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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2019CP041942
Appellant Case No. 2023-001401

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

v.

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

D.R. Horton, Inc., ... Appellant,

v.

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

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

of which Builder Services Group (f/k/a Masco Contractor
Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale
Contractors Services) and IBP Assets, LLC d/b/a Blue
Ridge Building Products, are the Respondents.

AMENDED RECORD ON APPEAL
VOLUME IV

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d/b/a Blue Ridge Building Products, LLC***

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Appellant Horton – Respondents IBP and Gale
Appeal 2023-001401

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State of South Carolina	)	
	)	Circuit Court
County of Anderson	)	2019-CP-04-01942

Zitek)
)
 vs.) Transcript of Record
)
 D.R. Horton et al.)

February 8, 2023
Anderson, South Carolina

B E F O R E:

The Honorable R. Scott Sprouse, Judge.

A P P E A R A N C E S (All present by video or telephone):

Justin O'Toole Lucey, Esq.
Attorney for the Plaintiffs

Jason Imhoff, Esq.
Attorney for the Defendants

Sara Iskimov
Transcriber

1 MR. IMHOFF: Twenty-five motions, probably, Your Honor.

2 THE COURT: Yeah.

3 MR. IMHOFF: The motions to reconsider.

4 THE COURT: Now, I have glanced through a number of these
5 motions, and they all appear to have -- they have several
6 parts, but it appears as though the bifurcation of discovery
7 is one issue. And then the dates of discovery -- the time
8 frame set forth in the order is an issue. So who wants to
9 start? These begin --

10 MR. IMHOFF: Your Honor, D.R. Horton filed their motion
11 first.

12 THE COURT: Okay.

13 MR. IMHOFF: So if you don't mind, and I think I will
14 cover most everything for everyone else.

15 THE COURT: Go ahead, Mr. Imhoff. Go ahead.

16 MR. IMHOFF: Okay. Your Honor, I can't speak to the
17 bifurcation. I think that must be in subcontractors' motion
18 to reconsider. The only thing we're asking you to consider,
19 Your Honor, is to extend the timelines. And again, I'll
20 remind you, this is a 221-homeowner neighborhood with
21 individual residences.

22 And unfortunately, this is a significant motion to us.
23 And it's also very, very, very long. Our position is this,
24 Your Honor. One, just the timelines. You had us finishing --
25 you ordered inspections be allowed with no limitations. You

1 had the timeline that those inspections would be finished by
2 the end of January. Your order came out in November, Your
3 Honor.

4 We immediately let everyone on this know to block their
5 calendars from January through March so that we could get
6 through all of the inspections, the discovery, and the
7 depositions, Your Honor. We told the plaintiffs that we
8 wanted to come out and do visual inspections. The plaintiffs
9 have been obstructionist in every manner of those discovery,
10 inspections, destructive testing, and depositions, Your Honor.
11 They've obstructed us at every turn.

12 We told them that we could get all 221 homes done in
13 January with visual inspections, and they said no. And they
14 continue to tell us that they could only produce a certain
15 number of homes on certain numbers of dates and that type of
16 thing, to the point that we still have not been allowed to
17 visually inspect 124 of these 221 homes, which is a direct
18 violation of your order.

19 And what the plaintiffs have been doing is they are
20 changing -- and everybody on this will agree to this. They
21 are changing what we can look at and when on a nightly basis.
22 We have engineers and lawyers coming from all over the
23 southeast. They show up; they block their calendars to come
24 look at these houses. And we hear the night before or the day
25 of, you can't go to that house, they canceled, but you might

1 be able to go to that house. We did destructive testing this
2 week, Your Honor, a couple of days of it. And the homeowners
3 were giving us access from 3:30 to 5:30 or from 2 to 5 or
4 canceling on us. Your court -- I'm sorry. I thought you said
5 something.

6 THE COURT: Go ahead. No, no, no. Go ahead.

7 MR. IMHOFF: Your Honor, they have not allowed us to
8 conduct the inspections that you ordered in January. And we
9 are now -- it's February 8th. We still haven't been allowed
10 to inspect 124 of those houses. And when they give them to
11 us, we have to -- everybody has to arrange their schedules --
12 our engineers, lawyers, everybody else. We get there and they
13 change the schedule again and don't give them to us.

14 So one of the things that we will ask you to do, Your
15 Honor, is extend that inspection period by consent, because
16 the plaintiffs couldn't produce the houses in a timely manner.
17 They extended -- we agreed to extend that inspection period
18 through February.

19 THE COURT: But I've already signed an order on that to
20 the end of February. Are you asking for an additional
21 extension?

22 MR. IMHOFF: Yes. They still have not given us access to
23 124 homes, Your Honor. And this is what I'm saying.

24 THE COURT: How long are you asking for? How long are
25 you asking for?

1 MR. IMHOFF: Well, I would ask you to direct -- my
2 solution to this is this. I think what is happening, Your
3 Honor, is a bunch of those people who joined the class action
4 don't really want to participate in the class action. And if
5 I can give kudos to Mr. Lucey's paralegal Annette, she is
6 having to call hundreds of homeowners who don't understand
7 this process. They don't understand the court, and they don't
8 either answer, respond, or they want to be there, or they
9 don't want us in their house or whatever it is.

10 I won't put that all on the plaintiffs' attorneys. I
11 think the plaintiffs don't want to do it either. And my
12 solution to this, which I presented to them this week, is that
13 we modify your order that the homeowners have to give access
14 to their home on a date selected by us. They can be there if
15 they want. They don't have to be there if they don't want to.
16 But -- unless they have some real legitimate concern or reason
17 that they can't give us access.

18 Judge, the -- Lucey's office doesn't have to coordinate
19 with all of these homeowners' schedules, especially on the
20 exterior destructive testing, Your Honor. So I would say at
21 least one more month, but with a strong order that these have
22 to be produced to us, Your Honor. That's just the start of
23 this. And I have much more of the destructive testing, Your
24 Honor. We've tried to set the destructive testing on multiple
25 occasions, and we're stopped by the plaintiffs, who have given

1 us unreasonable and burdensome and onerous demands about the
2 destructive testing, such as requiring us to sign waivers --
3 everyone who goes out there has to sign a waiver -- requiring
4 us to sign agreements that they write up, requiring us to wait
5 until a homeowner is ready.

6 I'll give you an example. We were out there ready to do
7 destructive testing on 211 Buxton, and what we were told is
8 that person is home but she was having a personal day, so we
9 couldn't bother her personal day until 3:30 in the afternoon,
10 Your Honor. But she wanted to be there.

11 So we went at 3:30 in the afternoon to do the destructive
12 testing on her house, and she left. She was so unconcerned
13 about being there that she actually left as we were cutting
14 into that house, despite the fact that we were limited in
15 time, presumably due to her, from 3:30 to 5:30. They've
16 required us to change dates. They've required us to change
17 times. They've required us to update and submit a protocol.

18 And Your Honor, I have to say this so that you understand
19 why it's such a big deal. The plaintiffs and their experts
20 have been doing investigation, inspections, and destructive
21 testing on these houses any time they want, carte blanche,
22 without any waivers, without any agreements, without any
23 written documentation to the owners. And they haven't invited
24 one lawyer in this case during the litigation to those
25 testings or those inspections.

1 And let me say that again. In all of the years that I
2 have been doing this, I have never seen a construction case
3 where the plaintiffs and their engineers are doing destructive
4 testing and the other parties aren't invited. And so what Mr.
5 Lucey is going to ask you to do in response is to limit what
6 we can do when his own experts have not been limited and, in
7 fact have been doing the exact same thing we've been asking to
8 do for the last three years.

9 Frankly, I think it's a spoliation of evidence issue, and
10 I also think it's an ethical issue. And at some point we're
11 going to ask the Court to do something about this because it
12 needs to stop. But the point is, they are obstructing us from
13 doing inspections per the order. They are obstructing us from
14 doing destructive testing.

15 Your Honor, that's just the inspections and destructive
16 testing. I haven't even gotten into the discovery and the
17 depositions yet. We asked to set depositions of the
18 homeowners and other people in January, every day in January.
19 We haven't had one deposition allowed by the Lucey law firm of
20 any plaintiff out there, including Your Honor, including the
21 class representatives. I've not been allowed to do those.

22 The first depositions of homeowners are scheduled
23 tomorrow. Again, February 8th. And so the plaintiff has
24 filed a motion to limit our discovery and also to go forward
25 with your order and your timeline, while at the same time

1 blocking us and obstructing us from getting these things done.
2 We've now wasted a month and eight days of potential
3 deposition days because these plaintiffs and homeowners have
4 not been made available to us until February 9th.

5 Your Honor, I want to follow up on one of those things.
6 The two homeowners that we're going to depose tomorrow -- back
7 to back, two of them in one day -- we got at 10:20 last night
8 their first discovery responses from those homeowners at 10:20
9 last night that we've asked for years; we filed a motion to
10 compel on that was in front of this Court -- or would have
11 been in front of this Court last fall. We are just finally
12 getting, the night before, or 36 hours before, hundreds and
13 hundreds of documents from these homeowners.

14 I can show you many more things. They stopped the
15 deposition of their expert, Dr. Whitlock, said I could not go
16 forward anymore, despite the fact that they intercepted our
17 subpoena, Your Honor. We sent a subpoena, as we do with every
18 expert and every construction case, directly to that expert.

19 The plaintiffs' counsel -- this is in the testimony, Your
20 Honor. It's an exhibit, and I could pull it up if you want to
21 see it. Mr. Whitlock testified that plaintiffs' counsel told
22 him not to respond to that subpoena. And instead of giving us
23 Dr. Whitlock's file in a normal manner in one document from
24 his office, plaintiffs' office intercepted it and sent us his
25 file piecemeal -- we still don't have the complete file -- we

1 still don't have his damages information -- in 17 different
2 supplemental discovery responses. Not saying that that is Mr.
3 Whitlock's total file. Just here's some more information for
4 you all to digest.

5 So when we got to Dr. Whitlock's deposition, half of the
6 first day was trying to figure out in those 17 discovery
7 responses, what's his file and is it his whole file and why
8 did he not respond to our subpoena.

9 Your Honor, I need to say this. Every one of these
10 should have been a motion to compel or a motions for sanctions
11 or rule of show cause in attorney's fees. But we know the
12 Court doesn't like that. And so we are trying to move forward
13 and get through these obstructions without filing this, these
14 constant motions to compel and threats and sanctions, all of
15 that. But each one of these things we think would have been a
16 motion to compel, and we have it sitting in a queue and we
17 just are trying not to file it, Your Honor.

18 Your Honor, I want to tell you one other thing. When we
19 go out to do the inspections, the Lucey law firm sends about a
20 dozen to 15 people. These are engineers at WDP Rhett
21 Whitlock, Dr. Whitlock's office, three of them, his entire
22 staff for this case, and other people who we don't know who
23 they are. And what they do is they take pictures of us and
24 they videotape us. And then they want each one of those three
25 different engineers who all work for the Lucey law firm and

1 all work for WDP then come and take their time to take
2 pictures and document and prod and poke the things that we're
3 looking at.

4 And yesterday and the day before, those people, 10 to 15
5 people, were the majority of the delays. They're in our way
6 and they're videotaping and photographing us when we weren't
7 even invited to their destructive testing, Your Honor. Your
8 Honor, so that's discovery.

9 We haven't been allowed to do the inspections. We've
10 been obstructed. We haven't been allowed to set the
11 depositions until February. We are not getting the discovery
12 responses from plaintiffs, despite motions to compel and
13 demands and depositions being scheduled. I've never gotten a
14 500 document -- 19 supplemental discovery response at 10:20
15 and 9:30 at six hours before these depositions, when we've
16 been asking for it, Your Honor.

17 I need to also bring this up, Your Honor, because Mr.
18 Lucey is going to say we're doing all kinds of terrible things
19 out there and we should be stopped and we don't match. Most
20 of it is handled on site. I haven't seen Mr. Lucey in person
21 in months and months and months. We had an agreement with his
22 partner, Dabny Lynn, that's he's got. We resolved all the
23 issues out there. And then we are getting emails from him at
24 9, 10 and 11 o'clock at night accusing us of ethical breaches
25 and violations and those types of things, except that when we

1 left the project, everything was fine between his partner and
2 our law firm.

3 The reason that I say that, Your Honor, is I want to show
4 you something so you can see the severity of the
5 obstructionism and -- what do I call it? I'm just not even
6 going to call it anything, Your Honor. But what I'm going to
7 try to do is I want to show you a couple of things that we
8 have found in our first couple of days of inspections out
9 there, if I can.

10 And I just don't -- I don't want to take all the Court's
11 time. And there are so many issues that we have out there,
12 Your Honor. But I think you need to see -- excuse me. I need
13 to move your screen out of the way.

14 Your Honor, this is a home that we inspected. Pardon me.
15 Your Honor, can you see a picture of brick, a light, and a
16 hand?

17 THE COURT: I can. I can.

18 MR. IMHOFF: Your Honor, this is a home at -- well, heck,
19 I lost it. This is a home. I think this is 4 Dartford, Your
20 Honor. It's in our brief. It's one of the things that we
21 sent to you. Someone has cut the brick here. You can clearly
22 see where someone has cut the brick and put new mortar in. We
23 don't know who did that, Your Honor. We don't know if
24 plaintiffs' engineering experts did that. We don't know if
25 the homeowner did that. But this sure looks like a

1 destructive test. And I had three people in my office go
2 through Whitlock's file to see if he documented destructive
3 testing at this location. He's actually got a 177-page photo
4 log. That's not the photos. That's just the log of all the
5 photos that he's taken. This house isn't in that photo log.

6 So according to his testimony, they have not done
7 destructive testing on this house. Someone has, Your Honor.
8 Someone has cut into that house and modified it. And we found
9 that at about two-thirds of the houses that we looked at just
10 this week.

11 This next picture, Your Honor, is Hardie board on the
12 same house. This Hardie board has been removed. Someone came
13 back and put -- I've got many more pictures, but this is just
14 for this hearing. Someone has come back and put brand new
15 what we call finishing nails into this Hardie board. This has
16 been taken off of that house and modified. Mr. Moore, who is
17 with ABS, he's our forensic engineer, took a piece of
18 evidence. Someone cut -- excuse me, Your Honor.

19 Someone cut and melted a piece of house wrap -- I think
20 it's on this house -- that has never been told to us that
21 anyone has ever done destructive testing on this house. It
22 was completely torn and melted.

23 Your Honor, this is a different house. As you know,
24 there are grading and water issues in this case. This is not
25 D.R. Horton work. This is the homeowner's work. He has put

1 in rip wrap and a little dry stream. He has put in a
2 retaining wall. There are other pictures where he's put in
3 drainage and other things on this house.

4 We have never heard from the plaintiff about any
5 modifications or any repairs to these 221 homes, which we've
6 asked for in discovery, which we filed a motion to compel on.
7 And we did not get it. We've never gotten it, Your Honor.
8 But these houses have been changed, sold, repaired, modified,
9 tested over the years, which is why it's so important that we
10 be able to go at least visually inspect all of them.

11 But secondly, that we go and are allowed to do
12 destructive testing. Your Honor, I hope I have a picture of a
13 nice pool in front of you. Do you have that?

14 THE COURT: I see it.

15 MR. IMHOFF: The named plaintiff in this case is Natalie
16 Zitek. She is the class representative. She claims that --
17 we haven't had her deposition, but we've had our husband's
18 deposition. She claims that she's a sufficient class
19 representative for all the people in the neighborhood, for all
20 of the things in the neighborhood, except they don't have
21 water issues because they put in a pool and a dry creek and a
22 drainage, which we found out in Mr. Zitek's deposition. They
23 also have an all-brick home. They don't have stone or some of
24 the issues at their house, Your Honor.

25 I want to go back to a couple of -- there's other

1 pictures. We went to a house yesterday. This is more of that
2 same house, that retaining wall. And we've got a bunch of
3 these pictures. But we went to a house yesterday. This is
4 one where the homeowner has put a shed attached to his house,
5 as you can see this. This is not D.R. Horton work. And he's
6 put, obviously, all of this hardscaping and this back patio
7 on, which protects his back door, which is part of this
8 lawsuit. All of this has been modified.

9 Plaintiffs in three years of this litigation have never
10 told us that in discovery, Your Honor. We walked next door --
11 and this is more harding that has been changed. We walked
12 next door -- and I hope that picture is coming up here
13 shortly. Hey, folks, next to that last house, also on Buxton.
14 This happened yesterday, Your Honor. The plaintiffs actually
15 gave us access to do destructive testing on this back door.
16 We walked into this backyard, and that is a brand new door.
17 That is not a D.R. Horton door. We don't know who did that,
18 when it was done, how much it cost, what the compensation is
19 on that house. And plaintiffs' attorney who was on site
20 yesterday admitted she didn't even know that they had replaced
21 that back door.

22 All of that is to say, Your Honor, the reason that we
23 asked for this discovery is because we don't know who bought
24 the home from D.R. Horton, who still owns the home -- I'm
25 going to I'm going to get off track a little bit. But your

1 original order -- maybe it wasn't your order, but the class
2 action certification order, Your Honor --

3 THE COURT: That was Judge Maddox.

4 MR. IMHOFF: Judge Maddox said that the plaintiffs were
5 to have two representatives. One was going to be Natalie's
6 Zitek, but the other representative was going to be determined
7 by plaintiffs of whether the former homeowners who have sold
8 their houses during this litigation are the plaintiffs or the
9 new homeowners are the plaintiffs.

10 We don't have an answer to that. They have a designated
11 person to be the class action representative for those
12 homeowners, whether they're present or former homeowners. So
13 I went off track a little bit. But this is the discovery
14 we've been asking for. Who owns the homes? What repairs did
15 they do? What modifications did they do when they sold these
16 homes, Your Honor? Especially during litigation, but at any
17 time did they tell the purchasers -- excuse my fingers. Did
18 they tell the purchasers that there was a lawsuit?

19 Did they do the necessary South Carolina residential
20 property disclosure form? Were there home inspections done,
21 as any typical homeowner would do when purchasing a home? And
22 I'm not talking about during the litigation, not necessarily
23 (indiscernible) ever, because you have statute of limitations
24 and repair arguments and modification arguments, Your Honor.

25 Boy, I could keep going on and on. I'm not sure where I

1 should stop or keep going. The ultimate request that I'm
2 making, and these third-party defendants are making, is to,
3 one, stop the plaintiffs' obstructionism. They need to
4 provide us information about who owns these houses and what's
5 been done, disclosed, inspected, repaired on these houses.
6 They need to start providing us plaintiffs' depositions in a
7 timely manner so that we can comply with your scheduling
8 order, Your Honor.

9 They need to allow us to do destructive testing and
10 inspections without throwing up roadblocks, changing the
11 houses, denying us other houses. Your Honor, if we weren't
12 allowed to do the inspections that you ordered -- and thank
13 you for that -- we would never know these things about the
14 pools; back doors; new patios; changed, modified houses. We
15 would never know.

16 And so that's -- we're asking you to order them to stop
17 obstructing us, but also give us a chance to do the work. We
18 just need to do the work. I blocked my calendar, Your Honor.
19 You're going to make me come and try the Canopy (phonetic)
20 case at some point. But I blocked my calendar for three
21 months so that we could comply with your order to get to get
22 discovery done, to get depositions done, to get inspections
23 done. And at every turn, we're obstructed by the plaintiffs.

24 Your Honor, this is our suggestion to you after you order
25 them to stop being obstructionists and give us more time to

1 complete this. We would love to come back and have status
2 conferences with you. But I also want to show you one other
3 thing that we have suggested, which has been done in other
4 cases, which may limit some of the depositions that need to be
5 done. Your Honor, I apologize. I have to find it. It'll
6 take me a minute, but we have proposed a survey to the
7 homeowners that is notarized. That survey would essentially
8 tell us those things that I just said. When did you buy the
9 home? Who did you buy the home for? Did you inspect it? Did
10 you get a residential property disclosure statement? What did
11 it say? Have you repaired or modified anything? Have you
12 changed it? Have you put drains in your backyard? Have you
13 put a pool in your backyard? Have you taken your back door
14 out?

15 I didn't have a picture of it, Your Honor, but there's a
16 window in one of the same houses. Again, I think it's 4
17 Dartford. That is an original window. They've actually
18 pulled a window out of that house and put a new window in. We
19 also found that out during the inspections. Here it is, Your
20 Honor. It is Exhibit T to our motion for partial
21 reconsideration.

22 This is our proposal to the Court, Your Honor. This is a
23 survey that we would request that all of the class members
24 fill out to tell us who they are, where they are, date of
25 purchase or sellers, what problems are you having, what

1 repairs, modifications, additions, maintenance have you had on
2 your home, following issues you've had with your home. It's
3 just a couple of pages -- insurance. I'll tell you, I was out
4 there yesterday, and there's a roof being replaced. I don't
5 know who pays for roofs anymore. I think most of them are
6 hail claims, Your Honor. I assume that's what happened. But
7 there's a roof. There's a roof being replaced literally while
8 we're there. We don't have any idea unless you allow
9 inspections, which thankfully you did.

10 But some of the roof issues are still in the case where
11 there is flashing or where it comes to a wall or stone or
12 brick or something like that. Inspections, repairs, sales
13 contracts -- those types of things, Your Honor. It's only
14 three pages long. Maintenance, heating and cooling. It's
15 only three pages long.

16 And again, Your Honor, I could talk. I could show you so
17 many other things. We're trying not to be in front of you
18 with motions to compel and sanctions and those types of
19 things. But we need to be allowed to do our job. We have
20 defenses that need evidence. Those defenses could be anything
21 from statute of repose, statute of limitations, repair model,
22 all those things that you could think of that D.R. Horton
23 would have that we have been blocked from getting because of
24 our failure to do these depositions, get discovery, and do
25 these inspections.

1 Right. And the Rule 34 allows us to do it. But you
2 ordered it, Your Honor. You didn't put any limitations on it.
3 But the plaintiffs have, repeatedly. And so that's --

4 THE COURT: What -- let me ask you this, Mr. Imhoff.
5 What is your proposed protocol for in the event you do
6 destructive testing for repairing the damage that's done to
7 the house? What's the time frame and how do you determine
8 what materials to restore the house? What is your proposed
9 protocol for that?

10 MR. IMHOFF: Well, I would point out at first that there
11 is no protocol from the plaintiffs' engineers who have already
12 done all that testing and have cut brick out, replaced brick.
13 I'd point that out, that we're being held to a different
14 standard than they are. But ABS, Applied Building Science,
15 who is our forensic engineer, and our general contractor, have
16 been there on site, Your Honor. And some of the materials, we
17 cannot match them. They're not made.

18 So yesterday -- I think it was yesterday; it might have
19 been the day before -- Dabny Lynn and I, we had discussions
20 about that. We tried to get on the phone with you on Monday,
21 but you were unavailable, so we worked it out. We have a
22 document that says D.R. Horton will fix it to the homeowner's
23 satisfaction best as reasonable, best matching, whatever we
24 can do.

25 Yesterday it came up again, again on site. We executed a

1 document, Dabny Lynn and I did, that said, if we can't get
2 matching brick, we will put brick in which we think will work.
3 But if the homeowner doesn't like it, D.R. Horton has to come
4 back, pull it out, and put in what they want. That's our
5 proposal. ABS has a right in their protocol that they will
6 use reasonable best efforts to match. And not only are they
7 using reasonable best efforts to match, we literally brought
8 brick samples to the sites for the homeowners and the
9 plaintiffs to look at to put back.

10 THE COURT: And that's what you and Mr. Lynn agreed to at
11 the scene?

12 MR. IMHOFF: There's two documents that I signed --

13 THE COURT: Okay.

14 MR. IMHOFF: -- at the scene.

15 THE COURT: Okay.

16 MR. IMHOFF: Yes, Your Honor. And we will do that. I
17 understand Mr. Lucey has a very upset homeowner out there.
18 We've cut a bunch of brick out of his house. We cannot -- we
19 tried to save as much as we could. Of course, it's only going
20 to be a couple of bricks, but we did break bricks out there.
21 We're going to have to put back some brick that they no longer
22 make on that house.

23 But we will try our best with reasonable efforts to match
24 it and make that homeowner happy. And what we put in the
25 agreement, Your Honor, is if we can't and we can't come to a

1 resolution, we come back to you.

2 THE COURT: Okay.

3 MR. IMHOFF: And we make you -- you can -- if we can't
4 match up brick and the homeowner just says -- it just can't be
5 resolved between us, we'll come back to you and you can
6 decide, well, this is the best we can do or not. The only
7 issue out there is the brick. You could put a new door. You
8 could put a new window in. You could match Hardie siding.
9 You could put stone back up. You don't break them when you
10 take them off. You put everything else back.

11 The only issue is the brick, and there are only a limited
12 number of homes and locations out there with the brick that we
13 want to look at and do destructive testing on.

14 THE COURT: Okay.

15 MR. IMHOFF: It's reasonable. But we're trying.

16 THE COURT: Let me hear from Mr. Lucey.

17 MR. LUCEY: Yes, Your Honor, if I may attempt to share my
18 screen. Does the Court see a window in the middle of the
19 screen with a bunch of brick missing around it?

20 THE COURT: Yes, sir. I can see that.

21 MR. LUCEY: All right. So this is what the unreasonable
22 plaintiffs have permitted D.R. Horton to do to the residences,
23 to the homeowners' residences. And you know what? This isn't
24 going to get fixed any time soon. You know why? Because even
25 though D.R. Horton is doing brickwork on all my clients'

1 houses, they didn't bother having a brick mason there
2 yesterday to put it back together.

3 But you know what, Your Honor? It wouldn't have mattered
4 if they did. You know why? Because D.R. Horton didn't
5 attempt to find any matching brick until yesterday. There was
6 no matching brick. And why is this important? Because part
7 of your order, Your Honor, back in -- I think it was October
8 or so, you ordered proper notice, proper request by the
9 defendant.

10 And you know, the defendant wrote the plaintiff. And
11 actually we pointed out to the Court in our previous filings,
12 we've been asking the defendant for their testing protocol for
13 over a year. These are the same engineers that did the right
14 to cure inspections, Your Honor, back in 2020. It's not like
15 they don't know the roads over in my clients' neighborhood.
16 They've been -- they were in dozens and dozens of these houses
17 back in 2020.

18 So for a year and a half, we had not only asked for the
19 repair protocol -- the testing and repair protocol in writing
20 so we could show it to our client and say, this is what the
21 agreement is -- not only did we ask for it, but for a year and
22 a half we were told it was coming. Every three or four months
23 we'd get an email. We're still working on it. We're still
24 working on it. We're still working on it.

25 So if the Court sees on the screen now there's an email

1 from my paralegal on that to the gentleman who was just
2 talking, and the email is dated December 22nd, 2022. And the
3 first line, you can see that on December 20th, we finally got
4 a protocol. Now, this is over two months after the Court
5 issued its order saying, get this case done. Two months go by
6 before they even get us an inadequate protocol for testing and
7 repair. We write back to them immediately. We're sitting
8 there working Christmas week. We write back and we say, by
9 the way, your protocol is missing important details. We need
10 those details by December 30th so that we can have time to go
11 to our homeowners and get them organized and get them to agree
12 to your testing. Please get it to us by December 30th.

13 And in fact, Your Honor, one of the things that we asked
14 them for -- and I'm in the exposed mode of the PowerPoint
15 because I had to start in the middle to address this issue.
16 But one of the things we asked them for is right here, number
17 3, third-party confirmation from Horton's material suppliers
18 that matching replacement materials, i.e. brick, stone,
19 windows, doors, trim have been ordered and will be available
20 on site should its repair team not be able to reinstall
21 materials removed for purposes of destructive testing.

22 This is one of the confirmations we asked for so that we
23 could go to our clients and get their consent to let people
24 tear apart their houses. How much time goes by? Did they
25 answer by December 30th? Of course not. This email came in

1 Friday, the 27th of January. A week ago, they emailed us
2 their ABS protocol. So now we're now four months after the
3 Court ordered them to give us adequate notice of inspections.

4 What did the ABS protocol do about the brick repair that
5 we wrote about on December 22nd, about the matching materials?
6 They buy into this imaginary theory here that they're going to
7 reuse the existing brick material, that they're not going to
8 break the bricks. Well, as we saw in that picture, they broke
9 the bricks, and they have no brick. They have no matching
10 brick. And this is just, Your Honor, one example of what
11 we're dealing with, with those people that are complaining
12 about us being uncooperative.

13 Your Honor, in the interim, since we didn't get a
14 response from D.R. Horton regarding its testing by December
15 30th like we requested, since we wanted to get this testing
16 done so that we can keep this case on track for a court
17 hearing, we went ahead and we drafted a simple consent to get
18 the homeowners to sign that we thought that they could rely
19 upon with D.R. Horton, that D.R. Horton would protect their
20 property and put back whatever's disturbed and make sure it
21 matched. Your Honor can see it on the screen now. It's four
22 lines. It's the simplest thing in the world.

23 We sent this consent to D.R. Horton before we got -- or I
24 think it was the day before we got that letter on the 27th, or
25 it actually crossed in the mail at the same time. We said,

1 since we haven't got your protocol, here's the consent form
2 we're using to procure our homeowners' consent; let us know if
3 you have anything to say about it. Not one word in response
4 for the ten days between the day we sent this to them and the
5 day they went out on our property to test, until Monday
6 morning, when they refused to sign it. And they said they'd
7 rather call you and try and get you to help them out rather
8 than sign the simple consent that says that they're going to
9 protect our clients' property, they're going to repair
10 whatever they hurt, and the materials are going to match.
11 That's all it says, and that's all they (indiscernible).

12 Here's what they eventually agreed to, because as it
13 turns out, they did not have brick; they did not have any
14 matching brick. They had made no arrangements to do this
15 testing. So they eventually signed this thing that they had
16 Dabny Lynn alter and handwrite with them that they put back
17 whatever brick they could and that they have time to go find
18 some matching brick. They're going to come back to the house
19 a second time.

20 Actually, it'll be a third or fourth time for the repair
21 because this has to be done in stages. But they'll come back
22 for a second series of days to do a repair. They will take
23 the sledgehammer to my clients' walls a second time, take out
24 the brick that does not match, and put in a brick that they
25 think's going to match the second time. And that's the kind

1 of nonsense that they're putting my clients through. And
2 that's just completely unacceptable. And it's not in
3 compliance with this Court's order.

4 Your Honor, the defendant has now been in 117 of the
5 class homes as of the completion of the ones that are on the
6 books this week and two days next week, 117 total out of 221.
7 That's over 50 percent. And Your Honor, that is a
8 statistically very high number for any class action. And
9 almost any engineer will testify to you that 10 percent would
10 give you give you a basis for extrapolation, and now they're
11 up over 50 percent. That's a lot of cooperation by my
12 clients.

13 Hey, the fact that sometimes we can only get in in the
14 afternoon because they've got a grandmother they're caring for
15 in the morning or they can have their kids let us in the
16 afternoon, or whatever it is that we're working around to try
17 and get the opposing party in there, that's just a minor
18 inconvenience. It can't have been too inconvenient because
19 they've been in 117 homes.

20 And this picture here of them tearing up the home, that's
21 just one of, I think, 20 homes that they're doing right now.
22 We've got -- they've taken off door trim; they've taken off
23 the siding. They have put back broken Hardie plank siding.
24 They have put back trim that's cut in half by them. They have
25 failed to replace trim that they've knocked the pieces as

1 they're doing testing.

2 I don't have -- I wouldn't have to bring this up if they
3 didn't just engage in such a big smear campaign for the last
4 30 minutes. I'm okay giving them some time to try and make
5 their repairs right. But the way they're going about this,
6 Your Honor, is not proper. And it's just -- it's not -- it
7 doesn't -- their side of this, Your Honor, just does not bear
8 scrutiny when you take a close look at that.

9 It happens to be they were not invited to our testing
10 because our testing was done before we filed suit, with one
11 exception. The one exception, Your Honor, was that they --
12 Your Honor may recall that they were upset that they weren't
13 certain about whether certain defects were in the case or not.
14 We supplemented our discovery and we said, okay, these three
15 defects we're not going to pursue in the case.

16 And one of them was shingles. We just heard something
17 about shingles a few minutes ago. Well, shingles aren't
18 relevant in our case. But anyway, we clarify, we're not
19 including the shingling in this suit. There was some nearby
20 flashing that's included, but not the shingling.

21 So we knocked two or three different components out of
22 the case, Your Honor, for clarification to them. But we did
23 say, yes, the floor problems are staying in the case. Too
24 many people have them. And since they were insisting on
25 knowing what it is that we're complaining about the floors, we

1 sent an engineer back out there to do an investigation on the
2 floors. It's my understanding all he did was observations,
3 other than perhaps look under the carpet in a couple places,
4 which sometimes you can pull that back without damaging it.
5 Other than that, it was a nondestructive observation. He was
6 sent out there to answer their questions regarding what, if
7 anything, is wrong with regards to the flooring.

8 Much to do has been made about the delay in the class
9 representative deposition. Let's talk about it. It got
10 delayed because they originally scheduled it for one day. It
11 was easy to get them one day in December or whenever it was.
12 When they changed their request to have her three days in a
13 row, and she had to take three days off, the earliest we could
14 get it was -- I believe it's in early March now because that's
15 the earliest. She's a TSA agent, one of those airport
16 screening people. And that was the first time she'd get three
17 days in a row off.

18 If they want to limit their deposition of her to a day,
19 we can get her back in there next week. They have already
20 deposed her husband, Paul Zitek, and they're deposing two
21 absent class members tomorrow. So almost every delay -- and
22 in fact, if we had to get Dabny Lynn involved in this to get
23 it drawn down into more detail, we could. Almost every delay
24 that has occurred, D.R. Horton has at least equally
25 contributed to, if not caused.

1 With regards to Dr. Whitlock, that was another smear
2 campaign. Plaintiffs have done what they do in every case,
3 which is every time we get new evidence, we send out a
4 supplement. It's not our design to send out 17 different
5 supplements from day 1. It happens to be that this is a
6 three-year-old case. As time goes on, the engineer does more
7 work. And we supplement it as timely as we can to the
8 opposition. And yes, we are -- I think last week or two days
9 ago, it was the 19th supplemental response.

10 The discovery response that came in two days ago of 2,000
11 documents, that was from a different party. That was Wright
12 Floors (phonetic), who finally answered their discovery rather
13 than face this motion to compel today. We did supplement with
14 documents from our clients that are being deposed tomorrow.
15 Yesterday we did do that.

16 Every time we present a client for deposition, we meet
17 with them one more time, say, are you sure there's not some
18 other document that might be relevant? They might want to see
19 this; they might want to see that. Let's double-check
20 everything. And whenever we find anything, out of abundance
21 of caution, whether it's relevant or not, we produce it. And
22 so yes, we always supplement our discovery for any deponent
23 before they depose, as is required.

24 Back to Dr. Whitlock for a second. Your Honor, the
25 original Whitlock production was huge, and we had them send it

1 to us so that we could Bates stamp it and so that we could
2 produce it in a way that electronic discovery could use it
3 properly, the electronic discovery tools that attorneys have
4 in their offices now. Yes, we did that. And you've got to do
5 it carefully because you don't want to Bates stamp the
6 natives, and things like that.

7 During the first two days of his deposition, after the
8 defendant made such a big deal that we had Bates stamped Dr.
9 Whitlock's documents for him, we facilitated Dr. Whitlock's
10 file being produced a second time on a hard drive. All we
11 asked D.R. Horton to do was either pay or supply him with a
12 hard drive. And that hard drive was filled by Dr. Whitlock
13 and sent back to D.R. Horton.

14 And besides that, because other parties wanted it too and
15 nobody wanted to pay for a hard drive, the entire file was
16 again put up on ShareFile for the 100 and odd third- and
17 fourth-party defendants, or D.R. Horton, too, if they wanted
18 it. And I understand they used that share file at the second
19 deposition.

20 Now, Dr. Whitlock did resume his deposition for three
21 days in January. There was two delays. One was getting his
22 hard drive done. And secondly, he got sick. So there was two
23 days, but we'd agreed to present him for three more days. And
24 we presented him for three days in January. As D.R. Horton
25 took its lunch break on its fifth day -- or its fourth or

1 fifth day of deposing Dr. Whitlock -- and let me be clear:
2 five full days. I mean, the federal rules allow six hours.

3 Five days by D.R. Horton, deposing the uncooperative
4 plaintiffs' expert. At the fourth or fifth day, we said to
5 D.R. Horton, look, if you agree to finish -- if we give you
6 one more day, we give you a sixth day, if you agree to finish
7 and rest, we'll go to that sixth day. But if we don't have
8 some sort of time limitation agreement, we're ending. And so
9 after the five agreed-upon days, we left. Two days in I think
10 November, three days in January.

11 And since then, Your Honor, we have facilitated the
12 subcontractors -- most of which have not had a chance to ask
13 questions -- to ask questions for an hour or so during that
14 five days. But other than that, that was five days of D.R.
15 Horton questioning of a single engineer.

16 We have facilitated the subcontractors re-noting Dr.
17 Whitlock's deposition so they get a chance to ask some
18 questions. And that deposition, I believe, is on the book to
19 occur in several weeks. Similarly, we have arranged for the
20 subcontractors to re-note our horizontal expert, our
21 horizontal engineer, so that they get a chance to ask them
22 questions. And that deposition is also on the books to occur
23 in several weeks.

24 So Your Honor, counsel indicated early on that
25 plaintiffs' motion for a protective order was partially in

1 response to this. I can't help but not make it partially in
2 response to this because D.R. Horton consistently files one
3 thing and argues another. As the Court can tell, D.R. Horton
4 just argued a three-year case in 30 minutes about every wrong
5 the plaintiff has done in three years. D.R. Horton just went
6 back to the class certification order, and apparently they
7 want plaintiff to appoint a second class representative now.

8 Well, D.R. Horton hadn't talked to plaintiffs about that
9 in two and a half years. And for the Court's background, the
10 reason Judge Maddox -- the reason the issue of a second
11 plaintiff came up in part was because it was unknown whether
12 or not D.R. Horton would appeal the refusal to compel
13 arbitration as to first-time homeowners that had bought
14 directly from D.R. Horton and who had an arbitration clause in
15 their purchase contracts.

16 In the event that there was an appeal by that subclass,
17 the court provided there would be a different class
18 representative for the downstream homeowners who would not be
19 in that appeal because they had no arbitration agreement with
20 D.R. Horton. Plaintiff is happy to appoint a subclass
21 representative for those downstream owners. We're happy to
22 amend the complaint. Like I said, D.R. Horton -- this is the
23 first time I've ever heard D.R. Horton raise that issue in
24 three years. But we are happy to take care of that.

25 So Your Honor, with regards to the remainder of the

1 balance of the plaintiffs' response and opposition, the Court
2 has allowed enough time. We've voluntarily extended it into
3 February. They want to say we're blocking depositions. Try
4 this out for size. They scheduled a hundred individual
5 interior depositions for January, for two weeks in January.
6 And then four days before Christmas break, three days before
7 Christmas break, they sent another letter scheduling
8 destructive testing instead for the same time period, telling
9 us to cancel all of our individual inspections with our
10 homeowners and now change it all to destructive testing.

11 My staff had worked for three weeks arranging all those
12 individual inspections to occur in January that D.R. Horton
13 tried to get us to cancel so they could do their destructive
14 testing in January.

15 And frankly, Your Honor, rather than allow that kind of
16 confusion to occur -- and we couldn't have made that work
17 anyway -- we agreed to give D.R. Horton another month of
18 inspection, subject to your approval, to continue the
19 individual inspections when they were approved -- when they
20 were scheduled, and then to do the two weeks of the
21 destructive testing in February, which is underway as we
22 speak. Most of my staff on this case -- court case is out
23 there on site right now.

24 This thing about my staff and my engineers delaying their
25 inspections, that's the first time I've ever heard of that.

1 That's typical D.R. Horton. Just throw in something new and
2 see what sticks. My people aren't in the way. My people are
3 facilitating the inspections, and they are honoring our pledge
4 to the homeowners to protect their property and to control the
5 access in and out of their residences.

6 They're complaining about us being obstructionist by
7 having them sign a liability waiver. That's -- you go on
8 somebody else's property, they're an idiot not to make you
9 sign a liability waiver. I don't want responsibility for
10 their engineer if they fall off a ladder. Don't tell me I'm
11 the one responsible. No. Anybody going on the property,
12 anybody getting on a ladder, anybody building a hangar, yeah,
13 sign a liability waiver in favor of the homeowner. We're not
14 going to be responsible for whatever you all do or don't do
15 for your accidents on our property.

16 So Your Honor, there are three absent class member
17 depositions on the books. One has already occurred. Two are
18 scheduled to occur tomorrow. We seek an order limiting the
19 number of absent class member depositions. The Court may
20 recall from our briefing that the -- and in fact, I had a copy
21 of Judge Young's order in this PowerPoint.

22 The Court may recall from our briefing that both
23 nationally, Newberg on Class Actions and the Schutz (phonetic)
24 case from the United States Supreme Court for three or four
25 decades now, it's known, it's absolutely known, that absent

1 class member discovery is disfavored. That's not the nature
2 of a class action.

3 Now, in prior class actions, construction class actions
4 in this state, prior circuit court judges have attempted to
5 give the defendant some discovery so it gets a feel for what's
6 involved -- I guess to see what's going on -- without overly
7 violating the class action discovery disfavoring rule.

8 And by the way, speaking of class action discovery, we
9 heard an argument for permission to send a survey. The Court
10 will not find a motion anywhere on its docket by D.R. Horton
11 formally asking this Court to sanction is sending a survey.
12 That survey just keeps coming in the back door attached to
13 some brief, attached to -- regarding some different discovery
14 matter or another. They've never actually briefed it.
15 They've never actually -- excuse me, they've never actually
16 moved for it and gave us an opportunity to hit that issue and
17 that issue only square in the head with this Court.

18 Surveys to absent class members are extremely
19 disfavored. And we just heard today where D.R. Horton is
20 really going with this. They think that they can force
21 surveys and they can force participation by absent class
22 members, and if they can force an inspection of every house,
23 they think they might shrink the size of the class. They
24 think they might reduce the damages. They finally just said
25 it out loud during their argument to you that this might be a

1 tool to reduce the size of the class.

2 Well, Your Honor, I argued -- I briefed that issue a
3 decade or two ago, and it resulted in a decision in this state
4 called Soundson v. Auto Owners (phonetic). And in that
5 particular case, I've been up on appeal on one matter, came
6 back down, went to trial, and Judge Young changed the class
7 action that we'd had certified previously, changed it from an
8 opt-out class, which is recognized by Schutz and by a civil
9 procedure, to an opt-in class.

10 And we went up on appeal, and the Supreme Court of South
11 Carolina ruled that no, absent class members don't have to
12 participate in an action. That's not the nature of a class
13 action. That's too burdensome on the class to make them opt
14 in. That was wrong for Judge Young to make it an opt-in
15 class. We're reversing that. And it's an opt-out class. And
16 the class was essentially recertified and sent back down to
17 the trial court for trial.

18 That's exactly what they're trying to do here by trying
19 to make the absent class members be active. They're trying to
20 shrink the size of the class. And that's not right. That's
21 violating class rights.

22 Your Honor, we are okay with the precedent they set in
23 their brief. There's a case. I think we filed the order
24 attached to one of our briefs too. There's an earlier case in
25 the Lancaster (phonetic) and the Grazia cases. In Grazia,

1 eventually the court allowed about 4/10ths of one percent of
2 the class to be deposed. They said, you can go take some
3 exemplary depositions.

4 In this case, that would be ten absent class members.
5 We're fine presenting ten absent class members for deposition
6 as a compromise. We're already in the process of presenting
7 three. We're happy to go get seven more. We will try and get
8 the ones they want with the Court's leave, us having the
9 flexibility to substitute some in if we just can't get the
10 exact seven they want. But we would be focusing on trying to
11 get what they want. We're okay with that. We object to any
12 survey.

13 We object to D.R. Horton noticing or continuing D.R. --
14 excuse me, Dr. Whitlock's deposition. They've already been at
15 it for five days. If you can't get a deposition done in two
16 days you know, in any case in the world, you can't get a
17 deposition done during two days, there must be just a huge
18 problem. And five days is plenty. What I suggest to the
19 Court, maybe it doesn't have to rule on that right now. We're
20 giving the subcontractor some time with Dr. Whitlock.

21 If Mr. Imhoff wants to try and come back to this Court
22 after the subcontractors asked him questions and show this
23 Court why it needs a sixth day on his deposition, maybe that
24 would be the time to approach the issue when we have his
25 transcript from the subcontractor portion of his deposition.

1 We've covered the inspections. As I said, there's been
2 117 inspections through next Tuesday when they complete. You
3 heard some mudslinging about plaintiff changing the
4 inspections all the time. We were asked to change the
5 inspections all the time. There's a storm coming on Friday.
6 D.R. Horton asked us to move our inspections into the earlier
7 part of the week before the storm gets here. In fact, not
8 only that, Monday, D.R. Horton asked us to cancel all the
9 interior inspections that we had scheduled this week. It told
10 us it didn't have enough engineers to get into all these
11 houses.

12 We went forward with the inspections anyway because we've
13 been ordered to get inspections done, and we had already made
14 the arrangements with the homeowners. And so that's what --
15 it's this week and next Monday and Tuesday. That's bringing
16 us up to 117 total inspections, including 17 houses on which
17 they're doing -- excuse me, 15 houses on which you're doing
18 destructive tests, 15 houses. And there's multiple
19 destructive tests occurring on most of those houses. So
20 that's about 45 or 50 destructive tests that D.R. Horton is
21 engaging in.

22 D.R. Horton wants to read a word into your order from
23 last fall, Your Honor, that doesn't exist. You ordered that
24 the inspections get done. You never ordered all houses be
25 inspected. That was not in that order. And the reason it's

1 not in the order, Your Honor, is because D.R. Horton never
2 asked for that at any time, in writing or otherwise, prior to
3 that hearing or you issuing that order. They had never asked
4 to inspect every residence. And now they're trying to read an
5 aspect in the order that doesn't exist.

6 We're glad to continue to make some more houses
7 available. We're doing it right now, but we submit that once
8 we're crossed the 50 percent mark, we've made an adequate
9 number of homes available for inspection by D.R. Horton. And
10 that beyond 50 percent, they should have a burden and it
11 should be a heavy burden to show why they need more
12 inspections when they've seen 50 percent.

13 They should have a burden of showing you that any of the
14 work they did changed on any of the houses such that the
15 conditions that we see in the first 117 houses are going to be
16 any different in the last 87 houses or whatever the math works
17 out to be. And the conditions we're talking about, Your
18 Honor, are not things like a fancy pool in the backyard. It's
19 not stuff like, oh, let's try and show the class rep can't be
20 typical. She must have more money than everybody else because
21 she's got a pretty pool.

22 The pool doesn't involve our suit. And if you saw behind
23 that pool in that picture they showed Your Honor, if you saw
24 behind that pool, she has that same slope at the back of her
25 yard that is dumping water into a flat yard. Now, it may be

1 that some of that water goes in the pool and gets pumped into
2 the sewer system so she doesn't get the same problem. Doesn't
3 mean her back yard isn't dumping water down that hill into her
4 flat yard, same as everybody else.

5 Your Honor, I think I've covered the issues. We asked
6 for a limitation on the number of inspections. We asked for
7 no -- we're going to complete the 15 houses we have available
8 for D.R. Horton to do destructive tests on by Tuesday,
9 depending on what that storm is. We ask for no more
10 destructive testing until they finish fixing what they've
11 already torn apart at our houses.

12 We ask for a reasonable limit on the number of absent
13 class member depositions, say ten total of a half day or less.
14 And we're happy to facilitate those. We object procedurally
15 and substantively to their request for a -- for their request
16 for a survey. We -- to the extent that they're asking
17 anything about Dr. Whitlock -- I don't know if that was just
18 mudslinging or if they're actually asking for another day.

19 To the extent they're asking to continue Dr. Whitlock's
20 deposition, we ask that that -- we suggest that maybe that
21 should be -- it should either be denied. because they already
22 had five days, or it should be held in abeyance until the
23 subcontractors have had it with Dr. Whitlock for a period of
24 time and see if there's really anything left to ask him about.

25 You may have seen in our submittal, Your Honor, that

1 mediation in this matter is scheduled for June 5, 6, and 7,
2 and that's in compliance with your scheduling order. It's
3 being mediated by Frank Smith (phonetic). The current
4 scheduling order keeps things on track for that mediation.

5 I believe I should inform the Court that Mr. Smith is
6 probably going to require plaintiffs to present an online
7 mediation presentation approximately a month ahead of time,
8 which means for the last few days of April and the first week
9 of May, plaintiffs will need to focus on getting a proper
10 presentation together for the mediation for both the
11 participants and for the mediator. And so we have factored
12 that into the schedule.

13 I don't know if the spoliation was just more mudslinging.
14 There's no spoliation motion pending before this case. I
15 don't know if the ethical allegation is more mudslinging.
16 There's no ethics motion pending in front of this Court. I'm
17 happy to answer any questions that the Court may have.

18 THE COURT: All right. We're going to take just a short
19 break, and then I want to hear from -- I want to hear from the
20 third-party defendants. So we'll take just a short break.

21 (Recess.)

22 THE COURT: Okay. All right, everybody. Wander back in.
23 Mr. Pritchard, on your computer, you look purple.

24 MR. PRITCHARD: I'm on Mars, Your Honor. I don't know
25 what happened along the way. My camera decided to go on the

1 out for consideration. Again, I would not try to hold up any
2 kind of discovery that -- to move the case forward. I just
3 wanted to bring it to the attention of the Court. Thank you
4 for your time.

5 THE COURT: Thank you, ma'am.

6 Mr. Kendall.

7 MR. KENDALL: Good afternoon, Your Honor. Everett
8 Kendall on behalf of Blue Ridge (phonetic). I want to --
9 going away from the current expert depositions to pick up on a
10 comment that was suggested and criticized -- a comment made by
11 Mr. Imhoff, criticized by Mr. Lucey. I was the counsel of --
12 defense counsel of record in the Grazia matter that was
13 referenced in this case.

14 And in that case we had -- it was a class action that
15 involved over 4,000 houses. Judge -- then Judge Baxley issued
16 a couple of orders that were very significant in helping us to
17 manage a lot of the aspects of that case. Perhaps the
18 Court -- those are not available on the public record index
19 because they preceded that possibility. But I can provide
20 those to the Court.

21 But I thought -- two points I wanted just to make to the
22 Court. One was that we did use a questionnaire in that case,
23 and it actually turned out that about 2,700 of those
24 homeowners returned that questionnaire. And as a result of
25 that, everything else that happened was much more effective.

1 Ultimately, the case did settle as a certified class on a --
2 with a settlement agreement that allowed all of the
3 participants. So we never got to the place where it was a
4 concern about whether or not this was an opt-in class by
5 virtue of the questionnaire. So we managed to work around
6 that problem and had a great result as a result of using a
7 questionnaire. So that could be a helpful tool to the Court.
8 Again, I can provide that.

9 The second question had to do with the number of
10 depositions we were allowed. It is not -- it was not the
11 holding of the Court that the number of depositions we took
12 was sufficient or a final number. It was just the number we
13 took and that we were able to take as part of a first effort.
14 In that case, we were phasing a lot of things and at that
15 point decided that we would not launch into a full deposition
16 panel of 4,000 depositions. We instead began that process and
17 then ultimately, again, the case settled and it was not
18 concluded.

19 The first order of the court, however, did limit the
20 number. But that was not based on a decision that -- a final
21 decision that that would be appropriate as an extrapolation
22 measure. In fact, courts have held that extrapolation is not
23 appropriate in South Carolina. So those are going to be -- I
24 just thought I would bring them to the Court's attention.
25 There are parts of this case that map that, and the Court

1 might find those instructive. I'd be glad to provide them.

2 THE COURT: If you have a copy of those orders you'd like
3 me to look at them, please send them me.

4 MR. KENDALL: I will do so --

5 THE COURT: And Mr. Lucey.

6 MR. KENDALL: I certainly will. Again, just hopeful that
7 it would -- so we don't have to -- we don't have to reinvent
8 the wheel on this.

9 THE COURT: Just send a copy to Mr. Lucey and Mr. Imhoff
10 and --

11 MR. KENDALL: Will do. Thank you.

12 MR. IMHOFF: Your Honor, and I want to give Mr. Kendall
13 credit. He's the one that came up with the survey idea. We
14 talked to him and said, how did you manage this massive thing
15 years ago? What did the court do? And he's been on the phone
16 with us and emailing with us and saying, you know, here's some
17 ideas how you do this. So let me give him credit. He
18 actually did. He prompted the survey idea as a workaround of
19 224 depositions.

20 MR. KENDALL: I'll send -- thank you, Your Honor. I'll
21 send those along when I can dig them out of archives.

22 THE COURT: Okay. Thank you. Thank you, Mr. Kendall.

23 All right. I'm looking. I think I've hit all of the
24 boxes. Is there somebody that I've missed?

25 I see Mr. Preeves is in. Mr. Preeves, do you have

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT OF THE
	)	TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO: 2019-CP-04-1942
	)	
	)	
Natalie Zitek, individually,	)	
and on behalf of all others	)	
similarly situated,	)	
	)	
PLAINTIFF	)	
	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	
D.R. Horton, Inc., Jane Doe	)	
#1-10; and, John Doe #1-50	)	
	)	
DEFENDANTS	)	
	)	
DR Horton, Inc.,	)	
	)	
THIRD-PARTY PLAINTIFF	)	
vs	)	
	)	
AJ Landscaping & Grading, LLC	)	
a/k/a AJ Landscaping &	)	
Grading, Inc; AllPro Textures,	)	
LCC; Alpha Omega Construction	)	
Group, Inc; American Concrete	)	
And Precast, Inc., a/k/a ACP	)	
Concrete, Inc.; A&J Framing,	)	
Inc; Alpha EMC; A-Z, Inc;	)	
Atlanta Floor Designs Center;	)	
A Grade Above Others, LLC;	)	
Brand-Vaughan Lumber Co., Inc.)	)	
BKF Builders, Inc.; Builders	)	
Designhouse, LLC; BMC East,	)	
LLC D/B/A Coleman Floor, LLC;	)	
Builders Firstsource	)	
Southeast Groupe, LLC, a/k/a	)	
Builders Firstsource, Inc;	)	
Bravo Carpenters, Inc.; Caryl	)	April 21, 2023
Mechanics II, Inc.; Caryl	)	ANDERSON, SC
Mechanicals, Inc.; Cannaday	)	
Siding and Gutter, Inc.; Cores)	)	
Painting, LLC; CBU Enterprises)	)	
Inc.; CPI Security Systems,	)	
Inc.; DOM Group, LLC; Ferguson)	)	
Enterprises, Inc.; Five Star	)	
Construction, Inc.;Five Star	)	

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

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE

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Kimila L. Wooten, Esquire
Attorney for DR Horton

MONA L. MANLEY
Court Reporter

PROCEEDINGS

1

2 THE COURT: Let's go down our motions today. We have a
3 number of motions. Now, I have been informed that several of
4 them have been resolved, but the clerk's also added a couple
5 of things to the docket. So, I'm just going to go down them
6 in order, and then if they have been resolved, you just note
7 that and then we'll -- we'll just go to the next one. So, the
8 first thing on the schedule is a Motion to Compel filed by
9 Builders First Source Southeast, so.

10 MR. HUGHES: Your Honor, this Steve Hughes. I represent
11 both Builders First Source and Probuild, and both of those
12 motions addressed to Therma-Tru have been resolved.

13 THE COURT: Okay. So, I'm going to mark that one as
14 resolved. And so, the second one, the Motion to Compel
15 Probuild Company, LLC?

16 MR. HUGHES: Same situation, Your Honor. Those have
17 been resolved as well.

18 THE COURT: Okay. Now, we have a Motion to Compel filed
19 by DR Horton. So, Mr. Imhoff, what's the status of that?

20 MR. IMHOFF: Your Honor, if that's -- is that the Motion
21 to Compel the continuation of Nick Dalton's deposition?

22 THE COURT: The ---

23 MR. IMHOFF: I have a different list of -- or roster than
24 you do, apparently, in a different order. So, I just want to
25 the make sure that I'm addressing the correct one, Your Honor.

1 MR. LUCEY: The Plaintiff shows that our motion for a
2 protective order filed February 16th, 2023, would be next. And
3 that DR Horton's Motion to Compel was filed on February 17th,
4 the next day.

5 THE COURT: Okay, this one was filed February the 17th,
6 so, this is linked with Zitek's motion for protection, is that
7 correct?

8 MR. LUCEY: Yes, sir.

9 THE COURT: All right. Well, let me hear from you first,
10 Mr. Lucey, since his motion is late to yours.

11 MR. LUCEY: Yes, Your Honor. Thank you and about --
12 there's about five motions for a protective order which are
13 nearly identical in content, Your Honor. They all concern the
14 status of Plaintiff's counsel's relationship with class
15 members and attempts by one or more Defendants to invade that
16 relationship. Your Honor, when this case was certified as a
17 class action approximately two and a half years ago, Judge
18 Cordell Maddox's order was very express in its terms. It
19 defined the class, and it appointed my law firm as class
20 counsel. That means, Judge Maddox, two and a half years ago,
21 appointed my law firm and all of my attorneys, including me,
22 as the attorneys for the class and its members. And that
23 class continues today. That's a two-and-a-half-year-old
24 class.

25 And the class definition, Your Honor, in that order is

1 MR. IMHOFF: Yeah, Kim Wooten is going to talk about
2 this. We're going to ask, since we don't have trial until
3 September, for the Court to consider extending the discovery
4 deadline because we are killing ourselves, Your Honor. I
5 think I've taken a deposition or two every day for months.
6 But I'll let -- and I want to have dinner with my wife, you
7 know, Your Honor, so.

8 MRS. WOOTEN: Right, we were just talking about the Nick
9 Dalton deposition right now. We have -- yesterday, Your
10 Honor, we just submitted a little memo to you about our
11 request to extend discovery or change the scheduling order up
12 a bit, and I can address that at end when we have gotten
13 everybody's actual motions addressed, if that's okay with Your
14 Honor.

15 THE COURT: That's fine. That's fine. All right, let's
16 -- so, I'm going to read what you've submitted about Mr.
17 Dalton, Mr. Imhoff, and I'll take that one under advisement,
18 as well.

19 MR. IMHOFF: Thank you, Your Honor.

20 THE COURT: Okay, let's go to -- what's our next one
21 here? Installed Building Products.

22 MR. KENDALL: Everett Kendall for Installed Building
23 Products.

24 THE COURT: Yes, sir.

25 MR. KENDALL: Thank you. Your Honor, procedurally, this

1 is a little convoluted, so I'll just remind the Court. This
2 is a Motion to Reconsider an order that was issued a couple of
3 months ago. When we came before the Court, we had filed a
4 motion for summary judgment that was argued in September. And
5 we brought that up to you in the last hearings -- I believe
6 they were in February, and said, Your Honor, there is still
7 this unrulled on motion. And Your Honor went back and looked
8 at the docket, and there were -- in fact, there was a
9 preceding motion that had been filed at the time of pleadings,
10 16, 20 months ago.

11 That motion, the Motion to Dismiss or motion on the
12 pleadings themselves are for a more and definite statement was
13 a moot motion. But when the Court -- because I did not make
14 it clear enough that that was out there or didn't remind the
15 Court, the Court ruled on that motion and not on our Motion
16 for Summary Judgment. So, the order that was issued by this
17 Court that we've now filed this Motion to Reconsider on is
18 simply just to point out to the Court and to say again,
19 there's an open Motion for Summary Judgment that we would like
20 to -- for the Court to rule upon.

21 And if the Court wants to hear the motion -- that was
22 argued in September of 2022. But if the Court needs to hear
23 argument on that, we are glad to do that today. But the
24 Motion to Reconsider is predicated on a motion that rule on,
25 again, a moot motion, that we -- I guess that we failed to

1 notify the Court that it had become moot.

2 THE COURT: Mr. Kendall, I remember -- your motion -- all
3 the other motions for summary judgment were based on an
4 indemnification issue, and yours was based on the lack of a
5 common defect, or ---

6 MR. KENDALL: Sort of. Most of the other motions were
7 based on the Stoneledge argument and having to do with
8 consolidation of the claims into indemnification. That was
9 not my argument. My argument is that there is no claim --
10 there is no derivative claim being presented in this case that
11 entitles the DR Horton to pursue my client as a third-party
12 Defendant under indemnification theory. So, it's different.

13 It is based upon the claims presented by the Plaintiff.
14 And so, that is what I think Your Honor is alluding to. Our
15 argument, in a very brief nutshell is this. The Plaintiff's
16 class claims that were presented and ruled on in the motion
17 for class certification did not include any work performed by
18 my client. My client did gutters and insulation, and then
19 some miscellaneous door knobs and mirrors, and that stuff that
20 nobody disagrees about. But those other two things we have --
21 were potentials, and so we've been waiting to see what would
22 happen. None of the reports that were ever issued -- and when
23 we briefed this in September, that's what we showed you, was
24 that there was nothing in the reports specific to blown-in
25 insulation and gutters.

1 Since that time, we have gone on and deposed Mr. Whitlock
2 and Mr. Maddox, and I've supplemented this week with excerpts
3 from their testimony, and in their testimony, they both said
4 that they did not -- they are not rendering opinions as to any
5 class defects related to gutters or blown-in insulation. And
6 if there is no class claim for either of those items, then
7 there cannot be a derivative claim from DR Horton to my
8 client, and that derivative claim is the first question that
9 has to be asked when we are looking at a third-party claim.

10 So, Your Honor, I'm asking that this Court grant summary
11 judgment on the third-party claim to the extent that it fails
12 to allege a derivative cause of action. Now, there may be a
13 separate argument for breach of contract, but that's not
14 derivative. They have to come up with a derivative claim.
15 So, Your Honor, I'm asking Your Honor to grant that motion and
16 order summary judgment. Glad to argue it further, but it's
17 been argued, it's been briefed, and I want to keep it brief
18 for the benefit of the everyone.

19 THE COURT: Thank, Mr. Kendall. Mr. Imhoff, any response
20 to that?

21 MR. IMHOFF: Yes, Your Honor. This was in front of you
22 months ago. I'm glad that you said that you remember this.
23 And at that time, we asked -- we wanted to narrow this case
24 down. As you see, there's 68 lawyers I think, or some 65
25 lawyers, in this case. A lot have of these lawyers, and maybe

1 their clients don't need to be in this case. If you remember,
2 there was an issue with the roofers, and Mr. Lucey said he
3 didn't sue the roofers with for the roofs necessarily, but
4 their flashing may be implicated, and so on.

5 And you and I asked Mr. Lucey on different subcontractors
6 and different work, if he would admit or go ahead and
7 stipulate that there are not issues with that work. This is
8 one of those, Your Honor. Mr. Kendall is right. Mr. Lucey
9 doesn't have reports and he does not have experts criticizing
10 the work of IBP. But, he did send a notice and opportunity to
11 cure, which did implicate the work of IBP, which is the basis
12 of how we brought the third-party subcontractors in.

13 And Mr. Lucey filed a very, very, very general pleading,
14 and he did not set forth exactly what he was complaining
15 about. My suspicion is they were still investigating these
16 houses and wanted to leave their options open. But that
17 leaves DR Horton in a little bit of an odd place where we are
18 defending the lawsuit based on very generalized allegations of
19 defective construction.

20 We had to necessarily bring in the subcontractors that we
21 knew, or suspected the Lucey Law Firm and the clients were
22 suing about, and we're left in that this odd position where we
23 want to the narrow the case down. We're not exactly sure who
24 Mr. Lucey is suing or what about. But Mr. Kendall is right
25 that there is no expert testimony at this time about his work.

1 And I would ask, Your Honor, it would be very simple if Mr.
2 Lucey would just stipulate that he is not making a claim for
3 insulation, I think the garage doors, and the gutters at this
4 time, and we can get Mr. Kendall's -- at least part of his
5 third-party client out of this.

6 I do disagree. I think there's a defense obligation in
7 the indemnity contract agreement. I don't think breach of
8 contract should be dismissed at this time. And we can argue
9 about that, but if we could get rid of half of this, with Mr.
10 Lucey's stipulation, then I think we would all be in a better
11 position, and it may shorten some of this case, Your Honor.

12 THE COURT: Okay. Mr. Lucey, anything that you would
13 like to tell me regarding that? Uh-oh.

14 MR. KENDALL: You're muted. You're muted, Justin.

15 THE COURT: I can't hear.

16 MR. LUCEY: I apologize, sir. And yes, no, I didn't sue
17 Mr. Kendall's client, and I have nothing to do with that. But
18 to the extent that the Court would like me to respond to the
19 brief that IBP submitted regarding the products they are
20 responsible for, I am unaware of any defect regarding all but
21 one of those products. One product, exterior door handles and
22 deadbolts, were shown to be leaking during water tests by
23 Engineer Whitlock, and he testified about that in his
24 deposition. I believe he testified about it. I know it's
25 noted in his water test reports that the patio doors were seen

1 leaking through the door handle, hardware, and locks.

2 So, to the extent that that is one location the doors
3 leak, that is an issue. Now, the memo -- the IBP memo I
4 reviewed wasn't very detailed about where its products were
5 used. It appears those were exterior door handles, because I
6 believe I saw a reference to deadbolts, and you would only
7 have deadbolts on an exterior door. There is -- obviously,
8 the front doors have door handles and locks, and if his
9 products were only used there, we have no issue with it. But
10 the rear patio door handle lock hardware was shown to leak
11 during water tests by Dr. Whitlock. The rest of his products,
12 he's absolute right. I know nothing wrong about them and we
13 have no claims relating to them.

14 MR. KENDALL: Your Honor, I will say this then, if I may
15 -- if that -- if we can -- now that that is stipulated on the
16 record and I know better -- to be honest, was not aware of the
17 -- that specific allegation, and that's due to a lack of
18 diligence, I suspect, on my part, of not parsing a report.
19 So, thank you Mr. Lucey, for the clarification.

20 I'll address that with Mr. Imhoff. But, now that we have
21 it understood that the gutters and the insulation are not part
22 of the derivative nature, and all that we're talking about is
23 door knobs on patio doors and door locking systems on patio
24 doors, I think, Your Honor, we'll just have to bring this back
25 up at another time.

1 THE COURT: Okay.

2 MR. KENDALL: But I don't want to reopen it to all the
3 others, I think, if we can get that worked out. Jason?

4 MR. IMHOFF: Your Honor, I just need one other
5 clarification. One of the homeowners, Heather Ray, just the
6 other day testified that she has problems with her interior
7 doors, and her interior doorknobs, and they no longer stay
8 closed. If Mr. Lucey will stipulate that that's not in the
9 case, also, because Mr. Kendall just said that they put those
10 interior doorknobs on, then we can resolve that, but that
11 testimony is out there now, because of a lot of the homeowners
12 think that parts of their house are in the class, and they're
13 not.

14 THE COURT: Let's do this. The things Mr. Lucey just
15 stipulated to, Mr. Lucey, put those in a stipulation and
16 circulate those to Mr. Imhoff and Mr. Kendall, and file that
17 in the file, and then we'll have it specified what issue is
18 before the Court.

19 MR. KENDALL: Thank you, Your Honor. I will -- now that
20 we have a new set of issues, I'll just pull back at this time
21 and we'll address it that way.

22 THE COURT: Okay. All right.

23 MR. KENDALL: Thanks, Your Honor.

24 THE COURT: That'll resolve that one.

25 MR. KENDALL: Yeah, and if you want to just rule on that

1 Motion to the Reconsider and the underlying motion that we had
2 had filed, the motion for clarifying and more definite
3 certain, if you want to make all of that moot, that's fine,
4 and just -- we'll just ignore the Motion for Summary Judgment
5 at this time.

6 THE COURT: And I'll issue a Form 4 on your motion that
7 sort of cleans that up. So that'll ---

8 MR. KENDALL: Thank you, that's -- right -- that's what I
9 was hoping for. Thank you, Your Honor.

10 THE COURT: Okay, very good. Let's go on to the next
11 one. Motion to Quash by Landaverry Flooring.

12 MR. HARJEHAUSEN: Good morning, Judge. John Harjehausen
13 on behalf of Jesus Perez and Carlos Humberto, Landaverry, and
14 Ngan My Giang, all d/b/a Landaverry Flooring. This is a
15 Motion to Quash a subpoena. I think that there may be an
16 agreement on this. Let me just give you a little bit of
17 background.

18 MR. LUCEY: There's an agreement if it'll save the Court
19 time.

20 MR. HARJEHAUSEN: Okay. My understanding is that -- my
21 understanding is that ---

22 MR. LUCEY: Mr. Harjehausen, wait a minute. If you are
23 putting on the record these guys are not being named as
24 experts, we'll withdraw the subpoena and it's moot. We just
25 don't want these subpoenas -- we just don't want these guys to

1 be named tomorrow as soon as we withdraw the subpoena, that's
2 all.

3 MR. HARJEHAUSEN: Yeah, and I appreciate that. I guess
4 my concern, Your Honor, is discovery is still ongoing. And
5 although there's a hard stop for May 8th, it's my understanding
6 that DR Horton's expert is going to be deposed on May 9th
7 through the 11th. The Plaintiff's expert, Rhett Whitlock, is
8 the one who, on behalf of the Plaintiffs has testified to sort
9 of damage estimates, and I don't know if there is actually
10 going to be a motion to continue the discovery in this case.
11 It sounds like DR Horton may do that.

12 At this time, my clients do not intend to identify the
13 two experts in the motion. I guess, though, if discovery
14 continues past the May 8th deadline, I just want to preserve my
15 right to potentially designate an expert based upon ongoing
16 discovery that may continue after that. And as I said, my
17 understanding is that DR Horton and the Plaintiffs have agreed
18 to do some discovery after that, including expert depositions.

19 THE COURT: Mr. Imhoff -- I mean, Mr. Lucey, what's your
20 position?

21 MR. LUCEY: We don't object to that clarification, Your
22 Honor, as long as we are not being shortchanged right now. If
23 they've got a new reason to name an expert, we don't object to
24 that.

25 THE COURT: All right, well, since you -- two of your ---

1 MR. LUCEY: We'll withdraw our subpoena, Your Honor.

2 THE COURT: Okay. All right. So, that's resolved.

3 MR. HARJEHAUSEN: I don't expect that we are going to
4 identify one, but I just wanted to preserve that in case we
5 did. Thank you.

6 THE COURT: Okay. Next one on the list is listed as a
7 Motion for Compliance.

8 MR. LUCEY: Your Honor, that's Plaintiff's motion, and
9 that party answered discovery, I believe yesterday -- produced
10 documents. We have not been able to review them overnight, so
11 we'll withdraw the motion and we'll refile it if we determine
12 that the responses are inadequate.

13 THE COURT: Okay. That was number six.

14 MR. EMGE: Your Honor. I'm sorry, Your Honor, if I may,
15 I had an issue with my mute button, I couldn't interject
16 earlier. My name is Chip Egme. I represent Gale Contractor
17 Services in this matter. We have similar scope issues as to
18 Mr. Kendall, and we would appreciate being included in any
19 communications regarding the stipulations with respect to the
20 gutters, down spouts, blown insulation, and the garage doors
21 between Plaintiff's counsel and DR Horton.

22 THE COURT: Mr. Imhoff, include Mr. Emge in that
23 correspondence.

24 MR. IMHOFF: Yes, Your Honor.

25 THE COURT: Okay. Any other concerns ---

1 MR. EMGE: Thank you, I apologize for the interruption.

2 THE COURT: Oh, that's ---

3 MR. EMGE: No, thank you very much.

4 THE COURT: That is fine. I want to make sure we --
5 everyone gets an opportunity if there's an issue we need to
6 deal with. Okay.

7 MR. EMGE: I appreciate that.

8 THE COURT: It looks like 7, 8, 9, 10, 11, 12, and 13,
9 we've already dealt with. Are there other motions that we
10 haven't heard from the parties on at this point?

11 MRS. WOOTEN: Your Honor, the only thing I can think of
12 is yesterday -- we didn't file a motion, but we just filed a
13 memo to Your Honor because, in the last hearing, you had
14 stated if there were any further issues about discovery, that
15 we should bring them up at this conference. Other than that,
16 I'm not aware of anything else. I'm ready to address that, if
17 no one else has any motions.

18 THE COURT: Okay. Go ahead and tell me what you want to
19 bring to my attention.

20 MRS. WOOTEN: Okay. Your Honor, despite what you may
21 have seen today during some of these hearings, we have been
22 able to work together very well in scheduling and rescheduling
23 these depositions. We had a great number of depositions to be
24 taken by the Court's current discovery deadline of May 8th, and
25 as it turned out, we had to, in order to accommodate expert

1 schedules and numerous attorney schedules and numerous party
2 scheduling issues, some days we had two depositions going on
3 at one time, so, the parties have worked very well in
4 scheduling and rescheduling these depositions.

5 And unfortunately, there are a few issues that Mr. Lucey
6 and I haven't been able to work out as far as discovery. So,
7 I really do want to give the Court just a brief background of
8 some of the things that have gone on since the last scheduling
9 order as far as discovery so that you can see kind of why we
10 are asking for some additional time and some additional
11 discovery in this case.

12 Again, Your Honor, we have a \$40 million class action
13 that has been filed against our client. And since the last
14 time that we gathered here in a conference with the Court, the
15 parties have conducted -- I'm going to say probably three
16 quarters of the allowed depositions, including a lot of expert
17 depositions and the parties reached an agreement in the order
18 that Mr. Lucey submitted to the Court, I believe it was last
19 week, about some further deposition being taken in the month
20 of May.

21 And as I recall, the Court had allowed such agreement in
22 the last scheduling order. All right, so, since that time,
23 even though we've agreed on rescheduling some of the
24 depositions that were already scheduled, significant issues
25 have surfaced through the discovery that we did take that was

1 allowed by Your Honor. For example, the Plaintiff's primary
2 construction defect expert testified that his damage
3 calculations are flawed in some aspects, and he is going to
4 have to redo some of it.

5 In addition, in the homeowner's deposition, it's become
6 more and more obvious that each of the homes in question has
7 distinct differing issues, that bear very importantly on DR
8 Horton's affirmative defenses in this case. For example,
9 although -- now we did also, Your Honor, with cooperation
10 between the parties, we completed all of the inspections that
11 the Court had allowed. But in this particular case, we also
12 tried to get an inspection and destructive testing done on the
13 one class member, the one actual class member, the Zitek home,
14 and we were not able to reach agreement on doing destructive
15 testing and further interior inspection of the home.

16 We did do a preliminary inspection of that home during
17 the notice to cure period. However, we asked the Plaintiff on
18 numerous occasions -- there are numerous emails about this,
19 for them to allow the Zitek home to be inspected. And it was
20 not allowed. And we took the inspections of the other absent
21 class members that we were allowed to take. We did those.

22 This is the class member. This was not a part of the
23 Court's inspection list that we gave the Court. What we had
24 asked for with the Court was additional inspections of the
25 absent class members. The Court granted that. We took all

1 those, and then the Lucey Law Firm would not allow to us to
2 inspect and do destructive testing on the actual class
3 member's home, Mrs. Zitek's home.

4 And, Your Honor, we would submit to the Court that it is
5 very prejudicial not to have been allowed that inspection,
6 that the class member is going to be the one to be testifying
7 about defects in this case, and she's also testified in her
8 deposition since the last conference with the Court, that the
9 repairs that were done by DR Horton haven't worked. So, the
10 repairs on this home -- it is very important that we be
11 allowed to inspect this one class member's home. So, that was
12 one reason for us to ask for additional time on the scheduling
13 order and this one piece of additional discovery.

14 In addition, Your Honor, now we have a trial date. I
15 think that the last time we had this conference, the Court was
16 scheduling with the fact in mind that we didn't know whether
17 we could be called to trial sometime between July and
18 December. Now that we have a September trial date, that makes
19 the schedule just a bit more relaxed, and there would be time
20 to do some additional discovery. During the depositions, Your
21 Honor, it's also really important about our affirmative
22 defenses and our ability to assert them in the way that they
23 should be.

24 Many issues involving the statute of limitations have
25 come up in the eight homeowner's depositions that we have

1 taken thus far, such as many of the homeowners have said that
2 they have known about the issues that they are alleging for
3 years prior to the lawsuit being filed, and it appears that
4 many of them would be untimely. In addition, the estoppel
5 waiver and spoliation defenses have -- a lot of evidence has
6 come to light about those because homeowners did not indicate
7 to anyone that they had a problem for a number of years.

8 There have been a number -- as far as spoliation defense
9 -- there have been a number of homeowners during the
10 inspections and depositions that we have discovered have
11 replaced doors, which are a big issue in this case, have
12 replaced windows, have put new roofs on their homes, all sorts
13 of issues that relate to the spoliation defense, and failure
14 to mitigate as well.

15 Many of the homeowners haven't taken any action to
16 mitigate their damages, and this has come out in the
17 inspections and in the depositions. Many of the -- one of the
18 big issues in this case, too, Your Honor, is the grading and
19 landscaping issues, and many of the homeowners have completely
20 relandscaped their yards, have completely regraded their
21 yards, have put in pools, all sorts of things, that, in order
22 for us to properly be able to assert and defend with our
23 affirmative defenses, we are going to need to have some more
24 discovery on those issues.

25 We realize that we can't depose every person in this

1 lawsuit, but we are going to need, we think, to take some more
2 homeowner depositions. However, in order to reduce the chance
3 of having to do that, what we are suggesting to the Court in
4 our memo is that the Court allow us to send surveys to the
5 class members to -- and this is done in a lot of class
6 actions, Your Honor, in some of the cases that I have looked
7 at in my research on this -- what we'd like to do is send the
8 surveys to the homeowners asking things like, what are your
9 particular issues on your home. When did these issues arise?
10 When did you discover these issues? Have you ever submitted a
11 warranty claim?

12 THE COURT: Just a minute. Let me stop you right there.

13 MRS. WOOTEN: Sure.

14 THE COURT: What has changed regarding -- because I've
15 already ruled on the survey issue.

16 MRS. WOOTEN: Yes, Your Honor. I think what has changed
17 ---

18 THE COURT: What has changed between now and the last
19 hearing?

20 MRS. WOOTEN: I'm sorry, Your Honor. I didn't mean to
21 interrupt you.

22 THE COURT: My question is -- I've already ruled on the
23 survey issue in my previous order.

24 MRS. WOOTEN: So --- and the reason we're asking again --
25 we understand. The reason that we're asking again is for the

1 reasons that I'm articulating here to you, Your Honor. It
2 appears that many of these homes have differing issues and
3 many -- if we're going to be able to properly assert our
4 affirmative defenses in this case, we either need to have
5 surveys or we need to be able to take at least another round
6 of representative depositions, you know, maybe 10 more
7 depositions of homeowners.

8 We have only been allowed 10. And because of the myriad
9 of issues that have come up, especially homeowners changing
10 things, spoliation and statute of limitations, then we think
11 that we are going to need some more depositions as well.
12 Jason, did you have something to add?

13 MR. IMHOFF: Your Honor, just very, very quickly. DR
14 Horton has defenses, and you allowed us 10 depositions, and
15 those 10 depositions have revealed things like, the party --
16 the homeowner has now changed their grade, put in a pool,
17 replaced the HVA system, replaced their roof, replaced their
18 flooring. Your Honor, Rhett Whitlock, Plaintiff's expert,
19 says that the proper measure of damages is the amount the
20 homeowner paid to fix the defective condition. That's
21 Plaintiff expert said that. And so, if the proper measure of
22 damages is what the homeowner did to fix the defect, we need
23 to first know what the homeowners have fixed the defect.

24 So, that's why the surveys come in. And, Your Honor, let
25 me point out, Mr. Lucey admitted earlier there were surveys

1 sent to the homeowner. He has not wanted us to do that. But
2 he has done it. And we didn't say surveys during the
3 deposition, the homeowners said they were given surveys during
4 depositions.

5 So, if the Court wants to know the actual issues in the
6 case, and the actual damages in the case -- we're going to
7 have the jury for a month, Your Honor, and we want to make
8 sure we get this right the first time. And if Plaintiff's
9 experts want to be able to testify, he testified that his
10 report right now, his damages, is incorrect. They have to go
11 do that. They have to survey and find out who has changed
12 what and how much it cost. And if they are going to do it,
13 we're asking the Court to allow us to do it so we can properly
14 defend our client.

15 We only want to do it once. Your Honor, and we've got
16 several months. So, that is what has changed. The 10
17 depositions that you have allowed us to do has highlighted all
18 of the defenses and the issues. With this one, being a class,
19 but two, what the existing defects are and what the damages
20 are. That's what's changed.

21 MRS. WOOTEN: Right. Right. So, Your Honor, what we are
22 asking, as far as just reconsidering the deadlines and the
23 things in the scheduling orders -- one, the surveys. But two,
24 for the Plaintiff to have to submit the one class member's
25 home for inspection and testing. Number two, that the motions

1 deadline be extended in this case now that we have a trial
2 deadline -- or a trial date of September. We would think that
3 a reasonable motions deadline might be July 29th, and that we
4 are allowed an additional number of depositions to extend the
5 discovery deadline -- particularly if Court is not going to
6 allow surveys -- we are going to need additional depositions
7 to extend the discovery deadline until July 1.

8 That would give the parties plenty of the time to get
9 done with discovery. I have consulted with nearly all of the
10 subcontractors on this issue. No one has said that they
11 object to it, and most have said that they agree with us, that
12 additional time is needed. Some of the subcontractors'
13 attorneys had specific conditions that they might like to see
14 in a new scheduling order, and I invite them to pipe up and
15 say what those are.

16 But the people that I have consulted with, everyone
17 except Mr. Lucey agrees that the discovery deadline should be
18 extended in this case and that the motions deadline should be
19 extended. So, we just respectfully ask that Your Honor
20 consider those things, given the nature of the case and the
21 fact that the parties have made such a -- really, a Herculean
22 effort to get all of this work done.

23 THE COURT: Mrs. Wooten, let me ask you this, when did
24 you request Mrs. Zitek's home to be inspected? That would --
25 was that part of the ---

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

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

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

PLAINTIFF

-vs-

TRANSCRIPT OF RECORD

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

DEFENDANTS

DR Horton, Inc.,

THIRD-PARTY PLAINTIFF

vs

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

July 20 &
July 21, 2023
ANDERSON, SC

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

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Christopher Scalzo, Esquire
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Carter Massingill, Esquire
Attorney for Kings Landscaping

Phillip Ferderigos, Esquire
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Attorney for Nazareth Builders

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Attorney for Harrelson Painting, LLC

1 who's going to argue this for DR Horton? Is Mr. Crawford or
2 Mr. Imhoff?

3 MR. IMHOFF: Your Honor, Jason Imhoff here -- sorry, Mrs.
4 Wooten and I are sitting in the same room. Sorry about that.

5 THE COURT: Okay. All right, Mr. Imhoff, any response to
6 Sodfather's argument?

7 MR. IMHOFF: Your Honor, bear with me. I know there's a
8 lot of motions, and the vast majority are against DR Horton.
9 May I ask, and I can have it in front of me -- is there an
10 order that you're looking at of how the motions are coming, so
11 we can be prepared as they pop up, Your Honor?

12 THE COURT: I'm looking at the docket that the clerk has
13 posted on the court roster. And in accordance with my prior
14 order, I instructed her to list them in the order in which
15 they were filed.

16 MR. IMHOFF: Okay.

17 THE COURT: So ---

18 MR. IMHOFF: Is that on the website, Your Honor?

19 THE COURT: Yes, sir. It's on the judicial branch
20 website, and all 75 motions are listed in order, which Jesus
21 Jiminez was April 28th, all the way through the end, which the
22 last one was DR Horton's last motion filed June 23rd, so
23 they're listed in the order in which they were filed.

24 But what I want to do, Mr. Imhoff, if there are specific
25 allegations factually for the summary judgment motions for

1 each one of these third-party defendants, I'm going to allow
2 you to respond factually to each individual. Now, as far as
3 general allegations, if they're general -- I hear a Stoneledge
4 argument has already been made, but if you want to respond
5 generally, I'll give you the opportunity to do so at the end.
6 But if there are specific, factual things regarding -- because
7 each one of these is a unique claim -- I'll give you that
8 opportunity at the time.

9 So, is there anything in particular that you would like
10 to point out about Sodfather's motion at this point?

11 MR. WATKINS: Your Honor, if I may interject real quick.
12 This is Trey Watkins. From a procedural standpoint for
13 Jason's clarification, too -- I know there were a bunch of
14 motions that are out there. But I believe that Sodfather,
15 along with the rest of the landscaping and grading defendants
16 have filed a consent motion for continuance due to a potential
17 settlement between the horizontal construction folks, and that
18 is one of the motions that is on the list probably for
19 tomorrow, but DR Horton and all of those landscaping, grading
20 contractors have submitted a consent ---

21 THE COURT: Okay.

22 MR. WATKINS: --- continuance on all those motions, so
23 this one may be moot right now, just to be held in abeyance
24 pending that settlement.

25 THE COURT: You agree with that, Mr. Imhoff?

1 or bad representation or breach of their warranties. Mr.
2 Reyna can speak some English and apparently write in English.
3 Again, they've seen this contract at least three times, maybe
4 four.

5 And here's one of the interesting things that came out of
6 this, and you're going to hear probably later, Your Honor.
7 All of the subcontractors are going to argue that DR Horton
8 does not have indemnity or contractual indemnity out of
9 contracts with them, or they shouldn't be enforceable -- have
10 their own similar contracts with their subcontractors. JLS,
11 MJ, and ML all have their own contracts with their
12 subcontractors.

13 And in fact, when I took the deposition of the JLS
14 designee, not only does he work at JLS, he's a general
15 contractor. And he has, according to his own testimony, very
16 similar contractual indemnity contracts with his
17 subcontractors. This is the standard in the industry. If
18 you're going to take millions of dollars for work on
19 construction project and you do it wrong, you need to step up
20 and either fix it, or if you don't fix it and we get sued, you
21 need to defend it and indemnify the general contractor.
22 That's the way it is in the field. That's what the attempt is
23 by the lawyers to put it in a contractual form that has a
24 signature on it.

25 But it doesn't change anything about the way that

1 construction has been done for maybe hundreds of years. Going
2 to Stoneledge, Your Honor -- Stoneledge has caused a lot of
3 trouble over the years because it's not as clear as everyone
4 wants to make it seem. I know you were involved in it,
5 unfortunately, and you know, Your Honor, I was involved in it.
6 I was the one that argued those appeals on Stoneledge. I was
7 there, Your Honor, and so I know what they were saying and
8 what they were asking.

9 Let me hit it briefly, though, okay. Stoneledge does not
10 say that all your causes of action as a general contractor
11 automatically collapse into equitable indemnity. It doesn't
12 say that. It says very, very specifically, and Justice Few
13 picked on me about it, because it was my pleadings that we
14 were talking about -- sorry, it's lagging a little, but I'm
15 trying to move it, Your Honor. I don't know if you can see
16 that or not. Oh, I must have gone by it.

17 But what he did, Your Honor, and it's in our brief, but
18 it's also in the Stoneledge opinion, is he went and looked at
19 my pleadings, my third-party pleadings, and he said, Mr.
20 Imhoff, your pleadings say that all of your damages arise from
21 this lawsuit. I think the pleadings probably did say that.
22 That wasn't my intent, but that's what the pleadings probably
23 would say. And they went in analysis right here of what the
24 pleadings say and what damages we've alleged.

25 I have obviously learned from that opinion, and our

1 pleadings at DR Horton, and the pleadings I've done for the
2 last, I don't know, five to seven years, now make sure that I
3 put in damages that arose separately from the lawsuit. And
4 those are set out in the complaint. But what the Court is
5 asking you to do, Your Honor, is to look at the pleadings and
6 see if we have alleged any damages that arose, or could arise
7 despite the lawsuit.

8 I don't agree that that should be the analysis, but until
9 we get back up there with a case, that's where they are right
10 now. And I will tell you that I'm cognizant of that, and I
11 made sure that our third-party pleadings, in fact, have those
12 damages outside of the damages caused by the lawsuit set
13 forth, Your Honor. So, I think that's a red herring to chase
14 that. We've clearly pled this, there's a factual issue there.

15 It further does not collapse all causes of action into
16 equitable indemnity by rule. There has to be an analysis.
17 It's a little bit confusing of an opinion, because section A
18 talks about how they collapsed the cross claims, Marick's
19 breach of contract and breach of warranty cross claims are
20 collapsed into equitable indemnity because they are not
21 independent causes of action for Marick's inequitable
22 indemnity claim, that's what they say.

23 But then they go on to talk about contractual indemnity
24 could be a standalone cause of action that is not collapsed
25 into equitable indemnity. And it makes sense, Your Honor. I

1 mean, these are all multi-million dollar companies. They can
2 all enter into a contract or not into a contract with whatever
3 terms that they want and negotiate the contract, and as you
4 know there's case law after case law out there that says two
5 arms' length sophisticated parties can enter into any contract
6 they want, and the court's not going to get involved in that
7 contract to determine whether they made a good deal or not.

8 And that's essentially what this says, Your Honor. They
9 talk about contractual indemnity, and when they ultimately
10 ruled against us in that case on contractual indemnity, it is
11 a correct decision, it is because the contracts that were
12 signed, were signed after the work. In particular, the Court
13 found as a matter of law that contracts are executed after all
14 respondents completed their work on Stoneledge project.

15 So, Your Honor, you could read this and this is how I
16 read it, because it's the only way it makes sense, is that
17 breach of warranty and breach of contract are separate causes
18 of action, which do not collapse into equitable indemnity,
19 because they are agreed upon and negotiated arms' length
20 between sophisticated parties and the Court's not going to get
21 involved.

22 But the Court could find that the contract doesn't apply
23 to the work, which is what the Stoneledge court found. That
24 contract doesn't apply. We don't know, and may never know,
25 what the Court would have done if we had correctly dated

1 contracts like we do in this DR Horton case, Your Honor. But
2 you're going to hear these arguments over and over again, and
3 what they come down to is we don't want to have to face
4 liability or damages for the bad work we did. That's their
5 argument.

6 It will be the argument all day long, and the second part
7 of that is, and if we did do bad work, DR Horton should have
8 caught us doing bad work. I've said this before a million
9 times, like my kids telling me it's my fault because they did
10 something bad, because I didn't catch them. That's just not
11 the way it works. It's not the way it works in the field,
12 it's not the way that works in this contract, it's not the way
13 it should work via law.

14 Your Honor, I think we're probably going to talk about
15 this a bunch more, but we would ask the Court to deny the
16 brick and stone masons' motions for summary judgment. In
17 fact, we're so confident of that, we have motions for summary
18 judgment against the masons. So, we believe that the case law
19 is mis-cited. The legal requirements, the analysis that they
20 are asking you do is mis-cited. We think that you can clearly
21 find that that contract is valid, enforceable, and a separate
22 cause of action, which does not collapse into equitable
23 indemnity.

24 If, however, you choose, or you decide that all of these
25 causes of action, even though there's a signed, legitimate

1 contract out there, collapse into equitable indemnity, Your
2 Honor, we would say that that's a factual issue. I hope, Your
3 Honor, you don't do that, because that contract was drafted
4 with the eyes on South Carolina law and intentionally to avoid
5 exactly this, which has been disclaiming responsibility for
6 their work.

7 And in it are requirements of additional insurance for DR
8 Horton, requirements of returning and coming back and fixing
9 it or losing their work, requirements that they do their work
10 per industry standard, code, manufacturer's installation
11 instructions. There are so many things in that contract that
12 require them to do their work correctly, that if the Court
13 finds that that contract is unenforceable or DR Horton doesn't
14 have a breach of contract cause of action, would completely
15 unravel again the construction industry litigation in South
16 Carolina, and it needs to be resolved.

17 I am sure, Your Honor -- I will stop. I am sure I have
18 to address this about 20 more times today, but in a nutshell
19 those are the arguments on behalf of DR Horton.

20 THE COURT: All right.

21 MR. MIMS: If I may reply briefly, Your Honor.

22 THE COURT: Okay. Be brief.

23 MR. MIMS: Yes, Your Honor. Thank you. Just a few
24 clarifications and misrepresentations by DR Horton. M & L
25 Reyna has no downstream subcontract with anyone. It certainly

1 subcontractor decided to go ahead and put the vinyl siding or
2 whatever their product is, up over deficient construction that
3 preceded them. And so, our damages -- DR Horton's damages,
4 are different from what Plaintiff is claiming because we have
5 these indemnity requirements -- and also, Your Honor, remember
6 we -- in this contract, and maybe I haven't said it that much,
7 there is an additional insured provision further down that
8 requires the subcontractors to go get their insurance company
9 to add them as an additional insure with their insurance
10 policy.

11 And if they don't, that's a whole other set of damages.
12 So, I hope I answered your question, Your Honor.

13 THE COURT: Okay.

14 MR. IMHOFF: The damages are two things. One, damage to
15 the structure, but two damage to DR Horton through all of
16 those things I listed before, but including attorney's fees,
17 costs, et cetera.

18 THE COURT: Okay. Okay. Well, Mr. Belcher has submitted
19 a thorough brief with a number of exhibits, and DR Horton has
20 submitted a response. I want to look at that. So, gentlemen,
21 I will take this one under advisement as well.

22 MR. BELCHER: Thank you, Your Honor.

23 MR. IMHOFF: On July 19th we filed -- it's to multiple
24 third parties, but P & T is in our July 13th supplemental
25 brief.

1 contracts. They have their own lawyers. They're in
2 litigation all the time, Your Honor, so, in this case, this
3 cannot be a burdensome contract to someone the size of
4 Builders First Source and Probuild. I will leave it there,
5 Your Honor. It's already almost ten to 5:00, I'll leave it
6 there.

7 THE COURT: I want to read what's been submitted, like
8 the others. Thank you, counsel. Okay, Installed Building
9 Products, LLC.

10 MR. KENDALL: Thank you, Your Honor, I'm Rett Kendall. I
11 represent Installed Building Products, Blue Ridge -- excuse
12 me, my video is set up wrong.

13 THE COURT: There you go. I can see you.

14 MR. KENDALL: Yeah, thank you, Your Honor. I'm Rett
15 Kendall, I represent Installed Building Products. I'm here on
16 a -- it's a follow up motion for summary judgment. We argued
17 part of this motion back in April, and you allowed me an
18 opportunity to address a different -- an issue that came up
19 then in this supplemental motion. That's what we're doing.

20 I'm pleased to tell you, Your Honor, I'm going to
21 introduce an issue that has yet to be discussed at all in the
22 case, and hopefully that makes this remarkable as you're
23 considering it. And that is, this is a Rule 14 issue. The
24 first question that has to be asked is, does DR Horton have a
25 derivative claim? Now, DR Horton, in order to have standing

1 to bring a third-party action, Rule 14 says that you -- to
2 bring a third-party action, you must have a claim against a
3 person who is or may be liable to him for all or part of the
4 Plaintiff's claim against him.

5 So, that is the gatekeeper on all of this for my client.
6 Why does that matter here? It is not coextensive with general
7 indemnity rights that DR Horton may have. DR Horton's
8 indemnity rights may, in fact, be broader than the third-party
9 gatekeeping function of derivative from the Plaintiff's claims
10 against him. What's happened in this case is it started off
11 with the shotgun approach of sue everybody. And what we have
12 learned is that the work that was performed by IBP is not part
13 of Plaintiffs' claims.

14 We first knew that with respect to the insulation in the
15 attics, and as to gutters. Since the hearing that we had
16 previously in April, the Plaintiff has entered a stipulation
17 that makes that clear. Blown in and batt insulation and
18 gutters are not part of the Plaintiffs' claims against DR
19 Horton. So therefore, that cannot flow through the third-
20 party funnel of Rule 14.

21 The issue that came up in April that prolonged my
22 involvement in this case, was that I have generally and
23 loosely commented that my client installed doorknobs. And
24 they did. Mr. Lucey, at that hearing, pointed out that hey,
25 we tested and found that there's a doorknob that leaks and I

1 can't -- he can't say none of my client's work is exempt.
2 Fair enough. So, we went back and did some further discovery,
3 and based on what we've learned to date, there is no claim
4 within the Plaintiffs' claim, that relates to work performed
5 by Blue Ridge, specifically referencing the doorknobs.

6 Your Honor, I'll just -- for the background on that, just
7 show you. We did find that, if I can share my screen, and I'm
8 attached these as exhibits. I'll do this briefly, as quickly
9 as possible, and I apologize. So, Your Honor, as we see, this
10 comes from Rhett Whitlock's Power Point report, and this is
11 the pages that reference the door spray testing that was done.
12 And as you can see, 8 Duxbury on a patio door, there was a
13 fail through a doorknob.

14 Your Honor, I will tell you that according to the
15 evidence that has been provided in this case specifically from
16 what we call the vendor-spend sheet, and this is the one that
17 relates to my client, Installed Building Products -- and it's
18 hard to prove the negative, but I will tell you, 8 Duxbury is
19 not listed anywhere as a house on which my client did any
20 work. To the extent we've been talking about this loosely
21 about this idea of doorknobs, I just want to show the Court
22 sort of what category that fell into.

23 And if the Court can -- I know this is all small, so let
24 me magnify it just a little bit. As we look at the scope of
25 work and we see these concepts like are listed here, where it

1 says finish hardware turnkey. That finish hardware includes
2 doorknobs. Generally speaking, that's interior doorknobs.
3 So, at this point, it becomes incumbent upon Horton, if there
4 is evidence that we installed a doorknob on a patio door at 8
5 Duxbury, they have to come up with the evidence to do that,
6 and they have not.

7 If we want to take, though, this concept of the class and
8 consider whether or not this is part of the class, I think
9 there we have to look at the testimony of Mr. Whitlock and
10 what he said. And here he's asked -- this is, again, also in
11 our brief -- he's asked about the doorknob leak. And he says
12 -- the question, so I'm trying to figure out what the fact --
13 that water is leaking through a doorknob means in the grand
14 scheme of this case, if anything. And his note is, well, it
15 was something I noticed and I thought I should report it. Is
16 it an installation issue? I don't know. Is it a design
17 issue? I don't know. Is it a manufacturing issue? I really
18 don't know.

19 So, the point -- the walk away from that is, even if
20 there is a doorknob issue, two things we take away. First of
21 all, he doesn't know why it's leaking, and my client merely
22 installed it. And second, he didn't make enough of it to even
23 suggest that this is a common issue to all of the patio doors
24 such that it becomes a class issue. So, Your Honor, there's
25 no avenue through which the door -- a leaky doorknob at 8

1 Duxbury becomes a claim that the Plaintiff is making against
2 Horton, that Horton can then ask through the third-party
3 funnel.

4 And so, Your Honor, based on that, we think that it is --
5 that this claim should be dismissed at the top level, because
6 there's no third-party -- valid third-party claim. Now, I
7 just again point out, DR Horton has made the suggestion
8 several times today that they may have claims for other
9 things.

10 Well, and that may be true. But we're not asking the
11 Court to say there is no indemnity claim, at least not in this
12 path. There's another path to that. But on this path, we're
13 saying you may have -- if you have indemnity claims for things
14 that arose out of the right to cure letter, which has been
15 their fall back, because that was a much broader set of
16 allegations.

17 If you have claims arise out of the right to cure letter,
18 which have not then devolved into the current claims brought
19 by the Plaintiff, the ones that the jury is going to hear
20 about, those can be pursued at another time. That's just a
21 breach of contract case. So, go pursue it in that context.
22 But not as a third-party claim here. It's a different
23 analysis. So, Your Honor, with that in mind, again, I'm
24 asking this Court to grant summary judgment on the third-party
25 claims.

1 I do want to also adopt the arguments that have been made
2 on the viability of the indemnity contract provision, and just
3 add one more wrinkle to what you've heard. I do think Mr.
4 Mims and Mr. Best and others, but they were the more
5 comprehensive arguments and I want to adopt those. But, Your
6 Honor, I would just point out that as to my client, DR Horton
7 cannot prove a clear and unequivocal contract because they
8 cannot establish the material terms of that contract.
9 Specifically, they cannot establish the scope of work that my
10 client was hired to do pursuant to the contract that has the
11 indemnity provision.

12 So, I just want to flash that up for the Court just to --
13 just for the benefit of this discussion, and so again, if
14 you'll just bear with me a moment. Your Honor, this -- you've
15 seen this contract on a number of occasions. This contract --
16 and again, I will -- it's a very bad copy, and I'll -- so I'll
17 blow it up as best I can. The scope of work in this contract
18 is supposed to be set forth in Exhibit A. And that then
19 becomes the subject matter of the indemnity and everything
20 else, is what is the scope of work that my client agreed to
21 do.

22 The form that is attached here, the one that bears the
23 base level production from DR Horton's attorneys, does not
24 have an Exhibit A attached. I did seek to have them
25 supplement to show -- to provide that, and it's lawyer talk,

1 so I didn't attach it as an exhibit, but I was told they don't
2 have it. And they did not produce -- they did not put it into
3 the record of this case. So, Exhibit A, for purposes of this
4 hearing today, does not exist, and so, a very material portion
5 of this contract is missing.

6 And that becomes important because remember, what the
7 Court in Cumberland wants to insure is that the person signing
8 an indemnity agreement in this intermediate form, this
9 concurrent breach or concurrent court standard is that the
10 person who is offering to indemnify understands what they are
11 getting into at the time they agree to get into it. In other
12 words, it has to be clear and convincing -- or clear and
13 unequivocal at the time of the contracting, not that the time
14 of some subsequent moment.

15 So, at the time of the contract, this indemnity
16 obligation arise out of the scope of work that they agreed to
17 perform. And if we don't know what that is, we can't know
18 that they were able to faithfully contemplate or thoroughly
19 contemplate what risks they were undertaking. And so, the art
20 of the construction contract is, in fact, risk allocation.
21 And you can't show me in this contract what it was, what risk
22 they were willing to accept. You can't possibly meet a
23 standard of clear and unequivocal to meet the Concord
24 standard. So, Your Honor, for that reason, I join in the
25 others who have made that motion and add that additional

1 basis. This may be specific to my client. So, those are my
2 arguments on this motion, Your Honor. Thank you very much.

3 THE COURT: Thank you, Mr. Kendall. Mr. Imhoff?

4 MR. IMHOFF: Yes, Your Honor. I'm not sure I'm smart
5 enough to follow all of Mr. Kendall's arguments, but I do know
6 one thing. I have not seen in his motion or brief that
7 argument, and so I would ask that if we didn't have notice of
8 that argument, the Rule 14 argument, that that be struck, Your
9 Honor. I didn't see that. It may be one of our other lawyers
10 or associates saw it, but I would ask that entire argument be
11 struck if we didn't have notice of it.

12 But further than that, Your Honor, as you know, we have
13 been in front of the Court several times. We got an original
14 notice to cure, which essentially said everything is bad out
15 there. And then another notice to cure that says everything
16 is bad out there. And then we got a very, very general
17 complaint that said things are bad out there. And we have
18 asked this Court multiple times -- we stood in front of you,
19 Your Honor, and said will you require Plaintiffs to identify
20 the specific defects that they have that they are going to
21 support so that we can narrow this case down.

22 And you and I turned and looked at Mr. Lucey, and he
23 didn't. He didn't until maybe an hour before this hearing
24 start finally stipulating that certain things are not part of
25 this lawsuit. And so, DR Horton would say in response to that

1 is, if we can't get clarification what's in this, and it takes
2 us eight days to suck the testimony out of Rhett Whitlock, and
3 we don't get the stipulation of things they're no longer going
4 to ask to until an hour before this hearing a month before
5 trial, that we could not possibly have known that Mr.
6 Kendall's clients were -- or anybody else's clients were --
7 the electrician or whoever in the stipulation -- is not going
8 to be part of this lawsuit.

9 And so, there is a contract out there. Again, presumably
10 between sophisticated, at arms' length entities, whereby IBP,
11 Mr. Kendall's clients, signed a document that says if you get
12 sued for our work, we'll fix it, defend you, we'll get
13 insurance for you, and we won't do that, and we'll come back
14 and supplement our warranties. And so, what I would say is, I
15 agree with Mr. Kendall that anything in the stipulation of
16 dismissal should now be dismissed -- Plaintiffs' and DR
17 Horton's claims against IBP. But, because we had to go out
18 there and take the depositions and hire experts and file
19 motions and that type of thing, DR Horton has incurred damages
20 for allegations of wrongdoing or defective work from all of
21 these subcontractors' work.

22 Now, whether the Plaintiff changes his mind a month
23 before trial or changes his mind two years ago would affect
24 how long they get dragged through this process, and I'm glad
25 we finally got that stipulation, but the fact is, that it

1 hasn't been narrowed down until a month before trial. And if
2 IBP had followed the contract, they would have stepped in and
3 indemnified. They would have gotten their insurance carrier
4 to step in and indemnify DR Horton and defend it. But they
5 didn't.

6 And they didn't make any other motions that I'm aware of
7 that would narrow that issue or force that issue. They could
8 have filed this motion for summary judgment two years ago,
9 Your Honor. Except the Plaintiff has no facts to support
10 allegations against these certain things. And the truth is
11 that the Ziteks -- I think it was the Ziteks, had a door that
12 sat sideways. It might have been another homeowner out there.
13 So, there are allegations regarding garage doors. There's
14 water on the site work, that some of the downspouts caused
15 damages out there.

16 Derek Hodgkin testified about that. So, I agree with Mr.
17 Kendall. If there are no longer allegations against his
18 client for construction defects, then that is something that
19 is ended when you order that. But the contractual requirement
20 to defend and indemnify and have insurance would all stand.
21 And otherwise, or I guess unless you decide, Your Honor, that
22 all of those contracts, with all of these subcontractors, are
23 either against public policy -- so they're not valid -- or you
24 strike them for Concord and Cumberland, Stoneledge, you
25 collapse them into equitable indemnity, that kind of thing.

1 But if there's a contract, and this is a breach of contract
2 case, and Mr. Kendall can have his folks come to the trial
3 eventually and testify that they didn't agree to these terms
4 or why they didn't agree to them. But there's a contract with
5 signature, and they signed it. And until that contract is
6 ruled by this Court to be invalid, either as a whole or in
7 part, then those causes against that client stand. I wish it
8 didn't work that way. I wish they could have got out earlier.
9 But it didn't work out.

10 THE COURT: Mr. Imhoff, I want make sure I understand
11 your argument. Their indemnification of the contract is
12 linked to them being negligent in some sort or failing to do
13 their job according to the contract, does it not?

14 MR. IMHOFF: Allegations, Your Honor. Allegations. We
15 don't think that the Plaintiff has half or a quarter of the
16 issues they say they do. In every lawsuit, right, in defense
17 work, you never agree with what the Plaintiffs say. But you
18 turn around, and it wasn't a shotgun approach. We identified
19 everybody that worked on the things that were in the notice
20 and opportunity to cure. There aren't people in this lawsuit
21 that weren't in the notice to cure or Rhett Whitlock didn't
22 testify about. So, the law -- I'll actually bring it back up
23 if you'd like to look at it, but it is attached to our briefs,
24 Your Honor.

25 THE COURT: All right. I'm going to read the brief.

1 MR. IMHOFF: It says ---

2 THE COURT: Last question, though. Last question. Do
3 you have any specific information regarding this doorknob at 8
4 Duxbury?

5 MR. IMHOFF: No, Your Honor.

6 THE COURT: Okay. I'm going to read what y'all have
7 submitted. I understand. I understand your argument.

8 MR. KENDALL: And Your Honor, I would only say that in
9 response to, just to bolster, actually, Mr. Imhoff's argument
10 in their brief, they anticipated the filing of the stipulation
11 that would occur and said if that stipulation did, in fact,
12 get filed, and I'm sorry, I'm fumbling to put my fingers on it
13 just this moment, that we would be entitled to the relief we
14 seek. And that stipulation was filed. Now, it didn't include
15 the doorknob, so the doorknob does have to be analyzed as to
16 whether there's a sufficient question of fact. Thank you,
17 Your Honor.

18 MR. IMHOFF: Your Honor, I have to reply to that. Your
19 Honor, I'm sorry. I have to reply to that. It says right in
20 the brief that if the stipulation is filed, which we didn't
21 know was coming until this morning, that we would dismiss
22 those claims, and it continues and goes on and says, but the
23 indemnity in the contract is not dismissed, and there is a
24 factual issue there.

25 MR. KENDALL: Right. And ---

1 MR. IMHOFF: And that whole sentence doesn't say what Mr.
2 Kendall said it says.

3 MR. KENDALL: Well, it's two different sentences, but
4 that goes to my final argument. If you don't first have a
5 derivative claim, then you may have an indemnity claim, but
6 it's for another time. You can't -- you have to have the
7 first one first. Anyway, thank you. I don't want to press
8 the issue any further.

9 THE COURT: I understand.

10 MR. KENDALL: And I did make this motion two years ago.
11 I've been pending a long time. Thank you, Your Honor.

12 THE COURT: Okay, I'll take this under advisement as
13 well.

14 MR. KENDALL: I know. Thank you.

15 THE COURT: All right, next one is -- let's see, Nazareth
16 Builders. Nazareth Builders.

17 MR. BOINEAU: Good afternoon, Your Honor.

18 THE COURT: Good afternoon.

19 MR. BOINEAU: Can you -- my apologies for not having a
20 tie on. I'm traveling and I left my tie at home, so I'm in a
21 hotel room doing this, but -- so, my apologies for that. I'll
22 be very brief, if it may please the Court?

23 THE COURT: Yes, sir.

24 MR. BOINEAU: Nazareth Builders, with regard to these
25 homes, allegedly did work on 26 of the homes in the

1 MR. DESHIELDS: Thank you, Your Honor.

2 MR. IMHOFF: Thank you, Your Honor.

3 THE COURT: All right. Topbuild Home Services.

4 MR. EMGE: Good morning, Your Honor. My name is Chip
5 Emge. Can you hear me all right?

6 THE COURT: Yes, sir.

7 MR. EMGE: All right, good morning.

8 THE COURT: Good morning.

9 MR. EMGE: I represent Topbuild Builder Services Group,
10 d/b/a Gale Contractor Services, and for convenience this
11 morning, I am just going to refer to them as Gale. Gale scope
12 of work included batt and blown insulation, gutters and
13 downspouts, garage doors and garage door openers. Plaintiff
14 stipulated yesterday that those are not at issue in this suit.
15 So, we join in the other subcontractors whose scopes of work
16 have been dismissed or raised as not an issue in Plaintiff's
17 stipulation yesterday.

18 As a result of that, the -- given the stipulation, and as
19 set forth in DR Horton's supplemental memo in opposition to
20 the third parties' motion for summary judgment, the only issue
21 we are discussing is whether DR Horton's contractual indemnity
22 would remain viable because Gale's obligation to defend was
23 triggered -- and I emphasize triggered, because that is an
24 important and key word with respect to the contractual
25 indemnity by the filing of Plaintiff's claim.

1 What I'd like to do, Your Honor, is to share my screen,
2 and let me see if I can get this going here. Okay, can you
3 see the power point, Your Honor?

4 THE COURT: It's -- I see a box, but nothing has come up
5 yet.

6 MR. EMGE: Okay. Let me try that again.

7 THE COURT: Okay.

8 MR. EMGE: Oh no. I apologize, Your Honor. The
9 technology is not always my forte. Is that coming up, Your
10 Honor?

11 THE COURT: There we go. I've got it.

12 MR. EMGE: Okay. Very good. All right, so let me -- all
13 right. So, again, this is -- I'll be referring to Gale as my
14 client in this case. What we're dealing with -- this is the
15 master indemnity contract to the independent contractor
16 agreement. Now, there are various agreements between DR
17 Horton and Gale, but the key difference between Gale and the
18 other subcontractors is that there is no other underlying
19 independent contract agreement or standard agreement between
20 Gale contractor services and DR Horton.

21 This is -- the latest master addendum that was issued in
22 July 1st, 2015, which I have on the screen, the indemnity
23 provision -- if you can see where my cursor is, there's the
24 indemnity insurance provision -- I'll just scroll down to show
25 the signatures. There's Topbuild. I've highlighted the key

1 indemnity provision on this screen. And there are a few terms
2 that I want to go through here. Any defense indemnification
3 holds harmless similar obligation collectively indemnification
4 opposed on contractor. Under the standard agreement, again --
5 we do not have a standard agreement -- shall be limited to any
6 claims, damages, defense expenses, including attorney's fees
7 and litigation costs or liabilities covered by the terms of
8 the indemnification in the standard agreement that are caused
9 by contractor's negligence or the negligence of its
10 subcontractor or its work.

11 And then in the paren, including any liability of builder
12 for its supervision of contractor, subcontractors, et cetera.
13 Now, I've put that language in the parenthesis and italics
14 because it is going to be part of our argument coming up in a
15 little bit. Then the provision goes on to state that other
16 than set forth above, contractor's indemnification shall not
17 apply based on the negligence or misconduct of the builder,
18 which is DR Horton in this case, as defined in the standard
19 agreement. Third parties or builders or any other
20 indemnitee's activities related to supervision -- again that
21 word supervision -- of third parties.

22 So, the first part of our argument is that DR Horton
23 cannot prove that these addendum contracts apply to
24 construction of Rose Hill and cannot prove that Gale is bound
25 by the indemnification clause. And why is that? Well, one,

1 again, there's no standard agreement or underlying independent
2 contractor agreement between DR Horton and Gale, and as Your
3 Honor well knows, contracts must be viewed as a whole.

4 The addendums specifically refer to the standard
5 agreement, which does not exist. Now, as further proof, but I
6 don't think DR Horton is going to contest this, but in their
7 exhibit 7 to DR Horton's memo in opposition to all third-party
8 defendants' motions for summary judgment, they set forth a
9 list of the various versions of the independent contractor
10 agreement that -- the independent contractor agreements that
11 exist between DR Horton and their subcontractors.

12 And I put that stuff on the screen in power point, and
13 you can read through that list there, Your Honor, but I will
14 represent to you that Builder Services Group, or Gale
15 Contractors, is not listed under any of the six versions that
16 DR Horton has asserted applies to its subcontractors. So, in
17 addition to that, there is no reference to the scope of work
18 to be performed by Gale at all in the master addendums, let
19 alone at Rose Hill, and I know that was discussed a little bit
20 yesterday, and I won't reiterate that. I'll just incorporate
21 those arguments, but obviously, the scope of the work is key
22 to the responsibilities that Gale would be taking on pursuant
23 to the contract and pursuant to the indemnity clause.

24 And further, DR Horton's own 30(b)(6) designee, Shawn --
25 I'll butcher this, I'm sure -- Kruglewicz -- who held a

1 variety of positions with DR Horton, including purchase
2 manager at one point, who was in charge of the contracts and
3 retaining of the subs. When asked about these contracts,
4 said, do you know if this amendment would apply to
5 construction at the Rose Hill project? No, ma'am. No. Why
6 do you not know whether or not that addendum or amendum
7 applies to construction at Rose Hill? Because I'm not
8 familiar with what work they did in Rose Hill. Well, why is
9 he not familiar? A, because he doesn't know, and B, because
10 there's not an attachment to the addendum that says what the
11 scope of the work is.

12 But looking at the contract alone, you don't know if it
13 applied to the work at Rose Hill? Correct. The other point
14 that Gale -- or that DR Horton has apparently made, and this
15 is asserted in their tender letter, and this is important
16 because several of the other independent contractors'
17 agreement, and for the Court's ease, I believe I've looked
18 back through it and as I see in independent contractor
19 agreements versions 2 through 5, contains this clause in the
20 indemnity provision. Contractor must defend in indemnity even
21 when the allegations against indemnity are ambiguous or
22 incomplete with respect to the issue of contractor's duty to
23 indemnify.

24 The defense duty is, again, triggered by allegations in a
25 lawsuit or other similar actions regardless of whether they

1 are groundless or fraudulent, or alternatively, by any facts
2 extrinsic to the allegations not plead or not plead with
3 specificity by the claimant. Once the duty to defend is
4 triggered, contractor is obligated to defend the entire
5 action, lawsuit, arbitration, or other litigation, including
6 any claims therein not subject to indemnity by contractors.

7 Now, obviously, they're other ICAs contain that clause.
8 Gale's does not. Mr. Mims did an excellent job arguing about
9 the complete baselessness of that provision. But regardless
10 of that, it does not apply to Gale, because that provision is
11 not in any agreement, let alone a contract with Gale. Now,
12 even if the Court finds that the addendum contracts may be
13 enforceable, which again, we would argue they are not, DR
14 Horton's claim for contractual indemnity must fail as a matter
15 of law and public policy.

16 Again, the trigger point for the indemnity -- and Your
17 Judge referred to this in one of the arguments yesterday, the
18 trigger point for the indemnity, as I just read, is a
19 negligent act caused by Gale. There have been no negligent
20 acts, as set forth in Plaintiff's stipulation. Second, the
21 language contained in the indemnity clause does not clearly
22 and unequivocally provide indemnity for DR Horton's own
23 negligence.

24 First and foremost, the lack of the underlying ICA
25 inherently creates an ambiguity since the indemnity provision

1 in the master addendums refers to it or its terms. Second,
2 sole negligence is not mentioned anywhere in the indemnity
3 provision in the master addendum. And then third, the
4 provision asserts that Gale must indemnify DR Horton for DR
5 Horton's supervision. Well, supervision is a broad and
6 undefined term, and does not address, design with sequencing
7 or other aspects of the project for which DR Horton has
8 admitted it was responsible.

9 It refers to any, which as set forth in Concord v.
10 Cumberland, is a broad term, and the bottom line, Your Honor,
11 is, that then there is a conflict or an ambiguity because in
12 one instance Gale -- the term says that Gale must indemnify DR
13 Horton for DR Horton's supervision of its work, but then in
14 the next sentence -- the next provisions, DR Horton says but
15 not for those with other third-party contractors. Well, the
16 work of these two entities is inter-related, as indicated in
17 perhaps sequencing or design issues. And that inherently
18 creates an ambiguity as to what risk Gale is taking on.

19 Finally, Your Honor, the indemnity contract at the bottom
20 asserts the provisions about the -- and Mr. Mims went into
21 this a little bit yesterday -- the builder may retain counsel
22 of builder's own choosing that is reasonably acceptable to the
23 contractor. The contractor should then have the duty to
24 reimburse builder only for the portion of builder's defense
25 expenses that are attributable to loss caused by contract.

1 That provision is in Gale's contract.

2 However, first, the demand was not made to Gale until
3 March 17th of 2023, and third, DR Horton has not produced any
4 damages related to this provision. And counsel earlier
5 referred to that discovery is closed. We have no information
6 as to what fees, if any, DR Horton has expended on -- as
7 alleged against Gale. But again, there are no -- there is no
8 negligence or reliability as to Gale or damages that could be
9 implied or inferred to DR Horton as a result of Gale's work.

10 Again, this lies still in -- these are the Stoneledge
11 defenses, but again, this just go to the fact that what we are
12 solely dealing with here is a contractual indemnity provision.
13 The unclean hands, Your Honor, I think, again, we're dealing
14 solely with contractual indemnity. I don't believe that there
15 is a provision that would allow a claim for attorney's fees
16 and defense costs under an equitable indemnity theory. Again,
17 as set forth in the Fountain case, you know, there must be
18 some liability. And there is no liability here.

19 One other point, going back to the independent contractor
20 agreement that I wanted to raise, is that DR Horton must have
21 known that the language that was in those master addendums was
22 not compliant with Concord and Cumberland. And Mr. Imhoff
23 referred to this yesterday in his arguments, and I don't
24 recall -- I believe it was in response to Mr. Mims' arguments,
25 but as Your Honor knows, it was a long day.

1 But basically, he said, you know, he said as a result of
2 Concord and Cumberland, you know, so negligence or some
3 intentional act or omission of indemnity shouldn't be
4 included. So they -- DR Horton put that right there in
5 writing, and he represented -- DR Horton said okay, South
6 Carolina courts, we hear you. You do not want us to have
7 contracts to get indemnity for our negligence. Let's put it
8 in the contract.

9 Well, they didn't put it in the contract, Your Honor.
10 They did not put in the contract anything about sole
11 negligence, anything about in part, and for those reasons,
12 Your Honor, in addition to the fact there is no standard
13 agreement or ICA with Gale Contractor Services, we believe
14 that DR Horton's claim for contractual indemnity should be
15 dismissed and summary judgment awarded. We would incorporate
16 the arguments of the other subcontractors with respect to
17 Concord v. Cumberland, as -- and any other arguments that are
18 applicable to those that I have made this morning. Thank you
19 very much, Your Honor.

20 THE COURT: Thank you, Mr. Emge. All right, Mr. Imhoff,
21 response?

22 MR. IMHOFF: Yes, Your Honor. Chip, will you take that
23 down?

24 MR. EMGE: I thought I -- let me -- I thought I just did.

25 MR. IMHOFF: You got it. You did it.

1 THE COURT: It's off.

2 MR. IMHOFF: Your Honor, let me point out a couple of
3 things, and what I think is most important -- or one of the
4 things I think is important to start off with, is the
5 contracts with Gale Contractor Services start way back in
6 2006, Your Honor. And I didn't count them as we were sitting
7 here, but it looks like there are at least four contracts
8 starting in 2006, and continually signed all the way through
9 2015, Your Honor. And it is signed by the president of
10 Builder Services Group, Inc., and by Brad Conlon, the VP of
11 director of national accounts at DR Horton.

12 This is at least a nine-year relationship, with four
13 different versions of this contract, Your Honor, signed arm's
14 length, sophisticated parties. It looks like they -- Builder
15 Services may be a national group. Their president signed it,
16 Your Honor. It's a little disingenuous to come in now and
17 say, well, this contract that we have used for a decade and
18 looked at at least four times and signed -- our president has
19 signed four times, well, it's not valid. It is clearly a
20 valid contract, and/or there's a question of fact of whether
21 it's a valid contract. It's signed over and over again. And
22 I assume that Builders Group -- not -- whatever they're
23 called, has lawyers that look at these.

24 We will concede this is a different agreement and there
25 are several of them. Builders First Source and some other

1 manufacturers had different agreements, where it's called a
2 master national agreement, or independent contractor
3 agreement. These are a little bit different than the ICAs
4 we've looked at before, so they shouldn't be compared to those
5 necessarily. But I will point out, Your Honor, and I haven't
6 said this necessarily yesterday or the day before, but these
7 contracts, these ICAs, what is being attacked is the indemnity
8 provision. The subcontractors aren't necessarily attacking
9 other clauses in these independent contractor agreements or
10 master national agreements, just the indemnity.

11 So, if the Court finds that it doesn't comply with
12 Concord and Cumberland, which we think it clearly does, and
13 I'll talk about that in just a minute. You're going to
14 actually cut out the sections that wouldn't comply, and these
15 contractors, subcontractors would still have obligations, Your
16 Honor, to perform their work pursuant to code, et cetera, et
17 cetera.

18 And they also, if you cut out the indemnity provision,
19 Your Honor, they also have agreed to add DR Horton as an
20 additional insured on their insurance policies so that if
21 something like this happens where there's a lawsuit, that not
22 only will -- the subcontractors step in and indemnify, but
23 there's arguably another insurance contract that would cover
24 both the subcontractor and DR Horton. That is part of the
25 negotiated contract and agreement between these parties, that

1 they are going to get insurance for each other.

2 S,o there are other provisions to these contracts, Your
3 Honor, which isn't just indemnity. It's how they perform
4 their work, whether they supervise, whether they check the
5 work of people in front of them or not, and the insurance
6 parts of it, Your Honor. And let me go back, we're talking
7 about trigger a little bit and we're mixing up some vocabulary
8 with insurance law versus liability law. But Your Honor,
9 again, the lawsuit was very, very general about its
10 allegations.

11 But Dabny Lynn, with Justin Lucey's firm -- here's her
12 name, on Lucey Law Firm letterhead, on December 11th, 2019,
13 this is the Zitek case, Your Honor, and they list all of the
14 things that they are saying is wrong, and that presumably are
15 in the lawsuit. And Mr. Emge's been trying to get out, as
16 other people have, in trying to get the Plaintiffs to say is
17 this list what you're still suing about or are you going to
18 stipulate what these things are in there.

19 And now, again, eve of trial, the Plaintiffs have finally
20 started to narrow down their case, and have stipulated that
21 these things don't exist. But from 2019 -- December 11th,
22 2019, through -- today's Friday -- through Wednesday, July
23 18th, or whatever it was, 2023, the insulation was an issue in
24 this case as set forth in paragraph 5 of Plaintiff's notice
25 and opportunity to cure, missing slash inadequate insulation.

1 And Your Honor, if DR Horton is being sued for
2 missing/inadequate insulation, and there's drywall cracking
3 for the last person, and we either ask the subcontractor or
4 the person responsible for it to come in and defend and
5 indemnify or at least defend, and they don't, for four years
6 pick up the defense or get the insurance company to pick up
7 the defense, then there is arguably, Your Honor, a factual
8 issue of whether or not they've breached this part of the
9 contract.

10 But it's in there, Your Honor, inadequate insulation.
11 Again, it wasn't a shotgun approach by us. We followed the
12 notice and opportunity to cure, which has missing insulation
13 in it. I want to go back to Mr. Emge's argument on
14 supervision, and I'm not sure that I've clarified that, but
15 Your Honor, let's talk about exactly why that is.

16 As you can see, every single subcontractor has alleged
17 that DR Horton didn't supervise it. In other words, again,
18 Your Honor, DR Horton didn't catch their bad work. And what
19 they have done is they have used that allegation to then
20 extrapolate that all of these contracts are against public
21 policy and violate Concord and Cumberland and the other case
22 law, because our courts have said you can't ask another party
23 to indemnify you for your own negligence.

24 And so, in every single construction case, every
25 subcontractor can make the allegation that the builder didn't

1 supervise, and therefore, it has unclean hands or is asking
2 for the subcontractor to indemnify it for its own negligence.
3 And it needs to be made clear, Your Honor. DR Horton doesn't
4 self-perform. They hire subcontractors to do the work. The
5 subcontractors -- and it's in the testimony -- all represent
6 that they are qualified, licensed, and competent to do their
7 work. And then if the work turns out to be bad in a lawsuit
8 like this or a warranty claim, then they say, you didn't
9 supervise me, and therefore, I don't have an obligation to
10 come back. It's your fault, and you can't ask me to indemnify
11 you because you're asking me to indemnify you for your work.
12 And that's nonsense, Your Honor. That's nonsense.

13 That is not what it's trying to do. The contract is
14 trying to make clear what has been a construction standard for
15 20, 30 years, that if a subcontractor does bad work, they need
16 to come in and fix it or pay for it. And just saying you
17 didn't catch me, so you can't, isn't sufficient. And I hope
18 that's made clear, because that's what happens in every
19 construction case.

20 THE COURT: Well, let me ask you this, Mr. Imhoff. Do
21 you agree that this particular instance that the stipulation
22 of counsel from Plaintiff that we received this week,
23 basically takes away any allegation of negligent work on
24 behalf of this party?

25 MR. IMHOFF: Absolutely, Your Honor, and I'm sorry I

1 didn't start with that. And so, what I'm asking you to keep
2 is the contractual ---

3 THE COURT: Okay.

4 MR. IMHOFF: --- breach of contract cause of action.

5 THE COURT: The contractual indemnity would be the only
6 issue left with this particular party?

7 MR. IMHOFF: Your Honor, I don't have it in front of me,
8 but I was very, very careful to actually -- the actual cause
9 of action is breach of contract, not equitable -- or
10 contractual indemnity. Those are two separate things in my
11 mind. Yes, there's a contractual indemnity provision in this
12 contract, but there are other parts of the contract that are
13 just breach of contract that aren't indemnity, or contractual
14 indemnity.

15 THE COURT: Okay. All right. All right, go ahead. I
16 interrupted you, go ahead.

17 MR. IMHOFF: Well, I think you've got it, though. You're
18 on it. We're asking for our breach of contract cause of
19 action to stay in all of these, against all of these
20 subcontractors, and where it's been stipulated that the
21 Plaintiff is no longer chasing that liability, for instance,
22 insulation here, yes, then the warranty and the negligence
23 claims go. We stipulate to that.

24 THE COURT: All right, sir.

25 MR. IMHOFF: I didn't say those should be dismissed

1 against DR Horton as well.

2 MR EMGE: Your Honor, if I may ---

3 THE COURT: I was going to ask you if you have anything
4 to add in response.

5 MR. EMGE: I do, just briefly. As far as Mr. Imhoff's
6 first argument about it's being disingenuous for Gale to come
7 in at this point and say the contract is not valid, let me be
8 clear, what we are saying is that DR Horton's position and the
9 enforceability of the indemnity provision is not clear and
10 unequivocal and is unenforceable. That is the point.
11 Essentially, Mr. Imhoff's argument is, well, you signed a
12 contract, it must be valid. Well, if that were the case, we'd
13 never have breach of contract suits.

14 With respect to -- he mentioned AI, and part of the
15 breach of contract claim, DR Horton has filed a declaratory
16 judgment action, in which it has admitted that Gale Contractor
17 Services did procure insurance, listing DR Horton has an
18 additional insured. That's fine. They want to leave that to
19 the DJ action -- that claim has no business being in this
20 suit.

21 With respect to the supervision, again, there is no
22 negligence, and our point with the supervision is that it
23 makes that indemnity clause -- it gives it a lack of clarity
24 such that it cannot meet the clear and unequivocal standard
25 for DR Horton's sole negligence pursuant to Concord and

1 Cumberland. And again, with respect to the attorney's fees --
2 the indemnity -- DR Horton does not have a complete contract
3 or an underlying contract with DR Horton. The addendum
4 contracts are vague, and without a contract and without
5 damages, their claims should be dismissed.

6 THE COURT: All right, thank you, counsel. Again, as in
7 the previous motion, I'll find that as a matter of law, the
8 warranty and negligence causes of action are dismissed.
9 Summary judgment will be granted on those. I'm going to take
10 the issue of the contractual dispute, breach of contract,
11 under advisement and consider what's been submitted. Thank
12 you.

13 MR. EMGE: Thank you, Your Honor.

14 THE COURT: Okay, next one, Landaverry Flooring.

15 MR. QUATTLEBAUM: Good morning, Your Honor, this is
16 Matthew Quattlebaum on behalf of Landaverry Flooring parties.
17 Can you hear me okay?

18 THE COURT: Yes, sir.

19 MR. QUATTLEBAUM: I believe as mentioned yesterday, there
20 was -- there's a tentative settlement agreement amongst the
21 flooring defendants, so we would simply ask the Court to
22 continue our motion pending the final execution of the
23 settlement agreement.

24 THE COURT: Okay.

25 MR. QUATTLEBAUM: Thank you.

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Pages 1484-1529

EXHIBIT 25

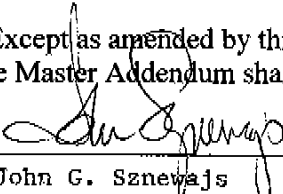
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**FIRST AMENDMENT TO MASTER ADDENDUM
TO INDEPENDENT CONTRACTOR AGREEMENT**

This First Amendment ("First Amendment") to Master Addendum to Independent Contractor Agreement effective as of January 1, 2006 ("Master Addendum"), by and between D. R. Horton, Inc. and its subsidiaries and affiliates ("Builder") and the direct and indirect subsidiaries and related companies of Masco Corporation listed on Exhibit B to the Master Addendum, amends the Master Addendum effective as of the dates stated below as follows:

1. Effective as of October 1, 2007, Masco Framing Corp. and its subsidiaries are added to Exhibit "B" to the Master Addendum.
2. Effective as of January 1, 2008, Masco's cabinet companies, Merillat LP, Texwood Industries, L.P. and Merillat Industries, LLC listed on Exhibit "B" to the Master Addendum are replaced by their successor by merger, Masco Builder Cabinet Group.
3. Effective as of January 1, 2008, Masco Contractor Services of California, Inc, formerly known as Schmid Insulation Contractors, Inc. is added to Exhibit "B" to the Master Addendum. Schmid Insulation Contractors, Inc. (now known as Masco Contractor Services of California, Inc.) is no longer a union company, and so the Master Addendum with D.R. Horton for Masco union companies entered into concurrently with the Master Addendum amended hereby will no longer apply to it.
4. Except as amended by this First Amendment, all other terms and conditions of the Master Addendum shall remain in full force and effect.

By


John G. Sznewajski

Vice President of Builder Services Group, Inc. and its subsidiaries, Masco Builder Cabinet Group, Masco Contractor Services of California, Inc., Masco Framing Corp. and its subsidiaries, and Milgard Manufacturing, Incorporated

Builder:

By

Name

Title

 5/21/08
Brad Conlon
V.P. Dir. of NAT (Act)

Master Addendum to Independent Contractor Agreement

This Master Addendum to Contractor Agreement ("Master Addendum") effective as of January 1, 2006, is by and between D.R. Horton, Inc. and its direct and indirect subsidiaries and related companies, listed on Exhibit A (individually and collectively "Builder") and the direct and indirect subsidiaries and related companies of Masco Corporation, listed on Exhibit B (individually and collectively "Contractor").

Builder and Contractor agree as follows:

This Master Addendum modifies the terms of any Builder preprinted standard contractor/subcontractor agreement (including its attached exhibits) ("Standard Agreement") entered into between Builder and Contractor for the provision of goods and/or services by Contractor (the "Work") to a Builder building project ("Project"). This Master Addendum will supersede and control any conflicting terms or conditions of the Standard Agreement (the Standard Agreement as modified by the Master Addendum is referred to as the "Contract"). Therefore, notwithstanding anything to the contrary in the Standard Agreement, the following provisions will apply to any Contract:

Indemnity and Insurance. Any defense, indemnification, hold harmless or similar obligation (collectively "Indemnification")¹ imposed on Contractor under the Standard Agreement shall be limited to any claims, demands, damages, defense expenses (including attorneys' fees and litigation costs) or liabilities (collectively "Loss") covered by the terms of the Indemnification in the Standard Agreement that are caused by Contractor's negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work). Other than as set forth above, Contractor's Indemnification shall not apply (based on indemnity, insurance, warranty, strict liability or otherwise) to the extent that the Loss arises out of the work, negligence or misconduct of Builder or any other indemnitee as defined in the Standard Agreement, third parties, or Builder's (or any other indemnitee's) activities related to supervision of third parties. Except as set forth above, Contractor shall not be responsible to the extent that the Loss arises out of (a) accident, misuse, abuse or neglect by someone other than Contractor or its agents; or (b) alteration, repair or attempted alteration or repair by anyone other than Contractor or its authorized agent.

Where Builder or other indemnitee as defined under the Standard Agreement (collectively "Indemnitee") demands indemnification for Loss falling within the terms of this indemnity, Builder may retain counsel of Builder's own choosing that is reasonably acceptable to Contractor. Contractor shall then have the duty to reimburse Builder only for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor and not excluded from indemnification in the preceding paragraph. The proportion of Builder's defense costs to be reimbursed by Contractor shall be calculated by Builder based upon Builder's reasonable and good faith allocation of the proportion of the Loss attributable to Contractor's conduct for which indemnity is owed in the preceding paragraph. Contractor's proportion of the defense costs may be subject to reasonable adjustment (upward or downward) in the event the original allocation provided for in this paragraph proves to be inequitable. In such case, the parties shall reimburse each other accordingly. In the event of a judgment or award against an Indemnitee, Contractor shall indemnify Indemnitee for that portion of the judgment or award attributable to Loss caused by Contractor and not excluded from indemnification in the preceding paragraph. In the event of a settlement, Contractor shall only be responsible for that portion of the settlement attributable to Loss allegedly caused by Contractor and not

¹ All Indemnification and Additional Insured Endorsement requirements imposed on Contractor by the Standard Agreement as modified by this Master Addendum do not apply to any Project that was or is covered by a Wrap Insurance Program (including without limitation an OCIP or CCIP).

excluded from indemnification in the preceding paragraph; but no such settlement shall be entered into without Contractor's consent, such consent not to be unreasonably withheld.

Any disputes regarding allocation of defense costs or indemnity shall be resolved with a "baseball" arbitration, whereby each party shall submit to the arbitrator and exchange with each other 45 days in advance of the hearing their last, best offers for allocation. The arbitrator shall be limited to awarding only one or the other of the two figures submitted, with the prevailing party to collect all costs and expenses of arbitration.

Builder shall endeavor to give notice, in writing, to Contractor of any claims (including without limitation any notices received by Builder under "right to repair" legislation) brought against Builder that are related to Contractor's Work and for which Indemnification or Additional Insured coverage might be sought. Builder shall endeavor to assure that Contractor has a meaningful opportunity to participate in any inspection or testing (destructive or otherwise). The failure to provide such written notice or provide such rights of inspection to Contractor shall not void Builder's Indemnification rights under the Standard Agreement as modified by this Master Addendum except to the extent that Contractor has been prejudiced thereby.

Insurance. Contractor will not provide certified copies of any insurance policies. Contractor will name Builder as an additional insured on Contractor's CGL policy pursuant to an Additional Insured Endorsement¹ in the form attached as Schedule 1. Notwithstanding anything to the contrary in the Standard Agreement, Contractor shall not be obligated to carry completed operations coverage on a Project for more than ten years after completion of the Work or out to the statute of repose in that jurisdiction, whichever is sooner. Builder acknowledges that the policy's deductible is greater than \$25,000. Builder may not exercise any right to purchase insurance on behalf of Contractor or impose any penalty on Contractor for failure to provide a current certificate of insurance unless Builder has given at least thirty (30) days prior written notice and an opportunity to cure such failure.

Time and Schedule of the Work. At the request of Contractor, Builder shall give any notices to proceed or change orders in writing. Builder shall give Contractor reasonable notice of changes in schedule or changes in the Work. Neither party shall be responsible for any loss, damage, detention or delay caused by any event beyond the reasonable control of either party. Dates for the performance or completion of the Work shall be extended by delay of time as may be reasonably necessary to compensate for such delay.

Warranty, Defect, Default. Builder shall endeavor to give Contractor or Contractor's agent or supply chain partner reasonable notice and opportunity to correct any breach or default under the Contract or defect in the Work, before making such corrections itself or through others. Contractor shall be allowed a reasonable period of time to complete correction of such breach, default or defect, subject to product lead times where practicable.

Remedies for Contractor's breach of a Contract as to a particular Project shall be allowed only with regard to that specific Project and shall not apply to other Projects or agreements between Builder and Contractor.

In no event shall either party be liable to the other for any incidental (including but not limited to overhead and administrative expenses), consequential, liquidated or special damages, including without limitation, lost revenues, profits or loss of use, even if it has been advised of the possibility of such damages. The foregoing limitation shall not apply to damages that Builder is obligated to pay a third party for a Loss that is indemnified by Contractor pursuant to the provisions on Indemnification above.

Rights and Liens. Contractor will not and does not waive (i) any legal rights provided under local, state or federal laws, statutes, rules, regulations or common law concerning the construction industry, including without limitation those enacted for the protection of contractors and subcontractors, or (2) under common law tort theories or in equity.

Payment. Contractor will use commercially reasonable efforts to invoice Builder for progress payments, final payments and for extras within any time deadlines imposed in the Standard Agreement; however, failure by Contractor to meet a deadline shall not relieve Builder of its obligation to pay the invoice. Notwithstanding anything in the Contract to the contrary, Contractor shall be paid 100% of the money for the Work under the Contract within thirty (30) days of invoice(s) submitted for payment, for each portion of its completed Work. Contractor shall have no duty to perform any Work if payment is not received as set forth herein.

Acts of Others. Contractor's obligation to inspect the work of others shall be limited to the obligation to discover and report to Builder patent defects that would be readily recognized by a contractor in Contractor's trade in prior work that directly affects or will be directly affected by Contractor's Work. Contractor will only be responsible for the safety of its own employees and agents and for conditions created by the Work at the Project site and not for safety of others or the Project site generally unless attributable to Contractor's work. Notwithstanding anything to the contrary in the Standard Agreement, in no event shall Contractor have any obligation of defense or indemnity for fines and penalties imposed upon Builder to the extent the amount of any such fines or penalties are based upon the prior history of Builder. To the extent that compliance with building codes, safety regulations, the Contract and/or best industry practices is impeded or prevented by Builder, Contractor shall have the right upon notice to Builder to walk off the job without liability to Builder.

Dispute Resolution. In the event of a dispute, only the decision of a third party neutral arbitrator(s) (e.g. not the architect, general contractor, etc.) or a competent court of law shall be binding on Contractor. In no event shall Contractor be bound by an award in an arbitration or other proceeding unless Contractor has received notice and an opportunity to participate in such proceeding.

Reciprocal Provisions. Provisions in the Standard Agreement in favor of Builder on non-waiver, confidentiality and entitlement to attorneys' fees shall be reciprocal between Builder and Contractor.

Choice of Law. The Standard Agreement as modified by this Addendum for each Project shall be governed by the internal laws of the State in which the Project is located, except to the extent the Federal Arbitration Act applies.

Effective Date. For each Project, the Standard Agreement as modified by this Addendum shall be deemed entered into by Builder and Contractor on the date that the Standard Agreement for that Project is entered into.

Termination. This Addendum may be cancelled by either party after January 1, 2007 with 30 days written notice to the signatories below, copy to Stephan Perison at sperison@drhorton.com and Barbara Ross at barbara_ross@mascohq.com, along with a hard copy to Masco Corporation, 21001 Van Born Road, Taylor, MI 48180 Attn: General Counsel. Cancellation of the Addendum is only effective for Standard Agreements entered into after the effective date of such cancellation; the Addendum shall continue in full force and effect for any Standard Agreements entered into prior to the effective date of such cancellation.

Except for incentive agreements between the parties for products supplied by Contractor to Builder, and except for the scope of the Work and pricing provided by Contractor for each Project, the Standard

Agreement between Builder and Contractor for that Project as modified by this Master Addendum shall constitute the entire agreement between the parties concerning Contractor's Work on that Project. This Master Addendum may only be modified by a written agreement signed by both parties that specifically references this Master Addendum; however electronic signatures shall not be effective for such a modification. For any modification to this Master Addendum to be binding upon Contractor, the Vice President signing on behalf of the applicable Masco subsidiary must also be a vice president of Masco Corporation. This Master Addendum shall be binding upon each party's successors and assigns. This Master Addendum shall extend to all future subsidiaries of the parties listed below. Each Contractor shall be individually and not jointly liable to Builder under this Master Addendum or any Contract.

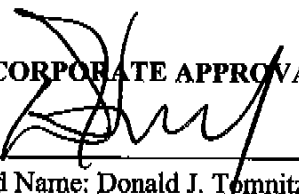
Accepted and agreed to by Builder:

By: 
 Printed Name: Brad Conlon
 Title: V.P., Dir. of Nat. Accounts of DHI Date: 3/20/06

Accepted and agreed to by Contractor:

By: 
 Printed Name: William T. Anderson
 Title: Vice President, Coast Insulation Contractors, Inc., Sacramento Insulation Contractors, Schmid Insulation Contractors, Inc., Insulpro Projects, Inc., and Superior Contracting Corporation Date: 3-8-06

DHI CORPORATE APPROVAL:

By: 
 Printed Name: Donald J. Tomnitz
 Title: President & CEO Date: 4/21/06

EMV7198989.3
 26172-930127

ELECTRONICALLY FILED - 2023 Jul 10 2:28 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

Exhibit A

D.R. Horton, Inc. and its subsidiaries and affiliates.

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Exhibit B

Masco Companies

1. Coast Insulation Contractors, Inc
2. Sacramento Insulation Contractors
3. Schmid Insulation Contractors, Inc.
4. Insulpro Projects, Inc.
5. Superior Contracting Corporation

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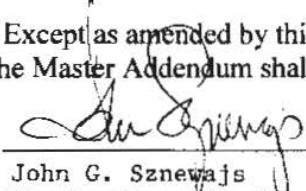
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FIRST AMENDMENT TO MASTER ADDENDUM TO INDEPENDENT CONTRACTOR AGREEMENT

This First Amendment ("First Amendment") to Master Addendum to Independent Contractor Agreement effective as of January 1, 2006 ("Master Addendum"), by and between D. R. Horton, Inc. and its subsidiaries and affiliates ("Builder") and the direct and indirect subsidiaries and related companies of Masco Corporation listed on Exhibit B to the Master Addendum, amends the Master Addendum effective as of the dates stated below as follows:

1. Effective as of October 1, 2007, Masco Framing Corp. and its subsidiaries are added to Exhibit "B" to the Master Addendum.
2. Effective as of January 1, 2008, Masco's cabinet companies, Merillat LP, Texwood Industries, L.P. and Merillat Industries, LLC listed on Exhibit "B" to the Master Addendum are replaced by their successor by merger, Masco Builder Cabinet Group.
3. Effective as of January 1, 2008, Masco Contractor Services of California, Inc, formerly known as Schmid Insulation Contractors, Inc. is added to Exhibit "B" to the Master Addendum. Schmid Insulation Contractors, Inc. (now known as Masco Contractor Services of California, Inc.) is no longer a union company, and so the Master Addendum with D.R. Horton for Masco union companies entered into concurrently with the Master Addendum amended hereby will no longer apply to it.
4. Except as amended by this First Amendment, all other terms and conditions of the Master Addendum shall remain in full force and effect.

By


John G. Szniewajs

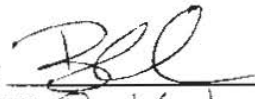
Vice President of Builder Services Group, Inc. and its subsidiaries, Masco Builder Cabinet Group, Masco Contractor Services of California, Inc., Masco Framing Corp. and its subsidiaries, and Milgard Manufacturing, Incorporated

Builder:

By

Name

Title

 5/21/08
Brad Conlon
VP, Dir. of Nat'l Accts

Master Addendum to Independent Contractor Agreement

This Master Addendum to Contractor Agreement ("Master Addendum") effective as of January 1, 2006, is by and between D.R. Horton, Inc. and its direct and indirect subsidiaries and related companies, listed on Exhibit A (individually and collectively "Builder") and the direct and indirect subsidiaries and related companies of Masco Corporation, listed on Exhibit B (individually and collectively "Contractor").

Builder and Contractor agree as follows:

This Master Addendum modifies the terms of any Builder preprinted standard contractor/subcontractor agreement (including its attached exhibits) ("Standard Agreement") entered into between Builder and Contractor for the provision of goods and/or services by Contractor (the "Work") to a Builder building project ("Project"). This Master Addendum will supersede and control any conflicting terms or conditions of the Standard Agreement (the Standard Agreement as modified by the Master Addendum is referred to as the "Contract"). Therefore, notwithstanding anything to the contrary in the Standard Agreement, the following provisions will apply to any Contract:

Indemnity and Insurance. Any defense, indemnification, hold harmless or similar obligation (collectively "Indemnification")¹ imposed on Contractor under the Standard Agreement shall be limited to any claims, demands, damages, defense expenses (including attorneys' fees and litigation costs) or liabilities (collectively "Loss") covered by the terms of the Indemnification in the Standard Agreement that are caused by Contractor's negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work). Other than as set forth above, Contractor's Indemnification shall not apply (based on indemnity, insurance, warranty, strict liability or otherwise) to the extent that the Loss arises out of the work, negligence or misconduct of Builder or any other indemnitee as defined in the Standard Agreement, third parties, or Builder's (or any other indemnitee's) activities related to supervision of third parties. Except as set forth above, Contractor shall not be responsible to the extent that the Loss arises out of (a) accident, misuse, abuse or neglect by someone other than Contractor or its agents; or (b) alteration, repair or attempted alteration or repair by anyone other than Contractor or its authorized agent.

Where Builder or other indemnitee as defined under the Standard Agreement (collectively "Indemnitee") demands indemnification for Loss falling within the terms of this indemnity, Builder may retain counsel of Builder's own choosing that is reasonably acceptable to Contractor. Contractor shall then have the duty to reimburse Builder only for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor and not excluded from indemnification in the preceding paragraph. The proportion of Builder's defense costs to be reimbursed by Contractor shall be calculated by Builder based upon Builder's reasonable and good faith allocation of the proportion of the Loss attributable to Contractor's conduct for which indemnity is owed in the preceding paragraph. Contractor's proportion of the defense costs may be subject to reasonable adjustment (upward or downward) in the event the original allocation provided for in this paragraph proves to be inequitable. In such case, the parties shall reimburse each other accordingly. In the event of a judgment or award against an Indemnitee, Contractor shall indemnify Indemnitee for that portion of the judgment or award attributable to Loss caused by Contractor and not excluded from indemnification in the preceding paragraph. In the event of a settlement, Contractor shall only be responsible for that portion of the settlement attributable to Loss allegedly caused by Contractor and not

¹ All Indemnification and Additional Insured Endorsement requirements imposed on Contractor by the Standard Agreement as modified by this Master Addendum do not apply to any Project that was or is covered by a Wrap Insurance Program (including without limitation an OCIP or CCIP).

excluded from indemnification in the preceding paragraph; but no such settlement shall be entered into without Contractor's consent, such consent not to be unreasonably withheld.

Any disputes regarding allocation of defense costs or indemnity shall be resolved with a "baseball" arbitration, whereby each party shall submit to the arbitrator and exchange with each other 45 days in advance of the hearing their last, best offers for allocation. The arbitrator shall be limited to awarding only one or the other of the two figures submitted, with the prevailing party to collect all costs and expenses of arbitration.

Builder shall endeavor to give notice, in writing, to Contractor of any claims (including without limitation any notices received by Builder under "right to repair" legislation) brought against Builder that are related to Contractor's Work and for which Indemnification or Additional Insured coverage might be sought. Builder shall endeavor to assure that Contractor has a meaningful opportunity to participate in any inspection or testing (destructive or otherwise). The failure to provide such written notice or provide such rights of inspection to Contractor shall not void Builder's Indemnification rights under the Standard Agreement as modified by this Master Addendum except to the extent that Contractor has been prejudiced thereby.

Insurance. Contractor will not provide certified copies of any insurance policies. Contractor will name Builder as an additional insured on Contractor's CGL policy pursuant to an Additional Insured Endorsement¹ in the form attached as Schedule 1. Notwithstanding anything to the contrary in the Standard Agreement, Contractor shall not be obligated to carry completed operations coverage on a Project for more than ten years after completion of the Work or out to the statute of repose in that jurisdiction, whichever is sooner. Builder acknowledges that the policy's deductible is greater than \$25,000. Builder may not exercise any right to purchase insurance on behalf of Contractor or impose any penalty on Contractor for failure to provide a current certificate of insurance unless Builder has given at least thirty (30) days prior written notice and an opportunity to cure such failure.

Time and Schedule of the Work. At the request of Contractor, Builder shall give any notices to proceed or change orders in writing. Builder shall give Contractor reasonable notice of changes in schedule or changes in the Work. Neither party shall be responsible for any loss, damage, detention or delay caused by any event beyond the reasonable control of either party. Dates for the performance or completion of the Work shall be extended by delay of time as may be reasonably necessary to compensate for such delay.

Warranty, Defect, Default. Builder shall endeavor to give Contractor or Contractor's agent or supply chain partner reasonable notice and opportunity to correct any breach or default under the Contract or defect in the Work, before making such corrections itself or through others. Contractor shall be allowed a reasonable period of time to complete correction of such breach, default or defect, subject to product lead times where practicable.

Remedies for Contractor's breach of a Contract as to a particular Project shall be allowed only with regard to that specific Project and shall not apply to other Projects or agreements between Builder and Contractor.

In no event shall either party be liable to the other for any incidental (including but not limited to overhead and administrative expenses), consequential, liquidated or special damages, including without limitation, lost revenues, profits or loss of use, even if it has been advised of the possibility of such damages. The foregoing limitation shall not apply to damages that Builder is obligated to pay a third party for a Loss that is indemnified by Contractor pursuant to the provisions on Indemnification above.

Rights and Liens. Contractor will not and does not waive (i) any legal rights provided under local, state or federal laws, statutes, rules, regulations or common law concerning the construction industry, including without limitation those enacted for the protection of contractors and subcontractors, or (2) under common law tort theories or in equity.

Payment. Contractor will use commercially reasonable efforts to invoice Builder for progress payments, final payments and for extras within any time deadlines imposed in the Standard Agreement; however, failure by Contractor to meet a deadline shall not relieve Builder of its obligation to pay the invoice. Notwithstanding anything in the Contract to the contrary, Contractor shall be paid 100% of the money for the Work under the Contract within thirty (30) days of invoice(s) submitted for payment, for each portion of its completed Work. Contractor shall have no duty to perform any Work if payment is not received as set forth herein.

Acts of Others. Contractor's obligation to inspect the work of others shall be limited to the obligation to discover and report to Builder patent defects that would be readily recognized by a contractor in Contractor's trade in prior work that directly affects or will be directly affected by Contractor's Work. Contractor will only be responsible for the safety of its own employees and agents and for conditions created by the Work at the Project site and not for safety of others or the Project site generally unless attributable to Contractor's work. Notwithstanding anything to the contrary in the Standard Agreement, in no event shall Contractor have any obligation of defense or indemnity for fines and penalties imposed upon Builder to the extent the amount of any such fines or penalties are based upon the prior history of Builder. To the extent that compliance with building codes, safety regulations, the Contract and/or best industry practices is impeded or prevented by Builder, Contractor shall have the right upon notice to Builder to walk off the job without liability to Builder.

Dispute Resolution. In the event of a dispute, only the decision of a third party neutral arbitrator(s) (e.g. not the architect, general contractor, etc.) or a competent court of law shall be binding on Contractor. In no event shall Contractor be bound by an award in an arbitration or other proceeding unless Contractor has received notice and an opportunity to participate in such proceeding.

Reciprocal Provisions. Provisions in the Standard Agreement in favor of Builder on non-waiver, confidentiality and entitlement to attorneys' fees shall be reciprocal between Builder and Contractor.

Choice of Law. The Standard Agreement as modified by this Addendum for each Project shall be governed by the internal laws of the State in which the Project is located, except to the extent the Federal Arbitration Act applies.

Effective Date. For each Project, the Standard Agreement as modified by this Addendum shall be deemed entered into by Builder and Contractor on the date that the Standard Agreement for that Project is entered into.

Termination. This Addendum may be cancelled by either party after January 1, 2007 with 30 days written notice to the signatories below, copy to Stephan Perison at sperson@drhorton.com and Barbara Ross at barbara_ross@mascohq.com, along with a hard copy to Masco Corporation, 21001 Van Born Road, Taylor, MI 48180 Attn: General Counsel. Cancellation of the Addendum is only effective for Standard Agreements entered into after the effective date of such cancellation; the Addendum shall continue in full force and effect for any Standard Agreements entered into prior to the effective date of such cancellation.

Except for incentive agreements between the parties for products supplied by Contractor to Builder, and except for the scope of the Work and pricing provided by Contractor for each Project, the Standard

Agreement between Builder and Contractor for that Project as modified by this Master Addendum shall constitute the entire agreement between the parties concerning Contractor's Work on that Project. This Master Addendum may only be modified by a written agreement signed by both parties that specifically references this Master Addendum; however electronic signatures shall not be effective for such a modification. For any modification to this Master Addendum to be binding upon Contractor, the Vice President signing on behalf of the applicable Masco subsidiary must also be a vice president of Masco Corporation. This Master Addendum shall be binding upon each party's successors and assigns. This Master Addendum shall extend to all future subsidiaries of the parties listed below. Each Contractor shall be individually and not jointly liable to Builder under this Master Addendum or any Contract.

Accepted and agreed to by Builder:

Accepted and agreed to by Contractor:

By: 
 Printed Name: Brad Conlon
 Title: V.P., Dir. of Nat. Accounts of DHI Date: 3/20/06

By: 
 Printed Name: William T. Anderson
 Title: Vice President, Coast Insulation Contractors, Inc., Sacramento Insulation Contractors, Schmid Insulation Contractors, Inc., Insulpro Projects, Inc., and Superior Contracting Corporation Date: 3-8-06

DHI CORPORATE APPROVAL:

By: 
 Printed Name: Donald J. Tomnitz
 Title: President & CEO Date: 4/24/06

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Exhibit A

D.R. Horton, Inc. and its subsidiaries and affiliates.

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Exhibit B

Masco Companies

1. Coast Insulation Contractors, Inc
2. Sacramento Insulation Contractors
3. Schmid Insulation Contractors, Inc.
4. Insulpro Projects, Inc.
5. Superior Contracting Corporation

Master Addendum to Independent Contractor Agreement

This Master Addendum to Contractor Agreement ("Master Addendum"), effective as of July 1, 2015, is by and between D.L. Horton and its direct and indirect subsidiaries and related companies, listed on Exhibit A (individually and collectively "Builder") and Builder Services Group, Inc., TruTeam of California, Inc. (f/k/a Masco Contractor Services of California, Inc.) and Amerioan National Services, Inc. and its subsidiaries (individually and collectively "Contractor"). This Agreement is entered into in contemplation of the announced transaction involving spin-off of Masco Corporation's services businesses in mid-2015 to TopBuild Corp.

Home Services

Builder and Contractor agree as follows:

This Master Addendum modifies the terms of any Builder preprinted standard contractor/subcontractor agreement (including its attached exhibits) ("Standard Agreement") entered into between Builder and Contractor for the provision of goods and/or services by Contractor (the "Work") to a Builder building project ("Project"). This Master Addendum will supersede and control any conflicting terms or conditions of the Standard Agreement (the Standard Agreement as modified by the Master Addendum is referred to as the "Contract"). Therefore, notwithstanding anything to the contrary in the Standard Agreement, the following provisions will apply to any Contract:

Indemnity and Insurance. Any defense, indemnification, hold harmless or similar obligation (collectively "Indemnification")¹ imposed on Contractor under the Standard Agreement shall be limited to any claims, demands, damages, defense expenses (including attorneys' fees and litigation costs) or liabilities (collectively "Loss") covered by the terms of the Indemnification in the Standard Agreement that are caused by Contractor's negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work). Other than as set forth above, Contractor's Indemnification shall not apply (based on indemnity, insurance, warranty, strict liability or otherwise) to the extent that the Loss arises out of the work, negligence or misconduct of Builder or any other indemnitee as defined in the Standard Agreement, third parties, or Builder's (or any other indemnitee's) activities related to supervision of third parties. Except as set forth above, Contractor shall not be responsible to the extent that the Loss arises out of (a) accident, misuse, abuse or neglect by someone other than Contractor or its agents; or (b) alteration, repair or attempted alteration or repair by anyone other than Contractor or its authorized agent.

Where Builder or other indemnitee as defined under the Standard Agreement (collectively "Indemnitee") demands indemnification for Loss falling within the terms of this indemnity, Builder may retain counsel of Builder's own choosing that is reasonably acceptable to Contractor. Contractor shall then have the duty to reimburse Builder only for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor and not excluded from indemnification in the preceding paragraph. The proportion of Builder's defense costs to be reimbursed by Contractor shall be calculated by Builder based upon Builder's reasonable and good faith allocation of the proportion of the Loss attributable to Contractor's conduct for which indemnity is owed in the preceding paragraph. Contractor's proportion of the defense costs may be subject to reasonable

¹ All Indemnification and Additional Insured Endorsement requirements imposed on Contractor by the Standard Agreement as modified by this Master Addendum do not apply to any Project that was or is covered by a Wrap Insurance Program (including without limitation an OCIP or CCIP).

adjustment (upward or downward) in the event the original allocation provided for in this paragraph proves to be inequitable. In such case, the parties shall reimburse each other accordingly. In the event of a judgment or award against an Indemnitee, Contractor shall indemnify Indemnitee for that portion of the judgment or award attributable to Loss caused by Contractor and not excluded from indemnification in the preceding paragraph. In the event of a settlement, Contractor shall only be responsible for that portion of the settlement attributable to Loss allegedly caused by Contractor and not excluded from indemnification in the preceding paragraph; but no such settlement shall be entered into without Contractor's consent, such consent not to be unreasonably withheld.

Any disputes regarding allocation of defense costs or indemnity shall be resolved with a "baseball" arbitration, whereby each party shall submit to the arbitrator and exchange with each other 45 days in advance of the hearing their last, best offers for allocation. The arbitrator shall be limited to awarding only one or the other of the two figures submitted, with the prevailing party to collect all costs and expenses of arbitration.

Builder shall endeavor to give notice, in writing, to Contractor of any claims (including without limitation any notices received by Builder under "right to repair" legislation) brought against Builder that are related to Contractor's Work and for which Indemnification or Additional Insured coverage might be sought. Builder shall endeavor to assure that Contractor has a meaningful opportunity to participate in any inspection or testing (destructive or otherwise). The failure to provide such written notice or provide such rights of inspection to Contractor shall not void Builder's Indemnification rights under the Standard Agreement as modified by this Master Addendum except to the extent that Contractor has been prejudiced thereby.

Insurance. Contractor will not provide certified copies of any insurance policies. Contractor will name Builder as an additional insured on Contractor's CGL policy pursuant to an Additional Insured Endorsement in the form attached as Schedule 1. Notwithstanding anything to the contrary in the Standard Agreement, Contractor shall not be obligated to carry completed operations coverage on a Project for more than ten years after completion of the Work or out to the statute of repose in that jurisdiction, whichever is sooner. Builder acknowledges that the policy's deductible is greater than \$25,000. Builder may not exercise any right to purchase insurance on behalf of Contractor or impose any penalty on Contractor for failure to provide a current certificate of insurance unless Builder has given at least thirty (30) days prior written notice and an opportunity to cure such failure.

Time and Schedule of the Work. At the request of Contractor, Builder shall give any notices to proceed or change orders in writing. Builder shall give Contractor reasonable notice of changes in schedule or changes in the Work. Neither party shall be responsible for any loss, damage, detention or delay caused by any event beyond the reasonable control of either party. Dates for the performance or completion of the Work shall be extended by delay of time as may be reasonably necessary to compensate for such delay.

Warranty, Defect, Default. Builder shall endeavor to give Contractor or Contractor's agent or supply chain partner reasonable notice and opportunity to correct any breach or default under the Contract or defect in the Work, before making such corrections itself or through others. Contractor shall be allowed a reasonable period of time to complete correction of such breach, default or defect, subject to product lead times where practicable.

Remedies for Contractor's breach of a Contract as to a particular Project shall be allowed only with regard to that specific Project and shall not apply to other Projects or agreements between Builder and Contractor.

In no event shall either party be liable to the other for any incidental (including but not limited to overhead and administrative expenses), consequential, liquidated or special damages, including without limitation, lost revenues, profits or loss of use, even if it has been advised of the possibility of such damages. The foregoing limitation shall not apply to damages that Builder is obligated to pay a third party for a Loss that is indemnified by Contractor pursuant to the provisions on Indemnification above.

Rights and Liens. Contractor will not and does not waive (i) any legal rights provided under local, state or federal laws, statutes, rules, regulations or common law concerning the construction industry, including without limitation those enacted for the protection of contractors and subcontractors, or (2) under common law tort theories or in equity.

Payment. Contractor will use commercially reasonable efforts to invoice Builder for progress payments, final payments and for extras within any time deadlines imposed in the Standard Agreement; however, failure by Contractor to meet a deadline shall not relieve Builder of its obligation to pay the invoice. Notwithstanding anything in the Contract to the contrary, Contractor shall be paid 100% of the money for the Work under the Contract within thirty (30) days of invoice(s) submitted for payment, for each portion of its completed Work. Contractor shall have no duty to perform any Work if payment is not received as set forth herein.

Acts of Others. Contractor's obligation to inspect the work of others shall be limited to the obligation to discover and report to Builder patent defects that would be readily recognized by a contractor in Contractor's trade in prior work that directly affects or will be directly affected by Contractor's Work. Contractor will only be responsible for the safety of its own employees and agents and for conditions created by the Work at the Project site and not for safety of others or the Project site generally unless attributable to Contractor's work. Notwithstanding anything to the contrary in the Standard Agreement, in no event shall Contractor have any obligation of defense or indemnity for fines and penalties imposed upon Builder to the extent the amount of any such fines or penalties are based upon the prior history of Builder. To the extent that compliance with building codes, safety regulations, the Contract and/or best industry practices is impeded or prevented by Builder, Contractor shall have the right upon notice to Builder to walk off the job without liability to Builder.

Dispute Resolution. In the event of a dispute, only the decision of a third party neutral arbitrator(s) (e.g. not the architect, general contractor, etc.) or a competent court of law shall be binding on Contractor. In no event shall Contractor be bound by an award in any arbitration or other proceeding unless Contractor has received notice and an opportunity to participate in such proceeding.

Reciprocal Provisions. Provisions in the Standard Agreement in favor of Builder on non-waiver, confidentiality and entitlement to attorneys' fees shall be reciprocal between Builder and Contractor.

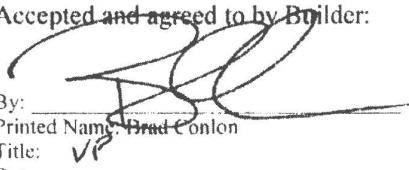
Choice of Law. The Standard Agreement as modified by this Addendum for each Project shall be governed by the internal laws of the State in which the Project is located, except to the extent the Federal Arbitration Act applies.

Effective Date. For each Project, the Standard Agreement as modified by this Addendum shall be deemed entered into by Builder and Contractor on the date that the Standard Agreement for that Project is entered into.

Termination. This Addendum may be cancelled by either party after with 30 days written notice to the signatories below, copy to Stephan Perison at sperison@drhorton.com and TopBuild Corp., 260 Jimmy Ann Drive, Daytona Beach, Florida 32114, Attn: General Counsel. Cancellation of the Addendum is only effective for Standard Agreements entered into after the effective date of such cancellation; the Addendum shall continue in full force and effect for any Standard Agreements entered into prior to the effective date of such cancellation.

Except for incentive agreements between the parties for the products and/or services supplied by Contractor to Builder, and except for the scope of the Work and pricing provided by Contractor for each Project, the Standard Agreement between Builder and Contractor for that Project as modified by this Master Addendum shall constitute the entire agreement between the parties concerning Contractor's Work on that Project. The parties acknowledge and agree that that certain Master Addendum to Independent Contractor Agreement effective January 1, 2006 by and between D.L. Horton and its direct and indirect subsidiaries and related companies and the following subsidiaries of Masco Corporation: Coast Insulation Contractors, Inc., Sacramento Insulation Contractor, Insulpro Projects, Inc., and Superior Contractor Corporation terminated effective April 1, 2015. This Master Addendum may only be modified by a written agreement signed by both parties that specifically references this Master Addendum; however electronic signatures shall not be effective for such a modification. For any modification to this Master Addendum to be binding upon Contractor, the President must sign on behalf of the applicable Contractor. This Master Addendum shall be binding upon each party's successors and assigns. This Master Addendum shall extend to all future subsidiaries of the parties listed below. Each Contractor shall be individually and not jointly liable to Builder under this Master Addendum or any Contract.

Accepted and agreed to by Builder:

By: 
Printed Name: Brad Conlon
Title: VP
Date: 7/30/15

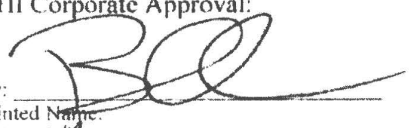
Accepted and agreed to by Builder Services Group, Inc.:

By: _____
Printed Name: _____
Title: _____
Date: _____

Accepted and agreed to by TruTeam of California, Inc.:

By: _____
Printed Name: _____
Title: _____
Date: _____

DHI Corporate Approval:

By: 
Printed Name: _____
Title: VP
Date: 7/30/15

Accepted and agreed to by American National Services, Inc. and its subsidiaries:

By: _____
Printed Name: _____
Title: _____
Date: _____

Exhibit A

Horton, Inc. and its subsidiaries and affiliates.

Schedule I

Additional Insured Endorsement

Amendment No. 1 to Master Addendum to Independent Contractor Agreement

WHEREAS, on or about July 1, 2015, D.R. Horton and its direct and indirect subsidiaries and related companies (individually and collectively "Builder"), and Builder Services Group, Inc., TruTeam of California, Inc. (f/k/a Masco Contractor Services of California, Inc.) and American National Services, Inc. and its subsidiaries (individually and collectively "Contractor") entered into that certain Master Addendum to Contractor Agreement ("Master Addendum");

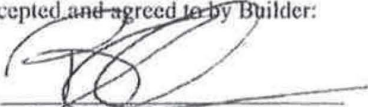
WHEREAS, the parties to the Master Addendum desire to add TopBuild Home Services, Inc. as a party to the Master Addendum; and

WHEREAS, TopBuild Home Services, Inc. desires to be made a party to the Master Addendum.

THEREFORE, the parties agree as follows:

1. Effective September 21, 2015, TopBuild Home Services, Inc. shall be included within the definition of "Contractor" within the Master Addendum, shall be considered a party to the Master Addendum, and shall have all rights, duties, obligations and remedies of "Contractor" under the Master Addendum.
2. Except as set forth in this Amendment, the Master Addendum is unaffected and shall continue in full force and effect in accordance with its terms.

Accepted and agreed to by Builder:

By: 
Printed Name: Brad Conlon
Title: VP, Director of National Accounts
Date: October 13, 2015

Accepted and agreed to by Builder Services Group, Inc.:

By: 
Printed Name: ROBERT BUCK
Title: PRESIDENT
Date: OCT 23, 2015

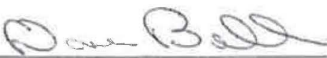
Accepted and agreed to by TruTeam of California, Inc.:

By: 
Printed Name: ROBERT BUCK
Title: PRESIDENT
Date: OCT 23, 2015

Accepted and agreed to by American National Services, Inc. and its subsidiaries:

By: 
Printed Name: Jennifer A. Hanson
Title: Assistant Secretary
Date: 10/23/2015

Accepted and agreed to by TopBuild Home
Services, Inc.:

By: 
Printed Name: DAVE BELL
Title: VP - BUILDING SERVICES
Date: 10/23/18

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-1942
	)	
Natalie Zitek, individually, and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF A. RHETT
	)	WHITLOCK, Ph.D., P.E.
v.	)	
	)	
D.R. Horton, Inc.; Jane Doe #1-10; and, John	)	
Doe #1-50,	)	
	)	
Defendants.	)	

PERSONALLY appeared before me the undersigned, A. Rhett Whitlock, Ph.D., P.E., who first being duly sworn, deposes and states as follows:

1. My name is A. Rhett Whitlock, Ph.D., P.E. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.
2. I was retained by Lucey Law Firm in behalf of the homeowners to evaluate existing construction conditions in two hundred thirty-four (234) single-family homes in the Rose Hill neighborhood in Easley, South Carolina ("Rose Hill homes"), to determine if repairs were warranted and the scope of the repairs, and to estimate repair costs based on the required repair scope.

(Experience)

3. I have a B.S., M.S., and Ph.D. in civil engineering, all from Clemson University. Additionally, I served on the Civil Engineering Advisory Board for Clemson's Civil Engineering department for over 6 years.
4. I am a licensed professional engineer in the state of South Carolina and have been licensed in South Carolina for over twenty-five (25) years.
5. I am also a licensed professional engineer in other states including Florida, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Texas and Virginia.
6. I specialize in the forensic engineering of residential homes, commercial buildings, and other structures as well as the evaluation and testing of construction materials. I analyze

how things are designed, constructed, and/or manufactured, with a special emphasis on masonry veneer, stucco, siding, doors, windows, and other exterior and interior systems.

7. I am also experienced with site work preparation and geotechnical engineering. I was employed by a large consulting engineering firm from 1987 until 1995 and was "Engineer in Responsible Charge" for the Manassas, Virginia, Geotechnical and Construction Services Division. In this capacity, I was involved in site development, geotechnical subsurface investigations, and geotechnical engineering as well as construction site testing and monitoring. My engineering firm maintains a geotechnical division.
8. I am a member of several professional organizations that develop standards used by the construction industry, such as the American Society for Testing and Materials (ASTM), the Masonry Society (TMS), Construction Specifications Institute (CSI), and American Architectural Manufacturers Association (AAMA).
9. I have contributed to hundreds of standards regarding building construction, masonry materials, design and construction, stucco materials, and water-penetration resistance of building enclosures.
10. I have also published more than 40 construction-related articles on topics like supporting masonry veneer in wood-framed buildings, evaluating water resistance of building materials, testing buildings for defective conditions, troubleshooting water penetration, establishing quantity estimates, and predicting damages.
11. I received honors and recognition from organizations like ASTM for my publications and other contributions.
12. I have personally conducted and led forensic engineering investigations of construction defects in residential homes and neighborhoods for over thirty (30) years, including ten (10) or more neighborhoods like the neighborhood in this case. Many of these have been in South Carolina.
13. I was also the structural engineer of record for hundreds of residential homes built by a national builder like D.R. Horton.
14. I have been certified by multiple judges as an expert in forensic engineering investigations of construction defects in both Federal and State Court cases, including (for South Carolina cases):
 - *Gardens at Cypress Bay Property Owners Association, Inc., et al v. Gardens at Cypress Bay, Inc. et al*, 2003-CP-26-1421 (trial) (Judge Baxley)
 - *Meeting Street at Tennyson Row Horizontal Property Regime by Meeting Street at Tennyson Row Homeowners Association, Inc. v. Meeting Street Builders, LLC, et al*, 2008-CP-10-7217 (trial) (Judge McDonald)

- *One Belle Hall Property Owners Association, Inc. and Marvin T. Meek and Francis E. Hill, individually, and on behalf of all others similarly situated v. Builders FirstSource Southeast Group LLC*, 2012-CP-10-07594 (trial) (Judge Goodstein)
 - *Robin Napier, individually, and on behalf of all others similarly situated v. Adiz, et al*, 2016-CP-02-0263 (trial) (Judge Maddox)
15. These cases, and the many other construction defect cases I have testified in on behalf of homeowners, involved similar construction defects, such as leaking windows and doors, failing exterior cladding systems, cracking slabs and foundations, inadequate yard drainage, and insufficient ventilation.
 16. In most cases in which I testified that proceeded to a jury's verdict, the homeowners received multi-million-dollar awards.
- (Rose Hill)
17. In this case, I was asked to evaluate existing construction conditions in two hundred thirty-four (234) Rose Hill homes. All Rose Hill homes appear to have been developed/built by D.R. Horton and its subcontractors.
 18. The Rose Hill homes were all built between approximately 2012-2018. The building codes in effect during this time frame include the 2006, 2012, and 2015 International Residential Code for One and Two-Family Dwellings (IRC 2006, 2012 or 2015). As it relates to the below construction issues, there is little difference between many of the applicable building code provisions.
 19. To date, I have looked at and cataloged all Rose Hill homes. I have also performed detailed inspections of approximately 15% of the Rose Hill homes.
 20. The Rose Hill homes are similar in that (1) they are all supported by a concrete slab-on-grade foundation; (2) they are all constructed with wood framing; (3) they all contain the same type of windows; (4) they are all clad with vinyl and/or cement based siding and masonry veneer, and; (5) they all have experienced the same weather conditions over the years having been constructed within a few square miles of each other.
 21. I have inspected a sampling of thirty-four (34) Rose Hill homes, including the home of Natalie Zitek.
 22. I inspected the exteriors and interiors of these homes and performed testing of some of the windows and masonry.
 23. All homes were well maintained but exhibited similar construction problems, such as leaking windows and doors, cracking/separating masonry veneer, cracking slabs and foundations, and poor workmanship.

24. I noted construction and material deficiencies in these same areas: windows, doors, masonry veneer, flashing, and slab foundations.
25. Many of these deficiencies violate the 2006, 2012, and 2015 IRC, industry standards, and/or good practice and all require repair.
26. I documented the deficiencies for each home, and the documented patterns show they are consistent and substantially similar in all 34 sample homes.
27. Examples of typical deficiencies include: (1) masonry veneer that is improperly flashed, poorly weeped, inadequately anchored and supported; (2) windows with insufficient water resistance and broken, leaking miters at the bottom corners; (3) damaged patio doors and trim with insufficient water resistance; and (4) slab foundations that are cracking excessively.
28. These deficiencies have resulted in failing building components as well as damage to these homes and personal property.
29. The resulting failures and damages documented are typical and consistent among all 34 sample homes and all require repair.
30. Examples of typical failures and damage associated with these deficiencies include: (1) masonry veneer that is cracking along exterior walls, separating above garage doors and at wall intersections, and falling off of homes leading to water intrusion; (2) windows that leak at the right and left sill corners leading to water intrusion, irreversible swelling, cracking trim, and structural framing damage; (3) patio doors that leak leading to water intrusion, irreversible swelling, and trim deterioration; and (4) slab foundations that are cracking in multiple locations.
31. All Rose Hill homes likely have these same or similar deficiencies, failures, and damages based, in part, upon the common patterns documented at the sample homes and the fact that these and the other Rose Hill homes were all designed and constructed by the same builder/developer (D.R. Horton) who used similar materials procured from the same vendors and suppliers.
32. The consistency in the observations during my inspections of the 34 sample homes and the quantity of sampling (i.e., 34 out of 234 Rose Hill homes or approximately 15% of the neighborhood) provide a reasonable basis for extrapolation of the sampled observations for all Rose Hill homes.
33. I was also asked to advise counsel on the probable repair costs for the neighborhood. A single damage model is appropriate for all Rose Hill homes because they have common defects with common repair scopes that can be commonly priced from home to home. I have developed a damage model and have grouped the homes into three general categories of basic, moderate, and complex for purposes of most accurately estimating the damages throughout all Rose Hill homes.

34. The damage model is based on estimates that allow for the calculation of all-inclusive unit costs for the repair of each common defect. For example, the cost to replace a window can be calculated as one, comprehensive, typical or average amount (e.g., \$1,500) that applies to all windows in all homes. These comprehensive unit costs include all work relating to repair for things like caulking, adding new flashing, correcting damaged structural framing, repainting, etc. such that these costs are typical and consistent among all Rose Hill homes. Once uniform, comprehensive costs are established, it becomes a simple calculation to determine, for example, the window repair and replacement cost for each residence as it is purely a function of the number of windows.¹
35. While there may be differences in total repair costs, any differences in cost are due to different quantities of the same repair. For example, a typical larger home may have 10 windows (units) whereas a typical smaller home may have 5 windows (units). The cost to repair each unit is approximately the same although the larger home has a higher total repair cost because it has more window units.
36. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training and experience in my fields of expertise as well as my review of applicable codes, product information, and case-related materials available to date.²

FURTHER THE AFFIANT SAYETH NOT.


A. Rhett Whitlock, Ph.D., P.E.

SWORN TO AND SUBSCRIBED before me
this 30th day of April, 2020.


Notary Public for South Carolina
My Commission Expires: 6/14/2022

¹ I have been asked whether the damages to each class member's home exceed \$100; as can be seen by the foregoing, they do.

² I understand that D.R. Horton has not provided its construction files for Rose Hill. I reserve the right to modify my opinions if/as these files or other information becomes available.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-1942
	)	
Natalie Zitek, individually, and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiff,	)	REPLY AFFIDAVIT OF A. RHETT
	)	WHITLOCK, Ph.D., P.E.
v.	)	
	)	
D.R. Horton, Inc.; Jane Doe #1-10; and, John	)	
Doe #1-50,	)	
	)	
Defendants.	)	

PERSONALLY appeared before me the undersigned, A. Rhett Whitlock, Ph.D., P.E., who first being duly sworn, deposes and states as follows:

1. My name is A. Rhett Whitlock, Ph.D., P.E. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.
2. I have reviewed Horton's Memo Opposing Plaintiff's Motion for Class Certification and the May 27, 2020 Affidavit of Shawn M. Kruglewicz ("Kruglewicz") and offer the following in reply on some of the engineering and construction issues in which I am involved.
3. As the Kruglewicz material has only just been produced, the below will simply highlight how many/most of Kruglewicz's points have little significance to the engineering work and observations that I have performed on the homeowners' behalf as there is insufficient time to address all of his attempted points.

Common and Typical Defects

4. Horton seems to confuse the construction defect issues with numerous and potentially irrelevant floor plans, interior components, and other matters.
 - a. Most of the defects at these homes can be classified singularly as defectively installed exterior building envelopes.
 - b. For present purposes, the building envelope can be sub-classified into two components – fenestrations (windows and doors) and cladding.
 - c. The windows appear to be identical or nearly identical throughout – and the Horton materials contain no allegation or evidence otherwise. The cladding is two types: siding and masonry. Siding and masonry are each two types: vinyl siding

and cementitious siding (sometimes referred to as “HardiPlank”), and brick and stone masonry.

- d. Most of the defect observations concern the defective installation and/or performance of these six envelope components, resulting in a defective exterior envelope on each residence.
5. Horton’s materials additionally seem to misinterpret my observations and conclusions as to the common and typical defects existing in these homes.
6. For example: I observed the same window product in the thirty-four sample homes that I inspected, and I documented evidence of water intrusion at one or more of these identical windows in most, if not all, residences. *See* (Photos of Common Window Damage attached as Exhibit A). The causation is common – open joints at the sills. The damage is common – water intrusion with resulting damage to adjacent finishes and components. (Ex. A).
7. I observed the same masonry products in the sample homes that I inspected, and I documented evidence of cracking, separation, and likely water intrusion at these identical masonry-clad walls in most residences. The causation is common – insufficient, fastening, support, and waterproofing (i.e., weeps, flashing, clearance). The damage is common – masonry that is cracking, separating, and falling off homes resulting in water intrusion.
8. I observed what appeared to be similar patio doors in the thirty-four sample homes that I inspected, and I believe I documented evidence of water intrusion at the patio doors in most residences. The causation is common – insufficient water resistant. The damage is common – water intrusion with resulting damage to adjacent finishes and components.

Kruglewicz

(Poinsett/Grading)

9. Kruglewicz claims that work performed by Poinsett Homes prior to Horton’s involvement at Rose Hill led to “variations” in Horton’s work. Kruglewicz does not explain what these variations are and offers no evidence showing that any such variation exists.
10. Poinsett only built approximately 27 homes in Rose Hill whereas Horton built 234. As the general contractor, Horton was responsible for both the horizontal (i.e., grading and site work) and vertical construction (i.e., home) of all 234 homes it built, even if relied on some prior site work by Poinsett.

(Design)

11. Kruglewicz states that there are 26 model plans at Rose Hill, each of which required a separate set of drawings and engineering. The fact that there are 26 separate plans means little without more pertinent detail. Kruglewicz does not point to any difference in the design among these plans or even the design professionals who prepared them that are relevant to the construction defects observed by my engineering firm.

12. What is drawn on these plans is similar from model to model. Homebuilders commonly reconfigure standardized floor plans to “tweak” the appearances of homes that they sell to the public.
13. Importantly, Kruglewicz’s and Horton’s materials are devoid of any allegation that the different model plans used different “detail” sheets. Detail sheets contain the architect’s or engineer’s close-up details of how to construct an important building condition. They are akin to mandatory means and methods. More likely than not, the same details were used for each home, by each trade, thereby resulting in common and typical as-built conditions.
14. My inspections of these homes confirmed that, while these homes may vary in size, configuration, and price, they all have the same standard components that contain the same common and typical defects and damages.

(Codes)

15. Kruglewicz next speculates that building codes “may” have varied during the six years Horton constructed these 234 homes.
16. As noted in my initial Affidavit, there is little difference between many of the applicable building code provisions as it relates to the construction defects observed by my firm; and Kruglewicz fails to document any meaningful differences in the different building codes.

(Construction Participants)

17. Kruglewicz states that multiple subcontractors, designers, testing firms, engineers, and suppliers were involved in the construction of these 234 home, but provides no evidence showing the differences among any of the work they allegedly performed.
18. Kruglewicz does not identify any of these different construction participants; and, merely speculates that because there was more than one framing or stone contractor, for example, that few of these homes had the same group of subcontractors.
19. Yet, permit records show that at least the mechanical, electrical, and plumbing subcontractors were largely the same for most of these homes.
20. Kruglewicz also admits that all subcontractors “were hired by Horton to perform similar, if not identical, scopes of work” at all homes. (Kruglewicz Aff., para 18).
21. Thus, regardless of whether there were four masons or eight framers, all are similar in that they were hired to perform the same scope of work under the direct supervision of Horton.

(Representative Sampling)

22. Kruglewicz claims that the homes I performed detailed inspections at are not representative of the "unique" home designs present in Rose Hill but provides no evidence to support this point.
23. From my inspections of all homes, the 34 sample homes are very representative of all. The 34 homes I performed detailed inspections contain the same materials and components as the other 200 homes that I catalogued during my firm's various visits to this neighborhood.
24. Horton's brochures advertising that they used the same building products in these homes further support this fact.
25. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training and experience in my fields of expertise as well as my review of applicable codes, product information, and case-related materials available to date.¹

FURTHER THE AFFIANT SAYETH NOT.

A. Rhett Whitlock

A. Rhett Whitlock, Ph.D., P.E.

SWORN TO AND SUBSCRIBED before me
this 29th day of May, 2020.

Cynthia M. Mason
Notary Public for South Carolina

My Commission Expires: 6/14/2022

¹I understand that D.R. Horton has still not provided its construction files for Rose Hill. I reserve the right to modify my opinions if/as these files or other information becomes available.

EXHIBIT A

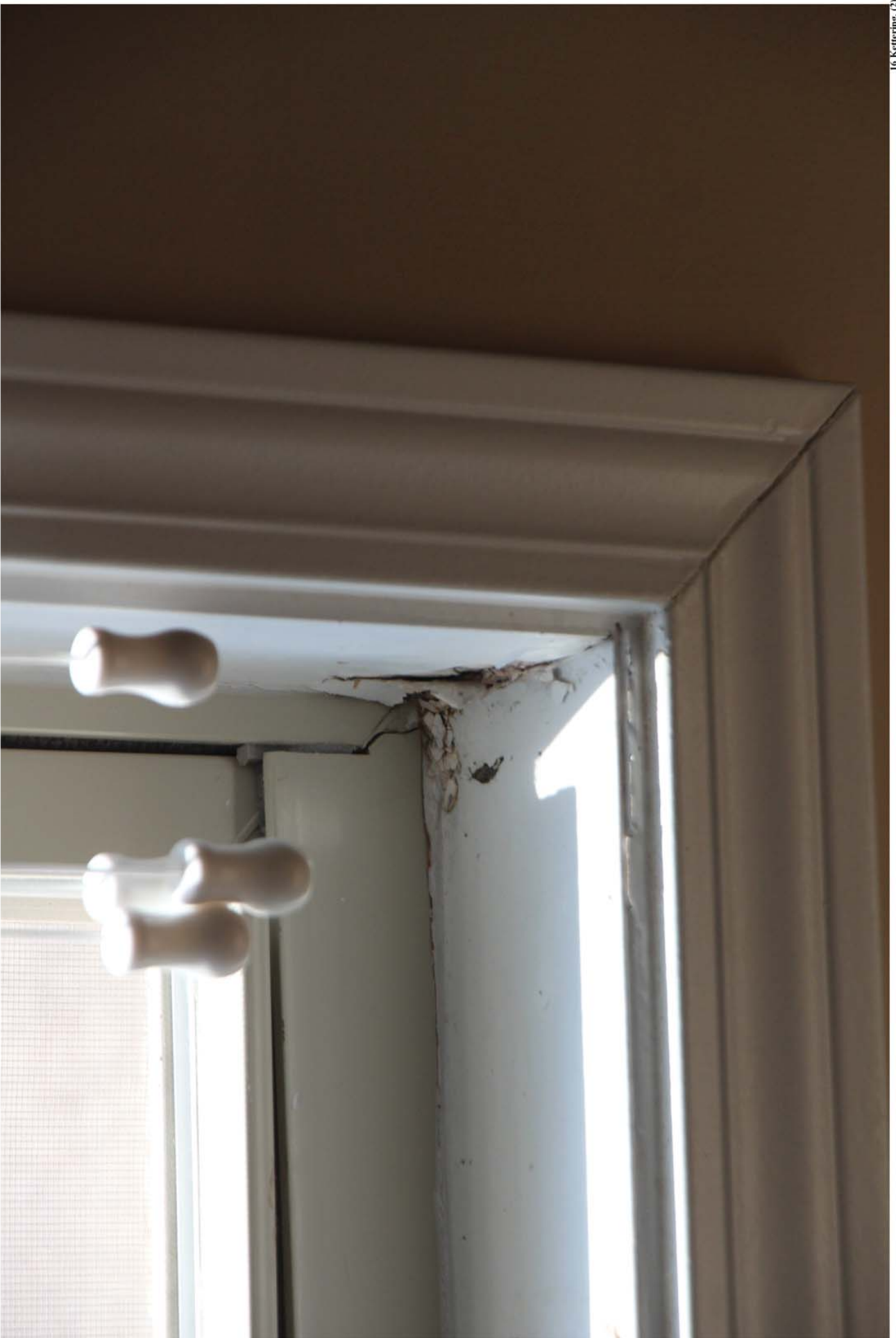








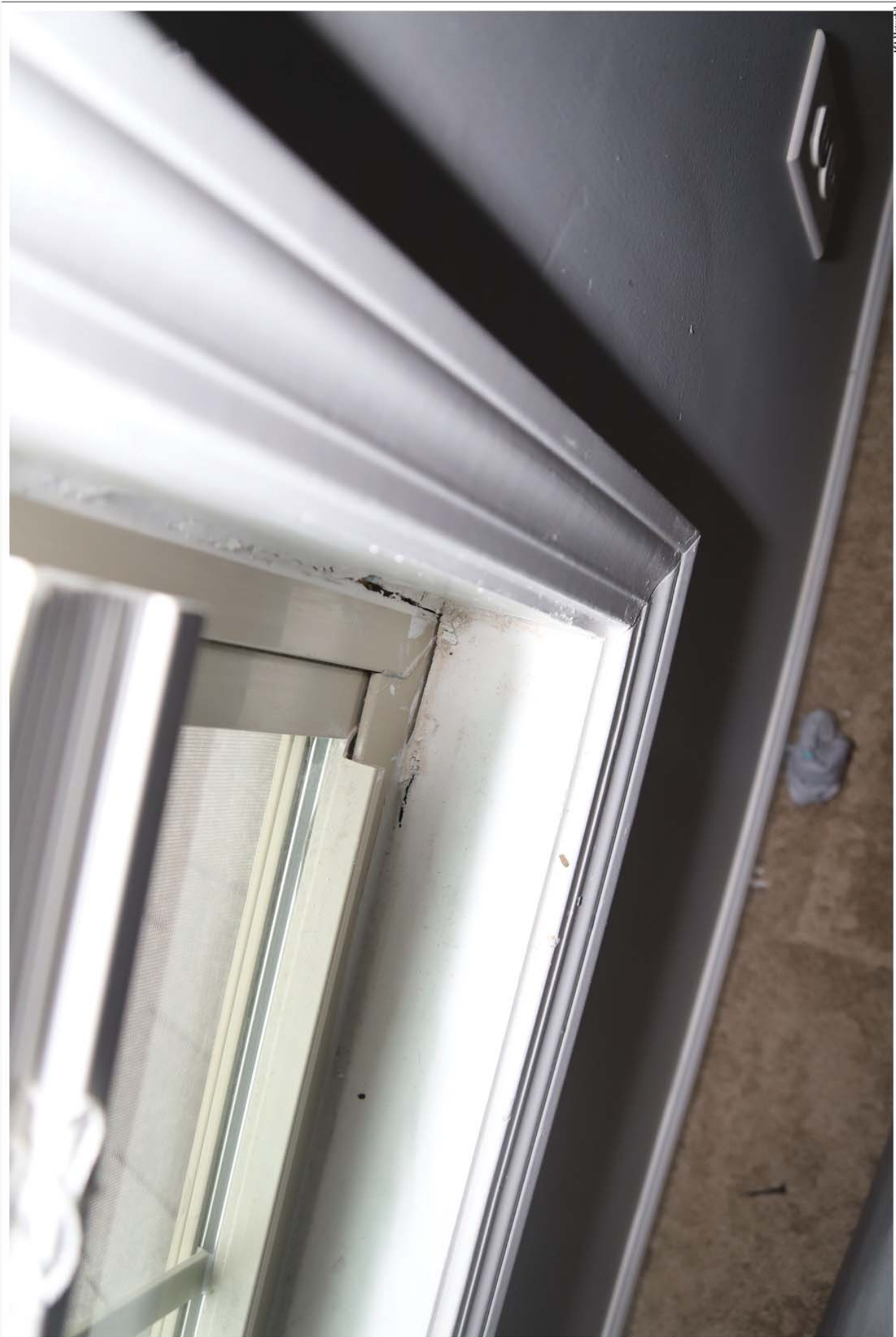














STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-1942
	)	
Natalie Zitek, individually, and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiff,	)	SUPPLEMENTAL AFFIDAVIT OF
	)	A. RHETT WHITLOCK, Ph.D., P.E.
v.	)	
	)	
D.R. Horton, Inc.; Jane Doe #1-10; and, John	)	
Doe #1-50,	)	
	)	
Defendants.	)	

PERSONALLY appeared before me the undersigned, A. Rhett Whitlock, Ph.D., P.E., who first being duly sworn, deposes and states as follows:

1. My name is A. Rhett Whitlock, Ph.D., P.E. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.
2. I have now performed detailed inspections of seventy-six (76) or approximately 1/3rd of the Rose Hill homes, including 22 homes selected by D.R. Horton and homes located throughout Rose Hill's 16 streets.¹
3. All my prior opinions remain true for this larger inspection sampling.
4. I have attached additional, exemplar photos of some of the common building envelope deficiencies and damages existing in these homes as follows:
 - Photos of Common Window Damage attached as Exhibit B;
 - Photos of Common Brick Damage attached as Exhibit C;
 - Photos of Common Stone Damage attached as Exhibit D;
 - Photos of Common Patio Door Damage attached as Exhibit E;
 - Photos of Stone Lacking Code-Prescribed Clearances attached as Exhibit F; and,
 - Photos of Missing Code-Prescribed Weeps Below Brick-Clad Windows attached as Exhibit G.
5. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training and experience in my fields of

¹ Rose Hill has a total of 17 streets; however, one of these streets, Oldham Drive, contains no homes.

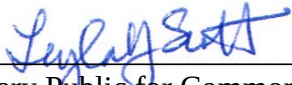
expertise as well as my review of applicable codes, product information, and case-related materials available to date.²

FURTHER THE AFFIANT SAYETH NOT.



A. Rhett Whitlock, Ph.D., P.E.

SWORN TO AND SUBSCRIBED before me
this 20th day of November, 2020.



Notary Public for Commonwealth of Virginia
My Commission Expires: 10/31/2023



²I understand that D.R. Horton has still not provided its construction files for Rose Hill. I reserve the right to modify my opinions if/as these files or other information becomes available.

Records Deleted Per Order of the Court

Pages 1576-1584



**KENISON, DUDLEY
& CRAWFORD, LLC**
ATTORNEYS AT LAW

John T. Crawford, Jr.
Managing Member
Licensed in SC
704 East McBee Avenue
Greenville, SC 29601
864.242.4899
crawford@conlaw.com

March 17, 2023

Via First Class Mail and Email

Old Republic Insurance Company
631 Excel Drive, Suite 200
Mt. Pleasant, PA 15666
Accounting@orinsco.com

Via First Class Mail and Email

Builder Services Group, Inc., d/b/a Gale
Contractor Services
c/o N. Keith Emge, Jr., Esq.
Jessica W. Stratta, Esq.
Resnick & Louis, P.C.
146 Fairchild Street, Suite 130
Charleston, South Carolina 29492
cemge@rlattorneys.com
jstratta@rlattorneys.com

Re: *Natalie Zitek, et. al. v. D.R. Horton, Inc., et. al.*, Anderson County Court of Common Pleas, CA No. 2019-CP-04-1942

To Whom It May Concern:

This firm represents D.R. Horton, Inc., (“D.R. Horton”) with respect to the above action. D.R. Horton hereby tenders its defense and demands indemnification from Builder Services Group, Inc. d/b/a Gale Contractor Services f/k/a Masco Contractor Services Central Inc. (“Builder Services Group”) and defense by Builder Services Group’s insurance carriers with respect to the claims asserted against D.R. Horton in the above-referenced lawsuit (the “Lawsuit”). The Lawsuit concerns itself homes located in the Rose Hill subdivision in Anderson County, South Carolina (“Rose Hill”). Rose Hill homeowners (“Homeowners”) have brought claims asserting deficiencies in the design, development, construction and repair of their homes in Rose Hill. A copy of the Complaint (**See Exhibit A**) and the Notice of Right to Cure (**See Exhibit B**) are enclosed for your records.

Our records indicate that Builder Services Group performed siding work (the “Work”) for Rose Hill. Our understanding is that Builder Services Group’s Work has been implicated by Homeowners’ claims and may have led in whole or in part to the injuries alleged by Homeowners. Builder Services Group’s Work was subject to and performed under a South Carolina Independent Contractor Agreement (“ICA”) with D.R. Horton.

Under the ICA, Builder Services Group owes a contractual duty to defend and indemnify D.R. Horton from these claims. Generally, the ICA states:

To the fullest extent remitted by law, contractor shall protect, defend, indemnify, and hold owner and owner's parent corporation, subsidiaries, affiliates, successors and assigns, and each of these entities' respective officers, directors, partners, employees, agents and insurers (individually or collectively "Indemnatee"), free and harmless from and against any and all claims, demands, lawsuits or other litigation, action, causes of action, or other liabilities, of every kind and character (including all costs thereof, attorneys' fees and interest), whether asserted by a purchaser or owner, contractor, or any third party (including but not limited to personnel furnished by contractor, its suppliers and subcontractors of any tier), on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property including the loss of use thereof in any way occurring, incident to, arising out of, or in connection with: (1) a breach of any warranties, representations, covenants, or other obligations of contractor set forth in this agreement; (2) the work, as defined in section 1, including but not limited to work performed or to be performed or material supplied by contractor or by contractor's agents or employees, or by its suppliers or subcontractors of any tier, or their respective agents or employees; (3) any negligent or intentional act or omission, or any strict liability, of contractor or any of contractor's employees, personnel, agents, suppliers or subcontractors, regardless of whether caused in part by indemnatee; or (4) any negligent or intentional act or omission, or any strict liability, of indemnatee related in any way to the work. Contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made against indemnatee which potentially or arguably is subject to contractor's duty to indemnify, regardless of contractor's ultimate liability for indemnity. Contractor must defend indemnatee even where the allegations against indemnatee are ambiguous or incomplete with respect to the issue of contractor's duty to indemnify. The defense duty is triggered by allegations in a lawsuit or other similar action, regardless of whether they are groundless, false or fraudulent, or alternatively by any facts (extrinsic to the allegations) not plead, or not pled with specificity, by the claimant. Once the duty to defend is triggered, contractor is obligated to defend the entire action, lawsuit, arbitration, or other litigation, including any claims therein not subject to indemnity by contractor.

Further, Builder Services Group had a contractual duty to list D.R. Horton as an additional insured for this matter. Generally, the ICA states that Builder Services Group agreed as follows:

To the fullest extent permitted by law, Contractor shall add Horton as Additional Insureds, specifically identifying Horton, on the GCL Policy covering both ongoing operations and completed operations . . .

Builder Services Group was issued a certificate of liability insurance. D.R. Horton is listed as an additional insured under Builder Services Group's General Liability Insurance policy, providing the following:

D.R. Horton, Inc., its affiliates and subsidiaries are listed as additional insured as respects [sic] to the General Liability . . .

A copy of the Certificate of Liability Insurance is enclosed herein as **Exhibit C**.

As stated previously, Builder Services Group's work has been implicated and **it is expected for Builder Services Group and its insurers to take the lead with regards to defending claims related to its scope of work in the referenced lawsuit.** As such, D.R. Horton expects Builder Services Group's insurance carriers to respond to this request in good faith, perform an investigation and agree to defend D.R. Horton in this matter.

We hope that D.R. Horton, Builder Services Group and its insurance carriers can work together to defend against Plaintiffs' allegations in this matter. Immediately upon receipt of this correspondence, please contact me to discuss this matter further.

Sincerely,

A handwritten signature in blue ink, appearing to read "JTC", is positioned above the name John T. Crawford, Jr.

John T. Crawford, Jr.

Enclosures

Exhibit A

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

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

Plaintiff,)

v.)

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

Defendants.)

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

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

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

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

September 25, 2019
Mount Pleasant, South Carolina

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

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

Plaintiff,)

v.)

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

Defendants.)

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

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

PARTIES AND JURISDICTIONAL STATEMENT

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

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

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

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

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

Developer Defendant

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

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

Jane Doe Defendants

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

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

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

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

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

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

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

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

John Doe Defendants

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

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

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

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

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

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

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

FACTUAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

CLASS ACTION ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

might otherwise be applicable to the claims asserted herein.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

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Attorneys for Plaintiff

September 25, 2019
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-_____
	)	
Madeline Jean Smith,	)	
	)	
	)	
Plaintiff,	)	SUMMONS
	)	(Defective Construction)
v.	)	(Jury Trial Demanded)
	)	
D.R. Horton, Inc.,	)	
	)	
	)	
Defendant.	)	

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

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

Justin O'Toole Lucey
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stowes@lucey-law.com
Attorneys for Plaintiff

July 29, 2020
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-_____
	)	
Madeline Jean Smith,	)	
	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
v.	)	(Defective Construction)
	)	(Jury Trial Demanded)
D.R. Horton, Inc.,	)	
	)	
	)	
Defendant.	)	

Plaintiff, Madeline Jean Smith, complaining of the above-named Defendant, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. The Rose Hill subdivision ("Rose Hill") is a neighborhood of approximately 270 single-family homes located off State Highway 74 in Anderson County, South Carolina.
2. Plaintiff Madeline Jean Smith ("Plaintiff Smith") is a citizen and resident of Anderson County, South Carolina.
3. Plaintiff Smith owns a home within Rose Hill that is located at 20 Duxbury Lane, Easley, South Carolina, 29462.
4. Plaintiff Smith purchased her home from the prior homeowner on or about October 5, 2018.

Developer Defendant

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

6. D.R. Horton is the developer, builder, and seller of the Plaintiff Smith's home in Rose Hill ("the Residence"). At all times relevant to this action, D.R. Horton coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale, and/or repair of the Residence.

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

8. Venue is proper in Anderson County as the most substantial part of Plaintiff Smith's injuries and D.R. Horton's alleged acts or omissions took place in Anderson County.

FACTUAL ALLEGATIONS

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

10. The Residence contains latent and undisclosed defects which emanate from the original design and construction of the Residence. The latent and undisclosed defects, in combination with fortuitous weather, repeated water intrusion and/or other events, have resulted in consequential damage to non-defective portions of the Residence and other property.

11. D.R. Horton should have known of the existence of the latent defects for many reasons, including their post-construction repair efforts at various residences in Rose Hill.

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

13. On June 22, 2020, D.R. Horton inspected the Residence in response to a right to cure letter sent by or on behalf of Plaintiff Smith.

14. D.R. Horton failed to timely submit an offer to cure the Residence; and it has not otherwise rectified the Residence's deficiencies.

15. D.R. Horton had a duty to design, develop, and construct the Residence in a workmanlike manner with suitable materials, free from all defects, and in accordance with the applicable building code, permitted building plans, good workmanship, and construction industry and engineering standards.

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

17. D.R. Horton's acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

18. These deficiencies and resulting damages show that D.R. Horton breached its duties to Plaintiff Smith.

19. Remedying these wrongs will result in additional consequential damages and loss of use.

20. As a direct and proximate result of D.R. Horton's violation of its legal duties, Plaintiff Smith has been proximately damaged in an amount to be determined by the trier of fact, and has had to incur reasonable attorneys' fees and costs for the retention of experts to determine the damage and scope of work for repair.

21. Upon information and belief, the occurrences of water intrusion and resulting consequential property damage commenced after completion of the Residence and have occurred and have been occurring since commencement.

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

22. D.R. Horton is estopped from relying on any statutes of limitations or repose by virtue of their acts. Upon information and belief, D.R. Horton should have known the Residence was defectively constructed and failed to alert purchasers of the Residence's defective condition.

23. D.R. Horton had a duty to inform purchasers of the defects described herein, which they should have known. Notwithstanding its duty, D.R. Horton never disclosed these defects.

24. Despite exercising reasonable diligence, Plaintiff Smith could not have discovered the defective condition of the Residence.

25. Given D.R. Horton's failure to disclose this non-public information about the defective nature of the Residence – information over which they had exclusive control – and because Plaintiff Smith could not reasonably have known of the Residence's defective nature, D.R. Horton is estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

26. The equitable tolling doctrine further precludes D.R. Horton from relying on a statute of limitations defense.

**ESTOPPEL FROM ASSERTING SOUTH CAROLINA NOTICE AND OPPORTUNITY
TO CURE CONSTRUCTION DWELLING DEFECTS ACT**

27. D.R. Horton is estopped/barred from asserting South Carolina's Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code § 40-59-810 *et. seq.*, because Plaintiff Smith complied with the Act prior to filing this lawsuit.

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

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

29. D.R. Horton, either on its own or through its agents, servants, and employees undertook and owed duties to Plaintiff Smith in connection with the work it performed at the Residence.

30. D.R. Horton had a duty to perform its work at the Residence in accordance with applicable codes, approved plans and specifications, industry standards, and in a careful, diligent, and workmanlike manner, free from defects.

31. D.R. Horton also had a duty to provide accurate information about the Residence's condition and to disclose defective conditions.

32. D.R. Horton breached its duties to Plaintiff Smith in a manner that was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to use due care in developing the Residence;
- b. In failing to provide adequate exterior claddings, windows, doors, structural components and/or other building components for the Residence;
- c. In failing to develop the Residence in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices;
- d. In failing to properly supervise the work performed at the Residence;
- e. In failing to properly coordinate the subcontractors and trades;
- f. In failing to act as a reasonable person would in the circumstances then and there prevailing;
- g. In failing to provide accurate information about the Residence;
- h. In failing to make proper repairs; and,

i. Other deficiencies or failures as will be proven at trial.

33. Plaintiff Smith has been damaged as a direct and proximate result of the negligence, carelessness, recklessness, gross negligence, willfulness, and wantonness of D.R. Horton.

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

35. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, Plaintiff Smith is entitled to an award of punitive damages against D.R. Horton.

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

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

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

38. D.R. Horton implicitly warranted that the Residence would be developed in a careful, diligent, and workmanlike manner, with suitable materials and components that complied with applicable building codes, industry standards, and industry practice.

39. D.R. Horton implicitly warranted that the Residence would be habitable, merchantable, free from latent defects, and fit for the particular purpose.

40. D.R. Horton breached its implied warranties by developing the Residence in a defective manner as set forth above.

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

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

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

Justin O'Toole Lucey
Dabny Lynn, Esq.
Sohayla R. Townes, Esq.
415 Mill Street (29464)
Post Office Box 806
Mount Pleasant, SC 29465-0806
(843) 849-8400 phone
(843) 849-8406 fax
jlucey@lucey-law.com
dlynn@lucey-law.com
stownes@lucey-law.com
Attorneys for Plaintiff

July 29, 2020
Mount Pleasant, South Carolina

Exhibit B

JUSTIN O'TOOLE LUCEY, PA

Attorneys at Law

Justin Lucey
Joshua F. Evans
Stephanie D. Drawdy
Dabny Lynn

415 Mill Street, Mount Pleasant, SC 29464
Reply to: P.O. Box 806, Mount Pleasant, SC 29465
Phone: 843.849.8400 · Fax: 843.849.8406 · www.lucey-law.com

Anna S. McCann
Lauren M. Milton
Sohayla R. Townes
Collin H. Fuller

December 11, 2019

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

D.R. Horton, Inc.
c/o C T Corporation System
2 Office Park Court Suite 103
Columbia, South Carolina 29223

RE: *Rose Hill Subdivision in Anderson County, South Carolina*
Notice and Opportunity to Cure Improper Construction Conditions and Resulting Damages

To Whom It May Concern:

This letter is to notify D.R. Horton, Inc. that Natalie and Paul Zitek as well as other owners of D.R. Horton homes within the Rose Hill subdivision in Anderson County, South Carolina ("Rose Hill") intend to proceed with litigation should D.R. Horton, Inc. fail to cure the following improper construction conditions and resulting damages existing at their homes within thirty (30) days from the date of this letter:

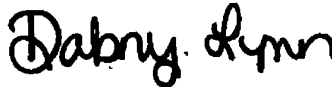
1. Brick: Insufficient/improperly installed brick veneer and resulting cracking, separation, water damage, efflorescence, and cost to repair;
2. Stone: Insufficient/improperly installed stone veneer and resulting loose embedment, cracking, separation, water damage and cost to repair;
3. Doors: Insufficient/improperly installed front and patio doors, deteriorating trim, resulting water damage/leakage, and cost to repair;
4. Floors: Insufficient/improperly installed flooring and resulting buckling, cracking, separation, bumpiness, water damage, and cost to repair;
5. General Wall: Insufficient/improperly installed framing, missing/inadequate insulation at exterior walls, drywall cracking, increased utility bills, and cost to repair;
6. Roof: Insufficient/improperly installed roofs, deteriorating sheathing and roof decking, resulting water damage/leakage, blow-offs, and cost to repair;
7. Windows: Insufficient/improperly installed windows, resulting water damage/leakage, cracking, separation, and cost to repair;

Notice and Opportunity to Cure
December 11, 2019
Page 2

8. Vinyl Siding: Insufficient/improperly installed vinyl siding, rot, water damage, and cost to repair;
9. Hardi Siding: Insufficient/improperly installed Hardi siding, rot, water damage, efflorescence, and cost to repair;
10. Concrete/Soil: Insufficiently supported concrete/inadequate soil, cracking, water damage, and cost to repair;
11. Grading/Drainage: Insufficient/improperly installed grading and resulting water damage, ponding, unevenness, landscaping difficulties, and cost;
12. MEP: Inadequate free air space, improper duct work, insulation in attics, plumbing/HVAC leaks, insufficient PEX piping, non-galvanized holes in roof sheathing at plumbing penetrations, inadequate outlets, insufficient power surges, and resulting cracking, water damage/leakage, cost to repair, and utility bills; and
13. Poor Work: Sloppy workmanship throughout Rose Hill homes and cost to repair.

Time is of the essence and extensions will not be granted. Thereafter, homeowners will proceed with serving litigation. Please contact us directly if you have questions or concerns regarding this Notice and Opportunity to Cure.

Sincerely,



Dabny Lynn
Sohayla Townes

DL/dl

Exhibit C



COMMERCIAL GENERAL LIABILITY DECLARATIONS

POLICY NUMBER**POLICYHOLDER SERVICE OFFICE:****PRODUCER #319****MWZY 55525-10**

Old Republic Risk Management, Inc.
445 South Moorland Road, Suite 300
Brookfield, WI 53005
(877) 797-3400

Aon Risk Services Central, Inc.
Chicago, IL

MWZY 55525-09**RENEWAL OF NUMBER****NAMED INSURED AND MAILING ADDRESS:**

Masco Corporation (See Broad Form Named Insured Endorsement, GL 319 008 0609)
21001 Van Born Road
Taylor, MI 48180

POLICY PERIOD: FROM 6-30-10 **TO** 6-30-11 **AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.**

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE							
EACH OCCURRENCE LIMIT		\$ * See Form GL 319 041 0610					
DAMAGE TO PREMISES RENTED TO YOU LIMIT		\$ *		Any one premises			
MEDICAL EXPENSE LIMIT		\$ *		Any one person			
PERSONAL AND ADVERTISING INJURY LIMIT		\$ *		Any one person or organization			
GENERAL AGGREGATE LIMIT		\$ *					
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT		\$ *					
RETROACTIVE DATE (CG 00 02 ONLY)							
THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.							
RETROACTIVE DATE: None (ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)							
DESCRIPTION OF BUSINESS							
FORM OF BUSINESS:							
☐ INDIVIDUAL ☐ JOINT VENTURE ☐ LIMITED LIABILITY COMPANY							
☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY) ☐ PARTNERSHIP ☐ TRUST							
BUSINESS DESCRIPTION: Products & Services for the Home & Family. Services include but not limited to construction contracting operations							
ALL PREMISES YOU OWN, RENT OR OCCUPY							
LOCATION NUMBER		ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY					
		On File With Company					
CLASSIFICATION AND PREMIUM							
LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/ Ops	Prod/Comp Ops	Prem/ Ops	Prod/Comp Ops
On File With Company			\$	\$	\$	\$ 129.00	\$ Included
				STATE TAX OR OTHER (IF APPLICABLE)		\$	
				TOTAL PAYABLE (SUBJECT TO AUDIT)		\$	
TOTAL SHOWN IS PAYABLE: \$ 129.00 AT INCEPTION \$ AT EACH ANNIVERSARY (IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)							
AUDIT PERIOD (IF APPLICABLE) ☐ ANNUALLY ☐ SEMI-ANNUALLY ☐ QUARTERLY ☐ MONTHLY							
ENDORSEMENTS							
ENDORSEMENTS ATTACHED TO THIS POLICY: See Forms Index							

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned (Date): 9-7-10 By (Authorized Representative): Gary Nies 9-7-10

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITS OF INSURANCE (Masco Form QQ)

It is hereby agreed and understood that the Limits of Insurance for the Commercial General Liability Declarations is as follows:

LIMITS OF INSURANCE		
EACH OCCURRENCE LIMIT	\$ 2,000,000	
EACH OCCURRENCE LIMIT (as respects Product Liability/Completed Operations)	\$ 3,000,000	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ 2,000,000	Any one premises
MEDICAL EXPENSE LIMIT	\$ 25,000	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ 2,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ 5,000,000	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ 10,000,000	

GL 319 041 0610
Masco Corporation

MWZY 55525-10

Effective 6-30-10/11

Gale Contractor 0001937

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

BROAD FORM NAMED INSURED
(Masco Form B)

Masco Corporation including any subsidiary corporation thereof, of any tier, as now or hereafter constituted and any other legal entity in which you have more than fifty percent ownership or over which you exercise management or financial control.

GL 319 008 0609
Masco Corporation

MWZY 55525-10

Effective 6-30-10/11

Gale Contractor 0001938



COMMERCIAL GENERAL LIABILITY DECLARATIONS

POLICY NUMBER

POLICYHOLDER SERVICE OFFICE:

PRODUCER #319

MWZY 55525-11

Old Republic Risk Management, Inc.
445 South Moorland Road, Suite 300
Brookfield, WI 53005
(877) 797-3400

Aon Risk Services Central, Inc.
Chicago, IL

MWZY 55525-10

RENEWAL OF NUMBER

NAMED INSURED AND MAILING ADDRESS:

Masco Corporation (See Broad Form Named Insured Endorsement, GL 319 008 0609)
21001 Van Born Road
Taylor, MI 48180

POLICY PERIOD: FROM 6-30-11 TO 6-30-12 AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE							
EACH OCCURRENCE LIMIT		\$ * See Limits of Insurance (Masco Form QQ) Form GL 319 041 0610					
DAMAGE TO PREMISES RENTED TO YOU LIMIT		\$ * Any one premises					
MEDICAL EXPENSE LIMIT		\$ * Any one person					
PERSONAL AND ADVERTISING INJURY LIMIT		\$ * Any one person or organization					
GENERAL AGGREGATE LIMIT		\$ *					
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT		\$ *					
RETROACTIVE DATE (CG 00 02 ONLY)							
THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.							
RETROACTIVE DATE: None (ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)							
DESCRIPTION OF BUSINESS							
FORM OF BUSINESS:							
☐ INDIVIDUAL ☐ JOINT VENTURE ☐ LIMITED LIABILITY COMPANY							
☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY) ☐ PARTNERSHIP ☐ TRUST							
BUSINESS DESCRIPTION: Products & Services for the Home & Family. Services include but not limited to construction contracting operations							
ALL PREMISES YOU OWN, RENT OR OCCUPY							
LOCATION NUMBER		ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY					
		On File With Company					
CLASSIFICATION AND PREMIUM							
LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/ Ops	Prod/Comp Ops	Prem/ Ops	Prod/Comp Ops
On File With Company			\$	\$	\$	55525-11	\$ Included
				STATE TAX OR OTHER (IF APPLICABLE)		\$	
				TOTAL PAYABLE (SUBJECT TO AUDIT)		\$	
TOTAL SHOWN IS PAYABLE: \$ 55525-11 AT INCEPTION \$ AT EACH ANNIVERSARY (IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)							
AUDIT PERIOD (IF APPLICABLE) ☐ ANNUALLY ☐ SEMI-ANNUALLY ☐ QUARTERLY ☐ MONTHLY							
ENDORSEMENTS							
ENDORSEMENTS ATTACHED TO THIS POLICY: See Forms Index							

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned (Date): 8-23-11 By (Authorized Representative): Gary Nies

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITS OF INSURANCE
(Masco Form QQ)

It is hereby agreed and understood that the Limits of Insurance for the Commercial General Liability Declarations is as follows:

<u>LIMITS OF INSURANCE</u>		
EACH OCCURRENCE LIMIT	\$ 2,000,000	
EACH OCCURRENCE LIMIT (as respects Product Liability/Completed Operations)	\$ 3,000,000	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ 2,000,000	Any one premises
MEDICAL EXPENSE LIMIT	\$ 25,000	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ 2,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ 5,000,000	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ 10,000,000	

GL 319 041 0610
Masco Corporation

MWZY 55525-11

Effective 6-30-11/12

Gale Contractor 0001940

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

BROAD FORM NAMED INSURED
(Masco Form B)

Masco Corporation including any subsidiary corporation thereof, of any tier, as now or hereafter constituted and any other legal entity in which you have more than fifty percent ownership or over which you exercise management or financial control.



COMMERCIAL GENERAL LIABILITY DECLARATIONS

ELECTRONICALLY FILED - 2023 Jul 10 2:34 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

POLICY NUMBER

POLICYHOLDER SERVICE OFFICE:

PRODUCER #319

MWZY 55525-12

Old Republic Risk Management, Inc.
445 South Moorland Road, Suite 300

Aon Risk Services Central, Inc.
Chicago, IL

MWZY 55525-11

Brookfield, WI 53005

RENEWAL OF NUMBER

(877) 797-3400

NAMED INSURED AND MAILING ADDRESS:

Masco Corporation (See Broad Form Named Insured Endorsement, GL 319 008 0609)
21001 Van Born Road
Taylor, MI 48180

POLICY PERIOD: FROM 06/30/12

TO 06/30/13

AT 12:01 A.M. STANDARD TIME AT YOUR MAILING
ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF
THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE

EACH OCCURRENCE LIMIT	\$ *	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ *	Any one premises
MEDICAL EXPENSE LIMIT	\$ *	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ *	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ *	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ *	

* See Limits of Insurance (Masco Form QQ) Form GL 319 041 0610

RETROACTIVE DATE (CG 00 02 ONLY)

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND
ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.

RETROACTIVE DATE: None

(ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)

DESCRIPTION OF BUSINESS

FORM OF BUSINESS:

- ☐ INDIVIDUAL ☐ JOINT VENTURE ☐ LIMITED LIABILITY COMPANY
☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY) ☐ PARTNERSHIP ☐ TRUST

BUSINESS DESCRIPTION: Products & Services for the Home & Family. Services include but not limited to construction contracting operations

ALL PREMISES YOU OWN, RENT OR OCCUPY

LOCATION NUMBER ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY

On File With Company

CLASSIFICATION AND PREMIUM

LOCATION NUMBER	CLASSIFICATION	CODE. NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/ Ops	Prod/Comp Ops	Prem/ Ops	Prod/Comp Ops
	On File With Company		\$	\$	\$	\$ 131,200	\$ Included

STATE TAX OR OTHER (IF APPLICABLE) \$

TOTAL PAYABLE (SUBJECT TO AUDIT) \$

TOTAL SHOWN IS PAYABLE: \$ AT INCEPTION \$ AT EACH ANNIVERSARY (IF POLICY
PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)

AUDIT PERIOD (IF APPLICABLE) ☐ ANNUALLY ☐ SEMI-ANNUALLY ☐ QUARTERLY ☐ MONTHLY

ENDORSEMENTS

ENDORSEMENTS ATTACHED TO THIS POLICY: See Forms Index

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY
ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned (Date): 05/24/12

By (Authorized Representative):

Gary Hies

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITS OF INSURANCE
(Masco Form QQ)

It is hereby agreed and understood that the Limits of Insurance for the Commercial General Liability Declarations is as follows:

<u>LIMITS OF INSURANCE</u>		
EACH OCCURRENCE LIMIT	\$ <u>2,000,000</u>	
EACH OCCURRENCE LIMIT (as respects Product Liability/Completed Operations)	\$ <u>4,000,000</u>	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ <u>2,000,000</u>	Any one premises
MEDICAL EXPENSE LIMIT	\$ <u>25,000</u>	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ <u>2,000,000</u>	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ <u>5,000,000</u>	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ <u>10,000,000</u>	

GL 319 041 0610

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

BROAD FORM NAMED INSURED
(Masco Form B)

Masco Corporation including any subsidiary corporation thereof, of any tier, as now or hereafter constituted and any other legal entity in which you have more than fifty percent ownership or over which you exercise management or financial control.

GL 319 008 0609

MWZY 55525 12

Masco Corporation

06/30/2012 - 06/30/2012

Case Contractor 0001944



COMMERCIAL GENERAL LIABILITY DECLARATIONS

POLICY NUMBER

MWZY 55525 13

MWZY 55525 12

RENEWAL OF NUMBER

POLICYHOLDER SERVICE OFFICE:

Old Republic Risk Management, Inc.
445 South Moorland Road, Suite 300
Brookfield, WI 53005
(877) 797-3400

PRODUCER #319

Aon Risk Services Central, Inc.
Chicago, IL

NAMED INSURED AND MAILING ADDRESS:

Masco Corporation (See Broad Form Named Insured Endorsement, GL 319 008 0609)
21001 Van Born Road
Taylor, MI 48180

POLICY PERIOD: FROM 06/30/13 TO 06/30/14 AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE

EACH OCCURRENCE LIMIT	\$ *	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ *	Any one premises
MEDICAL EXPENSE LIMIT	\$ *	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ *	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ *	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ *	

* See Limits of Insurance (Masco Form QQ) Form GL 319 041 0610

RETROACTIVE DATE (CG 00 02 ONLY)

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.

RETROACTIVE DATE: None

(ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)

DESCRIPTION OF BUSINESS

FORM OF BUSINESS:

☐ INDIVIDUAL ☐ JOINT VENTURE ☐ LIMITED LIABILITY COMPANY
☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY) ☐ PARTNERSHIP ☐ TRUST

BUSINESS DESCRIPTION: Products & Services for the Home & Family. Services include but not limited to construction contracting operations

ALL PREMISES YOU OWN, RENT OR OCCUPY

LOCATION NUMBER ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY

On File With Company

CLASSIFICATION AND PREMIUM

LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/ Ops	Prod/Comp Ops	Prem/ Ops	Prod/Comp Ops
	On File With Company		\$	\$	\$	\$	Included

STATE TAX OR OTHER (IF APPLICABLE) \$

TOTAL PAYABLE (SUBJECT TO AUDIT) \$

TOTAL SHOWN IS PAYABLE: \$ AT INCEPTION \$ AT EACH ANNIVERSARY (IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)

AUDIT PERIOD (IF APPLICABLE) ☐ ANNUALLY ☐ SEMI-ANNUALLY ☐ QUARTERLY ☐ MONTHLY

ENDORSEMENTS

ENDORSEMENTS ATTACHED TO THIS POLICY: See Forms Index

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned (Date): 07/02/13 By (Authorized Representative): Gary Nico

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITS OF INSURANCE
(Masco Form QQ)

It is hereby agreed and understood that the Limits of Insurance for the Commercial General Liability Declarations is as follows:

<u>LIMITS OF INSURANCE</u>		
EACH OCCURRENCE LIMIT	\$	<u>2,000,000</u>
EACH OCCURRENCE LIMIT (as respects Product Liability/Completed Operations)	\$	<u>4,000,000</u>
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$	<u>2,000,000</u> Any one premises
MEDICAL EXPENSE LIMIT	\$	<u>25,000</u> Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$	<u>2,000,000</u> Any one person or organization
GENERAL AGGREGATE LIMIT	\$	<u>5,000,000</u>
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$	<u>10,000,000</u>

GL 319 041 0610

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

BROAD FORM NAMED INSURED
(Masco Form B)

Masco Corporation including any subsidiary corporation thereof, of any tier, as now or hereafter constituted and any other legal entity in which you have more than fifty percent ownership or over which you exercise management or financial control.

GL 319 008 0609

MWZY 55525 13

Masco Corporation

06/30/2013 - 06/30/2014

Gale Contractor 0001947



COMMERCIAL GENERAL LIABILITY DECLARATIONS

ELECTRONICALLY FILED - 2023 Jul 10 2:34 PM - ANDERSON - COMMON PLEAS - CASE#2019CF0401942

POLICY NUMBER
MWZY 55525 14
MWZY 55525 13
RENEWAL OF NUMBER

POLICYHOLDER SERVICE OFFICE:
Old Republic Risk Management, Inc.
445 South Moorland Road, Suite 300
Brookfield, WI 53005
(877) 797-3400

PRODUCER #319
Aon Risk Services Central, Inc.
Chicago, IL

NAMED INSURED AND MAILING ADDRESS:

Masco Corporation (See Broad Form Named Insured Endorsement, GL 319 008 0609)
21001 Van Born Road
Taylor, MI 48180

POLICY PERIOD: FROM 06/30/14 **TO** 06/30/15 **AT** 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE

EACH OCCURRENCE LIMIT	\$ *	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ *	Any one premises
MEDICAL EXPENSE LIMIT	\$ *	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ *	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ *	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ *	

* See Limits of Insurance (Masco Form QQ) Form GL 319 041 0610

RETROACTIVE DATE (CG 00 02 ONLY)

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.

RETROACTIVE DATE: None

(ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)

DESCRIPTION OF BUSINESS

FORM OF BUSINESS:

☐ INDIVIDUAL ☐ JOINT VENTURE ☐ LIMITED LIABILITY COMPANY
☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY) ☐ PARTNERSHIP ☐ TRUST

BUSINESS DESCRIPTION: Products & Services for the Home & Family. Services include but not limited to construction contracting operations

ALL PREMISES YOU OWN, RENT OR OCCUPY

LOCATION NUMBER ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY

On File With Company

CLASSIFICATION AND PREMIUM

LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/ Ops	Prod/Comp Ops	Prem/ Ops	Prod/Comp Ops
	On File With Company		\$	\$	\$	\$	Included

STATE TAX OR OTHER (IF APPLICABLE) \$

TOTAL PAYABLE (SUBJECT TO AUDIT) \$

TOTAL SHOWN IS PAYABLE: \$ AT INCEPTION \$ AT EACH ANNIVERSARY (IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)

AUDIT PERIOD (IF APPLICABLE) ☐ ANNUALLY ☐ SEMI-ANNUALLY ☐ QUARTERLY ☐ MONTHLY

ENDORSEMENTS

ENDORSEMENTS ATTACHED TO THIS POLICY: See Forms Index

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned (Date): 07/28/13 By (Authorized Representative):

Gary Nies

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITS OF INSURANCE
(Masco Form QQ)

It is hereby agreed and understood that the Limits of Insurance for the Commercial General Liability Declarations is as follows:

<u>LIMITS OF INSURANCE</u>		
EACH OCCURRENCE LIMIT	\$	<u>2,000,000</u>
EACH OCCURRENCE LIMIT (as respects Product Liability/Completed Operations)	\$	<u>4,000,000</u>
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$	<u>2,000,000</u> Any one premises
MEDICAL EXPENSE LIMIT	\$	<u>25,000</u> Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$	<u>2,000,000</u> Any one person or organization
GENERAL AGGREGATE LIMIT	\$	<u>5,000,000</u>
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$	<u>10,000,000</u>

GL 319 041 0610

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

BROAD FORM NAMED INSURED
(Masco Form B)

Masco Corporation including any subsidiary corporation thereof, of any tier, as now or hereafter constituted and any other legal entity in which you have more than fifty percent ownership or over which you exercise management or financial control.

GL 319 008 0609

MWZY 55525 14

Masco Corporation

06/30/2014 - 06/30/2015

Gale Contractor 0001950



COMMERCIAL GENERAL LIABILITY DECLARATIONS

POLICY NUMBER

MWZY 304834

NEW

RENEWAL OF NUMBER

NAMED INSURED AND MAILING ADDRESS:

TopBuild Corp (See Broad Form Named Insured Endorsement, GL 672 008 0615)
260 Jimmy Ann Dr
Dayton Beach, FL 32114

POLICYHOLDER SERVICE OFFICE:

Old Republic Risk Management, Inc.
445 South Moorland Road, Suite 300
Brookfield, WI 53005
(877) 797-3400

PRODUCER #672

Aon Risk Services Central, Inc
Chicago IL

POLICY PERIOD: FROM 06/30/15

TO 06/30/16

AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE							
EACH OCCURRENCE LIMIT		\$ *					
DAMAGE TO PREMISES RENTED TO YOU LIMIT		\$ *		Any one premises			
MEDICAL EXPENSE LIMIT		\$ *		Any one person			
PERSONAL AND ADVERTISING INJURY LIMIT		\$ *		Any one person or organization			
GENERAL AGGREGATE LIMIT		\$ *					
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT		\$ *					
*See Limits of Insurance (TopBuild Form QQ) Form #GL 672 041 0615							
RETROACTIVE DATE (CG 00 02 ONLY)							
THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.							
RETROACTIVE DATE:		None					
(ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)							
DESCRIPTION OF BUSINESS							
FORM OF BUSINESS:							
☐ INDIVIDUAL ☐ JOINT VENTURE ☐ LIMITED LIABILITY COMPANY							
☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY) ☐ PARTNERSHIP ☐ TRUST							
BUSINESS DESCRIPTION: Insulation Installation Services							
ALL PREMISES YOU OWN, RENT OR OCCUPY							
LOCATION NUMBER		ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY					
		On File With Company					
CLASSIFICATION AND PREMIUM							
LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/Ops	Prod/Comp Ops	Prem/Ops	Prod/Comp Ops
	On File With Company		\$	\$	\$	\$	Included
				STATE TAX OR OTHER (IF APPLICABLE) \$			
				TOTAL PAYABLE (SUBJECT TO AUDIT) \$			
TOTAL SHOWN IS PAYABLE: \$				AT INCEPTION \$			
				AT EACH ANNIVERSARY (IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)			
AUDIT PERIOD (IF APPLICABLE) ☐ ANNUALLY ☐ SEMI-ANNUALLY ☐ QUARTERLY ☐ MONTHLY							
ENDORSEMENTS							
ENDORSEMENTS ATTACHED TO THIS POLICY:							

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned (Date): 07/13/15

By (Authorized Representative):

Gary H. Lee

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITS OF INSURANCE
(TopBuild Form QQ)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

It is hereby agreed and understood that the Limits of Insurance for the Commercial General Liability Declarations is as follows:

<u>LIMITS OF INSURANCE</u>		
EACH OCCURRENCE LIMIT	\$ 2,000,000	
EACH OCCURRENCE LIMIT (as respects Product Liability/Completed Operations)	\$ 2,000,000	
DAMAGES TO PREMISES RENTED TO YOU LIMIT	\$ 2,000,000	Any one premises
MEDICAL EXPENSE LIMIT	\$ 25,000	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ 2,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ 4,000,000	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ 4,000,000	

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BROAD FORM NAMED INSURED (TopBuild Form B)

TopBuild Corp including any subsidiary corporation thereof, of any tier, as now or hereafter constituted and any other legal entity in which you have more than fifty percent ownership or over which you exercise management or financial control.



OLD REPUBLIC INSURANCE COMPANY

COMMERCIAL GENERAL LIABILITY DECLARATIONS

POLICY NUMBER
POLICYHOLDER SERVICE OFFICE:
PRODUCER #672
MWZY 307518

Old Republic Risk Management, Inc.

Aon Risk Services Inc.

MWZY 304834

445 South Moorland Road, Suite 300

Southfield, MI 48075

RENEWAL OF NUMBER

Brookfield, WI 53005

(877) 797-3400

NAMED INSURED AND MAILING ADDRESS:

TopBuild Corp. (See Broad Form Named Insured Endorsement, GL 672 008 0615)

260 Jimmy Ann Dr

Dayton Beach, FL 32114

POLICY PERIOD: FROM 06/30/16

TO 06/30/17

AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.
LIMITS OF INSURANCE

EACH OCCURRENCE LIMIT	\$ *	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ *	Any one premises
MEDICAL EXPENSE LIMIT	\$ *	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ *	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ *	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ *	

*See Limits of Insurance (TopBuild Form QQ) Form #GL 672 041 0615

RETROACTIVE DATE (CG 00 02 ONLY)

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.

RETROACTIVE DATE: None

(ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)

DESCRIPTION OF BUSINESS

FORM OF BUSINESS:

☐ INDIVIDUAL ☐ JOINT VENTURE ☐ LIMITED LIABILITY COMPANY
☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY) ☐ PARTNERSHIP ☐ TRUST

BUSINESS DESCRIPTION: Insulation Installation Services

ALL PREMISES YOU OWN, RENT OR OCCUPY

LOCATION NUMBER ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY

On File With Company

CLASSIFICATION AND PREMIUM

LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/ Ops	Prod/Comp Ops	Prem/ Ops	Prod/Comp Ops
	On File With Company		\$	\$	\$	\$	\$ Included

STATE TAX OR OTHER (IF APPLICABLE) \$

TOTAL PAYABLE (SUBJECT TO AUDIT) \$

TOTAL SHOWN IS PAYABLE: \$ AT INCEPTION \$ AT EACH ANNIVERSARY (IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)

 AUDIT PERIOD (IF APPLICABLE) ☐ ANNUALLY ☐ SEMI-ANNUALLY ☐ QUARTERLY ☐ MONTHLY

ENDORSEMENTS

ENDORSEMENTS ATTACHED TO THIS POLICY: See Forms Index

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned (Date): 07/06/16

By (Authorized Representative):

CG DEC GN 0000 01 16

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MWZY 307518

TopBuild Corp.

06/30/2016 - 06/30/2017

Gale Contractor 0001954
1634

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IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITS OF INSURANCE
(TopBuild Form QQ)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

It is hereby agreed and understood that the Limits of Insurance for the Commercial General Liability Declarations is as follows:

LIMITS OF INSURANCE		
EACH OCCURRENCE LIMIT	\$ 2,000,000	
EACH OCCURRENCE LIMIT (as respects Product Liability/Completed Operations)	\$ 2,000,000	
DAMAGES TO PREMISES RENTED TO YOU LIMIT	\$ 2,000,000	Any one premises
MEDICAL EXPENSE LIMIT	\$ 25,000	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ 2,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ 4,000,000	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ 4,000,000	

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BROAD FORM NAMED INSURED (TopBuild Form B)

TopBuild Corp including any subsidiary corporation thereof, of any tier, as now or hereafter constituted and any other legal entity in which you have more than fifty percent ownership or over which you exercise management or financial control.

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OLD REPUBLIC INSURANCE COMPANY

COMMERCIAL GENERAL LIABILITY DECLARATIONS

POLICY NUMBER

POLICYHOLDER SERVICE OFFICE:

PRODUCER #672

MWZY 310455

Old Republic Risk Management, Inc.
445 South Moorland Road, Suite 300
Brookfield, WI 53005
(877) 797-3400

Aon Risk Services Inc.
Southfield, MI 48075

MWZY 307518

RENEWAL OF NUMBER

NAMED INSURED AND MAILING ADDRESS:

TopBuild Corp. (See Form GL 672 008 0615)
475 N Williamson Blvd
Daytona Beach, FL 32114

POLICY PERIOD: FROM 06/30/17

TO 06/30/18

AT 12:01 A.M. STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE			
EACH OCCURRENCE LIMIT	\$ *		
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ *		Any one premises
MEDICAL EXPENSE LIMIT	\$ *		Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ *		Any one person or organization
GENERAL AGGREGATE LIMIT	\$ *		
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ *		
*See Limits of Insurance (TopBuild Form QQ) Form #GL 672 041 0615			

RETROACTIVE DATE (CG 00 02 ONLY)

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.

RETROACTIVE DATE: None

(ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES)

DESCRIPTION OF BUSINESS

FORM OF BUSINESS:

☐ INDIVIDUAL ☐ JOINT VENTURE ☐ LIMITED LIABILITY COMPANY
☒ ORGANIZATION, INCLUDING A CORPORATION (BUT NOT INCLUDING A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY) ☐ PARTNERSHIP ☐ TRUST
 BUSINESS DESCRIPTION: Insulation Installation Services

ALL PREMISES YOU OWN, RENT OR OCCUPY

LOCATION NUMBER	ADDRESS OF ALL PREMISES YOU OWN, RENT OR OCCUPY
	On File With Company

CLASSIFICATION AND PREMIUM

LOCATION NUMBER	CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE		ADVANCE PREMIUM	
				Prem/Ops	Prod/Comp Ops	Prem/Ops	Prod/Comp Ops
	On File With Company		\$	\$	\$	\$	\$ Included

STATE TAX OR OTHER (IF APPLICABLE) \$

TOTAL PAYABLE (SUBJECT TO AUDIT) \$

TOTAL SHOWN IS PAYABLE: \$ AT INCEPTION \$ AT EACH ANNIVERSARY (IF POLICY PERIOD IS MORE THAN ONE YEAR AND PREMIUM IS PAID IN ANNUAL INSTALLMENTS)

AUDIT PERIOD (IF APPLICABLE)	☐ ANNUALLY	☐ SEMI-ANNUALLY	☐ QUARTERLY	☐ MONTHLY
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ENDORSEMENTS

ENDORSEMENTS ATTACHED TO THIS POLICY: See Forms Index

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS AND COVERAGE FORM(S) AND ANY ENDORSEMENT(S), COMPLETE THE ABOVE NUMBERED POLICY.

Countersigned (Date): 06/22/17 By (Authorized Representative):

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MWZY 310455

TopBuild Corp.

06/30/2017 - 06/30/2018

Gale Contractor 0001957

1637

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IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITS OF INSURANCE
(TopBuild Form QQ)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

It is hereby agreed and understood that the Limits of Insurance for the Commercial General Liability Declarations is as follows:

LIMITS OF INSURANCE		
EACH OCCURRENCE LIMIT	\$ 2,000,000	
EACH OCCURRENCE LIMIT (as respects Product Liability/Completed Operations)	\$ 2,000,000	
DAMAGES TO PREMISES RENTED TO YOU LIMIT	\$ 2,000,000	Any one premises
MEDICAL EXPENSE LIMIT	\$ 25,000	Any one person
PERSONAL AND ADVERTISING INJURY LIMIT	\$ 2,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ 4,000,000	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	\$ 4,000,000	

IL 10 (12/06) OLD REPUBLIC INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BROAD FORM NAMED INSURED (TopBuild Form B)

TopBuild Corp including any subsidiary corporation thereof, of any tier, as now or hereafter constituted and any other legal entity in which you have more than fifty percent ownership or over which you exercise management or financial control.

ELECTRONICALLY FILED - 2023 Jul 10 2:34 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

South Carolina General Assembly
124th Session, 2021-2022

A161, R210, H4048

STATUS INFORMATION

General Bill

Sponsors: Rep. G.M. Smith

Document Path: I:\council\bill\nbd\11204sd21.docx

Introduced in the House on March 9, 2021

Introduced in the Senate on April 7, 2022

Last Amended on May 10, 2022

Passed by the General Assembly on May 12, 2022

Governor's Action: May 13, 2022, Signed

Summary: Duty to defend and indemnify

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
3/9/2021	House	Introduced and read first time (House Journal-page 34)
3/9/2021	House	Referred to Committee on Ways and Means (House Journal-page 34)
3/31/2022	House	Committee report: Favorable with amendment Ways and Means (House Journal-page 31)
4/1/2022		Scrivener's error corrected
4/6/2022	House	Amended (House Journal-page 87)
4/6/2022	House	Read second time (House Journal-page 87)
4/6/2022	House	Roll call Yeas-107 Nays-2 (House Journal-page 89)
4/7/2022	House	Read third time and sent to Senate
4/7/2022	Senate	Introduced and read first time (Senate Journal-page 7)
4/7/2022	Senate	Referred to Committee on Judiciary (Senate Journal-page 7)
4/25/2022	Senate	Referred to Subcommittee: Talley (ch), Hutto, Matthews, Climer, Senn, Cash, Harpootlian
5/4/2022	Senate	Committee report: Favorable with amendment Judiciary (Senate Journal-page 13)
5/5/2022		Scrivener's error corrected
5/10/2022	Senate	Committee Amendment Adopted (Senate Journal-page 61)
5/10/2022	Senate	Read second time (Senate Journal-page 61)
5/10/2022	Senate	Roll call Ayes-44 Nays-0 (Senate Journal-page 61)
5/11/2022	Senate	Read third time and returned to House with amendments (Senate Journal-page 13)
5/12/2022	House	Concurred in Senate amendment and enrolled (House Journal-page 74)
5/12/2022	House	Roll call Yeas-102 Nays-0 (House Journal-page 75)
5/12/2022		Ratified R 210 (Senate Journal-page 222)
5/13/2022		Signed By Governor
5/31/2022		Effective date 05/13/22
5/31/2022		Act No. 161

View the latest [legislative information](#) at the website

VERSIONS OF THIS BILL

[3/9/2021](#)
[3/31/2022](#)
[4/1/2022](#)
[4/6/2022](#)
[5/4/2022](#)
[5/5/2022](#)
[5/10/2022](#)

(A161, R210, H4048)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 1-11-445 SO AS TO PROVIDE THAT THE STATE OF SOUTH CAROLINA MUST PROVIDE A LEGAL DEFENSE FOR AND INDEMNIFICATION TO A STATE AGENCY, DEPARTMENT, OR INSTRUMENTALITY AGAINST A CLAIM OR SUIT THAT ARISES OUT OF OR BY VIRTUE OF THE PERFORMANCE OF OFFICIAL DUTIES ON BEHALF OF A STATE AGENCY, DEPARTMENT, OR INSTRUMENTALITY, AND TO PROVIDE A SIMILAR DEFENSE AND INDEMNIFICATION TO BOARD MEMBERS AND EMPLOYEES, AND OFFICERS OF THE ENTITY; TO REPEAL SECTION 1-11-440 RELATING TO LEGAL DEFENSES AND INDEMNIFICATIONS PROVIDED TO MEMBERS OF THE FISCAL ACCOUNTABILITY AUTHORITY AND ITS DIRECTOR; AND TO REPEAL SECTION 12-4-325 RELATING TO LEGAL DEFENSES AND INDEMNIFICATION PROVIDED TO OFFICERS AND EMPLOYEES OF THE DEPARTMENT OF REVENUE.

Be it enacted by the General Assembly of the State of South Carolina:

Defense and indemnification of state agencies

SECTION 1. Article 1, Chapter 11, Title 1 of the 1976 Code is amended by adding:

“Section 1-11-445. (A) The State of South Carolina, by and through its agencies, departments, and instrumentalities, must defend the state agency, department, or instrumentality, and the members of a governing board of the state agency, department, or instrumentality, as applicable, against an uninsured claim or suit that arises out of or by virtue of the performance of official duties on behalf of the state agency, department, or instrumentality, and must indemnify them for an uninsured loss or judgment incurred by them as a result of the claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both. The State also must defend directors, officers, and employees of the entity, and legislative employees performing duties for the entity, against an uninsured claim or suit that arises out of or by virtue of the performance of official duties unless the director, officer, employee, or legislative employee was acting in bad faith including, but not limited to, acting outside the scope of his official duties, or that the

actions constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. The State shall indemnify these directors, officers, employees, and legislative employees for a loss or judgment incurred by them as a result of such uninsured claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both. This commitment to defend and indemnify extends to members of the entity, the entity's officers, the entity's director, the entity's employees, and legislative employees after they have left their employment with the entity or the General Assembly, as applicable, if the uninsured claim or suit arises out of or by virtue of their performance of official duties on behalf of their employer.

(B) The term 'instrumentality' as used in this section includes an entity where a specific duty or function is imposed on the entity by law and includes any function where the entity must exercise a portion of the state's sovereignty. Entities to which this provision applies include, but are not limited to, the State Fiscal Accountability Authority, the Judicial Merit Selection Commission, the Public Utilities Review Committee, the Retirement Systems Investment Panel, and all joint special legislative committees.

(C) The provisions of subsection (A) also apply to employees and officers while acting within the scope of their employment when administering any South Carolina statute which has not been held to be unconstitutional or unlawful by a final decision of a court of competent jurisdiction. For purposes of this section, a final decision is the decision of a court declaring the South Carolina statute unconstitutional or otherwise unlawful, and from which the appropriate officials of this State may not or do not take an appeal or request a rehearing.

(D) This section does not waive any defense, immunity, limitation, or jurisdictional bar including, but not limited to, the Tort Claims Act. This section does not affect the terms or conditions of any applicable policy of insurance."

Repeal

SECTION 2. Sections 1-11-440 and 12-4-325 are repealed on the effective date of this act.

Time effective

SECTION 3. This act takes effect upon approval by the Governor.

Ratified the 12th day of May, 2022.

Approved the 13th day of May, 2022.

SECTION 1-11-435. Protection of critical information technology infrastructure and data systems.

To protect the state's critical information technology infrastructure and associated data systems in the event of a major disaster, whether natural or otherwise, and to allow the services to the citizens of this State to continue in such an event, the Office of the State Chief Information Officer (CIO) should develop a Critical Information Technology Infrastructure Protection Plan devising policies and procedures to provide for the confidentiality, integrity, and availability of, and to allow for alternative and immediate on-line access to critical data and information systems including, but not limited to, health and human services, law enforcement, and related agency data necessary to provide critical information to citizens and ensure the protection of state employees as they carry out their disaster-related duties. All state agencies and political subdivisions of this State are directed to assist the Office of the State CIO in the collection of data required for this plan.

HISTORY: 2002 Act No. 339, Section 4.

SECTION 1-11-440. Repealed.

HISTORY: Former Section, titled Defense of members of Fiscal Accountability Authority and the Director of the Department of Administration, had the following history: 2003 Act No. 13, Section 1; 2014 Act No. 121 (S.22), Pt VII, Section 20.A, eff July 1, 2015. Repealed by 2022 Act No. 161, Section 2, eff May 13, 2022.

SECTION 1-11-445. Defense and indemnification of state agencies.

(A) The State of South Carolina, by and through its agencies, departments, and instrumentalities, must defend the state agency, department, or instrumentality, and the members of a governing board of the state agency, department, or instrumentality, as applicable, against an uninsured claim or suit that arises out of or by virtue of the performance of official duties on behalf of the state agency, department, or instrumentality, and must indemnify them for an uninsured loss or judgment incurred by them as a result of the claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both. The State also must defend directors, officers, and employees of the entity, and legislative employees performing duties for the entity, against an uninsured claim or suit that arises out of or by virtue of the performance of official duties unless the director, officer, employee, or legislative employee was

SECTION 12-4-320. Permissive powers and duties; rules, regulations, rulings, decisions; agreement or compromise as to taxpayer liabilities.

The department may:

(1) make rules and promulgate regulations, not inconsistent with law, to aid in the performance of its duties. The department may prescribe the extent, if any, to which these rules and regulations must be applied without retroactive effect;

(2) upon written application, determine the tax effects of transactions and the tax liability of taxpayers, upon facts furnished to it, and it may revoke or modify the rulings if the facts should develop differently later. The department, in its discretion, may publish these rulings. This publication may be in brief hypothetical form so as to give all pertinent facts and decisions without violating the provisions of Section 12-54-240;

(3) compromise any tax, interest, or penalty imposed by this title or other law assigned to it and may return to the owner, in whole or in part, any goods seized or confiscated;

(4) enter into a written agreement with a person with regard to a tax liability. If the agreement is approved by the director, it is final and conclusive and the case may not be reopened by administrative or judicial action or otherwise, except in cases of fraud, malfeasance, or misrepresentation;

(5) publish its findings and decisions in all controversies resolved by it. This publication may be in brief hypothetical form so as to give all pertinent facts, decisions, and reasons without violating the provisions of Section 12-54-240;

(6) for damage caused by war, terrorist act, or natural disaster or service with the United States armed forces or national guard in or near a hazard duty zone, extend the date for filing returns, payments of taxes, collection of taxes, and conducting audits, and waive interest and penalties;

(7) enter into an installment payment agreement with a taxpayer.

HISTORY: 1991 Act No. 50, Section 2; 1994 Act No. 516, Section 26; 1999 Act No. 114, Section 4; 2007 Act No. 110, Section 36, eff June 21, 2007; 2007 Act No. 116, Section 42, eff June 28, 2007, applicable for tax years beginning after 2007.

SECTION 12-4-325. Repealed.

HISTORY: Former Section, titled Defense and indemnification of Department of Revenue employees and officers, had the following history: 1998 Act No. 432, Section 1. Repealed by 2022 Act No. 161, Section 2, eff May 13, 2022.

SECTION 12-4-330. Witnesses before department.

(A) The director may summon witnesses to appear and give testimony and to produce records, books, papers, and documents relating to any matters which the department has authority to investigate or determine.

(B) The director may cause the deposition of witnesses residing within or without the State or absent from the State to be taken upon notice to the interested party, if any, in the manner that depositions of witnesses are taken in civil actions pending in the circuit court in any matter which the department has authority to investigate or determine.

(C) Oaths to witnesses may be administered by the department. A person who testifies falsely in a matter under consideration by the department is guilty of and, upon conviction, will be punished for perjury.

(D) An officer who serves summons or subpoenas and a witness appearing before the Department of Revenue receive the same compensation as an officer and a witness in the circuit court. The department may incur and pay the expense of obtaining expert witnesses or of other evidence for use by the department in a judicial or administrative proceeding. This compensation and expert witness expense must be paid upon certificate of the department by the State Treasurer, by drawing upon funds from the tax on income as provided by Section 12-6-510.

(E) Out-of-state appraisers serving as witnesses are not required to be licensed or certified in this State. For purposes of this section, out-of-state appraisers are defined as appraisers with a business address outside of this State.

(F) The director of the Department of Revenue and the officers designated by the director may administer oaths to any person or take acknowledgments of any person in respect of any return or report required by this title or the rules and regulations of the department.

HISTORY: 1991 Act No. 50, Section 2; 1994 Act No. 516, Section 27; 1995 Act No. 76, Section 9; 1998 Act No. 432, Section 2.

South Carolina Code of Laws Unannotated

Title 32 - Contracts and Agents

CHAPTER 2

Contracts Against Public Policy

SECTION 32-2-10. Hold harmless clauses in certain construction contracts.

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

HISTORY: 1980 Act No. 466.

South Carolina Legislative Services Agency * 223 Blatt Building * 1105 Pendleton Street *
Columbia, SC 29201

South Carolina General Assembly
124th Session, 2021-2022

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~~Indicates Matter Stricken~~

Indicates New Matter

S. 422

STATUS INFORMATION

General Bill

Sponsors: Senator Alexander

Document Path: l:\s-res\tca\013fair.kmm.tca.docx

Introduced in the Senate on January 12, 2021

Currently residing in the Senate Committee on **Judiciary**

Summary: Construction contracts

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number

--		
1/12/2021	Senate	Introduced and read first time (Senate Journal-page 307)
1/12/2021	Senate	Referred to Committee on Judiciary (Senate Journal-page 307)

View the latest [legislative information](#) at the website

VERSIONS OF THIS BILL

[1/12/2021](#)

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

A BILL

TO AMEND SECTION [32-2-10](#) OF THE 1976 CODE, RELATING TO HOLD HARMLESS CLAUSES IN CONSTRUCTION CONTRACTS, TO PROVIDE THAT CERTAIN INDEMNIFICATION PROVISIONS IN CONSTRUCTION AGREEMENTS AND DESIGN PROFESSIONAL AGREEMENTS ARE AGAINST PUBLIC POLICY AND UNENFORCEABLE IN SOUTH CAROLINA, AND TO DEFINE NECESSARY TERMS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section [32-2-10](#) of the 1976 Code is amended to read:

"Section [32-2-10](#). (A) For the purposes of this section:

(1) 'Construction agreement' means a promise, agreement, or contract concerning the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, or appliance, including moving, demolition, and excavation. A construction agreement may be a public or private agreement.

(2) 'Defend' means to pay for or furnish counsel at a promisor's expense to shield a promisee or promisee's derivative parties from claims brought against the promisee or the promisee's derivative parties by a third party in a court or tribunal, including forms of alternative dispute resolution required by law or contract, before a final determination of fault is reached.

(3) 'Derivative parties' means a party's subcontractors, agents, employees, or other persons or entities for which the party may be liable or responsible as a result of any statutory duty, tort, or contractual duty.

(4) 'Design professional' means a person licensed or registered pursuant to the provisions of Title 40 as an architect, a landscape architect, an engineer, or a surveyor.

(5) 'Design professional agreement' means any promise, agreement, or contract with a design professional or firm for design professional services.

(6) 'Design professional services' means work or a service performed by a design professional licensed or registered pursuant to the provisions of Title 40.

(7) 'Fault' means:

(a) a breach of contract;

(b) a negligent, reckless, or intentional act or omission constituting a tort under applicable statutes or common law; or

(c) a violation of applicable statutes or regulations.

(8) 'Firm' means a business entity functioning as a sole proprietorship, partnership, limited liability partnership, professional association, professional corporation, limited liability company, joint venture, or other legally constituted organization that offers or provides design services. For the purposes of this section, this term includes, but is not limited to, a firm through which the practice of providing design services requires a certificate of authorization.

(9) 'Subcontractor' means a person or entity providing labor or material through a promisor for use on a project at issue in a construction agreement or design professional agreement.

(B) Notwithstanding any other provision of law, a promise or agreement provisions in, or in connection with, the a construction agreement or design professional agreement, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees or the promisee's derivative parties against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees or the promisee's derivative parties is against public policy and unenforceable. Nothing contained in this section subsection shall affect prohibit a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees derivative parties against liability for damages resulting from the sole negligence, in whole or in part, of the promisor, its agents, or its employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

(C) Provisions in, or in connection with, a construction agreement or design professional agreement purporting to require a promisor to indemnify or hold harmless a promisee, the promisee's derivative parties, or any other person against losses, damages, or expenses are against public policy and unenforceable unless the fault of the promisor or its derivative parties is a proximate cause of the loss, damage, or expense indemnified.

(D) Provisions in, or in connection with, a construction agreement that include design professional services or a design professional agreement purporting to require a design professional to defend a promisee, the promisee's derivative parties, or any other person or entity against liability, claims for damages, or expenses, including attorney fees, proximately caused or allegedly caused by the professional negligence of the promisor, the promisee, or their derivative parties, are against public policy and unenforceable, whether the claim is alleged or brought in tort or contract.

(E) Nothing in this section shall be interpreted to exclude from any indemnity or hold harmless provision that is enforceable under subsections (B) or (C) of this section attorney fees, litigation or arbitration expenses, or court costs actually incurred by the promisee when guarding against third-party claims alleged in a court, tribunal, or alternative dispute resolution procedure required of the promisee by law or by contract, if the fault of the promisor or its derivative parties is a proximate cause of the attorney fees, litigation or arbitration expenses, or court costs to be indemnified.

(F) This section shall not apply to:

- (1) an insurance agreement or a workers' compensation agreement;
- (2) an electric utility, an electric cooperative, common carriers by rail and their corporate affiliates, or the South Carolina Public Service Authority; or
- (3) claims relating to liens or bonds."

SECTION 2. This act takes effect upon approval by the Governor.

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This web page was last updated on January 22, 2021 at 11:16 AM

Chapter 22B.
Contracts Against Public Policy.

Article 1.

Invalid Agreements.

§ 22B-1. Certain indemnity and defend agreements invalid.

(a) Provisions in, or in connection with, a construction agreement or design professional agreement purporting to require a promisor to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy, void and unenforceable. Nothing contained in this subsection shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees.

(b) Provisions in, or in connection with, a construction agreement or design professional agreement purporting to require a promisor to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, indemnitees, or any other person or entity against losses, damages, or expenses are against public policy, void, and unenforceable unless the the fault of the promisor or its derivative parties is a proximate cause of the loss, damage, or expense indemnified.

(c) Provisions in, or in connection with, a construction agreement that includes design professional services or a design professional agreement purporting to require a design professional to defend a promisee, the promisee's independent contractors, agents, or employees, the promisee's indemnitees, or any other person or entity against liability or claims for damages or expenses, including attorney's fees, proximately caused or allegedly caused by the professional negligence, in whole or in part, of the promisor, the promisee, or their derivative parties, whether the claim is alleged or brought in tort or contract, is against public policy, void, and unenforceable.

(d) Nothing in this section shall be interpreted to exclude from any indemnity or hold harmless provisions enforceable under subsections (a) and (b) of this section attorneys' fees, litigation or arbitration expenses, or court costs actually incurred by the promisee to defend against third party claims alleged in any court, tribunal, or alternative dispute resolution procedure required of the promisee by law or by contract, if the fault of the promisor or its derivative parties is a proximate cause of the attorney's fees litigation or arbitration expenses, or court costs to be indemnified.

(e) This section shall not affect an insurance contract, workers' compensation, or any other agreement issued by an insurer. This section shall not apply to lien or bond claims asserted under Chapter 44A of the General Statutes.

(f) For purposes of this section, the following definitions shall apply:

- (1) Construction agreement. – Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, or appliance, including moving, demolition, and excavating connected therewith.
- (2) Defend. – Any obligation to pay for or furnish counsel at the expense of the promisor to defend a promisee, the promisee's independent contractors, agents, employees, or indemnitees against claims alleged or brought against the

promisee, the promisee's independent contractors, agents, employees, or indemnitees by a third party alleged or brought in any court or other tribunal, including forms of alternative dispute resolution required by law or contract, before the court or tribunal has reached a final determination of fault.

- (3) Derivative parties. – With respect to a party, any of that party's subcontractors, agents, employees, or other persons or entities for which the party may be liable or responsible as a result of any statutory, tort, or contractual duty.
- (4) Design professional. – A person or entity who is licensed under and provides professional services regulated by Chapters 83A, 89A, 89C, 89E, or 89F of the General Statutes.
- (5) Design professional agreement. – Any promise or agreement in, or in connection with, a contract or agreement with a design professional to provide design professional services.
- (6) Design professional services. – A service or work performed by a design professional for which licensure is required under Chapters 83A, 89A, 89C, 89E, or 89F of the General Statutes.
- (7) Fault. – A breach of contract; negligent, reckless, or intentional act or omission constituting a tort under applicable statutes or common law; or violations of applicable statutes or regulations.
- (8) Subcontractor. – Any person or entity, of any tier, providing labor or material through the promisor for use on the project at issue in the applicable construction agreement or design professional agreement. (1979, c. 597, s. 1; 1991, c. 636, s. 3; 1993, c. 553, s. 12; 2019-92, s. 1.)

N.C. Section 22-B-1(c)

Records Deleted Per Order of the Court

Pages 1655-1754

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

COUNTY OF ANDERSON)

2019-CP-04-1942

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

Plaintiff)

vs)

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

Defendant)

**JLS MASONRY, INC.'S MOTION FOR
SUMMARY JUDGMENT**

D.R. HORTON, INC.)

Third-Party Plaintiff)

vs)

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

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

SUPPLY, LLC; TOPBUILD HOME)
 SERVICES, INC., A/K/A GALE)
 CONTRACTORS SERVICE; TUCKER)
 MATERIALS, INC., A/K/A GYPSUM;)
 UTM ENTERPRISES, INC; AND)
 WILLOW TREE LANDSCAPING, INC;
Third-Party Defendants.

COMES NOW Third Party Defendant JLS Masonry, Inc. (“JLS”), by and through the undersigned counsel, and pursuant to Rule 56, SCRCP, moves the Court for an order granting final summary judgment in favor of JLS on all of D.R. Horton’s claims against it. There are no genuine issues of material fact in dispute and JLS is entitled to judgment as a matter of law. This motion is based on the pleadings, discovery, affidavits, forthcoming memorandum of law, and oral argument at the hearing on this matter.

This the 1st of May, 2023

/s/ Blinn L. Cushman

Elizabeth A. Martineau (S.C. Bar # 78732)

Lee M. Thomas (S.C. Bar # 103034)

Blinn L. Cushman (S.C. Bar #104486)

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Attorneys for Defendant JLS Masonry, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

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

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

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

D.R. Horton, Inc.,

Third Party Plaintiff,

v.

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

Third Party Defendants.

JLS Masonry, Inc..

Fourth Party Plaintiff,

v.

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

Fourth Party Defendants.

**JLS MASONRY INC.'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

MJ Cowboys, LLC, Fourth Party Plaintiff, v. Jesus Jimenez; and Jesus Robles Montes a/k/a Robles Construction, Fourth Party Defendants.
M&L Reyna Construction, LLC, Fourth Party Plaintiff, v. Jesus Jimenez; and Jesus Robles Montes a/k/a Robles Construction, Fourth Party Defendants.

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

I. INTRODUCTION

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

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

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

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

II. RELEVANT FACTS

JLS is a masonry contractor. Established by Jose Luis Sanchez in the 1990s, JLS performs masonry work for general contractors all over North Carolina, and the Charlotte-region areas of South Carolina. It is a fairly small company whose fieldwork is directly managed by Mr. Sanchez, and a general manager.

On or about February 11, 2010, DRH presented a pre-drafted, non-negotiable, form, adhesion contract to JLS's then-general manager Christopher De La Torre, who signed it. The contract (also referred to as the Agreement, above) contains two contractual provisions that would seek to impose upon JLS an obligation to indemnify DRH for, not only the sole negligence of JLS, but DRH's concurrent negligence as well. These two contractual provisions are found in Sections 6.4 and 10.1 of the Agreement/Exhibit A. For convenience, these two sections have been copied and pasted in their original form, below.

Section 6.4:

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

Section 10.1:

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

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

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

1. Brick Installation Labor;
2. Manufactured Stone Veneer (hereinafter "MSV") Installation Labor and Supply of

Materials;¹

3. Concrete Monolithic Slab Foundation Installation; and

4. Concrete Flatwork Installation.²

JLS performed its work from 2011 to 2014 and performed one or more of the above tasks on roughly 102 houses. DRH was responsible for performing all of the architectural design and engineering work, for providing all of the architectural and engineering drawings necessary for each house, for selecting and providing all materials needed for the installation of the brick veneer, for the management of the subcontractors as it relates to timing and sequencing, and for any direction and/or instruction it gave to JLS.

III. LEGAL STANDARD

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

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

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

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

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

IV. ARGUMENT

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

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

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

- “If subcontractors’ work was defective, subcontractors breached their contractual and common law duties to D.R. Horton and caused it damages at the time it preformed [sic] its work.” *Id.* ¶ 87 (general allegations).
- “D.R. Horton is informed and believes that if, in fact, Plaintiff, individually, and on behalf of all others similarly situated, is correct regarding the allegations of the Complaint, that the defects, if any, are the result of the wrongful acts, breach of warranties, omissions, negligence, gross negligence, and/or representations of Subcontractors, all of which are contrary to the statutory and common laws of the State of South Carolina.” *Id.* ¶ 101 (contractual indemnity claim).
- “D.R. Horton is informed and believes that if, in fact, Plaintiff is correct about her allegations, that the allegations are the result of the wrongful acts, omissions, breach of contract, breach of warranty, negligence, gross negligence, and/or representations of Subcontractors, all of which are contrary to the statutory and common laws of the State of South Carolina.” *Id.* ¶ 110 (equitable indemnity claim).
- “To the extent that Plaintiff proves that the work was not performed correctly, Subcontractors materially breached the Agreements in failing to construct the Homes in Rose Hill in accordance with contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.” *Id.* ¶ 115 (breach of contract claim).
- “If the materials, installation, and/or workmanship were not in accordance with contract requirements, industry standards, and/or building code requirements, then Subcontractors have materially breached their express warranties.” *Id.* ¶ 119 (breach of express warranties claim)
- “If the materials, installation, and/or workmanship were not in accordance with contract requirements, construction plans, industry standards, and/or building code requirements, then Subcontractors . . . have materially breached their [implied] warranties.” *Id.* ¶ 123 (breach of implied warranties claim).
- “If due care was not used in ensuring proper levels of workmanship were achieved, then Subcontractors breached that duty of care by failing to ensure that proper levels of workmanship were achieved pursuant to the requirements under the Agreements.” *Id.* ¶ 127

(negligence/gross negligence/recklessness claim).

In its prayer for relief, DRH alleges:

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

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

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

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

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

Id. pp. 26-27.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Agreement, Section 10.1. Section 10.1 then continues, in general terms, to describe that the instances invoking indemnification will be instances of JLS’s negligence, and other elements of the work over which JLS possessed and/or exercised control. In this case, the Work Performed is

defined in Section 1 of the Agreement and entitled “Scope of Work,” as being that described within Exhibit A to the Agreement. Exhibit A establishes the tasks constituting work performed.

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

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

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

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

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

V. CONCLUSION

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

Respectfully submitted,

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D-R HORTON Full
Anderson Building

SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR JCS MASONRY, INC ("Contractor")
 Sole Proprietorship ☐ Partnership ☒ Corporation ☐ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No. 56-2131549
 Name of Owner(s)/Officer(s): JOSE LUIS SANCHEZ
 Division Name _____ Area Name _____ Assigned Vendor No. 1195192
 Address for All Notices PO Box 78410
 City CHARLOTTE State NC Zip Code 28221
 Telephone 844 624-7471 Fax 844 242-7469 E-Mail Address jcsmasonryinc@hotmail.com
 Insurance Carriers ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 11 day of FEB, 2010, between D R HORTON INC.
JCS MASONRY, INC ("Owner") and Contractor

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

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

3. CONTRACT PRICE.

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

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

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

4. PAYMENT.

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

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

Executed this 11 day of FEBRUARY, 2010

Owner: D-R HORTON, INC Contractor: CLD/T
 By: EDMOND G. JEANPREAU, JR. By: CHRISTOPHER DE LA TORRE
 Title: PURCHASE Title: GENERAL MANAGER
 Division President

INITIALS OWNER [Signature] CONTRACTOR 726

8F=1392311 MF=1392312 macon=1392313

Greenville=1392314



KDC 00014040

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

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

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

5. SCHEDULE OF WORK

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

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

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

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

6. PERFORMANCE STANDARDS

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

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

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

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

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

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

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

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

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

INITIALS: OWNER JA, CONTRACTOR KS

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

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

7. SAFETY

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

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

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

8. CONTRACTOR'S WARRANTIES

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

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

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

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

9. LIENS AND RETAINAGE

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

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

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

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

10. CONTRACTOR'S INDEMNITY.

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

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

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

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

11. INSURANCE.

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

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

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

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

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

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

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

12. REMEDIES.

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

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

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

13. ALTERNATIVE DISPUTE RESOLUTION.

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

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

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

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

INITIALS: OWNER  CONTRACTOR 

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

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

14. TERMINATION.

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

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

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

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

16. GENERAL CONTRACT PROVISIONS.

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

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

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

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

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

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

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

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

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

SOUTH CAROLINA REVISED 7/3/2007

INITIALS OWNER

[Signature]

CONTRACTOR

[Signature]

PERFORMANCE REQUIREMENTS AND SPECIFICATIONS
Exhibit "A"

DESCRIPTION: MASONRY

PERFORMANCE REQUIREMENTS

All masonry shall be installed in a uniform manner. All walls will be plumb and level. Mortar joints shall not be larger than 1/2". Mortar cracks are not to exceed 1/8". Weep holes are to be properly installed per Masonry Institute specifications. All necessary flashing will be properly installed to prevent leaks. An unobstructed gap of 1" shall separate the masonry from the framed wall. All areas of workmanship will remain defect free and maintain their structural integrity for a minimum of ten (10) years.

Hard hats and appropriate safety equipment are to be worn at all times while on D.R. Horton's property. The contractor shall ensure that each crew leader has attended the appropriate OSHA approved "Competent Person" training course.

NON-PERFORMANCE REMEDY

The subcontractor will repair and/or replace any defects resulting from work not meeting the performance requirements. All repairs include labor and material. D.R. Horton, Inc. will make the final determination on any remedial action.

SPECIFICATIONS AND SCOPE OF WORK

1. The Subcontractor shall furnish all necessary labor, tools, equipment, scaffolding, and incidentals to install masonry per plans and specifications.
2. Leave one (1) inch air space between brick and sheathing.
3. Laid in running bond, anchored with ties minimum 22 gauge, 7/8" wide, corrugated, corrosion resistant, imbedded at least two (2) inches in mortar and nailed with #8 nails.
4. Install ties two (2) feet O.C. horizontally and every fifth course vertically.
5. Mortar joints tooled and brushed, not to exceed 1/2". Type of joint to be concave or rodged (or from written specification change by Builder).
6. Mortar mix to be uniform in color and selected by D.R. Horton, Inc. (Buff is standard).
7. Brick sills below windows and doors on brick elevations per drawings with pitch of 1/4" for run off.
8. Brick mason is responsible to replace any faulty brickwork, and will properly blend random mixtures to achieve uniformity per manufacturer's specs.
9. Mortar mixture shall adhere to Portland Cement Association specifications per applicable job.
10. All brick walls are to be plumb and level and mortar joints over 1/2" will not be accepted.
11. Provide protection so that mortar does not get any other building products. Damage to any other products caused by mortar spillage will be the responsibility of the mason contractor.
12. No brick wall will be laid when the temperature is thirty-two (32) degrees Fahrenheit or lower.
13. Brick mason will install all lintels and flashing per CABO specifications. See Builder for specifications (Bolted with carriage bolts)
14. Mason to hard rake excess mortar @ base of brick.
15. Subcontractor is to place all debris caused by his operation in designated areas.

Contractor agrees to comply with all applicable building codes, ordinances and OSHA regulations

ACKNOWLEDGMENT

These specifications are a part of the subcontract identified above. D.R. Horton, Inc. reserves the right to modify or amend any of the above general specifications at any time, and will notify the subcontractor as soon as any change is initiated.

Contractor:

JLS MASONRY, INC.
By: EDMOND G. JEANFREAU JR
Date: 02/23/10

Builder:

D.R. Horton, Inc.
By: EDMOND G. JEANFREAU JR
Date: 02/23/10

PERFORMANCE REQUIREMENTS AND SPECIFICATIONS

Exhibit "A"

DESCRIPTION FRAMING LABOR

PERFORMANCE REQUIREMENTS

The framing structure and components shall be assembled according to plans, specifications, and details provided with the plans and are plumb, level, and square. Bearing connections shall be tight and bearing members (posts) continuous from the top of its bearing point to the bottom of the foundation. Frame assembly must meet the applicable codes for the area and use approved fasteners and connectors. Equipment used to transport framing members shall not adversely affect the design characteristics of the framing members. Floors shall not squeak nor have noticeable crowns, ridges, or dips. Exterior trim member shall be tight, free of gaps, uniform in appearance, and be properly flashed or sealed. Structural elements are warranted for ten (10) years. Non-structural elements are warranted for one (1) year. All subcontractors must wear hard hats on the job site at all times.

Hard hats and appropriate safety equipment are to be worn at all times while on D.R. Horton property. Each crew leader must have scaffolding, fall protection and PPE "Competent Person" training.

NON-PERFORMANCE REMEDY

The Contractor shall repair any defective workmanship, shrinkage gaps greater than 3/8", or areas not plumb or square (1/4" in 32") prior to the home being occupied. Stress caused by normal settlement or movement in the structure is not the responsibility of the Contractor. Exterior trim that is loose, shows gaps, or deteriorates because of inappropriate sealing or flashing, shall be repaired or replaced during the one year(1) of occupancy. Final determination for remedial action shall be made by D.R. Horton, Inc.

SPECIFICATIONS AND SCOPE OF WORK

1. All walls, openings, and floors to be framed level, square, and plumb.
2. Contractor is to check all foundations prior to framing for correct measurements, square, and level [all basement studs will be cut if necessary to level the first floor]. This includes slab and poured walls.
3. All exterior plates on slab or poured walls to be caulked, glued, or sill sealer used.
4. Furr-downs, fire blocking, barge rafters, and punch-out to be done before beginning another unit.
5. Stairs to be set as per D.R. Horton specifications, nailing every stud with 2" shims with even margins nailed at underside of stairs through carriage. Provide OSHA approved fall protection devices at all appropriate areas.
6. All windows installed square and level with even margins, to be shimmed and caulked as required by manufacturer's specifications.
7. All fire stops, water heater platforms and blocking for sheetrock, closet shelves, ext. soffit blocking for flood lights, and cabinets are contractor's responsibility and must be completed before starting another unit.
8. All overhangs for soffits to be of uniform distance.
9. All jobsites are to be broom swept daily to remove all construction debris caused by his operation with usable material stacked in garage and trash placed in the designated areas.
10. All insulated sheathing to be nailed properly with 1 1/4" button cap nails. All blown off or weather damaged sheathing will be the responsibility of the contractor to replace.
11. Framing punch out must be completed within 24 hours.
12. All load bearing walls to be 16" o.c. and non-load bearing 24" o.c. (See Builder)
13. All door jacks to be cut out of lineal (not studs) - 14' stock.
14. All joist hangers installed same time as floor system.
15. Contractor is responsible for damage or misused material.
16. Stairs damaged by weather are the responsibility of the contractor.
17. H-spacer ply clips will be used on all roofs decking (when trusses are 24" center to center).
18. All sub-flooring is to be glued using an appropriate caulk gun and nailed, per code.
19. All framing to be in accordance with the attached D.R. Horton, Inc. framing checklist.
20. Final payment is to be made upon completion of the signed-off framing inspection.
21. Permit boards, driveway barricades and walk boards (adequate to reach street) to be built by framing contractor.
22. Framers to follow engineered truss plan.

23. All gable ends to have horizontal cat walk bracing installed per truss manufacturers specs

SPECIFICATIONS AND SCOPE OF WORK

24. All floor and roof trusses to be braced in accordance to manufacturers specs.
 25. All ext. doors, normally front and rear French or sliding to be installed, square, and level with even margin shimmed and sealed with silicone sealant or its equivalent, on top, two sides, and bottom.
 26. All framing to pass County Inspection prior to final labor payment to contractor. All county required changes remain the responsibility of the contractor at no additional cost to builder.
 27. All framing to be done using "ladder" type framing.
 28. All fall protection to be secured to floor independent of wall framing.

Contractor agrees to comply with all applicable building codes, ordinances and OSHA regulations.

ACKNOWLEDGMENT

These specifications are a part of contract identified above. D R. Horton, Inc. reserves the right to amend or modify any of the above general specifications at any time, and will notify the contractor as soon as any change is initiated.

Contractor:

C. L. D. L. T.

By:

GENERAL MANAGER

Date:

02/17/10

Builder:

D R Horton, Inc.

By:

EDMOND G. JEANFREAU, JR

Date:

2/23/10

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0401942

Natalie Zitek et al
PLAINTIFF(S)

D R Horton Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

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

M&L General Construction Inc
M&L General Construction LLC
Lansing Building Products Inc
A-Z Inc
Kings Landscaping LLC
A&J Framing Inc
Alpro Textures LLC
AJ Landscaping & Grading LLC
Dupree Plumbing Company, Inc.
Blue Ridge Building Products
IBP Asset LLC
Greener Pastures Of Aiken LLC
Greener Pastures Inc
GBS Building Supply - US LBM LLC
Get Floored LLC
Five Star Construction Inc
Ferguson Enterprises Inc
DOM Group LLC
Caryl Mechanicals Inc
Latinos Roofing LLC
Edwin Edgardo Barahona
Edwin Barahona
GSF Renovations LLC
Jose Aristides Hernandez
Jose Hernandez
J3S Commercial Construction Inc
Brothers Contractors Inc
Brothers Contractors LLC
The App Phase Group
Alexander G. Koenig
Luis Solis Machado
J. Rene Padilla
Padilla Flooring LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Electronic Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-07-28 15:06:27 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

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

Plaintiff,

v.

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

Defendants.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

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

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-01942

**JLS MASONRY, INC.’S NOTICE OF
MOTION AND RULE 59(e) MOTION TO
RECONSIDER AND/OR TO ALTER OR
AMEND THE ORDER DENYING JLS
MASONRY’S MOTION FOR SUMMARY
JUDGMENT**

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

Third-Party Defendants.

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

STANDARD

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

JLS's MSJ
Case No: 2019-CP-04-1942

ROSS & CRISTALDI, LLC

s/ Emily C. Sheets
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AND

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Attorneys for JLS Masonry, Inc.

Mt. Pleasant, South Carolina

August 7, 2023

State of South Carolina)
)
County of Anderson)
) Circuit Court
) 2019-CP-04-01942

Zitek)
)
 vs.) Transcript of Record
)
D.R. Horton et al.)

February 8, 2023
Anderson, South Carolina

B E F O R E:

The Honorable R. Scott Sprouse, Judge.

A P P E A R A N C E S (All present by video or telephone):

Justin O'Toole Lucey, Esq.
Attorney for the Plaintiffs

Jason Imhoff, Esq.
Attorney for the Defendants

Sara Iskimov
Transcriber



1 THE COURT: Okay.

2 MR. KENDALL: Your Honor, this is Everett Kendall for
3 Blue Ridge again. I don't have a motion that appears on this
4 docket. I just want to remind the Court I've written a letter
5 to this effect. We presented a motion at the September 8th
6 hearing that was a motion to dismiss the third-party claims
7 against my client. It was factually -- it was we argued on a
8 different basis than other third-party contractors had argued.

9 Somehow, I believe that motion has gotten lost in terms
10 of being ruled upon. And so if I just -- I don't know what
11 else I might need to do and just asking for that direction
12 from the Court in order to get -- to know where we are with
13 that motion.

14 THE COURT: I'll go back and look at that.

15 MR. KENDALL: Thank you, Your Honor.

16 THE COURT: I'll go back and look at your filing to say
17 to make sure that it was something that was considered.

18 MR. KENDALL: It was filed and argued --

19 THE COURT: Okay.

20 MR. KENDALL: -- at the September 8th docket, but it
21 was -- again, it was -- it had a similar title to the other
22 motions you heard, but it was being argued on a very different
23 theory. And so I'm just -- I'm afraid it just might have
24 gotten buried.

25 THE COURT: I'll go back and look at that. Thank you for

1 calling that (indiscernible), Mr. Kendall.

2 MR. KENDALL: Thank you, Your Honor. Thank you.

3 THE COURT: Okay. Anyone else? Okay.

4 MR. IMHOFF: Does that mean it's back to me, Your Honor?

5 THE COURT: All right. I'll listen. And then I'll give
6 Mr. Imhoff and then Mr. Lucey last opportunity here. So go
7 ahead, Mr. Imhoff.

8 MR. IMHOFF: Your Honor, I'm going to try to be brief. I
9 have to put some things on the record. I'm not going to keep
10 us here forever, but I have to put some things on the record.

11 THE COURT: Okay.

12 MR. IMHOFF: Everyone on this -- in this case is in a
13 little bit different position. And D.R. Horton, my client,
14 obviously, is in a position where it is defending 221 homes in
15 a class action lawsuit, and all aspects of them, and also
16 prosecuting the third-party claims against all of the
17 subcontractors.

18 And so what we're asking you to do is extend this. And I
19 think Emily Sheets and a couple other people said it. We're
20 concerned -- and we're trying to do it as quickly as we can.
21 We're concerned that the current scheduling order and even
22 future ones may not make it there. And I want to point out to
23 Your Honor -- and I can put it up on the screen -- the
24 plaintiffs have had four years to talk to their homeowners,
25 inspect these houses, do destructive testing on all of these

Certificate of Counsel

The undersigned hereby certifies that the Amended Record on Appeal contains all of the material proposed to be included by any of the parties and not any other material.

September 12, 2023

s/Carl F. Muller

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[NOTE: Except as otherwise shown, to avoid duplication, or where not designated to be included, all exhibits to all motions and memoranda will be included.]