requests a trial by jury on all issues so triable.

TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679
813-922-5510
jason@tarokhlaw.com

/s/ Jason M. Tarokh
JASON M. TAROKH
SOUTH CAROLINA BAR # 72837

November 8, 2019

It is understood that Mr. & Mrs. Merlo (guarantor) are seeking a separate resource for funding the additional items agreed to be added to the construction of the home located at 548 Mountain View Lane lot 12 in Marina Bay. The current conventional construction loan does not cover the current overages due to Montgomery Holdings, dba IBI Builders (MHIBI) and a HELOC is being sourced to fund the current balance of overages. The following is the obligations of the guarantor:

OBLIGATIONS GUARANTEED. Guarantor irrevocably, absolutely, and unconditionally guaranties to MHIBI the full and punctual performance of the following (the "Obligations"):

- Full payment of all additional items, (AKA change orders, allowances overages,) notated on the balance sheet as well as remaining contract balance of construction.
- Balance sheet as of 4-30-19 consist of a total balance of \$183,382.
- Understood that other items will be added to the sheet such as Boulder Retaining walls, plumbing overages etc. and these approved additional item(s) will also be obligated under this said guarantee
- Full payment of this obligation will be made prior to move in completion of home and or Certificate of Occupancy request. (SEE CONTRACT FOR ALLOWED MONIES TO HOLD FOR PUNCH LIST COMPLETION)
- Guarantor will inform MHIBI of payments forthcoming and will update any change of status.

Guarantor shall remain liable until all terms of the Obligations are fully performed via final and total payment. This Guaranty remains enforceable regardless of any defenses that the Guarantor may assert on the Obligations, including but not limited to, failure of consideration, breach of warranty, fraud, statute of frauds, bankruptcy, lack of legal capacity, statute of limitations, lender liability, accord and satisfaction. If this Guaranty is given to an attorney for enforcement. Guarantor will reimburse MHIBI for all expenses incurred in connection with enforcement including without limitation, reasonable attorneys' fees.

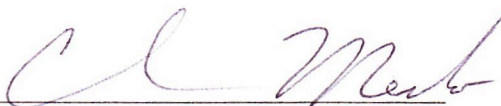
This is a NON-TRANSFERRABLE guarantee for either party. In such event as death, bankruptcy or unforeseen health condition, the guarantee remains enforceable to the guarantor and or trust.

NAME (PRINT): CHRIS MERLO

DATE: 5-3-19

SS#: _____

Name (SIGNATURE)



FILED OCONEE COUNTY, SC
ANNA K. DAVISON
REGISTER OF DEEDS

Recorded this 17 day of Oct 20 19
Vol. 8 Pg. 168
and Certified
Register of Deeds, Oconee County

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

2019 OCT 17 P 2:32

IN THE OFFICE OF THE
REGISTER OF DEEDS

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS

Petitioner,

**NOTICE AND CERTIFICATE
OF MECHANIC'S LIEN**

v.

CHRISTOPHER J. MERLO; BANK OF TRAVELERS
REST; and GRANDSOUTH BANK

Home Builders License # 22088
(IBI Builders)

Respondents.

TO: THE RESPONDENTS ABOVE NAMED

YOU WILL PLEASE TAKE NOTICE, that the Petitioner, Montgomery Holdings, LLC D/B/A IBI Builders, by virtue of the attached Affidavit of Mechanic's Lien and Statement of Account, hereby claims and holds a mechanic's lien upon the real estate hereinafter described for labor and materials Petitioner furnished in the amount of Two Hundred Fifty-Five Thousand Five Hundred Thirty-Four and 86/100 Dollars (\$255,534.86), as evidenced by the attached certified Statement of Account, together with a reasonable attorney's fee, interest and all costs and disbursements related to this lien. Such labor and materials were actually used in the construction and improvement of the real estate more particularly described in **Exhibit A**, which is attached hereto and incorporated herein by reference and the property upon which this lien is attached. Petitioner provided such professional services and/or materials by virtue of an agreement with Christopher J. Merlo (herein "Owner"), and by consent of the Owner, or a person or persons authorized by, or rightfully acting for said Owner, or by virtue of, upon information and belief, the authorization of said Owner for the procuring or furnishing of such labor and/or materials.

FURTHER NOTICE IS HEREBY GIVEN that the labor and/or materials were last furnished within ninety (90) days of the date hereof; that Petitioner has and claims a lien on the stated premises, structures, buildings, the tract of land and the leaseholds, pursuant to the Code

05260

25th Jarokk Saw
PO Box 10827
Champa LA 33679

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ELECTRONICALLY FILED - 2019 Nov 08 4:22 PM - OCONEE - COMMON PLEAS - CASE#2019CP3700687

of Laws of South Carolina, 1976, as amended, to secure the payment of the debt, the amount which is set forth on an itemized and verified Statement of Account which is attached as **Exhibit 1** to the Affidavit of Mechanic's Lien, which is attached hereto as **Exhibit B** and incorporated herein by reference; that the said Petitioner has a claim on said premises, structures, buildings, and said tract of land to secure payments of an additional sum to cover the costs and disbursements of any action to foreclose the aforementioned lien, including interest and reasonable attorney's fees, all pursuant to the provisions of the statutes applicable to such cases.

TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679
813-922-5510
jason@tarokhlaw.com



JASON M. TAROKH
SOUTH CAROLINA BAR # 72837
Attorney for the Petitioner

October 17, 2019

EXHIBIT A

Property Address: 548 Marina Bay Dr., Seneca, South Carolina 29762

Owner of Property: Christopher J. Merlo

TMS#: 520-82-01-012

Description of Property
subject to lien:

All that certain piece, parcel or lot of land, situate, lying and being in the State of South Carolina, County of Oconee, being shown and designated as Lot No. 12 on a Plat entitled Marina Bay, dated August 26, 2016 and recorded in Plat Book B560 at Page 5, Oconee County ROD. Reference is hereby made to said plat for a more complete description of metes and bounds.

This being a portion of the same property conveyed to MT Investments, LLC by deed of Crescent Communities, LLC, recorded October 30, 2015 in Deed Book 2140 at Page 198-205, Oconee County ROD.

See deed 2222 Pg 145

FILED OCONEE COUNTY, SC
ANNA K. DAVISON
REGISTER OF DEEDS

2019 OCT 17 P 2:32

EXHIBIT BFILED OCONEE COUNTY, SC
ANNA K. DAMSON
REGISTER OF DEEDSSTATE OF SOUTH CAROLINA
COUNTY OF OCONEEIN THE OFFICE OF THE
REGISTER OF DEEDS

2019 OCT 17 P 2:32

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Petitioner,

**AFFIDAVIT OF MECHANIC'S
LIEN**

v.

CHRISTOPHER J. MERLO; BANK OF TRAVELERS
REST; and GRANDSOUTH BANKHome Builders License # 22088
(IBI Builders)Respondents.
_____ /**TO: THE RESPONDENTS ABOVE NAMED AND ALL OTHERS CONCERNED**STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

PERSONALLY appeared before me, Gregory K. Grissinger, Jr., holder of home builders license # 22088, and doing business as IBI Builders, who being first duly sworn, deposes and states that certain labor and/or materials were furnished for the improvement of property described below:

Property Address: 548 Marina Bay Dr., Seneca, South Carolina 29762
Owner of Property: Christopher J. Merlo
TMS#: 520-82-01-012

All that certain piece, parcel or lot of land, situate, lying and being in the State of South Carolina, County of Oconee, being shown and designated as Lot No. 12 on a Plat entitled Marina Bay, dated August 26, 2016 and recorded in Plat Book B560 at Page 5, Oconee County ROD. Reference is hereby made to said plat for a more complete description of metes and bounds.

This being a portion of the same property conveyed to MT Investments, LLC by deed of Crescent Communities, LLC, recorded October 30, 2015 in Deed Book 2140 at Page 198-205, Oconee County ROD.

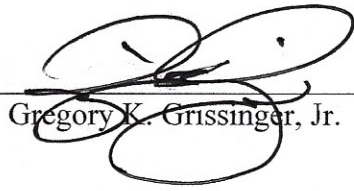
0057

Such labor and/or materials having been furnished by the Petitioner at the special insistence and request of the Owner of said property or by consent of the Owner or some person or agent having authority from or rightfully acting for such Owner or authorized by the Owner and such labor and/or materials having been furnished within ninety (90) days from the date of this Affidavit.

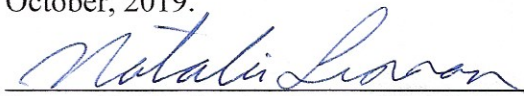
Affiant further states that there is due and owing to the Petitioner from the Owner of said property, the sum of Two Hundred Fifty-Five Thousand Five Hundred Thirty-Four and 86/100 Dollars (\$255,534.86), as evidenced by the Verified Statement of Account, attached as **Exhibit 1**, together with a reasonable attorney's fee, interest, and the costs and disbursements of any action to foreclose said lien.

FURTHER AFFIANT SAYETH NOT.

By: _____


Gregory K. Grissinger, Jr.

SWORN to before me this 16th day of
October, 2019.



Notary Public for the State of South Carolina

My Commission Expires
February 25, 2026

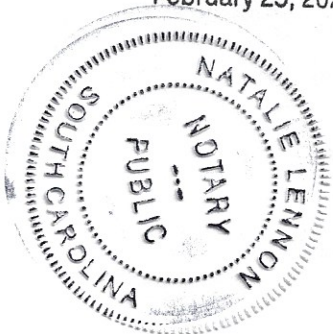


EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE OFFICE OF THE
REGISTER OF DEEDS

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Petitioner,

**VERIFIED STATEMENT OF
ACCOUNT OF MATERIALS
AND LABOR FURNISHED**

v.

CHRISTOPHER J. MERLO; BANK OF TRAVELERS
REST; and GRANDSOUTH BANK

Home Builders License # 22088
(IBI Builders)

Respondents.

Due to Petitioner for all materials and labor supplied by Petitioner for improvement of the property described in the Affidavit of Mechanic's Lien and owned by Christopher J. Merlo in the amount of Two Hundred Fifty-Five Thousand Five Hundred Thirty-Four and 86/100 Dollars (\$255,534.86) in base contract work and any applicable change orders and/or allowance overages.

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

VERIFICATION

PERSONALLY appeared before me John J. Montgomery, who, being duly sworn, says that he is the Authorized Agent for Montgomery Holdings, LLC D/B/A IBI Builders, and that the above Statement of Account is true and correct; and, that no part thereof has been paid.

FURTHER AFFIANT SAYETH NOT.

Montgomery Holdings, LLC D/B/A IBI
Builders

By:

John J. Montgomery

Its: Authorized Representative

SWORN to before me this 16th day of
October, 2019.

Natalie Lennon
Notary Public for the State of South Carolina

My Commission Expires
February 25, 2026



11-16-17

HOME CONTRACT

MONTGOMERY HOLDINGS, LLC d.b.a. (IBI Builders) (hereinafter "IBI") has contracted and agreed with Chris Merlo (hereinafter "Owners"), to finish construction of a new Home located Lot 12 Marina Bay Seneca, SC.

I. IBI agrees to construct the home per plans and scope (attached to this contract) for \$625,000. The cost does not include any cost associated with the Owner Bank Fees, HOA Fees, Utility Fees, Attorney Fees or any other cost not directly associated with construction material and labor of the project.

(A) IBI agrees to complete the work to the best of its ability in a period of 12 months from the date of reception of permits/authorization to commence work. This is an estimated completion time only and is understood that there are many variables that can potentially delay the timing of construction.

(B) The estimated completion date may be adjusted if minor deviations to the floor plan are requested or if Owners do not make product decisions in a timely manner. Change order requests should include a delay in the estimated completion date if appropriate, and all change orders shall be Approved by both parties, or via email. Estimated completion date DOES NOT take in to consideration of inclement weather, inspection periods, or any other areas outside of IBI authority that may suspend working activity.

II. Payment to IBI will be made according to the following schedule:

IBI will follow the draw inspection schedule via the bank involved. However, when draws are requested it understood that payment shall take no longer than 1 week to deliver, at no cost to IBI. When change orders are requested and agreed upon, payment may be required for the added cost at time of work.

III. Requirements of Owners

(A) The Owners shall forward all instructions to IBI in writing. Owners also agree that any and all changes desired in the current floor plan will be contained in writing in a change order signed by all parties or approved via email. Owners understand that such change orders will affect the original budgeted cost of the construction. *ANY REQUESTED WORK THAT IS NOT DETAILED ON THE PLANS OR IN SPEC SHEET MAY POTENTIALLY INCREASE AND A CHANGE ORDER WILL BE GENERATED FOR APPROVAL. NO COST SHALL INCREASE WITHOUT KNOWLEDGE OF OWNER.*

1

IBI:



Owners:



0060

11-16-17

- (B) Owners agree to accept the Home which will have been constructed in a workmanlike manner.
- (C) The Owners shall sign all necessary applications to obtain permits and bonds. **IF Applicable**
- (D) The Owners shall select in a timely manner all materials and colors required during the construction process.
- (E) The Owners shall obtain all necessary approvals and/or all acknowledgments from any architectural board or committee whose jurisdiction is relevant to this project.
- (F) The Owners agree to cooperate and make every reasonable effort to assist IBI and further agrees to permit IBI to place signs on or about the premises during the course of construction and allow IBI to show the project to potential customers during the course of construction. Owners shall not be entitled to contract with, authorize, or permit, for any reason whatsoever, any individual, other contractor, or subcontractor to perform, in whole or in part, any portion of work for the project, without **IBI APPROVAL**. Owners shall not communicate directly with any of the IBIs workmen, employees, agents, or subcontractors, unless so directed by IBI.

IV. Requirements of IBI

- (A) IBI shall supervise and direct the work, using its best skill and attention, and it shall be solely responsible for all construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the work under the contract.
- (B) Unless otherwise specifically provided in the contract documents, IBI shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper executions and completion of the work, whether temporary or permanent, and whether or not incorporated or to be incorporated in the work.
- (C) IBI shall at all times enforce strict discipline and good order among its employees and shall not employ on the project any unfit person or any person unskilled in the task assigned to him.
- (D) IBI warrants to the Owner that all materials and equipment incorporated in the work will be new unless otherwise specified, and that all work will be of good quality, free from faults and defects, and in conformance with the

IBI:



Owners:



11-16-17

contract documents. IBI further agrees to provide an unlimited one-year warranty on all work related to the uncompleted construction from the date of the issuance of the Certificate of Occupancy.

- (E) Unless otherwise provided in the contract documents, IBI shall pay all sales, consumer, use, and similar taxes, which are legally enacted at the time bids are received, and shall secure and pay for the building permit and for all other permits and governmental fees, licenses, and inspections (NOT INCLUDING BANK INSPECTIONS) necessary for the proper execution and completion of the work.
- (F) IBI shall give all notices and comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority with jurisdiction over the project, and shall promptly notice the Owners if the drawings and/or specifications are at variance therewith.
- (G) IBI shall be responsible to the Owners for the acts and omissions of his employees, subcontractors, and their agents and employees, and other persons performing any of the work under a contract with IBI.
- (H) IBI shall at all times keep the premises free from accumulations of excess waste materials or rubbish caused by his operations. At the completion of the work, IBI shall remove all their waste materials and rubbish from and about the project as well as his tools, construction equipment, machinery, and surplus materials.
- (I) IBI agrees to provide Worker's Compensation and general liability insurance for itself to the owner and or Bank Rep. IBI NOT RESPONSIBLE FOR ANY OTHER REQUIRED INSURANCE OR TAXES THAT MAY BE ASKED BY OWNER'S BANK.

V. Miscellaneous conditions and agreements.

- (A) Owners and IBI will jointly inspect the building before the C.O. is issued. At this inspection, Owners and IBI will prepare 1 written list of any and all items requiring repair, completion, correction, adjustment, or touch-up (the "Punch List"). Only those items contained in the Punch List will be addressed by IBI.
- (B) ~~Owners agree to transact all business related to the construction during normal business hours, Monday through Friday, from 8:00 a.m. until 6:00 p.m.~~
- (C) Pursuant to the terms and conditions contained in this Agreement and all Exhibits hereto, Owners hereby authorize IBI to contract and pay for the

IBI:



Owners:



11-16-17

purchase of materials, supplies, and permits necessary for the construction, and to enter into contracts with subcontractors.

- (D) Owners and IBI agree that commitments have been made to suppliers and subcontractors. Any and all obligations relating to materials and labor for the construction will be paid in full at the time of monthly reconciliation. IBI agrees to execute a Builder's Affidavit after the Final Payment of balance, certifying that all charges and costs for labor performed, material furnished, and fixtures installed in the home have been fully paid. **IBI CAN NOT BE RESPONSIBLE FOR ANY PRODUCT DELIVERY, WARRANTY (COST ASSOCIATE) MADE BY OWNER THROUGH ONLINE PURCHASES OR ANY OTHER SUPPLIERS NOT ASSOCIATED WITH IBI.**

- (F) This contract shall be governed by the laws of the State of South Carolina.

Agreed and acknowledged this 16 day of October 2017

MONTGOMERY HOLDINGS, LLC:
(D.B.A. IBI Builders, llc)

By:

John Montgomery

Date: 11-16-17



OWNERS:



Date: 11/17/17

Date: _____

IBI:



4

Owners:



0063



**SPEC SHEET for Chris Merlo Proposal based off of plans provided by Don Gardner plan
Name Sandy Creek. Home to be built in the Marina Bay Subdivision in Seneca, SC**

Permitting & Insurance

All permits will be acquired prior to construction. Any and all permitting cost, IBI will be Responsible. Prior to construction, IBI will provide full General Liability and Workman Compensation Certificates

Grading & Excavating

Lot will be graded per Specs of plan and or site plan. **(NO RET WALLS PERS SITE PLAN)**
Trees other than the building site area, will be marked by Home Owner for removal

Foundation

All footings will be poured to wall design requirements allowing for rock overlay
Pour Wall Foundation with Rebar reinforcement
Basement, garage slabs, and driveways will all include fiber mesh w/ 3000 psi concrete
Vapor Barriers and Radon venting to be installed if applicable
Water proofing system with 4" French drain system using Polypropylene membrane
Includes a 20 yr. warranty provided by the sub contractor only, not IBI.

Framing

Framing to comply with all state and county codes/frame per plan
Roof constructed using 2x8 rafters w/ OSB sheathing
ZIP Board or house wrap or similar product for moisture barrier
Floor system using I-Joist/ with Advantech (50 year) sub floor system (TO BE ENGINEERED)
All ceiling design (trey, coffer, cathedral, etc) per plan
Main floor 10' ceiling Basement 10'ceiling

Ext. Siding

Siding to consist of stone brick and hardy.
NO STUCCO (See stone/brick allowance on last page) *
Soffit and fascia using cement board (Hardy/Meritec) material
6 inch seamless gutter system/ with gutter guard protection
Columns recommend using 8X8 Post wrapped in Hardy

Signatures:



Window/Doors

All windows to consist of Premium Jeld WEN Vinyl windows or Sierra Pacific
Budget and recommendation based off using **ALL VINYL Window**
All exterior/interior doors per plan /or fiber glass **SEE DOOR SCHEDULE PER PLAN**
NO SKY Light per plan ** see note section
NOTE: Front door will be HO choice see allowance section *

Insulation

Tech Shield OSB roof sheathing
Ext. Walls, ceilings, attic, unfinished areas below finished BATT
Low compression foam applied to all seals, doors & windows
Sound proof R13 installed to all Bedrooms, bath, laundry rooms

Roof

NO Chimney as per plan
30 yr. architectural shingle installed color HO choice
Ice and water installed in all hips and valleys
Flashing installed in all side walls and necessary areas

CABINETS/Granite

Soft close drawers/doors Style and Color HO CHOICE. **See allowance section***
Level 2 granite HO choice/Granite throughout home per location of cabinet tops
Mantles to be included in Budget see allowance section *

Stairs

Per Plan. Stairs to Bonus to be carpet
Stairs to basement oak treads, oak Railing, iron balusters
HO choice of baluster and rail by options provided

Int. Trim/Doors

5 1/4" crown molding installed all areas of main floor & Basement (2pc. Crown)
All window and doors to be cased (trimmed out)
7" base boards installed through all finished areas.
All Int and Ext. doors to be Solid CORE
NO trim in closets or Bonus. Base only, in Dining 1 area for chair rail/or wainscoting
included

Flooring/Tile

All bathrooms, Laundry Room, have tile flooring
Tile material included see allowance section*
Hardwood Flooring throughout main floor. Basement/bonus to be carpet.
See allowance section for Carpet*

Signatures:



Decks/Porches

Flag stone floor for Front Porch
Flag Stone Steps for front Porch
Bottom deck Floor broom finish concrete
Select deck board for upper deck
Powder coated aluminum and balusters for exterior railing

HVAC

Trane or Lennox 15 seer Unit(s) tonnage to be accurately calculated
in field Gas Units if applicable for main floor only
Digital Thermostat
Returns in all bedrooms for more efficiency (if applicable)
All registers on main floor to be installed on floor (Not bonus or basement)
(Home Owner responsible for PROPANE SERVICE COMPANY IF REQUIRED)

Plumbing

All piping to PEX and plumbing to code
1 Gas (if applicable) Tank less water heater (location to be determined in field)
TUBS, FIXTURES, Toilets included see allowance section*
Ext. Hose Bibs HO choice of location (up to 3 included)
Utility sink in laundry room
White or Stainless rectangle sinks included
**Sewer is available and we will connect/Not responsible for any
required UTILITY FEES**

Electrical

Electrical will be installed to code & plan. Anything outside of code will be considered
added cost. 200 amp service. Under cabinet lighting in both kitchens only
Recessed cans to be installed location HO choice allotment of cans see allowance section*
(All other electrical fixtures and bulbs provided by homeowner/we include install)
Low voltage wiring:

We will install CAT 5/Cable/Data throughout home
Low Voltage will be ran to central panel (SMART PANEL)
for all future current TV, phone, etc. applications
One room (HO CHOICE) will be pre-wired for surround sound
All equipment (receivers, speakers, etc.) home owner will provide
Home owner responsible for security company and installation

Signatures:



Specialty

Items Included: See allowance section*

Closet Shelving Throughout Home
Garage Doors
Bath hardware (toilet paper, towel bars, etc.)
Bathroom Mirrors
Shower Doors
Int. Ext. Door handles/knobs (All locks)

Fireplaces/Appliances

Appliances see allowance section
1- 36" Pre Fab fireplace insert See allowance section

Landscape

See allowance section *
General Sod around the home
Small Plant & Tree Pkg
Automatic Sprinkler System
Mulch Beds
Tying in of gutters to down spouts for water control

NO LANDSCAPE PLAN PROVIDED

Notes:

- There is was not a site plan included or provided for this proposal
- This proposal includes our 10 yr. structural & 1 yr finishing warranty. Other warranties vary among other products, i.e. appliances, HVAC, etc.
- This price is based off the plans by DG 1329-D MR
- Any variations can lead to potential increase in cost
- In the event we are excavating and rock is discovered, there will be added cost.
- ~~IBI will provided the septic tank installation, material and will conform to code (NO DHEC PERMIT PROVIDED IN THIS PROPOSAL, IF PUMP IS REQUIRED THERE WILL BE ADDED COST).~~ Sewer available at road.
May have added cost for pump.
- Any door swings, sizes, etc. can be changed during framing at NO additional cost; however if changes request after work performed to plan, there may be additional cost.
- NO SPA included in this proposal as seen on the plans
- Understood no site plan provided indicating home placement, drive and walk ways. Subject to price increase
- All cost subject to change per ARC requirements
- General notes on plans are not considered specs and are subject to change
- Any discrepancy between code and plans, code will always prevail.

Signatures:



**** *BY SINGING THIS PAGE ALL ALLOWANCES ARE UNDERSTOOD AND AGREED UPON. IT IS HIGHLY RECOMMENDED THAT OWNER RESEARCH THESE NUMBERS AND DETERMINE THAT WILL OR WILL NOT CONFORM TO THEIR SELECTIONS, PRIOR TO SIGNING*****

Allowance Section:

- **Brick .42 cent / Rock material and labor at \$10.00 per sq ft.**
- **Front Door allowance of \$2,800.00**
- **Cabinets \$27,000.00**
- **Granite set at level 2 granite. Price range \$45.00-\$50.00 per sq ft.**
- **Mantel \$700.00**
- **Tile material \$5.00 per sq ft. Back Splash tile material \$15.00 per sq ft.**
- **Carpet \$24.00 per sq yard with pad**
- **Plumbing to include all toilets, fixtures, tub and shower inserts \$6,500.00**
- **Electrical can allotment of 42 cans with trim included. ALL OTHER FIXTURES (chandeliers, fans, globe lighting, etc.) provided by home owner; IBI will install**
- **Specialty \$9,000.00**
- **There is no landscape plan provided with this proposal. Allowance of \$15,000.**
- **Appliance \$12,000 kitchen and screen porch only.**

(Revised Cost based on meeting on 9-4-17)

****The plans are currently being modified. It is understood that this revised proposal is based up our meeting and the final plans. Once the revisions are made and site plan produced, we will confirm the overall estimated cost. ****

- * **NO ELEVATOR**
- * **Ext. garage stairs to be removed**
- * **No Spa/patio or Pool included as shown on original Plans**
- * **10' Ceilings to be constructed in the basement. (NOTE: this will/may cause the window and door sizes to change from their current size. These changes should be reflected on the revised plans).**
- * **Out Door Covered Porch. Will include outdoor grill, vented hood, sink, mini fridge. Any appliance h here considered part of appliance allowance.**
- * **Movie theater to be added down stairs. This space will be FOAM INSULATED FOR BETTER SOUND PROOF. This will not completely eliminate sound, however there are other options available. (Equipment not included. Will Pre Wire) SPACE, LAYOUT UNDEFINED. These changes should be reflected on the revised plans.**
- * **BONUS ROOM: PER PLAN ONLY**
- * **Out door shower to be installed. Location TBD. H/C faucet only no drain or enclosure**

Signatures:

IBI Builders
Greenville, SC

www.ibibuilders.com

Heated (approx) 4200
REVISED 11-11-17

0068



DELETIONS (REVISED 3)

- * Remove Accordion Door (Allowance)
- * Remove Chimney and Cap
- * Remove Sky Lights
- * Open UP Porch and remove 2 columns
(See Pic Emailed 11-9)

-
- * Based on the attached site plan, there are no retaining walls, thus reducing the price (next page)
 - * The attached REVISED floor plans will need to be completed with measurements and elevations

TOTAL CONTRACT COST

TOTAL TURNKEY REVISED (3)

\$625,000

Signatures:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
	)	
Montgomery Holdings, LLC d/b/a IBI Builders,	)	C. A. No. 2019-CP-37-00687
	)	
Plaintiff,	)	
	)	
v.	)	THIRD PARTY SUMMONS
	)	
Christopher J. Merlo, Bank of Travelers Rest and Grandsouth Bank,	)	
	)	
Defendants.	)	
	)	
_____ Christopher J. Merlo,	)	
	)	
Third Party Plaintiff,	)	
	)	
v.	)	
	)	
Gregory K. Grissinger, Jr. and John Montgomery,	)	
	)	
Third Party Defendants.	)	
	)	
_____	)	

TO THE ABOVE-NAMED THIRD PARTY DEFENDANTS:

YOU ARE HEREBY summoned and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices, P.O. Box 9246, Greenville, South Carolina, 29604, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court and judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted this 21st day of November 2019,

TOWNES B. JOHNSON III, LLC

/s/ Townes B. Johnson III

Townes B. Johnson III (SC Bar# 75412)

P.O. Box 9246

Greenville, SC 29604

PH: (864) 757-4899

tjohnson@sc.legal

Attorneys for Plaintiff

Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
	)	
Montgomery Holdings, LLC d/b/a IBI Builders,	)	C. A. No. 2019-CP-37-00687
	)	
Plaintiff,	)	
	)	
v.	)	ANSWER, COUNTERCLAIM
	)	AND THIRD PARTY COMPLAINT OF
	)	DEFENDANT CHRISTOPHER J. MERLO
Christopher J. Merlo, Bank of Travelers Rest and Grandsouth Bank,	)	
	)	
Defendants.	)	
	)	
_____ Christopher J. Merlo,	)	
	)	
Third Party Plaintiff,	)	
	)	
v.	)	
	)	
Gregory K. Grissinger, Jr. and John Montgomery,	)	
	)	
Third Party Defendants.	)	
_____	)	

TO: JASON M. TAROKH, ATTORNEY FOR PLAINTIFF

COMES NOW, the defendant, Christopher J. Merlo (hereinafter "Defendant"), by and through his undersigned counsel and hereby answers the Complaint of the plaintiff, Montgomery Holdings, LLC d/b/a IBI Builders (hereinafter "Plaintiff"), by denying each and every allegation not hereinafter specifically admitted, demanding strict proof thereof, and further responds as follows:

FOR A FIRST DEFENSE

1. Defendant has insufficient information to either admit or deny the allegations of Paragraph 1 of the Complaint and, accordingly, denies same and demands strict proof thereof.

2. Defendant admits the allegations of Paragraph 2 of the Complaint.

3. Defendant admits the allegations of Paragraph 3 of the Complaint.

4. Defendant admits the allegations of Paragraph 4 of the Complaint.

5. Defendant has insufficient information to either admit or deny the allegations of Paragraph 5 of the Complaint and, accordingly, denies same and demands strict proof thereof.

6. Defendant admits so much of the allegations of Paragraph 6 of the Complaint that he entered into a written agreement with Plaintiff. Defendant craves reference to the written agreement between the parties and denies any allegations contrary thereto.

7. Defendant denies the allegations of Paragraph 7 of the Complaint and demands strict proof thereof.

8. Defendant admits so much of the allegations of Paragraph 8 of the Complaint that Plaintiff provided labor, services and materials. Defendant denies the remaining allegations of Paragraph 8 of the Complaint and demands strict proof thereof.

9. Defendant admits so much of the allegations of Paragraph 9 of the Complaint that Plaintiff recorded a mechanics' lien against Plaintiff's property. Defendant denies the remaining allegations of Paragraph 9 of the Complaint and demands strict proof thereof.

10. Defendant denies the allegations of Paragraph 10 of the Complaint and demands strict proof thereof.

11. Defendant admits the allegations of Paragraph 11 of the Complaint.

12. Paragraph 12 of the Complaint does not require a response from Defendant, but to the extent that it does, Defendant denies same and demands strict proof thereof.

13. Defendant admits so much of the allegations of Paragraph 9 of the Complaint that Plaintiff recorded a mechanics' lien against Plaintiff's property. Defendant denies the remaining allegations of Paragraph 13 of the Complaint and demands strict proof thereof.

14. Defendant denies the allegations of Paragraph 14 of the Complaint and demands strict proof thereof.

15. Defendant has insufficient information to either admit or deny the allegations of Paragraph 15 of the Complaint and, accordingly, denies same and demands strict proof thereof.

16. Defendant denies the allegations of Paragraph 16 of the Complaint and demands strict proof thereof.

17. Defendant denies the allegations of Paragraph 17 of the Complaint and demands strict proof thereof.

18. Defendant admits the allegations of Paragraph 18 of the Complaint.

19. Defendant denies the allegations of Paragraph 19 of the Complaint and the WHEREFORE Paragraph and demands strict proof thereof.

20. Paragraph 20 of the Complaint does not require a response from Defendant, but to the extent that it does, Defendant denies same and demands strict proof thereof.

21. Defendant denies the allegations of Paragraph 21 of the Complaint and demands strict proof thereof.

22. Defendant denies the allegations of Paragraph 22 of the Complaint and demands strict proof thereof.

23. Defendant denies the allegations of Paragraph 23 of the Complaint and the WHEREFORE Paragraph and demands strict proof thereof.

24. Paragraph 24 of the Complaint does not require a response from Defendant, but to the extent that it does, Defendant denies same and demands strict proof thereof.

25. Paragraph 25 of the Complaint does not require a response from Defendant, but to the extent that it does, Defendant denies same and demands strict proof thereof.

26. Defendant denies the allegations of Paragraph 26 of the Complaint and demands strict proof thereof.

27. Defendant denies the allegations of Paragraph 27 of the Complaint and demands strict proof thereof.

28. Defendant denies the allegations of Paragraph 28 of the Complaint and demands strict proof thereof.

29. Defendant denies the allegations of Paragraph 29 of the Complaint and the WHEREFORE Paragraph and demands strict proof thereof.

30. Paragraph 30 of the Complaint does not require a response from Defendant, but to the extent that it does, Defendant denies same and demands strict proof thereof.

31. Paragraph 31 of the Complaint does not require a response from Defendant, but to the extent that it does, Defendant denies same and demands strict proof thereof.

32. Defendant admits so much of the allegations of Paragraph 6 of the Complaint that Plaintiff furnished labor, services and materials for the improvement of Defendant's

property. Defendant denies the remaining allegations of Paragraph 32 of the Complaint and demands strict proof thereof.

33. Defendant denies the allegations of Paragraph 33 of the Complaint and demands strict proof thereof.

34. Defendant denies the allegations of Paragraph 34 of the Complaint and the WHEREFORE Paragraph and demands strict proof thereof.

35. Paragraph 35 of the Complaint does not require a response from Defendant, but to the extent that it does, Defendant denies same and demands strict proof thereof.

FOR A SECOND DEFENSE
BY WAY OF AFFIRMATIVE DEFENSES

36. Defendant alleges that the complaint herein fails to sufficiently constitute a cause of action against Defendant or fails to state facts upon which a claim can be based.

37. Defendant alleges that to the extent Plaintiff seeks recovery in contract, Plaintiff materially breached the terms and conditions of said agreement and are entitled to no relief thereon.

38. Defendant alleges that it performed all of the actions required of it under the subject agreement and that the only additional action required to carry out the agreement was performance by others.

39. Defendant alleges that, to the extent Plaintiff seeks recovery in contract and to the extent Plaintiff alleges Defendant has any obligation or duty as to which full performance has not been rendered or excused, that obligation did not exist or was based upon acts or omissions that were void or otherwise extinguished.

40. Defendant alleges that, to the extent Plaintiff seeks recovery in contract and to the extent Plaintiff alleges Defendant has any obligation or duty as to which full

performance has not been rendered or excused, not all conditions precedent to said obligations or duties occurred.

41. Defendant alleges that, to the extent Plaintiff alleges this Defendant has any obligation as to which full performance has not been rendered or excused, there has been a failure of consideration.

42. Defendant alleges that the Plaintiff's action is barred under the equitable doctrine of unclean hands.

43. Defendant alleges that Plaintiff's bad faith bars its claims or that any damages must be reduced as a result of Plaintiff's comparative bad faith.

44. Defendant alleges that any recovery by Plaintiff must be set off or reduced, abated, or apportioned to the extent that any other party's actions caused or contributed to damages, if any there were.

45. Defendant alleges that the Plaintiff lacks standing or capacity to bring this action because it is not properly licensed nor authorized to do business in this state.

46. Defendant alleges that because the complaint herein is couched in conclusionary terms, Defendant cannot fully anticipate all affirmative defenses that may be applicable to the within action. Accordingly, the right to assert additional affirmative defenses, if and to the extent that such affirmative defenses are applicable, is hereby reserved.

FOR A THIRD DEFENSE
BY WAY OF COUNTERCLAIMS AND THIRD PARTY COMPLAINT

47. Defendant realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

48. The Defendant is a citizen and resident of Anderson County, South Carolina and the owner of real property located at 548 Marina Bay Dr., Seneca, South Carolina 29672.

49. Upon information and belief, Plaintiff is a South Carolina limited liability company, organized and existing under the laws of the State of South Carolina with its principal place of business in Greenville County, South Carolina.

50. Upon information and belief, Gregory K. Grissinger, Jr. (hereinafter "Grissinger"), individually, is a citizen and resident of Greenville County, South Carolina.

51. Upon information and belief, John Montgomery (hereinafter "Montgomery"), individually, is a citizen and resident of Greenville County, South Carolina.

52. The real property which is at the center of this dispute is located in Oconee County, South Carolina.

53. Jurisdiction and venue are proper in this court.

54. In November 2017, Defendant and Plaintiff entered into a contract for Plaintiff to be the general contractor for the construction of the Defendant's residence (hereinafter "Project").

55. The contract constitutes a binding contract between the parties and Plaintiff breached the contract by wrongfully failing and refusing to perform all of the conditions of the contract and original scope of work, including, but not limited to:

- (a) Failing to properly construct the Project;
- (b) Failing to manage the Project;
- (c) Unreasonably and negligently delaying the Project;

- (d) Failing to comply with laws, ordinances, rules, regulations and lawful orders of public authorities;
- (e) Failing to convey truthful information about the Project; and
- (f) Failing to pay its materialmen and subcontractors.

56. As the general contractor for the Project, Plaintiff, Grissinger and Montgomery owed a duty to Defendant to construct the residence in a good and workmanlike manner, to use due care to supervise construction of the residence, to ensure that all aspects of work performed on the project were acceptable and in accordance with the plans and specifications, and to accomplish the work undertaken in a manner appropriate to the residential construction industry.

57. Plaintiff, Grissinger and Montgomery additionally owed a duty to Defendant to estimate the cost of the Project in a manner appropriate to the residential construction industry, communicate important information about the Project to Defendant in a truthful manner, and only invoice Defendant for labor and materials that Plaintiff provided on the Project.

58. The Plaintiff, by and through Grissinger and Montgomery, breached these duties of care by failing to construct the residence in a good and workmanlike manner, by failing to use due care to supervise construction of the residence, by failing to ensure that all aspects of work performed on the project were acceptable and in accordance with the plans and specifications, by failing to accomplish the work undertaken in a manner appropriate to the residential construction industry, by intentionally and deceptively delaying the Project, and by intentionally and deceptively failing to communicate important information about the Project to Defendant and in a truthful manner.

FOR A FIRST COUNTERCLAIM
(Breach of Contract - Plaintiff)

59. Defendant realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

60. In November 2017, Defendant and Plaintiff entered into the aforementioned contract for Plaintiff to construct the Defendant's residence.

61. The contract constitutes a binding contract between the parties and Plaintiff breached the contract by wrongfully failing and refusing to perform all of the conditions of the contract and original scope of work, including, but not limited to:

- (g) Failing to properly construct the Project;
- (h) Failing to manage the Project;
- (i) Unreasonably and negligently delaying the Project;
- (j) Failing to comply with laws, ordinances, rules, regulations and lawful orders of public authorities;
- (k) Failing to convey truthful information about the Project; and
- (l) Failing to pay its materialmen and subcontractors.

62. As a direct and proximate result of Plaintiff's breach of the contract, Defendant has been damaged in an amount to be determined at trial, for which it hereby sues together with attorneys' fees, costs, and interest.

FOR A SECOND COUNTERCLAIM
AND FIRST CLAIM OF THE THIRD PARTY COMPLAINT
(Negligence – Plaintiff, Grissinger and Montgomery)

63. Defendant realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

64. Plaintiff, Grissinger and Montgomery owed Defendant a duty of care to protect Defendant against the foreseeable risk of harm from its actions and to construct the residence in a good and workmanlike manner, to use due care to supervise construction of the residence, to ensure that all aspects of work performed on the project were acceptable and in accordance with the plans and specifications, and to accomplish the work undertaken in a manner appropriate to the residential construction industry.

65. Plaintiff, Grissinger and Montgomery additionally owed a duty to Defendant to estimate the cost of the Project in a manner appropriate to the residential construction industry, communicate important information about the Project to Defendant in a truthful manner, and only invoice Defendant for labor and materials that Plaintiff provided on the Project.

66. Plaintiff, by and through Grissinger and Montgomery, failed to exercise to reasonable care and breached its duty of care to Defendant by failing to construct the residence in a good and workmanlike manner, by failing to use due care to supervise construction of the residence, by failing to ensure that all aspects of work performed on the project were acceptable and in accordance with the plans and specifications, by failing to accomplish the work undertaken in a manner appropriate to the residential construction industry, by intentionally and deceptively delaying the Project, and by intentionally and deceptively failing to communicate important information about the Project to Defendant and in a truthful manner.

67. As a direct and proximate result of Plaintiff, Grissinger and Montgomery's breach, Defendant has been damaged in an amount to be determined at trial, for which it hereby sues together with attorneys' fees, costs, and interest.

FOR A THIRD COUNTERCLAIM
AND SECOND CLAIM OF THE THIRD PARTY COMPLAINT
(Negligence Misrepresentation – Plaintiff, Grissinger and Montgomery)

68. Defendant realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

69. Plaintiff, by and through Grissinger and Montgomery, represented the following to Defendant:

- a. the construction schedule for the Project; and
- b. that the accounting it provided were for labor and materials that Plaintiff provided on the Project.

70. Plaintiff, Grissinger and Montgomery had a pecuniary interest in making these representations to Defendant.

71. Plaintiff, Grissinger and Montgomery owed Defendant a duty of care to see that truthful information was communicated to Defendant.

72. Plaintiff, Grissinger and Montgomery breached this duty by failing to exercise due care and falsely representing to each to Defendant.

73. In reliance on the truth of Grissinger and Montgomery's representations, Defendant:

- a. continued using Plaintiff as the contractor for the Project;
- b. made numerous decisions based on the construction schedule as supplied by Plaintiff, Grissinger and Montgomery; and
- c. paid Plaintiff for labor and materials not supplied to the Project;

74. Defendant was justified in relying on these representations.

75. As a direct and proximate result of Plaintiff's representations, by and through Grissinger and Montgomery, Defendant has been damaged in an amount to be determined at trial, for which it hereby sues together with attorneys' fees, costs, and interest.

FOR A FOURTH COUNTERCLAIM
AND THIRD CLAIM OF THE THIRD PARTY COMPLAINT
(Fraud – Plaintiff and Grissinger and Montgomery)

76. Defendant realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

77. Plaintiff, by and through Grissinger and Montgomery, fraudulently and deceptively represented its invoices and accounting related to the Project.

78. As a result of Grissinger and Montgomery's fraudulent and deceptive conduct, Plaintiff invoiced Defendant for labor and materials that were not provided on the Project.

79. Plaintiff, Grissinger and Montgomery either knew that the representations were false or had reckless disregard for their truth or falsity.

80. Plaintiff, Grissinger and Montgomery intended that Defendant act on the representation that the representations were accurate.

81. Defendant did not know the representations were false.

82. Defendant has relied on the representation's truth and had a right to rely thereon.

83. As a direct and proximate result of Defendant's reliance on the Plaintiff's representations, by and through Grissinger and Montgomery, Defendant has been injured and is entitled to a judgment against Plaintiff.

FOR A FIFTH COUNTERCLAIM
AND FOURTH CLAIM OF THE THIRD PARTY COMPLAINT
(Violation of the South Carolina Unfair Trade Practices Act – Plaintiff, Grissinger and Montgomery)

84. Defendant realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

85. Plaintiff, by and through Grissinger and Montgomery, fraudulently and deceptively invoiced Defendant for labor and materials that were not provided on the Project.

86. As a result of Plaintiff and Grissinger and Montgomery's fraudulent and deceptive invoices, Plaintiff invoiced Defendant for labor and materials that Plaintiff did not provide on the Project.

87. Plaintiff's billing procedures and misrepresentations, by and through Grissinger and Montgomery, create a potential for repetition of these fraudulent, unfair and deceptive acts.

88. Since these fraudulent and deceptive procedures can easily be repeated, it is offensive to public policy.

89. As a proximate cause of Plaintiff and Grissinger and Montgomery's fraudulent and deceptive acts, Defendant has been damaged and is entitled to a judgment against Plaintiff.

FOR A SIXTH COUNTERCLAIM
AND FIFTH CLAIM OF THE THIRD PARTY COMPLAINT
(Breach of Fiduciary Duty – Plaintiff, Grissinger and Montgomery)

90. Defendant realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

91. By and through the contract for Plaintiff to construct the Defendant's

residence, Defendant reposed special confidence in Plaintiff, Grissinger and Montgomery.

92. Accordingly, Plaintiff, Grissinger and Montgomery had a fiduciary duty to act in good faith and with due regard to Plaintiff's interests.

93. Plaintiff, Grissinger and Montgomery breached that duty by fraudulently and deceptively invoicing Defendant for labor and materials that were not provided on the Project, by fraudulently and deceptively misrepresenting the construction schedule, and by failing to communicate truthfully with Defendant.

WHEREFORE, the Defendant and Third Party Plaintiff, Christopher J. Merlo, having answered the Complaint of the plaintiff, Montgomery Holdings, LLC d/b/a IBI Builders, prays that this Court:

- (a) Dismiss Plaintiff Montgomery Holdings, LLC d/b/a IBI Builders's Complaint with prejudice;
- (b) Dissolve Plaintiff Montgomery Holdings, LLC d/b/a IBI Builders's mechanics' lien;
- (c) Enter a judgment against Plaintiff Montgomery Holdings, LLC d/b/a IBI Builders in an amount to be determined at trial, together with interest, costs, and attorneys' fees;
- (d) Enter a judgment against Third Party Defendant Gregory K. Grissinger in an amount to be determined at trial, together with interest, costs, and attorneys' fees;
- (e) Enter a judgment against Third Party Defendant John Montgomery in an amount to be determined at trial, together with interest, costs, and attorneys' fees;
- (f) Pre-judgment interest;
- (g) Attorneys' fees;
- (h) Treble damages;

- (i) Punitive damages;
- (j) Costs of this action;
- (k) For such other and further relief that this Court deems just and proper.

Respectfully submitted this _____ of November 2019.

TOWNES B. JOHNSON III, LLC

/s/ Townes B. Johnson III
Townes B. Johnson III (SC Bar# 75412)
PO Box 9246
Greenville, South Carolina 29604
PH: (864) 757-4899

Attorneys for Defendant

Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

v.

(Jury Trial Requested)

CHRISTOPHER J. MERLO; BANK OF TRAVELERS
REST; and GRANDSOUTH BANK

Defendants,

_____ /

CHRISTOPHER J. MERLO,

Third Party Plaintiff,

v.

GREGORY K. GRISSINGER, JR., and JOHN
MONTGOMERY,

Third Party Defendants,

_____ /

**PLAINTIFF'S ANSWER AND AFFIRMATIVE DEFENSES TO DEFENDANT'S
COUNTERCLAIMS**

Plaintiff, MONTGOMERY HOLDINGS, LLC D/B/A IBI BUILDERS, by and through its undersigned attorney, hereby answers the Counterclaims (herein "Counterclaim") of the Defendant, CHRISTOPHER J. MERLO, herein ("MERLO"), and states that each and every allegation of the Counterclaims not herein specifically admitted, qualified, or explained are denied, and further states as follows:

ANSWER

47. Paragraph 47 of the Counterclaim does not require a response from the Plaintiff, but

to the extent it does: Deny. Plaintiff further denies that any of “the foregoing paragraphs” as referenced in Paragraph 47 of the Counterclaim are consistent with Defendant’s alleged cause of action.

48. Admit.

49. Admit.

50. Admit.

51. Admit.

52. Admit.

53. Admit.

54. Admit that Plaintiff and MERLO entered into the Contract and Guaranty referenced in the Complaint. Deny remaining allegations.

55. Admit that Plaintiff and MERLO entered into the Contract and Guaranty referenced in the Complaint, which constitutes a binding contract between the parties. Deny remaining allegations.

a. Deny.

b. Deny.

c. Deny.

d. Deny.

e. Deny.

f. Deny.

56. Deny. Additionally, Plaintiff’s duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO’s Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

57. Deny. Additionally, Plaintiff’s duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO’s Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

58. Deny. Additionally, Plaintiff’s duties to MERLO were created solely by contract.

Therefore, the economic loss rule applies to bar MERLO's Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

59. Plaintiff re-alleges the paragraphs above as though fully set forth herein verbatim. Plaintiff further denies that any of "the foregoing paragraphs" as referenced in Paragraph 59 of the Counterclaim are consistent with MERLO's alleged cause of action.

60. Admit that Plaintiff and MERLO entered into the Contract and Guaranty referenced in the Complaint. Deny remaining allegations.

61. Admit that Plaintiff and MERLO entered into the Contract and Guaranty referenced in the Complaint, which constitutes a binding contract between the parties. Deny remaining allegations.

g. Deny

h. Deny

i. Deny

j. Deny

k. Deny

l. Deny

62. Deny.

63. Plaintiff re-alleges the paragraphs above as though fully set forth herein verbatim. Plaintiff further denies that any of "the foregoing paragraphs" as referenced in Paragraph 63 of the Counterclaim are consistent with MERLO's alleged cause of action.

64. Deny. Additionally, Plaintiff's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

65. Deny. Additionally, Plaintiff's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

66. Deny. Additionally, Plaintiff's duties to MERLO were created solely by contract.

Therefore, the economic loss rule applies to bar MERLO's Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

67. Deny. Additionally, Plaintiff's duties to Defendant were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

68. Plaintiff re-alleges the paragraphs above as though fully set forth herein verbatim. Plaintiff further denies that any of "the foregoing paragraphs" as referenced in Paragraph 68 of the Counterclaim are consistent with MERLO's alleged cause of action.

69. Deny.

a. Deny.

b. Deny.

70. Deny.

71. Deny. Additionally, Plaintiff's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

72. Deny. Additionally, Plaintiff's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

73. Deny.

a. Deny.

b. Deny.

c. Deny.

74. Deny.

75. Deny.

76. Plaintiff re-alleges the paragraphs above as though fully set forth herein verbatim. Plaintiff further denies that any of "the foregoing paragraphs" as referenced in Paragraph 76 of the Counterclaim are consistent with MERLO's alleged cause of action.

77. Deny.

78. Deny.

79. Deny.

80. Deny.

81. Deny. Plaintiff did not make false representations to MERLO.

82. Deny.

83. Deny.

84. Plaintiff re-alleges the paragraphs above as though fully set forth herein verbatim.

Plaintiff further denies that any of “the foregoing paragraphs” as referenced in Paragraph 84 of the Counterclaim are consistent with MERLO’s alleged cause of action.

85. Deny.

86. Deny.

87. Deny.

88. Deny.

89. Deny.

90. Plaintiff re-alleges the paragraphs above as though fully set forth herein verbatim.

Plaintiff further denies that any of “the foregoing paragraphs” as referenced in Paragraph 90 of the Counterclaim are consistent with MERLO’s alleged cause of action.

91. Deny.

92. Deny.

93. Deny this paragraph and the WHEREFORE paragraph.

AFFIRMATIVE DEFENSES

Plaintiff by and through its undersigned attorney, hereby alleges the following affirmative defenses to the MERLO’s Counterclaims, and states as follows:

Factual Allegations

94. MERLO is a licensed South Carolina real estate broker in charge for a commercial real estate company that offers commercial and residential acquisition and disposition brokerage services.

95. Upon information and belief, MERLO is a sophisticated real estate professional and

has substantial experience in the multiple aspects of commercial and residential real estate investing, financing and related matters.

96. On or about November 17, 2017, Plaintiff and MERLO entered into a written contract wherein Plaintiff would furnish labor, services and materials for the improvement of the Property (herein "Contract"). A true and correct copy of the Contract is attached to the Complaint and incorporated herein by reference.

97. On or about May 3, 2019, MERLO agreed, affirmed, assured and guaranteed to Plaintiff in writing that full payment would be made under the Contract and also for additional items as set forth therein (herein "Guaranty"). A true and correct copy of the Contract is attached to the Guaranty and incorporated herein by reference. The Guaranty constitutes an enforceable contract, which was intended by the Plaintiff and MERLO to supplement and/or modify the Contract.

98. MERLO breached his duty to Plaintiff under the Contract and Guaranty in failing to make full payment to Plaintiff and/or wrongfully and in bad faith terminating and repudiating the Contract and Guaranty.

99. MERLO represented to Plaintiff multiple times that he was pleased and satisfied with Plaintiff's provision of labor, services and materials before MERLO wrongfully and in bad faith terminating and repudiating the Contract and Guaranty.

100. It was not until approximately three days after Plaintiff declined to finance the installation of a home theater and entertainment equipment for the Property, and also declined MERLO's request to apply for a certificate of occupancy until after Plaintiff was paid the balance owed under the Contract and Guaranty, that MERLO unjustifiably terminated the contract.

101. Plaintiff remains unpaid in the amount of \$255,534.86 under the Contract and

Guaranty.

102. Upon information and belief, when MERLO executed and delivered the Guaranty, he surreptitiously intended to induce Plaintiff to continue providing valuable labor, services, and materials for the improvement of the Property with no intention of paying the Plaintiff in full as part of a deceitful and nefarious scheme to have the Plaintiff fund the improvement of the Property.

103. In the alternative, upon information and belief, when MERLO executed and delivered the Guaranty, he intended to buy time with the Plaintiff to obtain financing to pay the Plaintiff because without financing he would be unable to do so, and to also induce Plaintiff to continue providing valuable labor, services, and materials for the improvement of the Property in the interim.

104. However, upon information and belief, after MERLO executed and delivered the Guaranty, he either realized that obtaining financing would be difficult, impossible, inconvenient, unbeneficial and/or unsuccessful, or knew that he had been denied or rejected for financing. Therefore, MERLO unjustifiably terminated the Contract and Guaranty in a bad faith and fraudulent attempt to avoid paying the Plaintiff in full.

105. In either alternative alleged above, MERLO perpetrated a fraud upon Plaintiff by inducing Plaintiff to continue providing valuable labor, services and materials by making materially false representations that caused Plaintiff to reasonably believe that it would be paid in full under the Contract and Guaranty.

FIRST AFFIRMATIVE DEFENSE
(Fraud)

106. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

107. MERLO committed fraud against the Plaintiff.

108. MERLO made false representations to Plaintiff by, and during the process of, executing the Guaranty, by promising and assuring Plaintiff that it would be fully paid under the Contract and Guaranty, and by representing to Plaintiff multiple times that he was pleased and satisfied with Plaintiff's provision of labor, services and materials.

109. The false representations were material.

110. MERLO made the false representations with knowledge of their falsity or with a reckless disregard of their truth or falsity.

111. MERLO intended that Plaintiff act upon its false representations.

112. Plaintiff was unaware of the falsity of MERLO's representations.

113. Plaintiff reasonably relied upon MERLO's representations as the truth by continuing to provide valuable labor, material and services for the improvement of the Property.

114. Plaintiff had the right to rely upon MERLO's false representations.

115. Plaintiff has suffered damages as a result of MERLO's false representations.

SECOND AFFIRMATIVE DEFENSE
(Misrepresentation)

116. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

117. Defendant made false representations to Plaintiff by, and during the process of, executing the Guaranty, by promising and assuring Plaintiff that it would be fully paid under the Contract and Guaranty, and by representing to Plaintiff multiple times that he was pleased and satisfied with Plaintiff's provision of labor, services and materials.

118. The false representations were material.

119. MERLO had a pecuniary interest in making the false representations.

120. MERLO owed a duty of care to the Plaintiff to see that truthful information was communicated to the Plaintiff.

121. MERLO breached his duty by failing to exercise due care.

122. Plaintiff was unaware of the falsity of the MERLO's representations.

123. Plaintiff reasonably relied upon MERLO's representations as the truth by

continuing to provide valuable labor, materials and services for the improvement of the Property.

124. Plaintiff had the right to rely upon the MERLO's false representations.

125. Plaintiff has suffered damages as a result of the MERLO's false representations.

THIRD AFFIRMATIVE DEFENSE
(Equitable Estoppel)

126. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

127. MERLO engaged in conduct which amounts to a false representation or conduct which was calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the MERLO subsequently attempted to assert, to wit: by, and during the process of, executing the Guaranty; by promising and assuring Plaintiff that it would be fully paid under the Contract and Guaranty; by representing to Plaintiff multiple times that he was pleased and satisfied with Plaintiff's provision of labor, services and materials; and by requesting that Plaintiff apply for the issuance of a certificate of occupancy.

128. MERLO intended that such conduct be acted upon by Plaintiff.

129. MERLO had actual or constructive knowledge of the real facts.

130. Plaintiff lacked knowledge, and the means of knowledge, of the truth as to the facts in question.

131. Plaintiff relied upon the conduct of MERLO by continuing to provide valuable labor, services and materials for the improvement of the Property.

132. Plaintiff prejudicially changed its position in reliance of the MERLO's conduct.

133. Additionally, MERLO also made over 35 change orders, which caused significant delay.

FOURTH AFFIRMATIVE DEFENSE
(Unclean Hands)

134. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

135. MERLO comes into court with unclean hands.

136. MERLO should not recover against the Plaintiff because it acted unfairly,

wrongfully, negligently and/or and fraudulently to the prejudice of the Plaintiff.

FIFTH AFFIRMATIVE DEFENSE
(Waiver)

137. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

138. MERLO waived any rights to hold Plaintiff liable because he made payments to Plaintiff under the Contract and Guaranty, including a \$31,250.00 payment on or about August 30, 2019, which was approximately six weeks before he unjustifiably terminated the contract; permitted Plaintiff to continue providing valuable labor, services and materials for the improvement of the Property before he unjustifiably terminated the contract; made representations to Plaintiff multiple times that he was pleased and satisfied with Plaintiff's provision of labor, services and materials; requested that Plaintiff apply for the issuance of a certificate of occupancy; and also made over 35 change orders, which caused significant delay.

SIXTH AFFIRMATIVE DEFENSE
(Failure to Act in Good Faith)

139. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

140. All contracts are subject to a duty of good faith and fair dealing.

141. MERLO failed to act in good faith with respect to the Contract and Guaranty.

SEVENTH AFFIRMATIVE DEFENSE
(Failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act)

142. MERLO failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act before bringing his Counterclaims based upon allegations that Plaintiff failed to properly construct the Project in a good and workmanlike manner, failed to ensure that all aspects of work performed on the Project were acceptable and in accordance with the plans and specifications, and to accomplish the work undertaken in a manner appropriate to the residential construction industry.

143. The Act is a condition precedent, which MERLO failed to satisfy.

EIGHTH AFFIRMATIVE DEFENSE
(MERLO Failed to Perform His Contractual Obligations)

144. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

145. MERLO cannot recover for an alleged breach of contract against Plaintiff when he failed to perform his contractual obligations and is otherwise in breach of the Contract and Guaranty.

NINTH AFFIRMATIVE DEFENSE
(Economic Loss Rule)

146. Plaintiff's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

TENTH AFFIRMATIVE DEFENSE
(Failure to State a Cause of Action Pursuant to Rule 12(b)(6), SCRCP)

147. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

148. Plaintiff's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's Counterclaims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

149. Additionally, MERLO has failed to plead fraud with particularity as required pursuant to Rule 9(b), SCRCP, and therefore fails to state a cause of action for fraud and those causes action of action based on allegations of fraud.

ELEVENTH AFFIRMATIVE DEFENSE
(Contributory Negligence)

150. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

151. MERLO was negligent and the proximate cause of his alleged damages.

TWELFTH AFFIRMATIVE DEFENSE
(Reservation of Rights and Limitation as to Punitive Damages Claim)

152. Plaintiff re-alleges the Paragraphs above as though fully set forth herein verbatim.

153. Plaintiff reserves its rights arising under S.C. Code Ann. § 15-32-520 as to all issues described therein, and also pleads the limitations on punitive damages as set forth in S.C. Code Ann. § 15-32-530, as a defense.

WHEREFORE, Plaintiff, having answered the Counterclaim, respectfully requests that this Court dismiss the Counterclaim with prejudice and grant Plaintiff judgment in its favor; grant Plaintiff a judgment for its attorney's fees and costs against MERLO; and for such further relief as this Court deems just and proper.

JURY TRIAL REQUEST

154. Plaintiff requests a trial by jury on all issues so triable.

Respectfully submitted,

TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679
813-922-5510
jason@tarokhlaw.com

s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

December 20, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
	)	
Christopher J. Merlo,	)	C. A. No. 2020-CP-37-_____
	)	
Plaintiff,	)	
	)	
v.	)	SUMMONS
	)	
Gregory K. Grissinger, Jr. and John	)	
Montgomery,	)	
	)	
Defendants.	)	
_____	)	

TO THE ABOVE-NAMED DEFENDANT(S):

YOU ARE HEREBY summoned and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices, Townes B. Johnson III, LLC, P.O. Box 9246, Greenville, South Carolina, 29604, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court and judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted this 5th day of March 2020,

TOWNES B. JOHNSON III, LLC

/s/ Townes B. Johnson III

Townes B. Johnson III (SC Bar# 75412)

P.O. Box 9246

Greenville, SC 29604

PH: (864) 757-4899

tjohnson@sc.legal

Attorneys for Plaintiff

Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
	)	
Christopher J. Merlo,	)	C. A. No. 2020-CP-37-_____
	)	
Plaintiff,	)	
	)	
v.	)	COMPLAINT
	)	
Gregory K. Grissinger, Jr. and John	)	
Montgomery,	)	
	)	
Defendants.	)	
_____	)	

COMES NOW, the plaintiff, Christopher J. Merlo (hereinafter “Plaintiff”), complaining of the defendants, Gregory K. Grissinger, Jr. and John Montgomery (collectively hereinafter “Defendants”) would show the following:

1. Plaintiff is a citizen and resident of Anderson County, South Carolina.
2. Upon information and belief, Defendant Gregory K. Grissinger, Jr. (hereinafter “Grissinger”), individually, is a citizen and resident of Greenville County, South Carolina.
3. Upon information and belief, Defendant John Montgomery (hereinafter “Montgomery”), individually, is a citizen and resident of Greenville County, South Carolina.
4. Jurisdiction and venue are proper in this court.
5. In November 2017, Plaintiff entered into an agreement with non-party Montgomery Holdings, LLC d/b/a IBI Builders (hereinafter “IBI”) for IBI to be the general contractor for the construction of the Plaintiff’s residence (hereinafter “Project”).
6. The contract constituted a binding agreement between the parties and IBI, by and through Defendants, breached the contract by wrongfully failing and refusing to perform all of the conditions of the contract and original scope of work, including, but not limited to:

- (a) Failing to properly construct the Project;
- (b) Failing to manage the Project;
- (c) Unreasonably and negligently delaying the Project;
- (d) Failing to comply with laws, ordinances, rules, regulations and lawful orders of public authorities;
- (e) Failing to convey truthful information about the Project; and
- (f) Failing to pay its materialmen and subcontractors.

8. As the principals of the general contractor for the Project, Defendants owed a duty to Plaintiff to construct the residence in a good and workmanlike manner, to use due care to supervise construction of the residence, to ensure that all aspects of work performed on the project were acceptable and in accordance with the plans and specifications, and to accomplish the work undertaken in a manner appropriate to the residential construction industry.

9. Defendants, additionally, owed a duty to Plaintiff to estimate the cost of the Project in a manner appropriate to the residential construction industry, communicate important information about the Project to Plaintiff in a truthful manner, and only invoice Plaintiff for labor and materials that Defendants provided on the Project.

10. Defendants breached these duties of care by failing to construct the residence in a good and workmanlike manner, by failing to use due care to supervise construction of the residence, by failing to ensure that all aspects of work performed on the project were acceptable and in accordance with the plans and specifications, by failing to accomplish the work undertaken in a manner appropriate to the residential construction industry, by intentionally and deceptively delaying the Project, and by intentionally and deceptively failing to communicate important information about the Project to Plaintiff and in a truthful manner.

FOR A FIRST CAUSE OF ACTION
(Negligence)

15. Plaintiff realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

16. Defendants owed Plaintiff a duty of care to protect Plaintiff against the foreseeable risk of harm from its actions and to construct the residence in a good and workmanlike manner, to use due care to supervise construction of the residence, to ensure that all aspects of work performed on the project were acceptable and in accordance with the plans and specifications, and to accomplish the work undertaken in a manner appropriate to the residential construction industry.

17. Defendants additionally owed a duty to Plaintiff to estimate the cost of the Project in a manner appropriate to the residential construction industry, communicate important information about the Project to Plaintiff in a truthful manner, and only invoice Plaintiff for labor and materials that Defendants provided on the Project.

18. Defendants failed to exercise to reasonable care and breached its duty of care to Plaintiff by failing to construct the residence in a good and workmanlike manner, by failing to use due care to supervise construction of the residence, by failing to ensure that all aspects of work performed on the project were acceptable and in accordance with the plans and specifications, by failing to accomplish the work undertaken in a manner appropriate to the residential construction industry, by intentionally and deceptively delaying the Project, and by intentionally and deceptively failing to communicate important information about the Project to Plaintiff and in a truthful manner.

19. As a direct and proximate result of Defendants' breach, Plaintiff has been damaged in an amount to be determined at trial, for which it hereby sues together with attorneys' fees, costs, and interest.

FOR A SECOND CAUSE OF ACTION
(Negligence Misrepresentation)

20. Plaintiff realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

21. During the course of construction, Defendants represented the following to Plaintiff:

- a. the construction schedule for the Project; and
- b. that the accounting it provided were for labor and materials that Plaintiff provided on the Project.

22. Defendants had a pecuniary interest in making these representations to Plaintiff.

23. Defendants owed Plaintiff a duty of care to see that truthful information was communicated to Plaintiff.

24. Defendants breached this duty by failing to exercise due care and falsely representing to each to Plaintiff.

25. In reliance on the truth of Defendants' representations, Plaintiff:

- a. continued using IBI as the contractors for the Project;
- b. made numerous decisions based on the construction schedule as supplied by Defendants; and
- c. paid IBI for labor and materials not supplied to the Project;

26. Plaintiff was justified in relying on these representations.

27. As a direct and proximate result of Defendants' representations, Plaintiff has been damaged in an amount to be determined at trial, for which it hereby sues together with attorneys' fees, costs, and interest.

FOR A THIRD CAUSE OF ACTION
(Fraud)

28. Plaintiff realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

29. Defendants fraudulently and deceptively represented its invoices and accounting related to the Project.

30. As a result of Defendants' fraudulent and deceptive conduct, IBI invoiced Plaintiff for labor and materials that were not provided on the Project.

31. Defendants either knew that the representations were false or had reckless disregard for their truth or falsity.

32. Defendants intended that Plaintiff act on the representation that the representations were accurate.

33. Plaintiff did not know the representations were false.

34. Plaintiff relied on the representation's truth and had a right to rely thereon.

35. As a direct and proximate result of Plaintiff's reliance on the Defendants' representations, Plaintiff has been injured and is entitled to a judgment against Defendants.

FOR A FOURTH CAUSE OF ACTION
(Violation of the South Carolina Unfair Trade Practices Act)

28. Plaintiff realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

29. Defendants fraudulently and deceptively represented its invoices and accounting related to the Project.

30. As a result of Defendants' fraudulent and deceptive conduct, IBI invoiced Plaintiff for labor and materials that were not provided on the Project.

31. Defendants either knew that the representations were false or had reckless disregard for their truth or falsity.

32. Defendants intended that Plaintiff act on the representation that the representations were accurate.

33. Plaintiff did not know the representations were false.

34. Plaintiff has relied on the representation's truth and had a right to rely thereon.

35. As a direct and proximate result of Plaintiff's reliance on the Defendants' representations, Plaintiff has been injured and is entitled to a judgment against Defendants.

FOR A FIFTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

42. Plaintiff realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

43. By and through the contract for IBI to construct the Plaintiff's residence, Plaintiff reposed special confidence in Defendants.

44. Accordingly, Defendants had a fiduciary duty to act in good faith and with due regard to Plaintiff's interests.

45. Defendants breached that duty by fraudulently and deceptively invoicing Plaintiff for labor and materials that were not provided on the Project, by fraudulently and deceptively misrepresenting the construction schedule, and by failing to communicate truthfully with Plaintiff.

WHEREFORE, the Plaintiff, Christopher J. Merlo, prays that this Court:

- (a) Enter a judgment against Defendant Gregory K. Grissinger in an amount to be determined at trial, together with interest, costs, and attorneys' fees;
- (b) Enter a judgment against Defendant John Montgomery in an amount to be determined at trial, together with interest, costs, and attorneys' fees;
- (c) Pre-judgment interest;
- (d) Attorneys' fees;
- (e) Treble damages;
- (f) Punitive damages;
- (g) Costs of this action;
- (h) For such other and further relief that this Court deems just and proper

Respectfully submitted this 5th of March 2020

TOWNES B. JOHNSON III, LLC

/s/ Townes B. Johnson III

Townes B. Johnson III (SC Bar# 75412)

P.O. Box 9246

Greenville, SC 29604

PH: (864) 757-4899

tjohnson@sc.legal

Attorneys for Plaintiff

Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2020-CP-37-00188

CHRISTOPHER J. MERLO,

Plaintiff,

(Jury Trial Requested)

v.

GREGORY K. GRISSINGER, JR., and JOHN
MONTGOMERY,

Defendants,

_____ /

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES

Defendants', GREGORY K. GRISSINGER, JR., and JOHN MONTGOMERY (herein "Defendants"), by and through their undersigned attorney, hereby answers the Plaintiff's, CHRISTOPHER J. MERLO, (herein "MERLO"), Complaint, and states that each and every allegation of the Complaint not herein specifically admitted, qualified, or explained is denied, and further states as follows:

ANSWER

1. Admit.
2. Admit.
3. Admit.
4. Admit.

5. Admit that Plaintiff and IBI entered into the Contract and Guaranty attached hereto and incorporated herein as exhibits, which constitutes a binding contract between them. Deny remaining allegations.

6. Admit that Plaintiff and IBI entered into the Contract and Guaranty attached hereto and incorporated herein as exhibits, which constitutes a binding contract between them. Deny remaining allegations.

- a. Deny.
- b. Deny.
- c. Deny.

d. Deny.

e. Deny.

f. Deny.

8. Deny. Additionally, IBI's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's claims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

9. Deny. Additionally, IBI's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's claims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

10. Deny. Additionally, IBI's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's claims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

For A First Cause of Action – Negligence

15. Defendants re-allege the paragraphs above as though fully set forth herein verbatim. Defendants further deny that any of "the foregoing paragraphs" as referenced in Paragraph 15 of the Complaint are consistent with MERLO's alleged cause of action.

16. Deny. Additionally, IBI's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's claims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

17. Deny. Additionally, IBI's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's claims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

18. Deny. Additionally, IBI's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's claims based upon negligence. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

19. Deny. Additionally, MERLO is not entitled to seek attorney's fees and costs against Defendants because there is no contract and there is no statute under which attorney's fees and costs are available.

For a Second Cause of Action - Negligence [sic] Misrepresentation

20. Defendants re-allege the paragraphs above as though fully set forth herein verbatim. Defendants further deny that any of "the foregoing paragraphs" as referenced in Paragraph 20 [sic] of the Complaint are consistent with MERLO's alleged cause of action.

21. Deny.

a. Deny.

b. Deny. Additionally, the Contract is not a "cost-plus" contract.

22. Deny.

23. Deny.

24. Deny.

25. Deny.

a. Deny.

b. Deny.

c. Deny. Additionally, the Contract is not a "cost-plus" contract.

26. Deny.

27. Deny. Additionally, MERLO is not entitled to seek attorney's fees and costs against Defendants because there is no contract and there is no statute under which attorney's fees and costs are available.

For a Third Cause of Action – Fraud

28. Defendants re-allege the paragraphs above as though fully set forth herein verbatim. Defendants further deny that any of "the foregoing paragraphs" as referenced in Paragraph 28 [sic] of the Complaint are consistent with MERLO's alleged cause of action.

29. Deny.

30. Deny. Additionally, the Contact is not a "cost-plus" contact.

31. Deny.

32. Deny.

33. Deny. Defendants did not make false representations to MERLO

34. Deny. Additionally, the Contact is not a "cost-plus" contact.

35. Deny.

For a Fourth Cause of Action – Violation of the South Carolina Unfair Trade Practices Act

28. Defendants re-allege the paragraphs above as though fully set forth herein verbatim. Defendants further deny that any of “the foregoing paragraphs” as referenced in Paragraph 28 [sic] of the Complaint are consistent with MERLO’s alleged cause of action.

29. Deny.

30. Deny. Additionally, the Contract is not a “cost-plus” contract.

31. Deny. Defendants did not make false representations to MERLO.

32. Deny. Defendants did not make false representations to MERLO.

33. Deny. Defendants did not make false representations to MERLO.

34. Deny. Additionally, the Contract is not a “cost-plus” contract.

35. Deny.

For a Fifth Cause of Action – Breach of Fiduciary Duty

42. Defendants re-allege the paragraphs above as though fully set forth herein verbatim. Defendants further deny that any of “the foregoing paragraphs” as referenced in Paragraph 42 [sic] of the Complaint are consistent with MERLO’s alleged cause of action.

43. Deny.

44. Deny.

45. Deny this paragraph and the WHEREFORE paragraph that follows. Additionally, MERLO is not entitled to seek attorney’s fees and costs against Defendants because there is no contract and there is no statute under which attorney’s fees and costs are available.

AFFIRMATIVE DEFENSES

Defendants, by and through their undersigned attorney, hereby alleges the following affirmative defenses to the MERLO’s Complaint, and states as follows:

Factual Allegations

46. MERLO is a licensed South Carolina real estate broker in charge for a commercial real estate company that offers commercial and residential acquisition and disposition brokerage services.

47. Upon information and belief, MERLO is a sophisticated real estate professional and

has substantial experience in the multiple aspects of commercial and residential real estate investing, financing and related matters.

48. On or about November 17, 2017, IBI and MERLO entered into a written contract wherein IBI would furnish labor, services and materials for the improvement of the Property (herein "Contract"). A true and correct copy of the Contract is attached hereto and incorporated herein.

49. The Contract was not a "cost-plus" contract.

50. On or about May 3, 2019, MERLO agreed, affirmed, assured and guaranteed to IBI in writing that full payment would be made under the Contract and also for additional items as set forth therein (herein "Guaranty"). A true and correct copy of the Guaranty is attached hereto and incorporated herein by reference. The Guaranty constitutes an enforceable contract, which was intended by IBI and MERLO to supplement and/or modify the Contract.

51. MERLO breached his duty to IBI under the Contract and Guaranty in failing to make full payment to IBI and/or wrongfully and in bad faith terminating and repudiating the Contract and Guaranty.

52. MERLO represented to Defendants multiple times that he was pleased and satisfied with IBI's provision of labor, services and materials before MERLO wrongfully and in bad faith terminated and repudiated the Contract and Guaranty.

53. It was not until approximately three days after IBI declined to finance the installation of a home theater and entertainment equipment for the Property, and also declined MERLO's request to apply for a certificate of occupancy until after IBI was paid the balance owed under the Contract and Guaranty, that MERLO unjustifiably terminated the contract.

54. IBI remains unpaid in the amount of \$255,534.86 under the Contract and Guaranty.

55. Upon information and belief, when MERLO executed and delivered the Guaranty,

he surreptitiously intended to induce IBI to continue providing valuable labor, services, and materials for the improvement of the Property with no intention of paying IBI in full as part of a deceitful and nefarious scheme to have IBI fund the improvement of the Property.

56. In the alternative, upon information and belief, when MERLO executed and delivered the Guaranty, he intended to buy time with IBI to obtain financing to pay IBI because without financing he would be unable to do so, and to also induce IBI to continue providing valuable labor, services, and materials for the improvement of the Property in the interim.

57. However, upon information and belief, after MERLO executed and delivered the Guaranty, he either realized that obtaining financing would be difficult, impossible, inconvenient, unbeneficial and/or unsuccessful, or knew that he had been denied or rejected for financing. Therefore, MERLO unjustifiably terminated the Contract and Guaranty in a bad faith and fraudulent attempt to avoid paying IBI in full.

58. In either alternative alleged above, MERLO perpetrated a fraud upon IBI by inducing IBI to continue providing valuable labor, services and materials by making materially false representations that caused IBI to reasonably believe that it would be paid in full under the Contract and Guaranty.

59. During all material times, Defendants acted as agents for and on behalf of IBI and not in their individual capacities.

FIRST AFFIRMATIVE DEFENSE
(Fraud)

60. Defendants re-allege the Paragraphs above as though fully set forth herein verbatim.

61. MERLO committed fraud against the Defendants.

62. MERLO made false representations to Defendants by, and during the process of,

executing the Guaranty, by promising and assuring IBI that it would be fully paid under the Contract and Guaranty, and by representing to Defendants multiple times that he was pleased and satisfied with IBI's provision of labor, services and materials.

63. The false representations were material.

64. MERLO made the false representations with knowledge of their falsity or with a reckless disregard of their truth or falsity.

65. MERLO intended that Defendants act upon the false representations.

66. Defendants were unaware of the falsity of MERLO's representations.

67. Defendants reasonably relied upon MERLO's representations as the truth by IBI continuing to provide valuable labor, material and services for the improvement of the Property.

68. Defendants had the right to rely upon MERLO's false representations.

69. IBI has suffered damages as a result of MERLO's false representations.

SECOND AFFIRMATIVE DEFENSE
(Misrepresentation)

70. Defendants re-allege the Paragraphs above as though fully set forth herein verbatim.

71. MERLO made false representations to Defendants by, and during the process of, executing the Guaranty, by promising and assuring IBI that it would be fully paid under the Contract and Guaranty, and by representing to Defendants multiple times that he was pleased and satisfied with IBI's provision of labor, services and materials.

72. The false representations were material.

73. MERLO had a pecuniary interest in making the false representations.

74. MERLO owed a duty of care to the Defendants to see that truthful information was communicated to Defendants.

75. MERLO breached his duty by failing to exercise due care.

76. Defendants were unaware of the falsity of the MERLO's representations.

77. Defendants reasonably relied upon MERLO's representations as the truth by continuing to provide valuable labor, materials and services for the improvement of the Property.

78. Defendants had the right to rely upon MERLO's false representations.

79. Defendants had suffered damages as a result of MERLO's false representations.

THIRD AFFIRMATIVE DEFENSE
(Equitable Estoppel)

80. Defendants re-allege the Paragraphs above as though fully set forth herein verbatim.

81. MERLO engaged in conduct which amounts to a false representation or conduct which was calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the MERLO subsequently attempted to assert, to wit: by, and during the process of, executing the Guaranty; by promising and assuring IBI that it would be fully paid under the Contract and Guaranty; by representing to Defendants multiple times that he was pleased and satisfied with IBI's provision of labor, services and materials; and by requesting that Defendant apply for the issuance of a certificate of occupancy.

82. MERLO intended that such conduct be acted upon by Defendants.

83. MERLO had actual or constructive knowledge of the real facts.

84. Defendants lacked knowledge, and the means of knowledge, of the truth as to the facts in question.

85. Defendants relied upon the conduct of MERLO by continuing to provide valuable labor, services and materials for the improvement of the Property.

86. Defendants prejudicially changed their position in reliance of the MERLO's conduct.

87. Additionally, MERLO also made over 35 change orders, which caused significant delay.

FOURTH AFFIRMATIVE DEFENSE
(Unclean Hands)

88. Defendants re-allege the Paragraphs above as though fully set forth herein verbatim.

89. MERLO comes into court with unclean hands.

90. MERLO should not recover against the Defendants because he acted unfairly, wrongfully, negligently and/or and fraudulently to the prejudice of the Defendants.

FIFTH AFFIRMATIVE DEFENSE
(Waiver)

91. Defendants re-allege the Paragraphs above as though fully set forth herein verbatim.

92. MERLO waived any rights to hold Defendants liable because he made payments to IBI under the Contract and Guaranty, including a \$31,250.00 payment on or about August 30, 2019, which was approximately six weeks before he unjustifiably terminated the contract; permitted IBI to continue providing valuable labor, services and materials for the improvement of the Property before he unjustifiably terminated the contract; made representations to Defendants multiple times that he was pleased and satisfied with IBI's provision of labor, services and materials; requested that IBI apply for the issuance of a certificate of occupancy; and also made over 35 change orders, which caused significant delay.

SIXTH AFFIRMATIVE DEFENSE
(Failure to Act in Good Faith)

93. Defendants re-allege the Paragraphs above as though fully set forth herein verbatim.

94. All contracts are subject to a duty of good faith and fair dealing.

95. MERLO failed to act in good faith with respect to the Contract and Guaranty.

SEVENTH AFFIRMATIVE DEFENSE
(Failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act)

96. MERLO failed to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act before bringing his Counterclaims based upon allegations that IBI failed to properly construct the Project in a good and workmanlike manner, failed to ensure that all aspects of work performed on the Project were acceptable and in accordance with the plans and specifications, and to accomplish the work undertaken in a manner appropriate to the residential construction industry.

97. The Act is a condition precedent, which MERLO failed to satisfy.

EIGHTH AFFIRMATIVE DEFENSE
(Economic Loss Rule)

98. IBI's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's Complaint based upon alleged negligence of the Defendants. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

NINTH AFFIRMATIVE DEFENSE
(Failure to State a Cause of Action Pursuant to Rule 12(b)(6), SCRCP)

99. Defendants re-allege the Paragraphs above as though fully set forth herein verbatim.

100. IBI's duties to MERLO were created solely by contract. Therefore, the economic loss rule applies to bar MERLO's Complaint based upon alleged negligence of the Defendants. *See, Kenney v. Columbia Lumber and Manufacturing Company, Inc.*, 384 S.E.2d 730, 299 S.C. 335 (1989).

101. Additionally, MERLO has failed to plead fraud with particularity as required pursuant to Rule 9(b), SCRCP, and therefore fails to state a cause of action for fraud and those causes action of action based on allegations of fraud.

102. Additionally, the Contract is not a "cost-plus" contract.

103. Therefore, MERLO's claims based upon allegations that MERLO paid for labor and materials not supplied to the Project fail to state a cause of action for his claims based thereon.

104. Additionally, during all material times, Defendants acted as agents for and on behalf of IBI.

105. Therefore, MERLO's claim under the South Carolina Unfair Trade Practices Act against Defendants in their individual capacities fails to state a cause of action.

TENTH AFFIRMATIVE DEFENSE
(Contributory Negligence)

106. Defendants re-allege the Paragraphs above as though fully set forth herein verbatim.

107. MERLO was negligent and the proximate cause of his alleged damages.

ELEVENTH AFFIRMATIVE DEFENSE
(Reservation of Rights and Limitation as to Punitive Damages Claim)

108. Defendants re-allege the Paragraphs above as though fully set forth herein verbatim.

109. Defendants reserve their rights arising under S.C. Code Ann. § 15-32-520 as to all issues described therein, and also pleads the limitations on punitive damages as set forth in S.C. Code Ann. § 15-32-530, as a defense.

TWELFTH AFFIRMATIVE DEFENSE
(Corporate Agency)

110. During all material times, Defendants acted as agents for and on behalf of IBI.

111. Therefore, MERLO's claims against Defendants in their individual capacities fail as a matter of law.

THIRTEENTH AFFIRMATIVE DEFENSE
(The Contract is not a "cost-plus" contract)

112. The Contract is not a "cost-plus" contract.

113. Therefore, MERLO's claims based upon allegations that MERLO paid for labor and materials not supplied to the Project are meritless.

WHEREFORE, Defendants, having answered the Complaint, respectfully requests that this Court dismiss the Complaint with prejudice and grant Defendants judgment in their favor; grant Defendants a judgment for their attorney's fees and costs against MERLO; and for such further relief as this Court deems just and proper.

JURY TRIAL REQUEST

114. Defendants request a trial by jury on all issues so triable.

Respectfully submitted,

TAROKH LAW, PLLC
PO BOX 10827
TAMPA, FL 33679
813-922-5510

jason@tarokhlaw.com

s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

March 23, 2020

11-16-17

HOME CONTRACT

MONTGOMERY HOLDINGS, LLC d.b.a. (IBI Builders) (hereinafter "IBI") has contracted and agreed with Chris Merlo (hereinafter "Owners"), to finish construction of a new Home located Lot 12 Marina Bay Seneca, SC.

I. IBI agrees to construct the home per plans and scope (attached to this contract) for \$625,000. The cost does not include any cost associated with the Owner Bank Fees, HOA Fees, Utility Fees, Attorney Fees or any other cost not directly associated with construction material and labor of the project.

(A) IBI agrees to complete the work to the best of its ability in a period of 12 months from the date of reception of permits/authorization to commence work. This is an estimated completion time only and is understood that there are many variables that can potentially delay the timing of construction.

(B) The estimated completion date may be adjusted if minor deviations to the floor plan are requested or if Owners do not make product decisions in a timely manner. Change order requests should include a delay in the estimated completion date if appropriate, and all change orders shall be Approved by both parties, or via email. Estimated completion date DOES NOT take in to consideration of inclement weather, inspection periods, or any other areas outside of IBI authority that may suspend working activity.

II. Payment to IBI will be made according to the following schedule:

IBI will follow the draw inspection schedule via the bank involved. However, when draws are requested it understood that payment shall take no longer than 1 week to deliver, at no cost to IBI. When change orders are requested and agreed upon, payment may be required for the added cost at time of work.

III. Requirements of Owners

(A) The Owners shall forward all instructions to IBI in writing. Owners also agree that any and all changes desired in the current floor plan will be contained in writing in a change order signed by all parties or approved via email. Owners understand that such change orders will affect the original budgeted cost of the construction. *ANY REQUESTED WORK THAT IS NOT DETAILED ON THE PLANS OR IN SPEC SHEET MAY POTENTIALLY INCREASE AND A CHANGE ORDER WILL BE GENERATED FOR APPROVAL. NO COST SHALL INCREASE WITHOUT KNOWLEDGE OF OWNER.*

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IBI:



Owners:



0119

11-16-17

- (B) Owners agree to accept the Home which will have been constructed in a workmanlike manner.
- (C) The Owners shall sign all necessary applications to obtain permits and bonds. **IF Applicable**
- (D) The Owners shall select in a timely manner all materials and colors required during the construction process.
- (E) The Owners shall obtain all necessary approvals and/or all acknowledgments from any architectural board or committee whose jurisdiction is relevant to this project.
- (F) The Owners agree to cooperate and make every reasonable effort to assist IBI and further agrees to permit IBI to place signs on or about the premises during the course of construction and allow IBI to show the project to potential customers during the course of construction. Owners shall not be entitled to contract with, authorize, or permit, for any reason whatsoever, any individual, other contractor, or subcontractor to perform, in whole or in part, any portion of work for the project, without **IBI APPROVAL**. Owners shall not communicate directly with any of the IBIs workmen, employees, agents, or subcontractors, unless so directed by IBI.

IV. Requirements of IBI

- (A) IBI shall supervise and direct the work, using its best skill and attention, and it shall be solely responsible for all construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the work under the contract.
- (B) Unless otherwise specifically provided in the contract documents, IBI shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper executions and completion of the work, whether temporary or permanent, and whether or not incorporated or to be incorporated in the work.
- (C) IBI shall at all times enforce strict discipline and good order among its employees and shall not employ on the project any unfit person or any person unskilled in the task assigned to him.
- (D) IBI warrants to the Owner that all materials and equipment incorporated in the work will be new unless otherwise specified, and that all work will be of good quality, free from faults and defects, and in conformance with the

2

IBI:



Owners:



0120

11-16-17

contract documents. IBI further agrees to provide an unlimited one-year warranty on all work related to the uncompleted construction from the date of the issuance of the Certificate of Occupancy.

- (E) Unless otherwise provided in the contract documents, IBI shall pay all sales, consumer, use, and similar taxes, which are legally enacted at the time bids are received, and shall secure and pay for the building permit and for all other permits and governmental fees, licenses, and inspections (NOT INCLUDING BANK INSPECTIONS) necessary for the proper execution and completion of the work.
- (F) IBI shall give all notices and comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority with jurisdiction over the project, and shall promptly notice the Owners if the drawings and/or specifications are at variance therewith.
- (G) IBI shall be responsible to the Owners for the acts and omissions of his employees, subcontractors, and their agents and employees, and other persons performing any of the work under a contract with IBI.
- (H) IBI shall at all times keep the premises free from accumulations of excess waste materials or rubbish caused by his operations. At the completion of the work, IBI shall remove all their waste materials and rubbish from and about the project as well as his tools, construction equipment, machinery, and surplus materials.
- (I) IBI agrees to provide Worker's Compensation and general liability insurance for itself to the owner and or Bank Rep. IBI NOT RESPONSIBLE FOR ANY OTHER REQUIRED INSURANCE OR TAXES THAT MAY BE ASKED BY OWNER'S BANK.

V. Miscellaneous conditions and agreements.

- (A) Owners and IBI will jointly inspect the building before the C.O. is issued. At this inspection, Owners and IBI will prepare 1 written list of any and all items requiring repair, completion, correction, adjustment, or touch-up (the "Punch List"). Only those items contained in the Punch List will be addressed by IBI.
- (B) ~~Owners agree to transact all business related to the construction during normal business hours, Monday through Friday, from 8:00 a.m. until 6:00 p.m.~~
- (C) Pursuant to the terms and conditions contained in this Agreement and all Exhibits hereto, Owners hereby authorize IBI to contract and pay for the

IBI:



Owners:



11-16-17

purchase of materials, supplies, and permits necessary for the construction, and to enter into contracts with subcontractors.

- (D) Owners and IBI agree that commitments have been made to suppliers and subcontractors. Any and all obligations relating to materials and labor for the construction will be paid in full at the time of monthly reconciliation. IBI agrees to execute a Builder's Affidavit after the Final Payment of balance, certifying that all charges and costs for labor performed, material furnished, and fixtures installed in the home have been fully paid. **IBI CAN NOT BE RESPONSIBLE FOR ANY PRODUCT DELIVERY, WARRANTY (COST ASSOCIATE) MADE BY OWNER THROUGH ONLINE PURCHASES OR ANY OTHER SUPPLIERS NOT ASSOCIATED WITH IBI.**

- (F) This contract shall be governed by the laws of the State of South Carolina.

Agreed and acknowledged this 16 day of October 2017

MONTGOMERY HOLDINGS, LLC:
(D.B.A. IBI Builders, llc)

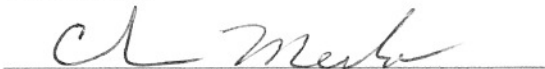
By:

John Montgomery

Date: 11-16-17



OWNERS:



Date: 11/17/17

Date: _____

IBI:



Owners:





**SPEC SHEET for Chris Merlo Proposal based off of plans provided by Don Gardner plan
Name Sandy Creek. Home to be built in the Marina Bay Subdivision in Seneca, SC**

Permitting & Insurance

All permits will be acquired prior to construction. Any and all permitting cost, IBI will be Responsible. Prior to construction, IBI will provide full General Liability and Workman Compensation Certificates

Grading & Excavating

Lot will be graded per Specs of plan and or site plan. **(NO RET WALLS PERS SITE PLAN)**
Trees other than the building site area, will be marked by Home Owner for removal

Foundation

All footings will be poured to wall design requirements allowing for rock overlay
Pour Wall Foundation with Rebar reinforcement
Basement, garage slabs, and driveways will all include fiber mesh w/ 3000 psi concrete
Vapor Barriers and Radon venting to be installed if applicable
Water proofing system with 4" French drain system using Polypropylene membrane
Includes a 20 yr. warranty provided by the sub contractor only, not IBI.

Framing

Framing to comply with all state and county codes/frame per plan
Roof constructed using 2x8 rafters w/ OSB sheathing
ZIP Board or house wrap or similar product for moisture barrier
Floor system using I-Joist/ with Advantech (50 year) sub floor system (TO BE ENGINEERED)
All ceiling design (trey, coffer, cathedral, etc) per plan
Main floor 10' ceiling Basement 10'ceiling

Ext. Siding

Siding to consist of stone brick and hardy.
NO STUCCO (See stone/brick allowance on last page) *
Soffit and fascia using cement board (Hardy/Meritec) material
6 inch seamless gutter system/ with gutter guard protection
Columns recommend using 8X8 Post wrapped in Hardy

Signatures:



Window/Doors

All windows to consist of Premium Jeld WEN Vinyl windows or Sierra Pacific
Budget and recommendation based off using **ALL VINYL Window**
All exterior/interior doors per plan /or fiber glass **SEE DOOR SCHEDULE PER PLAN**
NO SKY Light per plan ** see note section
NOTE: Front door will be HO choice see allowance section *

Insulation

Tech Shield OSB roof sheathing
Ext. Walls, ceilings, attic, unfinished areas below finished BATT
Low compression foam applied to all seals, doors & windows
Sound proof R13 installed to all Bedrooms, bath, laundry rooms

Roof

NO Chimney as per plan
30 yr. architectural shingle installed color HO choice
Ice and water installed in all hips and valleys
Flashing installed in all side walls and necessary areas

CABINETS/Granite

Soft close drawers/doors Style and Color HO CHOICE. **See allowance section***
Level 2 granite HO choice/Granite throughout home per location of cabinet tops
Mantles to be included in Budget see allowance section *

Stairs

Per Plan. Stairs to Bonus to be carpet
Stairs to basement oak treads, oak Railing, iron balusters
HO choice of baluster and rail by options provided

Int. Trim/Doors

5 1/4" crown molding installed all areas of main floor & Basement (2pc. Crown)
All window and doors to be cased (trimmed out)
7" base boards installed through all finished areas.
All Int and Ext. doors to be Solid CORE
NO trim in closets or Bonus. Base only, in Dining 1 area for chair rail/or wainscoting
included

Flooring/Tile

All bathrooms, Laundry Room, have tile flooring
Tile material included see allowance section*
Hardwood Flooring throughout main floor. Basement/bonus to be carpet.
See allowance section for Carpet*

Signatures:



Decks/Porches

Flag stone floor for Front Porch
Flag Stone Steps for front Porch
Bottom deck Floor broom finish concrete
Select deck board for upper deck
Powder coated aluminum and balusters for exterior railing

HVAC

Trane or Lennox 15 seer Unit(s) tonnage to be accurately calculated
in field Gas Units if applicable for main floor only
Digital Thermostat
Returns in all bedrooms for more efficiency (if applicable)
All registers on main floor to be installed on floor (Not bonus or basement)
(Home Owner responsible for PROPANE SERVICE COMPANY IF REQUIRED)

Plumbing

All piping to PEX and plumbing to code
1 Gas (if applicable) Tank less water heater (location to be determined in field)
TUBS, FIXTURES, Toilets included see allowance section*
Ext. Hose Bibs HO choice of location (up to 3 included)
Utility sink in laundry room
White or Stainless rectangle sinks included
**Sewer is available and we will connect/Not responsible for any
required UTILITY FEES**

Electrical

Electrical will be installed to code & plan. Anything outside of code will be considered
added cost. 200 amp service. Under cabinet lighting in both kitchens only
Recessed cans to be installed location HO choice allotment of cans see allowance section*
(All other electrical fixtures and bulbs provided by homeowner/we include install)
Low voltage wiring:

We will install CAT 5/Cable/Data throughout home
Low Voltage will be ran to central panel (SMART PANEL)
for all future current TV, phone, etc. applications
One room (HO CHOICE) will be pre-wired for surround sound
All equipment (receivers, speakers, etc.) home owner will provide
Home owner responsible for security company and installation

Signatures:



Specialty

Items Included: See allowance section*

Closet Shelving Throughout Home
Garage Doors
Bath hardware (toilet paper, towel bars, etc.)
Bathroom Mirrors
Shower Doors
Int. Ext. Door handles/knobs (All locks)

Fireplaces/Appliances

Appliances see allowance section
1- 36" Pre Fab fireplace insert See allowance section

Landscape

See allowance section *
General Sod around the home
Small Plant & Tree Pkg
Automatic Sprinkler System
Mulch Beds
Tying in of gutters to down spouts for water control

NO LANDSCAPE PLAN PROVIDED

Notes:

- There is was not a site plan included or provided for this proposal
- This proposal includes our 10 yr. structural & 1 yr finishing warranty. Other warranties vary among other products, i.e. appliances, HVAC, etc.
- This price is based off the plans by DG 1329-D MR
- Any variations can lead to potential increase in cost
- In the event we are excavating and rock is discovered, there will be added cost.
- ~~IBI will provided the septic tank installation, material and will conform to code (NO DHEC PERMIT PROVIDED IN THIS PROPOSAL, IF PUMP IS REQUIRED THERE WILL BE ADDED COST).~~ Sewer available at road.
May have added cost for pump.
- Any door swings, sizes, etc. can be changed during framing at NO additional cost; however if changes request after work performed to plan, there may be additional cost.
- NO SPA included in this proposal as seen on the plans
- Understood no site plan provided indicating home placement, drive and walk ways. Subject to price increase
- All cost subject to change per ARC requirements
- General notes on plans are not considered specs and are subject to change
- Any discrepancy between code and plans, code will always prevail.

Signatures:



**** *BY SINGING THIS PAGE ALL ALLOWANCES ARE UNDERSTOOD AND AGREED UPON. IT IS HIGHLY RECOMMENDED THAT OWNER RESEARCH THESE NUMBERS AND DETERMINE THAT WILL OR WILL NOT CONFORM TO THEIR SELECTIONS, PRIOR TO SIGNING*****

Allowance Section:

- **Brick .42 cent / Rock material and labor at \$10.00 per sq ft.**
- **Front Door allowance of \$2,800.00**
- **Cabinets \$27,000.00**
- **Granite set at level 2 granite. Price range \$45.00-\$50.00 per sq ft.**
- **Mantel \$700.00**
- **Tile material \$5.00 per sq ft. Back Splash tile material \$15.00 per sq ft.**
- **Carpet \$24.00 per sq yard with pad**
- **Plumbing to include all toilets, fixtures, tub and shower inserts \$6,500.00**
- **Electrical can allotment of 42 cans with trim included. ALL OTHER FIXTURES (chandeliers, fans, globe lighting, etc.) provided by home owner; IBI will install**
- **Specialty \$9,000.00**
- **There is no landscape plan provided with this proposal. Allowance of \$15,000.**
- **Appliance \$12,000 kitchen and screen porch only.**

(Revised Cost based on meeting on 9-4-17)

****The plans are currently being modified. It is understood that this revised proposal is based up our meeting and the final plans. Once the revisions are made and site plan produced, we will confirm the overall estimated cost. ****

- * **NO ELEVATOR**
- * **Ext. garage stairs to be removed**
- * **No Spa/patio or Pool included as shown on original Plans**
- * **10' Ceilings to be constructed in the basement. (NOTE: this will/may cause the window and door sizes to change from their current size. These changes should be reflected on the revised plans).**
- * **Out Door Covered Porch. Will include outdoor grill, vented hood, sink, mini fridge. Any appliance h here considered part of appliance allowance.**
- * **Movie theater to be added down stairs. This space will be FOAM INSULATED FOR BETTER SOUND PROOF. This will not completely eliminate sound, however there are other options available. (Equipment not included. Will Pre Wire) SPACE, LAYOUT UNDEFINED. These changes should be reflected on the revised plans.**
- * **BONUS ROOM: PER PLAN ONLY**
- * **Out door shower to be installed. Location TBD. H/C faucet only no drain or enclosure**

Signatures:

IBI Builders
Greenville, SC

www.ibibuilders.com

Heated (approx) 4200
REVISED 11-11-17

0127



DELETIONS (REVISED 3)

- * Remove Accordion Door (Allowance)
- * Remove Chimney and Cap
- * Remove Sky Lights
- * Open UP Porch and remove 2 columns
(See Pic Emailed 11-9)

-
- * Based on the attached site plan, there are no retaining walls, thus reducing the price (next page)
 - * The attached REVISED floor plans will need to be completed with measurements and elevations

TOTAL CONTRACT COST

TOTAL TURNKEY REVISED (3)

\$625,000

Signatures:

It is understood that Mr. & Mrs. Merlo (guarantor) are seeking a separate resource for funding the additional items agreed to be added to the construction of the home located at 548 Mountain View Lane lot 12 in Marina Bay. The current conventional construction loan does not cover the current overages due to Montgomery Holdings, dba IBI Builders (MHIBI) and a HELOC is being sourced to fund the current balance of overages. The following is the obligations of the guarantor:

OBLIGATIONS GUARANTEED. Guarantor irrevocably, absolutely, and unconditionally guaranties to MHIBI the full and punctual performance of the following (the "Obligations"):

- Full payment of all additional items, (AKA change orders, allowances overages,) notated on the balance sheet as well as remaining contract balance of construction.
- Balance sheet as of 4-30-19 consist of a total balance of \$183,382.
- Understood that other items will be added to the sheet such as Boulder Retaining walls, plumbing overages etc. and these approved additional item(s) will also be obligated under this said guarantee
- Full payment of this obligation will be made prior to move in completion of home and or Certificate of Occupancy request. (SEE CONTRACT FOR ALLOWED MONIES TO HOLD FOR PUNCH LIST COMPLETION)
- Guarantor will inform MHIBI of payments forthcoming and will update any change of status.

Guarantor shall remain liable until all terms of the Obligations are fully performed via final and total payment. This Guaranty remains enforceable regardless of any defenses that the Guarantor may assert on the Obligations, including but not limited to, failure of consideration, breach of warranty, fraud, statute of frauds, bankruptcy, lack of legal capacity, statute of limitations, lender liability, accord and satisfaction. If this Guaranty is given to an attorney for enforcement. Guarantor will reimburse MHIBI for all expenses incurred in connection with enforcement including without limitation, reasonable attorneys' fees.

This is a NON-TRANSFERRABLE guarantee for either party. In such event as death, bankruptcy or unforeseen health condition, the guarantee remains enforceable to the guarantor and or trust.

NAME (PRINT): CHRIS MERLO

DATE: 5-3-19

SS#: _____

Name (SIGNATURE)

Chris Merlo

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

v.

CHRISTOPHER J. MERLO;
and GRANDSOUTH BANK

Defendants,

_____ /

CHRISTOPHER J. MERLO,

CASE #: 2020-CP-37-00188

Plaintiff,

v.

GREGORY K. GRISSINGER, JR., and JOHN
MONTGOMERY,

Defendants,

_____ /

MOTION TO ALTER OR AMEND

TO: JASON TAROKH, COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendant Christopher J. Merlo (“Merlo” or “Defendant”), by and through its undersigned counsel, will move before The Honorable Steven C. Kirven, Master in Equity, at such time and place as is convenient to the Court and counsel, for an Order pursuant to *South Carolina Rules of Civil Procedure* Rule 59(e) altering or amending the Order entering judgment in this case, filed July 20, 2022, on the following grounds:

1. The Court erroneously finds that Merlo approved of all the change orders reflected when IBI did not present any change orders in accordance with the “Home Contract” between the parties and didn’t present any evidence that the change order provision in the contract had been waived.

2. The Court erroneously finds that “the balance sheet was periodically updated by IBI from time to time based upon charges for change orders and allowance overages, which were added to the balance sheet at or near the time they were incurred” when the evidence showed that several items weren’t added until after IBI was terminated although they were completely with the framing more than a year earlier.

3. The Court erroneously finds that the “Guaranty” was valid and, together with the “Home Contract” “constituted the entire agreement between the Merlo and IBI” when there was no consideration for the Guaranty. "The necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997).

4. The Court erroneously finds that the balance sheet reflected the balance owed by Merlo at any given time when the balance sheet, at all times, expressed the amount that would be owed upon full completion of the project.

5. Despite a complete lack of testimony presented, the Court, in the order, manufactured testimony and conclusions concerning the percentage of project completion.

6. The Order establishes payment to IBI as if it fully completed the scope of work yet cannot establish that IBI performed 100% of the scope of work.

7. The Court erroneously finds that IBI substantially completed the project when undisputed evidence showed that Merlo spent \$169,255.96 after IBI's termination to complete the scope.

8. The Court erroneously determines that: i) IBI's construction of Merlo's driveway on Merlo's neighbor's property, ii) IBI's construction of Merlo's retaining wall on Merlo's other neighbor's property, iii) IBI's failure to construct the basement to a ten foot ceiling height in accordance the contract specifications, and iv) IBI's failure to construct poured concrete wall as specified by the Project's plans were: i) not breaches of the Home Contract, ii) were not negligent, iii) were in accordance with the plans and specifications and iv) in compliance with the standard of care of the residential construction industry.

9. The Court disregarded the testimony and pictures which undisputedly demonstrated that the absence of the poured concrete wall as specified by the Project's plans and the associated waterproofing led to multiple instances of water entry.

10. The Court erroneously determines that the photographic evidence were all taken during the midst of construction and did not represent the final product when the testimony clearly established that much of the photographic evidence concerned remedial work which needed to be performed.

11. The Court erroneously determines that IBI's construction of the project was proper and was performed in a good and workmanlike manner when the photographic evidence clearly established remedial work which needed to be performed.

12. The Court erroneously finds that only after IBI filed and served its mechanic's lien did Merlo start raising issues related to construction quality and compliance with plans when the undisputed evidence showed that Merlo sent monthly re-work lists to IBI all regarding the quality

of the work and put IBI on notice of the failure to construct the basement with ten foot ceilings as soon as Merlo learned in December 2019.

13. The Court erroneously finds that Merlo did not present a definitive scope of work for which Joy Construction performed when, in fact, Merlo went through all scopes.

14. The Court erroneously finds, despite no testimony establishing same, that significant changes and additions to the project were made by Merlo after IBI was terminated. In fact, the only testimony about additional scopes of work were concerning the wine room which both Merlo and his wife, Karen N. Merlo, testified independently that work was not part of the monies they were seeking from IBI.

15. The Court erroneously finds that Merlo's claim was economic loss only when the undisputed evidence showed that the back porch IBI constructed was not built to code and consequently failed inspected as a result thereof and that IBI deviated from industry standards in their construction of Merlo's driveway on Merlo's neighbor's property, their construction of Merlo's retaining wall on Merlo's other neighbor's property, their failure to construct the basement to a ten foot ceiling height in accordance the contract specifications, and their failure to construct poured concrete wall as specified by the Project's plans.

16. The Court erroneously finds that Merlo was unjustified in terminating the contract with IBI when it is undisputed that IBI deviated from the plans and specifications for the project and the project was unreasonably delayed.

17. The Court erroneously failed to determine that IBI breached the contract first by failing to build the project in accordance with plans and specifications and, as such, IBI must bear all the liability for its nonperformance. See *Silver v. Aabstract Pools & Spas, Inc.*, 658 S.E.2d 539, 376 S.C. 585 (S.C. App. 2008) ("Where a contract is not performed, the party who is guilty

of the first breach is generally the one upon whom all liability for the nonperformance rests.” *citing Willms Trucking Co., Inc. v. JW Constr. Co., Inc.*, 314 S.C. 170, 178, 442 S.E.2d 197, 201 (Ct.App.1994).

18. The Court’s order relies on the testimony of IBI’s expert, Laplante to establish that IBI did not breach the Home Contract with regard to the encroachments height and the missing poured concrete wall being acceptable and, as such, the Court erroneously failed to grant Merlo’s Motion for Directed Verdict for breach of contract and negligence since Laplante was a rebuttable witness after IBI closed its case in chief.

19. The Court erroneously failed to find to that IBI, Grissinger and Montgomery had breached their fiduciary duty, established by the parties contractual relationship, by stealing Merlo’s house plans and using them for their own gain. *See Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct.App.2004) (*a fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another*) and *See O’Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) (*a fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.*)

20. The Court erroneously failed to find to that IBI breached the Home Contract by violating the implied duty of good faith and fair dealing their fiduciary duty with the stealing Merlo’s house plans and using them for their own gain. *See U.S. for Use and Benefit of Williams Elec. Co., Inc. v. Metric Constructors, Inc.*, 480 S.E.2d 447, 325 S.C. 129 (S.C. 1996) (*in South Carolina, there exists in every contract an implied obligation of good faith and fair dealing.*)

21. The Court erroneously failed to take judicial notice of UL489 Paragraph 7.1.4.3.3 as a learned treatise. *See Rule 803(18)*, SCRE (stating that a learned treatise is admissible if

'established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

22. The Court, by refusing to take judicial notice of UL489 Paragraph 7.1.4.3.3, erroneously failed to find that IBI had, in violation of code, overloaded the project's electrical panel resulting in temperatures exceeding the maximum specified by UL489 Paragraph 7.1.4.3.3.

CONCLUSION

Based on the foregoing grounds, the Defendant respectfully requests that the Court Alter or Amend the Order file July 20, 2022 and award a judgment and the recovery of attorneys' fees to Merlo.

Respectfully submitted this 29th of July, 2022.

/s/ Townes B. Johnson III

Townes B. Johnson III (SC Bar# 75412)

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Attorneys for Defendant

Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE #: 2019-CP-37-00687

MONTGOMERY HOLDINGS, LLC D/B/A
IBI BUILDERS,

Plaintiff,

v.

CHRISTOPHER J. MERLO;
and GRANDSOUTH BANK

Defendants,

_____ /

CHRISTOPHER J. MERLO,

CASE #: 2020-CP-37-00188

Plaintiff,

v.

GREGORY K. GRISSINGER, JR., and JOHN
MONTGOMERY,

Defendants,

_____ /

**IBI'S, GRISSINGER'S AND MONTGOMERY'S RESPONSE IN OPPOSITION TO
MERLO'S MOTION TO ALTER OR AMEND**

Plaintiff in case # 2019-CP-37-00687, MONTGOMERY HOLDINGS, LLC, D/B/A IBI BUILDERS (herein "IBI"), and Defendants in case # 2020-CP-37-00188, GREGORY K. GRISSINGER, JR. (herein "GRISSINGER"), and JOHN MONTGOMERY (herein "MONTGOMERY"), by and through their undersigned attorney, hereby responds in opposition to Defendant's in case # 2019-CP-37-00687 and Plaintiff's in case # 2020-CP-37-00188,

CHRISTOPHER J. MERLO (herein “Merlo”), Motion to Alter or Amend filed on July 29, 2022, and in support thereof states as follows:

The parties waived closing argument at the conclusion of the trial. Merlo is attempting to argue matters that he failed to argue at the trial, which is improper. Thus, Merlo’s instant motion should be denied for this reason alone. In addressing each of Merlo’s arguments, IBI, Grissinger and Montgomery do not waive their argument that Merlo is attempting to improperly argue matters that he failed to argue at trial. As stated by the court in *Hickman v. Hickman*, 301 S.C. 455, 456-7 (Ct. App. 1990):

“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not. *See Natural Resources Defense Council v. U.S.E.P.A.*, 705 F. Supp. 698, 701 (D.D.C. 1989), *vacated on other grounds*, 707 F. Supp. 3 (D.D.C. 1989) (“Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier.”); *Smith v. Stoner*, 594 F. Supp. 1091, 1118 (N.D. Ind. 1984) (“Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived.”); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (E.D. Va. 1984) (“I do not conceive of Fed. R. Civ. P. 59(e) as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued prejudgment.”).

1. Regarding Merlo’s first meritless argument set forth in paragraph # 1 of his motion that IBI did not present any change orders in accordance with the Home Contract and didn’t present any evidence that the change order provision had been waived, evidence was submitted that the parties communicated in writing and sometimes orally to proceed with a change order. Merlo is arguing that the change orders should have been in writing and signed by all parties or approved via e-mail. Therefore, even if this argument was not waived by Merlo (it was waived by virtue of Merlo waiving closing argument at trial and therefore should not be considered), there was an avalanche of evidence demonstrating the parties’ course of conduct relative to the

change orders, which includes but is not limited to oral and written communications, the balance sheets and the Guaranty. For example, the Guaranty referenced “additional items, (AKA change orders, allowance overages,)”, that the balance sheet as of “4-30-19 consist[s] of a total balance of \$183,382”, and that it was “[u]nderstood that other items will be added to the sheet”, which all amounts to Merlo’s waiver of the Home Contract change order approval provisions. “Waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be expressed or implied by a party’s conduct[.]” *Parker v. Parker*, 443 S.E.2d 388, 391 (1994) (internal citations omitted). Furthermore, estoppel applies to Merlo’s late (and therefore improper) attempt to enforce the Home Contract change order approval provisions. “Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do. It may arise even though there was no intention by the party to relinquish or change any existing rights. The essential element of estoppel is prejudice to the party raising the defense...the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations.” *Id.* at 391 (1994) (internal quotation and citations omitted). Furthermore, there was no evidence submitted by Merlo that he insisted on compliance with the Home Contract change order provision or otherwise objected to a change order because it was not memorialized in a writing and signed by the parties or sent by e-mail. Rather, the evidence clearly demonstrates the opposite.

2. Regarding Merlo’s second meritless argument set forth in paragraph 2 of his motion, IBI recalls that Merlo did not object to the admission of any balance sheets into evidence. This argument is a red herring because IBI recalls that the balance sheets were admitted into evidence without objection. Therefore, even if this argument was not waived by

Merlo (it was waived by virtue of Merlo waiving closing argument at trial and also waived by him by failing to object to the admission of the balance sheets into evidence, which means this argument should not be considered), there was ample evidence to establish and support the accuracy and reliability of the balance sheets.

3. Regarding Merlo's third meritless argument set forth in paragraph 3 of his motion that there was no consideration for the Guaranty, "[t]he slightest consideration is sufficient to support the most onerous obligation....". *First National Bank of South Carolina v. Wade*, 245 S.C. 426, 431 (1965). "Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *McPeters v. Yeargin Construction Company, Inc.*, 290 S.C. 327, 331 (Ct. App. 1986). In essence, the Guaranty was the vehicle for Merlo to delay payment of change orders to the end of project, instead at the time they were incurred. By virtue of the Guaranty, Merlo effectively promised to pay IBI for everything at completion and before moving in even though the Home Contract stated that "[w]hen change orders are requested and agreed upon, payment may be required for the added cost **at time of work**." (emphasis added). A promise is valid consideration. *See, Smalls v. Springs Industries, Inc.*, 292 S.C. 481, 484 (1987) ("Small's action or forbearance in reliance on Spring's promise was sufficient consideration to make the promise legally binding."). In like manner, IBI's forbearance of its right to require payment of change orders at the time they were incurred in reliance upon Merlo's promise to pay for everything after completion and before moving in the home was sufficient consideration to make the Guaranty legally binding. The Home Contract gave IBI the right to require payment for change orders at the time they were incurred ("at time of work"). The Guaranty was essentially Merlo's promise to pay for "additional items" (change orders and

allowance overages) at the completion of the project in exchange for IBI's agreement to forbear from enforcing its right to payment for change orders at the time they were incurred until the home was completed ("move in completion of home and or Certificate of Occupancy request"). "Undoubtedly, a forbearance to exercise legal rights is a sufficient consideration for a promise made on account of it in the general law of contracts." *General Electrical Company v. Gate*, 273 S.C. 88, 91 (1979). Therefore, even if this argument was not already waived by Merlo (it was waived by virtue of Merlo waiving closing argument at trial and therefore should not be considered), there is sufficient evidence demonstrating consideration even if the Guaranty is read in a vacuum, which is what Merlo is doing. However, the Guaranty should not be read in a vacuum in this case. The evidence demonstrated that the Guaranty arose from IBI's concern over the significant unpaid balance owed by Merlo and Merlo's request to add the very significant cost of the boulder wall to the balance sheet. The evidence sufficiently establishes that Guaranty together with the Home Contract, constituted the entire agreement between the parties. "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Regions Bank v. Schmauch*, 354 S.C. 648, 660 (Ct. App. 2003). "Where instruments entered into by the same parties at different times relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. If the provisions of one instrument limit, explain, or otherwise affect the provisions of the other, they will be given effect to accomplish the entire agreement between the parties." *Bishop Realty and Rentals, Inc., v. Perk, Inc.*, 292 S.C. 182, 185 (Ct. App. 1987) (internal citations omitted). Furthermore, the Guaranty itself states that it "remains enforceable regardless of any defenses that [Merlo] may assert...including...failure of consideration." Therefore, Merlo expressly waived the defense of failure of consideration by

entering into the Guaranty. Moreover, by virtue of entering into the Guaranty and IBI's performance, forbearance and detrimental reliance thereunder, Merlo should be estopped from denying its validity and enforceability.

4. Regarding Merlo's fourth meritless argument set forth in paragraph 4 of his motion, IBI does not fully understand this argument as written. Regardless, even if this argument was not waived by Merlo (it was waived by virtue of Merlo waiving closing argument at trial and therefore should not be considered), there was sufficient evidence establishing that the amount owed would naturally fluctuate from time to time based upon change orders, allowance overages and payments.

5. Regarding Merlo's fifth meritless argument set forth in paragraph 5 of his motion, the Court did not manufacture testimony or conclusions concerning the percentage of completion. The testimony of Lee Matthew West, III, was received into evidence as were his inspection reports, which provides an ample evidentiary basis for the Court's findings and conclusions.

6. Regarding Merlo's sixth meritless argument set forth in paragraph 6 of his motion, the Court found that the project was substantially completed before Merlo's improper and unjustified termination of the contract based upon the evidence. Merlo prevented IBI from performing 100% of the scope of work by terminating the contract. Thus, Merlo cannot benefit from breaching the contract. "[A] party cannot take advantage of his own default in the performance of a contract." *Willms Trucking Company, Inc., v. JW Construction Co., Inc.*, 442 S.E.2d 197, 201 (Ct. App. 1994) (internal citation omitted). Furthermore, IBI is entitled to the benefit of the bargain. "The legal principles governing this case are straight forward. In a breach of contract action, damages serve to place the nonbreaching party in the position he

would have enjoyed had the contract been performed. **That is, damages give him the benefit of his bargain.** *Id.*” *South Carolina Federal Savings Bank v. Thornton-Crosby Development Company, Inc.*, 303 S.C. 74, 77 (Ct. App. 1990) (internal citations omitted) (emphasis added).

7. Regarding Merlo’s seventh meritless argument set forth in paragraph 7 of his motion regarding IBI’s substantial completion, there was evidence disputing the amounts Merlo claimed as being spent to complete the scope. Therefore, even if this argument was not waived by Merlo (it was waived by virtue of Merlo waiving closing argument at trial and therefore should not be considered), the Court correctly found that Merlo breached the contract. Thus, this argument is a red herring and irrelevant. The Court also found that IBI substantially performed the contract and did not breach it. Thus, even presuming the amount claimed by Merlo to complete the project was reliable (if was not based upon the Court’s finding that Merlo was not credible), Merlo is not entitled to recovery of any amount because he did not prevail on any claims and breached the contract. “[W]here a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests”. *Willms Trucking Company, Inc., v. JW Construction Co., Inc.*, 442 S.E.2d 197, 201 (Ct. App. 1994) (internal citations omitted).

8. Regarding Merlo’s eighth meritless argument set forth in paragraph 8 of his motion, the Court’s findings and conclusions are correct and are amply supported by the evidence.

9. Regarding Merlo’s ninth meritless argument set forth in paragraph 9 of his motion, the Court’s evidentiary rulings were correct and within the Court’s sound discretion.

Furthermore, the Court’s findings and conclusions are amply supported by the evidence.

10. Regarding Merlo’s tenth meritless argument set forth in paragraph 10 of his motion,

the Court's evidentiary rulings were correct and within the Court's sound discretion.

Furthermore, the Court's findings and conclusions are amply supported by the evidence.

11. Regarding Merlo's eleventh meritless argument set forth in paragraph 11 of his motion, the Court's findings and conclusions are correct and are amply supported by the evidence.

12. Regarding Merlo's twelfth meritless argument set forth in paragraph 12 of his motion regarding when Merlo started raising issues with construction, there was ample evidence demonstrating that Merlo was not credible for the reasons outlined in the judgment. Therefore, it follows that Merlo's "re-work lists" were also not credible and are therefore of no consequence, especially in light of Merlo's inconsistent statements as detailed in the judgment. Even if the "re-work lists" were credible (they were not), Merlo offered no expert testimony to counter IBI's expert's testimony that the house was built by IBI to acceptable industry standards in terms of quality and the Court also correctly found that the "various photographs presented by Merlo and relied upon by him a showing substandard work were all taken during the midst of construction and do not represent the final product". Therefore, even if this argument was not waived by Merlo (it was waived by virtue of Merlo waiving closing argument at trial and therefore should not be considered), the "re-work lists" were of no consequence given Merlo's credibility issues and the fact there was ample evidence to support the Court's findings and conclusions. Furthermore, presuming that Merlo "put IBI on notice" about the basement ceiling heights in December 2019, Merlo's subsequent conduct effectively amounted to estoppel by silence and waiver of that issue (it was not an issue as covered in the testimony of IBI's expert witness).

13. Regarding Merlo's thirteenth meritless argument set forth in paragraph 13 of his

motion, the Court's findings and conclusions are correct and are amply supported by the evidence. Furthermore, the Court found that Merlo was not credible.

14. Regarding Merlo's fourteenth meritless argument set forth in paragraph 14 of his motion, the Court's findings and conclusions are correct and are amply supported by the evidence. Furthermore, the Court found that Merlo was not credible.

15. Regarding Merlo's fifteenth meritless argument set forth in paragraph 15 of his motion, the Court's findings and conclusions are correct and are amply supported by the evidence. Furthermore, Merlo offered no expert testimony to counter IBI's expert that the house was built by IBI to acceptable industry standards in terms of quality. Additionally, IBI recalls that the evidence demonstrated that the alleged failed deck (back porch) inspection occurred after Joy Construction had performed work on it. Therefore, the evidence did not establish that IBI was the cause of any deck issues. Furthermore, the Court found that Merlo was not credible.

16. Regarding Merlo's sixteenth meritless argument set forth in paragraph 16 of his motion, the Court's findings and conclusions are correct and are amply supported by the evidence.

17. Regarding Merlo's seventeenth meritless argument set forth in paragraph 17 of his motion, the Court's findings and conclusions are correct and are amply supported by the evidence.

18. Regarding Merlo's eighteenth meritless argument set forth in paragraph 18 of his motion, the Court's findings and conclusions are correct and are amply supported by the evidence. Furthermore, in deciding a motion for directed verdict, the judge is not to weigh the evidence, but rather is to consider the evidence and all its reasonable inferences in the light most favorable to the nonmoving party and is to deny the motion if the evidence yields more than one

inference. *See, South Carolina National Bank v. Silks*, 295 S.C. 107, 110 (Ct. App. 1998). Thus, the Court was correct in denying Merlo's motion for directed verdict.

19. Regarding Merlo's nineteenth meritless argument set forth in paragraph 19 of his motion, the Court's findings and conclusions are correct and are amply supported by the evidence. Furthermore, the evidence did not support Merlo's preposterous assertion that Merlo's house plans were stolen. Furthermore, the Court found that Merlo was not credible.

20. Regarding Merlo's twentieth meritless argument set forth in paragraph 20 of his motion, the Court's findings and conclusions are correct and are amply supported by the evidence. Furthermore, the evidence did not support Merlo's preposterous assertion that Merlo's house plans were stolen. Furthermore, the Court found that Merlo was not credible.

21. Regarding Merlo's twenty-first meritless argument set forth in paragraph 21 of his motion, the Court's evidentiary rulings were correct. Furthermore, IBI does not recall that Merlo was attempting to admit what was represented as "UL489 Paragraph 7.1.4.3.3" as a learned treatise specifically under Rule 803(18) of the South Carolina Rules of Evidence. IBI recalls that Merlo was attempting to have the Court take judicial notice of the purported "UL489 Paragraph 7.1.4.3" under Rule 201 of the South Carolina Rules of Evidence by arguing that Oconee County had adopted it even though the subject jurisdiction was the City of Seneca, not Oconee County. Thus, this Court properly ruled that the purported "UL489 Paragraph 7.1.4.3" was not generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Therefore, it is improper for Merlo to make an additional argument that he failed to make at trial.

Furthermore, Rule 803(18) of the South Carolina Rules of Evidence states, in relevant part, "To the extent called to the attention of an expert witness upon cross-examination or relied

upon by the expert witness in direct examination, statements contained in treatises....If admitted, the statements may be read into evidence but may not be received as exhibits.” Therefore, Rule 803(18) of the South Carolina Rules of Civil Procedure does not even apply and especially because Merlo did not have an expert witness testify on his behalf. Moreover, IBI recalls that Merlo did not examine IBI’s expert regarding the purported “UL489 Paragraph 7.1.4.3”.

22. Regarding Merlo’s twenty-second meritless argument set forth in paragraph 22 of his motion, the Court’s evidentiary rulings were correct. Furthermore, the Court found that Merlo’s testimony was not credible.

WHEREFORE, IBI, GRISSINGER and MONTGOMERY, respectfully request that the Court enter an order denying Melo’s Motion to Alter or Amend, and for such further relief as this Court deems just and proper.

Respectfully submitted,

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s/ Jason M. Tarokh
JASON M. TAROKH
S. CAROLINA BAR # 72837

August 9, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

MONTGOMERY HOLDINGS, LLC

D/B/A IBI BUILDERS,

Plaintiff,

vs.

CASE NO. 2019-CP-37-00687

CHRISTOPHER J. MERLO and

GRANDSOUTH BANK,

Defendants.

CHRISTOPHER J. MERLO,

Plaintiff,

vs.

CASE NO. 2020-CP-37-00188

GREGORY K. GRISSINGER, JR.

and JOHN MONTGOMERY,

Defendants.

TRANSCRIPT OF RECORD

Trial held before the Honorable Steven C. Kirven,
Master-in-Equity for Anderson and Oconee Counties,
beginning at 10:00 on the 24th day of May, 2022 and
continued through the 27th day of May, 2022 at the
Anderson County Courthouse, 100 South Main Street,
Anderson, South Carolina.

Virginia H. Campbell

Court Reporter and Notary Public

for State of South Carolina

APPEARANCES

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Other parties present:

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Gregory K. Grissinger, Jr.

John Montgomery

Fredda Meehan, Assistant to Master-in-Equity

*James H. Cassidy, Esquire

Attorney for GrandSouth Bank

*Only present during Mr. Marchant's testimony

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1 (MAY 24, 2022 @ 10:00 A.M. - DAY ONE OF TRIAL)

2 BY THE COURT:

3 This is two cases consolidated. The first case is
4 civil action number 2019-CP-37-00687, that's Montgomery
5 Holdings, LLC d/b/a IBI Builders, Plaintiff, versus
6 Christopher J. Merlo and GrandSouth Bank, also civil
7 action number 2020-CP-37-00188, Christopher J. Merlo,
8 Plaintiff, versus Gregory K. Grissinger, Jr. and John
9 Montgomery, Defendants. These matters were referred by
10 an Order of Reference, by Consent Order of Reference,
11 filed on August 30, 2021. And just so the record is
12 clear, these are Oconee County cases and they are being
13 heard and tried here today in Anderson by I believe the
14 consent of all parties as a matter of convenience I
15 suppose. All right, gentlemen, I'm going to get each
16 one of the attorneys to identify themselves for the
17 record and tell me who you represent and we'll start
18 with the Plaintiff.

19 BY MR. TAROKH:

20 Good morning, Your Honor. May it please the Court,
21 my name is Jason Tarokh. I represent the Plaintiff,
22 Montgomery Holdings, LLC d/b/a IBI Builders in the 2019
23 case; in the 2020 case I represent the Defendants, Mr.
24 John Montgomery and Mr. Grissinger, Jr.

25 BY THE COURT:

1 All right, sir.

2 BY MR. JOHNSON:

3 May it please the Court, Townes Johnson on behalf
4 of the Defendant, Christopher J. Merlo.

5 BY THE COURT:

6 All right. Gentlemen, do we have any other, any
7 other matters that we need to deal with before we start
8 going?

9 BY MR. TAROKH:

10 Your Honor, just a preliminary matter. The parties
11 entered into a Joint Stipulation Regarding Mortgage
12 Obligation Due GrandSouth Bank, that was filed on
13 February 16th of this year. And it's on record and I can
14 read it for the record: "1. The parties stipulate and
15 agree that GrandSouth Bank is the owner and holder of
16 the Promissory Note and Mortgage from Christopher J.
17 Merlo dated January 11, 2018, in the amount of Seven
18 Hundred Fifty-Two Thousand and no/100 Dollars
19 (\$752,000.00). The Note is secured by a Mortgage on
20 Real Property located in Oconee County, South Carolina
21 at 548 Marina Bay Drive, Seneca, South Carolina (the
22 'Property') more particularly described in the records
23 of the Register of Deeds Office for Oconee County, South
24 Carolina in Mortgage Book 3687 at Page 216. The
25 mortgage constitutes a first lien position on the

1 property. 2. At the call to trial in this matter, the
2 Parties shall cause this stipulation to be made a part
3 of the record and GrandSouth Bank will not be required
4 to appear to present evidence to establish the validity
5 or the enforceability of its Note and Mortgage. 3. It
6 is further stipulated and agreed that in the event the
7 Court grants any relief to any party by way of
8 foreclosure that any such Order shall provide that such
9 sale shall be subject to the first lien of the
10 GrandSouth Bank."

11 BY THE COURT:

12 All right. You've got any follow-up, Mr. Johnson?

13 BY MR. JOHNSON:

14 No, Your Honor.

15 BY THE COURT:

16 All right, sir. Well, it's in the record already,
17 I had seen it but that's fine. Basically, we're just
18 saying GrandSouth Bank has got the first mortgage and
19 everybody agrees to that?

20 BY MR. TAROKH:

21 That's correct, Your Honor.

22 BY THE COURT:

23 All right. Well, what I would suggest we do is I'd
24 like for the attorneys to just give me a brief opening
25 statement. We don't have a jury obviously but I am the

1 finder of the facts. So I've reviewed the file but I
2 would like for the attorneys to give me their brief
3 summary of the case from their respective points of
4 view. So, Mr. Tarokh?

5 BY MR. TAROKH:

6 Thank you, Your Honor, may it please the Court?
7 Judge, this is a foreclosure case for a mechanic's lien,
8 a construction lien to be exact, based upon the
9 construction contract that was entered into by the
10 Plaintiff and Mr. Merlo. The parties subsequently
11 amended and supplemented that agreement by virtue of
12 what I believe evidence will show as the Guaranty. My
13 client performed under the contract. Mr. Merlo did not
14 perform under the contract. He unjustifiably and
15 suddenly terminated the contract when completion was
16 imminent. The parties essentially were at the 10 yard
17 line and headed to the end zone and Mr. Merlo terminates
18 the contract. As a result, my client files a mechanic's
19 lien for the approximate amount of \$255,000. Mr. Merlo
20 then undertakes to hire a second contractor to, what I
21 believe evidence will show, that he's going to say that
22 it was to repair or remediate the work my client did.
23 However, we're competent that evidence will show that
24 the work the second contractor did was outside the
25 original scope of my client's, of the subject contract

1 we're seeking enforcement today. In addition, Your
2 Honor, the evidence will show that most of the amounts,
3 if not all, that Mr. Merlo expended with the second
4 contractor was to improve or add things that were beyond
5 the original scope. In other words, he hired a second
6 contractor to complete the work that my client was not
7 permitted to complete because they were unjustifiably
8 terminated. We believe he did that, Your Honor, in a
9 way to offset the lien amount. And we believe that the
10 evidence will show that Mr. Merlo was encouraging my
11 client, praising my client for his work, communicating
12 his satisfaction with the project to my client and also
13 to the bank in between Mr. Merlo's counterclaim against
14 the Plaintiff alleging fraud related to the accounting
15 and also fraud related to communication, invoices and
16 things of that nature. The evidence will not support
17 that we're confident. In addition, the 2020 case is Mr.
18 Merlo alleging the same allegations against Mr.
19 Montgomery and Mr. Grissinger personally. So we believe
20 apparently this case is about Mr. Merlo wanting
21 something for nothing. He wanted value and didn't pay
22 for it and the evidence will lay all that out for Your
23 Honor.

24 BY MR. JOHNSON:

25 May it please the Court, Your Honor? I'm Townes

1 Johnson on behalf of the Defendant, Christopher J.
2 Merlo. Your Honor, Mr. Merlo, and his wife, Ms. Merlo,
3 Nikki Merlo, Your Honor, they had saved for a lake house
4 for years and years and years and then they finally came
5 to the precedence to achieve that goal. They
6 interviewed numerous contractors around town. They were
7 highly impressed in the beginning with IBI and they
8 engaged them to build this house, it was under a lump-
9 sum agreement initially. And, Your Honor, it is a case
10 of an absentee contractor. The contractor is based in
11 Greenville, they were not supervising the project
12 appropriately. As a result thereof, they deviated from
13 the plans and specs on their own without Mr. Merlo's
14 consent, specifically with regard to the height of
15 ceilings in the basement level of the house and with
16 regard to failing to put in a poured concrete wall that
17 was called for in the plans, which resulted in numerous
18 locations inside the home that had to be repaired, Your
19 Honor. They did that in the scheme of a cost-plus
20 contract knowing that they could save money by deviating
21 on these things. They lowered the height of the ceiling
22 in the basement; they removed this concrete that was
23 specified, and they did that on their own, and the
24 arrogance they had with regard to being able to change
25 that as they please is disgusting. On top of that, Your

1 Honor, with this project the initial contract was
2 supposed to be for a year; Mr. Merlo got into the 24th
3 month, the 23rd month, and still not complete and has I
4 mean just defect, after defect, after defect, and just
5 poor workmanship, after poor workmanship, after poor
6 workmanship, and the Plaintiff's response at all points,
7 Your Honor, was that, oh, you know, the next step we'll
8 fix it, meaning those gaps, oh, we'll just caulk it up
9 and paint it and they'll be fine, they'll be fine. With
10 the breaches to the plans and specs and with the
11 compiling nature of the poor workmanship and delay, Your
12 Honor, Mr. Merlo had to make a decision and he made the
13 decision to properly terminate this contract. On top of
14 that, Your Honor, there are things that IBI is billing
15 for that are not part of the original lump-sum amount.
16 There's no change orders that were agreed to in the
17 ordinary course. There's others, Your Honor,
18 specifically the ones added after the final invoice.
19 We're saying no back and forth and they can't justify
20 them and that is fraudulent, Your Honor, and that is the
21 result of these gentlemen right here personally. They
22 are members of IBI and that is what we intend to prove.
23 BY THE COURT:

24 All right. Well, let me just ask this question,
25 just sort of planning ahead now. Now, I know y'all have

1 said this case is going to take three days, but that
2 remains to be seen. How many witnesses do you
3 anticipate? I'm not holding you to this but how many do
4 you think you're going to have?

5 BY MR. TAROKH:

6 Approximately six or seven, Your Honor.

7 BY THE COURT:

8 And that would include the two gentlemen here?

9 BY MR. TAROKH:

10 Yes, Your Honor, and as listed in our discovery,
11 Matthew West, he was the bank draw inspector, the two
12 witnesses from the bank, Ms. Merlo potentially, and I
13 have an expert witness as well.

14 BY THE COURT:

15 Okay, all right. What about you, Mr. Johnson?

16 BY MR. JOHNSON:

17 Your Honor, at this stage in my case in chief I
18 will probably be calling Mr. Merlo and then will call
19 the Plaintiffs. Potentially, well, a neighbor, Mr.
20 Wayne Culbertson, we're probably going to call as well
21 but outside of that I believe it's going to be limited
22 to those four.

23 BY THE COURT:

24 Okay. Well, like I said, I'm not holding you to
25 it. I'm just trying to get a rough idea for planning

1 purposes. I've got something that I've got to do today
2 at 1:00, so we'll probably break for lunch around 12:30
3 and come back around 2 or maybe a little after but other
4 than that we shouldn't have any difficulties.

5 We'll begin in the mornings at 10 and take a little time
6 for lunch and then end up no later than 5 unless
7 somebody has some pertinent reason to deviate from that.

8 All right, Mr. Tarokh?

9 BY MR. TAROKH:

10 Yes, Your Honor, at this time we would invoke the
11 rule. Ms. Merlo, excuse me, Mrs. Nikki Merlo is under
12 Subpoena from me. I don't want Ms. Merlo to waste her
13 time waiting outside the courtroom. I can't gauge when
14 it will be necessary, if it will be today, to call her
15 but we would ask that she depart the courtroom for
16 purposes of sequestration.

17 BY THE COURT:

18 Okay. Mr. Johnson?

19 BY MR. JOHNSON:

20 Your Honor, I think I mean she's the wife of the
21 Defendant, she's a defendant.

22 BY THE COURT:

23 She's not a party to the case so I think that he
24 has a right to have that request and I think it is
25 appropriate, so we'll go ahead and grant that request.

1 And, Ms. Merlo, that means you need to step out of the
2 courtroom and you won't be in attendance until after
3 you've testified if you -- I assume you'll testify. But
4 if you do testify, then you can certainly be free to
5 stay after that.

6 BY MR. TAROKH:

7 Your Honor, out of convenience for Ms. Merlo, I
8 would imagine if we are able to get to her today, it
9 will be after lunch so she can appear again after
10 lunchtime if she doesn't want to spend her time outside
11 unless ---

12 BY THE COURT:

13 Well, you're going to have to go chase her down and
14 tell her that because she left.

15 (MS. MERLO LEAVES COURTROOM)

16 BY THE COURT:

17 I mean that's fine. Somebody needs to communicate
18 to be her when she needs to be here. I assume Mr.
19 Johnson has gone to try to catch Ms. Merlo?

20 (MR. JOHNSON LEAVES COURTROOM TO SPEAK WITH MS. MERLO)

21 BY MR. TAROKH:

22 Yes, Your Honor, that's what we just discussed, the
23 timing and when it's likely the earliest I'll get to
24 her. If today, it will be after lunch.

25 BY THE COURT:

1 All right. Well, by the way -- well, I'll wait for
2 Mr. Johnson to get back.

3 (OFF THE RECORD)

4 BY THE COURT:

5 All right, Mr. Johnson has returned. I'm going to
6 ask a question, I know y'all did file a Stipulated Trial
7 Exhibit List and that document contains a number of
8 items, mostly it's sort of an in generalized description
9 which is fine, but do you have a specific list of
10 exhibits that you plan to include under that
11 stipulation? I mean like it says, "All texts between
12 the parties", well, I don't know if that could be 10 or
13 it could be 200 but?

14 BY MR. TAROKH:

15 Your Honor, I think our intent was to use those
16 exhibits in the course of our examination of witnesses
17 and represent to the Court, whether that specific
18 exhibit was one of the ones that were stipulated.

19 BY THE COURT:

20 Well, I mean are you going to mark each one
21 separately as an exhibit?

22 BY MR. TAROKH:

23 Well, I was planning on like, for example, Your
24 Honor, I was going to use the contract and the Guaranty,
25 for example, as Plaintiff's exhibits and I was going to

1 pass them to Madam Court Reporter to mark as an exhibit
2 in the course of the testimony or we can do it
3 beforehand, whatever Your Honor's preference is?

4 BY THE COURT:

5 Well, it'd be simpler I think if y'all would get
6 together and create a list of those things you want to
7 be exhibits, identify them, and number them, and go
8 ahead and get them marked, and then we'll save a lot of
9 time as we go instead of stopping and starting. I mean
10 y'all can, you can get your list and you get whatever
11 list you may have and y'all can get together maybe
12 during the break time or at lunchtime, whenever, and see
13 if you can work that out. That would be helpful.

14 BY MR. TAROKH:

15 Yes, Your Honor.

16 BY THE COURT:

17 Okay, all right. Well, anything else before we
18 proceed?

19 BY MR. TAROKH:

20 No, Your Honor.

21 BY THE COURT:

22 All right, Mr. Tarokh.

23 BY MR. TAROKH:

24 Your Honor, the Plaintiff calls Mr. Montgomery as
25 its first witness.

1 BY THE COURT:

2 All right. Mr. Montgomery, if you'll come around
3 here and be sworn in before you sit down.

4 BY COURT REPORTER:

5 Would you raise your right hand? Do you solemnly
6 swear or affirm to tell the truth, the whole truth and
7 nothing but the truth so help you God?

8 BY MR. MONTGOMERY:

9 Yes, ma'am.

10 TESTIMONY OF JOHN MONTGOMERY

11 DIRECT EXAMINATION BY MR. TAROKH:

12 Q. Mr. Montgomery, please state your full name for the
13 record.

14 A. My name is John Justin Montgomery.

15 Q. And can you give the Court the benefit of your
16 education and background?

17 A. Yes, I am from Simpsonville, South Carolina. I
18 graduated from Hillcrest High School and then
19 graduated from Newberry College.

20 Q. And what is your relationship to the Plaintiff?

21 A. I own Montgomery Holdings which partners with Greg
22 Grissinger doing business as IBI Builders building
23 custom homes in the Upstate.

24 Q. And when is the first time you met Mr. Merlo?

25 A. I believe it was around sometime in 2017 or '16.

1 He reached out well before we contracted to build a
2 house, I mean once he purchased the lot.

3 Q. And why did he reach out to you?

4 A. I believe a, I believe someone recommended him to
5 myself or myself to him so it was probably by email
6 that we referenced or communicated with each other
7 initially.

8 Q. I'm going to show you an email that will be marked
9 as Plaintiff's Exhibit 1 for identification.

10 (PLAINTIFF'S EXHIBIT NUMBER 1 MARKED FOR IDENTIFICATION)

11 Q. Will you please take a moment and look at this
12 document and identify it if you can?

13 A. Yep, it's an email from myself dated August 18,
14 2017 to Chris Merlo.

15 Q. And what are you doing in that email?

16 A. It looks like he had sent us the plans and I'm
17 asking questions how he would like to have the
18 plans priced. I gave him options of a cost-plus
19 contract or a turnkey contract, that's typically
20 the two ways you price a home.

21 Q. Can you explain the difference between a cost-plus
22 contract and what you reference as a turnkey
23 contract?

24 A. Yep. A cost-plus would be a culmination of all
25 costs associated with the project, plus a builder

1 fee or percentage thereof of the cost. A turnkey
2 would be an all-in price based on scope, plans of
3 that nature and it's one price guaranteed.

4 Q. And after that email correspondence did you
5 eventually end up contracting with Mr. Merlo?

6 A. Yes.

7 Q. And when I say "you", I mean IBI Builders?

8 A. Yes.

9 Q. I'm going to show you another document which will
10 be marked as Plaintiff's Exhibit 2 and, Your Honor,
11 for the record, Exhibit 2 is one of the stipulated
12 exhibits that were referenced on that list.

13 (PLAINTIFF'S EXHIBIT 2 MARKED FOR IDENTIFICATION)

14 BY THE COURT:

15 Well, the first one was an email. I assume this
16 will be included ---

17 BY MR. TAROKH:

18 Yes, Your Honor, this is Exhibit 2. This is one of
19 the -- so the numbers of the stipulated exhibits
20 don't match these exhibit numbers but this
21 contract, this is -- I'll have the witness, this
22 has already been stipulated as to admissibility.

23 BY THE COURT:

24 Well, I mean the first one was an email and in the
25 stipulation it says, "All e-mails related to

1 Merlo's responses to Plaintiff's Requests for
2 Admissions." Are there any others?

3 BY MR. TAROKH:

4 Your Honor, that is, I can represent to the
5 Court what I showed, the first exhibit, is not one
6 of those emails.

7 BY THE COURT:

8 Well, are you going to offer that in as an exhibit?

9 BY MR. TAROKH:

10 Yes, Your Honor. We ---

11 BY THE COURT:

12 I mean the first one?

13 BY MR. TAROKH:

14 Yes, Your Honor, we would ask that what's been
15 identified as Plaintiff's Exhibit 1 be put into
16 evidence.

17 BY THE COURT:

18 Do you have any objection?

19 BY MR. JOHNSON:

20 No, Your Honor, and I think with this you can
21 probably stipulate to the emails ---

22 BY MR. TAROKH:

23 Okay.

24 BY THE COURT:

25 All right. So Exhibit 1 and Exhibit 2 will be both

1 be admitted without objection.

2 (PLAINTIFF'S EXHIBITS 1 & 2 ADMITTED INTO EVIDENCE)

3 Q. Thank you. I've handed you a copy of the contract
4 between IBI Builders and Mr. Merlo, correct?

5 A. Yes.

6 Q. And what type of contract is that? Is that a
7 turnkey contract or a cost-plus?

8 A. This is a turnkey contract.

9 Q. And how do you know that?

10 A. Because it gives a specific price.

11 Q. And what is the date of that contract?

12 A. Dated November 16th, 2017.

13 Q. And after you signed, after the contract was
14 executed what did you do; what did IBI Builders do,
15 if anything?

16 A. Prepare for commencement, that involves applying
17 for permitting, preparing mobilization of graders,
18 Porta-Johns, utilities, things of that nature.

19 Q. And when did all those activities you just
20 described occur generally?

21 A. Between the date of the contract and when we
22 started which was I think early February of 2018.

23 (PLAINTIFF'S EXHIBIT 3 MARKED FOR IDENTIFICATION)

24 Q. I'm going to show you another document. I'll
25 represent to the Court this is a copy of an email

1 between the parties which I had, by consent of
2 counsel we've agreed would be admissible into
3 evidence. So we would ask that what's been marked
4 as Exhibit 3 be admitted into evidence, Your Honor,
5 by stipulation?

6 BY THE COURT:

7 It will be admitted by stipulation.

8 (PLAINTIFF'S EXHIBIT 3 ADMITTED INTO EVIDENCE)

9 Q. Can you please identify that document and tell me
10 what it is?

11 A. It's an email from Chris Merlo to myself on
12 February 2nd, 2018.

13 BY THE COURT:

14 What's that date again?

15 A. February 2nd, 2018.

16 Q. And what's being discussed in that email?

17 A. He's replying to my original email where I am
18 giving him a generalization of what to expect
19 regarding the foundation work starting on a Monday.
20 I'm beginning to explain to him the process of the
21 foundation.

22 Q. And IBI eventually performed that work?

23 A. Yes.

24 Q. I'm going to show you another document. This will
25 be marked as Plaintiff's Exhibit 4.

1 (PLAINTIFF'S EXHIBIT 4 MARKED FOR IDENTIFICATION)

2 BY THE COURT:

3 No objection?

4 BY MR. JOHNSON:

5 No objection.

6 BY THE COURT:

7 It will be admitted.

8 (PLAINTIFF'S EXHIBIT 4 ADMITTED INTO EVIDENCE)

9 Q. Please take a look at this document what's been
10 admitted as Exhibit 4 and tell me what it is?

11 A. It is an email from Chris and myself responding to
12 an email where I mention -- because he had changed
13 the plans after we had contracted and I notated
14 some things that had changed to the plans and that
15 there was going to be additional costs, and he
16 acknowledged that in his reply and that's pretty
17 much it.

18 Q. Now is there a reference to balance sheets?

19 A. I'm not seeing it, hold on. Oh, here it is, yeah.
20 It states how we process the balance sheets for our
21 projects, keeping tallies on all add-ons, change
22 orders, payments, credits, things of that nature.

23 Q. Now, what specifically is a balance sheet as you
24 meant it in that email?

25 A. It's a way of keeping generalization of all the

1 monetary transactions, again such as change orders,
2 add-ons, payments, credits, so it's in an Excel
3 sheet that we use that we send back and forth on
4 occasion throughout the project. We typically try
5 to send them on every draw payment or at the
6 client's request and it's a way that we found over
7 the years to eliminate surprises at the end because
8 people don't want to be surprised about a change
9 order that they had made in prior months and
10 forgotten about or something like that, so it's a
11 way to keep everybody on the same page.

12 Q. Is that the way IBI does its business relative ---

13 A. Yes.

14 Q. --- to accounting and things of that nature for a
15 particular project?

16 A. Yes, even today.

17 Q. I'm going to show you another document.

18 BY MR. JOHNSON:

19 No objection.

20 BY THE COURT:

21 All right, this is will be Number 5?

22 BY MR. TAROKH:

23 Yes, Your Honor. And I believe if we can mark the
24 attachment as Exhibit 6, so it's two separate.

25 (PLAINTIFF'S EXHIBITS 5 & 6 MARKED FOR IDENTIFICATION)

1 BY THE COURT:

2 So 5 and 6 are admitted without objection?

3 BY MR. TAROKH:

4 Yes, Your Honor.

5 (PLAINTIFF'S EXHIBITS 5 AND 6 ADMITTED INTO EVIDENCE)

6 Q. I'm going to show you Exhibits 5 and 6 which have
7 already been admitted into evidence. If you can
8 take a look and tell me what those two documents
9 are?

10 A. It's an email giving him an update of the
11 commencement of work and the foundation work and
12 that Greg does need to speak with him about
13 potential retaining walls and it's dated February
14 2nd, so about the time we started, and also attached
15 is the balance sheet where we send this out
16 periodically. The only thing on this balance sheet
17 that we have added is the extra three foot of dirt
18 you and Greg discussed on site, and so the
19 attachment is the balance sheet.

20 Q. And you reference "potential retaining walls and/or
21 options", can you explain what that is in this
22 context?

23 A. I believe, I believe, I believe Chris Merlo pushed
24 the house back further than the original site plan
25 which created a severe situation where a bigger

1 retaining wall was needed or more walls were
2 needed, and Greg suggested this and wanted to have
3 a meeting on site to discuss his options.

4 BY THE COURT:

5 Can you give me the date of that email?

6 A. February 2nd, 2018.

7 Q. Now, you reference that Exhibit Number 6 is a
8 balance sheet?

9 A. Yes.

10 Q. And are they, are those made at or near the time of
11 the event ---

12 A. Yes.

13 Q. --- by someone with knowledge?

14 A. They're made by me, yes.

15 Q. And is it the regular practice of IBI Builders to
16 create and maintain and rely upon these balance
17 sheets?

18 A. Absolutely.

19 Q. I'm going to show you another email, excuse me,
20 another document.

21 BY THE COURT:

22 I suppose no objection?

23 BY MR. TAROKH:

24 Yes, Your Honor. We're marking Plaintiff's Exhibit
25 7 and 8 without objection.

1 (PLAINTIFF'S EXHIBITS 7 & 8 MARKED FOR IDENTIFICATION)

2 BY THE COURT:

3 7 and 8?

4 BY MR. TAROKH:

5 Yes, Your Honor.

6 BY THE COURT:

7 Those will be admitted.

8 (PLAINTIFF'S EXHIBITS 7 & 8 ADMITTED INTO EVIDENCE)

9 Q. I'm going to show you what's been admitted as
10 Plaintiff's Exhibits 7 and 8. Can you identify
11 those documents?

12 A. Yep. It's an email from me dated March 6th, 2018 to
13 Chris Merlo sending him a copy of the balance
14 sheet, acknowledging that we received the draw
15 inspection report, and also explaining to him that
16 change orders are typically paid at the time of
17 draw and that he can wait until the next draw and
18 that will be fine with us, and the attachment was
19 the balance sheet, and it just has the grading
20 addition because of moving the house back three
21 feet as I mentioned earlier, and it shows his
22 payments or the bank's payment draw, and it just
23 has some notes at the bottom about how he had
24 changed the plans after we had started and some of
25 the items that were new and in addition to the

1 plans.

2 Q. And based upon that balance sheet, what is the
3 balance owed to IBI as of that date?

4 A. \$584,450.

5 Q. Now, you mentioned a draw schedule; can you explain
6 what that is?

7 A. Typically when you have construction draws with a
8 bank they have a draw schedule report. It's
9 percentage-allocated where a third-party inspector
10 goes out and inspects the job site, checking off
11 subject matters that are complete in his or her
12 eyes which is again percent-allocated, totals the
13 percent up and depending on the client's
14 construction loan amount, per that percentage is
15 paid from that amount, the loan.

16 Q. Now, during the course of your performance on the
17 project, how did you request draw payments to be
18 made?

19 A. I sent an email directly to Chris Merlo.

20 Q. And you would do that periodically?

21 A. Yes.

22 Q. I'm going to show you some more documents. These
23 will be marked as Plaintiff's Exhibits 9 and 10,
24 Your Honor.

25 (PLAINTIFF'S EXHIBITS 9 & 10 MARKED FOR IDENTIFICATION)

1 BY THE COURT:

2 It will be 9 and 10 and that's without objection?

3 BY MR. TAROKH?

4 Yes, Your Honor.

5 BY MR. JOHNSON:

6 Yes, Your Honor.

7 BY THE COURT:

8 So those will be admitted.

9 (PLAINTIFF'S EXHIBITS 9 & 10 ADMITTED INTO EVIDENCE)

10 Q. I'm going to show you two more documents that's
11 been admitted into evidence, Plaintiff's Exhibits 9
12 and 10. Can you explain what these documents are?

13 A. Yes, it's an email from myself on May 8th, 2018 to
14 Chris. I'm sending him a copy of the balance sheet
15 and explaining the windows were ordered as of
16 yesterday, there was a change order from his wife,
17 Nikki, he was aware of, and reminding him that
18 we'll need to get payment for the dirt for the
19 additional three feet removed, and the attachment
20 is the balance sheet showing the additional windows
21 that were added and approved by his wife.

22 Q. And what is the balance as of that date as
23 reflected on the balance sheet?

24 A. After related payments, \$521,580.

25 Q. I'm going to show you two more documents.

1 BY MR. JOHNSON:

2 No objection.

3 BY THE COURT:

4 Let me back up a minute and make sure I understand.
5 When you say the balance, you started off with the
6 contract amount which I think is 625, and then, of
7 course, you have pluses and minuses but when you
8 get down to this point there's still 521 left to go
9 on the project?

10 A. So, yes, sir. If we, if we finish the house
11 without any change orders or payments or credits
12 from that point, that's what would be owed at the
13 end.

14 BY THE COURT:

15 So you've sort got the tank full at 625 and then
16 other adding to it, you take off, you know, when
17 you get payments and so forth ---

18 A. Yes, sir.

19 BY THE COURT:

20 --- and this is where the tank is ---

21 A. Yes, sir.

22 BY THE COURT:

23 --- at that point?

24 A. Yes, sir.

25 BY MR. TAROKH:

1 It fluctuates, Your Honor.

2 BY THE COURT:

3 I understand, okay.

4 BY MR. TAROKH:

5 These will be marked as Exhibits 11 and 12.

6 (PLAINTIFF'S EXHIBITS 11 & 12 MARKED FOR IDENTIFICATION)

7 BY THE COURT:

8 And that's without objection?

9 BY MR. JOHNSON:

10 Without objection, Your Honor.

11 BY THE COURT:

12 All right, those both will be admitted.

13 (PLAINTIFF'S EXHIBITS 11 & 12 ADMITTED INTO EVIDENCE)

14 Q. Can you identify those two documents please?

15 A. Yes, sir, it's an email from myself to Chris Merlo
16 dated May 11th, 2018. I thanked him for the recent
17 payment, I'm also attaching the balance sheet for
18 his records and requesting the inspection report
19 from the bank for our records, also acknowledging
20 that Greg is on site now and we are working on
21 Nikki's window questions and will get back to him
22 asap, and the balance sheet is attached.

23 Q. And the "Greg" you mentioned, is that Mr.
24 Grissinger, Jr. who is here today?

25 A. Yeah, that's my partner, Greg.

1 Q. Now, you reference in that email, Plaintiff's
2 Exhibit 11, "Also, if you can send me the
3 inspection from the bank"; what is the inspection
4 report and why did you request it?

5 A. That's the, that's the third-party's report that
6 goes and inspects the progress of work and
7 typically with these reports it keeps pictures of
8 the site and it acknowledges what has been
9 completed in the bank's eyes and what is not
10 completed. We just keep it for our records.

11 Q. I'm going to show you three more documents.

12 BY MR. JOHNSON:

13 No objection.

14 (PLAINTIFF'S EXHIBITS 13, 14 & 15 MARKED FOR
15 IDENTIFICATION)

16 BY THE COURT:

17 Okay. So that's going to be Exhibits, 13, 14 and
18 15?

19 BY TAROKH:

20 Yes, Your Honor.

21 BY THE COURT:

22 Those will be admitted without objection.

23 (PLAINTIFF'S EXHIBITS 13, 14 & 15 ADMITTED INTO
24 EVIDENCE)

25 Q. I'm going to show you three more documents that

1 have been admitted into evidence. Can you explain
2 what these are?

3 A. Yeah. This one is an email from myself on July
4 10th, 2018 to Chris Merlo. He, it appears he's
5 changing the master window, per his request I'm
6 sending him the cost, giving him a cost of "\$2,215.
7 This includes window install, removal of the old
8 window, all re-work/or reframing, let me know," and
9 I'm asking how he he'd like to proceed, also am
10 attaching the balance sheet reflecting the latest
11 draw, and the attachments are the specs of the new
12 window he wanted for the master and the price, and
13 the balance sheet.

14 Q. And can you describe to the Court generally what
15 you did during the course of construction on the
16 Merlo project?

17 A. Excuse me, I'm sorry, I didn't hear you.

18 Q. Can you describe generally what you did during the
19 course of the construction of the Merlo project?

20 A. What I did?

21 Q. Yes.

22 A. Communicated with the client in ways such as this,
23 recording invoices, keeping up with the balance
24 sheet. A lot of, I do more than office work and,
25 you know, 75 to 80% of my time is spent in the

1 office working with vendors, subs, I work through a
2 lot of emails, things like that, you know,
3 communicating with Greg.

4 Q. And that's why you attached the window quote?

5 A. Yes, uh-huh (affirmative).

6 Q. Which was Exhibit 14?

7 A. Yes.

8 Q. I'm going to show you two more documents.

9 BY THE COURT:

10 No objection?

11 BY MR. JOHNSON:

12 No objection.

13 (PLAINTIFF'S EXHIBITS 16 & 17 MARKED FOR IDENTIFICATION)

14 BY THE COURT:

15 All right. So that's going to be 16 and 17

16 admitted without objection.

17 (PLAINTIFF'S EXHIBITS 16 & 17 ADMITTED INTO EVIDENCE)

18 Q. I hand you Plaintiff's Exhibits 16 and 17. What
19 are those documents?

20 A. It is an email from myself to Chris Merlo, August
21 3rd, 2018, acknowledging the receipt of the payment
22 and attaching the latest balance sheet.

23 Q. I'm going to show you two more documents.

24 BY MR. JOHNSON:

25 No objection.

1 (PLAINTIFF'S EXHIBITS 18 & 19 MARKED FOR IDENTIFICATION)

2 BY THE COURT:

3 All right. That will be Exhibits 18 and 19
4 admitted without objection.

5 (PLAINTIFF'S EXHIBITS 18 & 19 ADMITTED INTO EVIDENCE)

6 Q. I hand you what's been admitted as Plaintiff's
7 Exhibit 18 and 19. What are these documents?

8 A. It is an email from myself to Chris Merlo on
9 September 27th, 2018. I am sending him the balance
10 sheet with the latest draw payment for his records
11 and the attachment is the balance sheet on that
12 date.

13 Q. I'm going to show you three more documents.

14 BY MR. JOHNSON:

15 No objection.

16 (PLAINTIFF'S EXHIBITS 20, 21 & 22 MARKED FOR
17 IDENTIFICATION)

18 BY THE COURT:

19 That will be Plaintiff's Exhibits 20, 21 and 22
20 admitted without objection.

21 (PLAINTIFF'S EXHIBITS 20, 21 & 22 ADMITTED INTO
22 EVIDENCE)

23 Q. I'm going to hand you what's been admitted as
24 Plaintiff's Exhibits 20, 21 and 22. What are these
25 documents?

1 A. It is an email from myself to Chris Merlo on
2 October 24th, 2018. I am attaching, I am sending
3 him the balance sheet showing the latest payments,
4 also I'm sending him a picture of the front door
5 change and the specs of the front door. The two
6 attachments are the front door and the balance
7 sheet.

8 Q. I'm going to show you two more documents.

9 BY MR. JOHNSON:

10 No objection.

11 (PLAINTIFF'S EXHIBITS 23 & 24 MARKED FOR IDENTIFICATION)

12 BY THE COURT:

13 That will be Exhibits 23 and 24 admitted without
14 objection.

15 (PLAINTIFF'S EXHIBITS 23 & 24 ADMITTED INTO EVIDENCE)

16 Q. I hand you what's been admitted as Plaintiff's
17 Exhibits 23 and 24. What are these documents?

18 A. It's an email from myself to Chris Merlo dated
19 February 12th of 2019 sending over a copy of the
20 balance sheet and also requesting payments on some
21 of his change orders, and then the attachment is
22 the balance sheet as of that date.

23 Q. And what's the balance as of that date, February
24 12th, 2019?

25 A. That date is \$266,208.

1 Q. I'm going to show you two more documents.

2 BY MR. JOHNSON:

3 No objection, Your Honor.

4 (PLAINTIFF'S EXHIBITS 25 & 26 MARKED FOR IDENTIFICATION)

5 BY THE COURT:

6 That will be Plaintiff's Exhibits 25 and 26

7 admitted without objection.

8 (PLAINTIFF'S EXHIBITS 25 & 26 ADMITTED INTO EVIDENCE)

9 Q. I'm going to show you Plaintiff's Exhibit Numbers
10 25 and 26 that's been admitted into evidence. What
11 are these documents?

12 A. It's an email originally from, it looks like, it
13 appears to be from Chris Merlo to myself and then
14 I'm responding to his email. His email stated he
15 wanted to change paint colors, he also requested
16 the balance sheet to that date, and he also sent
17 over what he was calling the re-work schedule and
18 acknowledging that we initially had four pages and
19 now down to one, heading in the right direction,
20 thanks again for the assistance, and this was dated
21 August 9th, 2019. And the attachment because of my
22 reply is the balance sheet to that date.

23 Q. And what's the balance as of that date?

24 A. As of August 9th, 2019 it is \$175,443. But there
25 are many items on here that are pending his

1 decision making it not completed with the costs
2 yet.

3 Q. So like, for example, you would have an item and
4 then next to it you'd have the word "pending"?

5 A. That's correct.

6 Q. And can you tell me about that?

7 A. Yeah, there's a lot, there's a lot of items, there
8 are several items like that. So in this particular
9 case he wanted to stain each door in the house; he
10 had yet to approve the change order that we had
11 priced him. Apparently he had a landscape overage,
12 he requested some landscape lighting he had yet to
13 approve. He was extending the deck; it appears the
14 flooring and deck railing he had to approve. He
15 had made the theater room larger than what was
16 modified originally. And so those just stayed
17 pending so we're all again keeping full clarity on
18 what is coming or what is owed or to be owed.

19 Q. And what was the date of that again?

20 A. It was August 9th, 2019.

21 Q. I'm going to show you two more documents.

22 BY MR. JOHNSON:

23 No objection.

24 (PLAINTIFF'S EXHIBITS 27 & 28 MARKED FOR IDENTIFICATION)

25 BY THE COURT:

1 All right, that will be Plaintiff's Exhibits 27 and
2 28 admitted without objection.

3 (PLAINTIFF'S EXHIBITS 27 & 28 ADMITTED INTO EVIDENCE)

4 Q. I want to go back in time. You just testified that
5 your last date was from August, 2019. Can you tell
6 me -- I'm going to show you what's been admitted
7 Plaintiff's Exhibits 27 and 28 and what are those
8 documents and the date?

9 A. It's an email exchange between Christopher Merlo
10 and myself dated April 29th and April 30th of 2019.
11 Chris is acknowledging that he's trying to
12 determine who to use for the boulder wall that
13 needed to be in place, he's also explaining to me
14 that he's having trouble making the payment, making
15 payments, so he's having to result to a Heloc which
16 is also known as a home equity line of credit, and
17 acknowledging how much he thinks he can get from
18 the bank once the Heloc is in place, requesting the
19 balance sheet. He's asking us to essentially,
20 there's so much money owed on the change orders,
21 he's asking us essentially to be the bank for him
22 until we can get the house completed. My response
23 is, after pondering this and seeking advice from
24 other people, we would do this under a stipulation
25 that he would sign a Personal Guaranty showing his

1 approval of the current change orders in balances
2 and overages, and I explained to him how this was
3 difficult for us to do because of how much money is
4 owed, and then the attachment is the balance sheet
5 of that date.

6 BY THE COURT:

7 What was that date again?

8 A. That was April 30th, 2019, Your Honor.

9 Q. Now, you've referenced the boulder wall, correct?

10 A. Yes.

11 Q. And can you explain what that boulder wall is in
12 context of the Merlo project?

13 A. Yes, a boulder wall is also referred to as a
14 retaining wall and due to his steep lot and
15 challenging development, development on the lot, it
16 required a boulder wall and/or retaining wall, i.e.
17 retaining wall, which was discussed in the very
18 beginning, and it impeded a lot of the progress
19 throughout the project because we couldn't finish
20 the driveway, we couldn't put in a temporary
21 driveway. Due to the amount of rain we had it was
22 creating a lot of runoff so people were having
23 trouble accessing the bottom of the property where
24 the house was located such as suppliers, vendors
25 and subcontractors, and we're trying to get him to

1 make an agreement or approval of the wall at that
2 time to be installed because it was not part of the
3 contract.

4 Q. I'm going to show you another document. This will
5 be Plaintiff's Exhibit 29 and I believe this is
6 stipulated to.

7 BY MR. JOHNSON:

8 No objection.

9 (PLAINTIFF'S EXHIBIT 29 MARKED FOR IDENTIFICATION)

10 BY THE COURT:

11 All right, Exhibit 29 will be admitted without
12 objection.

13 (PLAINTIFF'S EXHIBIT 29 ADMITTED INTO EVIDENCE)

14 Q. Now, can you identify this document and tell me
15 what's going on here?

16 A. He tells me he was able to visit a client, one of
17 our client's houses to look at a comparable
18 retaining wall/boulder wall, i.e. boulder wall, he
19 acknowledges that we have convinced him the way to
20 handle it is to allow our crew to build it with
21 Greg's oversight. Quote, "My lender is ready to
22 pull the trigger on the HELOC loan to get our
23 balance settled but that would require a final
24 appraisal. I can request the appraisal now out to
25 60 days but I anticipate the project may extend

1 beyond June. We will require those funds to
2 satisfy the price tag of the boulder wall which is
3 much higher than I initially anticipated. As a
4 professional courtesy, considering placing the
5 costs of the boulder wall on our balance sheet to
6 expedite the completion. If you would like to
7 confirm the lender's commitment to the heloc funds"
8 please call blank, a banker, "at GrandSouth Bank,
9 she can be reached at" so and so number." We
10 "appreciate the value you and Greg have brought to
11 the project. It's refreshing to see subcontractors
12 working daily" and we're getting to the finish
13 line, and this dated April 27th, 2019.

14 Q. Now, the last two sentences, what were those two
15 sentences verbatim?

16 A. "Nikki and I appreciate the value you and Greg have
17 brought to the project. It's refreshing to see
18 subcontractors working daily to reach the finish
19 line."

20 BY THE COURT:

21 That date again was what?

22 A. That was April 27th, 2019, Your Honor.

23 BY THE COURT:

24 And that was an email from Merlo to you?

25 A. Yes, sir.

1 Q. I'm going to show you what will be marked as
2 Plaintiff's Exhibits 30 and 31.

3 BY MR. JOHNSON:

4 No objection.

5 (PLAINTIFF'S EXHIBITS 30 & 31 MARKED FOR IDENTIFICATION)

6 BY THE COURT:

7 Plaintiff's 30 and 31 will be admitted without
8 objection.

9 (PLAINTIFF'S EXHIBITS 30 & 31 ADMITTED INTO EVIDENCE)

10 Q. I'm going to hand you what's been admitted as
11 Plaintiff's Exhibits 30 and 31. Please let me know
12 what's going on here?

13 A. This an email from myself to Chris Merlo dated May
14 1st, 2019. This is in response to the agreement we
15 had prior made through phone conversation and the
16 emails I've just read, and I'm sending him a
17 Personal Guaranty. I explained to him, just in the
18 event something would happen to you, this is not
19 personal but it's a lot of money for us, and if
20 there's currently a question to let me. Also, I'm
21 attaching the balance sheet so if there's any item
22 that's on the balance sheet that's confusing or an
23 indiscretion, we need to discuss it, and I asked
24 him as soon as he gets the appraisal over to please
25 send that over, you should be able to get something

1 from the bank approving a HELOC which is a home
2 equity line, and you can send that over. Again,
3 we're meeting Friday to discuss material,
4 availability and start date and we'll let you know,
5 dah, dah, dah. So this is May 1st and I'm sending
6 him, the attachment is the Personal Guaranty that I
7 generated.

8 Q. I'm going to show you two more emails.

9 BY MR. JOHNSON:

10 No objection, Your Honor.

11 (PLAINTIFF'S EXHIBITS 32 & 33 MARKED FOR IDENTIFICATION)

12 BY THE COURT:

13 All right. Plaintiff's 32 and 33 will be admitted
14 without objection.

15 (PLAINTIFF'S EXHIBITS 32 & 33 ADMITTED INTO EVIDENCE)

16 Q. I'm going to show you what's been admitted as
17 Plaintiff's Exhibits 32 and 33 and please let me
18 know what these are?

19 A. This is an email from Chris Merlo to myself dated
20 May 3rd, 2019. "John, please find the signed
21 guarantee attached. The only item I don't
22 recognize on the balance sheet is 'Pine Basement
23 Door under front porch basement'. The door was
24 initially installed & then the painter mistakenly
25 painted whereas all the doors should be stained.

1 The door will actually be concealed by a cabinet
2 Mark Ladd is installing in front of it so it's
3 painted, no worries, we can live with it." And he
4 has attached the Guaranty, the Personal Guaranty
5 that I had sent him previously is signed and
6 printed and applied his social security number on
7 it.

8 Q. What's the date of that Guaranty?

9 A. The date of the Guaranty is May 3rd, 2019.

10 Q. I'm going to show you another document.

11 BY MR. JOHNSON:

12 No objection.

13 (PLAINTIFF'S EXHIBIT 34 MARKED FOR IDENTIFICATION)

14 BY THE COURT:

15 And that's going to be one document, Exhibit 34?

16 Q. Yes, Your Honor.

17 BY THE COURT:

18 It will be admitted without objection.

19 (PLAINTIFF'S EXHIBIT 34 ADMITTED INTO EVIDENCE)

20 Q. I hand you what's been admitted as Plaintiff's
21 Exhibit 34. What is that document?

22 A. It is an email exchange dated May 6th, 2019 from
23 myself with a reply from Chris Merlo. I thanked
24 Chris for signing the Personal Guaranty and
25 acknowledging the money owed. "We have scheduled

1 the boulder wall, guys will start end of the next
2 week. (We had to order the material, they were
3 short some in stock.) Regarding the door" in
4 question, "(call Greg to discuss, as he can better
5 understand this" but "what I'm understanding is
6 that this was not on the plan and it had to be a
7 weather stripped door and it is all solid pine
8 door. Again, please call Greg" with any
9 clarification "and he will let you know something,
10 and he will let me know something if it needs to be
11 changed." Chris then responds, "John - Now that
12 you remind me of the details, you are correct on
13 the door. Originally, the plan did not include an
14 access door under the porch. I think we own that
15 up-charge."

16 Q. Now, let's go back to the Guaranty that's Exhibit
17 33.

18 A. Yes.

19 Q. And the guarantor is who?

20 A. That would be Mr. and Ms. Merlo.

21 Q. But only Mr. Merlo signed it, correct?

22 A. Correct.

23 Q. And under the heading "OBLIGATIONS GUARANTEED",
24 what were those obligations?

25 A. "Full payment of all additional items (also known

1 as change orders, allowances overages,) notated on
2 the balance sheet as well as remaining contract
3 balance of the construction. Balance sheet as of
4 April 30th, 2019 consist of a total balance of
5 \$183,382. Understood that other items will be
6 added to the sheet such as Boulder Retaining walls,
7 plumbing overages, and these approved additional
8 item(s) will also be obligated under this said
9 guarantee. Full payment of the obligation will be
10 made prior to move in completion of home and/or
11 Certificate of Occupancy request. (SEE CONTRACT
12 FOR ALLOWED MONIES TO HOLD FOR PUNCH LIST
13 COMPLETION)."

14 Q. Now, let me just stop you. What is, what does that
15 mean "Certificate of Occupancy request"?

16 A. That is also known as a CO which is given by the
17 county at the end of a project once it's satisfied
18 all the code requirements. The last of the
19 obligation was "Guarantor will inform Montgomery
20 Holdings/IBI Builders of payments forthcoming and
21 will update any change of status."

22 Q. Now, let me point you back to Plaintiff's Exhibit
23 25 please, it's the email dated August 9th, 2019.

24 A. Okay.

25 Q. Just to get a point of reference, August 9th of '19.

1 BY MR. JOHNSON:

2 No objection.

3 (PLAINTIFF'S EXHIBIT 35 MARKED FOR IDENTIFICATION)

4 BY THE COURT:

5 This is going to be one exhibit?

6 BY MR. TAROKH:

7 Yes, Your Honor.

8 BY THE COURT:

9 35 is admitted without objection.

10 (PLAINTIFF'S EXHIBIT 35 ADMITTED INTO EVIDENCE)

11 Q. I show you what's been admitted as Plaintiff's
12 Exhibit Number 35. What is that document?

13 A. He is -- this is August 20th, 2019. Chris Merlo
14 sends me an email with an update on his financing,
15 said his lender has opened the paperwork and that
16 we are scheduled for the appraisal for around
17 September 16th. They will require a C/O for the
18 appraisal. I respond, "CO should be obtainable by
19 then. However, we have no control over the
20 government sector, but we will push our best.
21 Also, can you please go ahead and request a draw
22 inspection with bank and fund anything you can on
23 your end as well. Thank you."

24 Q. And how does he reply?

25 A. He replies, "I will request a draw with GrandSouth

1 now."

2 Q. And the first email in that chain, the one dated
3 August 20th, 2019 at 11:58, what does the second to
4 last sentence say?

5 A. "John, I wanted to get started now so that I can
6 fulfill my financial commitment promptly upon
7 completion. Thank you for helping us finish it
8 up."

9 Q. I'm going to show you another document, a one-page
10 document.

11 BY MR. JOHNSON:

12 No objection.

13 (PLAINTIFF'S EXHIBIT 36 MARKED FOR IDENTIFICATION)

14 BY THE COURT:

15 That will be Plaintiff's Exhibit Number 36 admitted
16 without objection.

17 (PLAINTIFF'S EXHIBIT 36 ADMITTED INTO EVIDENCE)

18 Q. I hand you what has been admitted as Plaintiff's
19 Exhibit 36. What is that document?

20 A. This document, it's an email from August 26th, 2019
21 from myself to Chris as well as his reply. I
22 state, "Chris, Hope all is well. The price for the
23 down stairs kitchen back splash is \$1279, material
24 and labor. Please let me know if you have any
25 questions." Chris responds back the same day,

1 "That works on the backsplash. Let's put it in.
2 On the mantel, we picked a simple one piece that
3 was priced at \$400. They are coming out next week
4 to measure. The plan had floating shelves in the
5 master bath and I was going to have Bree's include
6 those in the quote."

7 Q. After that date of August 26th, 2019, did IBI
8 install the downstairs kitchen backsplash?

9 A. Yes.

10 Q. And what was that amount again?

11 A. \$1,279.

12 Q. Now, Mr. Merlo eventually terminated the contract,
13 correct?

14 A. Yes.

15 Q. How soon after that email and after the
16 installation of the backsplash did Mr. Merlo
17 terminate your contract?

18 A. Approximately six weeks, five to six weeks.

19 Q. Do you remember the date?

20 A. Yes, it was October 11th or October 12th of 2019.

21 BY MR. JOHNSON:

22 No objection, Your Honor.

23 (PLAINTIFF'S EXHIBIT 37 MARKED FOR IDENTIFICATION)

24 BY MR. TAROKH:

25 One document, Your Honor.

1 BY THE COURT:

2 Plaintiff's Exhibit Number 37 admitted without
3 objection.

4 (PLAINTIFF'S EXHIBIT 37 ADMITTED INTO EVIDENCE)

5 Q. I hand you what's been admitted as Plaintiff's
6 Exhibit 37. If you could start from the beginning,
7 I believe it starts on the bottom of the second
8 page and let me know what's going on in each
9 communication please.

10 A. This starts out an email from myself to Christopher
11 Merlo, October 8th, "Hope all is well. Appliances
12 are finally in route this week for installation
13 after weeks of coordinating this. We are scheduled
14 to begin the CO inspections this week as soon as
15 the appliances are installed. This can be
16 unpredictable, due to the inspectors schedule,
17 request per inspector, documents required, et
18 cetera. Nonetheless, we have ordered and prepared
19 to respond accordingly to any request needed by the
20 City. We would like to know where you are with
21 your bank in regards to your refi, payment, et
22 cetera. This information would help tremendously
23 as we move forward." Chris Merlo responds the next
24 day on October 9th.

25 Q. 2019?

1 A. 2019. "Sounds like good news on the appliances.
2 C/O is required for refi efforts. Please find re-
3 work schedule, re-work list."

4 Q. Now, when you received that email reply what was
5 going through your head?

6 A. Well, I was a little shocked because we were very
7 clear in the Personal Guaranty and in multiple
8 discussions that the CO does not get issue
9 requested until all payment is issued. And he's
10 telling me now after the appliances are being
11 delivered and installed that CO is required for his
12 refi efforts. So it was very shocking and made me
13 a little nervous about the monies to be paid.

14 Q. And you respond that same day, correct?

15 A. Yes, within, within a half hour I responded back.
16 I said on October 9th, 2019, "Unfortunately we
17 cannot call for a CO until balance owed is paid per
18 contract. Refi's do not require a CO, so please
19 get this worked out with the bank and let us know.
20 If the bank can give us a letter of confirmation of
21 Payment, we can possibly work with that."

22 Q. And how does he respond to that email?

23 A. He forwards me an email from someone named Tyler
24 DeWitt with 1-800-Mortgage and he says do you have
25 a projected completion date on the project I can

1 offer the lenders? That's an email that Chris has
2 forwarded to this guy, and he responds, this Tyler
3 DeWitt of 1-800-Mortgage, "I got word back from the
4 underwriter. He said once you had a CO, send it my
5 way and we'll take things from there. They don't
6 want to move forward with getting an appraiser out
7 there until we have that."

8 Q. Okay.

9 A. And I was surprised by this because he had been
10 working with GrandSouth Bank the entire time and he
11 initially told me to speak with Rebecca at the
12 bank, and then here in the last hour I get this 1-
13 800-Mortgage.com, Tyler DeWitt, that I had no
14 communication or relationship with.

15 Q. Are you meaning Rocket Mortgage by 1-800-Mortgage?

16 A. Rocket Mortgage. Yeah, well, I think if you look
17 at his emails, it's mortgage.com. But they're all
18 under the same umbrella.

19 Q. And were you concerned with his response?

20 A. Yes, very because that tells me that he hasn't been
21 planning for any refi efforts because I've borrowed
22 a lot of money in my day and I've had to deal with
23 a lot of construction loans and no one has ever
24 required a CO. Furthermore, I've never known
25 anybody in custom homebuilding to be working with

1 an online broker for a refi effort, and lastly, it
2 was different than GrandSouth which we had been
3 working with the entire time.

4 Q. GrandSouth Bank was the ---

5 A. Construction loan.

6 Q. They're the ones paying the draw payments?

7 A. Correct, uh-huh (affirmative).

8 Q. And how do you respond to that email and what date
9 do you respond?

10 A. I responded the next day, the next morning on
11 October 11th, 2019, and I asked Chris, I said,
12 "Let's plan a time to meet in our office next week.
13 This is not part of what we agreed on and we are a
14 little concerned working with quicken loans online
15 rep. I think if we can meet we can get an
16 understanding in order. Let us know what works
17 best for you next week."

18 Q. And just to clarify, when you reference 1-800-
19 Mortgage and I reference Rocket Mortgage, was it
20 Quicken?

21 A. Tyler at Quicken Loans, Tyler DeWitt at 1-800-
22 Mortgage guy.

23 Q. And how does Mr. Merlo respond and when?

24 A. He responds, "John, sounds like plan, let me know
25 if next Friday will work & we can pencil it in."

1 Well, that was a week later and we've already got
2 plans for appliances going in and a CO being called
3 into place and ---

4 Q. Now, on that date, this date of this email
5 exchange, what day of the week was that?

6 A. This was a Friday.

7 Q. Okay. And what time does he email?

8 A. He emailed me Friday, October 11th, 2019 at 11:47
9 a.m.

10 Q. You mean ---

11 A. Excuse me, 3:56 p.m., I apologize.

12 Q. And then do you respond to his email?

13 A. Yes, I respond the same day, October 11th, Friday,
14 at 6:17 p.m. I state, "Friday will not work. Will
15 be best to do sooner. Let me know what you have
16 available."

17 Q. And after you sent that email on a Friday afternoon
18 after 5 what was going through your head?

19 A. Very concerned, I was very concerned, a lot of
20 money and I knew what he was -- I knew at that
21 point that he was trying to hold one over on us and
22 hurt us and take advantage of our generosity, and
23 the house was near complete with the appliances
24 going in, and he took the opportunity then, I knew
25 he was going to take the opportunity to do

1 something drastic and not fulfill his payment
2 obligation.

3 Q. And he emails you after your last email to him that
4 Friday afternoon, correct?

5 A. Yes.

6 Q. When? When?

7 A. October, Saturday, October 12th, 2019 at 7:24 a.m.

8 Q. And what does he state to you?

9 A. He emails me and he says, "John, I don't think a
10 meeting will be necessarily. After careful
11 consideration, I decided to terminate my contract
12 with IBI Builders effective immediately. The
13 contract began November 16th, 2017 and 695 days have
14 passed, 2 years to build a 4,000 square foot house.
15 It remains unfinished & the re-work required is
16 extensive. I cannot in good conscious devote
17 another year of my life to this partnership. While
18 I believe your team is very qualified, the
19 contractors hired & decisions made on the project
20 have been less than stellar. Mismanagement would
21 be an understatement. The one shining light is
22 Greg Sr. He has done more to benefit the project
23 than anyone & I commend his ability. Moving
24 forward, please instruct all subcontractors to
25 remain off the property. Security monitoring is

1 enabled & video recording is active. I truly hope
2 we can come to some type of consensus regarding the
3 financial component. My advisors are telling me I
4 have overpaid already with the costs incurred on my
5 side."

6 Q. When you received that email that Saturday what was
7 your state of mind upon receipt?

8 A. I panicked. I mean there ain't nothing I could do,
9 I knew it was coming. It was sheer shock that he
10 would actually do it. I'm still shocked knowing
11 that he did it, you know, we're at the finish end,
12 we're at the end, you know. Why would you do it
13 other than to manipulate the entire project and
14 hurt us financially while gaining, while gaining a
15 home without having to pay in its entirety.

16 Q. Now, Mr. Merlo is in the real estate business,
17 correct?

18 A. Yeah. From my understanding, yes.

19 Q. He references in that email "re-work". What does
20 that mean; what do you understand that term to
21 mean?

22 A. Re-work to me would mean work that was completed
23 and needed to be re-worked for whatever reason, a
24 punch list maybe if you will. He had been sending
25 re-work lists throughout the project which we

1 acknowledged every time. I read an earlier prior
2 email where he stated that it was down to one page
3 and it looks great. A lot of this stuff were items
4 that were either items still under construction or
5 a punch list item or had not been completed yet or
6 items that we'd already acknowledged, you know. So
7 it was a lot mundane, a lot of reciprocating, you
8 know, just a lot of the same old things, he was
9 just trying to muddy the waters for us. But we
10 acknowledged it, I walked it with him on one
11 occasion with Greg and I think Greg walked it with
12 him on numerous occasions along with Greg Sr.

13 Q. So to clarify, during the course of construction he
14 would send you what he labeled as re-work lists?

15 A. Yes.

16 Q. And those were like pictures of things that he
17 thought needed ---

18 A. Yes.

19 Q. --- finishing or repaired or something of that
20 nature?

21 A. Uh-huh (affirmative).

22 Q. What -- would you consider that what's called a
23 punch list?

24 A. I would say not yet because it's not, some items
25 would be considered a punch list. Where there's

1 paint or something, that would be considered a
2 punch list, or caulking or something like that.

3 But some items were not even complete yet so, you
4 know, to say it needs re-worked, you know, it's not
5 completed yet so it was again mundane.

6 Q. And you just referenced that you saw in one of
7 those emails that he commended you for reducing the
8 re-work list from four pages to one page?

9 A. Correct, yes.

10 Q. And that would've been around August of 2019?

11 A. Yes.

12 Q. So after you received this email, Exhibit 37, what
13 did you do?

14 A. I believe I called Greg and then I called you.

15 Q. Did you record a lien?

16 A. Yes.

17 (PLAINTIFF'S EXHIBIT 38 MARKED FOR IDENTIFICATION)

18 Q. Your Honor, this is Plaintiff's Exhibit 38.

19 BY THE COURT:

20 It will be admitted without objection.

21 (PLAINTIFF'S EXHIBIT 38 ADMITTED INTO EVIDENCE)

22 Q. Please take a look at Plaintiff's Exhibit 38 and
23 tell me what this is?

24 A. This is the lien I filed on October 17th, 2019.

25 Q. And what is, what is the date of recording on the

1 upper right hand corner?

2 A. October 17th, 2019.

3 Q. And what is the amount of the lien?

4 A. \$255,534.86.

5 Q. And where did you get that figure?

6 A. From the balance sheet.

7 (PLAINTIFF'S EXHIBIT 39 MARKED FOR IDENTIFICATION)

8 BY MR. JOHNSON:

9 No objection.

10 Q. One page, Your Honor.

11 BY THE COURT:

12 Plaintiff's Exhibit 39 is admitted without
13 objection.

14 (PLAINTIFF'S EXHIBIT 39 ADMITTED INTO EVIDENCE)

15 Q. I'm going to show you what's been marked as
16 Plaintiff's Exhibit 39. Can you identify that?

17 A. This is the final balance sheet.

18 Q. And what is the balance under the, under that
19 document?

20 A. \$255,534.86.

21 Q. And can you explain how that figure was arrived at?
22 I'm not asking you go through each line item but
23 generally?

24 A. It is approximately 40 to 50 change orders or add-
25 ons, allowance overages of the original contract

1 amount, payments made.

2 Q. And if you look at Column H and you go down to the

3 50s?

4 A. Yep.

5 Q. Like for, example, 58 has "CM" next to it?

6 A. Yes.

7 Q. What does the "CM" mean?

8 A. We put those in there to acknowledge where that

9 money came from, so that particular payment came

10 directly from Chris Merlo.

11 Q. And on what date?

12 A. February 19, 2019 of \$10,000.

13 Q. And that was before the boulder wall, correct?

14 A. Yes.

15 Q. And that was before the Guaranty, correct?

16 A. Yes.

17 Q. And did you receive any direct payments from Mr.

18 Merlo after February 19th, 2019?

19 A. Direct, direct payments? No, no, sir.

20 Q. How many direct payments did you receive from Mr.

21 Merlo prior or including February 19?

22 A. Four, four total.

23 Q. Okay. And the last payment you ever received from

24 any source based on this project was, was what

25 date?

1 A. August 30th, 2019 from the bank.

2 Q. I'm going to show you another document.

3 BY MR. JOHNSON:

4 No objection.

5 (PLAINTIFF'S EXHIBIT 40 MARKED FOR IDENTIFICATION)

6 BY THE COURT:

7 All right. Plaintiff's Exhibit 40 will be admitted
8 without objection.

9 (PLAINTIFF'S EXHIBIT 40 ADMITTED INTO EVIDENCE)

10 Q. I hand you what has been admitted as Plaintiff's
11 Exhibit 40. What is that document?

12 A. It's an email exchange between myself and Chris
13 Merlo on July 11th, 2019. The email from, the
14 original email from Chris is to myself and states,
15 "I have a lot in Powdersville & I'm thinking of
16 building a small 15,000 square foot flex building
17 kind of like the one pictured. Is this something
18 you guys would consider? Interested in seeing what
19 a square foot price might be. Thanks for taking a
20 look."

21 Q. And you respond to that email, correct?

22 A. Yes, sir.

23 Q. The same day?

24 A. Yes, sir.

25 Q. What did you say?

1 A. I said, "Yes, we would be interested. What time
2 frame are you thinking? We would need to see the
3 property and the building plans to give any
4 accurate price. To ball park, need a little more
5 information, size and what is inside to be
6 finished, bath rooms, etc."

7 Q. And he responds that same day, correct?

8 A. He responds that same day as well, "We will be
9 looking to begin 1st quarter 2020. I have the
10 building plans & next time we meet up I will be
11 certain to bring them along. It's essentially a
12 metal building with brick front and sides. The
13 interiors are a combo of office/warehouse."

14 Q. Now, when you received this email on July 11th,
15 2019, you were in the midst of the Merlo project,
16 correct?

17 A. Yes, nearing the, nearing the end.

18 Q. And how did this email make you feel when you
19 received it?

20 A. Validation that he was happy with us, and this
21 after the Guaranty so I know he's certainly happy
22 because we're funding his project for him. But
23 anybody that wants a rebuild or do another project
24 with you immediately after, obviously you've done
25 something right in their eyes.

1 Q. And your understanding is Mr. Merlo is in the
2 commercial real estate business?

3 A. Yes.

4 Q. That he's a broker-in-charge or something of that
5 nature?

6 A. And I think he does some development, too.

7 Q. Okay. So when you got this email ---

8 A. It made sense with what he does, yes.

9 Q. Now, were there things that caused the project to
10 take longer than you would've liked?

11 A. Certainly.

12 Q. And like what were those things?

13 A. Like having current weather, but then you had an
14 unusual amount of change orders and add-ons, the
15 inability to fund the project accordingly, those
16 can definitely lengthen a project of this size.

17 Q. Now, you mentioned weather. Was weather a factor
18 during the course of the construction of the Merlo
19 project?

20 A. Yes, and it was a lot, it was a lot of weather, but
21 more so the lot, you know, it was such a steep lot
22 and very hard to navigate even after the slightest
23 rain and so if you had got two, three days of rain,
24 you know, you might have two or three days of
25 letting it dry out, so just the lot itself extended

1 the length of time after any type of weather.

2 Q. So would it be true that the weather
3 disproportionately impacted this project because of
4 the way ---

5 A. Absolutely.

6 Q. --- the way the lot was situated?

7 A. Absolutely.

8 Q. And you mentioned change orders?

9 A. Uh-huh (affirmative).

10 Q. Is there a particular change order or an addition
11 that contributed to the addition of time that you
12 would need?

13 A. I would say, I would say the boulder wall was a
14 main driving factor. It, as I stated earlier, it
15 kept subs, vendors, suppliers from accessing the
16 job on many occasions. We couldn't put in a
17 driveway. It allowed for a lot of runoff and a lot
18 of mud, and so that delay of making that decision
19 to approve the change for the boulder wall, who was
20 going to do it and how they were going to do it,
21 getting the plan generated from Merlos took an
22 exorbitant amount of time.

23 Q. And if you remember, when did you first mention a
24 boulder wall or that boulder wall?

25 A. I know when it was very early on because I just

1 read it, it was in February right when I was
2 telling him the process of the foundation going in
3 and that Greg needed to speak to him in regards to
4 the retaining walls needed.

5 Q. So you said February, February 2018?

6 A. February, 2018, uh-huh (affirmative), yes.

7 Q. I'm going to show you another document.

8 BY MR. JOHNSON:

9 No objection.

10 (PLAINTIFF'S EXHIBIT 41 MARKED FOR IDENTIFICATION)

11 BY THE COURT:

12 That's going to be Exhibit 41 with no objection
13 admitted.

14 (PLAINTIFF'S EXHIBIT 41 ADMITTED INTO EVIDENCE)

15 Q. I'm going to show you what's been admitted as
16 Plaintiff's 44.

17 BY THE COURT:

18 44? That's 41.

19 Q. I'm sorry, Judge. I'm sorry, Your Honor. I'm
20 sorry about that. That's a 41?

21 BY COURT REPORTER:

22 41.

23 Q. 41, okay, I'm sorry, 41. What is this document?
24 You don't have to read it verbatim, just what is
25 it, specifically the first page in the middle?

1 A. It is an email from one of our subcontractors
2 explaining that he had talked to Merlo and that he
3 was -- I'm going to have to read it. "So, I wasn't
4 sure what to do so I called Greg today and told him
5 the situation about Merlo and his home theater.
6 Greg said he would talk to you about this. I'm
7 including the estimate with this email. I wasn't
8 sure how this should be handled with a \$5,761
9 balance of equipment. We also talked about some
10 homes that ready to be trimmed out. Please send me
11 a list of addresses. I talked to Mr. Merlo and he
12 said he was going to put all the theater equipment
13 into his loan."

14 Q. So this is an email dated October 9th, 2019 from a
15 Randy Lively, correct?

16 A. Yes.

17 Q. And Randy Lively is with Sound Scapes?

18 A. Yes, he does your AB work, low voltage wiring.

19 Q. And this email is saying that Mr. Merlo said to put
20 the cost of the theater equipment in the amount of
21 \$5,761.19?

22 A. Yeah, basically Randy wanted us to give him money
23 for Merlo's theater equipment which was not our
24 obligation or in our contract which is, which we'd
25 never do that even if that is in our contract.

1 Like we never paid trim out material which is
2 stated clearly in our contract. And it appears Mr.
3 Merlo is explaining to him that we were going to
4 fund it and he's going to pay for it through his
5 loan that he's getting with the bank eventually to
6 pay us off.

7 Q. What went through your mind when you received this
8 email?

9 A. It was October so it's close to the end, you know,
10 the appliances got delivered two days later, and
11 here he is trying to put stuff on our account this
12 late in the game for something that was never even
13 contracted to do. It made me really nervous.

14 Q. And this email was three days before you were
15 terminated, correct?

16 A. October 9th, yes, three days.

17 Q. And did you send this email to Mr. Merlo?

18 A. Yes, I did.

19 Q. And what did you tell him?

20 A. I said, "Chris, see below from Randy.
21 Unfortunately, we do not pay for entertainment
22 equipment and trim out, this is something you will
23 have to work out directly with Randy."

24 Q. Now, did you have a, did you have a construction
25 schedule for the Merlo project?

1 A. Of construction? Like a time schedule or a draw
2 schedule?

3 Q. Like a time schedule?

4 A. No, sir.

5 Q. Now, who is Wayne Culbertson?

6 A. He's a neighbor to the left. If you're facing
7 Chris Merlo's home, he's the neighbor to the left.

8 Q. Okay. And were there, did you have occasion to
9 have to speak him during the course of construction
10 ---

11 A. Yes.

12 Q. --- of the Merlo project?

13 A. Yes, sir.

14 Q. And what was that?

15 A. I believe Chris Merlo forwarded me an email from
16 Wayne Culbertson complaining about runoff from his
17 property to his property and threatening litigation
18 against us for that runoff, that's what I recall.
19 And then I responded that in essence I will meet
20 with Wayne Culbertson. I was pretty upset that he
21 had threatened litigation, this was the first I had
22 heard of this, he had never called me before and
23 but, nevertheless, we decided to meet on site. He
24 had a vacant lot (static) driveway and he had, he
25 had the vacant lot next to Merlo where they put a

1 gravel driveway, and we met out on the site and he
2 showed us where he thought water was running off.
3 I showed him how it was actually coming from
4 another property and from his own property because,
5 again he had a very steep lot, he was right next to
6 Merlo's lot. He said that our subcontractors were
7 using his driveway, the gravel driveway, to access
8 Merlo's property and he also stated that our
9 subcontractors broke his landscape light I believe.
10 I think that was it. We did find out that one of
11 our trim carpenters had used his driveway, again
12 because we couldn't get the boulder wall approved
13 and put in, they were having trouble accessing
14 Merlo's property. But the driveways I believe were
15 very close together so it appeared like that could
16 be Merlo's own driveway and people would access it.
17 The trim guy did access it and I apologized for
18 that. Even though the water runoff was not our
19 fault, I could see where water from Chris Merlo's
20 property in the back because we hadn't landscaped
21 yet was breaching a little bit into his property.
22 So I told Wayne we would put in a drain with a
23 drain box and fix his and replace his landscape
24 light, a little \$9 landscape light, and we did all
25 those in the next -- actually it was Easter

1 weekend, I do remember that, because I emailed him
2 on Easter, that Sunday, saying I believe we had
3 taken care of those items. I believe Merlo emailed
4 me back because he was copied in the reference and
5 stated something along the lines of thank you for
6 doing that and I'm sure Mr. Culbertson will enjoy
7 his upgrades to his property.

8 Q. So whatever the complaint was from Mr. Culbertson
9 that you just explained, would it be fair to
10 characterize it as resolved?

11 A. Oh, it was definitely resolved and, frankly, I mean
12 I personally don't believe it was our fault. I
13 don't know who broke his landscape light but in the
14 essence of being good neighbors and not creating
15 any contention next door, I fixed it, we fixed it.
16 Our landscaper was nearby, he's been with us a long
17 time, he went and put in a drain, a drain system to
18 catch any water runoff over from Merlo's lot. Oh,
19 there was also -- I forgot, I'm sorry. There was,
20 he had a two 4 x 4 posts with a small chain that he
21 claimed we broke the lock. Anybody could break it
22 and it was a very elementary setup and but anyway I
23 replaced that lock, too, so it was a lock, the
24 landscape light and the drain.

25 Q. That was at your cost?

1 A. Yeah, absolutely.

2 Q. What, roughly what was that amount?

3 A. \$9, a \$5 lock I think, Leo charged us about 5 or
4 \$600, yeah; \$700 I'm guessing.

5 Q. And you mentioned "Leo", who is Leo?

6 A. He's our landscaper but he does a lot of stuff for
7 us. He does a lot of grading, miscellaneous
8 grading, backfilling, boulder walls, retainer
9 walls, tree removal, things like that.

10 Q. And after, after you had the lien recorded you
11 filed this lawsuit, correct?

12 A. Yes, sir.

13 Q. And you also filed a Lis Pendens in connection with
14 the lawsuit?

15 A. Yes, sir.

16 Q. And, Your Honor, at this time I would ask the Court
17 to take judicial notice of the Lis Pendens being
18 filed in this case, alternatively I have a copy of
19 the Lis Pendens.

20 BY THE COURT:

21 If you got it, what's the filing information on
22 that?

23 BY MR. TAROKH:

24 Yes, Your Honor. It was filed November 8th, 2019 at
25 4:22 p.m.

1 BY THE COURT:

2 And is there a Lis Pendens number assigned, too?

3 BY MR. TAROKH:

4 Yes, Your Honor. I beg the Court's indulgence.

5 BY MR. JOHNSON:

6 I'll stipulate that it was filed.

7 BY THE COURT:

8 Well, I was just trying to get it identified for
9 the record.

10 BY MR. TAROKH:

11 Yes, Your Honor. It's, I don't know if it's
12 reflected on, I know it's reflected under this case
13 number, it's case number, you know, 2019-CP-37-
14 00687, and I believe there's a tag along Lis
15 Pendens and if you can give me a moment, I can pull
16 it up really quickly?

17 BY THE COURT:

18 Well, I can take judicial notice plus Mr. Johnson
19 said he doesn't have any objection to it; so you're
20 going to make that an exhibit?

21 BY MR. TAROKH:

22 I don't need to, Your Honor, if you're taking
23 judicial notice of that Lis Pendens was recorded,
24 was filed. This will be admitted or I can mark it
25 as an exhibit?

1 BY THE COURT:

2 Well, you might as well.

3 BY MR. JOHNSON:

4 No objection.

5 (PLAINTIFF'S EXHIBIT 42 MARKED FOR IDENTIFICATION)

6 BY THE COURT:

7 That will be Exhibit 42, Lis Pendens, admitted
8 without objection.

9 (PLAINTIFF'S EXHIBIT 42 ADMITTED INTO EVIDENCE)

10 BY MR. TAROKH:

11 Your Honor, at the time also I would ask the Court
12 to take judicial notice that the subject lien that
13 was admitted into evidence was also served on Mr.
14 Merlo and the two other Defendants, one Defendant
15 we dropped.

16 BY THE COURT:

17 Well, I assume there's a service affidavit in the
18 file, isn't there?

19 BY MR. TAROKH:

20 Yes, Your Honor, and I didn't know how Your Honor
21 wanted to handle that. I have Affidavits of
22 Service of the lien on that were filed and I can
23 give you those dates. In addition, the lien was
24 attached to the Complaint as an exhibit which was
25 also served on the Defendants which is evidenced in

1 the court file and we'd ask the Court to take
2 judicial notice, and I'm asking the Court to do
3 that because I would not like to call the process
4 server to testify as to her Affidavits of Service.

5 BY THE COURT:

6 Well, I mean I'll take judicial notice of anything
7 that's on the public record, which that I assume
8 is, and I don't think there's going to be any
9 objection to that?

10 BY MR. JOHNSON:

11 No objection, Your Honor.

12 BY THE COURT:

13 It seems like to me the issue is the Notice and
14 Certificate of Mechanic's Lien was properly filed
15 and served in a timely fashion; is that correct?

16 BY MR. JOHNSON:

17 Yes, Your Honor.

18 BY THE COURT:

19 Okay, that's covered. And then the action to
20 commence the mechanic's lien foreclosure was
21 commenced in a timely fashion as the Lis Pendens
22 was filed in connection with that?

23 BY MR. JOHNSON:

24 Yes, sir.

25 BY THE COURT:

1 So I think all that's covered.

2 BY MR. TAROKH:

3 Yes, Your Honor.

4 BY THE COURT:

5 All right.

6 Q. Now, Mr. Montgomery, as a result of Mr. Merlo's
7 termination of the contract and failure to pay what
8 was due, did you have to hire me?

9 A. Yes, sir.

10 Q. And did you have to, did you incur attorney fees
11 and costs?

12 A. Absolutely.

13 BY MR. TAROKH:

14 Your Honor, in terms of attorney fees and costs, we
15 would ask the Court instead of hearing testimony as
16 to attorney fees and costs now that if the court
17 rules in favor of my client as the prevailing party
18 that at that time the Court, the prevailing party
19 can submit Affidavits of Attorney Fees and Costs
20 which I understand is the custom?

21 BY THE COURT:

22 Yeah, that's fine. Any objection to that?

23 BY MR. JOHNSON:

24 No objection, Your Honor.

25 BY THE COURT:

1 Okay.

2 Q. Now, if I could point you back to the final balance
3 sheet, that's Exhibit Number 39?

4 A. Yes, sir.

5 Q. So those amounts are accurate ---

6 A. Yes, sir.

7 Q. --- and true?

8 A. Yes, sir.

9 Q. And it's from Exhibit 39 that you arrived at the
10 amount you state in the lien, correct?

11 A. Yes, sir.

12 Q. Your Honor, at this time I have no further
13 questions of Mr. Montgomery. Please answer any
14 questions of opposing counsel and I reserve the
15 right to recall.

16 BY THE COURT:

17 All right. Well, it's about 12:00 and we haven't
18 had a break. Do we need a break, anybody?

19 BY MR. TAROKH:

20 Yes, if you don't mind a brief break.

21 BY THE COURT:

22 Well, I mean we'll take just a very short break
23 because we're going to take a break for lunch
24 around 12:30, so things are going to get started
25 and I'm sure it's going to longer than that amount

1 of time to complete your cross examination.

2 BY MR. JOHNSON:

3 Absolutely, Your Honor.

4 BY THE COURT:

5 But we can certainly continue that after lunch.

6 BY MR. JOHNSON:

7 Certainly, that's fine.

8 BY THE COURT:

9 So let's just take about five minutes.

10 BY MR. TAROKH:

11 Thank you, Judge.

12 (OFF THE RECORD)

13 BY THE COURT:

14 All right, my clock says 12:07 so we'll get back

15 going. Now it will be cross examination by Mr.

16 Johnson.

17 CROSS EXAMINATION BY MR. JOHNSON:

18 Q. Thank you, Your Honor, may it please the Court?

19 Mr. Montgomery, as you know, I'm Townes Johnson.

20 A. Yes, sir.

21 Q. Plaintiff's Exhibit 2 which is front of you ---

22 A. I've got it, yes, sir.

23 Q. What were IBI's, under Item IV, what were IBI's
24 requirements under the contract?

25 A. Read all of them?

1 Q. No, the first one, number (A).

2 A. "(A) IBI shall supervise and direct the work, using
3 its best skilled and attention, and it shall be
4 solely responsible for all construction means,
5 methods, techniques, sequences, procedures, and for
6 coordinating all portions of the work under the
7 contract."

8 Q. Okay. So IBI agreed to be solely responsible for
9 all construction means, methods, techniques,
10 sequences and procedures, and for coordinating all
11 portions of the work; is that right?

12 A. Yes, sir.

13 Q. All right. Under (D) what were IBI's requirements?

14 A. "IBI warrants to the Owner that all materials and
15 equipment incorporated in the work will be new
16 unless otherwise specified, and that all work will
17 be of good quality, free from faults and defects,
18 and in conformance with the contract documents.
19 IBI further agrees to provide an unlimited one-year
20 warranty of all work related to the uncompleted
21 construction from the date of the issuance of the
22 Certificate of Occupancy."

23 Q. So IBI agreed to build the project free from
24 defects, faults, free from faults and defects, and
25 in conformance with the contract documents?

- 1 A. Yes, sir.
- 2 Q. Were the plans a part of the contract documents?
- 3 A. Yes.
- 4 Q. Was this, obviously the contract itself is part of
- 5 the contract documents; is that correct?
- 6 A. Say that again?
- 7 Q. The contract itself is part of the contract
- 8 documents?
- 9 A. Yes.
- 10 Q. All right. Under (G)?
- 11 A. "IBI shall be responsible to the Owners for the
- 12 acts and omissions of his employees,
- 13 subcontractors, and their agents and employees, and
- 14 other persons performing any the work under a
- 15 contract with IBI."
- 16 Q. So IBI agreed to be responsible for the acts and
- 17 omissions of its subcontractors on this project?
- 18 A. Yes, sir.
- 19 Q. Okay. Did the contract have any specifications
- 20 attached to it?
- 21 A. Yes or scope, we had spec sheets, scope of work.
- 22 Q. And that's on the back side of Exhibit 2?
- 23 A. Yep. Yes, sir.
- 24 Q. Okay. After the signature page ---
- 25 A. Yes, sir.

1 Q. --- you get the spec sheet, correct?

2 A. Yes, sir.

3 Q. All right. With regard to framing, on the last
4 line how was the house supposed to be framed?

5 A. All ceiling designs per plan, main floor 10 foot
6 ceiling, the basement is 10 foot ceiling.

7 Q. Do you know how tall the basement ended up being?

8 A. I do not.

9 Q. Were you present for Mr. Grissinger's deposition?

10 A. Yes, I was.

11 Q. Do you remember what he testified that it was?

12 A. I do not.

13 Q. If the basement ceiling was not 10 feet, would you
14 agree that that is in violation of the
15 specifications of this project?

16 A. No, I would not.

17 Q. Why not?

18 Q. There's a lot of variables the homeowner could
19 agree to. Sometimes the foundation wall cannot be
20 above a certain height in different jurisdictions
21 unless an engineer is called in and approved and
22 the homeowner has to get involved. The homeowner
23 could agree to a change order, so I can't agree to
24 that.

25 Q. Do you think that Mr. Merlo agreed to a change

1 order to change the height of the ceiling?

2 A. I don't know.

3 Q. Is there any written document between IBI or you
4 and Mr. Merlo that says we're changing this 10 foot
5 requirement to 8?

6 A. Not that I'm aware of.

7 Q. Are you aware of any code, any regulatory reason in
8 Ocone County why you can't build a 10 foot
9 basement?

10 A. Yes, 9 foot four inches is the highest a wall can
11 be without engineering. When you go above 9'4, and
12 I believe it's 9'4, somewhere in tenths of inches,
13 you have to have the wall engineered.

14 Q. Were the -- and we can pull out the plans. Were
15 the poured walls on the front of the house 10 feet
16 tall?

17 A. I don't know.

18 Q. Do you believe that the poured walls at the front
19 of the house were engineered?

20 A. I don't know. You ask that question of Greg, I
21 don't know.

22 Q. If the poured walls at the front of the house were
23 over 9 foot 4 inches, would you agree that the
24 walls had to be engineered anyway?

25 A. If they're over 9'4, yes, they have to be

1 engineered.

2 Q. Okay. So if the walls were as built 9'8, then they
3 would've had to have been engineered whether they
4 were 9'5 or 10 feet; is that correct?

5 A. 9'5 or 10 feet? Yes, I believe so.

6 Q. Okay. So in no event was there any reason why you
7 could not have built 10 foot walls for Mr. Merlo as
8 the contract specified?

9 A. Well, there can be because maybe he wanted his
10 front door a certain elevation which that can
11 dictate what you do with a wall, if he wants a
12 lower elevation of the front door or a higher
13 elevation of the front door, there's things you do
14 to achieve that. There's also things you do to
15 achieve a higher wall per se by crippling down
16 during the framing or crippling up during the
17 framing in this aspect to create that same
18 aesthetic feel. So there's a lot of variables and
19 I don't, and I'm not the one to ask that question
20 to, it's really Greg. I wouldn't know the best
21 answer.

22 Q. Okay. But you do agree that a 10 foot ceiling was
23 specified in the plans?

24 A. It was. Now, I don't know in the plan, we can pull
25 it up, but it was specified on the ---

1 Q. On the spec sheet?

2 A. --- on the spec sheet.

3 Q. And that is not what Mr. Merlo got?

4 A. I don't know. You'd have to show me that.

5 Q. I misspoke, I am going to use an exhibit before
6 lunch. All right, Mr. Grissinger, I am going to
7 hand you ---

8 A. Montgomery.

9 Q. Oh, Montgomery, my apology. I'm going to hand you
10 a document that is an email which I believe we've
11 already discussed dated December 19th of 2018
12 between you and Mr. Merlo ---

13 BY THE COURT:

14 Mr. Johnson, I'm going to get you to try to speak
15 up a little bit.

16 Q. My apologies, Your Honor.

17 BY THE COURT:

18 I'm having trouble hearing you and I'm sure the
19 court reporter may be, also.

20 Q. Will do, Your Honor. So this is a December 19th,
21 2018 email. Are you familiar -- at the very
22 bottom?

23 A. Okay.

24 Q. The bottom of the first of page, "John, I haven't
25 had time to call Greg"?

1 A. Yes, I see it.

2 Q. Okay. And are you familiar with that email?

3 A. Yes.

4 Q. Okay. Does that email contemplate a re-work list?

5 A. Let me read it, there's a lot. It's an email
6 exchange between myself and Chris Merlo. It
7 actually starts out December 17th, not to correct
8 you but that's what's on what you gave me.

9 Q. But the email at the bottom, the December 19th
10 email?

11 A. Yeah, it says, "John, I haven't had time to call
12 Greg because the schedule has been busy."

13 Q. Right. And then it continues on the next page,
14 right?

15 A. "Greg did reach out & I appreciate it. The
16 concerns are items we have spoken to Greg about &
17 I'm sure he will recognize them. Being the Realtor
18 I am, I have took the liberty to attach some
19 pictures that have been taken over the last few
20 months. I think the issues can remedied but I'm a
21 little anxious moving forward in light of the
22 number of hiccups." Is that what you wanted me to
23 read?

24 Q. It is. And so behind that email there's a list of
25 pictures and a list of items; do you see that?

1 A. The pictures, yes.

2 Q. The list on the very back page?

3 A. Okay.

4 Q. Is that the attachment that was to the December
5 19th, 2018 email?

6 A. I assume so, if you sent it to me and you're
7 telling me it is, it is.

8 Q. Yeah, it's something you produced in discovery, so
9 ---

10 A. Yes, okay, I assume so.

11 Q. Your Honor, I'd like to move this in as Defendant's
12 1.

13 (DEFENDANT'S EXHIBIT 1 MARKED FOR IDENTIFICATION)

14 BY THE COURT:

15 Any objection?

16 BY MR. TAROKH:

17 No, Your Honor.

18 BY THE COURT:

19 All right. Defendant's Exhibit 1 will be the
20 email, apparently December 17 through 19, 2018?

21 BY MR. JOHNSON:

22 And the attachment, Your Honor.

23 BY THE COURT:

24 And attachment, okay.

25 (DEFENDANT'S EXHIBIT 1 ADMITTED INTO EVIDENCE)

1 Q. At the back of that attachment, the last page, ---

2 A. Okay.

3 Q. --- did Mr. Merlo raise the question of the
4 ceilings not being 10 feet?

5 A. No.

6 Q. He did not?

7 A. I don't see a question, why are the ceilings 10
8 feet.

9 Q. The second bullet point, what does it say?

10 A. It says "Downstairs should be 10' ceiling but only
11 9'8." But that's not a question, he's not
12 questioning.

13 Q. Sure, but he's pointing out ---

14 A. Yes, he's pointing out "Downstairs should be 10'
15 ceilings but only 9'8", he states.

16 Q. Okay. And did IBI take any effort to remedy that
17 or to talk to Mr. Merlo at all about that?

18 A. I'm sure we talked to him. I felt that Greg would
19 definitely explain any issue like that at all in
20 person for sure.

21 Q. And you testified earlier that there's no
22 correspondence that you're aware of where Mr. Merlo
23 said that's great, that to me is more like what I
24 agree to?

25 A. I would guestimate a thousand emails between myself

1 and Merlo along with text messages. I'm sure I
2 could forget several emails and text messages, but
3 as far as I'm aware of, no, I don't know.

4 Q. And you testified that you were in the office doing
5 communications and the accounting side; is that
6 correct?

7 A. Among other things, yes.

8 Q. And you were producing the balance sheets for this
9 project?

10 A. Yes, sir.

11 Q. Okay. Between the last balance sheet, the final
12 balance sheet, which I believe is Exhibit ---

13 A. 39?

14 Q. Let me take a look, yes. So 39, what was the
15 balance sheet right before that, the September or
16 August 9th, 2019?

17 A. I don't know. This one, I don't know. If you
18 could produce it I could read the date to you.

19 Q. So Exhibit 26 that goes along with Exhibit 25 ---

20 A. Okay.

21 Q. --- is an August 9th, 2019 email analogy?

22 A. Yeah.

23 Q. Okay. Were there any intervening balance sheets
24 between August 9th and the final?

25 A. I don't know, I'm not sure. I don't think so but

1 there could have been one in September, but I can't
2 remember.

3 Q. Okay. And they're not in evidence?

4 A. Okay.

5 Q. I mean is that ---

6 A. I don't know.

7 Q. You didn't discuss any, you don't have any before
8 you?

9 A. No, I don't think so.

10 Q. Okay. On the August 9th, 2019 balance sheet ---

11 A. Okay.

12 Q. --- what items are pending?

13 A. Haul dirt, staining each door, making theater room
14 larger, barn doors.

15 Q. Okay. And did you input numbers into those items
16 for the final balance sheet?

17 A. Hang on a sec. It also mentioned landscape overage
18 and deck extension was pending.

19 Q. Okay. But did you enter in numbers for all those
20 items?

21 A. Eventually, yes, they would've been filled in.

22 Q. And they were filled in on the October balance
23 sheet which was provided after termination; is that
24 correct?

25 A. Yes, sir.

1 Q. All right. So for haul dirt, what is the number
2 that you put in?

3 A. \$14,075.

4 Q. Okay. And what is that based off of?

5 A. That is based off the cost it took to haul the dirt
6 away from Chris Merlo moving the house initially.

7 Q. And have you provided documents, backup
8 documentation to support that cost?

9 A. I would say I would think so, yes.

10 Q. Okay.

11 A. I mean we've exchanged thousands and thousands of
12 documents. I can't, I apologize for not having
13 memory to say exactly specifically what ---

14 Q. But you're in charge of the accounting, correct?

15 A. Yes.

16 Q. And you don't have any, you don't have any
17 documents here today to support that number?

18 A. I don't know. Did you -- I don't know. I don't
19 know.

20 Q. Well, I mean you're trying to charge Mr. Merlo
21 \$14,075?

22 A. No, I'm not trying to; we didn't get paid so I
23 didn't charge him.

24 Q. Well, you're seeking that in this lawsuit?

25 A. Seeking it, yes.

1 Q. You're representing that that money is owed?

2 A. Yes, uh-huh (affirmative).

3 Q. What is that based on?

4 A. That's based off of what we expensed to haul the
5 dirt.

6 Q. Well, what is the backup documentation to support
7 that?

8 A. I don't, I guess I don't have it in front of me.

9 Q. So you have no documentation to support ---

10 A. I can't say that, I just don't have it in front of
11 me. He was also -- Mr. Johnson, you will notice,
12 too, in the reference to the haul dirt, haul dirt
13 was on there from the very beginning and when he
14 signed the Personal Guaranty acknowledging how much
15 money he owed, haul dirt was on there pending, and
16 I asked him in that email to explain any item in
17 question and he never questioned that because he
18 knew. It was communicated on various occasions so
19 it was not, it wasn't just thrown in there as
20 you're insinuating.

21 Q. Well, how, how can anyone be expected to guarantee
22 a number that they don't know ---

23 A. From my recollection there was so much dirt and we
24 were trying to provide an area. Sometimes dirt
25 haul fees are volatile, it depends on how far the

1 truck is going. If the truck is going two miles
2 down the road, it's less; if it goes 20, it's more.
3 There was neighbors in the neighborhood that wanted
4 the dirt and Greg was trying to expend time to get
5 that dirt over there to save costs for Merlo, that
6 was what I remember. So during the entire process
7 that dirt sat there waiting to save Mr. Merlo money
8 to get the dirt cheaper elsewhere, closer by and
9 things of that nature, that's what I understand.
10 And again, Greg can -- you've got to understand the
11 essence of our business, oftentimes Greg will be in
12 the field and have a note, or been talking with a
13 homeowner and say, call me and say, John, hey make
14 a reference to this, we talked about this, make a
15 reference on the balance sheet and I do that. And
16 that's why it was pending for so long because we
17 couldn't, because Greg was waiting to save money
18 for the client.

19 Q. Was there any dirt that was hauled off after
20 October 9th, 2019?

21 A. Not -- by us?

22 Q. By anybody?

23 A. I have no idea because he terminated us on October
24 12th. So how do I know what he did afterwards?

25 Q. Forgive me. Was there any dirt that was hauled off

1 after August 9th?

2 A. August?

3 Q. Yeah.

4 A. Okay.

5 Q. The preceding balance sheet?

6 A. I don't know. I don't know, I don't know.

7 Q. Okay. I'm going to hand you some documents that
8 you produced to me in discovery.

9 A. Okay.

10 Q. And there are two hauling dirt invoices.

11 A. Uh-huh (affirmative). One is from Valley Farm's
12 Grading, it's for 2850 dated April 29th, 2018 and
13 the other is from KD Concrete on September 2018,
14 dated, or \$8,975. That looks like a total of
15 12,000 and some change.

16 Q. Okay. So the \$14,075 is a misrepresentation?

17 A. No, uh-uh (negative).

18 Q. You don't have any backup documentation to support
19 the difference?

20 A. I'm sure if we -- you know, we could have had time
21 where we paid a landscaper to -- this is just
22 hauling fees, this isn't the time for someone to
23 actually use their machine and load it into the
24 trucks. These are just hauling.

25 Q. But do you have any cut checks, any invoices to

1 support the difference?

2 A. Well, I would assume the person that did it was Leo
3 because he does a lot of that for us, and his
4 invoice, and he doesn't do traditional invoices
5 like this, he does handwritten or sometimes calls
6 me and says this is what you owe. He's been with
7 us for 15 years so we trust him. And he would, he
8 would be, he does multiple things for us daily,
9 weekly, annually, so his jobs culminate together
10 sometimes. So can I produce checks that I paid him
11 or somebody to do the work, to load the equipment?
12 Sure, absolutely I can.

13 Q. Well, why didn't you in this case?

14 A. Because I don't know. Again, it's hard to -- if
15 you're taking a check for multiple jobs that have
16 amounts that are disbursed over multiple jobs, it's
17 not going to add up as you're saying it would.

18 Q. But you have no documentation?

19 A. I don't have any more invoices, no, that would
20 support it.

21 Q. Or checks?

22 A. Not in front of me.

23 Q. That have been produced in this litigation?

24 A. I don't, I don't think so.

25 BY MR. TAROKH:

1 Objection, Your Honor. Asked and answered, this
2 whole line.

3 BY THE COURT:

4 All right. Let's go ahead and get a final answer
5 and then move on.

6 A. I don't have any more invoices to produce. These
7 add up to 12 or \$13,000, I don't have any more.

8 Q. Okay. And you agree with me that that is a
9 different amount than what is listed on the final
10 balance sheet?

11 A. Yes.

12 Q. Okay. Moving down to the next item that you stated
13 was pending, that was staining each door; is that
14 correct?

15 A. Okay, yes, staining each door.

16 Q. Okay. And on the August one, the August 2019
17 balance sheet, which you said it was going to be
18 \$45 each door?

19 A. Yes.

20 Q. All right. Moving down, I assume that in the final
21 balance sheet you just multiplied 45 times the 29
22 doors?

23 A. Yes.

24 Q. All right. On the next item, making the theater
25 room larger, ---

1 A. Right.

2 Q. --- how much did you charge Mr. Merlo for making
3 the theater room larger?

4 A. Let's see, \$7,975.

5 Q. Okay. And what is that number based on?

6 A. Well, the theater room wasn't on the plans, as you
7 know, the original plans that he submitted. He had
8 the plans modified and added a theater room, and
9 from my recollection he made that theater room even
10 bigger, and Greg calculated the costs on what that,
11 what it cost to make it even bigger.

12 Q. Okay. So let's go through the chronology real
13 quick. There were some original plans?

14 A. Yes.

15 Q. And then there's some revised plans?

16 A. I'd say completely new plans.

17 Q. Completely new plans?

18 A. There were two sets of plans.

19 Q. Okay. Did you contract with Mr. Merlo? Did IBI
20 contract with Mr. Merlo after the original plans or
21 after the more final one?

22 A. I believe we contracted him with the original plans
23 that he purchased because on the balance sheet
24 we've notated, if you notice here at the bottom the
25 subject notes, and I think there's email if I

1 recollect correctly about this, that he added
2 square footage by changing the plans, he added
3 cabinets, he added appliances. Because I know in
4 the original plans there wasn't a basement kitchen
5 and yet he added a basement kitchen after the fact.
6 He added a sink in the second bath. So these were
7 noted and they were on the balance sheet the entire
8 time. I believe there's an email stating that,
9 hey, you've changed the plans, here's the
10 acknowledgment, I don't know what this is going to
11 cost, we'll keep record of it as we go along.

12 Q. So you don't think that Mr. Merlo had the plans
13 with the theater room on them at the time he went
14 under contract?

15 A. I don't know for sure, I don't think so. I think
16 those were changed after. Well, they were
17 certainly changed after we proposed the -- we did a
18 proposal, I do know that for a fact.

19 Q. Okay.

20 A. The estimate, which the price is basically the same
21 price.

22 Q. If a theater room were a complete change order
23 versus just making it larger, would that line item
24 for a change order read differently than "making
25 theater room larger"?

1 A. No, that, from my recollection Greg told me to add
2 that because he actually made the theater room
3 larger, right.

4 Q. But that would contemplate that the theater room
5 was ---

6 A. Was there, right.

7 Q. --- there? Okay. I will submit to you that ---

8 A. It's confusing because when a homeowner will do
9 this, especially ones that's trying to manipulate
10 the entire thing, it gets confusing when they're
11 submitting multiple plans. I understand, it's
12 confusing for me so it's going to be confusing for
13 you. But, yes, what's added there is making the
14 theater room larger.

15 Q. Okay. But that contemplates that there was a
16 theater room?

17 A. Yes.

18 Q. Okay. So the original contract contemplated a
19 theater room?

20 A. No, the original contract, I don't, I don't think
21 so. I can't say for certain, but if you notice on
22 my notes at the bottom we added square footage, you
23 know. The theater room would be added additional
24 square footage, additional square footage added
25 with the final plans. We had to revisit that email

1 after Chris submitted the new plans and it would
2 read whatever it said to give you an exact answer
3 for that, but there's an email out there for that.

4 Q. All right. I think we can look at the email ---

5 BY THE COURT:

6 Mr. Johnson?

7 Q. Yes, sir?

8 BY THE COURT:

9 Go ahead and finish up about the theater
10 enlargement and then we're going to have to break
11 for lunch.

12 Q. Yes, sir. All right, with regard to the theater
13 room and making it larger, the \$7,975, ---

14 A. Okay.

15 Q. --- what supports that cost?

16 A. I don't -- when you say "support" like an invoice,
17 I don't think there's an invoice per se but there's
18 certainly costs associated with it. Anytime you
19 make something larger, it's going to cost more
20 money, especially heated square footage, heated
21 square space.

22 Q. But have you provided any documentation to Mr.
23 Merlo or in this ligation?

24 A. As far as an invoice, I don't think so.

25 Q. Okay. So there are no invoices?

1 A. We don't produce, we don't invoice our customers so
2 I doubt I did.

3 Q. Okay. Would y'all have done this work?

4 A. Would we have done the work?

5 Q. Yes.

6 A. Yes.

7 Q. Okay. And so IBI did not create an invoice for
8 this?

9 A. We didn't. Just for clarification, we don't
10 create, we don't invoice any homeowner. We would
11 work off our balance sheet.

12 Q. Okay. Well, I mean in the context of a lump-sum
13 contract, you would agree with me that change
14 orders are passed along if there's, if they're not
15 contemplated in the contract, they're passed along
16 at cost or cost-plus a fee; is that right?

17 A. No. Does it say that in our contract?

18 Q. It's silent in your contract, but ---

19 A. We keep up, we keep it with balance sheets as I've
20 stated many times.

21 Q. So you could have charged, and this is after
22 termination, you could have pulled a \$50,000
23 number, right?

24 A. I didn't. It's 7,000 and change, I didn't say
25 50,000.

1 Q. But it would still be the same when you have
2 nothing to support that?

3 A. I might not have something, I don't have an invoice
4 in front of me if you're asking me to support an
5 invoice or produce an invoice or a check or
6 anything like that?

7 Q. Well, you don't have any costs to support that?
8 You have not produced any costs to support that ---

9 A. I do know it costs money to do so.

10 Q. Well, I mean you're attempting to collect \$8,000
11 from my client for this line item, and you have
12 nothing that's been provided in this litigation to
13 support any of it?

14 A. Okay, that's your opinion. I think your client
15 knows very well what he ordered and what he wanted
16 and it was more, well beyond the scope of work and
17 plans.

18 Q. I mean my understanding is that there were two ---

19 A. I said that we certainly didn't have time to finish
20 it because he terminated us before we could get the
21 CO, so we didn't complete it or fill in the blanks
22 in a timely manner because he terminated us. We
23 didn't get to, we didn't get to go for the CO.

24 Q. But does that still give you the right to dream up
25 a figure and pass that along to Mr. Merlo?

1 A. I don't know. Does it give him the right to go to
2 our accounts and put things on our accounts such as
3 our appliances, our lighting store? Does it give
4 him the right to do that? I don't think it does.
5 And we have a right to collect what work we
6 perform, I do think so.

7 Q. But you can't sit here today and say how much that
8 work cost with regard to ---

9 A. I did and it's in the balance sheet, we put it in
10 the balance sheet.

11 Q. You could have put any number you wanted to in the
12 balance sheet.

13 A. That's your opinion, but we put \$7,000 and change.

14 Q. I understand you put \$7,975, but you agree that you
15 could have put any number in the balance sheet?

16 A. Yeah, but we wouldn't do that. We come up with a,
17 Greg would have came up with a calculation that is
18 determined off the work performed on site. It
19 wasn't just making it up as you're suggesting.

20 Q. Well, but you have nothing to support it?

21 A. No. If you haven't produced and we haven't
22 produced it, because we don't do invoicing like you
23 say, we don't have an invoice.

24 Q. How, how would Mr. Merlo have been able to produce
25 that?

1 A. If he hadn't terminated us, we would have told him
2 the total amount.

3 Q. I understand that, but that's not where we are.
4 This was a figure that was produced after
5 termination that you pulled out of thin air?

6 A. No. Greg would've had a conversation with Chris
7 about it and I know those two don't remember the
8 conversation, but it wasn't pulled out of thin air,
9 no.

10 BY THE COURT:

11 All right. It seems like we're at a good stopping
12 place.

13 BY MR. JOHNSON:

14 Your Honor, the only thing I would -- the hauling,
15 the two hauling invoices for the dirt, I would move
16 that in Defendant's 2.

17 (DEFENDANT'S EXHIBIT 2 MARKED FOR IDENTIFICATION)

18 BY THE COURT:

19 Any objection?

20 BY MR. TAROKH:

21 No objection.

22 BY THE COURT:

23 All right. Defendant's Exhibit 2 is two invoices
24 for dirt hauling totaling I think it's 12,000 and
25 some odd dollars, that's admitted without

1 objection, Defendant's Exhibit 2.

2 (DEFENDANT'S EXHIBIT 2 ADMITTED INTO EVIDENCE)

3 BY THE COURT:

4 All right, gentlemen.

5 BY MR. JOHNSON:

6 At 2:00, Your Honor?

7 BY THE COURT:

8 Well, let's say, yeah, 2 or maybe a little after,

9 2:15 or so.

10 BY MR. JOHNSON:

11 2:15?

12 BY THE COURT:

13 Something like that, whatever. I notice you had
14 sandwiches brought in for everybody? Is that what
15 you have?

16 BY MR. JOHNSON:

17 Oh, that's my projector, Your Honor.

18 BY THE COURT:

19 All right. We'll take a lunchbreak and be back at
20 let's just say 2:15.

21 BY MR. JOHNSON:

22 Great, thank you, Your Honor.

23 (OFF THE RECORD FOR LUNCHBREAK)

24 BY THE COURT:

25 Okay, everybody is back. It's about, one I've got

1 says 2:17 and other says 2:10, so whatever. But
2 anyway we're back from the lunchbreak and we will
3 now continue with the cross examination by Mr.
4 Johnson of the witness, John Montgomery.

5 CROSS EXAMINATION RESUMED BY MR. JOHNSON:

6 Q. Thank you, Your Honor. Mr. Montgomery, where we
7 left off prior to the break we were discussing the
8 balance sheet additions from the August 9th balance
9 sheet to the final balance sheet.

10 A. Okay.

11 Q. Okay. And we had just discussed making the theater
12 room larger. What was the next item that was added
13 to the balance sheet from the August 9th balance
14 sheet?

15 A. Let's see here, I've got the landscape overage, the
16 lights as well was pending, and that would've,
17 landscape overage and landscapes lights is what I
18 see.

19 Q. Okay. And what was the amount that was input into
20 the final balance sheet?

21 A. Yes, it was \$30,945.

22 Q. Okay. And how ---

23 BY THE COURT:

24 What was that?

25 A. \$30,945.

1 BY THE COURT:

2 All right, thank you.

3 Q. And how was that, how was that amount input into
4 this sheet; what is that based on?

5 A. He had a landscape design by a landscape designer,
6 Michael Dorn, at some point during the project, I
7 don't when exactly, after, well after we started.
8 He got the landscape design quoted with several
9 people, including ours, our landscaper, and he
10 decided to go with our landscaper and that's what
11 was billed to us, and he approved it in the form of
12 an email, the overage, and I believe the landscape
13 lights since they're in parentheses are notating
14 that he added that after because they're not on the
15 design, the landscape design, so he must have added
16 that after with Leo sometime during the process of
17 installing the landscape.

18 Q. Do you know of any invoices from Leo Landscape that
19 support that number?

20 A. I'm sure if we had it we submitted it, yes.

21 Q. So, Mr. Montgomery, what I just placed in front of
22 you are you familiar with that document?

23 A. Yeah, it looks like an invoice from Leo Landscape.

24 Q. Is that an invoice or a proposal?

25 A. This says "Proposal". His invoice is a proposal.

1 We have to forgive him, he's somewhat old school.

2 They're written on the same piece of paper.

3 Q. Okay. And how much, and I'll give you a minute to
4 add it up, how much is that proposal for? I can
5 give you pen and paper or a calculator?

6 A. Yeah, if you will give me a calculator, there's a
7 lot of items on here. It was \$44,945.

8 BY THE COURT:

9 Say that again?

10 A. \$44,945 was what the proposal added to.

11 Q. So let's go through that document.

12 A. Okay.

13 Q. So it's 2,000 plus 4,500, right?

14 A. Uh-huh (affirmative).

15 Q. Then 16,445?

16 A. Uh-huh (affirmative).

17 Q. 5,000?

18 A. Yep.

19 Q. 1,500?

20 A. 1,500, yep.

21 Q. 1,000?

22 A. Well, you missed the 4,000, the 4,000 for
23 installing the mulch.

24 Q. Okay, all right. 6,000?

25 A. Yep. Well, and you missed another \$1,000 for under

1 brushing ---

2 Q. Well, that was, I said that ---

3 A. So that was, yeah, I see that, okay, okay.

4 Q. So 44,945?

5 A. And then the second page has got some items on
6 there, too. Patio and fire pit at 6,000, plus
7 another walkway, install stepping stone walkway
8 from pier to dock, 4,500.

9 Q. Right. But that got to the 44,945?

10 A. 44,945, yes, sir.

11 Q. What was the allowance under the contract you
12 referred to?

13 A. "Allowance Section: There is no landscape plan
14 provided with this proposal. Allowance of
15 \$15,000."

16 Q. Okay. And so what was the net addition then?

17 A. You take the 44,945 minus the 15,000. You want me
18 to do it? Minus 15,000 equals 29,945.

19 Q. Okay. And so how much did you bill Mr. Merlo?

20 A. 30,945.

21 Q. So there's an additional \$1,000 in there?

22 A. Yeah, for the landscape lights as mentioned, 250
23 apiece, four, he added four lights at 250 apiece
24 per Leo.

25 Q. Where is the backup for that?

1 A. He called, he did it himself.

2 Q. Well, if he did himself how are you charging him
3 for it?

4 A. Because that's what I was billed.

5 Q. Where is the bill or invoice for that?

6 A. I don't, it'd be in discovery.

7 Q. Is it? I haven't see it.

8 A. We've submitted so many things, I don't know.

9 Q. Well, I mean you're the one who is in charge of the
10 accounts?

11 A. I was billed \$30,945 from the landscaper. The
12 extra \$1,000 came from the landscape lights.

13 Q. But you have no backup to support that?

14 A. I can, like I said, the landscaper, he don't, he
15 doesn't do invoicing like traditional like these
16 other two and he could've called me and said, hey,
17 it's another 1,000, he just added lights, is that
18 okay? And I would have said okay if he just added
19 lights because I trust him, it's \$1,000 difference.

20 Q. Well, I understand ---

21 A. And he approved it in email. Probably better, why
22 don't you submit the email where he approved it,
23 that would be much clearer?

24 Q. Well, I mean you're the one who's seeking these
25 costs, correct?

1 A. Yes.

2 Q. Okay. And you can't sit here and have anything to
3 prove it, do you?

4 A. I don't have it in front of me. Do you want to get
5 with my attorney?

6 BY MR. TAROKH:

7 Objection ---

8 A. Do you want me to get with my attorney and go ---

9 BY THE COURT:

10 For your information, I'm going to let him continue
11 to a certain level but we tend to get a little
12 argumentative in some of these back and forths, so
13 avoid that please.

14 Q. Yes, Your Honor.

15 A. I will be glad to get with my counsel and go
16 through all our documentation and pull out an
17 invoice if we have it, but I'm sure your client can
18 testify he told Leo to put four lights in that are
19 \$250 apiece.

20 Q. Okay. What is the next item that was added between
21 the August 19 balance sheet and the October balance
22 sheet?

23 A. Deck extension, flooring and rail.

24 Q. Okay, excuse me. What backup documentation do you
25 have to support this \$6,415?

1 A. I would have to get, again, get with counsel and
2 pull our invoices out. Greg calculated that based
3 on railing, deck flooring, that decking and the
4 railing.

5 BY THE COURT:

6 And how much did you say it came to?

7 Q. \$6,415, Your Honor.

8 A. Yeah, on the plan it had, from my recollection, it
9 had one deck in the rear and one deck on the side.
10 Chris Merlo wanted it connected to in somewhat of a
11 bridge fashion so that was calculated with the
12 deck, the decking and the railing.

13 Q. Okay. The next item that was added between the
14 August balance sheet and the October balance sheet?

15 A. "Back Splash Basement Kitchen", is that correct?

16 Q. Yes. And is that what was discussed earlier in the
17 emails that you've pointed out?

18 A. Yeah, yes.

19 Q. Okay. The same figure, 1279?

20 A. Yes, I'd have to look back at the email to give it
21 with certainty but I believe so.

22 Q. And the two extra floor receptacles, ---

23 A. Yes.

24 Q. --- is that the next item that was added?

25 A. Uh-huh (affirmative).

1 Q. Do you have any backup documentation to support
2 that?

3 A. I don't have it in front of me, no.

4 Q. How was that number generated?

5 A. Typically an electrician will bill us or if we have
6 buy those outlets, they're expensive, I believe
7 those outlets about 100, the floor outlets because
8 they're brass are \$150, and then running the wire
9 the electrician would bill us for that.

10 Q. Okay. And do you know who the electrician was on
11 this job?

12 A. You can check my records, I don't know which one
13 was on that job. I don't know who was ---

14 BY THE COURT:

15 What was that amount?

16 A. \$550.

17 BY MR. JOHNSON:

18 \$550.

19 BY THE COURT:

20 What about the backsplash, what was that amount?

21 BY MR. JOHNSON:

22 The backsplash was \$1,279.

23 BY THE COURT:

24 While I'm asking questions, way back up before
25 lunch you asked about staining each door that was

1 an item and I didn't get the amount on that either?

2 BY MR. JOHNSON:

3 It was \$45 per door and the final balance sheet
4 shows 29 doors.

5 A. So \$3,691.

6 BY THE COURT:

7 How much is that?

8 A. \$3,691.

9 BY THE COURT:

10 \$3,691. And one other question, on the two
11 invoices for the hauling dirt, what was the exact
12 total of those two invoices?

13 BY MR. JOHNSON:

14 It was ---

15 BY THE COURT:

16 That would be Exhibit 2.

17 BY MR. JOHNSON:

18 \$11,825, Your Honor.

19 BY THE COURT:

20 11,825?

21 BY MR. JOHNSON:

22 Yes, sir.

23 BY THE COURT:

24 All right, thanks. Did you want to put in that
25 exhibit you had him identify about the proposal

1 from the Leo Landscape?

2 BY MR. JOHNSON:

3 I do, Your Honor. If I could move that in as
4 Exhibit 3, Defendant's Exhibit 3?

5 BY MR. TAROKH:

6 No objection.

7 (DEFENDANT'S EXHIBIT 3 MARKED FOR IDENTIFICATION)

8 BY THE COURT:

9 All right. Defendant's Exhibit 3 will be admitted
10 without objection and that's the proposal from Leo
11 Landscape. All right, very good.

12 (DEFENDANT'S EXHIBIT 3 ADMITTED INTO EVIDENCE)

13 Q. Mr. Montgomery, who did IBI engage to survey this
14 lot; do you recall?

15 A. Could you repeat the question?

16 Q. Who ---

17 A. Survey the lot?

18 Q. Yes, sir.

19 A. I don't, I don't think we actually got -- we don't
20 request the survey, the homeowner would request the
21 survey.

22 Q. Okay. The site plan?

23 A. And I believe that was Pioneer, I believe that was
24 Pioneer Surveying.

25 Q. Okay. So Pioneer provided a site plan?

1 A. I believe so, yes.

2 Q. Okay. When they staked the lot did they stake out
3 the driveway?

4 A. No.

5 Q. Okay. Why did they not stake out the driveway?

6 A. Well, it depends on which stake out you're
7 referring to. Are you referring to the beginning
8 because there's several? Are you referring to
9 before we graded or at the end?

10 Q. Well, tell us about all of them.

11 A. Okay. So in the beginning initially you always
12 have a house staked out so the grader knows how to
13 clear the trees, the perimeter and so forth.
14 After, he comes back and stakes it again so that
15 the grader knows where to dig the basement. After
16 that, they come out, pin out the foundation for the
17 footers for the foundation company. So I need to
18 know which one you're referring to.

19 Q. Well, at any point did Pioneer come and stake out
20 the driveway?

21 A. Not to my recollection, no.

22 Q. Who did stake out the driveway?

23 A. Typically at the end of the project it's formed
24 with our concrete and our flat-work guys and the
25 homeowner comes out and acknowledges the forms that

1 this is what he wants and then it's poured.

2 Q. I'm going to hand you some emails with Pioneer.

3 A. Yep.

4 Q. Are you familiar with those emails?

5 A. Yes, sir.

6 Q. Okay. In that email correspondence is that the
7 beginning, the middle or closer to the end of the
8 project?

9 A. This would be at the very beginning.

10 Q. The very beginning, okay. And did you have a
11 conversation with Pioneer at that time about
12 staking out the house or the driveway, excuse me?

13 A. You want me to read the email that we're getting
14 to?

15 Q. Sure.

16 A. To John Montgomery, from Pioneer, it's December
17 21st, 2017, "We are going to have a crew come out on
18 December 27 to stake the house. Do you need a
19 driveway as well? For record keeping purposes, our
20 rate of construction staking is \$125 per hour." I
21 responded on December 21st, approximately 30 minutes
22 later, "Thank you... no, just the house for now.
23 You can email me the invoice."

24 Q. All right. And do you know, and I think you just
25 said this, but do you know if you engaged Pioneer

1 to come back out again to stake the driveway?

2 A. No.

3 Q. Okay. So ---

4 A. We don't pour the driveway at the beginning.

5 Q. Well, at any point did you engage Pioneer to come
6 back out and stake the house, stake the driveway?

7 A. Like I said, Pioneer wouldn't stake a driveway. We
8 would form it based on the site plan provided by
9 the client. The client comes out, sees the forms,
10 how it's shaped, adds, in this case he added more
11 driveway to it, and approves the forms, and then we
12 pour, that's the process. So Pioneer in that
13 process is typically not involved in the forming
14 and pouring of concrete.

15 Q. Okay. In your contract, going back to Exhibit 2, -
16 --

17 A. Okay.

18 Q. --- your contract expressly states that y'all are
19 solely responsible for what people are doing on
20 site; is that correct?

21 A. What are you, you want to give me a reference
22 point?

23 Q. Sure.

24 A. What letter or Roman Numeral are you referring to?

25 Q. In section ---

1 A. But we are responsible for our workers. I don't
2 know, I wouldn't be responsible for somebody like
3 Chris hiring somebody to come out and do something,
4 you know.

5 Q. But in the contract, under Section IV, numeral (A)?

6 A. Okay. Yes, it says, "IBI shall supervise and
7 direct the work, using the best skill and
8 attention, and IBI shall be solely responsible for
9 all construction, means, methods, techniques,
10 sequences and procedures for coordinating all
11 portions of the work under the contract."

12 Q. Okay. So if the driveway was poured and it
13 encroached upon the neighbor's lot, would IBI be
14 responsible for that?

15 A. Now, we would help if there was an issue, if it was
16 a few inches over. But we're going off the
17 approval and authority of the owner, it's his
18 property, okay, and in this situation he came out
19 later on to the concrete guys and instructed them
20 to make it even bigger behind our backs, so we had
21 no knowledge of this until after the fact.

22 Q. How wide, how wide is the driveway?

23 A. Typically 12, is it 10, 12 feet? It depends on
24 what the homeowner wants. I don't -- you can pull
25 up the site plan and it will tell you exactly, but

1 typically around 10 or 12 feet.

2 Q. Would it have been beneficial, even if what you're
3 saying is true about the facts which I know Mr.
4 Merlo is going to have own version, would it have
5 been beneficial for Mr. Merlo and for IBI to know
6 where the property line is when making this
7 decision on where the pour the driveway?

8 A. It'd certainly be beneficial for Mr. Merlo, it's
9 his property, it's his driveway, it's his
10 instruction. I mean I know what you're getting to.
11 We were never informed of this until this case.
12 The survey you provided showing the driveway going
13 over the property line was done in September, I
14 believe, of 2020, which is nearly a year after we
15 were terminated. One, we don't know what he did
16 after we were there, he could have added more
17 driveway; two, it was, from looking at rough scale
18 we're talking inches, okay, it would cost maybe a
19 couple of hundred dollars to shave it off and we
20 would do that for a client that we respected and
21 cared about, certainly. But there's nothing,
22 there's no intentional negligence being done there
23 and I think we should get to the point. Let's get
24 the survey out and show it to the Court.

25 Q. Well, ---

1 A. And plus, we didn't have, we never were given the
2 opportunity to correct it. How were we? Were we
3 acknowledged of this during our time under contract
4 with Mr. Merlo?

5 Q. Do you believe that Mr. Merlo knew about it at the
6 time y'all poured it?

7 A. I don't know. I'm asking were we ever given the
8 opportunity to cure what you're saying is our
9 fault?

10 Q. I believe we were in litigation at that stage, but
11 regardless. Is there landscaping on the neighbor's
12 side of the driveway as well?

13 A. Not when we were there, there wasn't landscaping
14 done, it was an undeveloped lot.

15 Q. Mr. Merlo's landscaping on the other side of the
16 driveway?

17 A. I don't remember. I mean, Mr. Johnson, y'all have
18 drug this case out for three years, I can't
19 remember if there's landscaping. I don't know if
20 he added landscaping after the driveway was put in,
21 I don't know. Again, I'm not on the site every
22 day; I'm in the office performing business
23 administration duties. And you're asking me is
24 there landscaping on the other side of the
25 driveway? When was there? I don't know. Is there

1 landscaping there now, is that what you're asking?

2 I don't know.

3 Q. Well, if the driveway is encroaching upon the
4 neighbor's property, wouldn't also any landscaping
5 that Leo Landscape put on the other side be
6 encroaching as well?

7 A. At whose direction? Was it done by the neighbor?
8 Was it done in collaboration with Mr. Merlo? Did
9 Mr. Merlo instruct him, instruct him to do so?

10 Q. So you're ---

11 A. Did Mr. Merlo have a landscape design generated and
12 given to us to follow?

13 Q. So you're saying that even though you agreed under
14 the contract to be solely responsible you're saying
15 you're not responsible; is that accurate?

16 A. No, I said the landscape plan was not included in
17 our contract or proposal because he didn't have
18 one. So you're asking is there landscaping on the
19 other side of the driveway; I don't know if there's
20 landscaping on the other side of the driveway and
21 if there is, I don't know when it was put in.

22 Q. But you do know that Leo Landscape did 40,000,
23 \$44,000 worth of landscaping work?

24 A. I do know that, yes.

25 Q. And that included all the plants and bushes that

1 are listed on the third page of Defendant's Exhibit
2 3 which is substantial?

3 A. \$16,000 worth of bushes, I mean I didn't make, your
4 client generated the plan with the help of a
5 landscape designer. We're just quoting off what he
6 gave us or what our landscaper quoted off of what
7 he gave us to quote.

8 Q. No, I understand. But don't you think that if you
9 were managing the project that you could've advised
10 Leo Landscape, the concrete driveway former, and
11 Mr. Merlo of where the property line was and where
12 he should not put trees?

13 A. I have no control of the homeowner going out there
14 without our discretion and supervising our subs on
15 their own accord; I have no control over that. He
16 told, he told our concrete guys to make the
17 driveway wider, that's what I know, okay. If the
18 driveway is encroached, if it was done at that time
19 and it was several inches over which, in fact, the
20 survey shows this, it shows it inches, we would
21 cure it by shaving it off and not causing a big
22 issue. My question is, is the driveway still
23 encroached and why has it not been taken care of it
24 if it's an issue? Did he do it after we were,
25 after we were terminated? Did he add more

1 driveway? Did he add landscaping? So there are a
2 lot of variables here we need to discover first.

3 Q. But if there were, if the driveway was not extended
4 and if the driveway, and if landscaping was put in,
5 under the contract do you agree with me that it
6 says that IBI would be solely responsible for that
7 work?

8 A. Yes, we would be responsible for the installation
9 of the driveway. We're not responsible for the
10 owner going behind our back and instructing the
11 workers to do something different than what was out
12 there.

13 Q. What is your understanding of the term "solely
14 responsible"?

15 A. That Greg and myself are responsible for the work
16 performed.

17 Q. Okay. I'm going to move the email exchange between
18 Mr. Montgomery and Pioneer Surveying in as
19 Defendant's 4.

20 (DEFENDANT'S EXHIBIT 4 MARKED FOR IDENTIFICATION)

21 BY THE COURT:

22 Any objection?

23 BY MR. TAROKH:

24 No objection.

25 BY THE COURT:

1 All right, that will be Defendant's Exhibit Number
2 4 and it will be admitted without objection.
3 That's the email exchange, the one with Pioneer
4 Surveying and IBI?

5 BY MR. JOHNSON:

6 IBI, yes, sir.

7 BY THE COURT:

8 That would have been about December of 2018?

9 A. '17.

10 BY THE COURT:

11 '17?

12 BY MR. JOHNSON:

13 Yes, sir.

14 A. It was 2017.

15 (DEFENDANT'S EXHIBIT 4 ADMITTED INTO EVIDENCE)

16 Q. Who was the architect that Mr. Merlo hired for this
17 job?

18 A. Don Gardner.

19 Q. And did Mr. Merlo send those plans to you for
20 review?

21 A. The original plans?

22 Q. Yes, sir.

23 A. Yes, he purchased a reproducible set from Don
24 Gardner online and sent those to me, yes.

25 Q. Do you know about the time period when he sent

1 those to you?

2 A. Around 2000 and, mid/late 2017.

3 Q. Do you remember the name of those plans?

4 A. Sandy Creek.

5 Q. Sandy Creek?

6 A. It's a very common plan, it's used all over the
7 lake. It's easy to remember.

8 Q. And so when you got those plans from Mr. Merlo did
9 you quote them for him?

10 A. He told us I believe, if I recall, he sent an email
11 that these are the plans I just purchased, I'm
12 having them modified, go ahead and price it based
13 on these plans.

14 Q. What else did you do with those plans around that
15 time?

16 A. Around that time knowing that he would be sending
17 modifications, I filed it away into a file that we
18 have on the computer that has miscellaneous plans
19 from years, generic plans, and plans that we use
20 for reference and things like that. I filed it
21 there and then I think later on he produced the
22 modifications after the contract to the secondary
23 plan.

24 Q. Did you ever pull the plans back out?

25 A. Yes. Yes, it's only my fault because I shouldn't

1 have put them in a file. We had another project as
2 you're aware, 543 Riverstone Drive, somewhere
3 around that time and we were doing a spec house.
4 Greg was going through the file looking for, we
5 needed something to create a footprint what would
6 fit on the lot and Greg had used that Sandy Creek
7 plan and it kind of morphed from that, he used that
8 plan for the entire project of Riverstone. It
9 never crossed my mind that it was the same one he
10 originally gave because the one that Chris modified
11 was so drastically different, you know, it didn't
12 look the same. So we built it, we built that other
13 house. I believe we started it in sometime around
14 '18, sometime early '18, and we sold it December of
15 2019. And like with every year-end job with my
16 accountant I was given my bookwork for year-end
17 which is list of itemizations of costs per job and
18 things like that, and I was phone with Greg at the
19 time and I was reviewing it at the same time and I
20 happened to see there was no architectural plan
21 cost to it. Over the years we have spent hundreds
22 of thousands of dollars towards architects, towards
23 plans, towards designers who are either part of the
24 transaction, we've done it for homeowners. In
25 fact, we spent \$90,000 last year alone on architect

1 fees. We have bought about approximately six plans
2 over the last 15 years for our own personal use
3 from Don Gardner. So when I'm looking at a job
4 cost and I see that there's no architectural plan
5 and I say, Greg, where did we get the plan from for
6 this Riverstone? And he said the file and so I
7 knew and I went and looked and I was like what, and
8 it hit me that it was the one that was originally
9 given to me by Chris Merlo, which is a very common,
10 reproducible mill factory plan that Don Gardner
11 till this day sells. And I immediately went on to
12 Don Gardner's website and purchased the license
13 agreement because I didn't want there to be any
14 issue of building a house without a license from an
15 architect, I believe it was \$1200. So and that
16 would have late December-ish 2019.

17 Q. Had renovations started between Don Gardner and IBI
18 at that stage?

19 A. When I purchased the license agreement? No, I
20 don't think so.

21 Q. So several documents within that ---

22 A. This says, "License to Build", gives the plan
23 number, Sandy Creek, order date January 6th, 2020
24 which is, I was close, like late December, early
25 January which is usually when I get my accountant.

1 It's the license agreement and it was \$1727 it
2 looks like, Sandy Creek.

3 Q. What else is that packet?

4 A. A receipt, it's an email it looks like from August
5 18, 2017 from Chris Merlo, that's what I was
6 mentioning earlier, "I went ahead and purchased the
7 attached file of the lake house from Don Gardner.
8 This way I can have builders effectively price the
9 project. Look it over & give me some feedback." I
10 wrote back looks like the same day -- no, is that
11 right? Yeah, it looks like I wrote back with
12 questions of how he wanted it priced, I would
13 suggest having a surveyor provide the site plan for
14 accurate budgeting, giving him some advice on the
15 way we can, we can price this.

16 Q. Okay. So that's August of '17?

17 A. That is August 18, 2017.

18 Q. Okay. So Mr. Merlo gave you the plans in August --

19 -

20 A. Uh-huh (affirmative).

21 Q. --- '17?

22 A. Uh-huh (affirmative).

23 Q. Okay?

24 A. Yeah, sorry, yes.

25 Q. What else is in that packet?

1 A. This is a site plan for a plan ---

2 Q. What's the lot?

3 A. Lot 57, Riverstone.

4 Q. Okay. Is that the lot you built on?

5 A. Yes, it is.

6 Q. Okay. And what is the date of that site plan?

7 A. The date of the site plan is October 11th, 2017.

8 Q. Okay. So within two months of Chris giving you the
9 plans for his house, you took the plans and decided
10 to use it for your own purposes?

11 A. Well, first of all, I didn't know exactly where I
12 got the plans from, I could never prove that
13 because that's as very common plan. I was actually
14 given a plan two months ago from another client,
15 the exact same plan, to have priced. So again,
16 it's a mill factory reproduced plan, so a
17 reproducible plans are very, very common plans all
18 over the lake. That plan which is on that site
19 plan, it appears to be the Sandy Creek plan because
20 the garage is on the right. And his plans that
21 were modified were actually reversed, we reversed
22 them back but it's a completely different plan.

23 Q. Okay. What's different about it?

24 A. We've got the plans, you want me to pull them up
25 and show you?

1 Q. Well, I have the plans, too, but just tell me what
2 was different?

3 A. Well, one, you've got -- the original Sandy Creek
4 plan is reproducible mill factory plan has a 45
5 degree angle garage; Merlo's is a 90 degree garage.
6 His actual plan is on the left and they reversed it
7 back on the right. The original Sandy Creek does
8 not have a theater room, does not have a workout
9 room, it does not have a secondary kitchen in the
10 basement, that's from memory of what I can recall.
11 Also I believe the elevations are different in
12 terms of finished floor elevation. I also believe
13 the square footage is drastically different as from
14 Chris' plan, you know, there's a lot more square
15 footage versus this factory plan of the Sandy
16 Creek. That's just off the top of my head, I'm
17 sure there's more.

18 Q. Well, when did Mr. Merlo learn that he was going to
19 have to change the garage from a 45 to a 90?

20 A. I'm sure there's an email about it. I don't know
21 exactly.

22 Q. Well, I mean it's in the last page of that packet.

23 A. Okay. This is an email from Chris to Pioneer.

24 Well, you've got it all backwards so I can't tell
25 who it's with. This one is from Pioneer and one is

1 from Chris to Pioneer, but, no, I'm not copied on
2 this so I'm not familiar with this email. I'll
3 read it, I show I read it but did not see it in any
4 mention, so I guess "it's 15 feet on the sides and
5 we need to commission an architect to make the
6 garage 90 degrees. Would you need to revise the
7 drawings to place it?" "Yes, please, from Shawn
8 Gilstrap." That's all I see.

9 Q. What's the date of that?

10 A. October 24th, 2017.

11 Q. Okay. So the sequence then is Chris gave you the
12 plans on August 17th, you took them and you were
13 making a quote for him based off those plans, and
14 you took them and got a site plan for yourself
15 based off those plans?

16 A. It was based off of Sandy Creek, not his particular
17 plans. Like I don't know about that. It was our
18 site plan, Riverstone was based off of the Sandy
19 Creek plan.

20 Q. Were the plans that were emailed to you on, in
21 August ---

22 A. I have no way of knowing that. All I know is the
23 Sandy Creek plan, which is a factory mill plan,
24 it's a reproducible set, was used for Riverstone.

25 Q. Does Don Gardner sell a license that you could buy

1 exclusively?

2 A. I don't know, you'd have to ask him.

3 Q. Did you know whether or not Mr. Merlo paid to get
4 an exclusive plan or an original plan?

5 A. I was not aware of that.

6 Q. But regardless, you ---

7 A. I don't recall it.

8 Q. Okay. But regardless, you took them and you took
9 them for your own benefit?

10 A. No, I can't, I cannot say that for certainty.

11 Q. I mean you said that you, Mr. Merlo ---

12 A. I put them in a file. It's highly likely, but I
13 can't say for certain because it's a Sandy Creek
14 plan. They're all over the place. It's a common
15 plan, that's why we use it, you know, for a spec.
16 It's very common especially on the lake.

17 Q. How many, how many emails from my Subpoena to Don
18 Gardner, how many sets of plans had you purchased
19 from Don Gardner prior to Merlo?

20 A. Oh, gosh, I would say nearly half a dozen.

21 Q. Why does their record reflect one?

22 A. I have no idea. I know, I know -- which one is
23 that? Which one was it? Sometimes, because when
24 we're working with a homeowner they buy it
25 themselves. We're just involved with the sourcing

1 through their website and sourcing the plans.

2 Q. I'll come back to that. I don't want to slow us
3 down, Your Honor. So y'all made the decision in
4 October of '17 to use the Sandy Creek plan?

5 A. The Sandy Creek? Yeah, well, we were fitting it on
6 a lot to see how it would fit. I don't know if
7 that's when we made the decision because we didn't
8 start for another, I believe approximately a year
9 or mid '18.

10 Q. Okay. But you had the plans, you based a site plan
11 on those plans, and it wasn't until more than two
12 years later that you bought the plan from Mr.
13 Gardner; is that correct?

14 A. Yeah, I bought it in, well, January 6th, 2020.

15 Q. Okay. And would Mr. Gardner have had any clue
16 about your use of his plans but for this
17 litigation?

18 A. No. I mean I know what happened; you know, Chris
19 told you and you told Don Gardner. But to tell you
20 how oblivious we were the fact, we sent Chris out
21 to 543 Riverstone Drive to look at retaining walls.
22 If I was so concerned about that and thought I was
23 doing something intentionally negligent, why would
24 I voluntarily send him out to the house that we
25 were constructing to look at retaining walls?

1 Q. And to this day sitting here, you don't know
2 whether Mr. Merlo had bought an exclusive plan or a
3 reproducible plan?

4 A. Which? Are you talking about, referring to Sandy
5 Creek?

6 Q. Yes, sir.

7 A. No, the Sandy Creek is still available today
8 because you can buy it right now on their website
9 today.

10 Q. Okay. But you didn't know that at the time you
11 decided to use it?

12 A. I didn't use the Sandy Creek plan or Merlo's plan;
13 I used the Sandy Creek which is available today
14 online.

15 Q. Your Honor, I'd like go ahead and move the
16 documents related to the Don Gardner plans in as
17 Defendant's 5.

18 BY THE COURT:

19 Let's get that all that you want intact because I
20 don't what all are you're talking about?

21 BY MR. TAROKH:

22 Your Honor, I would object to certain documents and
23 maybe it will be better if the Court prefers if we
24 break this up because there's multiple documents
25 and this is a composite document. But primarily

1 the email on the last page between, purportedly
2 between Mr. Merlo and Pioneer Surveying, and the
3 witness testified he doesn't know anything about
4 that email, that was my understanding, and so I
5 think there's an authentication issue with this
6 witness testifying as to this email because I
7 believe he testified he wasn't on it. The other
8 ones I have no objection, but I'd like to point out
9 the the email with the Bates stamp number 494 is
10 actually included in Plaintiff's first Exhibit
11 Number 1. So if he wants another variation, that's
12 fine but I just wanted to point it out. But all,
13 with all these documents I would object as to the
14 last page of this email chain between Mr. Merlo and
15 Pioneer Surveying on the basis of authentication.
16 Mr. Montgomery wasn't copied but he says he really
17 didn't know anything about it.

18 BY MR. JOHNSON:

19 Your Honor, we stipulated to all the third-party's
20 documents. That is a third-party document. I have
21 the Records Custodian Affidavit from Pioneer.
22 Regardless, I can enter it in through Mr. Merlo, it
23 doesn't matter.

24 BY THE COURT:

25 Well, I mean that's I was going to say. Now, I

1 agree that he's got a valid point that Mr.
2 Montgomery can't authenticate that document when he
3 testified he didn't know anything about it.

4 BY MR. JOHNSON:

5 I understand.

6 BY THE COURT:

7 He wasn't a party to it apparently. So that one
8 would not be admissible at this point. The others,
9 I mean what you need to do is get rid of that page
10 and make that a separate document and see if you
11 can it in later and ---

12 BY MR. JOHNSON:

13 Yes.

14 BY THE COURT:

15 But otherwise you've got -- how many pages is it?
16 Now, I've got Defendant's Exhibit Number 4 is an
17 email with Pioneer Surveying.

18 BY MR. JOHNSON:

19 Yes, sir, and that is an email between Mr.
20 Montgomery and Pioneer.

21 BY THE COURT:

22 And that's different from what you're talking about
23 now?

24 BY MR. JOHNSON:

25 Yes, sir.

1 BY THE COURT:

2 Now, what is this group going to be called?

3 BY MR. JOHNSON:

4 This is going to be called the -- the first page is
5 the License to Build.

6 BY THE COURT:

7 So this has something to do with IBI and Don
8 Gardner ---

9 BY MR. JOHNSON:

10 Yes, Your Honor.

11 BY THE COURT:

12 --- situation?

13 BY MR. JOHNSON:

14 So the first three pages, Your Honor, would be the
15 license, the next page of Exhibit 5 is an email
16 between Mr. Montgomery and Mr. Merlo where Mr.
17 Merlo is sending the plans to Mr. Montgomery, and
18 the third page is the plot plan for John Montgomery
19 by Freeland Engineers for 543 Riverstone Drive.

20 BY MR. COURT:

21 Riverstone. All right, so those -- how many total
22 pages is that? Is that five pages?

23 BY MR. JOHNSON:

24 Five pages, Your Honor.

25 (DEFENDANT'S EXHIBIT 5 MARKED FOR IDENTIFICATION)

1 BY THE COURT:

2 All right. And that's deleted, the one you
3 objected to I assume?

4 BY MR. TAROKH:

5 Correct, Your Honor.

6 BY THE COURT:

7 Have you got any objection to those?

8 BY MR. TAROKH:

9 No, Your Honor, not with the deleted pages.

10 BY THE COURT:

11 All right. So it is agreed those five pages will
12 be Defendant's Exhibit Number 5 and that will be
13 admitted without objection.

14 (DEFENDANT'S EXHIBIT 5 ADMITTED INTO EVIDENCE)

15 BY THE COURT:

16 It gets a little confusing when we start lumping
17 multiple documents.

18 Q Well, I'll try and not have it. Let me switch that
19 one. All right, Mr. Montgomery, would you take a
20 look at those plans.

21 A. Okay.

22 Q. Where in the process were those plans?

23 BY THE COURT:

24 Well, how about just for the record's sake, let's
25 go ahead and tell me what that is, plans of what or

1 who?

2 BY MR. JOHNSON:

3 Your Honor, these are the construction plans for
4 Mr. Merlo's residence.

5 BY THE COURT:

6 The construction plans?

7 BY MR. JOHNSON:

8 Yes, sir, these are the final plans.

9 BY THE COURT:

10 And that's ---

11 BY MR. JOHNSON:

12 Any objection?

13 BY MR. TAROKH:

14 I have a bigger copy.

15 BY MR. JOHNSON:

16 That's fine.

17 BY MR. TAROKH:

18 Do you want to use it?

19 BY MR. JOHNSON:

20 Do you have one for the Court:

21 BY MR. TAROKH:

22 Your Honor, I have a bigger copy of ---

23 BY THE COURT:

24 All right. So those are the construction plans and
25 it would be this Sandy Creek plan from Don Gardner

1 that's been modified?

2 A. Yes, sir.

3 BY THE COURT:

4 Is that correct?

5 A. Yes, sir.

6 BY THE COURT:

7 And that appears by Mr. Merlo from who?

8 BY MR. JOHNSON:

9 From Don Gardner, Your Honor.

10 BY THE COURT:

11 Okay.

12 Q. And so the plans that are going to be introduced as

13 Defendant's 5, Defendant's 6 ---

14 (DEFENDANT'S EXHIBIT 6 MARKED FOR IDENTIFICATION)

15 BY THE COURT:

16 This will be Defendant's Exhibit 6?

17 BY MR. JOHNSON:

18 Yes, Your Honor.

19 BY THE COURT:

20 And there's no objection?

21 BY MR. TAROKH:

22 No objection.

23 BY THE COURT:

24 All right, that's admitted.

25 (DEFENDANT'S EXHIBIT 6 ADMITTED INTO EVIDENCE)

1 Q. Is it your understanding that these are the final
2 plans?

3 A. These are, I wouldn't categorize them as final but
4 this what the house was built off of and this is
5 what he modified. As a matter of fact, if I'm not
6 mistaken I'm sure there are modifications, so I
7 would so yes, with modifications notes.

8 Q. But the title to those plans is still the Sandy
9 Creek plan, correct?

10 A. The title at the bottom says Sandy Creek Design
11 Number M177176-1329-DRMR.

12 Q. So Mr. Merlo gave you a Sandy Creek plan and you
13 took the Sandy Creek plan to build your own house?

14 A. No, uh-huh (negative), I don't know how many times
15 I have to explain that to you. We built the Sandy
16 Creek plan, the original one that was purchased on
17 the internet that is available this day, a
18 reproducible set, a factory mill set, it's there
19 like a pair of socks, anybody can get them.

20 Q. But the plan that Mr. Merlo, you think it was
21 modified when he got it in August ---

22 A. No, I know he modified it because it says
23 modifications on it.

24 Q. I understand that, Mr. Montgomery. But when he got
25 the plans offline in August, had he modified them

1 at that stage?

2 A. I don't think so. I don't know, but I wouldn't
3 have -- I know what, I don't know.

4 Q. But so you would agree with me that the email
5 showed that he didn't modify it to this until after
6 he learned about it on October 24th, and that's two
7 weeks after you've already gotten the site plan
8 based on the plans that he originally bought?

9 A. No, we got the site plans based on the Sandy Creek.
10 There's no way to tell it's his plans because
11 they're available for everybody. Like I said, I
12 just had a client send them to me yesterday or two
13 months ago saying the "Sandy Creek Plan". It's not
14 his plans. He just bought a reproducible set
15 that's from factory mill type architect, Don
16 Gardner, and that's what happened. I didn't, we
17 didn't -- if you're saying that he gave me actual
18 hard copies of a plan and if you're saying that I
19 went and took that plan and built another house,
20 no, that is not the case. We took the Sandy Creek
21 plan, the original one that's available on the Don
22 Gardner website.

23 Q. The one that Mr. Merlo emailed to you in August of
24 '17?

25 A. Yeah, it was a Sandy Creek plan, yes.

1 Q. Okay. So you took the one he emailed you in August
2 ---

3 A. No, I did not. I'm not saying I took the one he
4 sent me. I don't know which one. We have a file
5 with a plethora of generic plans, I told you, and
6 Sandy Creek was in that file.

7 Q. Okay.

8 A. I can assume I took that file, like I stated many
9 times to you in deposition and today, and filed it
10 in that file which Greg and I share, and my
11 assumption is he's looking at the plat and trying
12 to find a home that fits, playing around with it,
13 it's a spec home, we don't have a homeowner
14 involved, and he finds this and that's how the ball
15 generated, okay. I did not testify that I took his
16 personal plans because they're not his personal
17 plans, they're still available online. I took the
18 Sandy Creek plan. If anything that you're painting
19 a picture of me about I did it in error, I should
20 not have put it in the file. It was lack of daze
21 on my part and for that I regret. But at the end
22 of the day we built a different plan than his
23 house, we bought the license to it and it's a plan
24 that's still being reproduced today, okay. I don't
25 know what else that we can even talk about with it.

1 Q. But at the time you decided to use it, you did not
2 know whether or not he bought exclusive rights to
3 the plan?

4 A. I have no idea about that, no.

5 Q. But you chose to use them anyway?

6 A. I did not use his plans, I used the Sandy Creek
7 plan.

8 Q. Well, at that stage that's all he had.

9 A. Him and thousands of other people that buy it. Did
10 you ask Don Gardner how many times he had sold it?

11 Q. No, I did not.

12 A. Because it was brought up in our mediation. He had
13 sold that plan in the Southeast 1100 times since
14 2014. Did he tell you that? No? See, there
15 again, you're muddying the waters and you're
16 wasting our time and the Court's time. Let's get
17 to the facts, all right?

18 Q. Well, these are facts.

19 A. No, it's not. You're making a claim that I stole
20 his personal plans and that is far from the truth.
21 Our track record says otherwise. I can submit
22 proof that we have been involved with and paid for
23 hundreds of thousands of dollars' worth of
24 architect fees, bought plans. I can testify, I can
25 produce documents showing we spent \$90,000 last

1 year with architects. I can produce documentation
2 that shows that we have an architectural design
3 plan with all our customers. When they come in if
4 they don't have a plan, we submit them, we connect
5 them with one of our preferred architects, we
6 design the home for them and we purchase the plan
7 straight from them. We have a track record
8 including architects. I made a simple mistake by
9 filing a very reproducible set of plans into a file
10 that I shouldn't have and that's my mistake.

11 Q. And you ---

12 A. And how it affects his project on the other side of
13 the lake? I don't know the answer to that, I don't
14 know. And it's a different plan than what he
15 redesigned. If you want to go through, let's pull
16 the plan back up, this one right here, and we go
17 through what changed from the original Sandy Creek
18 to this one and I bet you're going to see a lot.

19 Q. But you don't download it by not buying the license
20 until ---

21 A. I bought the license afterwards, yes, sir.

22 BY THE COURT:

23 Now, Mr. Johnson, let me, let me stop you right
24 there. Now, I've let you go on a long time talking
25 about this plan.

1 BY MR. JOHNSON:

2 Okay.

3 BY THE COURT:

4 And it seems like to me that if anybody has got a
5 dog in that fight, it's going to be Don Gardner and
6 Don Gardner ain't here today. So ---

7 BY MR. JOHNSON:

8 He's not here.

9 BY THE COURT:

10 --- you know, I understand what you're saying that
11 he paid for a plan, you know, and he had an
12 exclusive right to it. But Don Gardner ultimately
13 is the architect and he's the one that has a
14 complaint if somebody starts using plans of his and
15 without proper license and so forth. Well, that's
16 not an issue in this case as far as I can see.

17 BY MR. JOHNSON:

18 No, I understand. I understand ---

19 BY THE COURT:

20 I think you've beat that horse to death.

21 BY MR. JOHNSON:

22 It's a pattern of deceitful behavior, Your Honor.

23 BY THE COURT:

24 Well, I mean that's an argument you can make. You
25 have the perfect right to make an argument, but I

1 think I understand what you're saying and I
2 understand what the witness has testified to
3 multiple times so far that the Sandy Creek plans
4 are available online to anybody that wants to buy
5 it and 1100 people have bought it. Now, Mr. Merlo
6 got a Sandy Creek plan and then he changed it and
7 modified it and probably paid some money to Don
8 Gardner to change it, but that's not what we're
9 talking about. So let's move on.

10 Q. Yes, sir. Mr. Montgomery, during the project you
11 were the one who mostly emailed back and forth with
12 Mr. Merlo; is that correct?

13 A. Yes, sir.

14 Q. Okay. And did he send you certain re-work lists --
15 -

16 A. Yes, sir.

17 Q. --- along the way?

18 A. Yes, sir.

19 Q. Okay. I'm going to give you a stack of re-work
20 lists and ask if you remember those?

21 A. I mean these looks similar to the ones he emailed,
22 yes.

23 Q. All right. Do you see any in there that you do not
24 recognize?

25 A. I can't say for certain because this is handwritten

1 on here and he would email me.

2 Q. Your Honor, this is an exhibit I had intended to
3 use the audio/visual tools that they told us were
4 available.

5 BY THE COURT:

6 I mean nobody has said anything to me about
7 beforehand so I don't -- I mean I probably could
8 have made some arrangements but I didn't know
9 anything about you needing to do that, but I mean
10 you can go ahead and do whatever you need to do. I
11 don't know. Can you set it up with that thing or?

12 BY MR. JOHNSON:

13 Yes, sir. I mean would projecting on that wall be
14 the most beneficial to you?

15 BY THE COURT:

16 I can't see a thing. I mean, you know, I can't see
17 that wall that great but that's what set up for the
18 jury if we had a jury ---

19 BY MR. TAROKH:

20 Your Honor, may we take a quick five-minute break
21 while he sets that up?

22 BY THE COURT:

23 Well, I mean is that going to be long enough? I
24 don't know Mr. Johnson's technical expertise?

25 BY MR. TAROKH:

1 Then an hour then.

2 BY THE COURT:

3 Yeah, we'll take a break while he gets that set up.

4 BY MR. TAROKH:

5 Thank you.

6 BY MR. JOHNSON:

7 Thank you.

8 (OFF THE RECORD)

9 BY THE COURT:

10 Who is that in the back?

11 BY MR. TAROKH:

12 Your Honor, that's the next witness for the

13 Plaintiff after Mr. Montgomery rests.

14 BY THE COURT:

15 How much longer you going to be talking to Mr.

16 Montgomery, you think, because I mean it's already

17 3:30?

18 BY MR. TAROKH:

19 Yes, Your Honor. I asked him to be here at 3:30

20 under Subpoena.

21 BY MR. JOHNSON:

22 And I'll be happy to proceed in that way if you

23 want to go that way?

24 BY MR. TAROKH:

25 I'm fine with that, Your Honor. If counsel will

1 allow ---

2 BY THE COURT:

3 Well, I'm just saying, you know, we've probably got
4 a lot of work certainly not to be after 5:00,
5 probably a little before that would be better?

6 BY MR. JOHNSON:

7 No, that's, that's ---

8 BY THE COURT:

9 However y'all want to do it? Now, if you say you
10 want to let him go ahead and do this witness and --
11 -

12 BY MR. JOHNSON:

13 And I can come back to Mr. Montgomery and finish up
14 this line of questioning on this?

15 BY MR. TAROKH:

16 Yeah.

17 BY MR. JOHNSON:

18 That works for me.

19 BY MR. TAROKH:

20 That's fine. He can finish up cross after this
21 witness and I can redirect with the witness.

22 That's fine.

23 BY THE COURT:

24 Well, I don't know how long this witness will take
25 but he's going to be last witness of the day and

1 then we'll ---

2 BY MR. TAROKH:

3 It shouldn't take him long, Your Honor. I know
4 that's general ---

5 BY THE COURT:

6 Well, I've heard that before. All right, well, Mr.
7 Montgomery, if you can just step down ---

8 BY MR. MONTGOMERY:

9 Yes, sir.

10 BY THE COURT:

11 --- and we'll go ahead. You're subject to coming
12 back and finishing up.

13 BY MR. MONTGOMERY:

14 Yes, sir.

15 BY THE COURT:

16 We won't get to you until in the morning.

17 BY MR. JOHNSON:

18 And I'll be all analog for the rest of the trial,
19 Your Honor.

20 BY THE COURT:

21 All right. So we'll proceed with the next witness.
22 Come on around here and be sworn in by the court
23 reporter please.

24 BY COURT REPORTER:

25 Do you solemnly swear or affirm to tell the truth,

1 the whole truth, and nothing but the truth so help
2 you God?

3 BY MR. WEST:

4 I do.

5 TESTIMONY OF LEE MATTHEW WEST, III

6 DIRECT EXAMINATION BY MR. TAROKH:

7 Q. Good afternoon, Mr. West. My name is Jason Tarokh
8 and I represent the Plaintiff in this case,
9 Montgomery Holdings, LLC d/b/a IBI Builders versus
10 Christopher Merlo. You're here from Subpoena,
11 correct?

12 A. Yes.

13 Q. And can you please state your full name for the
14 record?

15 A. Lee Matthew West, III.

16 Q. And can you please give the Court the benefit of
17 your education and background?

18 A. I graduated from Clemson in '92 with a degree in
19 finance and been doing appraisal work in the
20 Upstate since 1998.

21 Q. And do you have an appraisal company that you own?

22 A. I do.

23 Q. And what's the name of that company?

24 A. Appraisal Associates of Anderson.

25 Q. Now, are you familiar with the Merlo project

1 located at 548 Marina Bay Drive in Seneca?

2 A. Yes.

3 Q. And how are you familiar?

4 A. I did an appraisal based on plans and specs for
5 GrandSouth Bank.

6 Q. Now, you did multiple appraisals; is that correct?

7 A. On this property?

8 Q. Yes, sir.

9 A. No.

10 Q. Did you do draw inspections?

11 A. Yes.

12 Q. Okay. I'm going to show you a document which will
13 be marked as an exhibit.

14 BY MR. JOHNSON:

15 No objection.

16 BY COURT REPORTER:

17 It will be 43.

18 (PLAINTIFF'S EXHIBIT 43 MARKED FOR IDENTIFICATION)

19 Q. Plaintiff's Exhibit 43, Your Honor.

20 BY THE COURT:

21 All right, Plaintiff's Exhibit 43 will be admitted
22 without objection.

23 (PLAINTIFF'S EXHIBIT 43 ADMITTED INTO EVIDENCE)

24 Q. Can you take a moment and take a look at that time
25 document and let me know if you know what it is?

1 A. Yes.

2 Q. What is it?

3 A. This was the first Draw Inspection that I
4 completed.

5 Q. Okay. And can you tell me what's referenced on
6 that document?

7 A. As far as just the inspection?

8 Q. If I may?

9 A. Okay.

10 Q. Yes. I guess what is, what is a Draw Inspection
11 Report?

12 A. This is a form provided to me from GrandSouth Bank.

13 Q. Okay.

14 A. This is the form that they use and so it's just got
15 the borrower's information, the builder's name, the
16 address of the property, and then there's a
17 breakdown sheet allotting percentages and I go out
18 and check and verify if those items have been
19 completed.

20 Q. And then you would assign a value to certain
21 aspects?

22 A. I assign a percentage ---

23 Q. Okay.

24 A. --- complete. Like the bank has it broken down
25 into percentages depending on what, meaning this is

1 their form, and so as I go out and inspect if that
2 line item has been done, then I allocate a
3 percentage complete, two percent or three percent
4 or whatever the bank's form.

5 Q. And that's your handwriting ---

6 A. Yes.

7 Q. --- on that document?

8 A. Yes.

9 Q. Okay. And if you could turn the page and are those
10 pictures?

11 A. Yes.

12 Q. What are those pictures of?

13 A. That is the photographs that I took on the day of
14 the inspection.

15 Q. And are those photographs dated on that document?

16 A. Yes.

17 Q. And what's the date?

18 A. February 28 of 2018, I mean, yeah, 2/28/18.

19 Q. Okay. I'm going to show you another document.

20 BY MR. JOHNSON:

21 No objection.

22 (PLAINTIFF'S EXHIBIT 44 MARKED FOR IDENTIFICATION)

23 BY THE COURT:

24 That will be Number 44 admitted without objection.

25 (PLAINTIFF'S EXHIBIT 44 ADMITTED INTO EVIDENCE)

1 Q. I'm handing you what's been admitted as Plaintiff's
2 Exhibit 44. What is that document?

3 A. It's the second Draw Inspection.

4 Q. Okay. And the same types of things you just
5 testified to, are those also indicated on this
6 document?

7 A. Yes.

8 Q. Okay. And the pictures that are on the second, the
9 subsequent pages, are those pictures you took of
10 the property?

11 A. Yes.

12 Q. And are they also dated?

13 A. Yes.

14 Q. And what are the dates?

15 A. May 3rd, 2018.

16 (PLAINTIFF'S EXHIBIT 45 MARKED FOR IDENTIFICATION)

17 BY MR. JOHNSON:

18 No objection.

19 BY THE COURT:

20 Plaintiff's Exhibit 45 admitted without objection.

21 (PLAINTIFF'S EXHIBIT 45 ADMITTED INTO EVIDENCE)

22 Q. Mr. West, I'm going to show you another document
23 that's been admitted into evidence as Plaintiff's
24 Exhibit Number 45; do you recognize that document?

25 A. Yes.

- 1 Q. What is it?
- 2 A. Draw Inspection Number 3.
- 3 Q. Okay. And the same types of questions, so the
- 4 numbers that are on the middle of the first page,
- 5 those are numbers that you input based upon your
- 6 inspection?
- 7 A. Yes.
- 8 Q. And the subsequent pages, they have pictures?
- 9 A. Yes.
- 10 Q. And those are pictures of the Merlo property that
- 11 you took on the date indicated therein?
- 12 A. Yes.
- 13 Q. And what is the date of that?
- 14 A. July 3rd, 2018.
- 15 Q. And let me ask you something on the bottom. If I
- 16 may? Excuse me. So are those your initials?
- 17 A. Yes.
- 18 Q. Okay. And there's like a 33 on the bottom, what
- 19 does that 33 mean?
- 20 A. 33% complete.
- 21 Q. Okay. So as of the date of that inspection it's
- 22 33% complete?
- 23 A. (Affirmative nod)
- 24 Q. Is that correct?
- 25 A. Yes.

1 Q. I'm sorry, just for purposes of the court reporter,
2 verbalize your answers please.

3 A. Yes.

4 BY MR. JOHNSON:

5 No objection.

6 (PLAINTIFF'S EXHIBIT 46 MARKED FOR IDENTIFICATION)

7 BY THE COURT:

8 All right. Exhibit Number 46 admitted without
9 objection.

10 (PLAINTIFF'S EXHIBIT 46 ADMITTED INTO EVIDENCE)

11 Q. I'm going to show you what's been marked as
12 Plaintiff's Exhibit Number 46 which has been
13 admitted into evidence; what is that document?

14 A. Draw Inspection Number 4.

15 Q. Does it indicate the level of completeness?

16 A. Yes.

17 Q. And what's the number?

18 A. A total of 40%.

19 Q. And the subsequent pages are pictures that you took
20 of the property?

21 A. Yes.

22 Q. And what are the dates?

23 A. August 2nd, 2018.

24 Q. I'm going to show you another document.

25 BY MR. JOHNSON:

1 No objection, Your Honor.

2 (PLAINTIFF'S EXHIBIT 47 MARKED FOR IDENTIFICATION)

3 BY THE COURT:

4 All right. So Exhibit Number 47 is admitted
5 without objection.

6 (PLAINTIFF'S EXHIBIT 47 ADMITTED INTO EVIDENCE)

7 Q. I'm going to show you another document that has
8 been marked as Plaintiff's Exhibit 47 that's been
9 admitted into evidence. What is that document?

10 A. Draw Inspection Number 5.

11 Q. Okay. And does it indicate the percentage of
12 completeness?

13 A. 54%.

14 Q. And that's the value you assigned?

15 A. Yes.

16 Q. Okay. And based upon this and the inspection of
17 that day, what is the date of inspection?

18 A. September the 12th, 2018.

19 Q. Okay. And you also have pictures of the property
20 as of that date ---

21 A. Yes.

22 Q. --- that you took on subsequent pages; is that
23 correct?

24 A. Yes.

25 BY MR. JOHNSON:

1 No objection.

2 (PLAINTIFF'S EXHIBIT 48 MARKED FOR IDENTIFICATION)

3 BY THE COURT:

4 What was that?

5 BY MR. TAROKH:

6 Plaintiff's Exhibit Number 48, Your Honor.

7 BY THE COURT:

8 Okay. And there's no objection so it's admitted.

9 (PLAINTIFF'S EXHIBIT 48 ADMITTED INTO EVIDENCE)

10 Q. I'm going to show you what's been marked as
11 Plaintiff's Exhibit Number 48 that's been admitted
12 into evidence; what is that document?

13 A. Draw Inspection Number 6.

14 Q. And does it indicate the level of completeness that
15 you assigned?

16 A. Yes, 66%.

17 Q. And what's the date?

18 A. 10/17/2018.

19 Q. And the subsequent pages, do they have pictures of
20 the property you took?

21 A. Yes.

22 BY MR. JOHNSON:

23 No objection.

24 (PLAINTIFF'S EXHIBIT 49 MARKED FOR IDENTIFICATION)

25 BY THE COURT:

1 All right. Plaintiff's Exhibit Number 49 admitted
2 without objection.

3 (PLAINTIFF'S EXHIBIT 49 ADMITTED INTO EVIDENCE)

4 Q. I'm going to show you another document that's been
5 admitted into evidence, Plaintiff's Exhibit 49;
6 what is that document?

7 A. An invoice.

8 Q. Are there other pages attached to that invoice?

9 A. Draw Inspection Number 7.

10 Q. Okay. And what's the date of that Draw Inspection?

11 A. It looks like March 13th, 2019.

12 Q. Okay. And does it indicate a level of completeness
13 or percentage of completeness, excuse me?

14 A. 78.

15 Q. Okay. And that's the value you assigned based upon
16 the site inspection that date?

17 A. Yes.

18 Q. And there's also pictures indicated in that
19 document, correct?

20 A. Yes.

21 Q. And you took those pictures?

22 A. That day.

23 Q. Okay. I'm going to show you another document.

24 BY MR. JOHNSON:

25 No objection.

1 (PLAINTIFF'S EXHIBIT 50 MARKED FOR IDENTIFICATION)

2 BY THE COURT:

3 Plaintiff's Exhibit Number 50 admitted without
4 objection.

5 (PLAINTIFF'S EXHIBIT 50 ADMITTED INTO EVIDENCE)

6 Q. I show you what's been marked as Plaintiff's
7 Exhibit 50; do you recognize that document?

8 A. Yes.

9 Q. What is it?

10 A. Draw Inspection Number 8.

11 Q. And does it indicate a level or percentage of
12 completeness?

13 A. 88%.

14 Q. And does it also have pictures of the property?

15 Let me back up, what's the date of that Inspection
16 Report?

17 A. June 26th, 2019.

18 Q. Does it also have pictures of the property as of
19 that date?

20 A. Yes.

21 Q. I'm going to show you another document.

22 BY MR. JOHNSON:

23 No objection.

24 (PLAINTIFF'S EXHIBIT 51 MARKED FOR IDENTIFICATION)

25 BY THE COURT:

1 That will be Plaintiff's Exhibit Number 51 admitted
2 without objection.

3 (PLAINTIFF'S EXHIBIT 51 ADMITTED INTO EVIDENCE)

4 Q. I show you what's been marked as Plaintiff's
5 Exhibit 51; do you recognize that document?

6 A. Yes.

7 Q. What is it?

8 A. Draw Inspection Number 9.

9 Q. And what's the date of that document?

10 A. August 26th, 2019.

11 Q. And does it indicate a percentage of completion?

12 A. Yes, 93%.

13 Q. And does it also have pictures?

14 A. Yes.

15 Q. And those are pictures you took as of that date?

16 A. Yes.

17 Q. Now, the Draw Inspection Reports to which you just
18 testified, the multiple ones, were those
19 transmitted to the bank?

20 A. Yes.

21 Q. And was it your understanding that the bank made
22 draw payment decisions based upon that inspection?

23 A. Yes.

24 Q. And is that normally how the bank does business,
25 they employ you to make inspections?

1 A. As far as I know.

2 Q. And how long have you been an appraiser, or excuse
3 me, how long have you been an inspector for the
4 bank? How long have you made -- I mean how long
5 have you been making draw inspections for
6 GrandSouth Bank?

7 A. I started doing fee appraisal work in 1998, so I
8 would assume in and around 1998 they were one of my
9 clients so.

10 Q. For a long time?

11 A. Yes.

12 Q. Okay. Did you notice anything, any issues with the
13 home when you made your visits to the property to
14 complete your Draw Inspection Reports?

15 A. No.

16 Q. If you notice any issues, would you transmit that
17 information to the bank?

18 A. If it was something that I felt was really un-
19 normal, but I'm not a contractor or that's not my -
20 --

21 Q. Okay.

22 A. --- expertise.

23 Q. Okay. So based upon your reports the house was 93%
24 complete?

25 A. Yes.

1 Q. Did you do any subsequent inspection reports ---

2 A. No.

3 Q. --- on this property? No further questions, Your
4 Honor.

5 BY THE COURT:

6 Mr. Johnson.

7 CROSS EXAMINATION BY MR. JOHNSON:

8 Q. Mr. West, I'm Townes Johnson and I represent Chris
9 Merlo in this matter. In your investigations I see
10 on your inspection sheet you have categories; is
11 that accurate to say?

12 A. Yes.

13 Q. And your inspection, how would you characterize it?
14 Is it looking to see if it's done or how well it's
15 done?

16 A. If it's done, but both.

17 Q. Both. Did you have any understanding of the
18 contract between IBI and Mr. Merlo?

19 A. I had a copy of the contract.

20 Q. Okay, you did have a copy of the contract; did you
21 have a copy of the plan?

22 A. Yes.

23 Q. Okay. Did you look to see if they had built the
24 house to the plans and specs?

25 A. During the inspections, yeah, I mean I was looking

1 at it, but the final inspection typically is when I
2 measure to see if the house was built exactly to
3 sign off on the final inspection, which I never
4 did.

5 Q. Okay. But if the plans called for a poured wall
6 that wasn't there, how would you handle that?

7 A. I guess if it was something that I noticed, but on
8 the plans it's hard to figure some of that. I mean
9 since I'm not a builder, you know, I'm not there to
10 measure the construction part of it. I'm more just
11 looking to see ---

12 Q. So you're a little bit limited and I mean you're
13 looking basically for completion?

14 A. Yes.

15 Q. You don't always know what quality it is; is that
16 fair to say?

17 A. Yes.

18 Q. In a typical engagement for you how many draws are
19 there?

20 A. It would vary depending on the type of house, the
21 quality of the house.

22 Q. Okay. And how routinely are draws usually called
23 in?

24 A. Again that, that varies.

25 Q. Okay.

1 A. I mean there's no set.

2 Q. Is it unusual to go five months without a draw like
3 we did in this case between draw number 6 and draw
4 number 7?

5 A. Yes.

6 Q. Why is that unusual?

7 A. Because it's, you know, more so around every 30
8 days, 45 days.

9 Q. Okay. So five months is a real outlier in what you
10 do?

11 A. That's, in the construction loans that I've been
12 involved in, yes, it would be unusual to go five
13 months in between draw inspections.

14 Q. Okay. Is it also unusual that in those five months
15 only, and per your inspection like 12% was
16 accomplished between October 17th '18 and March 13
17 of '19?

18 A. Yeah, that's atypical.

19 Q. And going back, I know you said you didn't measure,
20 and so you didn't measure to see if the height of
21 the basement ceiling was in accordance with the
22 contract?

23 A. No, I did not.

24 Q. That's all the questions I have, Your Honor.

25 BY THE COURT:

1 Any redirect?

2 BY MR. TAROKH:

3 No, Your Honor.

4 BY THE COURT:

5 All right. Mr. West, you may step down. I assume
6 y'all don't have any objection to him being
7 excused?

8 BY MR. TAROKH:

9 No, Your Honor.

10 BY MR. JOHNSON:

11 No, Your Honor.

12 BY THE COURT:

13 All right, you're free to go. All right, so do you
14 want to go back to cross examination of Mr.
15 Montgomery?

16 BY MR. JOHNSON:

17 I believe so, Your Honor. I believe that makes
18 sense.

19 BY THE COURT:

20 I mean what else are we going to do?

21 BY MR. JOHNSON:

22 I agree.

23 BY THE COURT:

24 Now, it's about 10 minutes till 4, so I don't know
25 how long you've got but hopefully it's not more

1 than 10 minutes. I'm just kidding. We're back
2 into the darkness.

3 BY MR. JOHNSON:

4 Back into the darkness. I shouldn't have moved my
5 setup.

6 (OFF THE RECORD WHILE SETTING UP PROJECTOR)

7 BY THE COURT:

8 Well, put on the record what is it you are going to
9 do about all that? I don't know what y'all were
10 talking about.

11 BY MR. JOHNSON:

12 Very good, Your Honor.

13 TESTIMONY OF JOHN MONTGOMERY CONTINUED

14 CROSS EXAMINATION RESUMED BY MR. JOHNSON:

15 Q. So, Mr. Montgomery, I'm going to hand you a
16 computer.

17 A. Okay.

18 Q. And that ---

19 A. We're not doing projection?

20 Q. It wouldn't show up so you could read it.

21 A. All right.

22 Q. So that email is from Mr. Merlo to you.

23 A. Okay.

24 BY THE COURT:

25 Are these exhibits that have already been submitted

1 or ---

2 BY MR. TAROKH:

3 No, Your Honor. I believe what opposing counsel
4 intended to do is these are documents that I had
5 produced in discovery. He doesn't have hard copies
6 with him today and so tomorrow whatever documents
7 are testified to on Mr. Johnson's computer by the
8 witness, Mr. Johnson is going to bring hard copies.

9 BY MR. JOHNSON:

10 And I'll have hard copies from here on, Your Honor.

11 BY THE COURT:

12 Well, are you going to introduce any of this as
13 exhibits?

14 BY MR. JOHNSON:

15 I'd like to. I can put them in tomorrow if that's

16 ---

17 BY THE COURT:

18 Okay, all right.

19 BY MR. JOHNSON:

20 I mean unless you have objection to it? Do you
21 want to stand here and watch?

22 BY MR. TAROKH:

23 Yeah. I mean I'd like to sit here and watch so I
24 can keep track, and I have no problem of the
25 witness, not to burn time, testifying as to what

1 these documents are and having the actual physical
2 copies brought by opposing counsel tomorrow to, you
3 know, be introduced into evidence.

4 BY THE COURT:

5 All right.

6 CROSS EXAMINATION RESUMED BY MR. JOHNSON:

7 Q. Okay, my apologies, Your Honor. All right. So,
8 Mr. Montgomery, before you is an email from
9 February 26th, 2019 from Mr. Merlo to you.

10 A. Uh-huh (affirmative).

11 Q. Are you familiar with that email?

12 A. Yes, he's replying to my email right here.

13 Q. Okay.

14 BY THE COURT:

15 What's the date on that again?

16 A. February 26th, 2019.

17 Q. And that email contemplates an attachment; is that
18 correct?

19 A. Yeah, it looks like a Word document and an Excel
20 document.

21 Q. And one of the Word documents is called a Re-work
22 List; is that correct?

23 A. Yes, Merlo House Re-work List.

24 Q. Your Honor, part of the problem is my hotspot for
25 me, I couldn't find the courthouse wifi. All

1 right. So, Mr. Montgomery, what you're looking at
2 was pre-marked as Exhibit 35 by your counsel. Is
3 it your understanding that that is the attachment
4 to the February 26th email?

5 A. I have no way of knowing. You went into a
6 different file and opened this up, so I can't say
7 for certain.

8 BY MR. TAROKH:

9 Just note for the record I think that was Exhibit
10 33, not 35.

11 BY MR. JOHNSON:

12 Yeah, I think it was 35.

13 BY MR. TAROKH:

14 Okay.

15 BY THE COURT:

16 Wait a minute, whoa, time out.

17 BY MR. JOHNSON:

18 I'm sorry.

19 BY THE COURT:

20 The email dated February 26th is what number? Is it
21 going to be a Defendant's Exhibit?

22 BY MR. JOHNSON:

23 It's going to be Number 7 if it's Defendant's
24 Exhibit.

25 BY THE COURT:

1 Okay. Defendant's Exhibit Number 7 is an email.

2 Is there any objection to that?

3 BY MR. TAROKH:

4 No, Your Honor.

5 BY THE COURT:

6 Okay. So then I assume the attached list, Re-work
7 List, those attachments that will be Exhibit Number
8 8?

9 BY MR. JOHNSON:

10 If that's easier. Counsel wanted to keep them
11 together as 7, but whatever Your Honor chooses?

12 BY THE COURT:

13 Well, I'm going by the way the Plaintiff's attorney
14 did his.

15 BY MR. JOHNSON:

16 Okay, that's fine.

17 BY THE COURT:

18 I mean he did each one separate so it might be
19 better to stay that way.

20 BY MR. JOHNSON:

21 Perfect, all right.

22 BY THE COURT:

23 So Defendant's Exhibit 8 will be the Re-work List
24 attached to the February 26th, 2019 email and that
25 will be admitted without objection.

1 (DEFENDANT'S EXHIBITS 7 & 8 TO BE MARKED AND ADMITTED
2 INTO EVIDENCE)

3 Q. All right, sir. I'm showing you an email from
4 August 8th of 2019.

5 A. Okay.

6 Q. Do you see that email?

7 A. There's two of them, actually three but.

8 Q. But the header says August 8th, 2019 at 5:25 p.m.?

9 A. The email on top says 5:25 p.m., yes.

10 Q. Okay. And is that an email from Mr. Merlo to you?

11 A. It is from Chris Merlo to myself, yes.

12 Q. Okay. And does that attach a Re-work List?

13 A. It's titled Merlo House Re-work.

14 BY THE COURT:

15 So is that going to be Defendant's 9 and 10?

16 Q. Yes, Your Honor.

17 BY THE COURT:

18 Any objection?

19 BY MR. TAROKH:

20 No, Your Honor.

21 (DEFENDANT'S EXHIBITS 9 AND 10 TO BE MARKED AND ADMITTED
22 INTO EVIDENCE)

23 Q. All right. Mr. Montgomery, that should be an email
24 from September 11, 2019 from Mr. Merlo to you?

25 BY THE COURT:

1 That's September 11, '19?

2 Q. Yes, sir.

3 A. It looks like a PDF file. I can't say it's for
4 certain to me because there's no reference that I
5 got it.

6 Q. Okay.

7 A. But it states at the top it's a pdf, it's like a
8 screen, looks like a screenshot or something, but
9 it is an email from Chris Merlo and it has me,
10 myself and Greg on there, Greg and myself. But I
11 don't know if I, because I'm not, like the other
12 emails you were showing me it's not in the same
13 format so I can't like comment too much on it, but
14 what's your question?

15 Q. Does this email purport to provide you with another
16 list?

17 A. It says, "Please find updated list for the house",
18 but there's no attachment, or at least I don't see
19 it on here. I'm sorry.

20 Q. And that re-work attachment list is shown on this,
21 it's labeled September 11, 2019 at the top, it says
22 Exhibit 78, September of '19?

23 A. Okay. Okay, that's what I see.

24 Q. Okay. Do you believe that this is the re-work list
25 that was sent to you on September 11th, 2019?

1 A. I cannot say for certain because it's just an
2 attachment or it appears to be an attachment.

3 Q. Is this a document that you produced to me in
4 discovery?

5 A. We produced several re-work lists. I cannot say
6 for certain this is the exact one we produced dated
7 that way because it's not tied to an email. This
8 does appear to be a re-work list that he sent
9 periodically, but you're asking me is this the one
10 that was sent to me on a specific date and I cannot
11 guarantee that.

12 Q. The email preceding that?

13 A. Well, yeah, but you went through files and opened
14 it up. It's not in an email format, so I can't --
15 I don't, you're asking me something I can't
16 affirmatively say. I'll be glad to go through the
17 list with you if you want to, but I can't ---

18 BY MR. TAROKH:

19 Your Honor, based upon his testimony, I have to
20 object on authentication grounds. He's testified
21 effectively that he doesn't recognize it or he's
22 not sure, so I would object.

23 BY THE COURT:

24 Well, at this point I'm going to have to sustain
25 the objection. But now the email itself, is that

1 objectionable? Because he's got an email on
2 September 11, 2019 and I believe he testified it
3 was an email from Merlo to him and Mr. Greg.

4 A. Yes, sir.

5 BY THE COURT:

6 All right. So that would be Defendant's Number 11
7 if there's no objection?

8 BY MR. TAROKH:

9 No objection to that email, but objection to the --
10 -

11 BY THE COURT:

12 I got you. Well, you can clear it up in the
13 morning.

14 BY MR. JOHNSON:

15 Yes, Your Honor, I'll clear it up.

16 (DEFENDANT'S EXHIBIT 11 TO BE MARKED AND ADMITTED INTO
17 EVIDENCE)

18 (DEFENDANT'S EXHIBIT 12 TO BE MARKED FOR IDENTIFICATION
19 ONLY)

20 Q. Are you familiar with any other re-work lists that
21 Mr. Merlo sent?

22 A. He sent several titled that way so, yes, I'm
23 familiar with them.

24 Q. And regarding the work, at the deposition Mr.
25 Grissinger was more day in and day out?

- 1 A. Correct.
- 2 Q. And so he'd know more about what was going on with
3 the work; is that accurate?
- 4 A. Absolutely.
- 5 Q. Okay, I'll take that back. Looking back at Exhibit
6 6, Defendant's Exhibit 6, it's the plan.
- 7 A. Is this Exhibit 6 or ---
- 8 Q. Defendant's Exhibit 6.
- 9 A. Okay, your Exhibit 6, I apologize. Okay.
- 10 Q. Do those plans show any poured concrete walls for
11 foundation?
- 12 A. Yes.
- 13 Q. How are those delineated?
- 14 A. Well, it doesn't show them poured in, it's just the
15 way they draw the lines.
- 16 Q. So tell the Court.
- 17 A. Yeah, they're drawn right here.
- 18 Q. So the thicker spacing?
- 19 A. Yeah, the wider fall, yeah.
- 20 Q. And then so those are shown on page one of the
21 plans as well as page three?
- 22 A. Uh-huh (affirmative).
- 23 Q. In the porch area was there called to be a poured
24 wall on what's shown on the left side of the porch
25 area?

- 1 A. This porch?
- 2 Q. Yes, sir.
- 3 A. Is that a poured wall?
- 4 Q. That's on the right side. Is there a poured wall
- 5 that's supposed to be on the left side?
- 6 A. Right here?
- 7 Q. On the left side of the porch?
- 8 A. The left side of the porch, to me it's hard to say
- 9 because you've got, it's showing a 2 x 4 wall and
- 10 this is a 2 x 6 wall and, yeah, because that's a
- 11 brick ledge so, yes. It's a little different from
- 12 what you've showed over here but, yeah, I would say
- 13 so.
- 14 Q. How is page one different from page two?
- 15 A. Because you see that line, does that look like that
- 16 to you or is that the same? This line right here,
- 17 the outer line and this outer line, is that the
- 18 same?
- 19 Q. Okay.
- 20 A. It's not the same. So you're asking me is it the
- 21 same and it's not the same.
- 22 Q. But do they both show a thick white expanse for the
- 23 poured foundation wall?
- 24 A. I don't what expanse is, but it does show a thicker
- 25 wider wall in both areas.

1 Q. Okay. Which page of this is the foundation plan
2 for the home?

3 A. It's titled usually foundation plan right here.

4 Q. And so do you believe that this should be a poured
5 wall which is looking at the plans, the porch to
6 the left?

7 A. No, I don't think -- should I think a wall should
8 be there?

9 Q. Should it be a poured concrete foundation wall?

10 A. It really depends on the actual, where the house is
11 located on the lot.

12 Q. Why would that make a difference?

13 A. Because all foundations are -- you know, we get
14 with our foundation company and it's engineered.
15 Most people -- like we encouraged Chris Merlo, we
16 encourage them to have a house designed for the
17 lot, not to try to buy a plan and modify it. And
18 in this case this plan is not designed for his lot,
19 therefore, foundation modifications must occur to
20 make it work. So when placing on the lot it's
21 going to really determine all aspects of your
22 foundation, not to this.

23 Q. So if I understand correctly, you're saying that
24 you can change the plans in the field to fit the
25 lot?

1 A. Well, that would be dimensionally speaking. I'm
2 talking about -- you're saying there should be a
3 wall right here. Well, in your perception of that,
4 it really doesn't make much sense because you said
5 a 10 foot wide thickened wall, so if he had a 10
6 foot wide thickened wall around the whole thing,
7 are you expecting a 10 foot wide thickened wall
8 over here, too, to run all the way down? That's
9 not the case. It won't work specifically for the
10 lot he has.

11 Q. Who said it a 10 foot thickened wall?

12 A. And that's why -- that's what you said earlier.
13 Did you not say thickened, a 10 foot thickened
14 wall?

15 Q. No, poured foundation concrete.

16 A. Well, a poured foundation wall if you're -- this
17 foundation actually turns. I believe, if I
18 remember correctly, Greg actually turned it to help
19 with all, retaining dirt over here to help, and
20 then your footer is poured, and then you frame up
21 from the footer. That would be the most efficient
22 way to do this and the proper way to build the home
23 because it was not designed specifically for this
24 lot. Again, this question would be better answered
25 by Greg, but I'm just going off recollection. I

1 believe he decided to put the foundation wall or
2 wrap it around under this. It makes sense to me if
3 he did this, wrap around underneath or around
4 somewhere around this area of the porch. That way
5 the same wall, instead of having two walls you're
6 actually saving the customer money without having
7 to put another retaining wall out to retain the
8 massive amount of dirt that he had, especially when
9 he moved it back three feet.

10 Q. I guess my specific question, you testified that
11 all these walls were poured concrete, right?

12 A. Are they poured concrete filled?

13 Q. Well, they were supposed to be from the plans right
14 here?

15 A. Poured concrete, yes, sir, in the footers
16 absolutely, yeah.

17 Q. Okay. And this wall which looks is drawn identical
18 to these walls, was that called to be a poured
19 concrete wall?

20 A. It's poured concrete, yes.

21 Q. Okay. So it was supposed to be poured concrete?

22 A. Yeah. Well, high is the wall? How high are you
23 referring to? There's poured concrete there
24 because there's no way you can frame up off of it
25 without it.

1 Q. Would you agree with me that the darker lines are
2 showing framing, this is on page two of the plans?

3 A. Yeah, the plans.

4 Q. Are those not studs that are placed horizontally
5 instead of vertically with the wall?

6 A. Why would you want to do that? So you have a
7 concrete moisture, which concrete absorbs moisture,
8 placed against your heated space. You wouldn't
9 want to have that better insulated than versus
10 concrete? It doesn't make sense, no one does that,
11 no one practices that.

12 Q. So on this ---

13 A. Again, you're taking a plan that was generated not
14 for the lot, it was not designed for that lot.

15 Q. What difference would that make? What would this
16 wall have anything to do with the site plan of the
17 lot?

18 A. What difference would it make?

19 Q. Yeah.

20 A. A lot. What are you going to do? Have you been,
21 have you been out to the site?

22 Q. Yes.

23 A. What is the elevation drop from the road to where
24 the house is?

25 Q. Probably 20 feet, 15 feet, I don't know.

1 A. It's probably about 50 to 60. You can see above
2 the house, okay. So if you don't have a retainage,
3 some type of dirt holding this back, what happens
4 there? I mean I know you're not a builder, but
5 wouldn't it make sense for you to retain that
6 massive amount of dirt that's coming at you?

7 Q. Well, ---

8 A. And by doing so, at the cost of the homeowner
9 doesn't have to pay any more money in doing so with
10 the foundation that's actually going into the --
11 that type of wall is actually going into the entire
12 foundation?

13 Q. Don't you believe if this wall had been a poured
14 concrete wall and waterproofed that that would've
15 been a benefit to the client?

16 A. It's waterproofed, the foundation is waterproofed.
17 It's has 20-year warranty.

18 Q. You believe this wall is waterproofed?

19 A. No, that -- from my recollection we turned this
20 wall this way around to help retain the dirt.
21 Again, that's my recollection. Greg is in the
22 field way more than I am so you'd be better asking
23 him.

24 Q. I mean do you see another wall right here?

25 A. I don't think -- yeah, you need to go to the cut

1 sheets and it should tell you.

2 Q. Well, please find it.

3 A. You're the one who said this is a wall, I don't
4 think that's a wall. I'd have to look at the
5 information here. Exterior face outside stud above
6 wall.

7 Q. So is this a wall out here?

8 A. Yes, on that plan.

9 Q. Correct.

10 A. Not for that lot.

11 Q. Okay. You don't think that this plan was for this
12 lot?

13 A. You think it was designed for that lot? The plan
14 was not designed specifically for his lot, no.

15 Q. Well, I mean but this is the plan that you agreed
16 to build on the lot?

17 A. Right, and we told him many times to design a house
18 plan to get for the lot, not buy and modify it
19 based off of plans generated dozens of times and
20 thousands of sales all over the country.

21 Q. Okay. So anyway this says, and this is a knee
22 wall?

23 A. Does it say a knee wall?

24 Q. Well, I mean I'll be glad to get pictures for you
25 to refresh your memory.

1 A. Okay. Well, for the record you just stated that it
2 says knee wall and it does not say that.

3 Q. I didn't say that.

4 A. It does not say knee wall. You're confusing,
5 you're trying to confuse me and it doesn't say knee
6 wall.

7 Q. I'm not trying to confuse you, I'm trying to simply
8 ask you if these plan say that this is a poured
9 concrete wall?

10 A. It appears to be a wall or it could be an expanded
11 footer, I don't know.

12 Q. Okay.

13 A. Does it identify it as a poured concrete wall where
14 you're pointing?

15 Q. Well, I mean it's the same as all these other
16 walls, is that not accurate?

17 A. But you don't, you don't build houses like that,
18 Mr. Johnson, you don't just sit there and randomly
19 put a wall where it doesn't belong. Again, this
20 plan does not work specifically for his lot so
21 modifications have to be made to make it a better
22 product for him, for the homeowner. If you did it
23 this way, it would be a bad situation for him. It
24 wasn't -- you'd have so much massive amounts --
25 what's going on with all this dirt on this side?

1 Q. Let's look at a picture. So this picture ---

2 A. You see, that's exactly what I was saying to you
3 earlier, that from my recollection the wall came
4 out to here, I was right. It's beside the, look at
5 that, specifically to hold that wall back.

6 Q. Okay.

7 A. Hold this dirt back.

8 Q. And my question is ---

9 A. I was right.

10 Q. --- where this zip board is, is that a ---

11 A. Uh-huh (affirmative), it's a framed wall.

12 Q. And it's not supposed to be a poured wall?

13 A. It's not going to work, it wouldn't work with this,
14 it wouldn't work with that.

15 Q. And you're telling me the plans don't call for this
16 to be ---

17 A. The plans show a wall in that area, okay, but it
18 doesn't work in this application.

19 Q. Why wouldn't a concrete wall work right there?

20 A. It doesn't make -- okay, because then we'd have to
21 charge him more for this. Why would we do that,
22 we're being cost-effective early on helping him?

23 Q. It's a lump-sum project, right?

24 A. Uh-huh (affirmative).

25 Q. And you bid it to build this house?

1 A. Uh-huh (affirmative).

2 Q. That would include a concrete wall right there,
3 would it not?

4 A. Yes, but does the plans, does this plan that you're
5 referring to, does it show retaining walls? It's
6 simple, it's very simple, you know all this. Look,
7 where does it show retaining walls on this plan?

8 Q. Does it show the concrete wall? Does it show the
9 concrete wall?

10 A. No, to me that's a footer. You called it a knee
11 wall. How high is a knee wall?

12 Q. So you think this is a footer?

13 A. And for his lot, let's picture this, if this was a
14 flat lot by which you build a wall up, like a 10
15 foot wall right there for no reason, would it make
16 sense?

17 Q. No, because it's not called on the plans to be a 10
18 foot wall.

19 A. It's not, this plan if you were on a flat lot,
20 would you build a 10-foot wall where it's not
21 needed out of concrete?

22 Q. No. But where a plan calls for a wall, don't you
23 have you have an obligation, or a poured concrete
24 wall, don't have you have an obligation to build it
25 that way?

1 A. You don't, not necessarily. I would build it to a
2 better, to a better efficient product for the
3 homeowner. I wouldn't want to have heated space
4 butted up against a 10 foot concrete, or an 8, 9
5 foot concrete wall, that's just me.

6 Q. Okay. Even if the plans call for that?

7 A. Okay, even if the plans call for that I would not
8 want that, no.

9 Q. If this wall had been concrete and waterproofed,
10 would that have solved some of the leaking issues
11 that Mr. Merlo ---

12 A. You'd have to be more specific, I don't know what
13 you're referring to.

14 Q. You're not aware of any leakage?

15 A. I know I'm sure there were some during a mudslide
16 during thunderstorms that we cleaned up, but I
17 don't know about -- you said there were leaking
18 issues like plural, so which ones? I said you'd
19 have to be more specific. Let's get specific and
20 tell me which one.

21 Q. Okay.

22 A. During construction -- if you notice, there ain't
23 even a roof on that house so how are you asking for
24 it to be waterproofed that wall when the house is
25 under construction?

- 1 Q. Well, do you believe it was waterproofed when the
2 interior floor was in and the trim was in?
- 3 A. Is the house waterproofed?
- 4 Q. Yes.
- 5 A. We hadn't waterproofed yet. We have a 20-year
6 waterproofing.
- 7 Q. Okay. So when the interior was substantially
8 complete or the trim work was going on ---
- 9 A. That's ---
- 10 Q. --- do you believe it should have been watertight?
- 11 A. That's not complete.
- 12 Q. I understand.
- 13 A. You're really confusing because you're going from
14 this to that picture and saying that the trim is
15 in, and the trim is not in.
- 16 Q. I'm just simply stating that this wall on the
17 plans, which is this wall right here, ---
- 18 A. I understand.
- 19 Q. --- this is called to be a poured concrete wall?
- 20 A. Show me where it's calling for a poured concrete
21 wall.
- 22 Q. The plans speak for themselves and it is no
23 different than the entire ---
- 24 A. No, you said specifically it called for a concrete
25 wall and I'm asking you to show it to me.

1 Q. It does, I'll find it.

2 A. And if you should find it, then I will say yes or
3 no it calls for a concrete wall.

4 Q. But you agree that this is not a concrete poured
5 wall?

6 A. That is not a concrete poured wall, no.

7 Q. And you agree that it's unusual to have a finished
8 space where water seeps in through walls?

9 A. Yeah, that would be unusual.

10 Q. And waterproofing would help alleviate that?

11 A. Not that, you don't waterproof zip board.

12 Q. But you waterproof concrete walls, correct?

13 A. Concrete walls, yes.

14 Q. Your Honor, I would move this in as the picture of
15 the section, and then a blow up the portion from
16 the plans as Defendant's 12.

17 BY THE COURT:

18 I thought it was going to be Exhibit 13?

19 BY MR. TAROKH:

20 Your Honor, just to clarify ---

21 BY THE COURT:

22 12 has been identified, has been, Exhibit 12 is for
23 identification only at this point.

24 BY MR. TAROKH:

25 Correct, Your Honor.

1 BY THE COURT:

2 So 12 has already been assigned. So 13 would be
3 the next exhibit number and that will be
4 photograph. Is there any objection?

5 BY MR. TAROKH:

6 No Honor.

7 BY THE COURT:

8 And the next thing you wanted was what, a blow up
9 of the specs?

10 BY MR. JOHNSON?

11 It's all part of the same exhibit, Your Honor, a
12 blow up of the plan.

13 BY THE COURT:

14 So that's two pages?

15 BY MR. JOHNSON:

16 Yes, sir.

17 BY THE COURT:

18 Well, no, the photo was 13.

19 BY MR. JOHNSON:

20 Well, the photo can be 13 and the blowup can be 14.

21 BY THE COURT:

22 That will be the two page plan blowup and there's
23 no objection to that one?

24 BY MR. TAROKH:

25 No, Your Honor.

1 (DEFENDANT'S EXHIBIT NUMBERS 13 & 14 MARKED AND ADMITTED
2 INTO EVIDENCE)

3 BY THE COURT:

4 Jenny, you got that?

5 BY COURT REPORTER:

6 I think so. I still don't know what 12 was.

7 BY THE COURT:

8 12 was the attachment which was a Re-Work List
9 which Mr. Montgomery couldn't authenticate.

10 BY COURT REPORTER:

11 Okay, okay.

12 BY THE COURT:

13 So then we assigned the Number 12 to that for
14 identification purposes and then Mr. Johnson is
15 going to try to resolve the authentication issue
16 tomorrow when he gets a hard copy I suppose.

17 BY COURT REPORTER:

18 Okay.

19 BY THE COURT:

20 But right now that's not admitted, so now we've got
21 12 for Identification, and we've got 13 and 14 that
22 are admitted without objection.

23 BY COURT REPORTER:

24 Got it.

25 BY THE COURT:

1 All right.

2 BY MR. JOHNSON:

3 Your Honor, that's all the questions I have.

4 BY THE COURT:

5 All right. Mr. Tarokh, you've got anything on
6 redirect?

7 BY MR. TAROKH:

8 Yes, Your Honor.

9 BY THE COURT:

10 And briefly I hope?

11 BY MR. TAROKH:

12 Tarokh.

13 BY THE COURT:

14 Tarokh?

15 BY MR. TAROKH:

16 Tarokh.

17 BY THE COURT:

18 I said briefly I hope.

19 BY MR. TAROKH:

20 Oh, I'm sorry. I thought you were -- my apologies.

21 I'll try, Your Honor.

22 BY THE COURT:

23 All right. So it's 4:28 now so.

24 BY MR. TAROKH:

25 I'm sorry, it's difficult to hear with all the

1 plexiglass.

2 BY THE COURT:

3 Well, we're supposed to get this stuff taken down.

4 They haven't gotten around to us yet. I

5 understand.

6 REDIRECT EXAMINATION BY MR. TAROKH:

7 Q. Mr. Montgomery, if I could take you back to

8 Plaintiff's Exhibit Number 39, that's the final

9 balance sheet.

10 A. Okay.

11 Q. Are there any numbers reflected thereon inflated or

12 inaccurate?

13 A. No, sir. I would have to look at that to do that.

14 Q. Now, is it true that Merlo made change orders that

15 were reflected on the final balance sheet or other

16 balance sheets either in writing via emails or

17 texts but also verbally?

18 A. I didn't understand the question, I didn't hear it.

19 What's that, did he make?

20 Q. The items listed on the balance sheets as change

21 orders, were those approved by Merlo either in

22 writing or verbally?

23 A. Yes.

24 Q. So each item reflected on the balance sheet was

25 approved by Mr. Merlo either verbally or in

1 writing?

2 A. Yes.

3 Q. Now, how did you become aware of certain change
4 orders that Mr. Merlo wanted that were eventually
5 added to the balance sheet? And what I'm getting
6 at is, were those change orders communicated to you
7 directly by Mr. Merlo or in your conversations or
8 communications with Mr. Grissinger?

9 A. Both.

10 Q. And can you describe how you and Mr. Grissinger
11 communicated throughout the entirety of the Merlo
12 project?

13 A. Phone and in person and text only.

14 Q. And how frequent were those conversations or
15 communications?

16 A. Multiple times daily.

17 Q. So like, for example, if Mr. Merlo wanted something
18 changed or added to the original scope, he would
19 let's say communicate with Mr. Grissinger, and then
20 at the end of the day or whatever day, whatever
21 time you guys would communicate that day, he would
22 mention it to you and you'd make a note of it?

23 A. Yes.

24 Q. If I could point you back to one of the categories
25 on the final balance sheet.

1 A. Okay.

2 Q. You have it in front of you.

3 A. Okay.

4 Q. One of those categories was Electrical Trim
5 Balance, was it not?

6 A. Yes.

7 Q. And what is that category?

8 A. Electrical allowance overage.

9 Q. Was there an electrical overage in this contract?

10 A. No, there's shouldn't be.

11 Q. Excuse me, was there an electrical trim allowance
12 under this contract?

13 A. I want to mention, there is no, there is no
14 electrical allowance. Our contract states, let me
15 read this. I think he's not -- it states in our
16 allowance section, "all other electrical fixtures
17 and bulbs provided by the homeowner we will
18 install." There is no electrical allowance in our
19 contract and now, it states it twice "all fixtures
20 (chandeliers, fans, globe lighting) provided by
21 home owner, IBI will install." And now, I
22 remember, he went to our lighting center, our
23 account, and put it on our account without our
24 approval and we had to pay for that.

25 Q. And what was the total of that balance?

1 A. \$12,172.67.

2 Q. When did you discover that he did that?

3 A. I don't, I don't know. I know, you know, we always
4 recommend vendors but I assume I discovered it when
5 I got the invoice which would have been towards the
6 end of the project.

7 BY THE COURT:

8 Give me that amount again?

9 A. Sir?

10 BY THE COURT:

11 Give me that amount again?

12 A. Yes, sir, \$12,172, or excuse me, \$726.16, sorry.

13 BY THE COURT:

14 12,726.16?

15 A. Yes, sir.

16 BY THE COURT:

17 All right, thank you.

18 Q. One of the items that Mr. Johnson examined you on
19 was the stain for each door, the \$45 entry, do you
20 remember that?

21 A. Yes, sir.

22 Q. I'm going to show you an email. This will be
23 marked as Plaintiff's 52. There's no objection
24 from opposing counsel, Your Honor.

25 (PLAINTIFF'S EXHIBIT 52 MARKED FOR IDENTIFICATION)

1 BY THE COURT:

2 What's that, 52?

3 BY MR. TAROKH:

4 Yes, Your Honor.

5 BY THE COURT:

6 All right, 52 will be admitted without objection as
7 Plaintiff's Exhibit.

8 (PLAINTIFF'S EXHIBIT 52 ADMITTED INTO EVIDENCE)

9 Q. Now, if I can point you to the February 13th, 2019
10 email at 12:51. What's going on there?

11 A. It is an email I sent to him on February 13th, 2019
12 regarding the stained doors and fire-rated door
13 extra that we had placed on the balance sheet.

14 Q. Why do you say, and I'll just read it, "Chris, on
15 the balance sheet regarding the doors. Greg and I
16 confirmed, (in quotes) 'stained doors and fire
17 rated' (end quote) line items, correct"?

18 A. I believe he questioned that the line item on the
19 balance sheet, so he was acknowledging it on the
20 balance sheet and I was explaining it to him, that
21 staining of those doors at \$45 was separate because
22 this is what we are charged for staining these
23 doors vv. painting." It's separate from the wood
24 doors that he selected. "I do not have total price
25 for this until they actually do the work and

1 confirm the total amount of doors."

2 Q. And how does he respond to that?

3 A. "I appreciate you checking on the tub. It's the
4 one we prefer but we need to stay within the
5 allowance."

6 Q. So he's effectively signing as to that issue?

7 A. Yes, sir.

8 Q. And how did that, did that make you believe that he
9 had accepted that charge?

10 A. Yeah. If I was being told, if I was being charged
11 something extra that I wasn't approving, I
12 definitely would take that opportunity to
13 disapprove it.

14 Q. Now, every item that was examined by Mr. Johnson
15 when he was comparing the August 9th, 2019 balance
16 sheet to the final balance sheet, those specific
17 items, is it your testimony those were items that
18 Mr. Merlo had known about and approved in ---

19 A. Yes.

20 Q. --- one fashion or another?

21 A. Absolutely.

22 Q. Now, you testified earlier about landscape lights.
23 I believe it was four lights at \$250 a pop; do you
24 remember that?

25 A. Yes, sir.

1 BY MR. JOHNSON:

2 No objection.

3 (PLAINTIFF'S EXHIBIT 53 MARKED FOR IDENTIFICATION)

4 BY THE COURT:

5 Plaintiff's Exhibit 53 without objection will be
6 admitted.

7 (PLAINTIFF'S EXHIBIT 53 ADMITTED INTO EVIDENCE)

8 Q. I'm going to show you what's been marked as
9 Plaintiff's Exhibit 53.

10 A. Okay.

11 Q. What is, what is that email? Excuse me, what is
12 that document?

13 A. This is an email exchange from myself and Chris
14 Merlo, July 24, 2019.

15 Q. And you were replying to his email that was lower
16 on that document, correct?

17 A. Yes, he wrote me and said or he wrote me and said,
18 "John - I would like to add the 4 voltage ground
19 lights to shine up on the rear stone columns. In
20 addition, Greg and I spoke about adding some ship-
21 lap to the fireplace & adding a niche to fit the
22 television. He said it would be \$700 and I wanted
23 to confirm my acceptance of the up-charge."

24 Q. And how do you respond to him?

25 A. "I have told Leo about the lights and good on the

1 Ship lap", that's where the thousand dollars comes
2 from.

3 Q. So the four lights he referenced times \$250?

4 A. Exact, so I was right about prior, I remember that,
5 yes.

6 Q. Another category I recall Mr. Johnson examining
7 with you was backsplash, do you recall that?

8 A. Yes.

9 BY MR. JOHNSON:

10 Specifically the downstairs kitchen.

11 A. Are you referring to the backsplash downstairs
12 kitchen?

13 Q. Yes, sir.

14 A. Yes, sir.

15 (PLAINTIFF'S EXHIBIT 54 MARKED FOR IDENTIFICATION)

16 BY THE COURT:

17 Is that Exhibit 54?

18 Q. Yes, Your Honor.

19 BY THE COURT:

20 No objection?

21 BY MR. JOHNSON:

22 No objection, Your Honor.

23 (PLAINTIFF'S EXHIBIT 54 ADMITTED INTO EVIDENCE)

24 Q. I'm going to show you another email that's admitted
25 as Plaintiff's Exhibit 54. Do you recognize that

1 document?

2 A. Yes.

3 Q. Now, if you'd agree that this is -- well, the
4 bottom, the bottom email is what?

5 A. It is an email from myself to Chris Merlo, August
6 26th, 2019. "Chris, Hope all is well with you. The
7 price for the down stairs kitchen back splash is
8 \$1279, material and labor. Not bad. Please let me
9 know if you have any questions."

10 Q. And how does he respond?

11 A. He responds, "John - That works on the backsplash.
12 Let's put it in. On the mantel, we picked a simple
13 one piece that was priced at \$400. They are coming
14 out this week to measure & the quote should be
15 available. The plan had floating shelves in the
16 master bath & I was going to have Bree's include
17 those in the quote."

18 Q. Mr. Johnson also discussed with you the driveway,
19 do you remember that?

20 A. Yes, sir.

21 Q. I'm going to show you another email.

22 BY MR. JOHNSON:

23 No objection.

24 (PLAINTIFF'S EXHIBIT 55 MARKED FOR IDENTIFICATION)

25 BY THE COURT:

1 Plaintiff's Exhibit Number 55 without objection.

2 (PLAINTIFF'S EXHIBIT 55 ADMITTED INTO EVIDENCE)

3 Q. I'm going to show you a document that's been
4 admitted as Plaintiff's Exhibit 55; what is this
5 document?

6 A. It's an email exchange from myself, Majestic
7 Staircases. Oh, I'm sorry, yeah.

8 Q. You would agree with me that you forwarded, you
9 forwarded?

10 A. Yes, I see now, I'm having to read backwards. I
11 forwarded an email from Majestic Staircases, that's
12 the subcontractor who did the stair work to Chris
13 Merlo.

14 Q. And Mr. Merlo responds, would you agree with me it
15 says, "John - I think we are the culprit of this
16 change order" ---

17 A. Yeah, so I can tell you what it is.

18 Q. But my question is, he also says "PS", correct?

19 A. Yes.

20 Q. And what does that say, what does he say in the PS
21 portion?

22 A. "Driveway looks great!", exclamation point.

23 Q. And this was sent when, he sent the email when?

24 A. He sent it June 14th of 2019.

25 Q. Does that indicate to you that he was satisfied

1 with the driveway?

2 A. "PS - Driveway looks great!" Yes, that would
3 indicate to me the driveway was satisfactory to
4 him.

5 Q. Did he raise any other issues with the driveway
6 before this litigation began?

7 A. No, sir.

8 Q. Can you describe Mr. Merlo's level of involvement
9 in the project?

10 A. His level of involvement? He was involved
11 throughout the project through communication with
12 us and.

13 Q. Was he a more involved homeowner compared to other
14 homeowners that you had contracted with?

15 A. Yes.

16 Q. Would it be fair to describe him as meticulous?

17 A. Overly, yes.

18 Q. Did you spend a lot of time doing emails and
19 correspondence and communications with Mr. Merlo?

20 A. Yes, very much so, a lot of emails.

21 Q. Did that indicate to you that he was visiting the
22 site frequently and examining the premises?

23 A. Yes, he was, I believe he was visiting the site
24 daily.

25 Q. So would it be fair to say that there was nothing

1 going on with the project that he didn't already
2 know about, correct?

3 A. Yes, that'd be fair to say.

4 Q. Now, the landscape category that's reflected on the
5 balance sheet, you'd agree that's a big money item,
6 correct?

7 A. Oh, yes, absolutely.

8 BY MR. JOHNSON:

9 No objection.

10 (PLAINTIFF'S EXHIBIT 56 MARKED FOR IDENTIFICATION)

11 BY THE COURT:

12 All right. That will be Plaintiff's Exhibit 56
13 with no objection.

14 (PLAINTIFF'S EXHIBIT 56 ADMITTED INTO EVIDENCE)

15 Q. I'm going to show you an email that's been
16 referenced as Plaintiff's Exhibit Number, excuse
17 me, that's admitted as Plaintiff's Exhibit Number
18 56. If I can point you to the purported email
19 between, from Chris Merlo to you dated May 10,
20 2019. Are you there?

21 A. Yes.

22 Q. Now, in that email I'm looking at the second to the
23 last sentence, you'd agree he states, "If you have
24 a minute to look over the quote" and he's
25 referencing Leo Landscaper's quote, correct?

1 A. Yes, he is, he is acknowledging receipt of Leo
2 Landscaper's quote and is asking me to look over
3 the quote and make suggestions, make any
4 suggestion, "Perhaps there is some efficiency you
5 might recommend", and the way I take that is do I
6 have any ideas on lower the costs.

7 Q. So he relied upon you and your opinion on certain
8 aspects of the house, correct?

9 A. Yes, sir. Now, can I read what I responded to?

10 Q. Absolutely.

11 A. So I said, " Yes. He did this per the plan. The
12 biggest expense is the plants, the fire pit and the
13 walk way at nearly 30,000 in cost. There are 272
14 plants on the plan, on your landscape plan. That
15 is quite a lot, nothing wrong with that but
16 explains the expense. If you're looking to save,
17 cut the plants down, maybe some mulch (100 cubic
18 yards), of course not do the fire pit and walk, you
19 could save now \$20,000 plus or minus. If you are
20 considering doing it all at some point, now is
21 going to be cheaper as I am sure it will be more
22 later."

23 Q. So what is the date of that email?

24 A. May 13th, 2019.

25 Q. And that's after the Guaranty was or that was ---

1 A. Yes.

2 Q. --- after the Guaranty was signed?

3 A. That was after the Guaranty was signed.

4 Q. Now, let's visit the theater room, an issue that

5 you were examined on. Do you remember Mr. Johnson

6 asking you about that?

7 A. Yes, sir.

8 Q. Do you remember what specifically was done to that

9 room ---

10 A. I think I do. It was -- are you talking about

11 after? I'm sorry, I didn't mean to cut you off.

12 Q. No, go ahead.

13 A. I believe there was a lot of foam insulation for

14 sound barrier which was outside our scope, I

15 believe that was outside our scope. He had it

16 wired for theater purposes like surround sound,

17 multiple speakers, receivers and equipment. I

18 think there was some special lighting put in there.

19 Q. And he wanted it bigger, correct?

20 A. Yeah, and he wanted it bigger, yes.

21 Q. And IBI made it bigger?

22 Q. We did.

23 Q. Did he express his satisfaction with the theater

24 room to you or do you remember?

25 A. I don't recall but I could be wrong.

1 Q. Did he ever complain about the theater room?

2 A. He never complained about it, no, uh-uh (negative).

3 Q. Your Honor, those are all my questions.

4 BY THE COURT:

5 You sure?

6 BY MR. TAROKH:

7 Yes, Your Honor.

8 BY THE COURT:

9 All right. Now, Mr. Johnson, what are you doing?

10 BY MR. JOHNSON:

11 Recross?

12 BY THE COURT:

13 Well, we're going to save that until tomorrow

14 unless it's going to be about two minutes.

15 BY MR. JOHNSON:

16 I would reserve the right, Your Honor, to go longer

17 than two minutes, Your Honor.

18 BY THE COURT:

19 Well, I mean we've got to go, I mean these people

20 have got to get out of here.

21 BY MR. JOHNSON:

22 Yes, I understand, I understand.

23 BY THE COURT:

24 Of course, you're going to be limited to anything

25 that came up in redirect. You understand that, of