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Exhibit A



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR: M.J. Cowboys LLC
Sole Proprietorship Partnership X Corporation L.C. Other (ATTACH W-9)
Social Security No. or Tax ID No.: 46-4331473
Name of Owner(s)/Officer(s): Mauricio Reyna
Division Name: Greenville Area Name: 70900 Assigned Vendor No.: 1756708
Address for All Notices: 7740 Augusta Rd Ste 1A #129
City: Riedmont State: SC Zip Code: 29673
Telephone: 803-506-3510 Fax: 803-282-7582 E-Mail Address: MJCowboysLLC@gmail.com
Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND REDUCTIONS.
This agreement (the "Agreement") is entered into on this 6 day of May, 2014 between D-R Horton Inc ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work").

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

3. CONTRACT PRICE.

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

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

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

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) sixty (60) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not included in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 25-6-20 AND 25-6-21 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR AGREES THAT OWNER DOES AND WILL NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

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

Executed this 6 day of May, 2014.
By: MAURICIO REYNA
Title: Owner
By: M.J. Cowboys LLC
Title: Owner

INITIALS: OWNER MR CONTRACTOR MR

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rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

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

7. SAFETY.

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

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

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

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

8. CONTRACTOR'S WARRANTIES.

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

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

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

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

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon

INITIALS: OWNER  ; CONTRACTOR 

receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

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

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

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

10. CONTRACTOR'S INDEMNITY.

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

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

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

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

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or

INITIALS: OWNER  CONTRACTOR 

modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type of, or nature of, the Work or limit the type of structure on which the Work is to be performed. The CGL policy shall not contain a deductible or self-insured retention of more than \$25,000.00. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all 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 a named, Additional Insured, specifically identifying Owner, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Owner as an additional insured shall be primary, with any insurance of Owner being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the required policies, as requested by Owner.

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

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

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

12. REMEDIES.

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

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or claimed up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations,

INITIALS: OWNER  CONTRACTOR 

rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

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

13. ALTERNATIVE DISPUTE RESOLUTION.

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

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

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

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

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

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

14. TERMINATION.

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

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

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

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

16. GENERAL CONTRACT PROVISIONS.

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

INITIALS: OWNER  CONTRACTOR 

law, the Master National Independent Contractor Agreement shall control.

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

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

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

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

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


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

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

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

48026 Foundation Concrete
43040 masonry
43060 stone
45530 Flatwork Labor

SOUTH CAROLINA VERSION (REV. 12 APRIL 2013)

INITIALS: OWNER  CONTRACTOR MR.

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

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

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

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

D.R. Horton, Inc.,

Third Party Plaintiff,

v.

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

Third Party Defendants.

MJ Masonry, Inc..

Fourth Party Plaintiff,

v.

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

Fourth Party Defendants.

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

MJ Cowboys, LLC,

Fourth Party Plaintiff,

v.

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

Fourth Party Defendants.

M&L Reyna Construction, LLC,

Fourth Party Plaintiff,

v.

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

Fourth Party Defendants.

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

I. INTRODUCTION

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

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

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

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

II. RELEVANT FACTS

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

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

Section 6.4:

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

Section 10.1:

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

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

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

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

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

III. LEGAL STANDARD

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

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

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

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

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

IV. ARGUMENT

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

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

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

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

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

In its prayer for relief, DRH alleges:

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

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

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

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

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

Id. pp. 26-27.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

Respectfully submitted,

MARTINEAU KING PLLC

/s/ Lee M. Thomas

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Counsel for MJ Cowboys, LLC

Exhibit A



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

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

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work").

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses.

3. CONTRACT PRICE.

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

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

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

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement.

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

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

Executed this 28th day of October, 2015.

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

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

INITIALS: OWNER [Signature], CONTRACTOR [Signature]

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

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

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

5. SCHEDULE OF WORK.

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

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

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

6. PERFORMANCE OF THE WORK.

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

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

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

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

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

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

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

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

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

INITIALS: OWNER  CONTRACTOR 

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

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

7. SAFETY.

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

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

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

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

8. CONTRACTOR'S WARRANTIES.

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

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

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

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

INITIALS: OWNER , CONTRACTOR 

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

9. LIENS AND RETAINAGE.

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

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

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

10. CONTRACTOR'S INDEMNITY.

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

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

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

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

INITIALS: OWNER CONTRACTOR

11. INSURANCE.

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

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

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

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

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

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

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

12. REMEDIES.

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

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

INITIALS: OWNER  CONTRACTOR 

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

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

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

13. ALTERNATIVE DISPUTE RESOLUTION.

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

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

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

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

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

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

14. TERMINATION.

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

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

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

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

INITIALS: OWNER , CONTRACTOR

16. GENERAL CONTRACT PROVISIONS.

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

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

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

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

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

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

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

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

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

SOUTH CAROLINA VERSION (REV. 22 JUNE 2015)

INITIALS: OWNER EO, CONTRACTOR MR.

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 MJ Cowboys, LLC (“MJ”), by and through the undersigned counsel, and pursuant to Rule 56, SCRPC, moves the Court for an order granting final summary judgment in favor of MJ on all of D.R. Horton’s claims against it. There are no genuine issues of material fact in dispute and MJ 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 Third Party Defendant MJ

Cowboys

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON)

TENTH JUDICIAL CIRCUIT

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

CASE NO. 2019-CP-04-01942

Plaintiffs,)

**THIRD-PARTY DEFENDANT M&L
REYNA CONSTRUCTION, LLC'S
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**

v.)

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

Defendants.)

DR Horton, Inc.,)

Third-Party Plaintiff,)

v.)

AJ Landscaping & Grading, LLC a/k/a)
AJ Landscaping 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 EMC; A-Z, Inc.; Atlanta Floor)
Designs Center; A Grade Above Others,)
LLC; Brand-Vaughan Lumber Co., Inc.;)
BFK 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 Greener Pastures of Aiken, LLC; IBP)
Asset, LLC d/b/a Blue Ridge Building)
Products; JLS Masonry, Inc.; Kings)
Landscaping, LLC; Landshapers, LLC;)
Lade-Danlar, Inc.; Lansing Building)
Products, Inc; Long Heating & Air)
Conditioning, Inc.; L&M Electric, Inc.;)
Manale Landscaping, LLC; MJ Cowboys,)
LLC; M&L General Construction, LLC)
a/k/a M&L General Construction, Inc.;)
M&L Reyna Construction, LLC; M&M)
Foundations, LLC; Nazareth Builders, LLC;)
NB Contractors, LLC; Poinsett Homes,)
LLC; P&T Construction, Inc. a/k/a P&T)
Construction, Inc.; P&L Enterprises,)
LLC; Probuild Company, LLC a/k/a)
Probuild Holdings, Inc.; Rite Rug Co.;)
Rodney Howard Grading, Inc. a/k/a Rodney)
Howard Grading Co; Sandlapper Concrete,)
LLC; Sodfather, Inc.; Landscape)
Contractors; Stock Building Supply, LLC;)
Topbuild Home Services, Inc. a/k/a Gale)
Contractors Service; Tucker Materials,)
Inc. a/k/a Gypsum; UTM Enterprises, Inc.;)
Dupree Plumbing Company, Inc.;)
Willow Tree Landscaping, Inc.; and Silver)
Line Building Products Corporation,)

Third-Party Defendants.)

Builders FirstSource-Southeast Group,)
LLC,)

Fourth-Party Plaintiff,)

v.)

Harrelson Painting, LLC; Aaron D. Peris,)
Therma-True, LTD; and Huttig Building)
Products,)

Fourth-Party Defendants.)

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

Alpha Omega Construction Group, Inc.,)
)
Fourth-Party Plaintiff,)
)
v.)
)
Denny Concepcion, Jimenez Contractors,)
LLC, Jimenez Contractors, Inc., SL)
Commercial Construction, Inc., Brothers)
Contractors, Inc., Brothers Contractors,)
LLC, JJS Commercial Construction, Inc.,)
Santos Metal Works, LLC, Safeway)
Roofing, Maila Lopez d/b/a Safeway)
Roofing, Jose Hernandez a/k/a Jose)
Aristides Hernandez, GSF Renovations,)
LLC, Edwin Barahona a/k/a Edwin)
Edgardo Barahona, Henry Construction,)
LLC, Latinos Roofing, LLC, and Nataren)
Contractors, LLC,)
)
Fourth-Party Defendants.)

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

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

Fourth-Party Defendants.)

Atlanta Floor Designs Center,)

Fourth-Party Plaintiff,)

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

Fourth-Party Defendants.)
)
 _____)
 M&L Reyna Construction, LLC,)
)
 Fourth-Party Plaintiff,)
)
 v.)
)
 Jesus Jimenez and Jesus Robles Montes)
 a/k/a Robles Construction, and Castillo’s)
 Concrete, LLC,)
)
 Fourth-Party Defendants.)
 _____)
 Nicholas Soto a/k/a Nicolas Soto,)
 Individually and d/b/a Soto HVAC,)
)
 Fifth-Party Plaintiff,)
)
 v.)
)
 Toribio Islas and Alejandro Soto,)
)
 Fifth-Party Defendants.)
 _____)

TO: D.R. HORTON, INC. AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Third-Party Defendant M&L Reyna Construction, LLC (“M&L Reyna”), by and through its undersigned counsel, will move before this Court on the 10th day after service, or at such other time and place as is convenient to the Court and counsel, for an Order granting M&L Reyna’s Motion for Summary Judgment and/or Dismissing Third-Party Plaintiff D. R. Horton, Inc.’s (“DR Horton”) claims against M&L Reyna pursuant to Rules 12 and/or 56 of the South Carolina Rules of Civil Procedure. The grounds for the motion are as follows:

1. DR Horton did not have a valid contract with M&L Reyna at the time the work was performed.

2. DR Horton's claims for Contractual indemnity are barred by the Anti-Indemnity Statute, SC. Code § 32-2-10 et seq. and *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018);
3. DR Horton's Contract and/or specific terms of the contract are invalid, violate public policy, and are thus unenforceable. See *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018);
4. DR Horton's Contractual Indemnity Provision violates the requirements set forth in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), reh'g denied (Oct. 18, 2018);
5. DR Horton's claims for Negligence, Breach of Express and Implied Warranty, and Breach of Contract are all conditioned on liability to Plaintiff and are mere claims for indemnity in disguise, and, therefore, these claims should be dismissed pursuant to *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC* 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015);
6. DR Horton has unclean hands and cannot recover in equity. See *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC* 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) and *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687 (Ct. App. 2013); and
7. M&L Reyna adopts any other applicable grounds for summary judgment raised by other defendants pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure.

WHEREFORE for the forgoing reasons, M&L Reyna respectfully requests this Court enter an Order granting its Motion for Summary Judgment and dismissing Third Party Plaintiff DR Horton's claims. This Motion is based on the pleadings filed in this matter and may be supported

by a Memorandum of Law, information obtained through discovery, affidavit(s), witness testimony, and any other material the Court may receive before or at the hearing on this matter as permitted under the Rules of Civil Procedure.

LUZURIAGA MIMS, LLP

By: s/Whidbee S. Perrin

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

Charleston, South Carolina
May 1, 2023

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

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

Plaintiff,

v.

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

Defendants.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

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

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-01942

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

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

Third-Party Defendants.

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

STANDARD

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

MARTINEAU KING PLLC

/s/ Lee M. Thomas

Elizabeth A. Martineau (Bar: 78732)

Lee M. Thomas (Bar: 103034)

Blinn L. Cushman (Bar: 104486)

P.O. Box 241268

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Counsel for MJ Cowboys, LLC

Charlotte, North Carolina

August 7, 2023

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2019-CP-04-01942

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

Plaintiff,)

vs.)

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

Defendant.)

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

D.R. HORTON, INC.,)

Third-Party Plaintiff,)

vs.)

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

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

UTM ENTERPRISES, INC.; AND)
WILLOW TREE LANDSCAPING, INC.,)

Third-Party Defendants.)

LONG HEATING & AIR)
CONDITIONING, INC.,)

Fourth-Party Plaintiff,)

vs.)

ZENON GUTIERREZ ANTUNEZ, JESUS)
PEREZ, FREDY PEREZ AND)
VENUSTIANO PEREZ, INDIVIDUALLY)
AND D/B/A FREDY’S HVAC,)
NICHOLAS SOTO A/K/A NICOLAS)
SOTO, INDIVIDUALLY AND D/B/A)
SOTO HVAC, JASON WEAVER,)
INDIVIDUALLY AND D/B/A TIGER)
MECHANICAL AND PANUNCIO)
VICTORIANO MARTINEZ,)
INDIVIDUALLY AND D/B/A)
VICTORIANO HVAC, LLC,)

Fourth-Party Defendants.)

TO: THE PARTIES ABOVE NAMED AND THEIR COUNSEL:

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

[SIGNATURE ON FOLLOWING PAGE]

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Construction, LLC*

Charleston, South Carolina
August _7_, 2023

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

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

Plaintiffs,)
v.)

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

**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**

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

v.)
)

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

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

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

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

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

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

Fourth-Party Defendants.)

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

v.)

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

Fourth-Party Defendants.)

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

v.)

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

M&L Reyna Construction, LLC,)
Fourth-Party Plaintiff,)
v.)
Jesus Jimenez and Jesus Robles Montes a/k/a)
Robles Construction; Castillo’s Concrete,)
LLC,)
Fourth-Party Defendants.)
_____)

Nicholas Soto a/k/a Nicolas Soto, individually)
and d/b/a Soto HVAC,)
Fifth-Party Plaintiff,)
v.)
Toribio Islas and Alejandro Soto,)
Fifth-Party Defendants.)
_____)

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

PROCEDURAL BACKGROUND

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

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

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

SUMMARY OF RELEVANT FACTS

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

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

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

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

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

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

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

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

(See Exhibit A at p.4, § 10.1.)

LEGAL STANDARD

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

ARGUMENTS

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

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

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

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

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

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

S.C. Code Ann. § 32-2-10.

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Price found as follows in Shafi:

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. Have you read all of section 10.1?

A. I have.

Q. Did you read section 10.2?

A. I did not. Okay.

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

A. I cannot.

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

A. I do not.

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

A. I do not know.

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

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

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

A. I have, yes. I have.

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

A. Not specifically, no.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

[SIGNATURE PAGE AS FOLLOWS]

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Charleston, South Carolina

July 11, 2023

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

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

Plaintiff,

v.

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

Defendants.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

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

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-01942

**M&M FOUNDATIONS, LLC'S NOTICE
OF MOTION AND RULE 59(e) MOTION
TO RECONSIDER AND/OR TO ALTER
OR AMEND THE ORDER DENYING
M&M'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 M&M Foundations, LLC (“M&M”), 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 M&M’s motion for summary judgment filed July 28, 2023.

STANDARD

Rule 59(e), SCRCP, provides that “[a] motion to alter or amende 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. M&M is entitled to summary judgment as to all claims because DR Horton has failed to provide any evidence of improper work performed by M&M at the project.

M&M performed work at only twelve of over two-hundred homes in Rose Hill. Plaintiff's expert, Rhett Whitlock, did not view a single home M&M performed work at; however, Dr. Whitlock was shown images of the basements and testified only that the cause of any cracking within the work performed by M&M was due to shrinkage and settlement—not any defective construction on the part of M&M. Furthermore, DR Horton's expert, Steven Moore, did not note any defective installation at any home where M&M performed its work. M&M's work was not defective and therefore cannot be held responsible for the defective work that may or may not be located at other homes within the Rose Hill community. For these reasons, M&M 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.

II. DR Horton failed to provide evidence for its damages related to breach of contract, negligence, express warranty, and implied warranty causes of action, and M&M 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, XXX, 776 S.E.2d 426, XXX (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 own 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. M&M 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

III. M&M 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 M&M (“the Contract”) is not clear and unequivocal.² *See id.* The indemnity provision takes two completely incompatible positions: M&M 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

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.

² The full contractual indemnity language is set forth in the Contract at ¶¶ 10.1-10.2 and is also contained in M&M’s memorandum in support of its motion for summary judgment.

is that M&M 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, M&M 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

IV. M&M 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).

CONCLUSION

Therefore, M&M respectfully requests this Honorable Court issue an Order pursuant to Rule 56(e) of the South Carolina Rules of Civil Procedure, Altering or Amending its prior decision and enter an Order granting M&M's motion for summary judgment, dismissing D.R. Horton's claims against M&M as a matter of law. In support of this Motion, M&M 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

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.*

accordance with the South Carolina Rules of Civil Procedure. M&M joins in the arguments and Motions of others that may be forthcoming and are not inconsistent with M&M's arguments and Motion.

Respectfully submitted,

M&M's MSJ
Case No: 2019-CP-04-1942

ROSS & CRISTALDI, LLC

s/ Emily C. Sheets

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Mt. Pleasant, South Carolina

August 7, 2023

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2019-CP-04-01942

Plaintiff,)

**NAZARETH BUILDERS, LLC'S
MOTION FOR RECONSIDERATION
OF THE COURT'S JULY 28, 2023
ORDER DENYING SUMMARY
JUDGMENT**

v.)

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

Defendants.)

D.R. HORTON, INC.,)

Third-Party Plaintiff,)

v.)

A J LANDSCAPING & GRADING, LLC,)
)
A/K/A A J LANDSCAPING &)
)
GRADING, LLC; ALLPRO TEXTURES,)
)
LLC; ALPHA OMEGA CONSTRUCTION)
)
GROUP, INC.; AMERICAN CONCRETE)
)
AND PRECAST, INC.; A/K/A ACP)
)
CONCRETE, INC.; A & J FRAMING,)
)
INC; ALPHA E.M.C.; A-Z, INC.;)
)
ATLANTA FLOOR DESIGNS CENTER;)
)
A GRADE ABOVE OTHERS, LLC;)
)
BRAND-VAUGHAN LUMBER CO, INC.;)
)
BKF BUILDERS, INC.; BLUE RIDGE)
)
BUILDING PRODUCTS, LLC;)
)
BUILDERS DESIGNHOUSE, LLC; BMC)
)
EAST LLC; BUILDERS FIRSTSOURCE)
)
SOUTHEAST GROUP, LLC, A/K/A)
)
BUILDERS FIRSTSOURCE, INC.;;)
)
BRAVO CARPENTERS, INC.; CARYL)
)
MECHANICS II, INC., A/K/A CARYL)
)
MECHANICALS, INC.; CANNADAY)

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

Plaintiff Class's expert engineer Rhett Whitlock inspected the majority of the homes at Rose Hill in the Plaintiff Class and performed a forensic analysis to evaluate the presence of the purported construction defects and deficiencies in those homes. Mr. Whitlock produced multiple reports detailing his findings, opinions, and conclusions regarding the alleged defects.

STANDARD OF REVIEW

A party may bring a motion for reconsideration within ten (10) days after written notice of an entry of order. 59(e), SCRPC. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam v. S.C. DOT*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC; *Staubes v. City of Folly Beach*, 331 S.C. 192, 500 S.E.2d 160 (1998); *Summer v. Carpenter*, 328 S.C. 336, 492 S.E.2d 55 (1997). "[W]hen a motion for summary judgment is made and properly supported, an adverse party may not rest solely upon the allegations or denials in his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Colleton County Taxpayers Ass'n v. Sch. Dist.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

LEGAL BACKGROUND

Although D.R. Horton denies the presence of defects or deficiencies in the construction of the houses in Rose Hill, D.R. Horton contends that if defects do exist, they are the result of the

wrongful acts or omissions of the Third-Party Defendant Subcontractors (“Subcontractors”). Accordingly, D.R. Horton asserts the following causes of action against the Subcontractors: (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.

Initially, D.R. Horton claims it is entitled to contractual indemnity because it entered into contracts with each of the Subcontractors and each of these subcontracts contained a provision in which the Subcontractors agreed to indemnify D.R. Horton from damages. D.R. Horton’s breach of contract and breach of express warranties causes of action arise out of the same subcontracts. Further, even in the absence of a contract, D.R. Horton argues: it is entitled to equitable indemnification because a special relationship exists between it and Subcontractors such that it could be held liable for the Subcontractor’s work; Subcontractors made implied warranties regarding the work they performed; and Subcontractors negligently breached the duty they owed D.R. Horton to perform all work in a proper, workmanlike manner.

ARGUMENT

I. NAZARETH IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE CLAIM FOR CONTRACTUAL INDEMNITY BECAUSE THE INDEMNITY PROVISIONS USED BY D.R. HORTON IN ITS SUBCONTRACTS ARE ILLEGAL AND UNENFORCEABLE

The Contract between Nazareth and D.R. Horton contains the following indemnity language (attached as Exhibit A to prior memorandum in support ¶ 10.1 on page 4 of 7):

To the fullest extent permitted by law, contractor shall protect, defend, indemnify, and hold owner and owner’s parent corporation, subsidiaries and affiliates, successors and assigns, and each of these entities’ respective officers, directors, partners, employees, agents and insurers . . . , free and harmless from and against any and all claims, demands, lawsuits or other litigation, actions, causes of action, or other liabilities, of every kind and character (including all costs thereof, attorneys’ fees and interest),

. . . on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property, . . . 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 contractor's agents or employees, or by its suppliers or subcontractors of any tier, or their respective agents or employees; . . . or (4) any negligent or intentional act or omission, or any strict liability, of indemnitee related in any way to the work.

Nazareth is entitled to judgment as a matter of law on D.R. Horton's contractual indemnity cause of action because the indemnity clause is illegal and unenforceable. *See* Rule 56, SCRCP.

In DR Horton's third-party claim for contractual indemnity against IBP, this Court applied Concord & Cumberland's requirements¹ to IBP's contract in the July 26, 2023 Order granting IBP's Motion for Summary Judgment, finding that the indemnity provisions in the contract between IBP and DR Horton are not clear and unequivocal. IBP's contract with DR Horton is substantially similar to DR Horton's purported contract with Nazareth.

Specifically, Nazareth's Contract does not contain an agreed-to scope of work provision—just like IBP's did not. In Nazareth's Contract, there are no specifications for the contract or reference to the Rose Hill Project at all—just like IBP's contract made no such reference.

Within the four corners of the contract, a reader would be unable to determine what project the contract references, what scope of work is being performed by Nazareth. For this

¹ In addition, where an indemnity agreement between two parties seeks to reimburse one party for both parties' concurrent negligence, the indemnity provision must be strictly construed. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170–71 (Ct. App. 2018). Specifically, in *Concord & Cumberland*, the Court of Appeals held an indemnity clause will not be construed to indemnify a party against losses resulting from its own concurrent negligent acts “unless such intention is expressed in clear and unequivocal terms.” *Id.* at 647–50, 819 S.E.2d at 171–72 (quoting *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)) (emphasis added).

reason, Nazareth would request the Court reconsider its prior Order.

II. NAZARETH IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON D.R. HORTON'S CLAIMS FOR BREACH OF CONTRACT, BREACH OF EXPRESS AND IMPLIED WARRANTIES, AND NEGLIGENCE BECAUSE THEY ARE MERELY VEILED CLAIMS FOR EQUITABLE INDEMNITY

Specifically, D.R. Horton alleges: (1) breach of contract – “To the extent that Plaintiff proves that the work was not performed correctly, Subcontractors materially breached the Agreements . . .”; (2) breach of express warranties – “If the materials, installation, and/or workmanship were not in accordance with contract requirements . . .”; (3) breach of implied warranties – “If the materials, installation, and/or workmanship were not in accordance with contract requirements . . .”; (4) “If due care was not used . . . Subcontractors breached that duty of care” As D.R. Horton’s claims are conditioned on “if” the Plaintiff Class proves its allegations against D.R. Horton, D.R. Horton’s claims are merely claims for equitable indemnity. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 413 S.C. at 635–37, 639, 776 S.E.2d at 437, 439.

Accordingly, D.R. Horton’s causes of action for breach of contract, breach of express warranties, breach of implied warranties, and negligence are, as a matter of law, impermissible claims for indemnity and should be dismissed.

CONCLUSION

WHEREFORE, for the reasons set forth above, Third-Party Defendant Nazareth prays that the Court GRANT its Motion to Reconsider / Alter or Amend the Order Denying Nazareth’s Motion for Summary Judgment and such further relief as this Honorable Court deems just and proper.

MCANGUS GOUDELICK & COURIE, L.L.C.

s/R. Trippett Boineau, III

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ATTORNEYS FOR NAZARETH BUILDERS,
LLC

August 7, 2023

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS)
FOR THE TENTH JUDICIAL CIRCUIT)

C.A. No. 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)

**DEFENDANT D.R. HORTON, INC.’S)
MEMORANDUM IN OPPOSITION TO)
M&L RENYA CONSTRUCTION,)
LLC’S MOTION FOR)
RECONSIDERATION AND/OR TO)
ALTER OR AMEND PURSUANT TO)
RULE 59(e), SCRCP)**

D.R. HORTON, INC.)

Third-Party Plaintiff)

vs)

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

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

Third-Party Defendants

Defendant, D.R. Horton, Inc. (“D.R. Horton” or “DRH”) hereby responds to M&L Reyna Construction, LLC’s (“M&L”) Motion for Reconsideration and/or to Alter or Amend Pursuant to Rule 59(e), SCRCP, the Order dated July 28, 2023 denying M&L’s Motion for Summary Judgment as to the third-party claims asserted by D.R. Horton (the “Order”).¹

The Court received motions, briefs, and heard oral arguments on M&L’s Motion for Summary Judgment. The Court ordered as follows:

The Court considered the filings 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.²

M&L filed a Motion for Reconsideration on the following grounds:

1. Because the indemnity provision in M&L’s contract with D.R. Horton is not clear or unequivocal analogous to the indemnity provisions in Third-Party Defendant IBP Asset, LLC d/b/a Blue Ridge Building Product’s (“IBP”) contract with D.R. Horton pursuant to this Court’s Order dated July 26, 2023 (the “IBP Order”);

2. Because D.R. Horton’s claims for breach of contract, negligence/gross negligence, breach of express warranty, and breach of implied warranty are derivative of Plaintiff’s claims, these claims collapse into equitable indemnification; and

3. Any other applicable grounds for summary judgment raised by other Defendants pursuant to Rule 10(c), SCRCP.³

For the reasons set forth below, M&L’s Motion for Reconsideration should be denied.

¹ D.R. Horton fully incorporates herein its Brief in Opposition to Motion for Summary Judgment filed July 11, 2023, and Supplemental Brief in Opposition to M&L’s Motion for Summary Judgment filed July 14, 2023, as **Exhibits 1 and 2.**

² The Order also ruled on the Motions for Summary Judgment against D.R. Horton filed by JLS Masonry, Inc. and MJ Cowboys, LLC.

³ Pursuant to Rule 10(c), SCRCP, D.R. Horton incorporates herein the arguments raised in its Motions for Reconsideration and response to Third-Party Defendants’ Motions for Reconsideration.

I. INTRODUCTION

On January 27, 2021, the Court conditionally certified this class action for 234 homes in the Rose Hill subdivision in Easley, South Carolina, and the class is currently 221 homes (collectively, the “Rose Hill Homes,” or the “Homes”, or, individually, “Home”). M&L was one of the brick and stone subcontractors. Plaintiff brought the following claims against Defendant: negligence and gross negligence, breach of implied warranties, and unfair trade practices. However, D.R. Horton did not self-perform any of the work in the construction of the Subject Properties.

After filing the subject lawsuit, Plaintiff provided a Notice and Opportunity to Cure to D.R. Horton listing 13 categories of issues that were alleged to have been experienced by Plaintiff and similarly situated individuals. Only those subcontractors whose work was implicated by that notice have been named in the lawsuit. D.R. Horton brought claims against the entities and individuals with whom it contracted with to provide labor and/or supply materials for the construction of the Subject Properties including the Third-Party Defendants. D.R. Horton brought the following claims against the Third-Party Defendants: contractual indemnification, equitable indemnification, breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness.

D.R. Horton entered into agreements with subcontractors, including M&L, to perform the work (collectively hereinafter referred to as the “ICAs” and individually an “ICA”).⁴ Each of the ICAs included indemnity provisions (collectively hereinafter referred to as the “Indemnity Provisions”). Throughout the years D.R. Horton constructed homes in Rose Hill with various subcontractors, it had six slight variations of the ICA.

⁴ The ICA with M&L is attached hereto as **Exhibit 3**.

The M&L ICA includes the following applicable provisions.⁵

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work for [subcontractor] for [DRH]. The work to be performed under this Agreement shall include all work performed and materials supplied by [subcontractor], directly or indirectly, to [DRH], including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of [DRH] authorized by written purchase order, or similar document by [DRH]'s authorized field personnel (the "Work")...

Subcontractor Indemnity and Insurance Requirements:

10.1 GENERALLY. To the fullest extent permitted by law, contractor shall protect, defend, indemnify and hold owner and owner's parent corporation, subsidiaries affiliates, successors and assigns, and each of the entities' respective officers, directors, partners, employees, agents and insurers (individually or collectively hereinafter, "indemnitee"), free and harmless from and against any and all claims, demands, lawsuits or other litigation, actions, causes of action, or other liabilities of every kind and character (including all costs thereof, attorneys' fees and interest), whether asserted by a purchaser or owner, contractor, or any third party (including but not limited to personnel furnished by contractor, its suppliers and subcontractors or 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 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 the contractor or by the contractor's agents or employees, or by its suppliers or subcontractors of any tier, or their respective agents or employees; (3) any negligent or intentional act or omission of contractor or any of contractor's employees, personnel, agents, suppliers or subcontractors, regardless of whether caused in part by indemnitee; or (4) any negligent or intentional act or omission of indemnitee related in any way to the work. Contractor's duty to defend is a separate, distinct and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made against indemnitee

⁵ Each of the ICAs at issue generally incorporate the same applicable provisions.

which potentially or arguably is subject to contractor's duty to indemnify, regardless of contractor's ultimate liability for indemnity. Contractor must defend indemnitee even where the allegations against indemnitee are ambiguous or incomplete with respect to the issue of contractor's duty to indemnify, once the duty to defend is triggered, contractor is obligated to defend the entire action, lawsuit, arbitration, or other litigation, including any claims therein not subject to indemnity by contractor. Notwithstanding the foregoing, nothing herein shall require contractor to indemnify indemnitee against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of indemnity. Contractor agrees that its obligations shall not be limited by an limitation on the amount of damages, compensation or benefits payable by or for contractor under workers compensation acts, disability benefit acts or other employee benefit acts. Payment for the work is not a condition precedent to contractor's obligations under this section.

10.4 Subcontractor's and Supplier's Indemnity Obligations.

...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.

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner ... as named, Additional Insureds, specifically identifying Horton on the CGL Policy or policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG20101185 or, if unavailable, forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage...

See **Exhibit 3**.

II. ARGUMENT

M&L contends that the Indemnity Provisions in the ICA are not clear or unequivocal and are therefore barred by the requirements set forth in DRH, Inc. v. Builders FirstSource-Se.

Grp., LLC, 422 S.C. 144, 148, 810 S.E.2d 41, 45 (Ct. App. 2018) and S.C. Code § 32-2-10, *et. seq.* (the “Anti-Indemnity Statute”). M&L also argues that their ICA with D.R. Horton is substantially similar to IBP’s ICA. Because the Court granted IBP’s Motion for Summary Judgment against D.R. Horton, therefore, M&L asserts it is also entitled to summary judgment. D.R. Horton has filed a Motion for Reconsideration on the Order granting IBP’s Motion for Summary Judgment on the following relevant grounds, *inter alia*: (1) whether D.R. Horton’s entire ICA with IBP is unenforceable; (2) whether any section of D.R. Horton’s ICA with IBP is unenforceable; (3) whether the review of D.R. Horton’s ICA was made in the light most favorable to D.R. Horton; (4) whether clear and unequivocal is the correct standard to review D.R. Horton’s entire ICA and the basis for the Court’s finding.⁶

A. The Indemnity Provisions in the ICA are Clear and Unequivocal and are Legal and Enforceable

The perfunctory analysis provided by M&L is insufficient, as the South Carolina Court of Appeal’s decision in *Builders* made specific reference to the concealment and unreasonable award of damages, which impacted D.R. Horton’s ability to recover under the indemnification agreement.⁷ In *Builders*, Patricia Clark (hereinafter “Clark”) filed a suit against D.R. Horton for negligence, breach of contract, multiple breaches of warranty and a violation of the South Carolina Unfair Trade Practice Act. *Id.* at 148. The lawsuit alleged various defects in the Clark home, including but not limited to, the work performed by Builders FirstSource. Clark and D.R. Horton participated in arbitration, where Clark was awarded \$150,000.00. *Id.* However, the arbitration award did not indicate what damages the arbitrator found compensable. *Id.* Further,

⁶ D.R. Horton fully incorporates its Motion to Reconsider and/or Alter or Amend the Order Granting Third-Party Defendant IBP’s Motion for Summary Judgment as to D.R. Horton’s Third-Party Complained (August 8, 2023).

⁷ *Id.* at 153. “D.R. Horton cannot ask the arbitrator to conceal its reasons for an award, which may have included damages caused by its own negligence, then ask the circuit court to award it damages that would be barred by the statute.”

the arbitrator noted that “(c)ounsel for the parties have requested an order containing a monetary award only.” *Id.*

Following the arbitration award, D.R. Horton filed a complaint seeking contractual indemnification and contribution from Builders FirstSource for recovery of the arbitration award and attorney’s fees that D.R. Horton incurred as a result of the Clark suit. *Id.* Subsequently, Builders FirstSource filed a motion for summary judgement alleging D.R. Horton’s claim for contractual indemnification failed as the agreement required D.R. Horton to be indemnified from its own negligence. *Id.* at 148-49. Upon the request via multiple motions, the trial court granted Builders FirstSource’s motion for Summary Judgment. *Id.* at 149. D.R. Horton then appealed the trial court’s decision, asserting that the trial court erred by reading additional terms into the agreement and failed to require Builders FirstSource to pay the entire arbitration award and attorney’s fees. *Id.* at 150.

The Indemnity Provisions in this matter specifically exclude losses caused by the sole negligence of D.R. Horton. The Anti-Indemnity Statute provides, in pertinent part, as follows:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting ***from the sole negligence of the promisee***, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. 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.

(Emphasis added).

In *Builders*, the South Carolina Court of Appeals found that a prior version of D.R. Horton's ICA violated S.C. Code § 32-2-10. The former ICA required the indemnitee to indemnify D.R. Horton for claims "related in any way to the work, *even when the loss is caused by the fault or negligence of the indemnitee.*" *Id.* at 148 (emphasis added). As explained by the Court,

[The Anti-Indemnity Statute] allows D.R. Horton and [the Third-Party Defendants] to agree that [the Third-Party Defendants] will indemnify D.R. Horton for damages caused by [Third-Party Defendants] or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree. However, we agree that the indemnification clause is void as against public policy to the extent it purports to require [Third-Party Defendants] to indemnify D.R. Horton for damage caused by [D.R. Horton's] negligence or the negligence of its subcontractors.

Id. The Court held that the contract at issue "purport[ed] to require [subcontractor] to indemnify D.R. Horton for its own negligence in violation of section 32-3-10." *Id.*

In the present case, the Indemnity Provisions in the ICA with M&L specifically exclude claims arising out of the sole negligence of D.R. Horton by providing:

10.1 GENERALLY. ...nothing herein shall require contractor to indemnify indemnitee against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of indemnitee [DRH].

See **Exhibit 3**. Because the ICAs with the Third-Party Defendants, including M&L, explicitly exclude claims arising out of D.R. Horton's sole negligence, the Indemnity Provisions do not violate Section 32-3-10 and are distinguishable from the agreement in *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*.

B. The Indemnity Provisions Comply with The Requirements Set Forth in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC

M&L contends that the Indemnity Provisions do not comply with the requirements laid out in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) and are therefore unenforceable. M&L further asserts that the Indemnity Provision references “the work” performed by M&L and that the ICA fails to identify the work or the project. Therefore, M&L contends the ICA is not clear and unequivocal and in violation of Concord. However, the ICA defines work as follows:

1. **SCOPE OF WORK.** This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work for [subcontractor] for [DRH]. The work to be performed under this Agreement shall include all work performed and materials supplied by [subcontractor], directly or indirectly, to [DRH], including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of [DRH] authorized by written purchase order, or similar document by [DRH]’s authorized field personnel (the “Work”)...

Exhibit 3. Moreover, as outlined below, the ICA complies with Concord.

The court in Concord held that when a party seeks indemnification for its own concurrent negligence, the clear and unequivocal standard applies. *Id.* at 649, 172. Additionally, “when an indemnity clause purports ‘to relieve an indemnitee from the consequences of its own negligence,’ [South Carolina] case law requires strict construction of the clause.” *Id.* at 650, 172 (quoting Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111 584 S.E.2d 375, 378-379 (2003)).

There were two indemnity agreements entered at issue in Concord. For the first agreement, the court found that the phrase “to the extent caused or alleged to be caused in

whole or in part by any negligent act or omission of the [Muhler]” specifically limited Muhler’s obligation to indemnify to damages and losses caused by the negligence of the subcontractor and its lower tier subcontractors.⁸ *Id.* at 654, 174. Additionally, the phrase “regardless of whether it is caused in part by a party indemnified hereunder” did not alter the limiting language. *Id.* Therefore, the general contractor was not entitled to indemnification from the subcontractor, Muhler, for the general contractor’s concurrent negligence pursuant to the first agreement.

With regard to the second agreement, the court found that although the language was broader and excluded the limiting “to the extent caused” language from the first agreement, it still failed to include any reference to indemnification for the general contractor’s concurrent negligence.⁹ *Id.* at 656-657, 176. While “there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties’ intent to absolve the indemnitee of the consequences of its own

⁸ The first indemnity agreement in *Concord* stated, in relevant part, as follows:

the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor ... and other contractors and subcontractors ... from and against all claims, damages, loss and expenses, including but not limited to attorney’s fees, arising out of or resulting from the performance of the Subcontractor’s Work ...

- (a) ... to the extent cause or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor ... regardless of whether it is caused in part by a party indemnified hereunder.

Id. at 643, 168-169.

⁹ The second indemnity provision provided, in pertinent part,

In the event either Superior or Concord and Cumberland, LLC are sued hereafter ... alleging that one or more of the windows and/or doors do not comply with the original or amended contract documents, or are defectively installed, Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC ... and will pay all damages ... incurred by either or both[.]

Id. at 644, 169.

concurrent negligence.” *Id.* at 657, 176 (citation omitted). Further, the Court indicated that the following language may be sufficient to meet the clear and unequivocal standard: “[subcontractor] agrees to indemnify for all damages, regardless of whether the damages are caused in part by a party indemnified hereunder[.]” *Id.* at 656-657, 176.

The Indemnity Provision included in the ICA with M&L provides in relevant part:

“10.1 Generally. ... [Subcontractor] shall protect, defend, indemnify, and hold [DRH]... harmless from and against any and all claims, demands, lawsuits or other litigation...including all costs thereof, attorneys’ fees and interest... on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property... arising out of, or in connection with: (1) a breach of any warranties, representations, covenants, or other obligations of [subcontractor] set forth in this Agreement; (2) the work...performed or material supplied by [subcontractor]...(3) any negligent or intentional act or omission...of [subcontractor]...**regardless of whether caused in part by [DRH]; or (4) any negligent or intentional act or omission... of [DRH] related in any way to the work.”**

See **Exhibit 3** (emphasis added).

The Indemnity Provisions between D.R. Horton and M&L closely track the language suggested by the court in *Concord* and provide that the Third-Party Defendants will indemnify DRH for certain losses regardless of whether or not the losses caused in part by D.R. Horton. The Indemnity Provisions clearly and unequivocally show that the parties intended to absolve D.R. Horton of the consequences of its own concurrent negligence. Therefore, the Indemnity Provisions meet the standard set forth in *Concord* and are enforceable.

C. D.R. Horton’s Claims for Negligence, Breach of Warranties, And Breach Of Contract Are Independently Viable

D.R. Horton could sue and recover damages against the Third-Party Defendants, including M&L, under theories of negligence, gross negligence, recklessness, breach of contract, and breach of warranties related to construction deficiencies, regardless of whether

Plaintiff ever filed a lawsuit. Therefore, D.R. Horton's causes of action are not "disguised" equitable indemnity claims derivative of Plaintiff's lawsuit. D.R. Horton's rights to pursue these claims do not evaporate simply because D.R. Horton was not the first to discover the Third-Party Defendants' failures and a lawsuit was instituted by Plaintiff after the structure was sold. The Third-Party Defendants' reliance upon Stoneledge v. Clear View, LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (hereinafter referred to as "Stoneledge I") and Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) (hereinafter referred to as "Stoneledge II") (collectively referred to as "Stoneledge") is misplaced. Moreover, the Third-Party Defendants' interpretation of the Stoneledge decisions is overbroad.

Instead, a more reasonable interpretation of the Stoneledge decisions is that if the general contractor alleges and proves damages that arise separately from having to defend itself in the purchasers' lawsuit, the general contractor's claims for breach of warranty and negligence are independent from the equitable indemnity claim. Indeed, a careful reading of Stoneledge reveals that the court did not make a blanket bright line rule, but rather did an analysis, mostly of the allegations in the third-party complaint, to determine if the general contractor had plead, alleged, or proved a factual issue of the existence of damages not arising from the plaintiffs' lawsuit.

As the court explained in Stoneledge II, "[t]he issue [the general contractor] raises – whether the circuit court properly interpreted its claims for breach of contract and breach of warranty as one claim for equitable indemnity – requires us to construe its cross-complaint, and thus presents a question of law." Stoneledge II at 634. In determining that the general contractor's claims for breach of warranty and breach of contract were equitable indemnity

claims, the court explained that “[the general contractor’s] injuries arose exclusively from having to defend itself in [plaintiff’s] lawsuit.” *Id.* at 636.

In reviewing the general contractor’s allegations, the court held that the

allegations demonstrate [the general contractor] did not sustain its own damages as a result of any breach of contract or breach of warranty by the respondents. Rather, the allegations show [plaintiff] is the party that suffered damages, and [the general contractor’s] injuries *arose exclusively from having to defend itself in [plaintiff’s] lawsuit*. Consequently, the damages [the general contractor] seeks to recover resulted only from its potential liability to [plaintiff] and from the expenses [the general contractor] incurred defending itself.

Id. at 634 (emphasis added). The court then highlighted this point further:

[u]nder [the general contractor’s] own allegations, its cross-claims arose only when it faced potential liability for [plaintiff’s] damages and incurred fees and costs defending against [plaintiff’s] lawsuit.

Id. at 637.

The *Stoneledge* court looked to two federal court cases in making this decision: *South Carolina National Bank v. Stone*, 749 F. Supp. 1419 (D.S.C. 1990) and *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880 (D.S.C. 1992) (“USF&G”). As explained by the *Stoneledge* court,

In *Stone*, the defendants asserted cross-claims for breach of contract, negligence, and fraud against co-defendants that settled with the plaintiffs. The district court barred the non-settling defendants from asserting these cross-claims against the settling defendants because it found they were not independent causes of action. The court explained the cross-claims arose only if the non-settling defendants were liable to the plaintiffs, and these purported causes of action are nothing more than claims for ... indemnification with a slight change in wording.

Similarly, in *USF&G*, the defendants argued they had “independent claims” against a co-defendant in addition to their claim for indemnification. The district court barred the defendants

from bringing these claims, finding “*without plaintiffs suing the ... defendants[,] the ‘independent claims’ ... would not exist,*” and thus “these claims are really nothing more than claims for indemnity.” *Id.* We agree with *Stone* and *USF&G* and find the reasoning in those decisions applies to this case. Under [the general contractor’s] own allegations, its cross-claims arose only when it faced potential liability for [plaintiff’s] damages and incurred fees and costs defending against [plaintiff’s] lawsuit.

Stoneledge II at 636-637 (emphasis added).

Here, Plaintiff’s lawsuit did not give rise to D.R. Horton’s legal rights against the Third-Party Defendants. D.R. Horton can bring claims of breach of contract, implied warranties negligence/gross negligence/recklessness against the Third-Party Defendants. See *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 384 S.E.2d 730, 299 S.C. 335 (S.C. 1988). Those rights existed before the lawsuit was initiated by Plaintiff, which only provided notice of those issues to D.R. Horton. Thus, these claims, which existed but were latent, are not disguised indemnity claims derivative of the Plaintiff’s lawsuit – they are preexisting claims which are separate and distinct from D.R. Horton’s claim for equitable indemnity. Moreover, in addition to the damages D.R. Horton is incurring related to defending this lawsuit, D.R. Horton seeks to recover for extra workload, repairs or repair costs of the defective work, costs of investigation, and damage and harm to reputation. (See D.R. Horton’s Amended Answer to Plaintiff’s Complaint and Crossclaims, ¶¶ 87, 96, and 112).

These separate damages are explained by the court in *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). In *Addy*, the defendant owner of a building was sued by its tenant when the building caught fire. The building owner then sued the contractor whose negligent work caused the fire. The owner’s recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that “the weight of authority sustains [the building owner’s] right of recovery, either on the theory of an implied contract to indemnify, or because

they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract.” *Addy* at 33. As explained by the *Stoneledge* court, “[u]nlike in this case, the *Addy* appellants did suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit.” *Stoneledge II* at 639 (emphasis added).

The facts in *Addy* are aligned with the facts of this case. Like the building owner in *Addy*, D.R. Horton is forced to defend itself from the Plaintiff’s claims arising from the Third-Party Defendants’ tortious conduct (negligent performance of work) and breach of warranties (failure to perform work in a workmanlike manner). Moreover, D.R. Horton seeks not only damages related to defending this lawsuit, but also for costs to investigate and repair the deficient or defective work, attorneys’ fees and costs, and damage to reputation. These facts distinguish this case from *Stoneledge I* and *Stoneledge II*. D.R. Horton’s damages are thus recoverable under the separate causes of action it has pled, and those claims must remain in this action.

III. CONCLUSION

For the reasons set forth above, D.R. Horton requests the Court deny M&L’s Motion for Reconsideration of the Order.

Respectfully submitted,

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August 17, 2023

Greenville, South Carolina



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.

A&J Landscaping & Grading LLC, A/K/A AJ Landscaping
& Grading, Inc; 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-Vaughn
Lumber Co., Inc.; BFK 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 Buildings 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.

PROOF OF SERVICE

The undersigned does hereby certify that on September 16, 2024, a copy of Appellant’s Response to Respondent IBP Assets, LLC’s D/B/A Blue Ridge Building Products Reply and Modified Request For Clarification was served by email on all counsel of record by copy of this email and filed by electronic mail with the Clerk of Court for the South Carolina Court of Appeals.

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