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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

The Honorable R. Scott Sprouse  
Circuit Court Judge

Appellate Case No. 2024-000057  
Circuit Court Case No. 2019-CP-04-01942

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

v.

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

and.

D.R. Horton, Inc..... Third-Party  
Plaintiff,

v.

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

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

and.

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

JLS Masonry, Inc. is the ..... Appellants.

and

Natalie Zitek, individually, and on behalf of all others similarly situated and as assignee of the claims of Third-Party Plaintiff D.R. Horton, Inc., ..... Respondent,

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**RECORD ON APPEAL VOLUME V OF X**

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-1942
	)	
Natalie Zitek, individually, and on behalf of all others similarly situated,	)	
	)	
Plaintiff,	)	<b>PLAINTIFF’S MEMORANDUM</b>
	)	<b>OPPOSING DEFENDANT D.R.</b>
v.	)	<b>HORTON’S MOTION TO DISMISS</b>
	)	<b>AND COMPEL ARBITRATION AND</b>
D.R. Horton, Inc.; Jane Doe #1-10; and John Doe #1-50,	)	<b>MOTION TO STAY DISCOVERY</b>
	)	
Defendants.	)	

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Plaintiff submits this Memorandum Opposing Horton’s Motion to Dismiss or Stay and Compel Arbitration (“Arbitration Motion”)<sup>1</sup> and Horton’s Motion to Stay Discovery (“Discovery Motion”), and respectfully states as follows:

**SUMMARY OF ARGUMENT**

The arbitration provision in Zitek’s purchase agreement is unenforceable for three reasons. First, the arbitration provision has expired under the Doctrine of Merger because there was not a survival clause in the purchase agreement. Second, the arbitration “agreement” is unconscionable under *Smith* because it incorporates disclaimers of any and all implied warranties and monetary damages of any kind. Third, Horton has waived its right to compel arbitration because it delayed seeking arbitration for a year while it used the judicial process to, *inter alia*, request and receive information, inspected nearly 50 homes, and engage this Court more than five times.

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<sup>1</sup> Horton’s Arbitration Motion seeks “to dismiss or in the alternative stay” this action. This is an improper request. When a party seeks to compel arbitration, a court cannot dismiss the action – it may only stay the action “pending the outcome of the arbitration proceeding.” *Widener v. Fort Mill Ford*, 381 S.C. 522, 525, 674 S.E.2d 172, 174 (Ct. App. 2009).

## DISCUSSION

### A. Rosehill Overview

Rose Hill is an upstate subdivision that contains 234 homes built by Horton between 2012 and 2018. (Compl., ¶¶ 1, 7); (Whitlock Aff., ¶¶ 17-18). The construction of all 234 homes is very similar as to the components that matter. (Whitlock Aff., ¶ 31). Plaintiffs are the owners of these homes and their homes are similarly defective in multiple respects. (Comp., ¶¶ 3, 5, 24, 27). These common defects include leaky windows and patio doors; insufficiently supported brick that is cracking along exterior walls; loosely embedded stone that is separating away from exterior walls; insufficiently supported foundations and slabs that are cracking in many places; and, crimped and undersized ductwork that is restricting air flow. (Comp., ¶ 27); (Whitlock Aff., ¶¶ 23-32); (Zitek Aff., ¶¶ 4, 7).

Many of these problems are the result of defects and building code violations. (Whitlock Aff., ¶¶ 34-42; (Whitlock Supp. Aff., Exs. B-G). For example, the stone masonry does not comply with the code-prescribed clearances and the wall ties used to anchor the brick masonry do not comply with code-prescribed dimensions (i.e., they are not wide enough). The brick masonry also does not satisfy the codes' fastening, flashing, weep, and water resistance requirements because, *inter alia*, fasteners are improperly spaced; flashings do not extend fully; weeps are missing, improperly spaced, and/or clogged; and, air cavities are frequently filled with mortar.

Horton knew or should have known of these defects for many reasons, including its post-construction repair efforts at Rose Hill. (Compl., ¶ 25). Yet, Horton failed to disclose these defects to the Rose Hill homeowners both before and after the homeowners notified Horton of many of these problems. (Compl., ¶ 26); (Zitek Aff., ¶¶ 5-6). Not only did Horton fail to disclose its knowledge about these problems, but Horton also did not correct the problems and its various

repair attempts are failing or have failed. *Id.* As a result, Zitek brought this proposed class action against Horton. (Comp., pp. 1-14).

**B. Zitek’s Purchase Agreement and Deed**

Zitek executed the purchase agreement for her home on February 17, 2013. (Purchase Agreement, Ex. A, p. 8). Zitek’s agreement is a boilerplate contract that Horton offered to Zitek on a take-it-or-leave-it basis. The agreement contains an express arbitration provision in Paragraph 15 that twice references Horton’s Warranties<sup>2</sup> and Disclaimers in Paragraph 14:

**15. MANDATORY BINDING ARBITRATION. PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS CONTRACT AND/OR THE PROPERTY, INCLUDING BUT NOT LIMITED TO ANY DISPUTES REGARDING: (A) SELLER’S CONSTRUCTION AND DELIVERY OF THE HOME; (B) SELLER’S PERFORMANCE UNDER ANY PUNCH LIST OR INSPECTION AGREEMENT; AND (C) SELLER’S WARRANTY PURSUANT TO SECTION 14 ABOVE. THE ARBITRATION SHALL BE CONDUCTED IN ACCORDANCE WITH THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (THE “ACT”) AND SHALL TAKE PLACE IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED. THE PROCEEDING SHALL BE CONDUCTED PURSUANT TO THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE “AAA”), AND TO THE EXTENT POSSIBLE, UNDER RULES WHICH PROVIDE FOR AN EXPEDITED HEARING. IN THE EVENT OF A CONFLICT BETWEEN THE ACT AND THE RULES OF THE AAA, THE ACT SHALL CONTROL. THE FILING FEE FOR THE ARBITRATION SHALL BE PAID BY THE PARTY FILING THE ARBITRATION DEMAND, BUT THE ARBITRATOR SHALL HAVE THE RIGHT TO ASSESS OR ALLOCATE THE FILING FEES AND ANY OTHER COSTS OF THE ARBITRATION, INCLUDING REASONABLE ATTORNEY’S FEES, AS A PART OF THE ARBITRATOR’S FINAL ORDER. THE ARBITRATION SHALL BE BINDING AND FINAL, AND EITHER PARTY SHALL HAVE THE RIGHT TO SEEK JUDICIAL ENFORCEMENT OF THE ARBITRATION AWARD. NOTWITHSTANDING ANY OTHER PROVISION HEREIN, ANY DISPUTES ARISING UNDER THE STRUCTURAL WARRANTY PROVIDED TO PURCHASER BY THE NWP SHALL BE MEDIATED, ARBITRATED AND/OR JUDICIALLY**

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<sup>2</sup> These “Warranties” are Horton’s One Year Warranty and RWC’s Ten Year Warranty which are provided to homeowners after they sign their purchase agreement at closing.

**RESOLVED PURSUANT TO THE TERMS, CONDITIONS, PROCEDURES AND RULES OF THAT WARRANTY PROGRAM.**

(Ex. A, p. 5) (emphasis added). Paragraph 14 describes the Warranties, wrongfully disclaims implied warranties, and unconscionably attempts to relieve Horton of all liability for “monetary damages of any kind”:

**14. WARRANTIES AND DISCLAIMER.**

- a. NWP Warranty; Manufacturers' Warranties.** At Closing, Seller shall execute and deliver to Purchaser at no additional cost to Purchaser a structural warranty (the “Structural Warranty”) by and from Residential Warranty Corporation or such other national warranty provider as Seller may reasonably select (the "NWP"). The Structural Warranty will provide, at a minimum, a ten (10) year structural warranty for the residence located or to be located on the Property. Prior to or at Closing, Seller shall provide purchaser with a brochure or handbook from the NWP that states the terms of the Structural Warranty. . .
- b. Horton One-Year Warranty.** In addition, if within one year after the date of Closing any material feature of the construction of the home on the Property is found to be not in accordance with the requirements of this Agreement, then Seller shall correct such defect in construction after receipt of written request from Purchaser to do so. . .
- c. Disclaimer and Limitation on Seller's Liability.** THE WARRANTY MADE BY SELLER PURSUANT TO SUBSECTION b ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. . . AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR OBLIGATION TO PURCHASER OF ANY NATURE WHATSOEVER EXCEPT AS PROVIDED IN THIS SECTION 14 OF THIS AGREEMENT, IN SECTION 21 BELOW AND IN SELLER'S LIMITED WARRANTY DEED TO PURCHASER. SELLER SHALL NOT BE LIABLE FOR ANY REASON UNDER ANY CIRCUMSTANCES TO PURCHASER OR ANYONE CLAIMING THROUGH PURCHASER FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

(Ex. A, pp. 4-5) (emphasis added). Neither the contracts nor these paragraphs contain a survival clause, severability clause, or language that Horton's warranty disclaimers do not apply in certain jurisdictions. *Id.* Zitek's purchase agreement also does not contain these general provisions. (Ex. A).

Following her agreement, Zitek received her deed when she closed on July 25, 2013. (Zitek Deed, Ex. B). Zitek's deed does not contain an arbitration provision. (Ex. B).

### **C. Procedural History**

Zitek's Complaint was filed on September 25, 2019 and it asserts the following claims against Horton: negligence/gross negligence, breach of implied warranties, and unfair trade practices. (Compl., pp. 11-14). The following events occurred in the ten months between December 2019, when Horton learned of Zitek's Complaint, and October 2020, when Horton filed its Arbitration Motion, in the context of the pending Circuit **Court** action:

#### **1. Horton Requested Information and Delayed Inspections**

On December 11, 2019, Zitek sent Horton a right to cure notice about the Rose Hill homes. (2019 Notice, Ex. C). On January 3, 2020, three days after its right to inspect expired, Horton sent a letter indicating it would like to inspect the homes and requested, among other things: (1) a list of homeowners retained to date; (2) a list of issues at each home along with their location; (3) a list of the locations for the defects; and, (4) available expert reports. (1/3/20 Horton Letter, Ex. D).

On January 6, 2020, Zitek responded that Horton's inspections can take place the last week of January and addressed Horton's requests. (1/6/20 Zitek Letter, Ex. E). On January 8, 2020, Horton's counsel responded that the January dates would not work; and, asked for February inspection dates. (1/8/20 Horton Email, Ex. F).

On January 14, 2020, Horton's counsel asked for an indefinite extension to answer Zitek's Complaint (served on January 8<sup>th</sup>) and to inspect the homes "in lieu of" Horton filing a Motion to Stay. On January 16, 2020, Zitek's counsel agreed to Horton's "in lieu of" request. (1/16/20 Zitek Email, Ex. G).

On January 28, 2020, Zitek gave Horton the names and address of retained clients requested by Horton; proposed February 24<sup>th</sup>-27<sup>th</sup> inspection dates; and, Zitek and Zitek's counsel started to coordinate these inspections. (1/28/20 Zitek Letter, Ex. H). On February 12, 2020, Horton's Counsel informed Zitek's Counsel that February inspections are not moving forward because Horton needs even more information. (2/12/20 Horton Letter, Ex. I).

2. Horton Engaged the Court Multiple Times

On February 28, 2020, Horton filed a Motion to Stay under the Right to Cure Act seeking information even though Horton missed its deadline to ask for such information under the Act. Horton's Motion did not mention arbitration and Horton did not file a separate Arbitration Motion. On March 30, 2020, Zitek filed a Motion for Class Certification, and a month later, filed several exhibits supporting this Motion.

On or about May 14, 2020, the Court scheduled both parties' Motions to be heard on May 29, 2020. After receiving the scheduling notice, on May 19, 2020, Horton Moved to Continue Zitek's Class Certification Motion without first consulting Zitek's Counsel. On May 22, 2020, this Court denied Horton's Motion. On May 27, 2020, Horton filed a memo supporting its Stay Motion, as well as a memo and an Affidavit from a Horton Manager opposing class certification. On May 27, 2020, Horton also filed a separate Arbitration Motion.

At the May 29<sup>th</sup> hearing, the Court took the parties' Motions under advisement and encouraged the parties to come to an agreement. Over the course of the next several weeks, Horton

and Zitek negotiated a right to cure compliance plan and regularly updated the Court on their progress. The compliance plan was finalized on July 2, 2020 and approved by the Court on July 20, 2020. This same day, the Court also approved the parties' Consent Scheduling Order which scheduled mediation to occur on or before March 21, 2021.

Per the terms of the compliance plan, the parties were to withdraw their respective Motions. Plaintiff immediately withdrew her Class Certification Motion on July 21, 2020. Horton did not immediately withdraw its Arbitration Motion so the Court scheduled that Motion to be heard on August 3, 2020. Zitek's Counsel notified Horton's Counsel of this and Horton withdrew its Arbitration Motion on July 30, 2020 (Horton's Counsel then emailed the Court the day of the hearing to confirm that its Arbitration Motion was withdrawn).

### 3. Horton Inspected Nearly 50 Homes Then Filed its Arbitration Motion

In conjunction with the compliance plan, Horton and its experts inspected nearly 50 Rose Hill homes between June 22, 2020 and September 24, 2020. Zitek and Zitek's Counsel spent weeks coordinating and re-coordinating these inspections due to missed deadlines and other delays caused by Horton.<sup>3</sup> Plaintiff's Counsel then spent several more weeks forwarding and receiving cure offers and responses. The cure offers were transparently insincere, and practically all were rejected. After its last cure offer was rejected, Horton filed its Arbitration Motion on October 19, 2020.

## **IMPORTANT LEGAL POINTS**

### 1. **Arbitrability and Unconscionability**

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<sup>3</sup>For example, Horton failed to timely provide its inspection protocols or identify which homes it intended to inspect. *See, e.g.*, (Ex. G) (Zitek requesting Horton's inspection protocols; (Zitek 9/4/20 Letter, Ex. J) (Zitek noting Horton's repeated delay in providing information needed to schedule inspections).

Trial courts decide whether claims should be resolved through arbitration. *See, e.g., Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564, 569, n. 2 (2013) (noting questions of arbitrability are presumptively left for the court to decide); *Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) (“The question of arbitrability of a claim is an issue for the courts.”). This determination involves a two-step inquiry: (1) whether a valid arbitration agreement exists; and, (2) whether the specific dispute falls within the substantive scope of the arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007).

When deciding a motion to compel arbitration, the court is not to rule on the potential merits of the underlying claims. *AT & T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (citations omitted). Rather, the court should look to the state law that ordinarily governs the formation and construction of contracts.

In South Carolina, contract defenses such as fraud, duress and unconscionability apply to a court’s evaluation of the enforceability of an arbitration clause governed under either the SCUAA or the FAA. 9 U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon “such grounds as exist at law or in equity for the revocation of any contract.”); S.C. Code § 15-48-10(a) (containing similar language to that of the FAA). Thus, if this Court finds an arbitration clause unconscionable, the Court may refuse to enforce the clause or otherwise limit its application so as to avoid an unconscionable result. S.C. Code § 36-3-302(1).

The test for unconscionability is simply whether the arbitration clause creates a fair and impartial forum, or instead is used and intended to give one party an unfair advantage. *Simpson*, 373 S.C. at 25, 644 E.2d at 668-69.

## **2. Merger Doctrine**

The Doctrine of Merger (“Merger Doctrine”) provides that deeds supersede all prior agreements leading up to the execution of the deed:

The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed.

*Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 132-33 (Ct. App. 1984) quoting *Charleston & Western Carolina Railway Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957) (emphasis added). In other words, once parties execute a deed:

. . . [T]he written. . . agreement to convey is merged in the deed, the agreement to convey is discharged or is modified as indicated by the deed, the deed regulates the rights and liabilities of the parties, and evidence of [prior] agreement[s] between the parties is inadmissible to vary or contradict the terms of the deed.

*Charleston & Western*, 231 S.C. at 505, 99 S.E.2d at 193 (citations and quotations omitted); *Wilson*, 281 S.C. at 364, 315 S.E.2d at 133 (“A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract. . .”) (citations and quotations omitted).<sup>4</sup>

### 3. **Waiver**

The right to enforce an arbitration clause may be waived. *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992) (“A party may waive the right to arbitrate given by a contract.”); see also *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994) (“Waiver is the voluntary and intentional

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<sup>4</sup> See also *Yawkey v. Lowndes*, 150 S.C. 493, 148 S.E. 554, 562–563 (1929) (“[w]hatever may have been the plaintiff’s desires, as disclosed in his telegrams, it is certain that all the negotiations were merged in the deed”); *St. Philip’s Church v. Zion Presbyterian Church*, 23 S.C. 297, 315 (1885) (“The deed was absolute on its face and in its terms. No such conditions as those appearing in the lease were incorporated in the deed”).

relinquishment of a known right.”). In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985). “There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case.” *Hyload, Inc.*, 308 S.C. at 280, 417 S.E.2d at 624.

Generally, the factors our courts consider when determining if a party waived its right to compel arbitration are:

- (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration;
- (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and,
- (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

*Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (2007).

## **ARGUMENTS**

### **A. The Arbitration Provision is Unenforceable Under the Merger Doctrine**

This Court should deny Horton’s Arbitration Motion because it relies solely on the arbitration provision in Zitek’s purchase agreement which was not incorporated into Zitek’s deed.

In 2005 and 2011, two South Carolina Circuit Courts refused to enforce the arbitration provision in Horton’s purchase agreement because they found that the provisions in the purchase contract were extinguished by the deed:

Plaintiff asserts that because the only arbitration requirement is found in the contract of sale, and not the Deed. . . under the Doctrine of Merger, the arbitration clause contained in the contract is null and void.

South Carolina Law, like the general rule in other states, is clear that when there is a contract of sale and a subsequent deed, the subsequent deed becomes the contract. Accordingly, the Doctrine of Merger essentially means that the if the language

relied upon (in this case the Arbitration Clause) does not exist in the latter contract (the Deed), it is extinguished.

*Smith v. D.R. Horton*, Case No. 2010-CP-18-641 (S.C. Com. Pl.) (Judge Dickson Apr. 12, 2011 Order Denying Horton’s Arbitration Motion) (Dorchester County) (Ex. K) (emphasis added);<sup>5</sup> *Upchurch v. D.R. Horton*, 2005 WL 5621497, at \*3 (S.C. Com. Plea) (Judge Barber Sept. 28, 2005 Order Denying Horton’s Arbitration Motion) (Richland County) (Ex. L) (refusing to enforce arbitration because the “arbitration clause did not survive closing”); *see also Wilson*, 281 S.C. at 364, 315 S.E.2d at 133 (“A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract. . .”).

Like *Smith* and *Upchurch*, Zitek’s deed was executed after Zitek’s purchase agreement. (Ex. A, p. 8) (Zitek purchase agreement executed on February 17, 2013); (Ex. B, p. 2) (Zitek deed executed on July 25, 2013). The antecedent Paragraph 15 of Zitek’s purchase agreement – even if it had any validity –is therefore extinguished and unenforceable under the Merger Doctrine.

**B. Paragraphs 14 and 15 are Unenforceable Under *Smith***

This Court should also deny Horton’s Arbitration Motion under *Smith* in which our Supreme Court found an arbitration provision, similar to Zitek’s, unconscionable. *Smith v. D.R. Horton*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (“[U]nconscionability 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. . .”).

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<sup>5</sup> *Smith* was appealed and the Supreme Court ultimately affirmed the lower court’s declination of arbitration based on unconscionability grounds. Neither the Court of Appeals nor the Supreme Court addressed merger.

Like *Smith*, there is no evidence that Zitek “enjoyed a substantially stronger bargaining position against Horton than the average homebuyer” or that Zitek “was represented by independent counsel.” *Id.* Zitek is an unsophisticated purchaser whereas Horton is a sophisticated developer that has constructed nearly 800,000 homes throughout the United States. *Id.*; *see also* (Horton Website, Ex. M); (Zitek Aff., Ex. N); *Mirmow v. Great Southern Homes, Inc.*, 2019 WL 7611604, \*2 (S.C. Com. Pl.) (Judge Kessley Dec. 9, 2019 Order Denying Arbitration Motion) (Lexington County) (Ex. O). Thus, Zitek is “not a substantial business concern of Horton” because Zitek does “not comprise a large portion of Horton’s clientele.” *Id.* As such, this Court should find Zitek “lacked a meaningful choice in her ability to negotiate the arbitration clause”. *Id.*

Also, like *Smith*, Paragraph 15 references Paragraph 14 (which describes the Warranties and includes Horton’s disclaimers of any and all implied warranties and monetary damages of any kind), “intertwining” these paragraphs “so as to constitute a single arbitration provision.” *Id.* at 48, 790 S.E.2d at 4 (emphasis added); *see also* (Ex. P, \*3-4) (finding the arbitration agreement in limited warranty unconscionable based on “related” warranty and liability disclaimers).

The only pertinent differences between *Smith* and this case is that Horton relocated (1) its express arbitration clause from Paragraph 14(g) to Paragraph 15; and, (2) its disclaimers and limitations from Paragraph 14(i) to Paragraph 14(c). Horton relocated these provisions to try to get around *Smith*’s holding and to avail itself of *Prima Paint*’s holding. However, the relocation of these provisions does not negate *Smith*’s applicability. The *Smith* Court found that *Prima Paint* does not preclude courts from considering provisions that are “referenced by” an express arbitration provision.<sup>6</sup>

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<sup>6</sup> Rather, *Prima Paint* stands for the proposition that a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause.

The below comparison of Smith’s paragraphs to Zitek’s paragraphs shows that the references and disclaimers considered by the *Smith* Court are the same as here:

<p>Zitek’s Paragraph 15:</p> <p>Purchaser and Seller shall submit to binding arbitration any and all disputes which may arise between them regarding this contract and/or the property, including but not limited to any disputes regarding: (a) Seller’s construction and delivery of the home; (b) Seller’s performance under any Punch List or Inspection Agreement; and (c) <b><u>Seller’s warranty pursuant to Section 14 above. . . Any disputes arising <u>under the [RWC] Warranty. . .shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures and rules of that Warranty. . .</u></u></b></p>	<p>Smith’s Paragraph 14(g):</p> <p>Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller’s construction of the home; (2) Seller’s performance under any Punch List or Inspection Agreement; (3) <b><u>Seller’s performance under any warranty contained in this Agreement. . .If the arbitration arises out of a claim arising <u>under the RWC Warranty, the rules, terms and conditions in the RWC Warranty. . .control.</u></u></b></p>
<p>Zitek’s Paragraph 14(c):</p> <p>The warranty made by Seller pursuant to subsection b above <b><u>is to the exclusion</u></b> of all other warranties, expressed or implied, and <b><u>Seller hereby disclaims any and all such other warranties,</u></b> express or implied,</p>	<p>Smith’s Paragraph 14(i):</p> <p><b><u>Except for</u></b> the RWC Warranty. . .Title Warranties, and. . .any warranties imposed by</p>

*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967). So long as there is a challenge to the arbitration provision, like here, then courts can decide the “arbitrability” issue and, in doing so, can also consider both the arbitration provision and its affiliated provisions. As Justice Toal aptly explained in the oral arguments for *Smith*, *Prima Paint* “simply says you have to look at the arbitration provision” and “does not stand for the proposition that one can cherry pick out” certain language of a provision one drafted and which includes express references to other provisions. And, since *Prima Paint*, our courts have looked beyond arbitration provisions “themselves” to assess their enforceability. *See, e.g., Smith, supra; Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 126 n.3, 713 S.E.2d 799, 804 n.3 (Ct. App. 2011) (“ . . .Appellants contended this court is bound to reviewing the terms of the arbitration clause itself in determining its validity. We disagree. The South Carolina Supreme Court has looked outside the language of the arbitration clause to determine its enforceability.”) (emphasis added), *partially vacated on other grounds by, Davis v. K.B. Home of S.C. Inc.*, 292 S.C. 634, 636, 842 S.E.2d 653, 654 (2014) (“We. . .vacate part II of the Court of Appeals’ opinion addressing the issue of waiver”); *see also Brady v. Brady*, 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952) (“[I]t is proper to read together the different provisions therein dealing with the same subject matter. . .”).

<p>including but not limited to any warranty of <b>habitability</b>, merchantability or fitness for a particular purpose. . . <b><u>Seller shall not be liable for any reason under any circumstances to purchaser or anyone claiming through purchaser for monetary damages of any kind</u></b>, including secondary, consequential, punitive, general, special or indirect damages.</p>	<p>law, which cannot be disclaimed<sup>7</sup>, Seller makes no other warranty of any kind. <b><u>All other such warranties are hereby disclaimed.</u></b> . . Seller makes no warranty as to merchantability or fitness for a particular purpose, either express or implied. . . <b><u>Seller shall not be liable for monetary damages of any kind</u></b>, including secondary, consequential, punitive, general, special or indirect damages.</p>
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This Court cannot discount *Smith*'s applicability when this case involves the same disclaimers not physically "within" the same arbitration provision.

#### **D. Zitek's Purchase Agreement Does Not Contain a Severability Clause**

Another critical factor distinguishing *Prima Paint* from this case is the lack of a severability clause. In *Smith*, our Supreme Court found that the parties did not intend for a court to sever any unconscionable terms from the arbitration agreement because the agreement did not contain a severability clause. *Smith v. D.R. Horton*, 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013), *aff'd*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) ("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly Horton's attempt to waive any seller liability for 'monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.'") (emphasis added); *see also Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (recognizing that "severability is not always an appropriate remedy for an unconscionable provision. . . '[i]f illegality pervades the agreement such

<sup>7</sup> Notably, Zitek's Paragraph 14(c) does not contain this language and purports to disclaim a warranty imposed by law (i.e., the implied warranty of habitability) making this paragraph even more egregious than *Smith*'s Paragraph 14(i).

that only a disintegrated fragment would remain after hacking away the unenforceable parts. . . .” (citations omitted).

Like *Smith*, neither Paragraph 14 nor 15 of Zitek’s agreement (nor the body of the contract) contain a severability clause. As such, this Court can rightfully consider and reject Zitek’s arbitration “agreement” for the same reasons articulated by the *Smith* Court.

**D. Horton Waived its Right to Compel Arbitration**

This Court should also deny Horton’s Arbitration Motion because Horton has actively engaged in this litigation, in this forum, for over a year, all the while causing the Rose Hill homeowners to incur attorneys’ fees, expert fees, and delay. *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251 (discussing the three waiver factors).

**1. The Waiver Factors Weigh Against Horton**

**a. Almost a Year Has Passed**

First, a substantial length of time has passed in this case. Horton waited ten months after Zitek filed her Complaint before it decided to pursue arbitration.

**b. Horton Repeatedly Engaged This Court**

Second, Horton has availed itself of this Court’s assistance on several occasions. Horton first engaged the Court when it filed a Motion to Stay that this Court heard on May 29<sup>th</sup>. Horton next engaged the Court when it moved to continue Zitek’s Class Certification Motion which was denied on May 22, 2020. Zitek responded to both these motions, incurring attorneys’ fees and delay that would not have incurred had Horton moved to compel arbitration at its first opportunity.

Horton engaged the Court for a third time when it opposed Zitek’s Class Certification Motion. Two days before the hearing, Horton filed an Affidavit from a Horton Manager, Shawn Kruglewicz, that showed Horton reviewed its own files and pointed to purported “differences” that

this review revealed. For instance, Kruglewicz provided a list of home plans and noted he “reviewed” Horton’s subcontractor records, warranty logs, and other documents relating to the Rose Hill homes inspected by Zitek’s expert, Dr. Whitlock. (Kruglewicz Aff., Ex. P). Dr. Whitlock submitted a Reply Affidavit based on this new information, causing Zitek to incur additional expert fees on top of attorneys’ fees.

Horton engaged the Court for a fourth time when it filed its original Arbitration Motion on May 27, 2020 that was also discussed during the May 29<sup>th</sup> motion hearing and which Zitek’s Counsel spent time preparing opposing arguments.

Horton engaged the Court for the fifth and sixth time by consenting to the compliance plan and scheduling order that this Court approved on July 20, 2020. Pursuant to the terms of the scheduling order, mediation is scheduled to occur in this case in less than four months – on or before March 21, 2021.

Horton engaged the Court for the seventh time in withdrawing its Arbitration Motion on July 30, 2020 and contacting the Court to confirm its withdrawal the morning of the scheduled hearing.

**c. Horton Engaged in Discovery and Took Advantage of The Representative Right to Cure Compliance Plan**

Third, Horton has engaged in discovery through its multiple requests for additional information relating to these homes and its inspections of nearly 50 of these homes. While not a “formal” discovery exchange and done in the right to cure context, Horton received the benefit of defect lists, expert affidavits, and many days in and around these homes in the past year.

More importantly, the representative right to cure process that Horton chose this **Court** to oversee is entirely different than the process that would have been required in arbitration. If

conducted in arbitration, the arbitrator would have had to first decide whether Horton’s arbitration agreement allowed for class arbitration. (AAA Class Arb. Rule 3) (“Upon appointment, the arbitrator shall determine as a threshold matter. . .whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class. . .”) (emphasis added). Assuming the arbitrator decided that class arbitration was not allowed, there would have been no need for a “representative” compliance plan, the month-long delays associated with this plan, or the tens of thousands of dollars that Zitek incurred in attorneys’ and expert fees carrying out this plan.<sup>8</sup>

## 2. Horton Knew of Zitek’s Waiver Defense

Additionally, Horton has been on notice of Zitek’s waiver defense for months. In *Johnson*, our Supreme Court found this fact persuasive in finding that defendant waived its right to compel arbitration:

[Defendant] contends that the delay and expenses are insignificant because [Plaintiff] was on notice that it intended to compel arbitration in the future. However, we note that similarly, after [Plaintiff] filed her motion to strike, [Defendant] **was on notice that [Plaintiff] intended to pursue a defense of waiver, and that further action before filing a motion to compel would be costly and dilatory.** See *Evans*, 352 S.C. at 551, 575 S.E.2d at 77 (noting that the party seeking to compel arbitration has the burden to halt discovery and seek the court’s protection from further discovery pursuant to Rule 26(c)(1), SCRCP, and stating that “[defendant’s] prolongation of discovery necessitated [plaintiff’s] pursuit of discovery, thereby forcing her to incur costs she would not have incurred in arbitration. Thus, we find evidence that [defendant’s] continuation of discovery, **rather than seeking arbitration in a timelier manner,** prejudiced Evans by forcing her to incur discovery costs.”). **Nonetheless, [Defendant] waited another eight months to file its motion to compel,** in the meantime conducting its own discovery **and appearing in court multiple times.**

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<sup>8</sup> Notably, Plaintiff’s Counsel had approximately 35 Rose Hill clients when Horton filed its Right to Cure Motion on February 28, 2020. Had arbitration been compelled around this time, and the arbitrator found against class arbitration, Zitek would have only incurred fees for 35 inspections versus the 47 inspections performed under the compliance plan. Zitek would also not have incurred the fees associated with mailing notices and trying to schedule “non-client” inspections.

*Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 514, 788 S.E.2d 216, 219 (2016) (emphasis added).<sup>9</sup>

As in *Johnson*, Horton knew Zitek intended to assert a waiver defense. Horton could have moved to compel arbitration before it moved to stay the case for right to cure compliance; before it moved to continue class certification; before it opposed class certification; before it entered the compliance plan and inspected nearly 50 homes; before it entered the consent scheduling order for mediation to occur within the next four months; and, before Zitek sent Horton formal discovery requests. Horton elected not to, and by doing so, prejudiced all Rose Hill homeowners.

**E. Alternatively, the SCUAA Applies**

If this Court enforces arbitration despite the foregoing, the Court should find that the SCUAA – not the FAA – governs.

The parties to a contract are free to agree that state arbitration laws, like the SCUAA, will apply and this agreement shall be enforceable even if interstate commerce is involved. *See, e.g., Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 591, 553 S.E.2d 110, 116 (2001) (“Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA.”); *Dowling v. Home Buyers Warranty Corp.*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993) (“[A]rbitration is strictly a matter of contract and. . .the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate.”) (citations omitted).

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<sup>9</sup> Horton did not separately file a Rule 26 Motion seeking to halt discovery when it filed either of its Arbitration Motions. Rather, Horton waited until November 13, 2020, **after** it received Zitek’s discovery requests, to file a Rule 26 Motion

Here, the first page of Zitek’s purchase agreement states in bold, underlined, and all capitals that:

**NOTE: THIS CONTRACT PROVIDES FOR MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, SECTIONS 15-48-10 ET SEQ., SOUTH CAROLINA CODE OF LAWS (1976, AS AMENDED)**

(Ex. A, p. 1). Paragraph 15 also states that “the Arbitration shall be conducted in accordance with the South Carolina Uniform Arbitration Act (the “Act”) and shall take place in the county in which the property is located.” (Ex. A, p. 8). As such, the SCUAA clearly governs.

### **CONCLUSION**

In sum, this Court should deny Horton’s Arbitration Motion, and in doing so, the Court should find:

1. The arbitration provision in Horton’s purchase agreement is unenforceable under the Merger Doctrine because this provision was intended to, and did, merge with homeowner deeds;
2. The arbitration provision in Horton’s purchase agreement is unconscionable under *Smith* because the purchase agreement is an adhesion contract and its arbitration provision contains similar references to the same oppressive terms that “intertwine” these related provisions; and,
3. Horton waived its right to compel arbitration by repeatedly engaging this Court, taking advantage of the representative compliance plan, and prolonging discovery for over a year, forcing the Rose Hill homeowners to incur thousands in fees they would not have incurred had Horton sought arbitration at its first opportunity.

Alternatively, this Court should find that the SCUAA applies.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

/s/ Dabny Lynn

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*Attorneys for Plaintiff*

November 23, 2020  
Mount Pleasant, South Carolina

# EXHIBIT A



HOME PURCHASE AGREEMENT

NOTE: THIS CONTRACT PROVIDES FOR MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, SECTIONS 15-48-10 ET SEQ., SOUTH CAROLINA CODE OF LAWS (1976, AS AMENDED)

In consideration of the reciprocal covenants stated herein, D.R. Horton, Inc. ("Seller") and Paul Zitek and Natalie Zitek (collectively, "Purchaser") agree as follows:

1. CONVEYANCE. Seller shall sell to Purchaser and Purchaser shall purchase from Seller all that parcel of land located in Anderson County, South Carolina, with a street address of 104 Sturbridge Court, more particularly described as Lot 0266, Rose Hill 90' Subdivision (the "Lot"), together with all improvements thereon and all appurtenances thereto, but less and except all rights, titles and interests to all oil, gas, water, petroleum, natural gas, coal, lignite and other minerals and hydrocarbons, and all geothermal energy and resources, located in whole or in part on, in or under the Lot and / or that may be produced or extracted from the Lot. The interests to be conveyed pursuant to this Agreement are hereinafter collectively referred to as the "Property."

2. PURCHASE PRICE AND METHOD OF PAYMENT. Subject to adjustment as may be provided herein, the Purchase Price for the Property shall be: Two hundred eighty-eight thousand one hundred forty-four and 00/100 Dollars (\$288,144.00) to be paid in cash as provided herein. A breakdown of the Purchase Price as of the Effective Date (defined in Section 19 below) is set forth in Addendum 2 attached hereto and incorporated herein. The terms of the subsection (a or b) checked below shall also apply.

[ ] a. No Financing Contingency.

Purchaser shall pay to Seller the Purchase Price in cash at Closing. Within ten (10) business days of the Effective Date, Purchaser shall provide documentation to Seller that will verify to Seller's reasonable satisfaction that Purchaser has the available funds necessary to purchase the Property according to the terms of this Agreement. If Purchaser does not provide such documentation to Seller within that time period, then Seller may at its option terminate this Agreement by providing written notice to Purchaser of termination, in which event Seller shall retain the Earnest Money and neither party shall have any further obligation or liability to the other hereunder.

[x] b. Financing Contingency

(1) Purchaser shall use its best efforts to obtain a loan in the principal amount of no more than 100% of the Purchase Price, reduced to the next lowest hundred dollars, (the "Loan") to be secured by a first priority mortgage on the Property. The proceeds of the Loan, together with the balance of the Purchase Price, shall be paid to Seller by Purchaser in cash or other immediately available funds at Closing.

(2) Purchaser shall apply for the Loan within five (5) days of the Effective Date. Failure by Purchaser to apply for the Loan within that time-period or to pursue approval of the Loan diligently thereafter shall constitute a material breach of this Agreement by Purchaser. Within fourteen (14) days of the Effective Date, Purchaser shall provide Seller with a letter from Purchaser's lender (the "Approval Letter") confirming that the Loan has been approved. If Purchaser fails to provide the Approval Letter to Seller within that period, then Seller may terminate this Agreement upon written notice to Purchaser, in which event the Earnest Money shall be refunded to Purchaser if Purchaser is not in breach of this Agreement, and thereafter neither party shall have any further liability or obligation to the other hereunder.

(3) Purchaser acknowledges that there are many different loan programs available from many different lenders. If the loan approval obtained by Purchaser contains any contingencies, Seller may require the satisfaction of those contingencies within the time period specified for obtaining the Approval Letter and terminate this Agreement if those contingencies are not waived or satisfied; in which event, the Earnest Money shall be refunded to Purchaser, and neither party shall thereafter have any further liability or obligation to the other hereunder.

(4) Purchaser understands and acknowledges that loan/credit approvals are valid for up to one hundred twenty (120) days. Purchaser shall update loan/credit approval documentation as needed in order to maintain current loan approval up until the date of closing. Purchaser agrees to execute all papers and perform all other actions necessary to obtain the Loan and to accept the Loan if approved by lender. Purchaser shall, in addition to the payment of principal and interest upon the Loan, pay at Closing such amounts as may be required by the lender to establish or maintain an escrow for insurance, property taxes or private mortgage insurance.

[Handwritten initials]

(Purchaser's Initials: [Handwritten initials])

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(5) If Purchaser applies and obtains a commitment for an FHA insured loan, then notwithstanding any other provision of this Agreement, Purchaser shall not be obligated to complete the purchase of the Property or to incur any penalty by forfeiture of earnest money deposits or otherwise unless Purchaser has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Department of Veterans Affairs or a Direct Endorsement lender setting forth the appraised value of the property of not less than the full final purchase price. The Purchaser shall have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development ("HUD") will insure. HUD does not warrant the value or the condition of the property. Purchaser should satisfy himself/herself that the price and condition of the property are acceptable.

(6) If Purchaser applies and obtains a commitment for a VA guaranteed loan, then notwithstanding any other provision of this Agreement, Purchaser shall not incur any penalty for forfeiture of earnest money or otherwise or be obligated to complete the purchase of the Property if the contract purchase price or cost exceeds the reasonable value of the Property established by the Department of Veterans Affairs. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of this contract without regard to the amount of the reasonable value established by the Department of Veterans Affairs.

**3. FINANCIAL INFORMATION.** Purchaser acknowledges that Purchaser's financial situation may affect Purchaser's ability to obtain a loan and/or purchase this Property. Purchaser further acknowledges that it is important for the Seller to know Purchaser's financial situation and Purchaser's ability to obtain financing. Purchaser hereby grants permission for the Seller to contact any mortgage company or financial institution to which Purchaser may apply for a loan and to discuss Purchaser's financial situation and prospects of obtaining a loan. Purchaser hereby authorizes any mortgage company or financial institution from which Purchaser may seek a loan to discuss Purchaser's financial status with the Seller and to provide the Seller with any documentation or information regarding said financial status, including but not limited to Purchaser's credit score.

#### 4. EARNEST MONEY.

a. **Initial Deposit.** Purchaser has paid to Seller \$3,500.00 by check #3410 made payable to D. R. Horton, Inc., receipt of which is acknowledged by Seller (hereinafter, the "Initial Deposit"). The Initial Deposit shall be deposited in Seller's trust account upon acceptance of this Agreement by Seller.

b. **Additional Deposit.** On or before , Purchaser shall pay to Seller an Additional Deposit in the amount of , to be held in Seller's trust account. Failure by Purchaser to pay the Additional Deposit by shall constitute a material breach of this Agreement by Purchaser.

c. **Disbursement.** The Initial Deposit and the Additional Deposit are hereinafter referred to as the "Earnest Money," both individually and collectively. The Earnest Money shall be retained by Seller except as otherwise expressly stated in this Agreement. At Closing, the Earnest Money shall be credited to Purchaser against the Purchase Price; otherwise, the Earnest Money shall be disbursed as provided herein. If any dispute arises between Purchaser and Seller as to the final disposition of all or part of the Earnest Money, Seller may, but shall not be required to, interplead all or any disputed part of the Earnest Money into a court of competent jurisdiction. If Seller interpleads the Earnest Money into a court, Seller shall be entitled to recover the costs of such interpleader, including reasonable attorney's fees incurred in connection with the interpleader, from the Earnest Money.

**5. SURVEY.** At Closing, Seller shall provide Purchaser with a plat of survey of the Lot performed by an independent, licensed surveyor or engineer, showing all improvements located thereon as of the date of the survey. The plat of survey shall be suitable for use by Purchaser's closing attorney to obtain title insurance for the Property without exception for matters that would be shown or revealed by a current survey of the Lot. At Closing, Purchaser shall reimburse Seller for the cost of the survey and pay to Seller a reasonable fee, not to exceed Three Hundred Fifty Dollars (\$350.00), for obtaining and providing the survey. Seller makes no warranty or representation whatsoever regarding the quality, accuracy or reliability of the survey. Seller makes no warranty or representation whatsoever regarding any matter that would be shown or revealed by an accurate survey of the Lot. Purchaser acknowledges that the Property  is  is not located in a one hundred year flood plain as defined by HUD.

**6. WARRANTY OF TITLE.** Seller shall convey insurable fee simple title of the Property to Purchaser at Closing by general or limited warranty deed, subject to: (a) zoning ordinances affecting the Property; (b) utility, drainage and other easements of record upon which the residence does not encroach; (c) subdivision covenants, conditions and restrictions; (d) all matters shown on the final plat for the subdivision where the Property is located; (e) a prior conveyance of all rights, titles and interests to all oil, gas, water, petroleum, natural gas, coal, lignite and other minerals and hydrocarbons, and all geothermal energy and resources, located in whole or in part on, in or under the Lot and/or that may be produced or extracted from the Lot; and (f) any matters that would be shown or revealed by a current survey of the Lot. "Insurable title" shall mean title which a title insurance company licensed to do business in South Carolina will insure at its regular rates, subject only to its standard exceptions and those exceptions listed in subsections (a) through (e) above.

**7. TITLE EXAMINATION.** Purchaser shall have until ten (10) days prior to the Closing Date to examine title to the Property and to furnish Seller with a written statement of any exceptions to insurable title. If Purchaser does not serve Seller with notice of exception to insurable title prior to that date, Purchaser shall have waived any objection to title to the Property as it existed as of the Effective Date. If Purchaser does serve such notice on Seller prior to that date, the notice shall specify and itemize the exceptions to insurable title. If Seller does not remove any exceptions to insurable title within a reasonable time, Purchaser shall have the right to terminate this Agreement and to receive a refund of the Earnest Money and any Option Money paid to Seller. Under no circumstances shall Seller be obligated or required to remove or cure any exception to title to the Property that is not a valid exception to insurable title as defined in Section 6 above.

**8. DESTRUCTION.** If the home built on the Lot is either totally destroyed or substantially damaged (as determined by Seller in its sole discretion) before Closing, either party may terminate this Agreement by written notice to the other within ten (10) days of the date of such destruction. After Closing, all risk of loss to the Property shall be upon Purchaser.

**9. INSPECTION.**

**a. Procedure** Prior to Closing, Seller shall have the right to deny access to the Lot to any person at any time, as Seller determines in its sole discretion. However, Purchaser or a professional home inspector contracted by Purchaser shall have the right to enter upon the Property at reasonable times during normal business hours for the purpose of inspecting, examining, testing and surveying the Property, solely at Purchaser's expense, provided that any such inspection must meet the following requirements and conditions:

(1) Inspections by Purchaser:

(a) All Inspections by Purchaser must be scheduled through the Community Construction Superintendent. These inspections must be scheduled at least seven (7) days in advance, must take place during normal working hours (Mon. – Fri. 8:00AM to 4:00PM) and must be in accordance with the Community Construction Superintendent's production schedule.

(b) Seller or its appointed representative shall have the right to accompany Purchaser during the inspection.

(2) Inspections by an independent professional home inspector:

(a) All Inspections by a professional home inspector must be scheduled through the Community Construction Superintendent. These inspections must be scheduled at least seven (7) days in advance, must take place during normal working hours (Mon. – Fri. 8:00AM to 4:00PM) and must be in accordance with the Community Construction Superintendent's production schedule. IF AN INSPECTOR DOES NOT HAVE AN APPOINTMENT ONE WEEK PRIOR TO THE PROPOSED INSPECTION, THE INSPECTOR WILL NOT BE ALLOWED TO PERFORM THE INSPECTION AND WILL BE INSTRUCTED TO RESCHEDULE. SELLER WILL NOT DELAY CONSTRUCTION OR CLOSING TO ACCOMMODATE INSPECTION APPOINTMENTS.

(b) Seller or its appointed representative shall accompany the home inspector during the inspection.

(c) The home inspector must be licensed to do business by the State of South Carolina and must furnish to Seller a copy of the home inspector's State License Certificate prior to the inspection.

(d) Prior to the inspection, the home inspector must furnish Seller with proof that the home inspector has workman's compensation insurance, if applicable, and a \$300,000.00 General Liability Insurance Policy which names Seller as an additional insured.

Failure by Purchaser to follow the procedures set forth in this subsection shall constitute a material breach of this Agreement. Unauthorized entry onto the Lot by Purchaser, its agents or contractors shall constitute a material breach of this Agreement.

**b. Purchaser's Indemnity.** Purchaser assumes all responsibility for the acts of Purchaser, Purchaser's agents, contractors or representatives in exercising Purchaser's rights under this Section, and shall indemnify and hold Seller harmless from any loss or expense Seller may suffer as a result of any claim or damage which arises directly or indirectly out of Purchaser's exercise of its rights under this Section. Notwithstanding any other provision herein, Purchaser's indemnity of Seller pursuant to this Section shall survive Closing and the termination of this Agreement for any reason.

**c. Inspection Results.** In the event any inspection by Purchaser or its agents or contractors reveals a purported defect in the Property, Purchaser shall provide Seller with written notice of the claim of defect and, if a professional home inspection was performed, a true and complete copy of any report produced by the home inspector. If Seller determines the claim of defect is valid, Seller shall correct or repair the defect. If Seller determines the claim of defect is not valid, Seller shall notify the Purchaser of that determination within thirty (30) days of receipt of the written notice of claim of defect. Notwithstanding any other provision herein, Seller shall not be required to correct or repair any defect in construction that does not constitute a violation of: (1) the building code of the governing jurisdiction in which the Property is located, or (2) the building guidelines and standards of the provider of the Structural Warranty pursuant to subsection a of Section 14 below.

**10. REAL ESTATE BROKER AND COMMISSION.** In negotiating this Agreement, Seller has acted as its own real estate broker. Purchaser acknowledges that Seller's sales agents represent Seller only, and do not represent Purchaser. Purchaser represents to Seller that Purchaser has not employed any real estate broker, agent or finder in connection with this Agreement, other than Candace Jordan, an agent of Keller Williams Realty Western Upstate ("Co-Broker"), who represents Purchaser. Purchaser shall indemnify and hold Seller harmless from and against any and all liabilities, losses, costs, damages and expenses (including attorneys' fees and expenses and costs of litigation) that Seller may suffer or incur because of any claim by any broker, agent or finder, whether or not meritorious, for any compensation with regard to this transaction arising out of any acts or contracts of Purchaser, other than the Co-Broker named above. Notwithstanding any other provision herein, the provisions of this Section shall survive Closing or termination of this Agreement for any reason. Purchaser acknowledges receipt of a copy of the Agency Disclosure Brochure.

**11. NO RELIANCE.** Purchaser acknowledges that it has not relied upon the advice or representations, if any, of Seller, Broker or Seller's salespersons or other agents with regard to the legal and tax consequences of this Agreement or the terms and conditions of any proposed financing of the purchase of the Property. Purchaser acknowledges that if such matters are of concern to Purchaser, Purchaser must obtain independent, professional advice regarding them.

**12. WOOD INFESTATION REPORT.** At the time of Closing, Seller shall provide Purchaser with a letter or a soil treatment report from a pest-control company licensed in South Carolina certifying that the Lot has been treated within one (1) year of the date of Closing for subterranean termite infestation. If required by Purchaser's lender, Purchaser may obtain at Purchaser's expense a South Carolina Wood Infestation Report performed by a pest-inspection company licensed in South Carolina.

**13. HAZARDOUS SUBSTANCES.** Purchaser acknowledges that Seller makes no representation or warranty with respect to the presence or absence of toxic waste, radon, hazardous materials or other undesirable substances on the Property. SELLER HEREBY DISCLAIMS ANY LIABILITY OR RESPONSIBILITY FOR THE PRESENCE OF ANY SUCH SUBSTANCES IN, ON, UNDER OR ABOUT THE PROPERTY.

**14. WARRANTIES AND DISCLAIMER.**

a. **NWP Warranty; Manufacturers' Warranties.** At Closing, Seller shall execute and deliver to Purchaser at no additional cost to Purchaser a structural warranty (the "Structural Warranty") by and from Residential Warranty Corporation or such other national warranty provider as Seller may reasonably select (the "NWP"). The Structural Warranty will provide, at a minimum, a ten (10) year structural warranty for the residence located or to be located on the Property. Prior to or at Closing, Seller shall provide purchaser with a brochure or handbook from the NWP that states the terms of the Structural Warranty. Also, at Closing Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the home built on the Property.

b. **Horton One-Year Warranty.** In addition, if within one year after the date of Closing any material feature of the construction of the home on the Property is found to be not in accordance with the requirements of this Agreement, then Seller shall correct such defect in construction after receipt of written request from Purchaser to do so, unless Purchaser has previously accepted or approved such defect or condition in writing. Seller shall correct such defects either: (i) approximately thirty (30) days after Closing, or (ii) approximately eleven (11) months after closing. Oral or email requests to Seller's staff are not acceptable. If Purchaser fails to notify Seller of the defect within the 1-year warranty period, or if Purchaser does not allow Seller any and all access to the Property needed to correct the defect during reasonable business hours, then Purchaser shall be deemed to have waived any claim against Seller for failure to correct such defect or condition. Notwithstanding any other provision herein, all of Seller's obligations and responsibilities pursuant to this subsection shall automatically expire one year from the date of Closing. Also, the following matters are excluded from Seller's Warranty:

- (1) Landscaping, including trees, shrubs, grass and flowers are not covered by any warranty.
- (2) Grading and drainage are not covered by any warranty, nor will they be maintained or modified by Seller after closing in any way whatsoever UNLESS the grading or drainage is found to be in violation of the applicable provision of the South Carolina Residential Construction Standards. Purchaser's closing of the sale constitutes an acceptance of the existing drainage and erosion controls of the Property, except for matters noted on a Punch List as provided in Section 21 below.
- (3) As of the date and time of the Closing, Seller shall have no further responsibility for soil erosion, soil conditions or the growth or death of grass, trees or shrubbery. Seller shall not be liable for trees or shrubs, or damage or destruction to same. Seller makes no warranty whatsoever as to the type, location or amount of trees which will exist on the Property after construction. Seller will plant grass seed or install sod, as the case may be, in certain locations at Seller's discretion; however, as part of its construction many areas will be left in their natural state and will not be landscaped in any way. Because the growth of grass seed and the health of sod are dependent on Purchaser's care and maintenance, Seller makes no warranty regarding the presence, absence, growth or death of grass. Because prevention of erosion is dependent on Purchaser's care and maintenance of the grass and sod, Seller makes no warranty regarding erosion.

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(4) Seller shall not be responsible for the correction of any leakage or seepage caused by: (a) damaged water pipes or mains, (b) alteration of the landscaping by a party other than Seller (specifically including, without limitation, any changes which cause water to flow toward the dwelling), or (c) prolonged direction of water against the outside foundation wall from a spigot, sprinkler, hose or improperly maintained gutters or downspouts.

(5) Seller will not correct minor cosmetic defect after Closing unless the defect is listed on the Punch List prior to Closing. Unless a defect is noted on the Punch List, Seller does not warrant the installation or the quality of any carpet or flooring product.

c. **Disclaimer and Limitation on Seller's Liability.** THE WARRANTY MADE BY SELLER PURSUANT TO SUBSECTION b ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IN ADDITION, SELLER MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER REGARDING THE PAST, PRESENT OR FUTURE CONDITION OR USE OF ANY LANDS OR AREAS SURROUNDING THE PROPERTY OR IN THE VICINITY OF THE PROPERTY. AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR OBLIGATION TO PURCHASER OF ANY NATURE WHATSOEVER EXCEPT AS PROVIDED IN THIS SECTION 14 OF THIS AGREEMENT, IN SECTION 21 BELOW AND IN SELLER'S LIMITED WARRANTY DEED TO PURCHASER. SELLER SHALL NOT BE LIABLE FOR ANY REASON UNDER ANY CIRCUMSTANCES TO PURCHSER OR ANYONE CLAIMING THROUGH PURCHASER FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

**15. MANDATORY BINDING ARBITRATION.** PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS CONTRACT AND/OR THE PROPERTY, INCLUDING BUT NOT LIMITED TO ANY DISPUTES REGARDING: (A) SELLER'S CONSTRUCTION AND DELIVERY OF THE HOME; (B) SELLER'S PERFORMANCE UNDER ANY PUNCH LIST OR INSPECTION AGREEMENT; AND (C) SELLER'S WARRANTY PURSUANT TO SECTION 14 ABOVE. THE ARBITRATION SHALL BE CONDUCTED IN ACCORDANCE WITH THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (THE "ACT"), AND SHALL TAKE PLACE IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED. THE PROCEEDING SHALL BE CONDUCTED PURSUANT TO THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE "AAA"), AND TO THE EXTENT POSSIBLE, UNDER RULES WHICH PROVIDE FOR AN EXPEDITED HEARING. IN THE EVENT OF A CONFLICT BETWEEN THE ACT AND THE RULES OF THE AAA, THE ACT SHALL CONTROL. THE FILING FEE FOR THE ARBITRATION SHALL BE PAID BY THE PARTY FILING THE ARBITRATION DEMAND, BUT THE ARBITRATOR SHALL HAVE THE RIGHT TO ASSESS OR ALLOCATE THE FILING FEES AND ANY OTHER COSTS OF THE ARBITRATION, INCLUDING REASONABLE ATTORNEY'S FEES, AS A PART OF THE ARBITRATOR'S FINAL ORDER. THE ARBITRATION SHALL BE BINDING AND FINAL, AND EITHER PARTY SHALL HAVE THE RIGHT TO SEEK JUDICIAL ENFORCEMENT OF THE ARBITRATION AWARD. NOTWITHSTANDING ANY OTHER PROVISION HEREIN, ANY DISPUTES ARISING UNDER THE STRUCTURAL WARRANTY PROVIDED TO PURCHASER BY THE NWP SHALL BE MEDIATED, ARBITRATED AND/OR JUDICIALLY RESOLVED PURSUANT TO THE TERMS, CONDITIONS, PROCEDURES AND RULES OF THAT WARRANTY PROGRAM.

**16. CLOSING.** The actual exchange of the Purchase Price for the Special Warranty Deed and possession of the Property is referred to herein as the "Closing." The date on which the exchange occurs is referred to herein as the "Closing Date." Closing shall not be complete until Seller has received full payment of the Purchase Price. Closing shall be scheduled and conducted as follow:

a. **Closing Date.** The subsection checked below shall apply:

(1) Closing shall take place on or before 07/25/2013. Seller shall notify Purchaser of the final date and time of Closing at least three (3) days in advance.

(2) Seller shall notify Purchaser of a tentative date for Closing at least thirty (30) days in advance. Not less than ten (10) days prior to the tentative date set by Seller, Seller shall notify Purchaser by telephone and/or email of the final date and time for Closing, which shall be no earlier than, but may be later than, the tentative date previously set by Seller. Subject only to the provisions of Section 20 below, Closing shall occur no later than that date which is two (2) years after the date that Purchaser signs this Agreement.

b. **Exchange at Closing.** At Closing, Seller shall deliver to Purchaser the Special Warranty Deed for the Property, possession of the Property, a certificate of occupancy for the house located on the Property issued by the applicable governmental authority, and, if applicable, a certificate of final approval by FHA or VA. At Closing, Purchaser shall pay to Seller the Purchase Price in full.

c. **Place of Closing.** Closing shall take place at the office of Morris Hardwick Schneider, 3527 Pelham Rd. Suite A, Greenville, SC. 29615 Phone: (864)297-8944, or at such other place as the parties may agree in advance.

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**d. Purchaser's Failure to Close.** Purchaser's failure to close on the final closing date set by Seller shall constitute a material breach of this Agreement by Purchaser. In such event, in addition to and without waiving any rights and remedies which Seller shall have pursuant to Section 18 below, Seller, at Seller's option, may extend the Closing Date until Purchaser tenders full payment of the Purchase Price; provided that Seller shall retain the right to terminate this Agreement and to retain Purchaser's Earnest Money at any time prior to actual Closing. If Seller does extend the Closing Date pursuant to this subsection, then at Closing Purchaser shall pay to Seller, in addition to the Purchase Price, liquidated damages in the amount of Two Hundred Fifty Dollars (\$250.00) per day, calculated from the final date for Closing set by Seller until the date on which Purchaser pays to Seller the full Purchase Price plus all liquidated damages due to Seller pursuant to this subsection, not to exceed Seven Thousand Five Hundred Dollars (\$7,500.00).

**e. Closing Costs.** Seller shall pay for preparation of the deed, Seller's attorney's fees and any property transfer tax (deed stamps) imposed by the State of South Carolina. Purchaser shall pay for all other costs related to the Closing. Real estate taxes on the Property for the calendar year in which the sale is closed shall be prorated as of the Closing Date. In the event the property is part of a Horizontal Property Regime, any prepaid hazard insurance shall be prorated at Closing.

**17. UTILITIES AND PERSONAL PROPERTY.** Purchaser shall transfer all utilities into Purchaser's name within three (3) business days after Closing. Purchaser shall not move any personal property onto the Property prior to Closing.

**18. DEFAULT; REMEDIES.** The remedies specified below shall be the sole and exclusive remedies available to the parties in the event of breach of this Agreement, and shall be to the exclusion of all other remedies at law or in equity.

**a. Purchaser's Default.** If Purchaser defaults on any of its obligations hereunder prior to Closing, Seller's sole and exclusive remedy shall be to terminate this Agreement by written notice to Purchaser; whereupon, Seller shall retain all Earnest Money and Option Money paid by Purchaser to Seller as liquidated damages and Seller may recover from Purchaser any liquidated damages due to Seller as of the date of termination pursuant to subsection e of Section 16 above. Thereafter, neither party shall have any further liability or obligation to the other hereunder.

**b. Seller's Default.** If Seller defaults on any of its obligations hereunder prior to Closing, Purchaser's sole and exclusive remedy shall be either: (a) to terminate this Agreement by written notice to Seller, whereupon Purchaser shall be entitled to recover all Earnest Money and Option Money (if any) paid to Seller; or (b) to seek specific performance of this Agreement by serving written notice of default on Seller and by instituting mandatory binding arbitration of Purchaser's claim of default and demand for specific performance. Notwithstanding the foregoing, subject to the provisions of Section 20 below and provided that Seller has not terminated this Agreement as a result of breach by Purchaser, if Seller is obligated by this Agreement to build a single-family residence on the Lot and Seller fails to complete construction of the residence within two (2) years of the date Purchaser signs this Agreement, then Purchaser may pursue whatever remedies it may have against Seller at law or in equity.

**19. TIME/DATE.** The Effective Date of this Agreement shall be the date of signing of this Agreement by the last of the parties to sign. Time is of the essence as to the occurrence of all events, the satisfaction of all conditions and the performance of all obligations hereunder.

**20. EXCUSED DELAYS.** Notwithstanding any other provision herein, if Seller is delayed in performing any of its obligations hereunder or meeting any specified completion dates by labor disputes, fire, delays in deliveries, adverse weather conditions, unanticipated damage to or destruction of the Property, governmental controls or moratoria, acts of God or any other causes beyond Seller's reasonable control, then the time-period specified herein for performance of such obligation and/or meeting such completion date shall be extended a sufficient number of working days to enable and allow Seller to perform and/or complete the obligation.

**21. WALK-THROUGH.** Not more than ten (10) days prior to Closing, Purchaser and Seller shall conduct a mutual examination of the Property, commonly referred to as a "walk-through." Seller shall schedule the walk-through during normal working hours (Mon. - Fri., 8:00AM to 4:00PM) and shall give Purchaser at least twenty-four (24) hours prior notice of the scheduled time by telephone. Immediately after the walk-through, Purchaser and Seller shall prepare a written list of items on the Property that the parties agree should be corrected, repaired or replaced (hereinafter, the "Punch List"). Seller shall thereafter correct, repair or replace the items listed on the Punch List. Under no circumstances shall Seller be required to correct, repair or replace any items on or of the Property that are not listed on a written Punch List that has been signed by Seller. Seller's obligation to correct, repair or replace any items that are listed on a written Punch List that has been signed by Seller shall survive Closing. UNDER NO CIRCUMSTANCES SHALL CLOSING BE DELAYED DUE TO SELLER'S FAILURE TO COMMENCE OR COMPLETE CORRECTION, REPAIR OR REPLACEMENT OF ANY ITEMS ON A PUNCH LIST. UNDER NO CIRCUMSTANCES SHALL FUNDS BE ESCROWED AT CLOSING TO COVER THE COST OF CORRECTION, REPAIR OR REPLACEMENT OF ANY ITEMS ON A PUNCH LIST.

*[Handwritten Signature]*  
(Purchaser's Initials) *[Handwritten Initials]*

**22. RESTRICTIVE COVENANTS; HOMEOWNERS ASSOCIATION.** Purchaser acknowledges receipt of a copy of that Declaration of Covenants, Conditions and Restrictions for Rose Hill 90' Subdivision of record at Anderson, County Registry, together with all amendments thereto (collectively, the "Declaration"). Purchaser acknowledges that the Property is subject to the Declaration and that upon purchase of the Property, Purchaser shall personally be subject to all the provisions of the Declaration, including but not limited to provisions requiring membership in and payment of assessment to Rose Hill 90' Homeowners Association (the "Association"). Purchaser acknowledges that the restrictive covenants governing this community require a payment of an initiation fee in the amount of \$100 at Closing as well as annual dues (presently \$400) and a quarterly sewer fee (presently \$99 per quarter) payable on a prorated basis at closing, which amount may change. PURCHASER FURTHER ACKNOWLEDGES THAT THE DECLARATION MAY BE AMENDED FROM TIME TO TIME AS PROVIDED THEREIN, AND THAT THE AMOUNTS TO BE PAID BY PURCHASER TO THE ASSOCIATION MAY CHANGE ACCORDINGLY.

**23. SUCCESSORS AND ASSIGNS; INTERPRETATION.** This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their heirs, successors, administrators, executors and assigns. Purchaser shall not have the right to assign Purchaser's interest in this Agreement. As required by context herein, the singular shall include the plural, and the neuter shall include the masculine and the feminine.

**24. ENTIRE AGREEMENT; AMENDMENT.** This document contains the sole and entire agreement between the parties hereto with regard to the Property. All prior discussions have been merged into this Agreement. No representation, statement, promise or inducement shall be binding upon either party hereto unless specifically stated in this Agreement. This Agreement may not be modified except by a writing signed by both parties.

**25. ADDENDA AND EXHIBITS.**

a. **Addenda.** The following Addenda are attached hereto and incorporated herein: (Check those that apply)

- |  |                                     |
|--|-------------------------------------|
| (1) Addendum 1, Buyer's Referral Incentives and Contributions Addendum | <input checked="" type="checkbox"/> |
| (2) Addendum 2, Completed Construction Addendum                        | <input type="checkbox"/>            |
| (3) Addendum 2, Construction in Progress Addendum                      | <input type="checkbox"/>            |
| (4) Addendum 2, New Construction Addendum                              | <input checked="" type="checkbox"/> |
| (4) Addendum 3, Design Center Voucher                                  | <input type="checkbox"/>            |
| (5) Addendum 4, Sale of Current Residence Contingency Addendum         | <input type="checkbox"/>            |
| (6) Addendum 5, Special Stipulations Addendum                          | <input checked="" type="checkbox"/> |
| (7) Addendum 6, Teacher/Military/EMS Credit                            | <input type="checkbox"/>            |
| (8) Addendum 10, Federal Tax Credit Disclosure                         | <input type="checkbox"/>            |
| (9) Addendum 11, Variations in Materials and Components                | <input checked="" type="checkbox"/> |
| (10) Addendum *, Community Specific Addendum: (List) _____             | <input checked="" type="checkbox"/> |
| (11) Exhibit E FHA/VA Amandatory Statement                             | <input checked="" type="checkbox"/> |
| (12) Commission Rebate Certification                                   | <input checked="" type="checkbox"/> |
| (13) Commission Rebate Addendum  | <input type="checkbox"/>            |

b. **Exhibits.** The following Exhibits are attached hereto and incorporated herein:

- (1) Exhibit A, Included Features List, Plat Map, Collaterals Plan and Elevation, Specifications
- (2) Exhibit B, Selected Options List
- (3) Exhibit C, Stage Matrix
- (4) Exhibit D, Community Specific: (List) \_\_\_\_\_
- (6) Notice of Seller's Business Affiliations

**26. NOTICE.** Except when specifically provided otherwise herein, any notices required to be given hereunder must be in writing. Notice shall be deemed delivered upon receipt or refusal if deposited in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid, properly addressed to the party to be served. Notice shall also be deemed given if delivered to the address for service of notice shown below by Federal Express, UPS or other nationally recognized overnight carrier service, with no signature or receipt required. Each party warrants that its correct mailing address for service of notice is shown below. Purchaser warrants that its correct telephone number and email address are shown below. A party may change its address for service of notice by giving the other party written notice of the change of address.

*[Handwritten Signature]*

(Purchaser's Initials) 202-11-13/12 21143

27. OFFER. This instrument shall be regarded as an offer by the first party to sign until fully executed by both parties, at which time it shall become binding on both parties.

NOTE: SELLER IS LICENSED AS A REAL ESTATE OFFICE IN SOUTH CAROLINA.

IN WITNESS WHEREOF, the parties hereto have executed this Home Purchase Agreement on the dates indicated below.

<b>Purchaser:</b> Paul Zitek <i>X Paul Zitek</i> Date: <i>X 2-17-13</i> Natalie Zitek <i>X Natalie Zitek</i> Date: <i>X 2-17-13</i> Purchaser's Current Mailing Address: 5614 N Overhill Chicago, IL 60631 <hr/> Purchaser's Home Phone: <u>(773) 206-3088</u> Mobile: <u>(773) 206-9279</u> Work: <u>(773) 206-3088</u> Purchaser's Email: <u>schoolcar@comcast.net</u>	<b>Seller:</b> D. R. Horton, Inc. By: <i>N. Hamilton</i> Date: <i>2/20/13</i> Seller's Address: 1 Bronson Drive Simpsonville, SC 29680 Seller's Phone: <u>864-757-9930</u>
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(Purchaser's Initials) *X Paul Zitek*

**ADDENDUM 1  
BUILDER'S REFERRAL INCENTIVES AND CONTRIBUTIONS ADDENDUM**

This ADDENDUM is attached to and made a part of that Home Purchase Agreement between D.R. Horton, Inc., as Seller, and Paul Zitek and Natalie Zitek as Purchaser (the "Purchase Agreement"), regarding that parcel of real estate located in Anderson County, South Carolina, briefly described as Lot 0266, Rose Hill 90', and referred to in the Purchase Agreement as the "Lot." All terms defined in the main text of the Purchase Agreement shall have the same meanings used when used in this Addendum. This Addendum, together with the Purchase Agreement, constitutes the sole and entire agreement between Seller and Purchaser with regard to any incentives, allowances, adjustments, credits, discounts, rebates or other contributions of any kind or amount (collectively, the "Referral Incentives and Contributions") made, or to be made, by Seller to Purchaser in connection with Seller's referral of Purchaser to SELLER'S PREFERRED MORTGAGE LENDER(S) DESCRIBED BELOW ("PREFERRED LENDER"), and there are no agreements regarding such Referral Incentives and Contributions, whether written or unwritten, expressed or implied, between the parties except as set forth in this Addendum. In the event of any conflict between the terms and provisions of this Addendum and the terms and provisions of the main text of the Purchase Agreement, the terms and provisions of this Addendum shall control. The parties state, acknowledge and agree as follows:

Purchaser acknowledges receipt of that document entitled, "Notice of Seller's Business Affiliations," (the "Affiliation Notice"), and confirms its understanding that Seller has an affiliation with DHI MORTGAGE COMPANY, LTD. ("DHI MORTGAGE") and that Purchaser is not required to use this affiliated company or any Preferred Lender (described below) as a condition of Purchaser's purchase of the Property or Purchaser's access to settlement services in connection with the purchase of the Property.


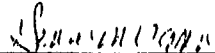
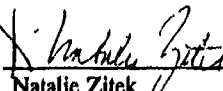
1. Seller shall provide for the benefit of Purchaser the Referral Incentives and Contributions listed in Section 2 below, provided that Purchaser chooses to use PREFERRED LENDER to finance the purchase of the Property and provided that each and all of the following occur:

- a. Purchaser applies to PREFERRED LENDER for a mortgage loan to finance the purchase of the Property within ten (10) business days after the date of this Purchase Agreement;
- b. Purchaser's loan application is approved by PREFERRED LENDER, and PREFERRED LENDER actually funds the loan and finances the purchase of the Property;
- c. Purchaser closes on the purchase of the Property on or before the Closing Date specified in the Purchase Agreement; and
- d. Purchaser uses the closing attorney recommended by Seller to act as settlement agent and close the purchase of the Property.

2. Provided that all the above conditions are satisfied and met in a timely manner, Purchaser shall be entitled to contributions to closing costs to be paid by Seller in the maximum amount of two percent (2.00%) of the final Purchase Price, provided that the total amount of such contributions may not exceed Ten Thousand Dollars (\$10,000). The contributions may be used by Purchaser to purchase multiple settlement services. Purchaser may apply these contributions, up to the total amount of two percent (2.00%) of the final Purchase Price (but not to exceed \$10,000), in full or partial payment of fees charged by the Lender, title insurance premiums, escrow fee or other title company charges, tax pre-payments required by the Lender (less any amounts credited to Purchaser pursuant to the provision of the Purchase Agreement regarding proration of real property taxes, and shown on lines 210 and/or 211 of the HUD-1 Settlement Statement), insurance pre-payments required by the Lender or other customary closing costs charged by other settlement service providers. No portion of this amount may be applied as a credit to, or in partial payment of, the Purchase Price of the Property or disbursed to Purchaser.

3. **Preferred Lender.** The preferred lenders relating to this Builder's Incentive and Concessions Addendum are: DHI Mortgage and USAA Federal Savings Bank, a federally chartered Savings Bank ("USAA FSB"). More information regarding DHI Mortgage is available at: [www.dhimortgage.com](http://www.dhimortgage.com). Please note that USAA FSB mortgages are limited to USAA members. More information regarding USAA FSB, its mortgages and USAA membership are available at: [www.usaa.com](http://www.usaa.com). USAA is not an affiliate of Seller.

IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM, HAVE SIGNED THIS ADDENDUM ON THE DATE SHOWN BELOW.

<b>Purchaser:</b>  Paul Zitek Date: 2-17-13	<b>Seller:</b> D. R. Horton, Inc. By: 
 Natalie Zitek Date: 2-17-13	

Buyer Paul Zitek / Subdivision Rose Hill 90' / Lot 0266 / Address 104 Starbridge Court / Job 70953-0266

Salesperson: Angela H Moss / Date Printed 02/17/2013

**ADDENDUM 2  
NEW CONSTRUCTION ADDENDUM**

This Addendum is attached to and made a part of that Home Purchase Agreement (the "Agreement") between Paul Zitek and Natalie Zitek as Purchaser and D.R. Horton, Inc. as Seller, regarding that parcel of land located in Anderson County, SC, briefly described as Lot 0266, Rose Hill 90', and referred to in the Agreement as the "Lot." All terms defined in the main text of the Agreement shall have the same meanings when used in this Addendum. Purchaser and Seller further agree as follows:

**1. CONSTRUCTION OF HOUSE.** Prior to Closing, Seller shall construct a single-family (✓) detached ( ) townhouse residence (the "House") on the Lot. Seller shall not be required to commence construction of the House unless and until: (a) the Loan has been approved by Purchaser's lender to Seller's satisfaction; (b) Purchaser has paid all amounts then due to Purchaser's lender and to Seller; (c) all contingencies to Purchaser's performance hereunder have been satisfied or removed to Seller's satisfaction; and (d) Purchaser has completed its selection of all colors and options for the House.

**2. HOUSE PLAN.** Seller shall construct the House according to the WESTERLY Plan, Elevation A-70953, plan revision date: tbl, including those features listed on that Included Features List attached hereto as Exhibit A and incorporated herein, on a (✓) slab ( ) basement ( ) crawlspace (collectively, the "Base Plan"). Seller's obligation to construct the House shall be contingent on Seller's ability: (a) to place the House on the Lot without obtaining variances from any set-backs or other dimensional requirements, and (b) to construct the House on the Lot without incurring abnormal costs for foundation, slab or structural support walls. If Seller determines that either of these contingencies cannot be satisfied to Seller's satisfaction, then Seller may terminate this Agreement upon written notice to Purchaser, in which event the Earnest Money and the Option Money (if any) shall be refunded to Purchaser. Seller shall determine the placement and orientation of the House on the Lot in Seller's sole discretion. Purchaser acknowledges that the House shall be handmade and unique, and that although the House shall be based on the Base Plan, variations from the Base Plan will occur. Seller shall not be responsible for such variations from the Base Plan. Purchaser also acknowledges that brochures, models and displays used by Seller's sales agents are for general illustrative purposes only, and are not to be relied upon as representations of actual locations, dimensions, specifications or finished products. Subject only to the provisions of Sections 14 and 21 of this Agreement, Closing shall constitute acceptance of the House by Purchaser AS BUILT, and Purchaser hereby waives any right to object to any variation in construction from the Base Plan after Closing.

**3. HEATING AND AIR CONDITIONING.** The House shall be adequately and efficiently heated and air-conditioned with equipment having at least the minimum specifications for the House as established by Load Calculations, Manual J, of the Air-Conditioning Contractors of America, current edition. The clothes dryer shall vent to the outside.

**4. INSULATION.** Insulation shall be installed in the House to at least the following minimum standards: (a) exterior walls, excluding exterior garage walls, to be insulated with BATT insulation to a thickness of 3 5/8 inches which will, according to the manufacturer, yield an R-value of 13; (b) ceilings below attic areas to be insulated with BLOWN insulation to a thickness of 13 inches which will, according to the manufacturer, yield an R-value of 30; (c) vaulted ceilings to be insulated with BATT insulation to a thickness of 6 1/4 inches which will, according to the manufacturer, yield an R-value of 19; and (d) floor overhangs to be insulated with BATT insulation to a thickness of 3 5/8 inches which will, according to the manufacturer, yield an R-value of 13.

**5. PURCHASE PRICE.** The base price for the House, constructed on a lot in Rose Hill 90' according to the Base Plan, is **\$232,990.00** (the "Base Price"). The premium charged for the Lot (the "Lot Premium") is **\$3,000.00**. The total price of all options selected to date by Purchaser as of the Effective Date of the Agreement is **\$52,154.00** (see Exhibit B attached hereto and incorporated herein for an itemization of those options and their prices). Therefore, the initial Purchase Price for the Property, as stated in Section 2 of the Agreement, is:

*gm*

X <i>gm</i>	2-17-13
X <i>kg</i>	2-17-13

ELECTRONICALLY FILED - 2020 Nov 23 2:28 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

Buyer: Paul Zitek / Subdivision: Roes Hill 90' / Lot 0266 / Address: 104 Sherbridge Court / Job: 70953-0266

Salesperson: Angela H. Moss / Date Printed: 02/17/2013

Base Price	\$232,990.00
Plus Lot Premium	+ \$3,000.00
Plus Options Selected to Date	+ \$52,154.00
Total Purchase Price	\$288,144.00

The Purchase Price is subject to adjustment by amendment to this Agreement as provided herein.

6. MANDATORY SELECTION MEETING; OPTION MONEY.

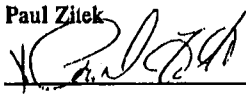
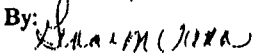
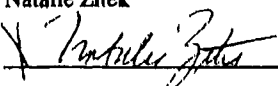
a. Within 14 working days of the Effective Date of this Agreement, Purchaser and Seller's representative will meet at Seller's Design Center, located at 75 Brookfield Oaks Dr. Suite 350, Greenville, SC 29607, to select and confirm all options to be used in the construction of the House, including all colors and finishes. Seller shall schedule this meeting (the "Selection Meeting") during normal working hours and shall give Purchaser at least twenty-four (24) hours prior notice of the scheduled date and time by telephone and/or email. If Purchaser fails to attend the Selection Meeting and complete selection of all options at the Selection Meeting, then Seller may terminate this Agreement upon written notice to Purchaser, in which event Seller shall retain all Earnest Money. At the conclusion of the Selection Meeting, Seller and Purchaser shall execute a First Amendment to this Agreement which shall specify all options chosen by Purchaser and any corresponding change to the Purchase Price. If the total cost of all non-structural options chosen by Purchaser at the Selection Meeting exceeds \$, then Purchaser shall pay to Seller, at the time of execution of the First Amendment, the full amount of that excess (the "Option Money").

b. Any Option Money paid to Seller at any time shall not be held in escrow, and shall be nonrefundable to Purchaser except in the event of: (1) breach of this Agreement by Seller, or (2) termination of this Agreement by Seller pursuant to Section 2 above. Upon Closing, all Option Money previously paid to Seller shall be credited to Purchaser against the Purchase Price. If Seller omits any option from the construction of the House, Purchaser shall be entitled to an additional credit at Closing against the Purchase Price in the amount of the specified price of the omitted option. Failure by Seller to install an option, including any of the options on Exhibit B, shall not constitute a breach of this Agreement by Seller, and Purchaser shall have no rights or remedies resulting from such failure except the right to a credit at Closing.

7. CHANGES. Seller shall not be required to allow any changes to Purchaser's selection of options after the execution of the First Amendment to this Agreement. If Purchaser requests a change in options and Seller agrees to the change, Purchaser shall pay to Seller a Change Fee in the amount of Two Hundred Fifty Dollars (\$250.00) for each such change at the time the request is approved by Seller. Any Change Fee paid shall be nonrefundable and shall not be credited against the Purchase Price. Any changes to options shall not be effective unless evidenced by a written amendment to this Agreement. At the time of execution of that amendment, Purchaser shall pay to the Seller the total increase in the Purchase Price resulting from the change in options as additional Option Money.

8. COMPLETION. Subject to the contingencies stated herein, Seller shall complete construction of the House prior to Closing. Seller shall construct the House according to all applicable governmental codes and regulations. Seller reserves the right to substitute materials or items to be used in the construction of the House with materials or items of equal or comparable value. Construction of the House shall be deemed complete when a certificate of occupancy is issued for the House by the applicable governmental authority. Seller shall deliver the completed House to Purchaser at Closing in "broom-clean" condition, ready to occupy. The House and Lot shall be free of all trash and debris.

9. PURCHASER'S INQUIRIES. Purchaser shall direct all inquiries and questions to Seller's on-site associate. The on-site associate will provide Purchaser with timely responses; however, the associate does not and shall not have authority to change the terms of this Agreement in any manner. This Agreement may be changed or modified only by a written amendment duly executed by both Purchaser and Seller. Purchaser acknowledges that Seller's sales associates, superintendents, closing staff, warranty staff and other employees do not have authority to modify this Agreement. Only an authorized corporate officer of Seller may modify this Agreement on Seller's behalf.

<b>Purchaser:</b> Paul Zitek  _____ 2-17-13 Date:	<b>Seller:</b> D. R. Horton, Inc. By:  _____ Date: 2/20/13
Natalie Zitek  _____ 2-17-13 Date:	

Buyer Paul Zitek / Subdivision: Rose Hill 90' / Lot 0266 / Address 104 Sturbridge Court / Job 70953-0266  
Salesperson Angela H Moss / Date Printed 02/17/2013

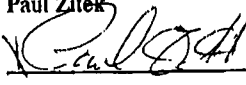
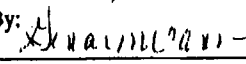
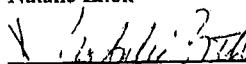
**ADDENDUM 5  
SPECIAL STIPULATIONS ADDENDUM**

This ADDENDUM is attached to and made a part of that Home Purchase Agreement (the "Agreement") between D.R. Horton, Inc., as Seller, and Paul Zitek and Natalie Zitek, as Purchaser, regarding that parcel of real estate located in Anderson County, SC, briefly described as Lot 0266, Rose Hill 90' and referred to in the Agreement as the "Lot." **Contrary to the incentive amount offered in the BRICA, Seller agrees to pay up to \$ 5000\_ of Purchaser's closing costs and/or prepaids on the first and second mortgage (if applicable), which amount shall include the State of South Carolina Transfer Tax, subject to any loan program restrictions.**

**All other terms of the BRICA remain in full force and effect.**

**Purchaser is using \_DHI\_ as their mortgage provider.?. All terms defined in the main text of the Agreement shall have the same meanings when used in this Addendum. Notwithstanding any other provision of the Agreement, Seller and Purchaser agree as follows:**

**IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM,  
HAVE SIGNED THIS ADDENDUM ON THE DATES SHOWN BELOW.**

<b>Purchaser:</b> Paul Zitek  _____ Date: <u>2-17-13</u>	<b>Seller:</b> D. R. Horton, Inc. By:  _____ Date: <u>2/26/13</u>
Natalie Zitek  _____ Date: <u>2-17-13</u>	

**ADDENDUM 11  
VARIATIONS IN MATERIALS AND COMPONENTS**

This Addendum is attached to and made a part of that Home Purchase Agreement (the "Agreement") between Paul Zitek and Natalie Zitek as Purchaser and D.R. Horton, Inc. as Seller, regarding that parcel of land located in Anderson County, SC, briefly described as Lot 0266, Rose Hill 90' and referred to in the Agreement as the "Lot." All terms defined in the main text of the Agreement shall have the same meanings when used in this Addendum. Purchaser and Seller further agree as follows:

Many materials, both natural and man-made, used in the construction of homes contain variations and inconsistencies. Such variations and inconsistencies are beyond Seller's control, and Seller shall not be responsible or liable for them. Some of the materials and components which may exhibit variations and inconsistencies are as follows:

**CONCRETE**

Purchaser understands that when adding additional concrete to the existing concrete pad, the two pads may not match in color. Also, there may be visible seam between the two pads.

**INTERIOR PAINT**

Seller installs a level 4 drywall/Gypsum Board finish in its homes. White or light color flat paint is recommended for this type of finish and is a standard feature in DR Horton homes. Colored, gloss or semi-gloss paint are not recommended as they may magnify joint or patch photographing in critical lighting areas. Purchaser understands that Seller will install, upon Purchasers request, alternate colored paint on an "as is" basis and is not responsible for any additional drywall finishing or painting to reduce visible joint or patch photographing.

**OUTLET LOCATION**

Purchaser understands that any cable, phone and/or data outlet locations that are not specifically designated at the initial time of selections will be placed by the construction supervisor, and will not be moved.

**WOOD**

Purchaser understands that wood of the same species will vary in color, mineral streaking, texture, pitch pockets, and grain uniformity, depending on when, where and how the tree grew and the fact that different wood products come from different manufacturers. These characteristics may occur on adjacent cabinets, between pair of doors and/or drawers, with the same cabinet panels, between flooring, stair treads and railings and between flooring and cabinets/vanities. It is these differences, caused by nature, that create the warmth and individuality of fine woods. Darker finishes tend to hide some of these natural characteristics while lighter finishes tend to accentuate the differences. Because of this, the variations in color and contrast may be different than in a display or in a smaller sample.

Seller does not recommend to any Purchaser that hardwood flooring be placed in areas that may have excessive moisture present including but not limited to kitchens, powder rooms, laundry rooms, or any bath rooms. Upon the Purchaser's request, Seller will install hardwood in these areas only on an "as is" basis and will not warranty any moisture or wear related items at anytime. The Purchaser understands they will be totally responsible for all problems arising in the future concerning this type of flooring in the areas as described above.

**STUCCO**

The final appearance of your home may be impacted by sunlight angles, shadows from architectural details, application and texturing techniques, environmental surrounding and color lot to color lot variations.

**BRICK/STONE**

Brick and stone products are composed of earthen materials and go through many processes before firing and consequently each run or lot of brick/stone will vary. Photographs, samples and even completed homes are only a

*g*

X-DO	2-17-13
X-13	2-17-13

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Buyer: Paul Zitek / Subdivision: Rose Hill 90' / Lot: 0266 / Address: 104 Shurbridge Court / Job: 70953-0266


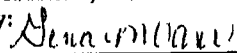
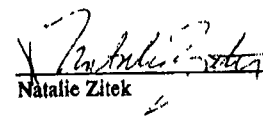
Salesperson: Angela El Moss / Date Printed: 02/17/2013



representation of the color and each run or lot and even installation can vary from home to home. An exact replication of total color or percentages as displayed by samples or model homes cannot be guaranteed.

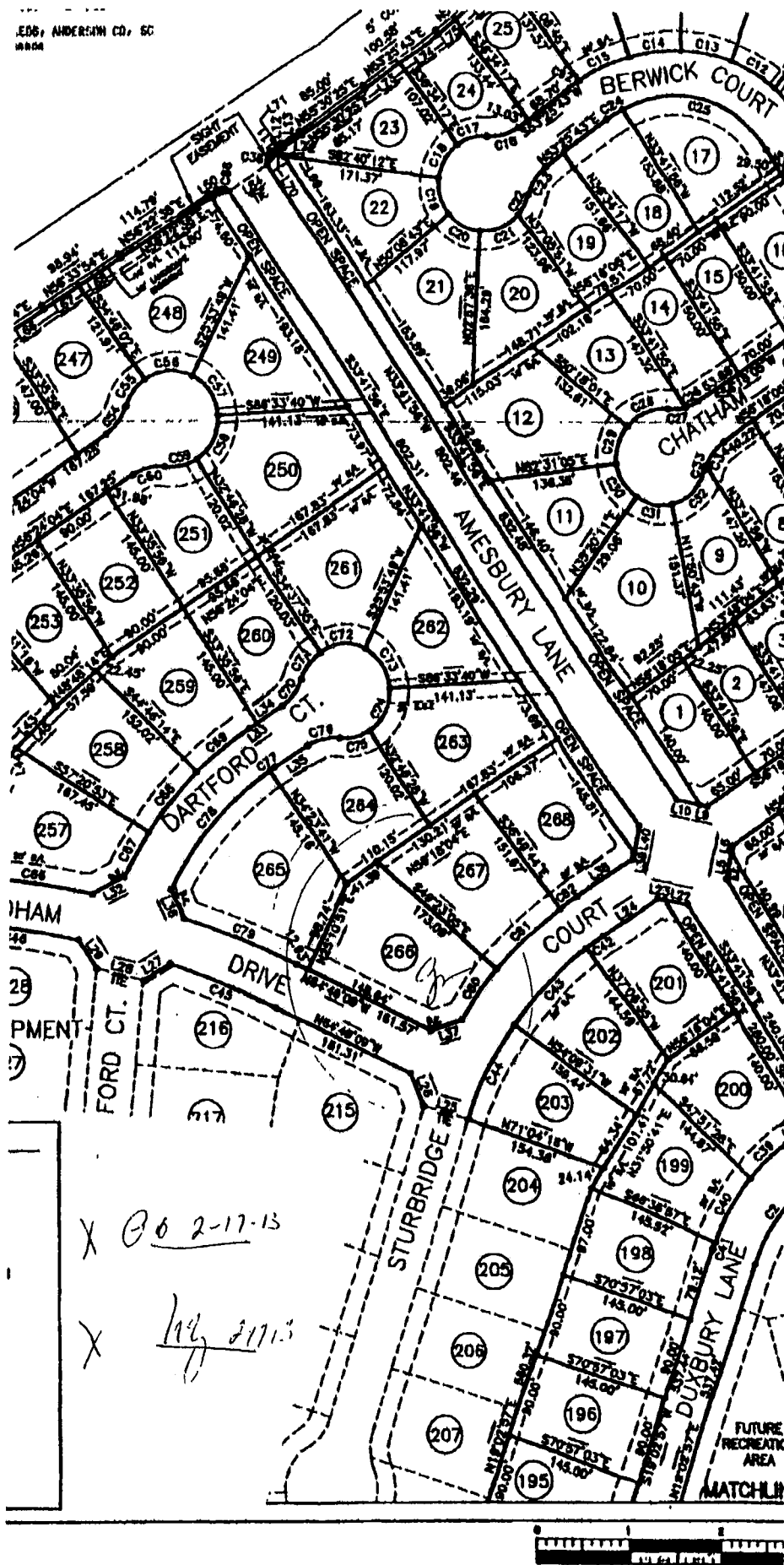
**GRANITE/CERAMIC/MARBLE**

The materials used in counter tops, fireplace surrounds/hearths, wall and floor tile contain color variations and "veining", natural blemishes, and grain. Accordingly, consistency cannot be guaranteed.

IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM, HAVE SIGNED THIS ADDENDUM ON THE DATES SHOWN BELOW.

<b>Purchaser:</b>  Paul Zitek Date: 2-17-13	<b>Seller:</b> D.R. Horton, Inc. By:  Date: 2/20/13
 Natalie Zitek Date: 2-17-13	

X		2-17-13
X		2-17-13



# The Westerly

Reverse Plan



Brick,  
stone,  
hardi

Elevation A



Elevation B



Elevation C

Renderings and floor plans are the artist's conception. Details and dimensions may differ from actual plan. Standard and optional features may vary. D.R. Horton reserves the right to institute changes without prior notice. See Community Sales Associate for information.

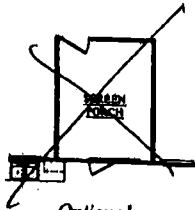


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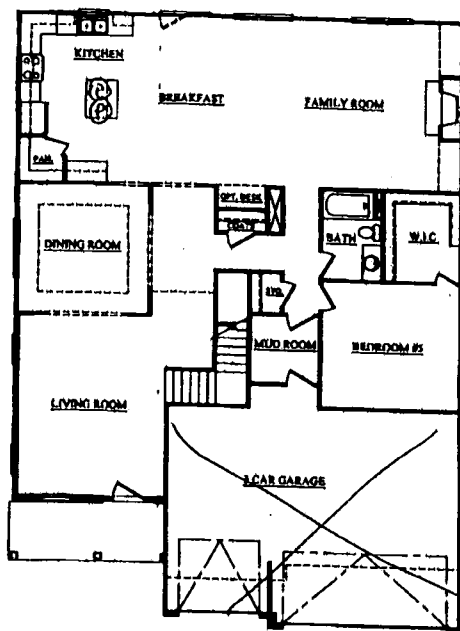
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*John*

# The Westerly

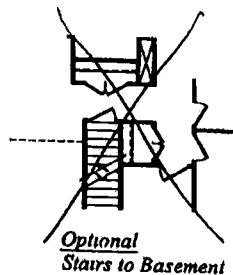


Optional Screen Porch

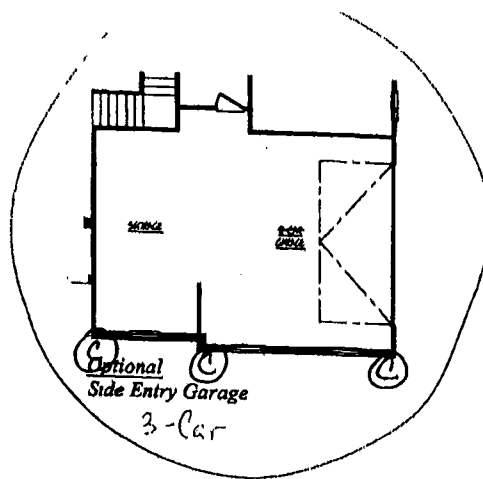


First Floor Plan

- (R) - Recessed
- \* - Ceiling Fan Prewire
- ⊗ - Ceiling Fan w/ Light Kit
- (C) - Couch lights
- (P) - Pendant Lights



Optional Stairs to Basement



Optional Side Entry Garage  
3-Car

Recordings and floor plans are the artist's assumption. Details and dimensions may differ from actual plot. Standard and optional features may vary. © R. Ferret reserves the right to initiate changes without prior notice. See community Sales Agreement for information.

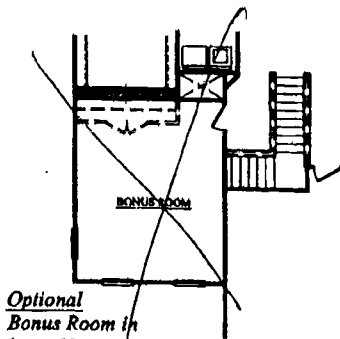


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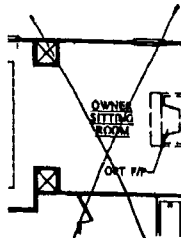
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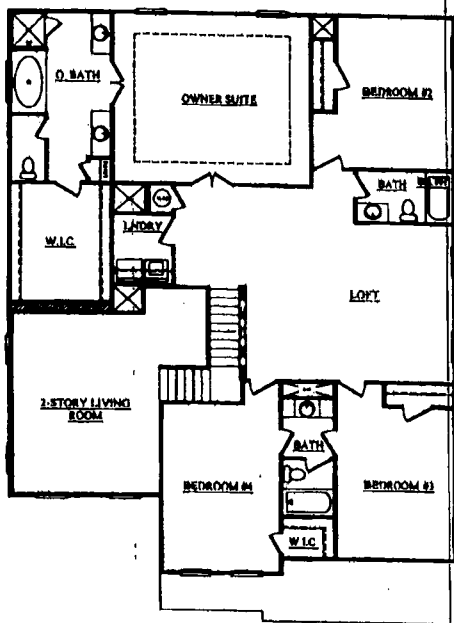
# The Westerly



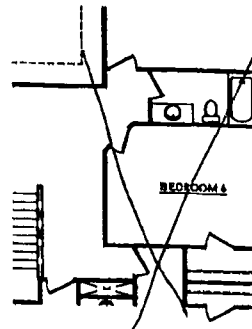
*Optional Bonus Room in lieu of 2 story Living Room*



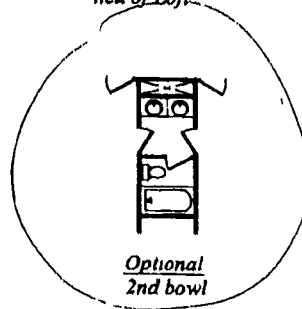
*Optional Master Sitting in lieu of Bedroom 2*



Second Floor Plan



*Optional Bedroom 6 in lieu of Loft*



*Optional 2nd bowl*

Renderings and floor plans are the artist's conception. Details and dimensions may differ from actual plan. Standard build optional features only vary. D.R. Haron reserves the right to initiate changes without prior notice. See community Sales Agreement for information.



X 2-17-13

X 4/3 2/7/13

*Jim*



**The Estates**

**COMMUNITY**

- ◆ Community Amenity includes Swimming Pool, Cabana and Children's Playground
- ◆ Community sidewalks and streetlights for resident's enjoyment
- ◆ Community Homeowner's Association Covenants to protect your investment
- ◆ Strict design standards provide continuity within the community
- ◆ Professionally landscaped front entrance with architecturally designed entrance monument

**INTERIOR**

- ◆ Direct Vent Fireplace with Glass Doors, Gas Logs and Granite Surround
- ◆ Oak Plank Hardwood Flooring in the Foyer, Extended Foyer, Kitchen and Breakfast Area
- ◆ Wainscoting and chair rail in the Foyer and Dining Room
- ◆ One piece crown moulding in the Living Room, Dining Room and Owner's Suite tray (per plan)
- ◆ Designer 2 panel beaded smooth interior doors
- ◆ Energy efficient Kitchen appliances including: GE® Dishwasher, Self Cleaning Electric Range and Built in Microwave over the Range
- ◆ Exquisitely crafted Aristokraft® Flat Panel Birch Kitchen cabinets with crown molding and decorator knobs
- ◆ Granite Kitchen countertop with under mount stainless steel sink
- ◆ Moen® Designer Chrome Fixtures in all Baths
- ◆ Cultured Marble vanity tops in all Baths
- ◆ Dual bowls in Owner's Suite Bath (per plan)
- ◆ Flat Panel Birch Cabinets in all Baths (Cabinet finish matches Kitchen)
- ◆ Designer tub and separate shower in Owner's Suite Bath (per plan)
- ◆ Ceramic tiled floor in the Owner's Suite Bath
- ◆ Elongated toilets in all Baths
- ◆ Ceiling Fan with light kit installed in Family Room
- ◆ Nibco® Dura-Pex Plumbing

**INTERIOR (cont')**

- ◆ Pre-wired for phone in Kitchen, Owner's Suite and Family Room (per plan)
- ◆ Pre-wired for cable in Owner's Suite and Family Room (per plan)
- ◆ Smooth ceilings
- ◆ 9' ceilings (per plan)
- ◆ Garage walls finished and painted
- ◆ Cased windows
- ◆ Edge Gold® Premium sub floor (Limited 50 yr warranty)

**EXTERIOR** *30 ft frame car*

- ◆ Professionally landscaped with fully sodded lawn (pine islands and natural areas excluded)
- ◆ Fiberglass Roof Shingles with a 20 year Manufacturer's Warranty
- ◆ LP® TechShield® radiant barrier roof sheathing
- ◆ Weather Proof Electrical Outlet at Front and Rear Entries
- ◆ Termite Monitoring System provided by Pestban® with one year of service included
- ◆ Full seamless Gutters and Down Spouts with Splash Blocks (Front and Rear)

**SAFETY AND ENERGY**

- ◆ Double Pane Low-E Vinyl Windows with double locks and tilt in sash for easy maintenance
- ◆ Electrical 220V Outlet for Dryer
- ◆ Single HVAC system with two independent zones with digital thermostats for maximum comfort and efficiency (per plan)

**WARRANTY AND QUALITY CONTROL**

- ◆ Covered by Nationally Recognized 2 - 10 year Extended Warranty Program with Residential Warranty Corporation for New Homes
- ◆ Homeowner Orientation
- ◆ Final inspection by Homeowner

FOR MORE INFORMATION: (864) 644-8494

D.R. Horton, Inc. is continuously improving our product and reserves the right to change floor plans, specifications and prices. This brochure is for illustration purposes only and is not part of a legal contract. Information shown is believed to be accurate, but is not warranted and is subject to change without notice. ©Copyright D.R. Horton, Inc. 2011



X *Per 2-17-13*

*B*

X *hg 2-17-13*

**EXHIBIT B**

**Selected Options List**

BLIN00D2	BLINDS LEVEL 1 - 2 STORY PLAN, 1 YR WTY DOES NOT INCL 2 STORY WNDWS FRT DR S/L TRNSM & BSMT		\$2,700.00	1	\$2,700.00
DOWL00EX	EXTRA BOWL		\$715.00	1	\$715.00
CHALETXX	DIMENSIONAL SHINGLES ILO STAND ARD SHINGLES		\$0.00	1	\$0.00
CLRPLUS1	COLOR PLUS COMMUNITY-USE A CP EXTERIOR COLOR SCHEME (Note: Siding- Navajo Beige, Brick - Autumn Beige, Door & Shutters - Rookwood Brown, Trim - Beige, Stone - Villa Grey)	Color: Color Scheme 3	\$0.00	1	\$0.00
CUSTOM01	DEC Custom Option (Note: Level 2 Granite Kitchen)	Color: Ferros Gold	\$1.00	550	\$550.00
DESK0002	DESK-LANDEN GLAZED	Color: Java Glaze	\$2,010.00	1	\$2,010.00
HSAS00WN	THIS PLAN TO BE BUILT AS DRAWN		\$0.00	1	\$0.00
J3SDS0BK	ADDITIONAL BRICK (LEFT & RIGHT) ON SLAB	Color: Autumn Ridge	\$0.00	1	\$0.00
J4SDS0BK	ADDITIONAL BRICK (LEFT, RIGHT, REAR) ON SLAB		\$5,800.00	1	\$5,800.00
JAOT00DE	ELECTRICAL- DEDICATED ELECTRIC AL OUTLET 110v		\$100.00	3	\$300.00
JAOT00EI	ADD INTERIOR 110 OUTLET OR SWITCH		\$50.00	6	\$300.00
JAP10106	RANGE-GH GAS JGB600DETBB - BLA CK SELF-CLEAN		\$760.00	1	\$760.00
JAP20201	MICROWAVE GE JVM1540DMBB - BLA CK 1.5 CU FT		\$0.00	1	\$0.00
JAP30301	DISHWASHER GE GSD2100VBB - BLA CK		\$0.00	1	\$0.00
JAP40403	REFRIGERATOR GE GSH25JGDBB - B LACK SIDExSIDE 25.3 cu ft		\$1,390.00	1	\$1,390.00
JCB20053	ARISTOKRAFT LANDEN GLAZED FLAT PANEL MAPLE OR BRIARCLIFF MAPLE W/36" UPPERS (Note: Kitchen & Baths)	Color: Java Glazed	\$4,295.00	1	\$4,295.00
JCBU0014	SINGLE SLIDE OUT TRAYS PER PLAN		\$312.00	1	\$312.00
JCBU0015	REFRIGERATOR CABINET		\$0.00	1	\$0.00
JCBU0020	CABINETS-2" CROWN		\$0.00	1	\$0.00
JCBU0022	CABINETS-KNOBS	Color: H303	\$0.00	1	\$0.00
JCBU0025	VANITY - BATHROOM CABINET TO M ATCH KITCHEN CABINETS		\$0.00	1	\$0.00
JCBU0031	CABINETS - MICROWAVE BUMP UP/B UMP OUT		\$0.00	1	\$0.00
JCBU0033	CABINETS - 36" TO 42"		\$375.00	1	\$375.00
JCBU0046	36" HIGH VANITY CABINETS IN MA STER BATH-SINCLAIR		\$0.00	1	\$0.00
JCT10001	CARPET BASE-ANGELUS	Color: Oat Straw	\$0.00	1	\$0.00
JCWN001P	1-PIECE CROWN MOULDING (PER ROOM) 1 STORY ROOM - OMS ONLY		\$250.00	13	\$3,250.00
JELC0010	OUTLET 220 (ELECTRICAL APPLIAN CE)		\$250.00	1	\$250.00
JENT0002	CABLE OUTLET (RG6)		\$75.00	1	\$75.00
JENT0024	WIRING-PREWIRE AND BRACE FOR C EILING FAN		\$75.00	6	\$450.00
JGAS00LN	GAS STUB (FOR ADDITIONAL GAS A PPLIANCES, STUB IS ON OUTSIDE C ORNER OF PATIO) - REAR PATIO WALL ONLY)		\$275.00	1	\$275.00

Initials

*Handwritten initials/signature*

X	<i>Handwritten initials</i>	2-17-13
X	<i>Handwritten initials</i>	2-17-13

ELECTRONICALLY FILED - 2020 Nov 23 2:28 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

Buyer Paul Zitek / Subdivision Rhee Hill 90' / Lot 0266 / Address 104 Starbridge Court / Job 70953-0266  
 Salesperson Angela H Moss / Date Printed 02/17/2013

JGDO00XX	GARAGE DOOR OPENER-WITH TWO TRANSMITTER (PRO-DRIVE)		\$350.00	1	\$350.00
JGDOHDWR	GARAGE DOOR HARDWARE		\$0.00	1	\$0.00
JHEA00WM	STACK STONE (MANTLE HT. W/ WD MANTLE)	Color: Villa Grey Location: Fireplace	\$700.00	1	\$700.00
JIPT0002	INTERIOR PAINT-(LARGE HOME) SUMMER BEIGE aka Desert Fawn WITH SHELL WHITE CEILING	Color: Summer BeigeWhite Ceilings	\$1,150.00	1	\$1,150.00
JKSK0021	KITCHEN FAUCET - MOEN #7590 OIL RUBBED BRONZE		\$520.00	1	\$520.00
JPAT00SF	CONCRETE PATIO EXTENSION PER SQ. FOOT		\$6.00	680	\$4,080.00
JPB10021	PLUMBING-MASTER BATH FAUCET-MOEN BRANTFORD OIL RUB		\$500.00	1	\$500.00
JPB20009	PLUMBING-SECONDARY BATH FAUCET -MOEN EVA OIL RUB		\$420.00	3	\$1,260.00
JRAN00LT	RECESSED CAN LIGHT WITH ONE (1) SWITCH		\$110.00	27	\$2,970.00
JRVS00DR	THIS PLAN TO BE BUILT REVERSED		\$0.00	1	\$0.00
JSFG0025	SIDE ENTRY GARAGE-SERIES 200 ON SLAB (CONSTRUCTION TO CONFIRM EXTRA COST ON BASEMENT)		\$3,800.00	1	\$3,800.00
JSERS025	CLASSIC 200 + ON SLAB-REFER TO NEIGHBORHOOD SPECIFICATIONS		\$0.00	1	\$0.00
JSHWRDR2	SHOWER ENCLOSURE - BRONZE WITH CLEAR GLASS		\$190.00	1	\$190.00
JSNK00UT	UTILITY SINK (PER PLAN). NOT TO BE LOCATED IN UNHEATED AREA		\$584.00	1	\$584.00
JTOP00U9	GRANITE LEVEL 2 DESK TOP		\$558.00	1	\$558.00
JTOPOH12	12" GRANITE ISLAND OVERHANG LEVEL 2 (MUST ALSO PICK GRANITE ISLAND TOP OPTION)	Color: Ferros Gold	\$250.00	1	\$250.00
JUCP028P	CARPET PAD - 8 lb REBOND 2 STORY		\$1,500.00	1	\$1,500.00
JUV20001	VINYL-ARMSTRONG INITIATOR (Note: 66254 - Laundry & Mud Room & Downstairs Bath 66089 - Upstairs Hall Bath & Jack n Jill bath)		\$0.00	1	\$0.00
JWTR2532	WATER HEATER UPGRADE-RINNAI #2 532 TANKLESS (3 OR MORE BATHROOM PLANS) PRESALE ONLY!		\$2,120.00	1	\$2,120.00
LITG00B4	LIGHTING - BATHS (ALL) LEVEL 4 (SEABROOK OR BURNISHED CHESTNUT)	Color: Espresso	\$393.00	1	\$393.00
LHTG00C3	LIGHTING-EXTERIOR COACH 3	Color: P5878-31	\$95.00	3	\$285.00
LHTG00H4	LIGHTING - HOUSE LEVEL 4 (FORGED BRONZE)	Color: Espresso	\$421.00	1	\$421.00
LHTG00P2	LIGHTING-PENDANT LEVEL 2 (OXFORD SILVER OR COBBLESTONE)	Color: P5083-84 Espresso	\$128.00	2	\$256.00
MATRIX00	COMMUNITY SPECIFIC MATRIX		\$0.00	1	\$0.00
MSTRS01G	LEVEL 1 TILE-MASTER BATH ON SQUARE ON SLAB	Color: Pacific Natural Location: Master Bath	\$0.00	1	\$0.00
RAIL0002	OPEN RAIL W/PICKETS ON FIRST 3-5 STEPS (PER PLAN)		\$0.00	1	\$0.00
RAIL00WD	OPEN RAIL W/PICKETS ON ALL STEPS (NOT AVAILABLE W/THIRD FLOOR WALK-UP)		\$550.00	1	\$550.00
SIGTRM25	SIGNATURE TRIM PACKAGE - CLASSIC 200 PLUS SERIES		\$1,655.00	1	\$1,655.00

*JH*


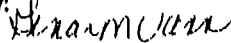
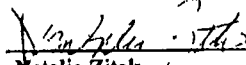
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X	<i>17-3</i>	<i>2/17/13</i>

70953-0266



Buyer: Paul Zitek / Subdivision: Rose Hill 90' / Lot 0266 / Address: 104 Starbridge Court / Job: 70953-0266  
 Salesperson: Angela H Moss / Date Printed: 02/17/2013

VTYTOPCM	VANITY TOPS CULTURED MARBLE		\$0.00	1	\$0.00
WOODS0D1	LEVEL 1 HARDWOOD - DINING ROOM ON SLAB	Color: Cherry Spice	\$1,435.00	1	\$1,435.00
WOODS0H1	LEVEL 1 HARDWOOD - REAR HALL ON SLAB	Color: Cherry Spice	\$1,225.00	1	\$1,225.00
WOODS0K1	LEVEL 1 HARDWOOD - KITCHEN/BREAKFAST ON Slab - ILO VINYL - BASEMENT	Color: Cherry Spice	\$2,325.00	1	\$2,325.00
WOODS0L1	LEVEL 1 HARDWOOD - LIVING ROOM ON SLAB	Color: Cherry Spice	\$2,220.00	1	\$2,220.00
WOODS0R1	LEVEL 1 HARDWOOD - FOYER ON SLAB	Color: Cherry Spice	\$205.00	1	\$205.00
XPOS0001	Sales & Marketing Incentive		\$-1.00	1,500	\$-1,500.00
XPOS0008	Sales & Marketing Incentive (Note: Signature Trim Pkg Included)		\$-1.00	1,655	\$-1,655.00

<b>Total Option Price:</b>	<b>\$52,154.00</b>
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<b>Purchaser:</b>  Paul Zitek Date: 2-17-13	<b>Seller:</b> D. R. Horton, Inc. By:  Date: 2/20/13
 Natalie Zitek Date: 2-17-13	

Initials

X		2-17-13
X		2-17-13

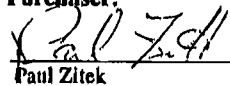
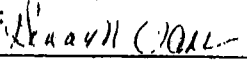

**D.R. HORTON**  
**Stage of Option Availability Matrix**

**Exhibit C**

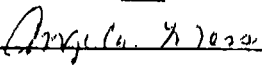
**Use the following table to determine if a Standard Change Order is allowable**

OPTIONS	PRIOR TO FOUNDATION	PRIOR TO FRAME	PRIOR TO ROUGH MECHANICAL	PRIOR TO INSULATE	PRIOR TO SHEETROCK
Additional Appliances	Y	Y	Y	Y	Y
Flooring Selections	Y	Y	Y	Y	Y
Exterior Concrete Changes	Y	Y	Y	Y	Y
Door and Shutter Color	Y	Y	Y	Y	Y
Kitchen Sink Option	Y	Y	Y	Y	Y
Electrical Appliance Option Upgrade	Y	Y	Y	Y	Y
Window Blinds	Y	Y	Y	Y	Y
Cabinet Crown Molding	Y	Y	Y	Y	N
Interior Trim Options/Plantation shutters	Y	Y	Y	N	N
Exterior/Interior Door Hardware	Y	Y	Y	N	N
Plumbing Fixtures (faucets)	Y	Y	Y	N	N
Kitchen Counter Color	Y	Y	N	N	N
Cabinet Options/Upgrades	Y	Y	N	N	N
Lighting & Fans (must have prewire)	Y	Y	N	N	N
Electrical Options/Upgrade	Y	Y	N	N	N
Microwave Option	Y	Y	N	N	N
Roof Color	N	N	N	N	N
Exterior Color Selections Vinyl/Stucco	N	N	N	N	N
Framing Options	N	N	N	N	N
Plumbing Options/Gas Line	N	N	N	N	N
Structural Options/Sunroom/	N	N	N	N	N
Screen Porch	N	N	N	N	N
Brick Color	N	N	N	N	N

**\*\*PURCHASER(S) ACKNOWLEDGE THAT NO CHANGES ARE ALLOWED AFTER SHEETROCK\*\***

<b>Purchaser:</b>  Paul Zitek Date: <u>2-17-13</u>	<b>Seller:</b> D. R. Horton, Inc. By:  Date: <u>2/20/13</u>
 Natalie Zitek Date: <u>2-17-13</u>	

**CURRENT STAGE OF HOME:** None

**Agent Signature:**   
**Date:** 2/17/13

By signing this, Construction verifies that changes can be made to 70953-0266 per the restrictions of this stage matrix.

**Construction Signature:** \_\_\_\_\_

Buyer Paul Zick and Nadia Zick / Subdivison, Page 10 of 27 / Lott#: 0000 - / Address: 141 Subdivison Court / Apt: 7000 0000  
Annex B, Item # 02132013

### FHAVA AMENDATORY STATEMENT EXHIBIT E

This Addendum is attached and made part of that certain Purchase Agreement by and between D.R. Horton, Inc./ D.R.Horton, Inc. -Torrey, Seller, and Paul Zick and Nadia Zick, Purchaser, dated 02/17/2013, for the purchase and sale of Lot 9200, WRISTLERLY MODEL, Page H11 90' Subdivision.

**A. FHA LOANS:** It is expressly agreed that, notwithstanding any other provisions of this contract, the Purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise, unless the Purchaser has been given in accordance with HUD/FHA or VA requirements a written statement issued by the Federal Housing Commissioner/Department of Veterans Affairs or a Direct Endorsement lender setting forth the appraised value of the property of not less than \$200,000. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of the contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development/Veterans Administration will insure. HUD/VA does not warrant the value or the condition of the property. The Purchaser should satisfy himself/herself that the price and condition of the property are acceptable.

**B. VA LOANS:** It is expressly agreed that, notwithstanding any other provisions of this contract, Purchaser shall not incur any penalty by forfeiture of earnest money or otherwise be obligated to complete the purchase of the property described herein, if the contract purchase price or cost exceeds the reasonable value of the property established by the Department of Veterans Affairs. Purchaser shall, however, have the privilege and option of proceeding with the consummation of this contract without regard to the amount of the reasonable value established by the Department of Veterans Affairs.

Purchaser: [Signature] 2-17-13  
Paul Zick Date Seller: D.R. Horton, Inc./ D.R. Horton, Inc. -Torrey  
[Signature] 2/17/13  
Date Seller

[Signature] 2-17-13  
Nadia Zick Date

### FHAVA REAL ESTATE CERTIFICATION

The undersigned Sellers, Borrowers, and Real Estate Broker involved in this transaction do hereby certify that the terms of the sales contract are true to the best of their knowledge and belief. There are no other side agreements other than the agreement statement on the sales contract.

Purchaser: [Signature] 2-17-13  
Paul Zick Date Seller: D.R. Horton, Inc./ D.R. Horton, Inc. -Torrey  
[Signature] 2/17/13  
Date Seller

[Signature] 2-17-13  
Nadia Zick Date

[Signature] 2/20/13  
Broker's Affiliated Business Disclosure

78953-8266

Buyer: Paul Zitek / Subdiv: Bass Hill SW / Lot 6266 / Address: 104 Starbridge Court / Jct: 78953-8266  
Salesperson: Angela H Stone / Class: 7/19/08 09/17/08 13

COMMISSION REBATE CERTIFICATION

Seller: D.R. Horton, Inc.  
Buyer(s): Paul Zitek and Natalie Zitek  
Contract Date: 02/17/2013  
Property Address: 104 Starbridge Court BASLEY, SC 29642  
Real Estate Agency: Keller Williams Realty Western Upstate  
Real Estate Agent: Candace Jordan  
Agency Address: 3332 Hwy 153 PO Box 8159 Greenville, SC 29604

This Commission Rebate Certification ("Certification") is being provided pursuant to the Purchase Agreement / Contract of Sale / Earnest Money Contract ("Contract") by and between Seller and Buyer(s), for the purchase and sale of the above-referenced Property.  
1. Pursuant to the Contract, the Real Estate Agent/Broker ("Agent/Broker") will be paid a real estate sales commission ("Commission") of 6% as described in the Contract upon the closing and funding of the Property. For the purposes of this Certification, the term Commission is intended to include all commissions, incentives and bonuses to be received by Broker in connection with the Contract or from any prior transactions with the Buyer(s).  
\$1500 or Bonus

2. With regard to the Commission, Agent/Broker hereby acknowledges and certifies that they (check applicable box):

WILL NOT rebate\* to the Buyer(s) part or all of the Commission.

Broker acknowledges and agrees that no rebate of any portion of this commission will be made directly to, or indirectly on behalf of, the Buyer or any other interested and/or related party, or used to pay Buyer costs associated with purchase and sale of the above-referenced Property.

WILL rebate\* to the Buyer(s) part or all of the Broker Commission.

Broker acknowledges and agrees to execute a "Commission Rebate Addendum" to the Contract to disclose the terms of such rebate in order to create transparency with regard to how such rebate applies to the purchase and sale of the above-referenced Property.

\* The term "rebate" is intended to include any incentive related to the purchase and sale of the above-referenced Property, including but not limited to: a cash rebate, credit rebate of closing costs, buy-out of a lease or related borrower financial obligation, purchase of appliances or related merchandise, prizes and/or trips.

3. Agent/Broker recognizes that Seller is relying on this Certification as verification of whether or not any rebate of Commission is to take place. A rebate occurring outside of the closing of the purchase and sale of the above-referenced Property does not preclude the Agent/Broker from acknowledging that such a rebate will occur.

4. In the event that a change of circumstance arises where Agent/Broker decides at a later date to rebate to Buyer(s), Agent/Broker agrees to execute a "Commission Rebate Addendum" to the Contract to disclose the terms of such rebate in order to create transparency with regard to how such rebate applies to the purchase and sale of the above-referenced Property and to deliver the Commission Rebate Addendum (executed by Agent/Broker and Buyer(s)) to Seller.

AGENT OR BROKER

Candace Jordan Candace Jordan Date: 2/2/13

Seller: Stamm LLC 2/2/13

**NOTICE OF SELLER'S BUSINESS AFFILIATIONS**

**TO: Paul Zitek and Natalie Zitek** PROPERTY: 104 Sturbridge Court EASLEY, SC 29642  
[Homebuyer(s)]

**FROM: D.R. HORTON, INC.**  
1 Bronson Drive  
Simpsonville, SC 29680  
[Seller]

**DATE: 02/17/2013**

This is to give you notice that the above referenced seller has a business relationship with:

**DHI MORTGAGE COMPANY, LTD.**  
101 Sturbridge Court  
Easley, SC 29642

**D.R. HORTON INSURANCE AGENCY, INC.**  
301 Commerce St Suite 500  
Fort Worth, TX 76102

The nature of this business relationship is that these companies are corporate affiliates, each being 100% wholly owned by, or by a subsidiary of, the same parent corporation. Because of this relationship, this referral may provide seller a financial or other benefit.

Set forth below is the estimated charge or range of charges by each company for settlement services listed. You are NOT required to use these companies as a condition of your purchase of the property from seller or as a condition of your application for, or settlement of, a mortgage loan on the property in connection with your purchase. THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.

DHI MORTGAGE COMPANY, LTD.	
Service	Charge or Range
Loan Origination Charge:	1% of Loan Amount plus \$595.00
	An additional 1% of the Loan Amount may apply for certain Affordable Housing Loan Programs

Mortgage fees may vary depending upon whether the loan is originated or brokered by DHI Mortgage Company, Ltd.

Note: If you apply with DHI Mortgage Company, Ltd., a Good Faith Estimate of all settlement charges will be provided to you by DHI Mortgage Company, Ltd. at or within three business days after loan application.

You may be entitled to additional builder discounts/credits paid by the seller to purchase multiple settlement services as set forth in the Builder's Incentive and Concessions Addendum to your purchase contract.

D. R. HORTON INSURANCE AGENCY, INC.
D.R. HORTON INSURANCE AGENCY, INC. is a licensed insurance agent that offers policies of property insurance as agent for one or more insurance companies qualified to transact insurance business in the state of South Carolina. You will be provided a separate proposal or quote of the terms and conditions of any policy of insurance offered by D.R. HORTON INSURANCE AGENCY, INC. in which you express an interest. For comparison purposes, the cost for a hazard insurance policy for a home valued at \$211,000 with commonly selected coverage items and deductibles would range between: \$200 and \$1,923 per annum. The specific premium depends on various factors, including but not limited to, the value of the home, the location of the home, deductibles selected, and the amount of coverage selected. The quote will set out the estimated premium and other charges, or range of charges, by D.R. HORTON INSURANCE AGENCY, INC. for its insurance products or services.

**ACKNOWLEDGMENT:**

I/we have read this disclosure form and understand that seller is referring me/us to purchase the above-described settlement services from DHI MORTGAGE COMPANY, LTD., and D.R. HORTON INSURANCE AGENCY, INC., and may receive a financial or other benefit as the result of this referral.

*Paul Zitek* 2-17-13 \_\_\_\_\_ Homebuyer

*Natalie Zitek* 2-17-13 \_\_\_\_\_ Homebuyer

*JH*



**Change Order Number 1**

**ADDENDUM TO CONTRACT BETWEEN**  
 Paul Zlak and Natalie Zlak, Buyer  
 And  
 DR Horton Incorporated, Seller

Date: 03/14/2013  
 Change Order Type: DEC  
 Change Order Status: Open  
 Change Order Status Date: 03/14/2013  
 Change Order Approved By:  
 Change Order Created By: Karrie Hills  
 Change Order Created Date: 03/14/2013  
 Change Order Notes:

Community: Rose Hill 90' Section/Phase:  
 Plan/Elevation/Series: WSLY/A-70053  
 Plan/Elevation Name: WESTERLY  
 Lot #: 0296 Block: -  
 Lot Address: 104 Starbridge Court  
 EASLEY, SC 29642  
 Lot Swing: R

**Added Options:**

Option Code	Description	Unit	Price	Qty	Extended Amt
JCBU0047	Java Glaze	36" HIGH VANITY CABINETS IN MASTER BATH-ALL OTHER LEVELS	F	1	\$210.00
JSTR0001		BOXED STAIRS W/STAINED STEPS W /PAINTED RISER	F	1	\$1,925.00

**Deleted Options:**

Option Code	Description	Unit	Price	Qty	Extended Amt
JCBU0046		36" HIGH VANITY CABINETS IN MASTER BATH-SINCLAIR	F	1	\$0.00

**Change Order Price Summary:**

<b>Total Amount of Option Changes</b>		<b>\$2,135.00</b>
<b>Old Sales Price</b>		<b>\$268,144.00</b>
<b>New Sales Price</b>		<b>\$269,279.00</b>

**APPRAISED VALUE (Applicable to VA and FHA Loans Only).** It is expressly agreed that notwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise, unless the purchaser has been given, in accordance with HUD/FHA or VA requirements, a written statement by the Federal Housing Commissioner, Department of Veterans Affairs, or a Direct Endorsement lender setting forth the appraised value of the property of not less than \$269,279.00. The purchaser shall have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development or the VA, as applicable, will insure. HUD/VA, as applicable, does not warrant the value or condition of the property. The purchaser should satisfy himself/herself that the price and condition of the property are acceptable.

*gjh*

Initials PE Date 3-14-13  
 Initials JL Date 3-14-13



Change Order Number 1

ADDENDUM TO CONTRACT BETWEEN  
Paul Zitek and Natalie Zitek, Buyer  
And  
DR Horton Incorporated, Seller

Date: 03/14/2013  
Change Order Type: DEC  
Change Order Status: Open  
Change Order Status Date: 03/14/2013  
Change Order Approved By:  
Change Order Created By: Karris Hills  
Change Order Created Date: 03/14/2013  
Change Order Notes:

Community: Rose Hill 90' Section/Phase:  
Plan/Elevation/Series: WSLY/A-70653  
Plan/Elevation Name: WESTERLY  
Lot #: 0288 Block: -  
Lot Address: 104 Starbridge Court  
EASLEY, SC 29642  
Lot Swing: R

Paul Zitek 3-14-13  
Paul Zitek Date

Natalie Zitek 3-14-13  
Natalie Zitek Date

Karris Hills  
Sales Representative Date

Suzanne 3/19/13  
Seller Date

Initials \_\_\_\_\_ Date \_\_\_\_\_  
Initials \_\_\_\_\_ Date \_\_\_\_\_

# EXHIBIT B

*END*

After Recording Return To:  
Morris|Hardwick|Schneider, LLC  
3527 Pelham Road, Suite A  
Greenville, SC 29615  
GRV-130300155S

State of South Carolina  
County of Anderson

**SPECIAL WARRANTY DEED**

KNOW ALL MEN BY THESE PRESENTS, D.R. Horton, Inc. by Morris|Hardwick|Schneider, LLC its Attorney in Fact Purusant to Limited Power of Attorney recorded in Book 10323, Page 199 Anderson County, South Carolina records, 8800 Roswell Road Bldg B Suite 100, Sandy Springs, GA 30352 (hereinafter called "Grantor"), for and in consideration of the sum of Two Hundred Ninety Thousand Two Hundred Seventy Nine (\$290,279.00) Dollars to it hand paid at and before the sealing of these presents by Paul Zitek and Natalie Zitek (hereinafter called "Grantee") in the State aforesaid, (the receipt of which is hereby acknowledged) has granted, bargained, sold and released and by these Presents does hereby grant, bargain, sell and release unto the Grantee, as joint tenants with the right of survivorship and not as tenants in common, his/her/their heirs, successors and assigns:

THIS PROPERTY IS MORE COMMONLY KNOWN AS 104 Sturbridge Court, Easley, SC, 29642 AND IS MORE PARTICULARLY DESCRIBED IN EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF BY REFERENCE.

Grantee's Address: 104 Sturbridge Court, Easley, SC 29642

Subject to all easements and restrictions of record and otherwise affecting the property and matters and accurate survey would reveal.

TOGETHER, with all and singular the Rights, Members, Hereditaments and Appurtenances to the Premises belonging or in any wise incident or pertaining.

TO HAVE AND TO HOLD, all and singular the premises before mentioned unto the Grantee, as joint tenants with the right of survivorship and not as tenants in common, his/her/their heirs, successors and assigns forever, and the Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the premises unto the Grantee, his/her/their successors and assigns against the lawful claim of any person claiming by, through or under the Grantor.

Deed Prepared By:  
Morris|Hardwick|Schneider, LLC

IN WITNESS WHEREOF, Grantor has caused these presents to be executed in its name by its undersigned officer(s) and its seal to be hereto affixed.

Date: 7/25/2013

D.R. Horton, Inc.

BY: Morris|Hardwick|Schneider, LLC its Attorney in Fact Pursuant to Limited Power of Attorney recorded in Book 10323, Page 199 Anderson County, South Carolina records.

BY: [Signature]  
Christy K. Noll  
Attorney in Fact

Signed, sealed and delivered in the presence of:

[Signature]  
Witness #1 - Print Name: Kimberly A. Davis

[Signature]  
Witness #2 - Print Name: Teressa Harbin

State of South Carolina  
County of Greenville

Personally appeared before me the undersigned witness who, being duly sworn says that (s)he saw within named Grantor by its officer(s) as its act and deed, sign, seal and deliver the within Deed and that (s)he with other witness whose signature appears above witnessed the execution thereof.

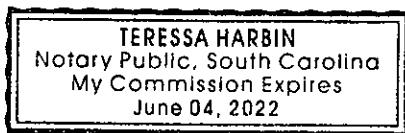
Sworn to before me this 25th day of July, 2013.

[Signature]  
Notary Public for the State of South Carolina  
My commission expires: 6/4/2022

[Signature]  
Witness #1 - Print Name: Kimberly A. Davis

[Seal]

RE: 104 Sturbridge Court, Easley, SC 29642  
REO #: /



Deed Prepared By:  
Morris|Hardwick|Schneider, LLC

**EXHIBIT A**

All that certain piece, parcel or lot of real property in Anderson County, South Carolina designated as the Lot 266 on the Final Plat captioned "Rose Hill- Phase I Section I" dated April 26, 2006 recorded with the Register of Deeds for Anderson County, South Carolina in Plat Book 1618, Page 10; reference is made to said plat for a metes and bounds description of said lot.

Together with rights appurtenant to the Premises created under Declaration of Protective Covenants, Conditions, and Restrictions for Rose Hill Subdivision dated July 17, 2006 recorded July 20, 2006 in Deed Book 7483, Page 49 in the Register of Deeds for Anderson County, South Carolina.

Being a portion of the same property conveyed unto D.R. Horton, Inc. by deed of SCBT, a South Carolina bank dated 03/07/13, recorded 03/08/13 in Book 10835, Page 127 in the office of the ROD for Anderson County.

Property Address: 104 Sturbridge Court, Easley, SC, 29642

TMS # 213-12-01-058.000

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**AFFIDAVIT**

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located at 104 Sturbridge Court, Easley, SC, 29642 bearing Anderson County Tax Map Number 213-12-01-058.000, was transferred by D.R. Horton, Inc. by Morris|Hardwick|Schneider, LLC its Attorney in Fact Pursuant to Limited Power of Attorney recorded in Book 10323, Page 199 Anderson County, South Carolina records to Paul Zitek and Natalie Zitek on July 25, 2013.
3. Check one of the following: The deed is
  - (a)  X  subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
  - (b) \_\_\_\_\_ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
  - (c) \_\_\_\_\_ exempt from the deed recording fee because (See Information section of affidavit):

(If exempt, please skip items 4-7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase realty?

Yes \_\_\_\_\_ No \_\_\_\_\_

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit.):
  - (a) \_\_\_\_\_ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$290,279.00
  - (b) \_\_\_\_\_ The fee is computed on the fair market value of the realty which is
  - (c) \_\_\_\_\_ The fee is computed on the fair market value of the realty as established for property tax purposes which is
5. Yes \_\_\_\_\_ A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land,  
No \_\_\_\_\_ tenement, or realty after the transfer.

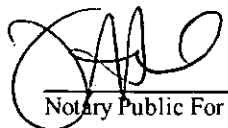
If yes, the amount of the outstanding balance of this lien or encumbrance is:

6. The deed recording fee is computed as follows:
  - (a)  \$ 290,279.00  Place the amount listed in item 4 above here:
  - (b) \_\_\_\_\_ Place the amount listed in item 5 above here:  
(If no amount is listed, place a zero here.)
  - (c) \_\_\_\_\_ Subtract Line 6(b) from Line 6(a) and place result here:

130017943 7/29/2013 09:56:36 AM  
FILED, RECORDED, INDEXED  
Bk: 11041 Pg: 00015 Pages: 004  
Rec Fee: 10.00 St Fee: 755.  
Co Fee: 319.55  
REGISTER OF DEEDS, ANDERSON CO, SC  
Jean Jones

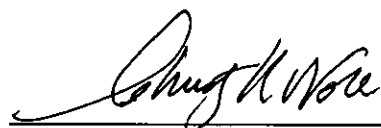
7. The deed recording fee due is based on an amount listed on Line 6(c) above and the deed recording fee is: \$1,074.85
8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Attorney
9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

SWORN to before me this 25th day of July, 2013

  
\_\_\_\_\_  
Notary Public For South Carolina

My Commission Expires:

TERESSA HARBIN  
Notary Public, South Carolina  
My Commission Expires  
June 04, 2022

  
\_\_\_\_\_  
Responsible Person Connected with the Transaction  
Christy K. Noll, Attorney

# EXHIBIT C

# JUSTIN O'TOOLE LUCEY, PA

Attorneys at Law

Justin Lucey  
Joshua F. Evans  
Stephanie D. Drawdy  
Dabny Lynn

415 Mill Street, Mount Pleasant, SC 29464  
Reply to: P.O. Box 806, Mount Pleasant, SC 29465  
Phone: 843.849.8400 · Fax: 843.849.8406 · www.lucey-law.com

Anna S. McCann  
Lauren M. Milton  
Sohayla R. Townes  
Collin H. Fuller

December 11, 2019

## **VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

D.R. Horton, Inc.  
c/o C T Corporation System  
2 Office Park Court Suite 103  
Columbia, South Carolina 29223

*RE: Rose Hill Subdivision in Anderson County, South Carolina*  
Notice and Opportunity to Cure Improper Construction Conditions and Resulting Damages

To Whom It May Concern:

This letter is to notify D.R. Horton, Inc. that Natalie and Paul Zitek as well as other owners of D.R. Horton homes within the Rose Hill subdivision in Anderson County, South Carolina (“Rose Hill”) intend to proceed with litigation should D.R. Horton, Inc. fail to cure the following improper construction conditions and resulting damages existing at their homes within thirty (30) days from the date of this letter:

1. Brick: Insufficient/improperly installed brick veneer and resulting cracking, separation, water damage, efflorescence, and cost to repair;
2. Stone: Insufficient/improperly installed stone veneer and resulting loose embedment, cracking, separation, water damage and cost to repair;
3. Doors: Insufficient/improperly installed front and patio doors, deteriorating trim, resulting water damage/leakage, and cost to repair;
4. Floors: Insufficient/improperly installed flooring and resulting buckling, cracking, separation, bumpiness, water damage, and cost to repair;
5. General Wall: Insufficient/improperly installed framing, missing/inadequate insulation at exterior walls, drywall cracking, increased utility bills, and cost to repair;
6. Roof: Insufficient/improperly installed roofs, deteriorating sheathing and roof decking, resulting water damage/leakage, blow-offs, and cost to repair;
7. Windows: Insufficient/improperly installed windows, resulting water damage/leakage, cracking, separation, and cost to repair;

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Notice and Opportunity to Cure

December 11, 2019

Page 2

- 
8. Vinyl Siding: Insufficient/improperly installed vinyl siding, resulting waviness, water damage, and cost to repair;
  9. Hardi Siding: Insufficient/improperly installed Hardi siding, resulting cracking, water damage, efflorescence, and cost to repair;
  10. Concrete/Soil: Insufficiently supported concrete/inadequate soil, resulting cracking, water damage, and cost to repair;
  11. Grading/Drainage: Insufficient/improperly installed grading and/or drainage, resulting water damage, ponding, unevenness, landscaping difficulties, and cost to repair;
  12. MEP: Inadequate free air space, improper duct work, insufficient insulation in attics, plumbing/HVAC leaks, insufficient PEX piping, non-galvanized piping, holes in roof sheathing at plumbing penetrations, inadequate outlets, insufficient amperage, power surges, and resulting cracking, water damage/leakage, cost to repair, and increased utility bills; and
  13. Poor Work: Sloppy workmanship throughout Rose Hill homes and resulting cost to repair.

Time is of the essence and extensions will not be granted. Thereafter, the Rose Hill homeowners will proceed with serving litigation. Please contact us directly if you have any questions or concerns regarding this Notice and Opportunity to Cure.

Sincerely,




Dabny Lynn  
Sohayla Townes

DL/dl

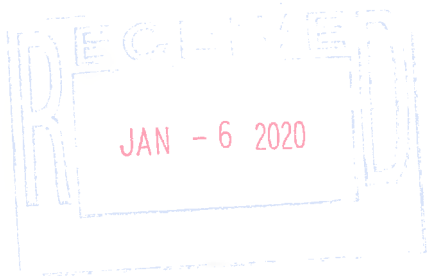
7017 1450 0002 3749 3122

<b>U.S. Postal Service™</b> <b>CERTIFIED MAIL® RECEIPT</b> <i>Domestic Mail Only</i>	
For delivery information, visit our website at <a href="http://www.usps.com">www.usps.com</a> ®.	
<b>OFFICIAL USE</b>	
Certified Mail Fee \$ _____	Postmark Here
Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/> Return Receipt (hardcopy) \$ _____	
<input type="checkbox"/> Return Receipt (electronic) \$ _____	
<input type="checkbox"/> Certified Mail Restricted Delivery \$ _____	
<input type="checkbox"/> Adult Signature Required \$ _____	
<input type="checkbox"/> Adult Signature Restricted Delivery \$ _____	
Postage \$ _____	
Total Postage and Fees \$ _____	
Sent To <i>U.S.</i> <b>D.R. Horton, Inc. do CT Corporation Syst</b>	
Street and Apt. No., or PO Box No. <b>Office Park Ctr, Suite 103</b>	
City, State, ZIP+4® <b>Columbia, SC 29223</b>	
PS Form 3800, Apr. 11 2015 PSN 7530-02-000-9047 See Reverse for Instructions	

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY														
<ul style="list-style-type: none"> <li>■ Complete items 1, 2, and 3.</li> <li>■ Print your name and address on the reverse so that we can return the card to you.</li> <li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature</p> <p><input checked="" type="checkbox"/> Pam Johnson <span style="float: right;"><input type="checkbox"/> Agent <input type="checkbox"/> Addressee</span></p>														
<p>1. Article Addressed to:</p> <p>DR. Horton Inc. c/o CT Corporation System 2 Office Park Court, Suite 103 Columbia, SC 29223</p>  <p>9590 9402 4502 8278 0951 54</p>	<p>B. Received by (Printed Name) <span style="float: right;">C. Date of Delivery</span></p> <p>Pam Johnson <span style="float: right;">12/16</span></p>														
<p>2. Article Number (Transfer from service label)</p> <p>7017 1450 0002 3749 3122</p>	<p>D. Is delivery address different from item 1? <span style="float: right;"><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</span></p> <p>If YES, enter delivery address below:</p>														
<p>PS Form 3811, July 2015 PSN 7530-02-000-9053</p>	<p>3. Service Type</p> <table border="0"> <tr> <td><input type="checkbox"/> Adult Signature</td> <td><input type="checkbox"/> Priority Mail Express®</td> </tr> <tr> <td><input type="checkbox"/> Adult Signature Restricted Delivery</td> <td><input type="checkbox"/> Registered Mail™</td> </tr> <tr> <td><input checked="" type="checkbox"/> Certified Mail®</td> <td><input type="checkbox"/> Registered Mail Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail Restricted Delivery</td> <td><input checked="" type="checkbox"/> Return Receipt for Merchandise</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery</td> <td><input type="checkbox"/> Signature Confirmation™</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Insured Mail Restricted Delivery</td> <td></td> </tr> </table> <p style="text-align: right;">Domestic Return Receipt</p>	<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®	<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™	<input checked="" type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery	<input type="checkbox"/> Certified Mail Restricted Delivery	<input checked="" type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™	<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery	<input type="checkbox"/> Insured Mail Restricted Delivery	
<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®														
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<input type="checkbox"/> Insured Mail Restricted Delivery															

DEC 20 2019

# EXHIBIT D



KEVEN K. KENISON  
(1964-2013)

THOMAS E. DUDLEY, III  
Practicing Attorney in South Carolina and North Carolina

JOHN T. CRAWFORD, JR.  
Practicing Attorney in South Carolina

BRIAN A. AUBRY  
Practicing Attorney in South Carolina

F. JAMES WARMOTH  
Practicing Attorney in South Carolina and North Carolina

MARK A. BIBLE, JR.  
Practicing Attorney in South Carolina

VIRGIL K. THOMPSON, III  
Practicing Attorney in South Carolina and California

January 3, 2020

**Via E-mail and First Class Mail**

Dabny Lynn, Esquire  
Lucey Law Firm  
415 Mill Street  
Mount Pleasant, South Carolina

Re: Owner: Natalie and Paul Zitek, et al.  
Subdivision: Rose Hill  
Location: Powdersville, South Carolina

Dear Ms. Lynn:

This firm represents D.R. Horton, Inc., ("DR Horton"). We are in receipt of your letter, dated December 11, 2019, (the "Letter") and have been asked to assist DR Horton in responding. The Letter states that Mr. and Mrs. Zitek, along with other owners in the Rose Hill subdivision ("Rose Hill"), are currently experiencing issues with their respective homes. We are notifying you of DR Horton's intent to inspect the Zitek's home, along with all other homes referred to in this letter.

We are available to inspect the home(s) on the following dates: January 8<sup>th</sup>, January 9<sup>th</sup>, January 10<sup>th</sup>, and January 14<sup>th</sup>. If you are unavailable on all of these dates, please contact us immediately so that we can find a more suitable date.

We are also requesting clarification as to the Letter as certain items we believe were not sufficiently provided. To conduct a proper inspection of the home(s) and offer cures, DR Horton requires the following clarifications.

- (1) Please provide a list of homes within Rose Hill that you are stating have construction defects. This list should include the address of the home, name of the homeowner(s), and date of purchase. DR Horton needs to know the homes prior to inspection so that it may review any records pertinent to the home(s). We understand that this list may be added to over the course of this matter. We would ask for you to supplement the list

GREENVILLE  
704 East McBee Avenue ■ Greenville, South Carolina 29601  
Phone 864.242.4899 ■ Fax 864.242.4844

COLUMBIA  
1320 Main Street, Suite 300 ■ Columbia, South Carolina 29201  
Phone 803.605.5271

ATLANTA  
2346 Wisteria Drive ■ Suite 220 ■ Snellville, Georgia 30078  
Phone 770.513.6400 ■ Fax 770.513.3239

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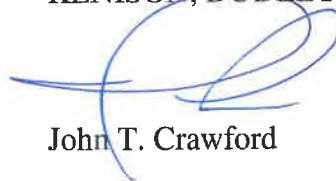
and allow DR Horton to inspect the newly-added homes as they become known.

- (2) When providing the list of homes, please list which issues are currently present at each home along with a general location for the issue. For example, to the extent flooring issue is identified, please list the room where the issue is located. We understand that these issues may be supplemented in the future as they become known. Likewise, we would request an opportunity to inspect the supplemented issues as they become known.
- (3) Please provide clarification as to the issues at the home(s). The Letter is vague as to the improper conditions currently in the home(s). For instance, #1 mentions water damage to the brick veneer and separation. Knowing the location of these defects will greatly assist and expedite the process of possibly furnishing a proper repair. Not knowing the location means that a stated defect on your list could be accidentally overlooked. We understand that not all issues may be known at this time, but DR Horton is trying to be as thorough and efficient when conducting these inspections.
- (4) Please clarify that you are representing all of the homeowners listed in response to subsection (1), or, if known, whether the owners have retained separate counsel for this matter. We are currently under the assumption that you are representing all the homeowners and want to make sure that all future correspondence is directed to the correct firm.
- (5) Also, please let us know if any investigations have occurred and if the corresponding reports have been furnished. A report of the home(s) inspected would greatly expedite this process during our inspection of the Zitek home and any other similarly situated home located within Rose Hill.

Please let us know your availability for the inspection at your earliest convenience. Should you have any comments, questions, or concerns, please do not hesitate to contact me by email at [crawford@conlaw.com](mailto:crawford@conlaw.com) or by phone at 864-242-4899. I look forward to meeting you at the inspection and working with you to resolve these issues.

Very truly yours,

KENISON, DUDLEY & CRAWFORD, LLC



John T. Crawford

# EXHIBIT E

# JUSTIN O'TOOLE LUCEY, PA

*Attorneys at Law*

Justin Lucey  
Joshua F. Evans  
Stephanie D. Drawdy  
Dabny Lynn  
James L. Floyd, III

415 Mill Street, Mount Pleasant, SC 29464  
*Reply to:* P.O. Box 806, Mount Pleasant, SC 29465  
Phone: 843.849.8400 · Fax: 843.849.8406 · [www.lucey-law.com](http://www.lucey-law.com)

Anna S. McCann  
Lauren M. Milton  
Sohayla R. Townes  
Collin H. Fuller

January 6, 2020

**VIA E-MAIL AND U.S. MAIL**

John T. Crawford, Esquire  
Kyle D. McGann, Esquire  
Kenison Dudley & Crawford, LLC  
1122 Barnwell Street  
Columbia, SC 29201  
[crawford@conlaw.com](mailto:crawford@conlaw.com)  
[mcgann@conlaw.com](mailto:mcgann@conlaw.com)

RE: Rose Hill Subdivision  
Reply to D.R. Horton's January 3, 2020 Response About its Opportunity to Cure

Kyle and John,

Thank you for confirming your representation of D.R. Horton and responding to the Notice and Opportunity to Cure ("Notice") letter about Rose Hill.

Regarding the scheduling of inspections, it will take some time to contact the homeowners and coordinate dates that work for them; and, before this can happen, we will need to confirm an inspection protocol with you. Assuming you envision a one hour non-destructive inspection of each home, please let us know if you have a continuous three day period available during the last week of January.

Further responding to your clients' requests, we represent a number of Rose Hill homeowners and a proposed class of similar Rose Hill homeowners whose homes were built by D.R. Horton. It is our clients' belief that each of these homes contain similar construction defects and, the defects listed in the Notice are the applicable defects. There are some obvious differences, e.g., if a particular home does not have brick cladding, no brick deficiency is claimed.

It appears that you want a list of the individual clients who have retained us to date. We will contact these homeowners and ask for their consent to disclose their name and address.

We are not aware of any homeowner who has retained separate counsel for this matter and no expert reports have been published to date. Expert reports will be provided according to the scheduling order eventually entered in this case.

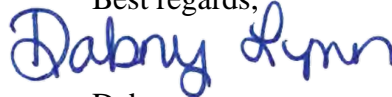
As to your other requests for further information regarding investigations, etc., we will be happy to consider it. The homeowners will require the exchange of information be mutual. In this regard, please make available for our copying or scanning:

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- 1) A complete copy of the Rose Hill construction documents and electronically stored information, including all plans, drawings, permits, invoices, purchase orders, change orders, submittals, instructions, recommendations, certifications, meeting minutes, worklogs, model information/diagrams, marketing materials, and other documents relating in any way to the Rose Hill residences;
- 2) A complete copy of all warranty/repair/work requests relating to the Rose Hill residences; and
- 3) A complete copy of your client's commercial general liability, umbrella, and excess insurance policies in effect for the last five years, together with the insurance information on each framing, cladding, fenestration, and HVAC subcontractor employed on this job and the fenestration manufacturers and suppliers.

We look forward to working with you and receiving your response.

Best regards,



Dabny Lynn

Sohayla Townes

DL/dl

# EXHIBIT F



Annette Mixson &lt;amixson@lucey-law.com&gt;

**RE: Rose Hill//Service of Summons and Complaint**

1 message

**Kyle McGann** <mcgann@conlaw.com>

Wed, Jan 8, 2020 at 1:05 PM

To: Dabny Lynn &lt;dlynn@lucey-law.com&gt;, John Crawford &lt;crawford@conlaw.com&gt;

Cc: Kelly Nix &lt;nix@conlaw.com&gt;, Shelley Morgan &lt;morgan@conlaw.com&gt;, Sohayla Townes &lt;stownes@lucey-law.com&gt;, Annette Mixson &lt;amixson@lucey-law.com&gt;

Hey Dabny,

Unfortunately, we are unable to accept as their policy does not allow us to do so. Otherwise, we would. You will still need to go ahead and serve the registered agent for DR Horton in this matter. That being said, we are happy to continue working with you on this matter and getting the inspection done with.

As to the inspection, given the length of inspection, the last week of January won't be possible. We will need to schedule this for Mid-February. If you could please provide us with some dates as to this inspection, we can try to get that on all of our calendars so we can get this show on the road.

Given you all's comments about the 120 days, we'd be fine seeing if we can go ahead and agree to an extension of time to serve DR Horton until we can get these inspections done. If served before then, we would likely need to file a motion and go the route of staying the case until the inspections and whatnot are all completed.

Feel free to give us a ring as needed. Thanks!

**Kyle D. McGann**

Attorney

**KENISON, DUDLEY & CRAWFORD, LLC**

1122 Barnwell Street

Columbia, SC 29201

Email: [mcgann@conlaw.com](mailto:mcgann@conlaw.com)

Direct Dial: (803) 753-4714

Main: (864) 242-4899

Website: [www.conlaw.com](http://www.conlaw.com)

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Kenison, Dudley & Crawford, LLC by replying to this email and delete the original and reply emails. Thank you.

**From:** Dabny Lynn <dlynn@lucey-law.com>**Sent:** Wednesday, January 8, 2020 12:12 PM

11/12/2020

Lucey Law Firm Mail - RE: Rose Hill//Service of Summons and Complaint

**To:** Kyle McGann <[mcgann@conlaw.com](mailto:mcgann@conlaw.com)>; John Crawford <[crawford@conlaw.com](mailto:crawford@conlaw.com)>  
**Cc:** Kelly Nix <[nix@conlaw.com](mailto:nix@conlaw.com)>; Shelley Morgan <[morgan@conlaw.com](mailto:morgan@conlaw.com)>; Sohayla Townes <[stownes@lucey-law.com](mailto:stownes@lucey-law.com)>; Annette Mixson <[amixson@lucey-law.com](mailto:amixson@lucey-law.com)>  
**Subject:** Rose Hill//Service of Summons and Complaint

Kyle and John,

With the number of homes and homeowners to coordinate in Rose Hill, it looks like we will not be able to get the inspections done within 120 days of when the Summons and Complaint filed; and, therefore, we need to proceed with service upon D.R. Horton.

Please confirm that you will accept service of the Summons and Complaint on behalf of D.R. Horton by Friday, January 10, 2019.

Thank you,

--

Dabny Lynn

JUSTIN O'TOOLE LUCEY, P.A.

415 Mill Street

P.O. Box 806

Mt. Pleasant, South Carolina 29464

Telephone: (843) 849-8400

Fax: (843) 849-8406



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# EXHIBIT G



Annette Mixson &lt;amixson@lucey-law.com&gt;

## Re: Rose Hill//Service of Summons and Complaint

1 message

**Dabny Lynn** <dlynn@lucey-law.com>

Thu, Jan 16, 2020 at 11:06 AM

To: Kyle McGann <mcgann@conlaw.com>

Cc: John Crawford <crawford@conlaw.com>, Kelly Nix <nix@conlaw.com>, Shelley Morgan <morgan@conlaw.com>, Sohayla Townes <stownes@lucey-law.com>, Annette Mixson <amixson@lucey-law.com>

Kyle,

Agreed.

Thank you,

On Tue, Jan 14, 2020 at 4:07 PM Kyle McGann <mcgann@conlaw.com> wrote:

Dabny,

Hope your travels back to South Carolina went smoothly.

DR Horton was served with the Complaint. As previously discussed, we are seeking an indefinite extension so we can get these homes inspected in lieu of us filing a Mtn to Stay the case until such time. Let us know if this is agreeable.

Thanks,



**Kyle D. McGann**

Attorney

**KENISON, DUDLEY & CRAWFORD, LLC**

1122 Barnwell Street

Columbia, SC 29201

Email: [mcgann@conlaw.com](mailto:mcgann@conlaw.com)

Direct Dial: (803) 753-4714

Main: (864) 242-4899

Website: [www.conlaw.com](http://www.conlaw.com)

This email contains information that may be confidential and/or privileged. If you are not the intended recipient, or the employee or agent authorized to receive for the intended recipient, you may not copy, disclose or use any contents in this email. If you have received this email in error, please immediately notify the sender at Kenison, Dudley & Crawford, LLC by replying to this email and delete the original and reply emails. Thank you.

**From:** Dabny Lynn <dlynn@lucey-law.com>

**Sent:** Thursday, January 9, 2020 8:44 AM

**To:** Kyle McGann <mcgann@conlaw.com>

**Cc:** John Crawford <crawford@conlaw.com>; Kelly Nix <nix@conlaw.com>; Shelley Morgan <morgan@conlaw.com>;

Sohayla Townes <[stownes@lucey-law.com](mailto:stownes@lucey-law.com)>; Annette Mixson <[amixson@lucey-law.com](mailto:amixson@lucey-law.com)>  
**Subject:** Re: Rose Hill//Service of Summons and Complaint

Kyle,

Thanks. We have no issues going that route. Will let you know once the Summons and Complaint is served.

Thanks again,

On Wed, Jan 8, 2020 at 1:42 PM Kyle McGann <[mcgann@conlaw.com](mailto:mcgann@conlaw.com)> wrote:

Hey Dabny,

Thanks for chatting with me quickly this afternoon. As mentioned, seems better to just go ahead and serve D.R. Horton as I do not know if we could technically extent the 120 days. Should be an easy process for serving.

Double check me on this, but the Secretary of State is showing:

C T CORPORATION SYSTEM

2 Office Park Court Suite 103

[Columbia, South Carolina](#) 29223

As we mentioned, once the complaint is served, you and I spoke about getting an extension until we get these inspections and whatnot done with. This way we aren't under the gun and do not need to file a Motion to Stay. Let us know if you have any issues with going that route.

Enjoy the game this weekend!

Thanks



**Kyle D. McGann**

Attorney

**KENISON, DUDLEY & CRAWFORD, LLC**

1122 Barnwell Street

Columbia, SC 29201

Email: [mcgann@conlaw.com](mailto:mcgann@conlaw.com)

Direct Dial: (803) 753-4714

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Website: [www.conlaw.com](http://www.conlaw.com)

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**From:** Dabny Lynn <dlynn@lucey-law.com>  
**Sent:** Wednesday, January 8, 2020 1:23 PM  
**To:** Kyle McGann <mcgann@conlaw.com>  
**Cc:** John Crawford <crawford@conlaw.com>; Kelly Nix <nix@conlaw.com>; Shelley Morgan <morgan@conlaw.com>; Sohayla Townes <stownes@lucey-law.com>; Annette Mixson <amixson@lucey-law.com>  
**Subject:** Re: Rose Hill//Service of Summons and Complaint

Thanks Kyle.

I am heading out of town for a few days, but will circle back with you regarding the extension by next week if not sooner. Thank you for the offer.

On Wed, Jan 8, 2020 at 1:05 PM Kyle McGann <mcgann@conlaw.com> wrote:

Hey Dabny,

Unfortunately, we are unable to accept as their policy does not allow us to do so. Otherwise, we would. You will still need to go ahead and serve the registered agent for DR Horton in this matter. That being said, we are happy to continue working with you on this matter and getting the inspection done with.

As to the inspection, given the length of inspection, the last week of January won't be possible. We will need to schedule this for Mid-February. If you could please provide us with some dates as to this inspection, we can try to get that on all of our calendars so we can get this show on the road.

Given you all's comments about the 120 days, we'd be fine seeing if we can go ahead and agree to an extension of time to serve DR Horton until we can get these inspections done. If served before then, we would likely need to file a motion and go the route of staying the case until the inspections and whatnot are all completed.

Feel free to give us a ring as needed. Thanks!

**Kyle D. McGann**

Attorney

**KENISON, DUDLEY & CRAWFORD, LLC**

1122 Barnwell Street

Columbia, SC 29201

Email: [mcgann@conlaw.com](mailto:mcgann@conlaw.com)

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**From:** Dabny Lynn <[dlynn@lucey-law.com](mailto:dlynn@lucey-law.com)>**Sent:** Wednesday, January 8, 2020 12:12 PM**To:** Kyle McGann <[mcgann@conlaw.com](mailto:mcgann@conlaw.com)>; John Crawford <[crawford@conlaw.com](mailto:crawford@conlaw.com)>**Cc:** Kelly Nix <[nix@conlaw.com](mailto:nix@conlaw.com)>; Shelley Morgan <[morgan@conlaw.com](mailto:morgan@conlaw.com)>; Sohayla Townes <[stownes@lucey-law.com](mailto:stownes@lucey-law.com)>; Annette Mixson <[amixson@lucey-law.com](mailto:amixson@lucey-law.com)>**Subject:** Rose Hill//Service of Summons and Complaint

Kyle and John,

With the number of homes and homeowners to coordinate in Rose Hill, it looks like we will not be able to get the inspections done within 120 days of when the Summons and Complaint filed; and, therefore, we need to proceed with service upon D.R. Horton.

Please confirm that you will accept service of the Summons and Complaint on behalf of D.R. Horton by Friday, January 10, 2019.

Thank you,

--

Dabny Lynn

JUSTIN O'TOOLE LUCEY, P.A.

415 Mill Street

P.O. Box 806

Mt. Pleasant, South Carolina 29464

Telephone: (843) 849-8400

Fax: (843) 849-8406



--

Dabny Lynn

JUSTIN O'TOOLE LUCEY, P.A.

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Mt. Pleasant, South Carolina 29464

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--

Dabny Lynn

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Mt. Pleasant, South Carolina 29464

Telephone: (843) 849-8400

Fax: (843) 849-8406




--

Dabny Lynn

11/12/2020

Lucey Law Firm Mail - Re: Rose Hill//Service of Summons and Complaint

JUSTIN O'TOOLE LUCEY, P.A.  
415 Mill Street  
P.O. Box 806  
Mt. Pleasant, South Carolina 29464  
Telephone: (843) 849-8400  
Fax: (843) 849-8406  
final resized.jpg

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# EXHIBIT H

# JUSTIN O'TOOLE LUCEY, PA

*Attorneys at Law*

Justin Lucey  
Joshua F. Evans  
Stephanie D. Drawdy  
Dabny Lynn

415 Mill Street, Mount Pleasant, SC 29464  
*Reply to:* P.O. Box 806, Mount Pleasant, SC 29465  
Phone: 843.849.8400 · Fax: 843.849.8406 · [www.lucey-law.com](http://www.lucey-law.com)

Anna S. McCann  
Lauren M. Milton  
Sohayla R. Townes  
Collin H. Fuller

January 28, 2020

## **VIA E-MAIL AND U.S. MAIL**

John T. Crawford, Esquire  
Kyle D. McGann, Esquire  
Kenison Dudley & Crawford, LLC  
1122 Barnwell Street  
Columbia, SC 29201  
[crawford@conlaw.com](mailto:crawford@conlaw.com)  
[mcgann@conlaw.com](mailto:mcgann@conlaw.com)

RE: Rose Hill Subdivision  
D.R. Horton's Opportunity to Inspect Rose Hill

Kyle and John,

The individual homeowners we currently represent, and their corresponding addresses are:

1. Matt Davis – 306 Amesbury
2. Delbert & Kathryn Cornwell – 314 Amesbury
3. Lisa & Ernest Butler – 106 Berwick
4. Mitchell Todd – 120 Berwick
5. Carla McAlister – 123 Berwick
6. Thomas Raines – 125 Berwick
7. Shaquille Lawson – 200 Buxton
8. Sharon & David Galloway – 201 Buxton
9. Krista & Maria Bofill – 204 Buxton
10. John & Victoria Tracey – 206 Buxton
11. Blair & Jolanda Johnstone – 207 Buxton
12. Donna & Don Bastian – 1 Chatham
13. Joshua & Christel Price – 3 Chatham
14. Mark Kruger – 6 Duxbury
15. Nick Dalton – 8 Duxbury
16. David Snider – 10 Duxbury
17. Madeline Smith – 20 Duxbury
18. Mike White – 5 Harwick
19. Gareth & Nancy Lengkeek – 10 Harwick
20. Thomas & Carla Westhoff – 147 Haverhill
21. Jon & Jessica Collier - 151 Haverhill
22. Emily Dimitrova – 158 Haverhill
23. Ashleigh & Timothy Gentry – 159 Haverhill
24. Keven Wienke – 2 Kettering

25. Frederick & Ruth Ann Saamwaa– 4 Kettering
26. Robert Knorr – 8 Kettering
27. Denise & Russell Larsen – 16 Kettering
28. Ricky Jefferson – 17 Kettering
29. David & Stacey Turner – 204 Marshfield
30. Joel & Katie Perry – 404 Rowley
31. Heather Ray – 408 Rowley
32. Natalie & Paul Zitek – 104 Sturbridge
33. Stan Yarborough – 106 Sturbridge

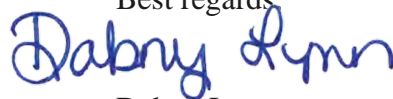
Regarding inspection scheduling, we are planning for a one-hour, non-destructive inspection of each home with a total of 8 homes inspected a day. This means D.R. Horton will need four consecutive days of inspections beginning at 8:00 a.m. and ending 6:00 p.m. each day. We propose February 24<sup>th</sup>-27<sup>th</sup>. Please let us know whether these dates work by February 7<sup>th</sup> or sooner, if possible.

Please also provide: (1) the names, job titles, and company information for all individuals who will be attending the inspection; (2) confirmation that these individuals will not speak with our clients onsite; and, (3) signed copies of the attached waiver of liability (each individual who will be attending the inspection needs to sign a waiver).

Prior to the inspection, we will provide you with a four-day schedule that outlines the times and addresses of the homes available for inspection each day. Just as a reminder, D.R. Horton/its experts are responsible for bringing their own labor, equipment, and supplies necessary for the inspections. This includes protective materials such as foot covers that the homeowners request be used when accessing their homes. Parking is limited so we encourage carpooling.

As to your requests seeking additional information to assist D.R. Horton in its inspection, we have put D.R. Horton on notice of the applicable defects and are offering D.R. Horton the opportunity to inspect anything it wants to in or around these homes. We remain open to considering your other requests provided we receive the information outlined in our January 6, 2010 letter.

Best regards,



Dabny Lynn  
Sohayla Townes

DL/dl

# EXHIBIT I

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

February 12, 2020

**Via E-mail and First Class Mail**

Dabny Lynn, Esquire  
Lucey Law Firm  
415 Mill Street  
Mount Pleasant, South Carolina

Re: Owner: Natalie and Paul Zitek, et al.  
Subdivision: Rose Hill  
Location: Powdersville, South Carolina

Dear Ms. Lynn:

As you are aware, this firm represents D.R. Horton, Inc., (“DR Horton”) in the above-referenced matter. We received your letter, dated January 28, 2020, (the “Reply”) replying to our initial request for clarification. The Reply provides thirty-four (34) additional homeowners<sup>1</sup> along with the Ziteks (the “Owners”), who are experiencing issues with their respective homes within the Rose Hill subdivision (“Rose Hill”). We are writing to you in good faith to resolve the issues provided in our initial response and stated below, and to find a workable solution for both parties. Further, we are notifying you of DR Horton’s intent to inspect each respective home.

We are seeking further clarification as to the issues provided in your letter. The Reply, which incorporates the December 11, 2019<sup>2</sup>, letter, (collectively the “Letters”) alleges broad issues at each respective home. We believe that the Letters are not in compliance with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (the “Act”).

The Act requires the Owners to provide the following before filing suit:

- A statement alleging the defects known at the home;
- Description of the claims giving reasonable detail to determine the nature of the defect; and
- Description of any results caused by the defect.

<sup>1</sup> The Letter only contains thirty-three (33) homeowners, but a thirty-fourth (34<sup>th</sup>) homeowner was added to this matter via email from Ms. Lynn, dated January 30, 2020.

<sup>2</sup> The December 11, 2019, letter has been enclosed for your convenience.

The Letters do not provide reasonable detail to determine the defects at each home, including the location of the defects. For example, to the extent a flooring issue is identified, please list the room where the issue is located.

Further, the Letters do not distinguish which issues are present at which home. This will prove difficult for the inspection, as DR Horton will not know where to inspect and the issues to look for. This defeats the purpose of the Act, which is to allow the builder (i.e. DR Horton) the opportunity to furnish repairs for any issues known by the homeowner (i.e. Owners).

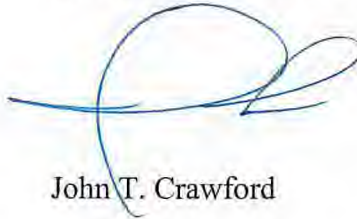
While DR Horton is notifying you of its desire to inspect the homes, DR Horton cannot inspect until the Owners are in compliance with the Act. The Act provides that the appropriate remedy for failure to comply with these requirements is to stay the entire matter. Should we be unable to find an amicable resolution, we will seek this remedy.

Finally, you have made us aware that the issues known at the home are attorney-client privilege. We do not agree with your analysis. If true, no demand letter prior to the filing of suit outlining damages could ever be sent, as this theory of attorney-client privilege would immediately be waived. Further, based on discussions with Kyle McGann in our office you both agree that the requested information along with the information contained the Letters would be discoverable at a deposition or through any other form of discovery.

Should you have any comments, questions, or concerns, please do not hesitate to contact me by email at [crawford@conlaw.com](mailto:crawford@conlaw.com) or by phone at 864-242-4899. I look forward to meeting you at the inspection and working with you to resolve these issues.

Very truly yours,

KENISON, DUDLEY & CRAWFORD, LLC

A handwritten signature in blue ink, appearing to read "John T. Crawford". The signature is stylized with a large loop and a horizontal stroke.

John T. Crawford

# EXHIBIT J

# JUSTIN O'TOOLE LUCEY, PA

*Attorneys at Law*

Justin Lucey  
Joshua F. Evans  
Stephanie D. Drawdy  
Dabny Lynn

415 Mill Street, Mount Pleasant, SC 29464  
*Reply to:* P.O. Box 806, Mount Pleasant, SC 29465  
Phone: 843.849.8400 · Fax: 843.849.8406 · [www.lucey-law.com](http://www.lucey-law.com)

Anna S. McCann  
Lauren M. Milton  
Sohayla R. Townes  
Collin H. Fuller

September 4, 2020

## **VIA E-MAIL AND U.S. MAIL**

John T. Crawford, Esquire  
Tom Dudley, Esquire  
Kyle D. McGann, Esquire  
James Warmoth, Esquire  
Kenison Dudley & Crawford, LLC  
1122 Barnwell Street  
Columbia, SC 29201  
[crawford@conlaw.com](mailto:crawford@conlaw.com)  
[dudley@conlaw.com](mailto:dudley@conlaw.com)  
[mcgann@conlaw.com](mailto:mcgann@conlaw.com)  
[warmoth@conlaw.com](mailto:warmoth@conlaw.com)

RE: *Natalie Zitek, et. al. v. D.R. Horton, Inc., et. al.*  
D.R. Horton's Right to Cure Inspections  
Case No. 2019-CP-04-1942

John,

We received your September 2<sup>nd</sup> letter following up on our August 12<sup>th</sup> letter about scheduling D.R. Horton's unretained inspections.

Your letter mischaracterizes D.R. Horton's continued delay in providing Plaintiff the information needed to schedule these inspections. D.R. Horton knows Plaintiff needs its list of selected unretained homes with enough time to get homeowner notices out, allow for their responses, and finalize an inspection schedule.

Yet, D.R. Horton failed to send its list by the compliance plan's July 7<sup>th</sup> deadline despite Plaintiff providing D.R. Horton a random selection of unretained homes on June 16<sup>th</sup> using the same process Plaintiff used for the random selection of retained homes.

Over the past two months, Plaintiff has repeatedly requested D.R. Horton's list. As of August 12<sup>th</sup>, D.R. Horton still had not send its list which made it impossible to move forward with inspections on August 31<sup>st</sup>. Plaintiff noted this in their August 12<sup>th</sup> letter, suggested September 14<sup>th</sup> or 21<sup>st</sup> inspection dates, and informed D.R. Horton that it would need its list by noon in order to have enough time to schedule inspections on one of these weeks.

While D.R. Horton claims this was an "unfeasible deadline", D.R. Horton had months to provide its list prior to this time; and, Plaintiff needed the list for the effective coordination of September inspections by this time. D.R. Horton also claims that it did not send its list because of

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disagreement on inspection days but nothing prevented D.R. Horton from providing Plaintiff its list so at least the notice could go out to the homeowners; and then, Plaintiff could have more easily followed up with inspection specifics once an agreement was reached.

Now, three more weeks have passed, and D.R. Horton finally provides its list on September 2<sup>nd</sup> and lets Plaintiff know that its experts are available for inspection the week of September 21<sup>st</sup> which is less than twenty (20) days away.

Despite just receiving D.R. Horton's list of unretained homeowners two days ago, Plaintiff is putting notices in the mail to these homeowners today. Plaintiff also wants to work amicably and will compromise to schedule inspections using three (3) teams on two days. The days will need to be Wednesday, September 23<sup>rd</sup>, and Thursday, September 24<sup>th</sup>.

Plaintiff is asking the homeowners to return responses by September 11<sup>th</sup> because there is not enough time between now and the inspections to give the homeowners a 14-day response window and also coordinate a final schedule. There is also not enough time for a second notice round.

Plaintiff will provide D.R. Horton a list of the homeowners who have opted in v. opted out of the inspections on September 14<sup>th</sup>. Assuming there are less than 25 responses, Plaintiff will attempt to follow up with unretained homeowners who have not responded to the notice via phone but cannot guarantee that a total of 25 will be secured. Alternatively, Plaintiff can try to fill any available time slots with retained homes if D.R. Horton so chooses.

Plaintiff will send the finalized, three team inspection schedule to D.R. Horton prior to Wednesday, September 23<sup>rd</sup>. Each day, our teams will meet each of your teams at their first home ten minutes before the scheduled start time. Please remember to bring masks, gloves, shoe covers, and signed waivers for the inspections.

Please let us know if you have any questions or concerns by mid-day. We look forward to seeing you all at the inspections.

Thank you,



Dabny Lynn

DL/dl

cc: Natalie Zitek (via e-mail)

# EXHIBIT K

417 S.C. 42  
Supreme Court of South Carolina.

Gregory W. SMITH and  
Stephanie Smith, Respondents,

v.

D.R. HORTON, INC., [Tom's Vinyl Siding, LLC, Lutzen Construction, Inc.](#), Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., Defendants,  
Of whom D.R. Horton, Inc. is the Petitioner.

Appellate Case No. 2013–001345

|  
Opinion No. 27645

|  
Heard March 3, 2015

|  
Filed July 6, 2016

|  
Rehearing Denied September 5, 2016

#### Synopsis

**Background:** Homeowners brought action against contractor that built home for construction defects. Contractor moved to compel arbitration. The Circuit Court, Dorchester County, [Edgar Warren Dickson, J., 2011 WL 12565687](#), denied motion. Contractor appealed. The Court of Appeals, [Short, J., 403 S.C. 10, 742 S.E.2d 37](#), affirmed. Contractor petitioned for writ of certiorari, which was granted.

**Holdings:** The Supreme Court, [Toal](#), Acting J., held that:

[1] court was required to consider damages limitation in home purchase agreement in determining whether arbitration provision in agreement was unconscionable, and

[2] arbitration provision was unconscionable and unenforceable.

Affirmed.

[Kittredge, J.](#), dissented and filed opinion in which [Pleicones, C.J.](#), concurred.

West Headnotes (8)

#### [1] **Alternative Dispute Resolution**

🔑 **Scope and standards of review**

Arbitrability determinations are subject to de novo review.

[Cases that cite this headnote](#)

#### [2] **Appeal and Error**

🔑 **Reasonableness**

A circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.

[Cases that cite this headnote](#)

#### [3] **Alternative Dispute Resolution**

🔑 **Unconscionability**

Court was required to consider subparagraph containing damages limitation that was included in a home purchase agreement in determining whether arbitration clause in agreement was unconscionable; damages limitation and arbitration clause were part of a paragraph entitled “Warranties and Dispute Resolution,” and subparagraphs contained numerous cross-references to one another and were required to be read as a whole to understand the scope of the warranties and how different disputes were to be handled.

[3 Cases that cite this headnote](#)

#### [4] **Contracts**

🔑 **Unconscionable Contracts**

“Unconscionability” is 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.

[3 Cases that cite this headnote](#)

**[5] Alternative Dispute Resolution****🔑 Unconscionability**

Whether one party lacks a meaningful choice in entering an arbitration agreement typically speaks to the fundamental fairness of the bargaining process.

[1 Cases that cite this headnote](#)

**[6] Alternative Dispute Resolution****🔑 Unconscionability**

While adhesion contracts are not unconscionable per se, courts tend to look upon them with considerable skepticism because they give rise to considerable doubt that any true agreement ever existed to submit disputes to arbitration.

[Cases that cite this headnote](#)

**[7] Alternative Dispute Resolution****🔑 Unconscionability**

In determining whether a party lacked a meaningful choice to arbitrate, courts should consider the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether the plaintiff is a substantial business concern.

[2 Cases that cite this headnote](#)

**[8] Alternative Dispute Resolution****🔑 Unconscionability**

Arbitration provision in new home purchase agreement between homeowners and contractor that built home was unconscionable and unenforceable, and thus homeowners were not required to arbitrate their construction defect claims against contractor; buyers were not represented by independent counsel and were a single client to contractor, which was a corporation that constructed homes in 27 states, the only remedy for a defect in the home was repair or replacement, which were options

left entirely to contractor's discretion, and monetary recuperation was disallowed even though repairs were inadequate.

[1 Cases that cite this headnote](#)

**\*\*2 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal From Dorchester County, Edgar W. Dickson, Circuit Court Judge

**Attorneys and Law Firms**

[Matthew Kinard Johnson](#) and [W. Kyle Dillard](#), both of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Petitioner.

[Phillip Ward Segui, Jr.](#), of Segui Law Firm, of Mt. Pleasant, [John T. Chakeris](#), of Chakeris Law Firm, and [Michael A. Timbes](#), of Thurmond Kirchner Timbes & Yelverton, PA, both of Charleston, for Respondents.

**Opinion****ACTING JUSTICE TOAL:**

\*45 D.R. Horton, Inc., asks this Court to reverse the court of appeals' decision in *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), affirming the circuit court's refusal to compel arbitration between Gregory and Stephanie Smith (collectively, the Smiths) and D.R. Horton. We affirm.

**FACTS/PROCEDURAL BACKGROUND**

D.R. Horton is a corporation specializing in residential construction. In March 2005, the Smiths entered into a home purchase agreement (the Agreement) with D.R. Horton for the design and construction of a new home in Summerville, South Carolina.

The Agreement is organized into numbered paragraphs and lettered subparagraphs, and sets forth the various responsibilities of the parties prior to and immediately following closing.<sup>1</sup> Paragraph 14 of the Agreement is titled "Warranties and Dispute Resolution," and consists of subparagraphs 14(a) through 14(j). Subparagraphs 14(c) and 14(g) contain provisions stating that the parties

agree to arbitrate any claim arising out of D.R. Horton's construction of the home, as well as any disputes related to the warranties contained in the Agreement. However, in the majority of the remaining subparagraphs of paragraph 14, D.R. Horton expressly disclaims all warranties for the home—including the implied warranty of habitability—except for a ten-year structural warranty. Moreover, subparagraph 14(i) stipulates that D.R. Horton “shall not be liable for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.” (Emphasis in original).

\*46 In August 2005, D.R. Horton completed construction of the Smiths' home, and the Smiths closed on the property and received the deed. Thereafter, the Smiths experienced a myriad of problems with the home that resulted in severe water damage to the property. D.R. Horton attempted to repair the alleged construction defects on “numerous occasions” during the next five years, but was ultimately unsuccessful.

In 2010, the Smiths filed a construction defect case against D.R. Horton and seven subcontractors. In response, D.R. Horton filed a motion to compel arbitration. The Smiths opposed the motion, arguing, *inter alia*, that the arbitration agreement was unconscionable and therefore unenforceable.

The circuit court denied D.R. Horton's motion to compel arbitration, finding that the arbitration agreement was unconscionable. The court based its ruling on “a number of oppressive and one-sided provisions,” including D.R. Horton's attempted waiver of the implied warranty of habitability, as well as subparagraph 14(i)'s prohibition on awarding money damages of any kind against D.R. Horton. D.R. Horton made a motion to reconsider pursuant to Rule 59(e), SCACR, but the circuit court again denied the motion to compel.<sup>2</sup>

D.R. Horton appealed, and the court of appeals affirmed the circuit court's order. See *Smith*, 403 S.C. at 10, 742 S.E.2d at 37. The court of appeals found the arbitration agreement was unconscionable, citing subparagraph 14(i) and its prohibition on awarding money damages against D.R. Horton. *Id.* at 15, 742 S.E.2d at 40–41. Further, the court of appeals *sua sponte* conducted a severability analysis to determine whether subparagraph 14(i) could be severed from the remaining provisions of the arbitration agreement. *Id.* at 17, 742 S.E.2d at 41. The court of appeals

ultimately concluded that severing the subparagraph would be inappropriate. *Id.*

D.R. Horton petitioned the court of appeals for rehearing, asserting that the court of appeals made two fundamental errors. First, D.R. Horton argued that the court of appeals' unconscionability analysis was flawed because it did not discuss \*47 whether the Smiths lacked a meaningful choice in entering the arbitration agreement. See *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007) (stating that an unconscionability analysis has two prongs, one of which is whether one of the parties to the contract lacked a meaningful choice in agreeing to arbitrate (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004); S.C. Code Ann. § 36–2–302(1) (1976))).

Second, D.R. Horton asserted that the court of appeals' decision violated the United States Supreme Court's holding in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* See 388 U.S. 395, 406, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (holding that courts may only consider the threshold question of whether the *arbitration agreement* is fraudulently induced and thus invalid, not whether the *contract as a whole* is invalid); see also *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) (adopting a broad interpretation of *Prima Paint* in South Carolina, and holding that “a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause” (the *Prima Paint* doctrine)). In D.R. Horton's view, the arbitration agreement was contained exclusively in subparagraph 14(g), and therefore, the court of appeals' consideration of the allegedly one-sided terms in subparagraph 14(i) was inappropriate.<sup>3</sup>

Ultimately, the court of appeals denied the petition for rehearing, and we granted D.R. Horton's petition for a writ of certiorari to review the court of appeals' decision.

## ISSUE

Whether the arbitration agreement is unconscionable?

## STANDARD OF REVIEW

[1] [2] Arbitrability determinations are subject to de novo review. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). \*48 However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.* at 453, 730 S.E.2d at 315.

## ANALYSIS

### I. The Prima Paint Doctrine

As an initial matter, we address D.R. Horton's argument regarding the court of appeals' alleged failure to heed the *Prima Paint* doctrine.<sup>4</sup>

\*\*4 In *Prima Paint*, the Supreme Court held that to avoid arbitration, a party must assert a contractual defense to the arbitration agreement itself, and not to the contract as a whole. See 388 U.S. at 406, 87 S.Ct. 1801. Thus, for example, a party must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable. See *S.C. Pub. Serv. Auth.*, 312 S.C. at 562–63, 437 S.E.2d at 24. Similarly, in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.

[3] Here, the parties fundamentally disagree on the application of the *Prima Paint* doctrine to the Agreement. D.R. Horton asserts that the arbitration agreement is wholly contained in subparagraph 14(g). Therefore, according to D.R. Horton, the Court may not consider any of the remaining subparagraphs of paragraph 14—such as subparagraph 14(i)'s damages limitation—in determining whether the arbitration agreement is unconscionable. We disagree.

Like the lower courts, we construe the entirety of paragraph 14, entitled “Warranties and Dispute Resolution,” as the arbitration agreement. As the title indicates, all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled. The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision.

\*49 Thus, in accordance with the *Prima Paint* doctrine, we find that in determining whether the arbitration agreement is unconscionable, we may properly consider the entirety of paragraph 14.

### II. Unconscionability

[4] “In South Carolina, 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.” *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668 (citations omitted).<sup>5</sup>

[5] [6] [7] Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process. *Gladden v. Boykin*, 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013) (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669). Thus, parties frequently allege they lacked a meaningful choice when the dispute involves an adhesion contract. See *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (defining adhesion contracts as “standard form contract[s] offered on a take-it or leave-it basis with terms that are not negotiable”). While adhesion contracts are not unconscionable per se, courts tend to look upon them with “considerable skepticism” because they give rise to “considerable doubt that any true agreement ever existed to submit disputes to arbitration.” *Id.* at 26–27, 644 S.E.2d at 669–70 (quotation marks omitted). In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether “ ‘the plaintiff is a substantial business concern.’ ” *Id.* (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669).

[8] \*50 “We have [ ] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.” *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989); *cf. Sapp v. Ford Motor Co.*, 386 S.C. 143, 147–48, 687 S.E.2d 47, 49–50 (2009) (stating that South Carolina's “courts have shifted from following the doctrine of *caveat emptor* (‘let

the buyer beware’) to the doctrine of *caveat venditor* (‘let the seller beware’). There is no indication in the record \*\*5 that the Smiths enjoyed a substantially stronger bargaining position against D.R. Horton than the average homebuyer, or that they were represented by independent counsel. Moreover, the Smiths were a single client to a corporation that constructs houses in twenty-seven states. Thus, the Smiths were also not a substantial business concern of D.R. Horton, as they did not comprise a large portion of D.R. Horton's clientele.

Accordingly, we find that the Smiths lacked a meaningful choice in their ability to negotiate the arbitration clause in the Agreement.

Moreover, in considering the actual provisions of the arbitration agreement, we find that D.R. Horton's attempts to disclaim implied warranty claims and prohibit *any* monetary damages are clearly one-sided and oppressive. Under the terms of paragraph 14, the only remedy provided for a defect in the home is repair or replacement—options left entirely in the discretion of D.R. Horton. This is no remedy at all because it leaves the relief to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate. We therefore affirm the court of appeals and hold the arbitration provision is unconscionable and thus unenforceable.<sup>6</sup>

### \*51 CONCLUSION

For the foregoing reasons, the decision of the court of appeals is

**AFFIRMED.**

BEATTY and HEARN, JJ., concur. KITTREDGE, J., dissenting in a separate opinion in which PLEICONES, C.J. concurs.

JUSTICE KITTREDGE:

The underlying contract involves interstate commerce and, as a result, the Federal Arbitration Act (FAA) controls. Because I believe the majority has not followed controlling precedent of the United States Supreme Court, I respectfully dissent. In my judgment, state law does not

provide a valid basis to avoid enforcing this particular agreement to arbitrate, and the court of appeals erred in upholding the circuit court's refusal to compel arbitration. I would reverse.

### I.

This arbitration agreement is subject to the FAA, a fact conspicuously absent in the majority opinion. “Generally, any arbitration agreement affecting interstate commerce is subject to the FAA.” *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121–22, 747 S.E.2d 461, 464 (2013) (quoting *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013)). “The United States Supreme Court ‘has previously described the [FAA]’s reach expansively as coinciding with that of the Commerce Clause.’” *Id.* at 122, 747 S.E.2d at 464 (quoting *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)). “Thus, in determining whether the FAA applies to a particular arbitration agreement, a court considers whether the contract concerns a transaction involving interstate commerce.” *Id.* (citing *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977)).

In support of its motion to compel arbitration, D.R. Horton submitted affidavits from several executives indicating that D.R. Horton is a Delaware corporation with its principal place of business in Texas. These affidavits further establish D.R. Horton is engaged in the residential construction business in twenty-seven states and that many of the building materials and supplies used in constructing the Smiths' home in Summerville were obtained from suppliers outside South Carolina.<sup>7</sup> Because the arbitration clause at issue here is included in a contract that \*\*6 evidences a transaction involving interstate commerce, the FAA governs the enforceability of the arbitration provision. *See Cape Romain*, 405 S.C. at 123–24, 747 S.E.2d at 465 (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594–95, 553 S.E.2d 110, 117–18 (2001); *Episcopal Housing*, 269 S.C. at 640, 239 S.E.2d at 652) (observing that out-of-state materials used in construction were instrumentalities of interstate commerce); *see also Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117 (relying upon affidavits in determining whether a transaction involves interstate commerce).

## II.

The FAA requires that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The United States Supreme Court has construed section 2 of the FAA as permitting “agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011). However, this provision of the FAA has been narrowly construed.

Moreover, “[a] recurring question under § 2 [of the FAA] is who should decide whether grounds exist at law or in equity to invalidate an arbitration agreement.” *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (internal quotations omitted). The United States Supreme Court has determined that “unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

\*53 Indeed, absent a “discreet challenge to the validity of the arbitration clause,” federal law establishes that challenges to the validity of contractual provisions “are within the arbitrator’s ken.” *Preston*, 552 U.S. at 353–54, 128 S.Ct. 978.

“[W]hen parties commit to arbitrate contractual disputes, it is a mainstay of the [FAA]’s substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance ....” *Nitro-Lift Techs., LLC v. Howard*, — U.S. —, 133 S.Ct. 500, 503, 184 L.Ed.2d 328 (2012) (internal quotation marks omitted) (citing *Preston*, 552 U.S. at 349, 128 S.Ct. 978; *Prima Paint*, 388 U.S. at 403–04, 87 S.Ct. 1801). The permissible scope of the initial judicial inquiry is “highly circumscribed” and must relate “specifically to the arbitration clause.” *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). If the arbitration provision is found to be valid (or is not challenged), then the validity of the remainder of the contract is for the arbitrator to decide. *Nitro-Lift*, 133 S.Ct. at 503.

Moreover, “this arbitration law applies in state as well as federal courts.” *Buckeye*, 546 U.S. at 446, 126 S.Ct. 1204. Simply put, courts—state or federal—may decide only the question of whether the parties validly agreed to arbitrate the dispute that has arisen; controversies as to the enforceability of any other contractual provision(s)—including those which may be so objectionable as to undermine the contract in its entirety—are to be resolved by the arbitrator.

Here, the majority acknowledges this point of law, as it must. However, the majority nevertheless adopts the findings of the trial court, which circumvent the application of these legal principles by expanding the relevant scope of the contractual language at issue to include matters beyond the arbitration provision. This is accomplished by the fiction that the arbitration provision is the entirety of Paragraph 14, which contains more than 1,800 words. Indeed, the following is the portion of the parties’ contract the majority finds to constitute the “arbitration provision”:

### 14. WARRANTIES AND DISPUTE RESOLUTION

**\*54 a. Structural Warranty.** At Closing, Seller shall execute and deliver to Purchaser at no additional cost a warranty from Residential Warranty Corporation \*\*\*7 (“RWC”) or such other national warranty provider as Seller may reasonably elect (the “RWC Warranty”). This RWC Warranty will provide, at a minimum, a ten (10) year structural warranty. *The RWC Warranty referred to in this paragraph is the only warranty being made by Seller, except for such warranties which may not be disclaimed by State or Federal law.* In addition, Seller hereby assigns to Purchaser all warranties, expressed or implied, which arise or are given by the manufacturer of any product installed in the home built on the Property.

**b. RWC Warranty.** Purchaser has been, or will be prior to Closing, provided with a copy of the RWC Warranty book on the Ten Year Limited Warranty, which is administered by the Residential Warranty Corporation. Validation of the RWC Warranty is conditioned upon the Seller’s compliance with all RWC’s enrollment procedures and upon Seller remaining in good standing in the RWC Program.

**c. The RWC Warranty is provided by Seller to Purchaser in lieu of all other warranties, verbal**

*agreements, or representations and Seller makes no warranty, express or implied, as to quality, fitness for a particular purpose, merchantability, habitability or otherwise, except as is expressly set forth in the Program or as otherwise required by Federal or State law. Particularly, Purchaser understands and agrees that any and all complaints of any nature in regard to the property that arise more than 365 days after closing must be submitted to RWC.* Purchaser understands and agrees that the warranties of all appliances and other consumer products installed in the home are those of the manufacturer or supplier and same are assigned to Purchaser, effective on the date of Closing. In any event, Seller shall not be liable for any personal injury or other consequential or secondary damages and/or losses, which may arise from or out of any and all defects. **Except for purchasers of FHA or VA financed homes, Purchaser acknowledges and understands that the RWC Warranty \*55 ty includes a provision requiring all disputes that arise under the RWC Warranty to be submitted to binding arbitration.** Purchaser has been, or will be given prior to Closing, provided with a copy of the D.R. Horton Warranty manual, "Foundations." Purchaser understands and agrees to all warranties to their extent as outlined in said manual. Purchaser shall execute an acknowledgement that Seller makes no warranties express or implied, as to fitness for a particular purpose, merchantability, and habitability as set forth above at Closing, which statement shall be affixed to Purchaser's deed.

Purchaser Initial(s): s/GS s/SM

**d. Exclusions.** The following are excluded from all warranties provided by Seller: (i) those matters excluded in the RWC Warranty documents; (ii) those matters excluded in sub-paragraph (f) below, and (iii) the following matters:

Landscaping, including trees, shrubs, grass and flowers are not covered by any warranty. All grading, fill, landscaping, disposition of trees and control of water flow shall be constructed and maintained at the sole discretion of Seller prior to Closing. Grading and drainage are not covered by any warranty nor will they be maintained or modified by Seller after closing in any way whatsoever UNLESS the grading or drainage is found to be in violation of the applicable provision

of the South Carolina Residential Construction Standards. Many areas will be left in their natural state and will not be landscaped in any way. As of the date and time of Closing, Seller shall have no further responsibility for soil erosion, the growth of grass, death of trees, grass or shrubbery, or soil conditions. Seller is not liable for trees or shrubs, or damage or destruction to same. Seller makes no warranty whatsoever as to the type, location or amount of trees, which will exist on the property after construction. Seller will plant grass seeds or install sod, as **\*\*8** the case may be, as part of its construction. Because the growth of grass seeds and the health of sod is dependent on Purchaser's care and maintenance, no warranty is provided and all grass is installed "as-is." Because prevention of erosion is dependent **\*56** on Purchaser's proper maintenance of the grass and sod, Seller provides no warranty for erosion. Purchaser's closing of the sale constitutes an acceptance of Seller's drainage and erosion controls for the Property, except for matters noted on Purchaser's "Punch list." Seller shall not be responsible for the correction of any leakage or seepage caused by (i) damaged water pipes or mains, (ii) alteration of the landscaping by a party other than Seller (specifically including, without limitation, any changes which cause water to flow toward the dwelling), or (iii) prolonged direction of water against the outside foundation wall from a spigot, sprinkler, hose, or improperly maintained gutters or down spouts. Seller will not warrant any cosmetic defect post-closing unless this condition is listed on the "punch list" prior to Closing. Examples of "cosmetic defects" include sheetrock dings, dimples and nail pops, paint discoloration, chips or irregularities in marble, Formica, or tile. Unless a defect is noted on the "punch list," Seller does not warrant the installation or the quality of any carpet or flooring product (however, note that Seller assigns the manufacturer warranties to Purchaser at Closing).

Purchaser Initial(s): s/GS s/SM

**e. Existing Trees:** D.R. Horton will make every effort to save as many existing trees as possible during the construction process. Those trees that must be removed will be removed at the sole discretion of the Area Manager and their Field Manager. D.R.

Horton reserves the right to remove any trees, which in their judgment may have roots damaged by construction to the extent that the tree would not be expected to live. Those trees that are in or within close vicinity of the home's footprint or concrete flatwork area will be removed. Additionally, trees that impede the drainage of the site, or overall community drainage plan will be removed. D.R. Horton does not guarantee the health, survival or growth of any tree after closing. Repairs to living trees and removal or replacement of dead trees at any time after closing is the responsibility of the buyer unless requested before closing, \*57 agreed upon, and noted in writing at the "Pre-settlement Orientation Inspection."

Purchaser Initial(s): s/GS s/SM

**f. Landscaping.** D.R. Horton does not guarantee the continued health, growth or life of any landscape components after closing. Survival of landscaping components (trees, bushes, plants, sod, seed etc.) after closing is the buyer's responsibility. No landscaping items will be replaced or repaired after closing unless noted in writing and agreed upon at the "Pre-settlement Orientation Inspection." Landscaping requires a continuous maintenance program, which includes proper watering, fertilization, mowing and weed control. Deficiencies, other than those noted prior to closing, will not be warranted by D.R. Horton. Upon closing, all maintenance is the responsibility of the buyer. The buyer is responsible for any damage due to neglect or inadequate maintenance. Wetland, wetland buffers and wooded natural areas throughout the Community will be left "as is." Buyer understands that "standing water" beyond 40'-0" of the home may occur in wetland, wetland buffers and wooded natural areas. Maintenance and repair of the aforementioned areas are the sole responsibility of the Buyer after closing. Clearing and disturbance of natural areas in order to provide underground utility services to the home may be necessary. These areas will be left un-landscaped and allowed to return to their natural state. The remaining undisturbed area will be left in its natural state.

Purchaser Initial(s): s/GS s/SM

**\*\*9 g. MANDATORY BINDING ARBITRATION.** Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) Seller's performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which Purchaser and Seller agree to arbitrate.

**\*58 i.** If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to Purchaser shall control.

**ii.** If the arbitration arises out of any claim other than a claim under the RWC Warranty, then the arbitration shall be conducted in Charleston/Dorchester/Berkeley County, South Carolina. The arbitrations shall be conducted by an arbitrator or panel of arbitrators agreed upon by the parties, and to the extent possible, the proceeding shall be conducted under rules, which provide for an expedited hearing. The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the arbitration as part of the arbitrator's final order. The arbitration referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

Purchaser Initial(s): s/GS s/SM

**h.** In addition to the rights and obligations of each party specified in subparagraphs (a)-(d) above, in the event that a bona fide dispute, as determined by the Seller, should arise between Purchaser and Seller prior to the Closing Date, and such dispute cannot in good faith be resolved completely and to the mutual satisfaction of all parties within ten (10) days after the beginning of the dispute, then Seller shall have the right, upon written notice to Purchaser, to terminate this Agreement and return the Earnest Money to

Purchaser, and no cause of action shall accrue on behalf of Purchaser because of such termination.

**i. Limitation of liability. EXCEPT FOR THE RWC WARRANTY, AND EXCEPT FOR THE TITLE WARRANTIES SPECIFIED IN PARAGRAPH 4 ABOVE, AND EXCEPT FOR ANY WARRANTIES IMPOSED BY LAW, WHICH CANNOT BE DISCLAIMED, SELLER MAKES NO OTHER WARRANTY OF ANY KIND, ALL SUCH OTHER WARRANTIES ARE HEREBY DISCLAIMED BY SELLER. SELLER MAKES NO WARRANTY AS TO MERCHANTABILITY \*59 TY OR FITNESS FOR A PARTICULAR PURPOSE, EITHER EXPRESSED OR IMPLIED. THE EXCLUSIVE REMEDY FOR ANY DEFECT OF ANY ITEM OR CLAIMED DEFECT IN THE HOME IS BY WRITTEN NOTIFICATION PRIOR TO THE EXPIRATION OF THE WARRANTY PERIOD. SELLER'S OBLIGATION SHALL BE THE CORRECTION OF SUCH DEFECT BY REPAIR OR REPLACEMENT, IN ITS DISCRETION. NO SUCH ACTIONS TAKEN BY SELLER TO REPAIR OR REPLACE A DEFECT SHALL EXTEND THE WARRANTY PERIOD. SELLER SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.**

**j.** Requests for warranty service within the first 365 days after closing, must be in writing and faxed, mailed, or delivered to Seller at Seller's address as indicated below Seller's signature on this Agreement. Verbal requests to Seller's staff are not acceptable. Such requests must comply with all applicable law and must state the nature of the problem with particularity. Seller has 30 days to **\*\*10** determine whether such request will be fulfilled.

(italization added).

In seeking to avoid arbitration on the basis of unconscionability, the Smiths claimed the italicized language in the above excerpt represents D.R. Horton's attempt to disclaim certain implied warranties and to eliminate liability for monetary damages, the terms of which are unfairly oppressive and one-sided. However,

in opposing arbitration, the Smiths do not challenge any provision of subparagraph (g) titled "MANDATORY BINDING ARBITRATION." More to the point, the Smiths do not contend the specific agreement to arbitrate was unconscionable.

As noted, federal law requires that unless the claim of unconscionability goes to the arbitration clause itself, the issue of enforceability must be resolved by the arbitrator, not by the courts. Thus, courts can consider unconscionability challenges only when they relate to the issue of whether the parties agreed to arbitrate disputes in the first place. *See Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) **\*60** ("Principles of equity may counsel for invalidation of an arbitration agreement if the grounds for revocation relate specifically to the arbitration clause. ... However, when claims allege unconscionability of the contract generally, these issues are determined by an arbitrator because the dispute pertains to the formation of the entire contract, rather than the arbitration agreement." (citing *Hooters of America*, 173 F.3d at 938; *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986))).

Here, the majority circumvents controlling federal law by construing the entirety of paragraph fourteen—i.e. all ten separately denominated subparagraphs—as comprising the arbitration agreement. In attempting to justify such a construction, the majority cites no supporting authority, instead reasoning that the contract groups warranties and dispute resolution together under a single heading "Warranties and Dispute Resolution" and that "[t]he subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the paragraphs so as to constitute a single provision." Indeed, it is only by treating paragraph fourteen as a single, indivisible provision that the majority is able to transform the Smiths' objection to certain warranty and liability disclaimers into a challenge to the arbitration provision, only the latter being proper for judicial rather than arbitral determination.

I reject the majority's construction that the arbitration provision is the entirety of paragraph fourteen. In my judgment, under well-established state law, paragraph fourteen is comprised of numerous severable provisions, which include not only the parties' mutual promise to settle any disputes through arbitration, but also various other distinct provisions, including D.R. Horton's

promise to provide a ten-year structural warranty, D.R. Horton's promise to assign appliance manufacturer warranties to the Smiths, mutual promises regarding which party is responsible for landscaping maintenance at various points in time, and the Smiths' promise to give written notice of any warranty claims in accordance with specified procedures, among many other things.

\*61 Specifically, I believe the challenged warranty disclaimers and liability limitations are separate and distinct from the agreement to arbitrate, in terms of both formatting and subject matter. Indeed, not only does the parties' chosen paragraph structure and subparagraph denomination spatially delineate these provisions as separate from the agreement to arbitrate, but also the gravamen of each of these terms is distinct and independently operative. Consequently, as a matter of South Carolina law, these provisions are properly viewed as discrete terms rather than as a cohesive contractual provision. See *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (explaining that a “severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be,” and finding a lump-sum contract for services involved severable provisions despite interdependence of material terms); \*\*11 *Packard & Field v. Byrd*, 73 S.C. 1, 51 S.E. 678, 680 (1905) (finding contract terms relating to the seller's promise to deliver shoes and the buyer's promise to purchase shoes were distinct and severable, and therefore enforceable, despite the presence of other contractual provisions which were deemed unenforceable as against public policy); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 65, 566 S.E.2d 863, 867 (Ct. App. 2002) (finding a single subparagraph was comprised of three discrete provisions because “separate and distinct rights” were implicated in each provision).

Further, I emphasize the fact that the Smiths separately initialed subparagraph (g) titled “MANDATORY BINDING ARBITRATION” (and four other subparagraphs within paragraph fourteen), which in my judgment indicates the parties themselves viewed these terms as distinct contractual provisions to which they separately consented. See *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (noting “[t]he cardinal rule of contract interpretation

is to ascertain and give legal effect to the parties' intentions” (citation omitted)); *Columbia Architectural Group.*, 274 S.C. at 641, 266 S.E.2d at 429 (“The entirety or severability of a contract depends primarily upon the intent of the parties \*62 rather than upon the divisibility of the subject, although the latter aids in determining the intention.” (quoting *Packard & Field*, 73 S.C. at 6, 51 S.E. at 679)); *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986) (finding a party's act of initialing two paragraphs amounted to a signing and an acceptance of a counter offer relating to those two provisions). Thus, it is my view that the majority's decision to ignore the obvious divisibility of the multitude of contractual terms within paragraph fourteen contravenes state law.

Moreover, “as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” *Buckeye Check Cashing*, 546 U.S. at 445, 126 S.Ct. 1204; see also 6 C.J.S. Arbitration § 11 (“Agreements for arbitration contained in a contract are treated as separable parts of the contract, so that the illegality of another part of the contract does not nullify an agreement to arbitrate.” (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959))). The United States Supreme Court has identified an arbitration provision as consisting of the “specific written provision to settle by arbitration a controversy.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (internal quotation marks omitted). Stated differently, as a function of federal law, the relevant arbitration provision consists of only that portion of subparagraph (g) in which the parties agree to arbitrate any controversies. Accordingly, even if state law justified the majority's finding that the entirety of paragraph fourteen constitutes the relevant arbitration provision (which it does not), such a finding would in any event be in conflict with, and therefore preempted by, federal substantive law identifying only a portion of subparagraph (g) as the arbitration agreement. See *Concepcion*, 563 U.S. at 352, 131 S.Ct. 1740 (finding state law rules that conflict with or “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FAA]” are preempted and invalidated); see also *DirecTV, Inc. v. Imburgia*, — U.S. —, 136 S.Ct. 463, 468–69, 193 L.Ed.2d 365 (2015) (citing U.S. Const. art. VI, cl. 2) (reaffirming the holding in *Concepcion* that state contract principles which conflict with the FAA are preempted).

Because the Smiths fail to raise *any* challenge to the arbitration provision in subparagraph (g), I would find the \*63 Smiths' claims regarding unconscionability must be resolved in an arbitral forum, and I would reverse the court of appeals' decision. *Cf. Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001) (“An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined.”).

PLEICONES, C.J., concurs.

#### All Citations

417 S.C. 42, 790 S.E.2d 1

#### Footnotes

- 1 For example, the Agreement requires the Smiths to obtain suitable financing to purchase the home prior to the start of construction and to deposit a specified amount of earnest money, and requires D.R. Horton to convey marketable title to the Smiths at the closing.
- 2 In the second order denying D.R. Horton's motion to compel arbitration, the court elaborated on its previous finding of unconscionability, finding that the Agreement was a contract of adhesion, and that the Smiths had significantly less bargaining power than D.R. Horton.
- 3 In conjunction with this argument, D.R. Horton also asserted that a severability analysis was inappropriate because the portions of the Agreement that the court of appeals considered severing were not actually part of the arbitration agreement, i.e., were not part of subparagraph 14(g).
- 4 As will be explained further, *infra*, we must address this issue first because it controls which portions of the Agreement we may properly consider in conducting our unconscionability analysis.
- 5 We note that the court of appeals addressed only the allegedly oppressive nature of the terms found in the arbitration agreement, but appears not to have considered whether the Smiths lacked a meaningful choice in agreeing to arbitrate. We caution courts and parties in the future to analyze both prongs of unconscionability.
- 6 Because the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions. See *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673.
- 7 These materials include rebar, framing materials, wall sheathing, windows, gypsum drywall, shingles, cabinets, carpet, vinyl flooring, plumbing fixtures, lighting hardware, and appliances.

# EXHIBIT L

2005 WL 5621497 (S.C.Com.Pl.) (Trial Order)  
Court of Common Pleas of South Carolina,  
Fifth Judicial Circuit.  
Richland County

Robert J. UPCHURCH, Plaintiff,

v.

D. R. HORTON, INC., Defendant.

No. 05 CP40 1231.  
September 28, 2005.

### Order

[James R. Barber, III](#), S.C. Circuit Court Judge.

The Complaint in this action states tort causes of action for Trespass to Real Property, Negligent Misrepresentation, and Unfair Trade Practices arising out of the placement of a mound of dirt by the defendant on the rear of property owned by the Plaintiff without his consent or permission.

The placement of this dirt occurred after the sale and closing of property purchased from the defendant. The defendant seeks arbitration of this law suit based on language contained in the closed sales contract. The Plaintiff denies he agreed in the sales contract to arbitrate the tort causes of action contained in the Complaint of this action.

The defendant has refused to participate in discovery, including answering interrogatories, responding to requests to produce or participating in a noticed deposition and has filed a Motion to Quash Discovery. The Plaintiff has filed a Motion to Compel Discovery. The Plaintiff has also filed a Motion to Strike Defenses contained in the Defendant's Answer.

### Arbitration Motion

Arbitrability of a claim is an issue for judicial determination. *A T & T Techs, Inc. v. Communication Workers of America*, 475 U.S. 643, 106 S.Ct. 1415 (1986). The Court looks to see if the parties have consented to arbitrate the dispute because consent to arbitrate a dispute is a matter of contract. A party cannot be required to submit to arbitration a dispute that the party has not agreed to submit. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001).

The only consent to arbitrate is contained in the sales contract for the purchase of the property. The sale was completed prior to the defendant placing dirt on the Plaintiff's property. The first issue is whether there is a contract arbitration clause to consider. Paragraph 15 of the contract to purchase controls the survival of the arbitration agreement. Its plain language states:

“Any condition or stipulation not fulfilled at time of Closing shall survive the Closing, execution and delivery of the Warranty Deed until such conditions or stipulations are fulfilled.”

The sales contract was closed, Plaintiff moved into his home and two months later dirt was placed on his property. The arbitration clause did not survive the closing. Plaintiff is not complaining of anything either arising out of the contract or a condition or stipulation not fulfilled at the time of Closing.

For purposes of analysis, this Court will assume the arbitration clause survived the closing and will consider whether the factual allegations underlying the causes of action plead in the Complaint fall within the scope of the arbitration language contained in the sales contract.

The sales contract's arbitration clause contained in subparagraph d of paragraph 14 states in part:

..... The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection agreement; (3) Seller's performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which Purchaser and Seller agree to arbitrate.

The underlying facts of this dispute are not covered by the language contained in (1), (2), (3), or (4) of the above clause.

The defendant's only basis for compelling arbitration is the preamble language of the above quoted paragraph which reads:

“Purchaser and Seller each agree that to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves”.

The S.C. Supreme Court has held that “[a] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a ‘significant relationship’ exists between the asserted claims and the contract in which the arbitration clause is contained” *Zabinski v Bright Acres Assoc.* 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001). The “significant relationship” test is based on whether the particular tort claim is so interwoven with the contract that it would not stand alone. If the tort and contract claims are interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable. See: *Id.* at 598 n. 4, 553 S.E.2d at 119 n. 4.

The only relationship between the parties is the sales contract prepared by the defendant for the purchase of the home and site which was signed on January 5, 2004. It was closed by George Nickolson, Esquire on June 7, 2004. Plaintiff was given a deed to the property and the single business relationship between the parties was ended as of June 7, 2004.

Approximately two months later, dirt was dumped on Plaintiff's property on August 2, 2004. It is alleged that the dirt was dumped by agents of D.R. Horton, Inc. and additional dumping of dirt and traveling over plaintiff's property with bulldozers has continued as recently as April 27, 2005 and May 2, 2005. Because of this dumping and trespass, a Summons and Complaint was filed and served. The factual underpinning of the Plaintiff's causes of action are not based on the sales contract.

The Complaint's first cause of action alleges the intentional act of dumping dirt on Plaintiff's property without his permission or knowledge. Trespass and conversion of Plaintiff's property is not an act contemplated by the single business transaction between the parties and both the cause of action and damages are completely independent of and do not arise under the sales contract. This is also true of the second and third causes of action.

The negligent failure to disclose the planned dumping of dirt on property sold to Plaintiff involves damages as a result of the sale; if the facts show the dumping was planned prior to June 7, 2004. This cause of action does not arise out of the terms of the contract, but from the actions of D.R. Horton in dumping dirt and trespassing. This cause of action is independent of the contract.

The third cause of action, Unfair Trade Practices, is based on the placement of dirt on plaintiff's property and the resultant loss of use of his property. The cause of action and damages are completely independent of the contract to purchase the home and do not arise under the sales contract.

It is clear that this dispute involves intentional torts after the closing of the sales contract and does not arise out of the contract. A single sales contract transaction does not meet the test of a significant relationship between the trespass and the contract between the parties.

A simple analysis which shows the error of defendant's argument that every dispute between the parties must be sent to arbitration is to reverse the parties' positions and analyze the following facts. Assume the plaintiff had arranged to place several tons of dirt on the front lawn of D. R. Horton's model home to prevent access to the front door and rode a motorcycle over the mound on a regular basis. D.R. Horton, Inc. would not take the position they have to arbitrate this intentional tort. They could file either a Complaint in common pleas to seek an injunction and damages for the intentional tort of trespass or seek criminal charges for the trespass. If this is not a correct analysis of their options, the arbitration clause written by D.R. Horton, Inc. would be unconscionable "as so oppressive that no reasonable person would make them and no fair and honest person would accept them". *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (Sup Ct 1996)

By the same token, the defendant's act of dumping dirt on plaintiff's property without permission, continuing to dump dirt and drive bulldozers over his property, and allowing motorcycles and four-wheelers to "play" on the mound are not acts contemplated in the arbitration clause of the sales contract. Any argument that trespass is contemplated by the specific language of the preamble to the arbitration clause is wrong. Otherwise, the clause would be unconscionable and have to be stricken from the contract. The parties did not consent to have trespass, conversion, assault and battery and other intentional acts covered by the preamble language. D.R. Horton's contract contained examples of what was covered by arbitration and intentional acts were not included in that language. Defendant has not proved the Plaintiff consented to arbitrate the facts alleged in the complaint.

Arbitration cannot be compelled when the underlying facts allege the defendant committed intentional torts that did not arise out of the contract. There is no significant relationship between the underlying facts of the causes of action and the sales contract. The case of *Chasserrau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 611 S.E.2d 305 (Ct.App. 2005) is illustrative. In *Chasserrau* the Plaintiff purchased a pool from the defendant. The sales contract had a broad arbitration clause. The plaintiff did not make the financing payments to the defendant in a timely manner and the defendant in the process of collecting the payments allegedly defamed the Plaintiff and engaged in harassing phone calls. A law suit was brought for the defamation and harassment and the circuit court refused to send the case to arbitration. The Court of Appeals agreed that the claims did not arise out of the contract "any more than would a claim that Darwin and other employees of Global-Sun Pools had gone to Chassereau's workplace and verbally or physically attached her" *Id. at 611 S.E.2d 309*. The court held the claims could be proved independently of the contract and did not have a significant relationship to the governing contract.

### ORDER

The Motion to stay or dismiss this action and force arbitration is denied. The arbitration clause did not survive the closing of the contract. Even assuming that the arbitration clause survived, it is clear the factual basis of the complaint arose after the closing of the Contract and there is no significant relationship to the sales contract.

Plaintiff's problem is with defendant's conduct, not with the contract. The unexpected tortious behavior of the Defendant could not have been foreseen when the sales contract was executed so there could not have been an agreement to arbitrate these facts.

The motion to compel discovery by Plaintiff is granted. The award of attorney fees to Plaintiff's attorney for filing a Motion to Compel is denied. The Plaintiff's Motion to strike from the Answer the first defense, fifth defense and thirteenth defense is granted. The Plaintiff's Motion to strike the other defenses is denied at this time subject to discovery being completed and the ruling on the validity of the seventh, eighth, ninth, and tenth defenses is reserved for the trial judge.

AND IT IS SO ORDERED

<<signature>>

James R. Barber, III

S.C. Circuit Court Judge

September 28, 2005

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End of Document

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# EXHIBIT M



**D.R. HORTON AMERICA'S BUILDER**

Home for every stage in  
life.®



01:25



# Giving you more

We're committed to giving you more ways to find your home. We'll work together to guide your entire homebuying journey from start to finish.

[LEARN MORE](#)

## RESOURCES

Tools for homebuyers and homeowners.

[CHECK OUT TOOLS](#)

## HOME IS CONNECTED

Check out what's behind the door of America's Smart Home.

[LEARN MORE](#)

## PARTNER WITH US

We love working with real estate agents.

[LEARN MORE](#)

## SELL YOUR HOME

Learn more about our partnership with Zillow Offers.

[LEARN MORE](#)





# We want to hear your story

Because of you and so many others, we can call ourselves America's Builder. We want to share your homebuying journey from start to finish.

**SHARE YOUR STORY**



**D.R. HORTON**

# An Industry Standard Since 1978

You want the best for your family. So do we. That's why D.R. Horton has been giving America's homeowners quality, value and peace of mind since 1978.



## THE TIMELINE

**1978**

D.R. Horton broke ground on our first home in Fort Worth.

**1992**

The company completes its initial public offering of stock.

**2002**

D.R. Horton becomes the nation's largest homebuilder by volume.

## VALUE

Your home says a lot about what you value in life. It's a refuge for you to relax, entertain, learn, grow, or just be. Which is why we build your home using only the finest materials, latest designs, and the kind of warranty that can only come from America's Builder.

## TRUST

When you're making the biggest investment of your life, you need to know that you can count on your builder. You're not just a customer. You're family. And we'll take care of you like family.

## TRADITION

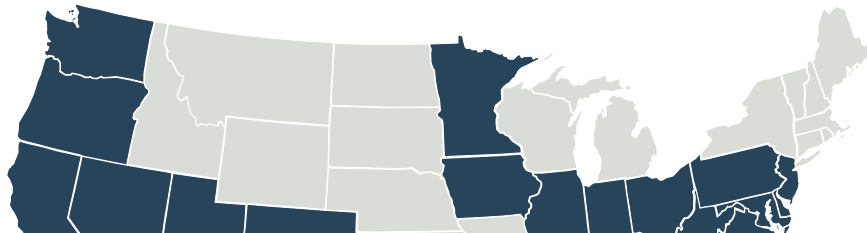
You're buying more than just a house. You're investing in a place to call home as you grow through life's stages, and one day retire. Which is why since 1978, D.R. Horton has stood by its promise to deliver you top-quality homes at affordable prices. Or, what we like to call, the American Dream.

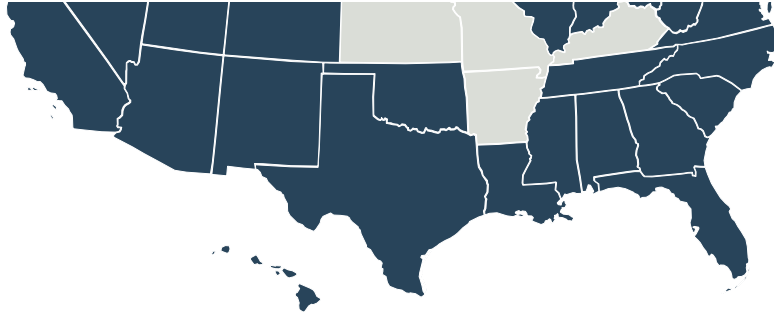
61,164  
HOMES CLOSED LAST  
YEAR (TTM ENDED 6/30/20)



**VALUE**      **TRUST**      **TRADITION**

SELECT A STATE TO BEGIN YOUR SEARCH





03:21

## OUR STORY

# We Are America's Builder

It's one of the greatest opportunities we have as Americans. It's that special place where our memories are made – that place we call home. Since 1978, we've been delivering the American dream. We believe in a vision of homeownership for everyone, a home for every stage in life.

**COMMITMENT TO  
EXCELLENCE**

In 1978, D.R. Horton broke ground on our first home in Fort Worth, Texas. Since that day, the company has defined its success not by bricks and mortar, but by the satisfaction of the families that make our houses their homes. Our foundation is a single, guiding principle: a value-first dedication to the individual needs of each and every one of our nation's homebuyers.

From first-time homebuyers to empty nesters, our family of brands provides a home for every stage in life. Our highly-trained, market experts are where you want to live, from New Jersey to Hawaii, providing unique, personalized services tailored to your individual needs. But the real value comes from the quality construction we put into every home, and the peace of mind that comes with a premium-backed warranty from America's Number One Homebuilder.

What else should you consider as you select a new home? We believe the financial strength of the builder is an important consideration. Below are a few items for your consideration in determining our ability to be there for you, both during the construction process and after you close on your home.

- We've delivered more than 770,000 homes to our nation's customers since our company's inception.

- Since 2002, more homebuyers have chosen D.R. Horton than any other national builder.
- We operate in 44 of homebuilding's top 50 markets in the U.S., and rank among the top 5 in 36 of these.
- Our team of operating experts are spread across the nation in 29 states and 88 markets.

Above all, our customer-driven principles have allowed us to work closely with each individual market to gain insight into the needs and wants from those who matter most: you.

## **BUILDING THE FUTURE**

We've come a long way, and while more people choose our family of brands over any other builder in the country, we never forget the most important thing of all – the families that choose us for their place to call home.

So continue to live out those dreams, America, and know we'll be here for you every step of the way.

D.R. Horton. **We are America's Builder.**



## **HOME BUYING GUIDE**

Let us  
help you  
get  
started

At D.R. Horton, we understand the value and pride in owning a quality home.

**SINCE 1978, D.R. HORTON  
HAS HELPED MORE THAN  
770,000 OF OUR NATION'S**

# HOMEBUYERS ACHIEVE THE AMERICAN DREAM.

We also understand it can be overwhelming at times. There are several aspects of the homebuying process, which is why we've provided a step-by-step guide to serve as a reference to simplify the process and help you to reap the benefits of homeownership for years to come.

The following is a list of steps to consider when buying a new home:

## DETERMINE HOMEOWNERSHIP COSTS

Homeownership is a big purchase and a lifestyle change. Before you begin looking at homes, it's critical to know your finances. We recommend using our handy mortgage calculator to help determine your financial feasibility.

## GET MORTGAGE PRE- APPROVAL

Next, it's time to begin the process of mortgage pre-approval. Our lending affiliates can help offer a positive home mortgage experience and provide you a good faith estimate that includes a list of anticipated costs you can expect to pay as part of your home loan and closing costs.

## SEARCH FOR A NEW HOME

Location is a key aspect of owning a home. Our sales specialists are located inside the community in order to better serve your needs. Just click the magnifying glass at the very top of the page to search for an up-to-date map and see what communities are available in your market.

## **VISIT MODEL HOMES AND COMMUNITIES**

Once you've narrowed down your search to a few communities, it's time to pay an in-person visit. Schedule a visit right from the listing on this site, or use the address provided to drop by one of our locations during listed business hours.

## **SIGN A SALES CONTRACT**

So, you've decided on your new home. Next, it's time to sign on the dotted line. Our experienced sales agents are glad to assist you and can walk you through the entire purchasing process by answering any of your questions.

## **CLOSE ON YOUR HOME**

Even though you are close to the home stretch, you can't pass "Go" until you've closed on your home. This might even include fundamentals such as closing costs, which can account for up to three to six percent of your home purchase. Luckily, working with one of our reputable lenders can provide you with this information early in the homebuying process.

## **MOVE INTO YOUR HOME**

Don't forget to save for the move itself. It's a good idea to call around and request quotes from moving companies. Consider calling one of our referral moving companies who are a fantastic resource and can help ease some of the anxieties of moving. Once you have a good idea on the size and layout of your new home, it's a great time to determine what goes where.

Contact us to start your journey today!

## WARRANTY & SERVICE REQUESTS

# Help when you need it.

**Submit a warranty request**

---

**Warranty guides**

---

## Submit a warranty request

Move into your new home with peace of mind. We are proud to offer a robust home warranty with each new D.R. Horton home. Should you have a concern with your home or would like to schedule a service appointment, submitting a request is simple.

First, enter your home's zip code, then select your complete address from the list that is displayed. For faster results, begin typing your street address to reduce the number of addresses listed. If you don't see your address listed, select "Address Not Listed" and we'll ask a few additional questions to try to get your request into the right hands.

Warranty response times may be impacted by COVID-19 protocols. Learn more about our COVID-19 policy **here**.

## Home Information

Zip Code: \*

Select Address: \*

Address Not Listed

## DOCUMENTS & GUIDES

# Help when you need it.

[Submit a warranty request](#)

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[Warranty guides](#)

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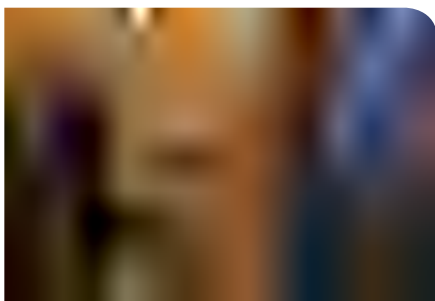
## RWC 10-Year Limited Warranty

Learn what is covered by your home's warranty and how to submit a warranty claim with Residential Warranty Company, LLC ("RWC") for major structural defects. Exclusions are also noted as well as addenda for specific states. Click below to read or print a copy of the warranty.

[RWC GUIDE](#)

# THE LIMITED WARRANTY

10 YEAR WRITTEN WARRANTY FOR NEW HOMES



This Limited Warranty does not cover consequential or incidental damages. The Warrantor's total aggregate liability of this Limited Warranty is limited to the Final Sales Price listed on the Application For Warranty form.

The Builder makes no housing merchant implied warranty or any other warranties, express or implied, in connection with the attached sales contract or the warranted Home, and all such warranties are excluded, except as expressly provided in this Limited Warranty. There are no warranties which extend beyond the face of this Limited Warranty.

Some states do not allow the exclusion or limitation of incidental or consequential damages by the Builder so all of the limitations or exclusions of this Limited Warranty may not apply to you.

### Warranty Confirmation

Your validated Warranty consists of your Application for Warranty, the Limited Warranty book, and your Warranty Confirmation. You can confirm your warranty has been validated by RWC, and obtain your Warranty Confirmation, AFTER 60 days from your closing at [confirm.rwcwarranty.com](http://confirm.rwcwarranty.com). If you do not have access to the Internet, please contact RWC to obtain your Limited Warranty book and Warranty Confirmation.

For your Limited Warranty to be in effect, you should receive the following documentation:  
Limited Warranty #319 • Application For Warranty form #316 (Refer to I.B.3. for applicability) • Warranty Confirmation

*Insurer: Western Pacific Mutual Insurance Company, A Risk Retention Group*

# RESIDENTIAL WARRANTY COMPANY, LLC



Dear Home Buyer,

Congratulations on the purchase of your new Home. This is probably one of the largest, most important investments you've ever made and we wish you many years of enjoyment. You've chosen a Home built by a leading Builder which includes the RWC Limited Warranty, assurance that your investment is well protected. This book explains the Limited Warranty in its entirety, and we encourage you to take time to READ IT CAREFULLY.

This Limited Warranty provides you with protection in accordance with this warranty book for ten full years of Home ownership. During the first two years, your Builder is responsible for specified warranty obligations. In the unlikely event your Builder is unable or unwilling to perform, the Warranty is provided subject to the conditions, terms and exclusions listed. For the remaining eight years, your Warranty applies to Major Structural Defects as defined in this book.

This is not a warranty service contract, but a written ten year limited warranty which your Builder has elected to provide with your Home.

Take time now to read this book. Familiarize yourself with the Warranty and its limitations. Contact your Builder regarding specific construction standards and how they apply to your Home.

Again, congratulations and enjoy your new Home!

Very truly yours,  
Residential Warranty Company, LLC

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Residential Warranty Company, LLC  
5300 Derry Street, Harrisburg, PA 17111  
717-561-4480

**A. Introduction**

To help you better understand your Limited Warranty, refer to the following list of definitions which apply in this book.

**B. Definitions****1. Administrator**

Residential Warranty Company, LLC (RWC) is the Administrator of this Limited Warranty. RWC is neither Warrantor nor Insurer.

**2. Appliances and Items of Equipment, including Attachments and Appurtenances**

Water heaters, pumps, stoves, refrigerators, compactors, garbage disposals, ranges, dishwashers, washers and dryers, bathtubs, sinks, commodes, faucets, light fixtures, switches, outlets, thermostats, furnaces and oil tanks, humidifiers, oil purifiers, air conditioning materials, in-house sprinkler systems and similar items.

**3. Application For Warranty**

The form signed at closing by you, the Purchaser, and your Builder which identifies the location, the Effective Date Of Warranty and the Final Sales Price of the enrolled Home. If the Builder is participating in the RWC electronic enrollment process, the Application for Warranty form is eliminated. This information will be included on your Warranty Confirmation.

**4. Arbitrator**

The person appointed by the independent arbitration service to resolve an Unresolved Warranty Issue.

**5. Builder**

The person, corporation, partnership or other entity which participates in the RWC Limited Warranty Program and has obtained this Limited Warranty for you.

**6. Consequential Damages**

All consequential damages including, but not limited to, damage to the Home that is caused by a warranted Defect but is not itself a warranted Defect and costs of shelter, transportation, food, moving, storage or other incidental expenses related to relocation during repairs.

**7. Cooling, Ventilating and Heating Systems**

All ductwork, refrigerant lines, steam and water pipes, registers, convectors and dampers.

**8. Defect**

A condition of any item warranted by this Limited Warranty which exceeds the allowable tolerance specified in this Limited Warranty. Failure to complete construction of the Home or any portion of the Home, in whole or in part, is not considered a Defect.

**9. Effective Date Of Warranty**

The date coverage begins as specified on the Application for Warranty form or on your Warranty Confirmation if your Builder is participating in the electronic enrollment process.

**10. Electrical Systems**

All wiring, electrical boxes and connections up to the house side of the meter base.

**11. Home**

The single family dwelling, identified on the Application For Warranty form, which may be a townhome, condominium or duplex.

**12. Insurer**

Western Pacific Mutual Insurance Company, a Risk Retention Group (WPMIC), located at 9265 Madras Ct, Littleton, CO 80130, phone: 303-263-0311. *(Refer to Section IV. for instructions on requesting warranty performance.)*

**13. Limited Warranty**

The terms and conditions contained in this book including any applicable addenda.

## DEFINITIONS

### SECTION I.

#### 14. Major Structural Defects (MSD)

All of the following conditions must be met to constitute a Major Structural Defect:

- a. actual physical damage to one or more of the following specified load-bearing components of the Home;
- b. causing the failure of the specific major structural components; and
- c. which affects its load-bearing function to the degree that it materially affects the physical safety of the occupants of the Home.

Load-bearing components of the Home deemed to have MSD potential:

- (1) roof framing members (rafters and trusses);
- (2) floor framing members (joists and trusses);
- (3) bearing walls;
- (4) columns;
- (5) lintels (other than lintels supporting veneers);
- (6) girders;
- (7) load-bearing beams; and
- (8) foundation systems and footings.

Examples of non-load-bearing elements deemed not to have Major Structural Defect potential:

- (1) non-load-bearing partitions and walls;
- (2) wall tile or paper, etc.;
- (3) plaster, laths or drywall;
- (4) flooring and subflooring material;
- (5) brick, stucco, stone, veneer, or exterior wall sheathing;
- (6) any type of exterior siding;
- (7) roof shingles, sheathing and tar paper;
- (8) Heating, Cooling, Ventilating, Plumbing, Electrical and mechanical systems;
- (9) Appliances, fixtures or Items of Equipment
- (10) doors, windows, trim, cabinets, hardware, insulation, paint and stains; and
- (11) drainage Systems located within or outside the Home.

#### 15. Owner

See Purchaser.

#### 16. Plumbing Systems

All pipes located within the Home and their fittings, including gas supply lines and vent pipes.

#### 17. Purchaser

You. The Purchaser includes the first buyer of the warranted Home and any and all subsequent Owners who take title within the warranty period.

#### 18. Residence

See Home.

#### 19. Sewage Disposal System (Private or Public)

This system includes, but is not limited to, all waste, drainage, sewer pipes and lines, cleanouts, tanks, pumps, drainfields and seepage pits, outside and beyond the exterior wall of the Home.

#### 20. Structurally Attached

An integral part of the Home being structurally supported by footings, block walls or reinforced concrete and connected to the foundation of the Home.

#### 21. Unresolved Warranty Issue

All requests for warranty performance, demands, disputes, controversies and differences that may arise between the parties to this Limited Warranty that cannot be resolved among the parties. An Unresolved Warranty Issue may be a disagreement regarding:

- a. the coverages in this Limited Warranty;
- b. an action performed or to be performed by any party pursuant to this Limited Warranty;
- c. the cost to repair or replace any item covered by this Limited Warranty.

#### 22. Warrantor

Your Builder in Years 1 and 2; the Insurer in Years 3 through 10 and in Years 1 and 2 if your Builder defaults.

#### 23. Warranty Confirmation

The document you obtain by going to [confirm.rwcwarranty.com](http://confirm.rwcwarranty.com) (or by contacting RWC if you do not have access to the Internet). It includes your Validation Number, Effective Date of Warranty, Term of Coverage, and any applicable Addenda.

#### 24. Water Supply System (Private or Public)

This system includes, but is not limited to, all supply and distribution pipes, fittings, valves, pumps and wells, outside the exterior wall of the Home, which supply water to the Home.

## THE LIMITED WARRANTY

### SECTION II.

#### A. Introduction to the Limited Warranty

1. This book provides specific details, conditions and limitations of the Limited Warranty including procedures for requesting warranty performance and for binding arbitration, in accordance with the procedures of the Federal Arbitration Act. Additional information may be received by calling RWC at 717-561-4480. Read this document in its entirety to understand the protection it affords, the exclusions applicable to it, the Warranty Standards which determine its interpretations and operation and your responsibilities.
2. This is NOT an insurance policy, a maintenance agreement or a service contract. It is an explanation of what you, the Purchaser, can expect from this Limited Warranty.
3. Appliances and Equipment included in the Home are not warranted under this Limited Warranty, but may be covered by separate warranties provided by the manufacturer or supplier. These warranties are passed on to you by your Builder at closing and are separate from this Limited Warranty.
4. You are responsible for maintenance of your new Home. General and preventative maintenance are required to prolong the life of your new Home.
5. This Limited Warranty is **automatically transferred** to subsequent Owners during the ten-year term of this Limited Warranty, except in the case of a foreclosure that voids the warranty as provided in Section II.A.6.
6. This Limited Warranty becomes void and all obligations on the part of Warrantor cease as of the date an Owner vacates the Home due to foreclosure proceedings.
7. This Limited Warranty is subject to changes required by various regulating bodies and some local agencies as indicated in the Addenda Section V of the Limited Warranty book. Notations throughout indicate where the Addenda apply.

#### B. The Limited Warranty

1. **Actions taken to cure Defects will NOT extend the periods of specified coverages in this Limited Warranty.**
2. Only warranted elements which are specifically designated in the Warranty Standards are covered by this Limited Warranty.

3. The Warrantor has the choice to repair, replace or pay the reasonable cost to repair or replace warranted items which do not meet Warranty Standards and are not excluded in the Limited Warranty.
4. If a warranted MSD occurs during the appropriate coverage period, and is reported as required in **Section IV.**, the Warrantor will repair, replace or pay you the reasonable cost to repair or replace the warranted MSD, limited to actions necessary to restore the MSD to its load-bearing capacity.



#### C. Warranty Coverage

1. **ONE YEAR COVERAGE:** Your Builder warrants that for a period of one (1) year after the Effective Date Of Warranty, warranted items will function and operate as presented in the Warranty Standards of Year 1, **Section III.A.** Coverage is ONLY available where specific Standards and Actions are represented in this Limited Warranty.
2. **TWO YEAR COVERAGE:** Your Builder warrants that for a period of two (2) years from the Effective Date Of Warranty, specified portions of the Heating, Cooling, Ventilating, Electrical and Plumbing Systems, as defined in this Limited Warranty, will function and operate as presented in the Warranty Standards of Years 1 and 2 only, **Section III.B.**‡
3. **TEN YEAR COVERAGE:** Major Structural Defects (MSD) are warranted for ten (10) years from the Effective Date Of Warranty. Your Builder is the Warrantor during Years 1 and 2 of this Limited Warranty and the Insurer is the Warrantor in Years 3 through 10.
4. **CONDOMINIUM COVERAGE:** This Limited Warranty shall only apply to warranted common elements. Warranted common elements are those portions of the defined Electrical, Heating, Ventilating, Cooling, Plumbing and structural Systems

‡Homeowners in Indiana, refer to State of Indiana Addendum, Section V.C.

## THE LIMITED WARRANTY

### SECTION II.

which serve two (2) or more residential units, and are contained wholly within a residential structure. Warranty coverage for common elements shall be for the same periods and to the same extent as similar or comparable items in individual residential units. Examples of common elements which are covered by this Limited Warranty are hallways, meeting rooms and other spaces wholly within the residential structure designated for the use of two (2) or more units. Examples of common elements which are not covered under this Limited Warranty are club houses, recreational buildings and facilities, exterior structures, exterior walkways, decks, balconies, arches or any other non-residential structure which is part of the condominium.



### D. Conditions

1. This Limited Warranty provides coverage only in excess of coverage provided by other warranties or insurance, whether collectible or not.
2. This Limited Warranty is binding on the Builder and you and your heirs, executors, administrators, successors and assigns.
3. This Limited Warranty shall be interpreted and enforced in accordance with the laws of the state in which the Home is located.
4. This Limited Warranty is separate and apart from your contract and/or other sales agreements with your Builder. It cannot be affected, altered or amended in any way by any other agreement which you may have.
5. This Limited Warranty cannot be modified, altered or amended in any way except by a formal written instrument signed by you, your Builder and the Administrator.
6. If any provision of this Limited Warranty is determined by a court of competent jurisdiction to be unenforceable, that determination will not affect the validity of the remaining provisions.
7. All notices required under this Limited Warranty must be in writing and sent by email or certified mail, return receipt requested. If you send your written notice by email, your written notice must be sent to [warranty.resolution@rwcwarranty.com](mailto:warranty.resolution@rwcwarranty.com). The written notice will not be considered received without a valid confirmation of receipt number. If you do not receive a confirmation of receipt number within 48 hours of emailing your written notice, contact RWC by calling 717-561-4480 and request to speak with the Warranty Resolution Department's Customer Service. If sending your written notice by certified mail, return receipt requested, it must be postage prepaid, to the recipient's address shown on the Application for Warranty form, or to whatever address the recipient may designate in writing.
8. If actions by the Warrantor on any obligations under this Limited Warranty are delayed by an event beyond its control, such performance will be excused until the delaying effects of the event are remedied. Such events include, but are not limited to, acts of God, acts of the common enemy, war, riot, civil commotion or sovereign conduct, or acts or omissions by you or any other person not a party of this Limited Warranty.
9. If your Builder fails to complete any part of the Home that is reasonably foreseeable to cause damage to the Home, then it is your responsibility to complete such parts of the Home to avoid the damage. If you fail to complete the work, then any resulting damage is not covered under this Limited Warranty. The warranty period for any item completed after the Effective Date of Warranty shall be deemed to have commenced on the Effective Date of Warranty.
10. Costs incurred for unauthorized repairs to warranted items are not reimbursable. Written authorization prior to incurring expenses must be obtained from the Administrator.

## THE LIMITED WARRANTY

### SECTION II.

11. Whenever appropriate, the use of one gender includes all genders and the use of the singular includes the plural.



12. Under this Limited Warranty, the Warrantor is not responsible for exact color, texture or finish matches in situations where materials are replaced or repaired, or for areas repainted or when original materials are discontinued.
13. Your Builder must assign to you all manufacturers' warranties on products included in the Final Sales Price of your Home. Neither the Insurer nor the Administrator shall be liable for your Builder's failure to do so.
14. You are responsible for establishing a written, final walk-through inspection list of items in need of service prior to occupancy or closing, whichever is first. This list must be signed and dated by you and your Builder. Keep a copy for your records.

### E. Exclusions

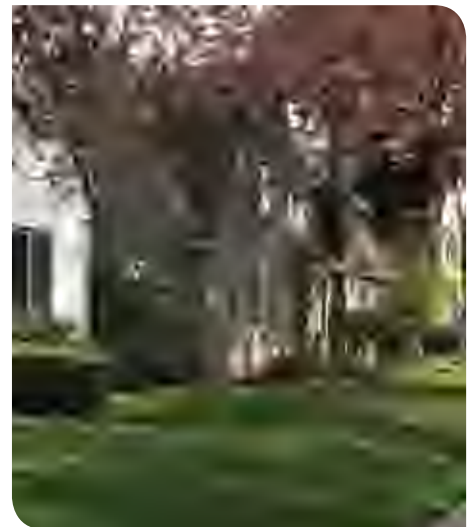
The following are NOT covered under this Limited Warranty:

1. Loss or damage:
  - a. to land.
  - b. to the Home, persons or property directly or indirectly caused by insects, birds, vermin, rodents, or wild or domestic animals.
  - c. which arises while the Home is used primarily for non-residential purposes.
  - d. which is covered by any other insurance or for which compensation is granted by legislation.
  - e. resulting directly or indirectly from flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these (whether or not driven by wind), water which backs up from sewers or drains, changes in the water table which were not reasonably foreseeable, water below the surface of the ground (including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool, or other structure), wetlands, springs or aquifers.
- f. from normal deterioration or wear and tear.
- g. caused by material or work supplied by anyone other than your Builder or its employees, agents or subcontractors.
- h. from your or the condominium association's failure to perform routine maintenance on the Home, common areas, common elements or your or the condominium association's grounds.
- i. after Year 1, to, resulting from, or made worse by all components of structurally attached decks, balconies, patios, porches, stoops, porch roofs and porticos.
- j. after Year 1, to, resulting from, or made worse by elements of the Home which are constructed separate from foundation walls or other structural elements of the Home such as, but not limited to, chimneys and concrete floors of basements and attached garages.
- k. to wiring, to and between communication devices from the source of power, whether or not connected to the interior wiring system of the Home. Such devices shall include, but not be limited to, telephone systems, television cable systems, intercom systems, computer systems and security systems. Sources of power shall include, but not be limited to, service entrance conductors, switches, outlets, receptacles and junction boxes.
- l. to, or caused by, recreational facilities; driveways; walkways; patios, porches and stoops not structurally attached; decks and balconies which are not bolted to or cantilevered from the main structure of the Home; boundary and/or retaining walls; bulkheads; fences; landscaping, sodding, seeding, shrubs, trees and plantings; subsurface drainage systems (other than footer drains); lawn sprinkler systems; off-site improvements, including streets, sidewalks, adjacent property and the like; or any other improvements not part of the Home itself.

## THE LIMITED WARRANTY

### SECTION II.

- m. caused by any item listed as an additional exclusion on the Application for Warranty form.
- 2. Loss or damage resulting from, or made worse by:
  - a. changes in the grading of the property surrounding the Home by anyone except your Builder or its employees, agents or subcontractors.
  - b. changes in grading caused by erosion.
  - c. modifications or additions to the Home, or property under or around the Home, made after the Effective Date Of Warranty (other than changes made in order to meet the obligations of this Limited Warranty).
  - d. intrusion of water into crawl spaces.
  - e. the weight and/or performance of any type of waterbed or any other furnishing which exceeds the load-bearing design of the Home.
  - f. the presence or consequence of unacceptable levels of radon, formaldehyde, carcinogenic substances or other pollutants and contaminants; or the presence of hazardous or toxic materials resulting in uninhabitability or health risk within the Home.
  - g. acts or omissions by you, your agents, employees, licensees, invitees; accidents, riots, civil commotion, nuclear hazards, acts of God or nature, fire, explosion, blasting, smoke, drought, water escape, windstorms, tropical storms, hurricanes, hail, lightning, ice, snow, falling trees, aircraft, vehicles, flood, mud slides, sink-holes, mine subsidence, faults, crevices, earthquake, land shock waves or tremors occurring before, during or after a volcanic eruption, or manmade events such as war, terrorism or vandalism.
  - h. your failure to perform routine maintenance.
  - i. your failure to minimize or prevent such loss or damage in a timely manner.
  - j. defects in, but not limited to: recreational facilities; driveways; walkways; patios, porches and stoops not structurally attached; decks and balconies which are not bolted to or cantilevered from the main structure of the Home; boundary and/or retaining walls; bulkheads; fences; landscaping, sodding, seeding, shrubs, trees and plantings; sub-surface drainage systems (other than footer drains); lawn sprinkler systems; off-site improvements, including streets, sidewalks, adjacent property and the like; or any other improvements not part of the Home itself.
  - k. defects in detached garages or outbuildings (except those which contain Plumbing, Electrical, Heating, Cooling or Ventilating Systems serving the Home, and then only to the extent where Defects would affect these systems). A detached garage is one which is constructed on its own foundation, separate and apart from the foundation of the Home. A breezeway, fence, utility line or similar union shall not cause a garage or outbuilding to be considered attached.
  - l. negligent maintenance or operation of the Home and its systems by anyone other than your Builder or its agents, employees or subcontractors.
  - m. any portion of a Water Supply System, private or public, including volume and pressure of water flow.
  - n. quality and potability of water.
  - o. any portion of a Sewage Disposal System, private or public, including design.
  - p. dampness, condensation or heat build-up caused by your failure to maintain proper ventilation.



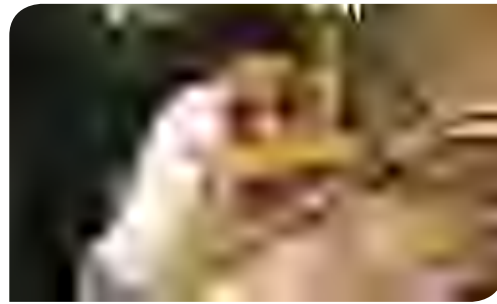
## THE LIMITED WARRANTY

### SECTION II.

3. Failure of your Builder to complete construction of the Home or any part of the Home on or before the Effective Date Of Warranty or damages arising from such failure. An incomplete item is not considered a Defect, although your Builder may be obligated to complete such items under separate agreements between you and your Builder.
4. Any deficiency which does not result in actual physical damage or loss to the Home.
5. Any Consequential Damages.
6. Personal property damage or bodily injury.
7. Violation of applicable Building Codes or ordinances unless such violation results in a Defect which is otherwise covered under this Limited Warranty. Under such circumstances, the obligation of the Warrantor under this Limited Warranty shall only be to repair the defective warranted portion of the Home, but not to restore or bring the Home to conform to code.
8. Any request for warranty performance submitted to the Administrator after an unreasonable delay or later than 30 days after the expiration of the applicable warranty period.
9. Warranted Defects that you repair without prior written authorization of the Administrator.
10. Any damage to or resulting from the use, construction, placement, equipment, components, maintenance, etc., whether inside or outside the Home, of the following: swimming pools, elevators, or solar panels.
11. The removal and/or replacement of items specifically excluded from coverage under this Limited Warranty, such as landscaping or personal property, and items not originally installed by your Builder, such as wallpaper, where removal and replacement are required to execute a repair.
12. Any Defect consisting of, caused by, contributed to, or aggravated by moisture, wet or dry rot, mold, mildew, fungus or rust, regardless of the originating cause of any moisture or water penetration that leads to the Defect.
13. Sound transmission and sound proofing between rooms or floor levels.
14. Appliances and Equipment included in the Home are not warranted under this Limited Warranty, but may be covered by separate warranties provided by the manufacturer or supplier. These warranties are passed on to you by your Builder at closing and are separate from this Limited Warranty. Damage

caused by improper maintenance or operation, negligence, or improper service of these items by you or your agent will not be covered under this Limited Warranty. †

15. Modifications or additions to the Home, or property under or around the Home, made after the Effective Date of Warranty (other than changes made in order to meet the obligations of this Limited Warranty).



### F. Limitation of Liability

1. The Warrantor's liability and obligations are limited to the repair, replacement or the payment of the reasonable cost of repair or replacement of warranted items not to exceed an aggregate equal to the Final Sales Price of the Home as listed on the Application for Warranty form or in the absence of an Application for Warranty form, as otherwise provided to the Administrator by the Builder. The choice to repair, replace or make payment is the Warrantor's.
2. All other warranties, express or implied, including, but not limited to, all implied warranties of fitness, merchantability or habitability, are disclaimed and excluded to the extent allowed by law.

† Homeowners in the State of New York, refer to State of New York Addendum, Section V.B.

## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply. †

### A. YEAR 1 STANDARDS ONLY

#### 1. FOUNDATIONS

### SECTION III.

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>BASEMENT</b>		
1.1 Cracks appear in control joints.	No action required.	The expansion/contraction joint is placed to control cracking. This is not a deficiency.
1.2 Uneven concrete floors in finished areas of a basement.	Builder will correct those areas in which Defect exceeds 3/8 in. within a 32 in. measurement.	In rooms not initially finished as living areas or where a floor or a portion of a floor surface has been designed for specific drainage purposes, a slope which exceeds 3/8 in. within a 32 in. measurement is not a deficiency.
1.3 Cracks in poured concrete foundation walls.	Builder will correct any crack which exceeds 1/4 in. in width.	Shrinkage cracks are common and should be expected. Surface patching and epoxy injections are examples of acceptable repair methods.
1.4 Cracks in block or veneer wall.	Builder will correct cracks which exceed 1/4 in. in width.	Some cracks are common through masonry and mortar joints. Cracks 1/4 in. or less are considered routine Owner maintenance.
1.5 Leaks resulting in actual flow or trickling of water through wall or floor, causing an accumulation.	Builder will correct.	A one-time occurrence may not indicate a Defect. Owner must maintain proper grading around the Home and maintain any surface water control systems installed by Builder. Dampness and condensation are normal conditions and are not covered by this Limited Warranty.
1.6 Disintegration of the concrete floor surface.	Builder will correct disintegrated surfaces caused by improper placement of concrete.	Disintegration caused by erosion due to salt, chemicals, implements used and other factors beyond Builder's control is not a warranted deficiency.
1.7 Cracks in concrete floor which rupture or significantly impair performance of floor covering.	Builder will correct so Defect is not readily noticeable when floor covering is in place.	Minor impressions in floor covering are not considered significant imperfections.
1.8 Cracks in concrete floor of unfinished area (no floor covering) or in areas not designed for living.	Builder will correct cracks which exceed 1/4 in. in width or vertical displacement.	Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks are common and should be expected.
1.9 Condensation on walls, joists, support columns and other components of basement area.	No action required.	Maintaining adequate ventilation and moisture control is considered Owner maintenance.

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**1. FOUNDATIONS**

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>CRAWL SPACE</b>		
<b>1.10</b> Cracks in poured concrete foundation walls.	Builder will correct any crack which exceeds 1/4 in. in width.	Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks of 1/4 in. or less are common and should be expected.
<b>1.11</b> Cracks in block or veneer wall.	Builder will correct cracks greater than 1/4 in. in width.	Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks of 1/4 in. or less are common and should be expected.
<b>1.12</b> Inadequate ventilation.	Builder will install properly sized louvers or vents.	Maintaining adequate ventilation and moisture control, including seasonal adjustment of vent openings, is considered Owner maintenance.
<b>1.13</b> Condensation on walls, joists, support columns and other components of the crawl space area.	No action required.	Maintaining adequate ventilation and moisture control, including seasonal adjustment of vent openings, is considered Owner maintenance.
<b>SLAB ON GRADE</b>		
<b>1.14</b> Cracks appear at control joints.	No action required.	Expansion/contraction joint is placed to control cracking. This is not a deficiency.
<b>1.15</b> Uneven concrete floors in finished areas.	Builder will correct areas in which Defect exceeds 3/8 in. within a 32 in. measurement.	In rooms not initially finished as living areas or where a floor or a portion of a floor surface has been designed for specific drainage purposes, a slope which exceeds 3/8 in. within a 32 in. measurement is acceptable.
<b>1.16</b> Disintegration of concrete floor surface.	Builder will correct disintegrated surfaces caused by improper placement of concrete.	Disintegration caused by erosion due to salt, chemicals, implements used and other factors beyond Builder's control is not a warranted deficiency.
<b>1.17</b> Crack in concrete floor which ruptures or significantly impairs performance of floor covering.	Builder will correct so Defect is not readily noticeable when floor covering is in place.	Minor impressions in floor covering are not considered significant imperfections.
<b>1.18</b> Cracks in attached garage slab.	Builder will correct cracks which exceed 1/4 in. in width or vertical displacement.	Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks are common and should be expected.
<b>1.19</b> Cracks in concrete floor of unfinished area (no floor covering) or in areas not designed for living.	Builder will correct cracks which exceed 1/4 in. in width or vertical displacement.	Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks are common and should be expected.
<b>1.20</b> Cracks in visible face of foundation.	Builder will correct cracks in excess of 1/4 in. in width.	Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks are common and should be expected.

**SECTION III.**

## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

### 2. FRAMING

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>CEILING</b>		
2.1 Uneven ceiling.	Builder will correct if unevenness exceeds 1/4 in. within a 32 in. measurement.	Some minor framing imperfections should be expected.
<b>FLOOR</b>		
2.2 High and low areas.	Builder will correct if high or low areas exceed 1/4 in. within a 32 in. measurement.	Some minor framing imperfections should be expected.
2.3 Floor squeaks.	Builder will correct if caused by a defective joist or improperly installed subfloor. Builder will take corrective action to reduce squeaking to the extent possible within reasonable repair capability without removing floor or ceiling finishes.	A large area of floor squeaks which is noticeable, loud and objectionable is a Defect. A squeak-proof floor cannot be guaranteed. Lumber shrinkage as well as temperature and humidity changes may cause squeaks.
<b>ROOF</b>		
2.4 Split or warped rafters or trusses.	No action required.	Some splitting and warping is normal and is caused by high temperature effects on lumber.
<b>WALL</b>		
2.5 Bow or bulge.	Builder will correct if bow or bulge exceeds 1/2 in. within 32 in. horizontal or vertical measurement.	Minor framing imperfections should be expected.
2.6 Out-of-plumb.	Builder will correct where out-of-plumb condition exceeds 3/4 in. within 8 ft. vertical measurement.	Minor framing imperfections should be expected.
2.7 Wall is out-of-square.	No action required.	A wall out-of-square is not a Defect.

### SECTION III.

## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

### 3. EXTERIOR

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>STRUCTURALLY ATTACHED WOOD OR COMPOSITE DECKS</b>		
3.1 Wood twisting, warping or splitting.	Builder will correct only if due to improper installation.	Twisting, warping or splitting of wood deck material is normal due to exposure to the elements. Owner maintenance is required.
3.2 Settlement.	Builder will correct slope of deck which exceeds a ratio of 2 in. in a 10 ft. measurement.	Some slope is often provided to allow for water drainage.
3.3 Loose railing or post.	Builder will correct if due to improper installation.	Owner maintenance is required.
<b>DOORS</b>		
3.4 Binds, sticks or does not latch.	Builder will correct if caused by faulty workmanship or materials.	Seasonal changes may cause doors to expand and contract, and are usually temporary conditions.
3.5 Wood door panel shrinks.	No action required.	Panels will shrink and expand and may expose unfinished surfaces.
3.6 Warping.	Builder will correct warping which exceeds 1/4 in., measured vertically, horizontally or diagonally.	Seasonal changes may cause doors to expand and contract, and are usually temporary conditions.
3.7 Split in panel.	Builder will correct if split allows the entrance of elements.	Splits which do not allow the entrance of elements are considered normal. Owner maintenance is required.
3.8 Separation between door and weather-stripping.	Builder will correct if daylight is visible or if entrance of elements occurs under normal conditions.	Even with properly installed weather-stripping, some movement of the door, when closed, may be expected. Owner maintenance is required for minor alterations to adjustable thresholds and other parts of the door.
3.9 Screen mesh is torn or damaged.	Builder will correct only if damage is documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
3.10 Overhead garage door fails to operate or allows rain or snow to leak through.	Builder will correct garage doors which do not fit or operate properly.	Some entrance of elements can be expected and is not considered a deficiency. If Owner installs a garage door opener, Builder is not responsible for operation of door.

### SECTION III.

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**3. EXTERIOR****SECTION  
III.**

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>ROOFING</b>		
<b>3.11</b> Roof and roof flashing leaks.	Builder will correct active and current leaks that occur under normal conditions.	No action is required if leak is due to snow or ice buildup, high winds or driving rains. Prevention of snow or ice buildup is the Owner's responsibility. Substantiation of an active and current leak is the Owner's responsibility.
<b>3.12</b> Lifted, torn, curled, or cupped shingles.	No action required.	Owner maintenance is required. Cupping in excess of 1/2 in. should be reported to the manufacturer.
<b>3.13</b> Shingles that have blown off.	Builder will correct affected area if due to poor installation.	Shingles shall not blow off in winds less than the manufacturer's specifications.
<b>3.14</b> Inadequate ventilation.	Builder will provide adequate ventilation.	Moisture accumulation in attics which are not adequately vented is a deficiency. Owner is responsible to keep vents clear of obstructions to promote air flow.
<b>3.15</b> Water stays in gutters.	Builder will correct to limit standing water depth at 1 in.	Owner is responsible for keeping gutters and downspouts clean.
<b>3.16</b> Gutter or downspout leaks.	Builder will correct leaks at connections.	Owner is responsible for keeping gutters and downspouts clean. Gutters may overflow during heavy rains.
<b>SITE WORK</b>		
<b>3.17</b> Standing water within 10 ft. of the foundation.	Builder will correct water which stands for more than 24 hours, or more than 48 hours in swales.	Standing water beyond the 10 ft. perimeter of the foundation is not covered by this Limited Warranty. Owner is responsible for establishing and maintaining adequate ground cover.
<b>3.18</b> Settling of ground around foundation walls, utility trenches or other filled areas on property where there has been excavation and backfill which affected foundation drainage.	If final grading was performed by Builder, he will replace fill in excessively settled areas only once.	If settlement does not exceed 6 in., it is Owner's responsibility to fill affected areas. The party responsible for establishing the final grade shall provide for positive drainage away from foundation. Owner is responsible for establishing and maintaining adequate ground cover.
<b>STRUCTURALLY ATTACHED STOOP, PORCH &amp; PATIO</b>		
<b>3.19</b> Settlement, heaving or movement.	Builder will correct if movement exceeds 1 in. from the Home for stoops, porches and patios which are structurally attached.	Stoops, porches and patios which are poured separately and simply abut the house are not covered by this Limited Warranty.
<b>3.20</b> Concrete splatters on adjacent surfaces.	Builder will correct only if damage is documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.

## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

### 3. EXTERIOR

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>WALL COVERING</b>		
<b>3.21</b> Entrance of elements through separations of wood, hardboard or fiber cement siding or trim joints, or separation between trim and surfaces of masonry or siding.	Builder will correct entrance of elements or separations exceeding 3/8 in. by caulking or other methods.	Any separations 3/8 in. or less are considered routine Owner maintenance.
<b>3.22</b> Cracks in stucco or similar synthetic based finishes.	Builder will correct cracks which exceed 1/8 in. in width.	Caulking and touch-up painting are examples of acceptable repair methods. Builder is not responsible for exact color, texture or finish matches. Hairline cracks are common.
<b>3.23</b> Siding materials become detached from the Home.	Builder will correct affected area if due to improper workmanship or materials.	Separated, loose or delaminated siding can be due to improper maintenance and is not considered a Defect.
<b>3.24</b> Aluminum or vinyl siding is bowed or wavy.	Builder is responsible only if installed improperly and waves or bowing exceed 1/2 in. within a 32 in. measurement.	Check your manufacturer's warranty on this product for coverage regarding dents, holes, wind specifications, etc.
<b>3.25</b> Paint or stain peels or deteriorates.	Builder will correct. If 75% of a particular wall is affected, entire wall will be corrected.	Some fading is normal due to weathering. Mildew and fungus on exterior surfaces are caused by climatic conditions and are considered routine maintenance. Varnish or lacquer deteriorates quickly and is not covered by this Limited Warranty.
<b>3.26</b> Paint splatters and smears on other surfaces.	Builder will correct only if damage is documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
<b>3.27</b> Faulty application of paint on wall and trim surfaces.	Builder will correct affected area. If greater than 75% of wall or trim piece is affected, entire surface will be corrected.	Some minor imperfections such as over-spray, brushmarks, etc., are common and should be expected.
<b>3.28</b> Knot holes bleed through paint or stain.	Builder will correct affected areas where excessive bleeding of knots appear.	Knot holes will be apparent depending on the quality of material used.
<b>3.29</b> Vent or louver leaks.	Builder will correct if caused by improper installation.	Properly installed louvers or vents may at times allow rain or snow to enter under strong wind conditions and is not a deficiency.
<b>3.30</b> Cracks in masonry, veneer, stone, etc.	Builder will correct cracks which exceed 1/4 in. in width.	Some cracks are common through masonry and mortar joints. Cracks 1/4 in. or less are considered routine Owner maintenance.

### SECTION III.

## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

### 3. EXTERIOR

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>WINDOWS</b>		
<b>3.31</b> Condensation or frost on interior window surface.	No action required.	Condensation is relative to the quality and type of windows. Temperature differences in high levels of humidity along with individual living habits will cause condensation.
<b>3.32</b> Clouding or condensation between panes of glass.	Builder will correct only if damage is documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
<b>3.33</b> Glass breakage.	Builder will correct only if damage is documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
<b>3.34</b> Excessive drafts and leaks.	Builder will correct poorly fitted windows.	Relative to the quality and type of windows, drafts are sometimes noticeable around windows, especially during high winds. It may be necessary for the Owner to have storm windows installed to provide a satisfactory solution in high wind areas. All caulking materials expand and contract due to temperature variation and dissimilar materials. Maintenance of weather-stripping is Owner's responsibility.
<b>3.35</b> Difficult to open, close or lock.	Builder will correct.	Windows should open, close and lock with reasonable pressure.

### 4. INTERIOR

<b>DOORS</b>		
<b>4.1</b> Latch is loose or rattles.	No action required.	Some minor movement should be expected.
<b>4.2</b> Binds, sticks or does not latch.	Builder will correct if due to faulty workmanship and materials.	Seasonal changes may cause doors to expand and contract, and are usually temporary conditions.
<b>4.3</b> Warping.	Builder will correct warping which exceeds 1/4 in., measured vertically, horizontally or diagonally.	Seasonal changes may cause doors to expand and contract, and are usually temporary conditions.
<b>4.4</b> Excessive opening at bottom.	Builder will correct gaps in excess of 1-1/2 in. between bottom of passage door and finished floor or 2 in. between bottom of closet door and finished floor.	Gaps under doors are intended for air flow.
<b>4.5</b> Rubs on carpet.	Builder will correct.	Builder is not responsible if Owner installs carpet.

## SECTION III.

## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

### 4. INTERIOR

### SECTION III.

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>WALLS, CEILINGS, SURFACES, FINISHES &amp; TRIMS</b>		
4.6 Cracks and separations in drywall, lath or plaster; nail pops.	Builder will correct cracks in excess of 1/8 in. in width. Builder will correct nail pops which have broken finished surface. Repair cracks and/or nail pops and touch up paint to match as close as possible, one time only. Such conditions should be reported near the end of Year 1 of the warranty period to allow for normal movement of the Home.	Minor seam separations and cracks, and other slight imperfections, are common and should be expected. Minor depressions and slight mounds at nail heads are not Defects.
4.7 Peeling of wallpaper.	Builder will correct if not due to Owner neglect or abuses.	Builder is not responsible for wallpaper installed by Purchaser. Owner is responsible for maintaining adequate ventilation in areas of high humidity, such as kitchens and bathrooms.
4.8 Separated seams in wallpaper.	Builder will correct if wall surface is readily visible.	Minor imperfections can be expected.
4.9 Lumps, ridges and nail pops in wallboard which appear after Owner has wall covering installed by himself or others.	No action required.	Owner should insure that surface to be covered is suitable for installation of wall covering.
4.10 Surface deficiencies in finished woodwork.	Builder will correct readily apparent splits, cracks, hammer marks and exposed nail heads, only if documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
4.11 Gaps between trim and adjacent surfaces, and gaps at trim joints.	Builder will correct gaps in excess of 1/8 in. at trim joints and 1/4 in. between trim and adjacent surfaces.	Some separation due to lumber shrinkage is normal and should be expected.
4.12 Cracks in ceramic grout joints.	Builder will correct cracks in excess of 1/8 in. one time only.	Cracking of grout joints is common and is considered routine Owner maintenance unless excessive.
4.13 Ceramic tile cracks or becomes loose.	Builder will correct only if documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
4.14 Cracking or deterioration of caulking.	No action required.	All interior caulking shrinks and deteriorates. Owner maintenance is required.

## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

### 4. INTERIOR

#### SECTION III.

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>WALLS, CEILINGS, SURFACES, FINISHES &amp; TRIMS</b>		
<b>4.15</b> Wall or trim surfaces visible through paint.	Builder will correct affected area. If greater than 75% of wall, trim piece, or ceiling is affected, entire surface will be corrected. The surface being painted shall not show through new paint when viewed from a distance of 6 feet under normal lighting conditions.	Some minor imperfections such as overspray, brushmarks, etc., are common and should be expected.
<b>FLOOR COVERING</b>		
<b>4.16</b> Resilient flooring comes loose at edge.	Builder will correct.	Owner maintenance is required.
<b>4.17</b> Gaps at seams of resilient flooring.	Builder will correct gaps of similar materials in excess of 1/8 in., and 3/16 in. where dissimilar materials abut.	Minor gaps should be expected.
<b>4.18</b> Fastener pops through resilient flooring.	Builder will correct affected area where fastener has broken through floor covering.	Sharp objects such as high heels, table and chair legs, can cause similar problems, and are not covered by this Limited Warranty.
<b>4.19</b> Depressions or ridges in resilient flooring at seams of sub-flooring.	Builder will correct depressions or ridges which exceed 1/8 in. in height or depth.	This is determined by placing a 6 in. straight edge over ridge or depression, with 3 in. on either side, and measuring height or depth at sub-flooring seam.
<b>4.20</b> Cuts and gouges in any floor covering.	Builder will correct only if documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
<b>4.21</b> Hollow sounding marble or tile.	No action required.	Hollow sounding marble or tile is not a deficiency of construction and is not covered under this warranty.
<b>4.22</b> Fades, stains or discolors.	Builder will correct stains or spots only if documented prior to occupancy.	Fading is not a deficiency. Owner is responsible for establishing a pre-closing walk-through inspection list.
<b>4.23</b> Premature wearing of carpet.	No action required.	Excessive wear in high-traffic areas such as entryways and hallways is normal. Wearability is directly related to quality of carpet.
<b>4.24</b> Visible gaps at carpet seams.	Builder will correct gaps.	Seams will be apparent. Owner maintenance is required.
<b>4.25</b> Carpet becomes loose or buckles.	Builder will correct one time only.	Some stretching is normal. Owner should exercise care in moving furniture.

## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

### 5. MECHANICAL

**SECTION  
III.**

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>ELECTRICAL</b>		
5.1 Circuit breakers trip excessively.	Builder will correct if tripping occurs under normal usage.	Ground Fault Circuit Interrupters (GFCI) are intended to trip as a safety factor. Tripping that occurs under abnormal use is not covered by this Limited Warranty.
5.2 Outlets, switches or fixtures malfunction.	Builder will correct if caused by defective workmanship or materials.	Owner should exercise routine care and maintenance. Replacement of light bulbs is Owner's responsibility.
<b>HEATING &amp; COOLING</b>		
5.3 Condensation lines clog under normal use.	No action required.	Condensation lines will clog under normal conditions. Continued operation of drain line requires Owner maintenance.
5.4 Noisy ductwork.	Builder will correct oil canning noise if caused by improper installation.	When metal heats and cools, ticking and cracking may occur and are not covered by this Limited Warranty.
5.5 Insufficient heating.	Builder will correct if Heating System cannot maintain a 70 degree Fahrenheit temperature, under normal operating and weather conditions. Temperature shall be measured at a point 5 ft. above center of floor in affected area. All rooms may vary in temperature by as much as 4 degrees.	Orientation of the Home, location of rooms and location of vents will also provide a temperature differential. There may be periods when outdoor temperature falls below design temperature thereby lowering temperature in the Home. Certain aspects of the Home including, but not limited to, expansive stairways, open foyers, sunrooms or cathedral ceilings may cause abnormal variation from these Standards and are not covered by this Limited Warranty.
5.6 Insufficient cooling.	Builder will correct if Cooling System cannot maintain a 78 degree Fahrenheit temperature, under normal operating and weather conditions. Temperature shall be measured at a point 5 ft. above center of the floor in the affected room. On excessively hot days, where outside temperature exceeds 95 degrees Fahrenheit, a difference of 17 degrees from outside temperature will be difficult to maintain. All rooms may vary in temperature by as much as 4 degrees.	Orientation of the Home, location of rooms and location of vents will also provide a temperature differential. There may be periods when outdoor temperature rises above design temperature thereby raising temperature in the Home. Certain aspects of the Home including, but not limited to, expansive stairways, open foyers, sunrooms or cathedral ceilings may cause abnormal variation from these Standards and are not covered by this Limited Warranty.
5.7 Refrigerant line leaks.	Builder will correct.	Owner maintenance is required on the system.

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**5. MECHANICAL**

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>PLUMBING</b>		
<b>5.8</b> Pipe freezes and bursts.	Builder will correct if due to faulty workmanship or materials.	Proper winterization of pipes is considered routine maintenance and Owner should maintain suitable temperatures inside the Home.
<b>5.9</b> Noisy water pipe.	Builder will correct hammering noise if caused by improper installation.	Some noise can be expected due to flow of water and pipe expansion. This is not a Defect.
<b>5.10</b> Plumbing fixtures and trim fittings leak or malfunction.	Builder will correct if due to faulty workmanship and materials.	Owner maintenance is required. Scratches, tarnishing or marring must be noted on a pre-closing walk-through inspection list.
<b>5.11</b> Damaged or defective plumbing fixtures and trim fittings.	Builder will correct only if documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list. Defective trim fittings and plumbing fixtures are covered under the manufacturer's warranty.

**6. SPECIALTIES**

<b>BATHROOM &amp; KITCHEN</b>		
<b>6.1</b> Cabinet separates from wall or ceiling.	Builder will correct separation in excess of 1/4 in.	Some separation is normal. Caulking is an acceptable method of repair.
<b>6.2</b> Crack in door panel.	Builder will correct only if documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
<b>6.3</b> Warping of cabinet door or drawer front.	Builder will correct if warp exceeds 3/8 in. as measured from cabinet frame.	Seasonal changes may cause warping and may be a temporary condition.
<b>6.4</b> Doors or drawers do not operate.	Builder will correct.	Owner maintenance is required.
<b>6.5</b> Chips, cracks, scratches on countertop, cabinet fixture or fitting.	Builder will correct only if documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
<b>6.6</b> Delamination of countertop or cabinet.	Builder will correct only if documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.
<b>6.7</b> Cracks or chips in fixture.	Builder will correct only if documented prior to occupancy.	Owner is responsible for establishing a pre-closing walk-through inspection list.

**SECTION III.**

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**6. SPECIALTIES****SECTION  
III.**

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>CHIMNEY &amp; FIREPLACE</b>		
<b>6.8</b> Exterior and interior masonry veneer cracks.	Builder will correct cracks in excess of 1/4 in. in width.	Some cracks are common in masonry and mortar joints. Cracks 1/4 in. in width or less are considered Owner maintenance.
<b>6.9</b> Firebox color is changed; accumulation of residue in chimney or flue.	No action required.	Owner maintenance is required.
<b>6.10</b> Chimney separates from the Home.	Builder will correct separation in excess of 1/2 in. within 10 ft.	Newly built chimneys will often incur slight amounts of separation.
<b>6.11</b> Smoke in living area.	Builder will correct if caused by improper construction or inadequate clearance.	Temporary negative draft situations can be caused by high winds; obstructions such as tree branches too close to the chimney; the geographic location of the fireplace; or its relationship to adjoining walls and roof. In some cases, it may be necessary to open a window to create an effective draft. Since negative draft conditions could be temporary, it is necessary that Owner substantiate problem to Builder by constructing a fire so the condition can be observed.
<b>6.12</b> Water infiltration into firebox from flue.	No action required.	A certain amount of rainwater can be expected under certain conditions.
<b>6.13</b> Firebrick or mortar joint cracks.	No action required.	Intense heat may cause cracking.
<b>INSULATION</b>		
<b>6.14</b> Air infiltration around electrical receptacles.	No action required.	Air flow around electrical boxes is normal and is not a deficiency.

**WARRANTY STANDARDS • B. YEARS 1 & 2 COVERAGE ONLY  
C. TEN YEAR MSD COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**SECTION III.**

**B. SYSTEMS - YEARS 1 & 2**

OBSERVATION	ACTION REQUIRED	COMMENTS
<b>ELECTRICAL</b>		
<b>B.1</b> Wiring fails to carry specified load.	Builder will correct if failure is due to improper installation or materials.	Switches, outlets and fixtures are applicable to <b>Year 1 Coverage Only</b> .
<b>HEATING AND COOLING</b>		
<b>B.2</b> Ductwork separates.	Builder will correct.	Owner maintenance is required.
<b>PLUMBING</b>		
<b>B.3</b> Pipe leaks.	Builder will correct.	Condensation on pipes does not constitute leakage. Faulty faucets, valves, joints and fittings are applicable to <b>Year 1 Coverage Only</b> .
<b>B.4</b> Water supply stops.	Builder will correct if due to faulty workmanship or materials inside the Home.	Drought or causes other than faulty workmanship and materials will not be covered under this Limited Warranty.
<b>B.5</b> Clogged drain or sewer.	Builder will correct clog within structure caused by faulty workmanship or materials.	Clogs and stoppages beyond the exterior wall are not covered by this Limited Warranty. Routine Owner maintenance and proper use is required.

**C. TEN YEAR MSD COVERAGE**

**MAJOR STRUCTURAL DEFECTS**

<b>C.1.</b> Major Structural Defects.	The criteria for establishing the existence of a Major Structural Defect is set forth in Section I.B.14 of this Limited Warranty Agreement.	The Warrantor will correct Major Structural Defects, limited to such actions as are necessary to restore the load-bearing capability of the component(s) affected by a Major Structural Defect.
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SECTION IV.

**A. Notice to Warrantor in Years 1 & 2**

1. If a Defect occurs in Years 1 and 2, you must notify your Builder in writing. Your request for warranty performance should clearly describe the Defect(s) in reasonable detail.
2. Request for warranty performance to your Builder does not constitute notice to the Administrator, and it will not extend applicable coverage periods.
3. If a request for warranty performance to your Builder does not result in satisfactory action within a reasonable time, written notice must be given to RWC, Administrator, at [warranty.resolution@rwcwarranty.com](mailto:warranty.resolution@rwcwarranty.com) or forwarded by certified mail, return receipt requested to 5300 Derry Street, Harrisburg, Pennsylvania 17111, Attn: Warranty Resolution Department. This notice should describe each item in reasonable detail.
4. *Please note that a written request for warranty performance must be emailed no later than thirty (30) days after the expiration of the applicable warranty period or sent to RWC by certified mail, return receipt requested and postmarked no later than thirty (30) days after the expiration of the applicable warranty period. For example, if the item is one which is warranted by your Builder during your second year of coverage, a request for warranty performance must be emailed or mailed to RWC and postmarked no later than thirty (30) days after the end of the second year to be valid.*
5. You must provide the Warrantor with reasonable weekday access during normal business hours in order to perform its obligations. Failure by you to provide such access to the Warrantor may relieve the Warrantor of its obligations under this Limited Warranty.
6. If your Builder does not fulfill its obligations under this Limited Warranty, the Administrator will process the request for warranty performance as described in the Limited Warranty and subject to the provisions of **IV.F.**

**B. Notice to Warrantor in Years 3–10**

If a Defect related to a warranted MSD occurs in Years 3 through 10 of this Limited Warranty, you must notify the Administrator to review the item within a reasonable time after the situation arises. All such notices must be presented in writing to RWC, Administrator, at [warranty.resolution@rwcwarranty.com](mailto:warranty.resolution@rwcwarranty.com) or forwarded by certified mail, return receipt requested to RWC, Ad-

ministrator, 5300 Derry Street, Harrisburg, Pennsylvania 17111, Attn: Warranty Resolution Department. Any such notice should describe the condition of the MSD in reasonable detail. Requests for warranty performance emailed or postmarked more than thirty (30) days after the expiration of the term of this Limited Warranty will not be honored.

**C. Purchaser’s Obligations**

1. **Your notice to the Administrator must contain the following information:**
  - a. Validation # and Effective Date Of Warranty;
  - b. Your Builder’s name and address;
  - c. Your name, address, email address and phone number (including home, cell and work numbers);
  - d. Reasonably specific description of the warranty item(s) to be reviewed;
  - e. A copy of any written notice to your Builder;
  - f. Photograph(s) may be required; and
  - g. A copy of each and every report you have obtained from any inspector or engineer.
2. You have an obligation to cooperate with the Administrator’s mediation, inspection and investigation of your warranty request. From time to time, the Administrator may request information from you regarding an alleged Defect. Failure by you or your appointed representative to respond with the requested information within thirty (30) days of the date of the Administrator’s request can result in the closing of your warranty file.

**D. Mediation and Inspection**

Within thirty (30) days following the Administrator’s receipt of proper notice of request for warranty performance, the Administrator may review and mediate your request by communicating with you, your Builder and any other individuals or entities who the Administrator believes possess relevant information. If, after thirty (30) days, the Administrator has not been able to successfully mediate your request, or at any earlier time when the Administrator believes that your Builder and you are at an impasse, then the Administrator will notify you that your request has become an Unresolved Warranty Issue. At any time following the receipt of proper notice of your request for warranty performance, the Administrator may schedule an inspection of the item. You must provide the Administrator reasonable access for any such inspection as discussed in **Section IV.A.5.** The Administrator, at its discretion,

## REQUESTING WARRANTY PERFORMANCE

### SECTION IV.

may schedule a subsequent inspection to determine Builder compliance.

**When a request for warranty performance is filed and the deficiency cannot be observed under normal conditions, it is your responsibility to substantiate that the need for warranty performance exists including any cost involved. If properly substantiated, you will be reimbursed by the Warrantor.**

### E. Arbitration

You begin the arbitration process by giving the Administrator written notice of your request for arbitration of an Unresolved Warranty Issue. The written notice of your request for arbitration must be received by the Administrator no later than thirty (30) days following the expiration of the ten year warranty period. However, if you receive notification of an Unresolved Warranty Issue from the Administrator following the expiration of the ten year warranty period, then this period is extended and written notice of your request for arbitration must be received by the Administrator no later than thirty (30) days from the date of your receipt of notification of the Unresolved Warranty Issue. Within twenty (20) days after the Administrator's receipt of your notice of request for arbitration, any Unresolved Warranty Issue that you have with the Warrantor shall be submitted to an independent



arbitration service experienced in arbitrating residential construction matters upon which you and the Administrator agree. This **binding** arbitration is governed by the procedures of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et. seq.* If you submit a request for arbitration, you must pay the arbitration fees before the matter is submitted to the arbitration service. After arbitration, the Arbitrator shall have the power to award the cost of this fee to any party or to split it among the parties to the arbitration. The arbitration shall be conducted in accordance with this Limited Warranty and the arbitration rules and regulations to the extent that they are not in conflict with the Federal Arbitration Act.

Within one (1) year after an arbitration award, either party may apply to the U.S. District Court where the Home is situated to confirm the award. The Administrator's receipt of a written request for arbitration in appropriate form shall stop the running of any statute of limitations applicable to the matter to be arbitrated until the Arbitrator renders a decision. The decision of the Arbitrator shall be final and binding upon all parties.<sup>†</sup>

Since this Limited Warranty provides for mandatory binding arbitration of Unresolved Warranty Issues, if any party commences litigation in violation of this Limited Warranty, such party shall reimburse the other parties to the litigation for their costs and expenses, including attorney fees, incurred in seeking dismissal of such litigation.

In Years 1 & 2, the Builder shall have sixty (60) days from the date the Administrator sends the Arbitrator's award to the Builder to comply with the Arbitrator's decision. In Years 3-10, the Warrantor shall have sixty (60) days from the date the Administrator receives the Arbitrator's award to comply with the Arbitrator's decision. Warranty compliance will begin as soon as possible and will be completed within the sixty-day compliance period with the exception of any repair that would reasonably take more than sixty (60) days to complete, including, but not limited to, repair delayed or prolonged by inclement weather. The Warrantor will complete such repair or replacement as soon as possible without incurring overtime or weekend expenses.


You may request a compliance arbitration within twenty (20) days after the sixty-day compliance period has expired by giving the Administrator written notice of your request. You must pay the fees for the compliance arbitration prior to the matter being submitted to the arbitration service.

### F. Conditions of Warranty Performance

1. You must provide the Warrantor and/or Administrator with reasonable weekday access during normal business hours to inspect the condition of your Home and/or to perform their obligations.
2. When your request for warranty performance is determined to be a warranted issue, the Warrantor reserves the right to repair or replace the warranted item, or to pay you the reasonable cost of repair or replacement.
3. In Years 1 and 2, if your Builder defaults in its warranty obligations, the Administrator will process the request for warranty performance provided you pay a warranty service

<sup>†</sup> Homeowners in the State of New York, refer to State of New York Addendum, Section V.B.

## REQUESTING WARRANTY PERFORMANCE

- fee of \$250 for each request prior to repair or replacement.\*♦
4. In Years 3 through 10 you must pay the Administrator a warranty service fee of \$500 for each request.\*♦
  5. If the Administrator elects to award you cash rather than repair or replace a warranted item, the warranty service fee will be subtracted from the cash payment.
  6. If the Warrantor pays the reasonable cost of repairing a warranted item, the payment shall be made to you and to any mortgagee or mortgagee's successor as each of your interests may appear; provided that the mortgagee has notified the Administrator in writing of its security interest in the Home prior to such payment. Warrantor shall not have any obligation to make payment jointly to the Purchaser and mortgagee where the mortgagee has not notified your Builder or the Administrator in writing of its security interest in the Home prior to such payment. Any mortgagee shall be completely bound by any mediation or arbitration relating to a request for warranty performance between you and the Warrantor.
  7. Prior to payment for the reasonable cost of repair or replacement of warranted items, you must sign and deliver to the Builder or the Administrator, as applicable, a full and unconditional release, in recordable form, of all legal obligations with respect to the warranted Defects and any conditions arising from the warranted items.
  8. Upon completion of repair or replacement of a warranted Defect, you must sign and deliver to the Builder or the Administrator, as applicable, a full and unconditional release, in recordable form, of all legal obligations with respect to the Defect and any conditions arising from the situation. The repaired or replaced warranted item will continue to be warranted by this Limited Warranty for the remainder of the applicable period of coverage.
  9. If the Warrantor repairs, replaces or pays you the reasonable cost to repair or replace a warranted item, the Warrantor shall be subrogated to all your rights of recovery against any person or entity. You must execute and deliver any and all instruments and papers and take any and all other actions necessary to secure such rights, including, but not limited to, assignment of proceeds of any insurance or other warranties to the Warrantor. You shall do nothing to prejudice these rights of subrogation.
  10. Any Warrantor obligation is conditioned upon your proper maintenance of the Home, common elements and grounds to prevent damage due to neglect, abnormal use or improper maintenance.
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11. **Condominium Procedures:**
    - a. In the case of common elements of a condominium, at all times, owner(s) of each unit affected by the common elements in need of warranty performance shall each be responsible to pay the warranty service fee (\$250 in Years 1 and 2, \$500 in Years 3 through 10) for each request for warranty performance.\*
    - b. If a request for warranty performance under this Limited Warranty involves a common element in a condominium, the request may be made only by an authorized representative of the condominium association. If the Builder retains a voting interest in the association of more than 50%, the request may be made by unit owners representing 10% of the voting interests in the association.
    - c. If a request for warranty performance under this Limited Warranty involves a common element affecting multiple units, and all affected units are not warranted by the RWC Warranty Program, the Insurer's liability shall be limited to only those units warranted by the RWC Warranty. The limit of liability shall be prorated based upon the number of units warranted by this Limited Warranty.

### SECTION IV.

## ADDENDA

### SECTION V.

#### A. Newark, Delaware, Addendum

The warranty service fee as described in **Sections IV.F.3., IV.F.4. and IV.F.11.a** will be waived for homes built in the city of Newark, Delaware.

#### B. State of New York Addendum

Except as expressly provided in this Addendum, the warranties and rights listed herein are in addition to, and are not exclusive of, any warranties or rights listed in this Limited Warranty.

1. **Appliances and Items of Equipment** — Subject to other terms and conditions listed in this Limited Warranty, the exclusion concerning deficiencies in Appliances and Items of Equipment described in **Section II.E.14.** of this Limited Warranty shall not apply during the first two (2) years of the warranty term wherever (i) such Appliances and Items of Equipment are components of the Cooling, Ventilating, Heating, Electrical or Plumbing Systems; and (ii) the deficiencies in such fixtures, Appliances or Items of Equipment are the result of defective installation by your Builder.
2. **Standards — Section III.** — If the statutes of the State of New York provide greater coverage than the provisions of this Limited Warranty, those provisions shall modify the warranty to allow for the greater coverage.
3. **Alternative Dispute Resolution** — When making a request for warranty performance pursuant to **Section IV.E.** of this Limited Warranty, you have no obligation to submit to binding arbitration, nor do you have to pay any fee or charge for participation in non-binding arbitration or any mediation process concerning your request. However, any Unresolved Warranty Issues must be submitted to arbitration before a legal proceeding may be commenced. Further, if an Owner resorts to litigation, the rights and obligations imposed by **Section IV.E.** shall apply to such litigation.

#### C. State of Indiana Addendum

The warranties and rights listed above are in addition to, and are not exclusive of, any warranties listed in this book.

Notwithstanding anything contained in the attached printed form of the RWC Limited Warranty, this Limited Warranty shall include the following protection per **Section II.C.**, and is amended to read as follows:

1. **Two Year Coverage** — Commencing on the Effective Date of this Limited Warranty as specified on the Application For Warranty form, and subject to the terms and conditions listed herein, your Builder warrants that for a period of two (2) years your Home will be free from Defects due to nonconformity with the Warranty Standards set forth in **Section III.** of this Limited Warranty. With respect to fixtures, Appliances and Items of Equipment, the Warranty is for one (1) year or the manufacturer's written warranty, whichever is less.
2. **Years 3 and 4 Coverage Only** — During the third and fourth year following the Effective Date Of Warranty as specified on the Application For Warranty form, and subject to the terms and conditions listed in this Limited Warranty, your Warrantor warrants that your Home will be free from Defects due to nonconformity with the Warranty Standards set forth in **Section III. A. 3.11-3.16.**

#### D. Maryland Addendum

You should contact the Administrator personally to verify the existence of your Warranty. Further, you should report any Warranty problems, which are not promptly resolved by your Builder, to the Administrator.

1. **Section IV.F.3. and IV.F.4.** are not applicable for the state of Maryland.



RESIDENTIAL WARRANTY COMPANY, LLC

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

) FOR THE TENTH JUDICIAL CIRCUIT

) CASE NO.: 2019-CP-04-1942

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

)  
)  
)

Plaintiff,

) **AFFIDAVIT OF NATALIE ZITEK**

v.

)  
)  
)

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

)  
)  
)

Defendants.

)  
)  
)

PERSONALLY appeared before me, Natalie Zitek, who, being first duly sworn, deposes  
and says as follows:

1. My name is Natalie Zitek and I am a named Plaintiff in this action.
2. I work for the Department of Homeland Security (“DHS”) in the Transportation Security Administration (“TSA”) as a Transportation Security Officer (“TSO”).
3. I have no education, training, or profession experience in the law, real estate, or construction.
4. In 2013, my husband and I purchased our home located at 104 Sturbridge Court in the Rose Hill subdivision from D.R. Horton, Inc. (“Horton”).
5. On February 17, 2013, I signed what appeared to be a standard form purchase agreement that was provided by Horton and presented to me as Horton’s standard contract.
6. Horton did not explain that my purchase agreement contained related dispute resolution provisions before I signed the agreement.
7. I was also never given the opportunity to negotiate or modify these provisions before I signed the agreement.
8. I was also not represented by my own attorney at the time I signed the agreement.
9. On July 25, 2013, I closed on the purchase of my home and received my deed.

FURTHER THE AFFIANT SAYETH NOT.

Natalie Zitek  
Natalie Zitek

SWORN TO AND SUBSCRIBED before me  
this 21<sup>st</sup> day of November, 2020.

[Signature]  
Notary Public for South Carolina  
My Commission Expires: 8-10-2021



# EXHIBIT O

2019 WL 7611604 (S.C.Com.Pl.) (Trial Order)  
Court of Common Pleas of South Carolina.  
Lexington County

Dianne MIRMOW,  
v.  
GREAT SOUTHERN HOMES, INC. and Under Par Group, LLC.

No. 2019-CP-32-02577.  
December 9, 2019.

**Order Denying Great Southern Homes, Inc.'s Motion to Dismiss in lieu of Answer or Compel Arbitration**

William P. Keesley, Judge.

\*1 This matter came before the Court on November 19, 2019 at 11:00 a.m. on the Motion of Defendant, Great Southern Homes, Inc. (“Great Southern”), to Dismiss in Lieu of Answer or Compel Arbitration. The Plaintiff, Dianne Mirmow, was represented by F. Elliott Quinn IV of The Steinberg Law Firm, LLP of Charleston. Great Southern was represented by Drew Hamilton Butler of Richardson Plowden & Robinson, PA of Charleston. The motion is denied.

***FACTUAL SUMMARY AND PROCEDURAL BACKGROUND***

This action is a construction defect suit arising from the defendants' construction of Plaintiff's home. Plaintiff filed suit on June 25, 2019, asserting claims of negligence, breach of implied warranties, and unfair trade practices against Great Southern and Under Par Group, LLC. Plaintiff alleges the defendants graded the lot on which her home was constructed so as to create a slope at the rear of the lot without a retaining wall or other structure to support the slope. Plaintiff further alleges the defendants constructed the slope improperly and constructed her home too close to that slope. Plaintiff alleges the slope is now failing resulting in a loss of support for her home, cracking, and other damage to her home.

After service of the Summons and Complaint, Great Southern filed the instant motion to dismiss or compel arbitration under [Rule 12\(b\)\(1\), SCRCP](#), and the South Carolina Uniform Arbitration Act, [S.C. Code Ann. §§ 15-48-10, et. seq.](#) (“SCUAA”). At issue is whether the parties are bound by an enforceable arbitration agreement that would require a stay of this action pending the outcome of said arbitration proceedings.<sup>1</sup> Plaintiff asserted the arbitration agreement is unconscionable and fails to comply with the notice requirements of the SCUAA. Plaintiff asserted the arbitration agreement is unenforceable for either or both of those reasons.

***STANDARD OF REVIEW***

The question of the arbitrability of a claim is an issue for judicial determination. [Partain v. Upstate Automotive Group](#), 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). South Carolina courts are to apply a presumption that a claim falls within the scope of an arbitration agreement, but that presumption in favor of arbitration does not extend to whether a valid arbitration agreement exists. [Wilson v. Willis](#), 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019).

## ANALYSIS

### I. Unconscionability

The SCUAA requires an arbitration agreement to comply with generally applicable law regarding the enforceability of contracts. *S.C. Code Ann. § 15-48-10*. In accordance with such generally applicable contract law, “a party may seek revocation of the contract under such grounds as exist at law or in equity, including fraud, duress, and unconscionability.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Under South Carolina law, an agreement is unconscionable where a party lacked a meaningful choice in entering into the agreement and the agreement contains oppressive, one-sided terms. *Id.* at 24–25, 644 S.E.2d at 668–69. This Court finds the arbitration agreement at issue is unconscionable and therefore unenforceable because of a lack of a meaningful choice and oppressive, one-sided terms.

#### A. Lack of a Meaningful Choice

\*2 When determining whether a party lacked a meaningful choice in entering into an agreement, courts must take into consideration “the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, the relative disparity of 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.” *Id.* at 25, 644 S.E.2d at 669–70. Additional factors to be considered are whether the agreement is an adhesion contract and whether the agreement is for a consumer “necessity.” *Id.* at 26–27, 644 S.E.2d at 669–70. Adhesion contracts are reviewed with “considerable skepticism,” raise “considerable doubt that any true agreement ever existed to submit disputes to arbitration,” and weigh in favor of finding a lack of meaningful choice. *Id.*

Here, the evidence presented by the parties causes the Court to conclude Great Southern's arbitration agreement was an adhesion contract. An adhesion contract is “a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). A review of the agreement indicates it was a form contract created by Great Southern as shown by Great Southern's company name typed into the agreement whereas blanks spaces were left for Plaintiff's name to be handwritten into the agreement and for the details of the lot and purchase price to be handwritten into the agreement. Furthermore, as set forth in the Affidavit of Plaintiff Dianne Mirmow, she avers she was presented the agreement on a take-it-or-leave-it basis with no opportunity to negotiate or modify the agreement's terms. Great Southern argues that Plaintiff was able to negotiate the agreement's terms and in support, points to the handwritten terms on the agreement as to the purchase price for the home, the purchase being contingent on Plaintiff selling her residence at that time, and a few upgrades and selections for the home to be purchased. The Court finds these handwritten terms do not provide any indication that Plaintiff was able to negotiate the agreement's terms such that the agreement would not be an adhesion contract. Rather, the handwritten terms evidence minor additions to the agreement, not negotiations of Great Southern's standard terms.

Great Southern's agreement is also a contract for a necessity—a home. In the *Simpson* decision, the South Carolina Supreme Court found that an automobile is “critically important in modern day society” and a contract to purchase an automobile is a contract for a necessity. If an automobile is a necessity in modern society, then shelter—a home—is also a necessity.

The injuries Plaintiff alleges she suffered are, if proven, substantial. She alleges she is in danger of losing her monetary investment in her home as well as the physical structure of and shelter provided by her home.

The evidence presented indicates Plaintiff entered into the agreement not as a substantial business concern, but as an ordinary consumer in an unequal bargaining position with Great Southern. Because the agreement was for

the purchase of a home, there is a presumption that Plaintiff was in an unequal bargaining position in relation to Great Southern. *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989) (stating the Supreme Court has “taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller”); *see also Smith v. D. R. Horton*, 417 S.C. 42, 50, 790 S.E.2d 1, 4–5 (2016) (applying the *Kennedy* presumption of unequal bargaining power to find a home purchaser lacked a meaningful choice in entering into an arbitration agreement). Great Southern did not present evidence to overcome the presumption of unequal bargaining position applicable here. Moreover, Plaintiff presented evidence that she purchased the home as an individual and that she is an educator without relevant sophistication in law, engineering, or homebuilding. Plaintiff presented evidence that she was one purchaser of a home from Great Southern among many purchasers of homes from Great Southern, and therefore, that she was not a substantial business concern to Great Southern. Plaintiff also presented evidence resulting in the conclusion that Great Southern is a substantial business concern with significant bargaining power and sophistication in homebuilding and home sales. For all of these reasons, the Court concludes Plaintiff was not a substantial business concern and there was a wide disparity in the parties' bargaining power and relative sophistication.

\*3 The arbitration language here was inconspicuous. The arbitration language was on the third page of the agreement and was indistinguishable from the other terms on that page. The arbitration language was not in bold, underlined, or capitalized, as opposed to other terms which were in bold, underlined, or capitalized. The arbitration language did not require initialing or any other form of acknowledgement by the home purchaser, as opposed other terms which required the home purchaser's initials. Additionally, the related limited warranty terms and waiver of liability terms are inconspicuous. Other than bolding of limited portions of those terms, those terms are not made conspicuous to a home purchaser. Those terms are not underlined, are not capitalized, and did not require initialing or any other acknowledgment by the purchaser. The waiver of liability provision is on the fifth page of the agreement at the bottom of a section entitled “Miscellaneous.”

In conclusion, Great Southern's agreement was an adhesion contract for the purchase of a necessity, and Great Southern was a large, corporate homebuilder who presented the relatively unsophisticated Plaintiff with a contract with inconspicuous arbitration, warranty waiver, and limitation of liability terms buried in the agreement. Considering each of the factors relevant to whether a party lacked a meaningful choice in entering into an arbitration agreement, the Court finds ample evidence supporting a conclusion that Plaintiff lacked a meaningful choice in entering into Great Southern's arbitration agreement.

### **B. Oppressive, One-Sided Terms**

In addition to a lack of meaningful choice, the agreement contains terms that are oppressive and one sided. The arbitration agreement at issue here contains warranty disclaimers and limitations on liability that are substantially identical to those found to be oppressive and one-sided in the Supreme Court's decision in *Smith v. D. R. Horton*, 417 S.C. 42, 790 S.E.2d 1 (2016). In *Smith*, the Supreme Court held that an arbitration agreement which contained a disclaimer of implied warranties and a limitation of liability provision barring monetary damages was oppressive and one-sided, and that those terms combined with a lack of a meaningful choice, rendered the arbitration agreement unconscionable. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. In addition to being unconscionable because it contains essentially the same terms as those found oppressive and one-sided in the *Smith* decision, Great Southern's arbitration agreement also contains additional oppressive, one-sided terms beyond those considered in the *Smith* decision.

Like the waiver of implied warranties found oppressive and one-sided in the *Smith* decision, Great Southern's agreement contains the following disclaimer of implied warranties:

This Limited Warranty issued to the Purchaser shall be in lieu of all other warranties, express or implied, any warranty of habitability, suitability for residential purposes, merchantability, or fitness for a particular purpose is hereby excluded and disclaimed.

Like the limitations on liability and bar on monetary damages found oppressive and one-sided in the *Smith* decision, Great Southern's agreement attempts to limit Great Southern's obligations and liability to the terms of the limited warranty and to bar any monetary damages against Great Southern, providing:

“Purchaser agrees to accept said limited liability in lieu of all other rights or remedies, whether based on contract or tort.”

“Purchaser hereby releases and relinquishes all claims against Seller for damages to property or personal injury arising after the date of this contract relating to any of the following: ... Any claims for repairs to the Property except as specifically covered by Seller's limited home warranty.”

As found oppressive and one-sided in the *Smith* decision, the limitation on liability and bar on monetary damages terms in Great Southern's agreement would result in Plaintiff having no monetary damages remedy and no other remedy for damages from the improper construction of her home other than any repairs provided by Great Southern under its limited warranty, even where any repairs provided by Great Southern are inadequate.

\*4 While these provisions alone are sufficient to render the agreement oppressive and one-sided, the agreement goes further by including additional oppressive and one-sided terms. While Great Southern's agreement attempts to limit Plaintiff's remedy and Great Southern's obligations and liability to the terms of a limited warranty, Plaintiff presented evidence establishing that Great Southern did not provide her with a copy of that limited warranty prior to or at the time she signed the agreement. Plaintiff not having received the limited warranty prior to or when she signed the agreement is established by her affidavit wherein she stated she did not receive a copy of the warranty at any time prior to when she closed on the home, she was not informed of the limitation of Great Southern's liability to the terms of the limited warranty prior to this action, and was not informed of any option to request a copy of the limited warranty prior to closing. Additionally, Plaintiff not having received the limited warranty before signing the agreement is established by language in the agreement which provides: “The Seller shall furnish the Purchaser at closing with a limited warranty .... A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the offices of the Seller.” Great Southern did not present any evidence to the contrary. Therefore, Great Southern attempted to force Plaintiff to agree to limit Great Southern's obligations and liability for improper construction to the terms of a limited warranty that Great Southern did not provide to Plaintiff. The Court finds that a term limiting a purchaser's rights to a limited warranty that the purchaser has not had the opportunity to read is an oppressive, one-sided term.

In addition to the limitation of liability provisions already discussed, Great Southern's agreement also attempts to limit its liability through a term providing that the issuance of a certificate of occupancy by the applicable jurisdiction binds the parties as a determination that the construction was performed in compliance with the applicable building codes and other laws. Specifically, the agreement provides:

The issuance of a certificate of completion or occupancy, or final inspection approval by any governmental entity shall constitute certification of completion of the improvements in substantial conformity with the terms of this contract and shall also constitute a final determination, binding on the Parties hereto, that the property and improvements are in full compliance with all applicable laws, regulations and building codes.

The agreement thus provides that an inspection to be conducted after Plaintiff entered into the agreement, by a governmental entity over which Plaintiff had no control, for which no guarantee of notice or the opportunity to be present was given to Plaintiff, and the scope of which Plaintiff was not informed, would result in Plaintiff not

being able to assert that any portion of the construction violates the applicable building codes or any other law. The Court finds this term to be an oppressive, one-sided term.

The court finds the terms of the agreement to be one-sided and oppressive, and having found the agreement was the result of a lack of a meaningful choice, the Court accordingly finds the arbitration agreement unconscionable and unenforceable.

## II. SCUAA's Notice Requirements

The court rejects the Plaintiff's claim that the notice requirements of the SCUAA were not met. That Act provides: "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." [S.C. Code § 15-48-10](#). The Plaintiff argues that the reference to "pursuant to this chapter," is a reference to the SCUAA, *i.e.*, Chapter 48, Title 15 of the South Carolina Code. Great Southern's arbitration agreement states on the first page "*CONTRACT SUBJECT TO ARBITRATION (S.C. CODE 15-48-10)*." The court declines to adopt the interpretation that this notice fails to comply with the notice requirements of the SCUAA.

## CONCLUSION

In conclusion, this Court denies Great Southern's Motion to Dismiss in Lieu of Answer or Compel Arbitration because the agreement for the reasons stated above.

AND IT IS SO ORDERED.

[Electronic signature follows on separate page.]

Circuit Judge (Code #2050)

s/ William P. Keesley

## Footnotes

- 1 Great Southern filed the Motion as a motion to dismiss or in the alternative to stay the action, but Great Southern conceded at the hearing on the Motion that a dismissal is not available as a result of moving to compel arbitration. When a party seeks to compel arbitration of an action, a court may stay the action pending the outcome of the arbitration proceedings but may not dismiss the action. See *Widener v. Fort Mill Ford*, 381 S.C. 522, 525, 674 S.E.2d 172, 174 (Ct. App. 2009).

# EXHIBIT P

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,

Plaintiffs,

vs.

**AFFIDAVIT OF SHAWN M.  
KRUGLEWICZ**

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

Defendants.

PERSONALLY APPEARED BEFORE ME, Shawn M. Kruglewicz, who, being first duly sworn,  
deposes and avers the following:

1. I am a citizen and resident of Greenville County, South Carolina.
2. I am currently the New Market Development Project Manager, East Region for D.R. Horton, Inc. ("D.R. Horton"). I have held this title since 2018. I have been employed with D.R. Horton since 2004 and was its Greenville Division Manager from 2012-2018.
3. My job includes, but is not limited to, reviewing and maintaining documents related to the construction of D.R. Horton homes and the subdivision the homes are located in.
4. I have reviewed the lawsuit filed by Natalie Zitek against D.R. Horton.
5. I have knowledge concerning the subdivision located in Easley, South Carolina commonly known as Rose Hill ("Rose Hill"). I have knowledge concerning the homes constructed by D.R. Horton within Rose Hill as these homes were within the purview of D.R. Horton's Greenville Division when I was its Manager.
6. There are approximately two hundred sixty-one (261) homes located within Rose

Hill.

7. Poinsett Development, LLC (“Poinsett”), the original developer of Rose Hill, developed the property from 2006 through 2011 and during that time caused the initial approximately twenty-seven (27) homes to be constructed (“Poinsett Homes”). There were substantial differences between the subset of twenty-seven (27) homes constructed by Poinsett, such that there is additional variation beyond those identified herein below with respect to the D.R. Horton homes. Poinsett subsequently deeded the property to its bank via a deed-in-lieu and assigned its declarant rights in the property. Poinsett’s bank, as the declarant, then sold various lots to D.R. Horton.

8. D.R. Horton first became involved with Rose Hill in 2011 and constructed the remaining approximately two hundred thirty-four (234) homes (“D.R. Horton Homes”) over roughly a six (6) year time span, beginning in 2011 and ending when the last D.R. Horton Home was sold on June 30, 2017. The lots for the D.R. Horton Homes were completed to various stages of development by Poinsett before D.R. Horton took over, ranging from lots with completed grading/site work to raw/undeveloped lots for which D.R. Horton performed all site work and grading.

9. The topography of Rose Hill is hilly, which resulted in variations in the foundations and soil supporting the foundations. These variations include slab-on-grade on cut material, slab-on-grade on fill material, homes with basements, and lots with and without soil retaining walls. The hilly topography also resulted in variations in site drainage methods and conditions on each lot.

10. D.R. Horton categorized different areas within Rose Hill into different lot classifications, including Rose Hill 65, Rose Hill 70, Rose Hill 70s, Rose Hill 90, Rose Hill Land

70, and Rose Hill Land 90. Each category of lot was limited to certain home configurations available to be constructed on the lot type.

11. Within Rose Hill, there are twenty-six (26) different D.R. Horton models plans (“D.R. Horton Models”), each with multiple elevation options (impacting exterior materials, window type/location, etc.)<sup>1</sup>, resulting in a total of sixty-seven (67) plan/elevation configurations, each of which is a unique home designs. Each of the 26 home plans required a separate set of drawings and each required separate engineering and/or architecture work by design professionals, and each set of plans included individual design information for each available elevation. A list of the available home plans is attached hereto as **Exhibit A**. See examples of various model plans/elevation configurations attached hereto as **Exhibit B**.

12. The D.R. Horton home plans differ substantially in their basic configurations. They vary between one-story ranches, one story home with a single room over the garage, and a full two-story home that consists of multiple rooms and bathrooms on the second floor. See **Exhibit B**.

13. The D.R. Horton home plans differ substantially in size, varying from less than 2000 square feet to over 4000 square feet.

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<sup>1</sup> The elevations represented significant variations within a single model, including:

- a. Exterior being all brick;
- b. Exterior being all vinyl and hardiplank;
- c. An exterior combination of vinyl and brick;
- d. An exterior combination of hardiplank and brick;
- e. An exterior combination of hardiplank and stone;
- f. An exterior combination of brick and stone;
- g. Layout of rooms;
- h. Flooring of the home;
- i. Appliances within the home, such as location of the oven and grill;
- j. Increase in the number of bedrooms a specific model included;
- k. Increase in the number of bathrooms a specific model included; and
- l. Square footage being increased by an addition to the home.

14. The D.R. Horton home plans differ substantially in room layout, containing as few as 3 beds/2 baths to as many as 5 beds/4 baths.

15. The D.R. Horton plans, including elevation selections, resulted in substantially differences in sales price, varying from roughly One Hundred Forty-Seven Thousand and 00/100 Dollars (\$147,000.00) to Three Hundred Fifty-Eight Thousand and 00/100 Dollars (\$358,000.00).

16. Due to construction spanning over six (6) years, D.R. Horton would have applied the building codes in effect at the time of construction of each home, which may have varied over the 6 year period.

17. The Rose Hill homes are further distinguishable by the engineers, architects, testing firms, subcontractors, and suppliers who provided services, labor, and materials for each home. D.R. Horton did not self-perform any work on the D.R. Horton Homes, but rather contracted with an assortment of engineers, architects, testing firms, subcontractors, and suppliers (collectively "Subcontractors") to perform the work. Further, as is standard practice, these Subcontractors subcontracted with an assortment of additional entities ("Second Tier Subcontractors") to perform aspects of the work, although the identities of these Second Tier Subcontractors is currently unknown.

18. Multiple Subcontractors with similar, if not identical, scopes of work were hired to construct various D.R. Horton Homes, illustrating that two comparable D.R. Horton Homes could have completely different Subcontractors constructing the home.

19. As is standard on construction projects, the means and methods to perform a scope of work could vary between the Subcontractors and/or Second Tier Subcontractors. This indicates that the means and methods to perform work on D.R. Horton Homes will vary from Subcontractor to Subcontractor, from Subcontractor to Second Tier Subcontractor, and from Second Tier

Subcontractor to Second Tier Subcontractor. Therefore, the means and methods on two comparable D.R. Horton Homes could have been completely different depending on the subset of Subcontractors constructing the respective homes.

20. I have reviewed available D.R. Horton's records regarding the Subcontractors who provided construction services on the D.R. Horton Homes. Based on my preliminary review there are multiple Subcontractors who performed the same scope of work on various D.R. Horton Homes whose work maybe implicated as defective based on affidavits and the initial right to cure letter ("Cure Letter") provided. For instance, at a minimum:

- a. There were approximately three (3), different geotechnical firms who evaluated soils and fill materials;
- b. There were approximately eight (8) different framers;
- c. There were approximately ten (10) different grading contractors;
- d. There were at least four (4) stone/masonry subcontractors;
- e. There were multiple flat work (concrete) subcontractors;
- f. There were multiple soil testing firms;
- g. There were approximately seven (7) different flooring contractors;
- h. There were approximately nine (9) different drywall installers;

21. Given the number of Subcontractors, duration of construction, likely existence of Second Tier Subcontractors, and differing D.R. Horton models/elevations, it is unlikely that many D.R. Horton Homes, if any, consisted of the exact same combination of Subcontractors per constructed home.

22. I have reviewed the Cure Letter, along with subsequent letters and emails, from the Lucey Law Firm concerning certain homes within Rose Hill.

23. I have reviewed the Affidavit of Natalie Zitek and the Affidavit of A. Rhett Whitlock.

24. I have also reviewed the documents concerning the thirty-four (34) homes inspected ("Inspected Homes") by Dr. Whitlock. For purposes of my review, I have assumed that the

Inspected Homes correspond to the list of homes provided by Plaintiff's counsel in the letter attached to D.R. Horton's Motion to Stay as Exhibit D.

25. The Inspected Homes include only eleven (11) out of twenty-six (26) D.R. Horton home plan variations, and only twenty-two (22) of the sixty-seven (67) potential plan/elevation configurations identified herein above. Accordingly, the Inspected Homes are not representative of the unique home designs present in Rose Hill.

26. I reviewed the warranty logs maintained by D.R. Horton for all Inspected Homes. These records indicate that warranty work was furnished pursuant to standard thirty (30) day and eleven (11) month walkthroughs on the Inspected Homes. While some of these homeowners made subsequent warranty claims, D.R. Horton is unaware of any recent, unresolved complaints being provided that relate to the allegations in this lawsuit. I have also reviewed the warranty logs of all other D.R. Horton Homes located in Rose Hill and have determined that many of those homes have not notified D.R. Horton of the types issues raised in the Whitlock and Zitek affidavits. Conversely, certain warranty claims that do relate to notice of the issues raised in this action occurred more than three (3) years prior to this action being filed.

27. The Ziteks closed on their home on or about July 25, 2013. The Zitek home is a larger, two-story, all brick home on a corner lot. The Zitek home is atypical when compared to the other thirty-four (34) Inspected Homes, in multiple respects, including the following:

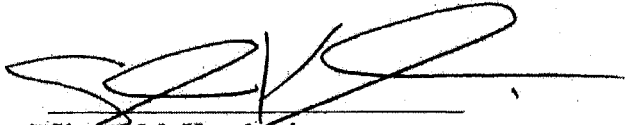
- a. it was the only Westerly Model among the Inspected Homes;
- b. it is more than twice the size of the smallest Inspected Home;
- c. it is the second highest priced Inspected Home; and
- d. it is nearly double the cost of the lowest priced Inspected Home

28. The Zitek home is also subject to an arbitration agreement (the "Arbitration Agreement") contained in the contract between D.R. Horton and Mrs. Zitek. The Arbitration Agreement is attached hereto and incorporated by reference as "**Exhibit C**".

29. Given the number of Subcontractors, duration of construction, likely existence of Second Tier Subcontractors, and differing D.R. Horton models/elevations, it is unlikely the Zitek home was built by the same combination of Subcontractors as the other Inspected Homes.

30. Upon information and belief, the Zitek home is atypical of the homes in Rose Hill not inspected by Dr. Whitlock for the same reasons identified in Paragraphs 27-29.

31. Taking into consideration all of the information ascertained from D.R. Horton's files, I believe that each D.R. Horton Home in Rose Hill is a unique design and was built on unique site by a unique subset of subcontractors.



Shawn M. Kruglewicz  
D.R. Horton, Inc.

Sworn to and subscribed in my presence  
this 27 day of May, 2020.

Neil R. Witt  
Notary Public for South Carolina  
My Commission Expires: June 28, 2029

## Exhibit A

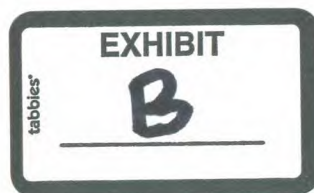
The D.R. Horton Model plans are listed below:

- a. Abingdon;
- b. Blakely;
- c. Bonaventur;
- d. Brookwood;
- e. Buchanan;
- f. Byron;
- g. Coastal;
- h. Cynthia;
- i. Dijon;
- j. Embry;
- k. Everett;
- l. Fieldstone;
- m. Fillmore;
- n. Glenhurst;
- o. Heritage;
- p. Herrington;
- q. Hunter;
- r. Lenox;
- s. McDaniel;
- t. McKinley;
- u. Miller;
- v. Samantha;
- w. Sherwood;
- x. Westerly;
- y. Winnfield; and
- z. Woodrow

104 Sturbridge



100 Amhearst Way  
All vinyl/hardi



**10 Duxbury Lane**  
**One story ranch**



**305 Amesbury**  
**One story with roof over garage**



**11 Chatham Court**  
**Two story**



**109 Sturbridge**  
**All brick**



**304 Reading Court**  
**Vinyl/Brick combo**



**177 Haverhill Lane**  
**Brick/Stone combo**



**166 Haverhill Lane**  
**Hardi/Stone combo**



**6 Dartford Court**  
**Hardi/Brick combo**





HOME PURCHASE AGREEMENT



ELECTRONICALLY FILED - 2020 Nov 23 2:28 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

NOTE: THIS CONTRACT PROVIDES FOR MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, SECTIONS 15-48-10 ET SEQ., SOUTH CAROLINA CODE OF LAWS (1976, AS AMENDED)

In consideration of the reciprocal covenants stated herein, D.R. Horton, Inc. ("Seller") and Paul Zitek and Natalie Zitek (collectively, "Purchaser") agree as follows:

1. CONVEYANCE. Seller shall sell to Purchaser and Purchaser shall purchase from Seller all that parcel of land located in Anderson County, South Carolina, with a street address of 104 Sturbridge Court, more particularly described as Lot 0266, Rose Hill 90' Subdivision (the "Lot"), together with all improvements thereon and all appurtenances thereto, but less and except all rights, titles and interests to all oil, gas, water, petroleum, natural gas, coal, lignite and other minerals and hydrocarbons, and all geothermal energy and resources, located in whole or in part on, in or under the Lot and / or that may be produced or extracted from the Lot. The interests to be conveyed pursuant to this Agreement are hereinafter collectively referred to as the "Property."

2. PURCHASE PRICE AND METHOD OF PAYMENT. Subject to adjustment as may be provided herein, the Purchase Price for the Property shall be: Two hundred eighty-eight thousand one hundred forty-four and 00/100 Dollars (\$288,144.00) to be paid in cash as provided herein. A breakdown of the Purchase Price as of the Effective Date (defined in Section 19 below) is set forth in Addendum 2 attached hereto and incorporated herein. The terms of the subsection (a or b) checked below shall also apply.

[ ] a. No Financing Contingency.

Purchaser shall pay to Seller the Purchase Price in cash at Closing. Within ten (10) business days of the Effective Date, Purchaser shall provide documentation to Seller that will verify to Seller's reasonable satisfaction that Purchaser has the available funds necessary to purchase the Property according to the terms of this Agreement. If Purchaser does not provide such documentation to Seller within that time period, then Seller may at its option terminate this Agreement by providing written notice to Purchaser of termination, in which event Seller shall retain the Earnest Money and neither party shall have any further obligation or liability to the other hereunder.

[x] b. Financing Contingency

(1) Purchaser shall use its best efforts to obtain a loan in the principal amount of no more than 100% of the Purchase Price, reduced to the next lowest hundred dollars, (the "Loan") to be secured by a first priority mortgage on the Property. The proceeds of the Loan, together with the balance of the Purchase Price, shall be paid to Seller by Purchaser in cash or other immediately available funds at Closing.

(2) Purchaser shall apply for the Loan within five (5) days of the Effective Date. Failure by Purchaser to apply for the Loan within that time-period or to pursue approval of the Loan diligently thereafter shall constitute a material breach of this Agreement by Purchaser. Within fourteen (14) days of the Effective Date, Purchaser shall provide Seller with a letter from Purchaser's lender (the "Approval Letter") confirming that the Loan has been approved. If Purchaser fails to provide the Approval Letter to Seller within that period, then Seller may terminate this Agreement upon written notice to Purchaser, in which event the Earnest Money shall be refunded to Purchaser if Purchaser is not in breach of this Agreement, and thereafter neither party shall have any further liability or obligation to the other hereunder.

(3) Purchaser acknowledges that there are many different loan programs available from many different lenders. If the loan approval obtained by Purchaser contains any contingencies, Seller may require the satisfaction of those contingencies within the time period specified for obtaining the Approval Letter and terminate this Agreement if those contingencies are not waived or satisfied; in which event, the Earnest Money shall be refunded to Purchaser, and neither party shall thereafter have any further liability or obligation to the other hereunder.

(4) Purchaser understands and acknowledges that loan/credit approvals are valid for up to one hundred twenty (120) days. Purchaser shall update loan/credit approval documentation as needed in order to maintain current loan approval up until the date of closing. Purchaser agrees to execute all papers and perform all other actions necessary to obtain the Loan and to accept the Loan if approved by lender. Purchaser shall, in addition to the payment of principal and interest upon the Loan, pay at Closing such amounts as may be required by the lender to establish or maintain an escrow for insurance, property taxes or private mortgage insurance.

Jim

(Purchaser's Initials: [Signature])

(5) If Purchaser applies and obtains a commitment for an FHA insured loan, then notwithstanding any other provision of this Agreement, Purchaser shall not be obligated to complete the purchase of the Property or to incur any penalty by forfeiture of earnest money deposits or otherwise unless Purchaser has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Department of Veterans Affairs or a Direct Endorsement lender setting forth the appraised value of the property of not less than the full final purchase price. The Purchaser shall have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development ("HUD") will insure. HUD does not warrant the value or the condition of the property. Purchaser should satisfy himself/herself that the price and condition of the property are acceptable.

(6) If Purchaser applies and obtains a commitment for a VA guaranteed loan, then notwithstanding any other provision of this Agreement, Purchaser shall not incur any penalty for forfeiture of earnest money or otherwise or be obligated to complete the purchase of the Property if the contract purchase price or cost exceeds the reasonable value of the Property established by the Department of Veterans Affairs. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of this contract without regard to the amount of the reasonable value established by the Department of Veterans Affairs.

**3. FINANCIAL INFORMATION.** Purchaser acknowledges that Purchaser's financial situation may affect Purchaser's ability to obtain a loan and/or purchase this Property. Purchaser further acknowledges that it is important for the Seller to know Purchaser's financial situation and Purchaser's ability to obtain financing. Purchaser hereby grants permission for the Seller to contact any mortgage company or financial institution to which Purchaser may apply for a loan and to discuss Purchaser's financial situation and prospects of obtaining a loan. Purchaser hereby authorizes any mortgage company or financial institution from which Purchaser may seek a loan to discuss Purchaser's financial status with the Seller and to provide the Seller with any documentation or information regarding said financial status, including but not limited to Purchaser's credit score.

**4. EARNEST MONEY.**

a. **Initial Deposit.** Purchaser has paid to Seller \$3,500.00 by check #3410 made payable to D. R. Horton, Inc., receipt of which is acknowledged by Seller (hereinafter, the "Initial Deposit"). The Initial Deposit shall be deposited in Seller's trust account upon acceptance of this Agreement by Seller.

b. **Additional Deposit.** On or before , Purchaser shall pay to Seller an Additional Deposit in the amount of , to be held in Seller's trust account. Failure by Purchaser to pay the Additional Deposit by shall constitute a material breach of this Agreement by Purchaser.

c. **Disbursement.** The Initial Deposit and the Additional Deposit are hereinafter referred to as the "Earnest Money," both individually and collectively. The Earnest Money shall be retained by Seller except as otherwise expressly stated in this Agreement. At Closing, the Earnest Money shall be credited to Purchaser against the Purchase Price; otherwise, the Earnest Money shall be disbursed as provided herein. If any dispute arises between Purchaser and Seller as to the final disposition of all or part of the Earnest Money, Seller may, but shall not be required to, interplead all or any disputed part of the Earnest Money into a court of competent jurisdiction. If Seller interpleads the Earnest Money into a court, Seller shall be entitled to recover the costs of such interpleader, including reasonable attorney's fees incurred in connection with the interpleader, from the Earnest Money.

**5. SURVEY.** At Closing, Seller shall provide Purchaser with a plat of survey of the Lot performed by an independent, licensed surveyor or engineer, showing all improvements located thereon as of the date of the survey. The plat of survey shall be suitable for use by Purchaser's closing attorney to obtain title insurance for the Property without exception for matters that would be shown or revealed by a current survey of the Lot. At Closing, Purchaser shall reimburse Seller for the cost of the survey and pay to Seller a reasonable fee, not to exceed Three Hundred Fifty Dollars (\$350.00), for obtaining and providing the survey. Seller makes no warranty or representation whatsoever regarding the quality, accuracy or reliability of the survey. Seller makes no warranty or representation whatsoever regarding any matter that would be shown or revealed by an accurate survey of the Lot. Purchaser acknowledges that the Property  is  is not located in a one hundred year flood plain as defined by HUD.

**6. WARRANTY OF TITLE.** Seller shall convey insurable fee simple title of the Property to Purchaser at Closing by general or limited warranty deed, subject to: (a) zoning ordinances affecting the Property; (b) utility, drainage and other easements of record upon which the residence does not encroach; (c) subdivision covenants, conditions and restrictions; (d) all matters shown on the final plat for the subdivision where the Property is located; (e) a prior conveyance of all rights, titles and interests to all oil, gas, water, petroleum, natural gas, coal, lignite and other minerals and hydrocarbons, and all geothermal energy and resources, located in whole or in part on, in or under the Lot and/or that may be produced or extracted from the Lot; and (f) any matters that would be shown or revealed by a current survey of the Lot. "Insurable title" shall mean title which a title insurance company licensed to do business in South Carolina will insure at its regular rates, subject only to its standard exceptions and those exceptions listed in subsections (a) through (e) above.

(Purchaser's Initials) *Per 2-17-15 AB 26711*

**7. TITLE EXAMINATION.** Purchaser shall have until ten (10) days prior to the Closing Date to examine title to the Property and to furnish Seller with a written statement of any exceptions to insurable title. If Purchaser does not serve Seller with notice of exception to insurable title prior to that date, Purchaser shall have waived any objection to title to the Property as it existed as of the Effective Date. If Purchaser does serve such notice on Seller prior to that date, the notice shall specify and itemize the exceptions to insurable title. If Seller does not remove any exceptions to insurable title within a reasonable time, Purchaser shall have the right to terminate this Agreement and to receive a refund of the Earnest Money and any Option Money paid to Seller. Under no circumstances shall Seller be obligated or required to remove or cure any exception to title to the Property that is not a valid exception to insurable title as defined in Section 6 above.

**8. DESTRUCTION.** If the home built on the Lot is either totally destroyed or substantially damaged (as determined by Seller in its sole discretion) before Closing, either party may terminate this Agreement by written notice to the other within ten (10) days of the date of such destruction. After Closing, all risk of loss to the Property shall be upon Purchaser.

**9. INSPECTION.**

**a. Procedure** Prior to Closing, Seller shall have the right to deny access to the Lot to any person at any time, as Seller determines in its sole discretion. However, Purchaser or a professional home inspector contracted by Purchaser shall have the right to enter upon the Property at reasonable times during normal business hours for the purpose of inspecting, examining, testing and surveying the Property, solely at Purchaser's expense, provided that any such inspection must meet the following requirements and conditions:

**(1) Inspections by Purchaser:**

**(a)** All Inspections by Purchaser must be scheduled through the Community Construction Superintendent. These inspections must be scheduled at least seven (7) days in advance, must take place during normal working hours (Mon. – Fri. 8:00AM to 4:00PM) and must be in accordance with the Community Construction Superintendent's production schedule.

**(b)** Seller or its appointed representative shall have the right to accompany Purchaser during the inspection.

**(2) Inspections by an independent professional home inspector:**

**(a)** All Inspections by a professional home inspector must be scheduled through the Community Construction Superintendent. These inspections must be scheduled at least seven (7) days in advance, must take place during normal working hours (Mon. – Fri. 8:00AM to 4:00PM) and must be in accordance with the Community Construction Superintendent's production schedule. **IF AN INSPECTOR DOES NOT HAVE AN APPOINTMENT ONE WEEK PRIOR TO THE PROPOSED INSPECTION, THE INSPECTOR WILL NOT BE ALLOWED TO PERFORM THE INSPECTION AND WILL BE INSTRUCTED TO RESCHEDULE. SELLER WILL NOT DELAY CONSTRUCTION OR CLOSING TO ACCOMMODATE INSPECTION APPOINTMENTS.**

**(b)** Seller or its appointed representative shall accompany the home inspector during the inspection.

**(c)** The home inspector must be licensed to do business by the State of South Carolina and must furnish to Seller a copy of the home inspector's State License Certificate prior to the inspection.

**(d)** Prior to the inspection, the home inspector must furnish Seller with proof that the home inspector has workman's compensation insurance, if applicable, and a \$300,000.00 General Liability Insurance Policy which names Seller as an additional insured.

Failure by Purchaser to follow the procedures set forth in this subsection shall constitute a material breach of this Agreement. Unauthorized entry onto the Lot by Purchaser, its agents or contractors shall constitute a material breach of this Agreement.

**b. Purchaser's Indemnity.** Purchaser assumes all responsibility for the acts of Purchaser, Purchaser's agents, contractors or representatives in exercising Purchaser's rights under this Section, and shall indemnify and hold Seller harmless from any loss or expense Seller may suffer as a result of any claim or damage which arises directly or indirectly out of Purchaser's exercise of its rights under this Section. Notwithstanding any other provision herein, Purchaser's indemnity of Seller pursuant to this Section shall survive Closing and the termination of this Agreement for any reason.

**c. Inspection Results.** In the event any inspection by Purchaser or its agents or contractors reveals a purported defect in the Property, Purchaser shall provide Seller with written notice of the claim of defect and, if a professional home inspection was performed, a true and complete copy of any report produced by the home inspector. If Seller determines the claim of defect is valid, Seller shall correct or repair the defect. If Seller determines the claim of defect is not valid, Seller shall notify the Purchaser of that determination within thirty (30) days of receipt of the written notice of claim of defect. Notwithstanding any other provision herein, Seller shall not be required to correct or repair any defect in construction that does not constitute a violation of: (1) the building code of the governing jurisdiction in which the Property is located, or (2) the building guidelines and standards of the provider of the Structural Warranty pursuant to subsection a of Section 14 below.

( )

(Purchaser's Initials) *PA 2-11-18 / 2-12-18*

**10. REAL ESTATE BROKER AND COMMISSION.** In negotiating this Agreement, Seller has acted as its own real estate broker. Purchaser acknowledges that Seller's sales agents represent Seller only, and do not represent Purchaser. Purchaser represents to Seller that Purchaser has not employed any real estate broker, agent or finder in connection with this Agreement, other than Candace Jordan, an agent of Keller Williams Realty Western Upstate ("Co-Broker"), who represents Purchaser. Purchaser shall indemnify and hold Seller harmless from and against any and all liabilities, losses, costs, damages and expenses (including attorneys' fees and expenses and costs of litigation) that Seller may suffer or incur because of any claim by any broker, agent or finder, whether or not meritorious, for any compensation with regard to this transaction arising out of any acts or contracts of Purchaser, other than the Co-Broker named above. Notwithstanding any other provision herein, the provisions of this Section shall survive Closing or termination of this Agreement for any reason. Purchaser acknowledges receipt of a copy of the Agency Disclosure Brochure.

**11. NO RELIANCE.** Purchaser acknowledges that it has not relied upon the advice or representations, if any, of Seller, Broker or Seller's salespersons or other agents with regard to the legal and tax consequences of this Agreement or the terms and conditions of any proposed financing of the purchase of the Property. Purchaser acknowledges that if such matters are of concern to Purchaser, Purchaser must obtain independent, professional advice regarding them.

**12. WOOD INFESTATION REPORT.** At the time of Closing, Seller shall provide Purchaser with a letter or a soil treatment report from a pest-control company licensed in South Carolina certifying that the Lot has been treated within one (1) year of the date of Closing for subterranean termite infestation. If required by Purchaser's lender, Purchaser may obtain at Purchaser's expense a South Carolina Wood Infestation Report performed by a pest-inspection company licensed in South Carolina.

**13. HAZARDOUS SUBSTANCES.** Purchaser acknowledges that Seller makes no representation or warranty with respect to the presence or absence of toxic waste, radon, hazardous materials or other undesirable substances on the Property. SELLER HEREBY DISCLAIMS ANY LIABILITY OR RESPONSIBILITY FOR THE PRESENCE OF ANY SUCH SUBSTANCES IN, ON, UNDER OR ABOUT THE PROPERTY.

**14. WARRANTIES AND DISCLAIMER.**

**a. NWP Warranty; Manufacturers' Warranties.** At Closing, Seller shall execute and deliver to Purchaser at no additional cost to Purchaser a structural warranty (the "Structural Warranty") by and from Residential Warranty Corporation or such other national warranty provider as Seller may reasonably select (the "NWP"). The Structural Warranty will provide, at a minimum, a ten (10) year structural warranty for the residence located or to be located on the Property. Prior to or at Closing, Seller shall provide purchaser with a brochure or handbook from the NWP that states the terms of the Structural Warranty. Also, at Closing Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the home built on the Property.

**b. Horton One-Year Warranty.** In addition, if within one year after the date of Closing any material feature of the construction of the home on the Property is found to be not in accordance with the requirements of this Agreement, then Seller shall correct such defect in construction after receipt of written request from Purchaser to do so, unless Purchaser has previously accepted or approved such defect or condition in writing. Seller shall correct such defects either: (i) approximately thirty (30) days after Closing, or (ii) approximately eleven (11) months after closing. Oral or email requests to Seller's staff are not acceptable. If Purchaser fails to notify Seller of the defect within the 1-year warranty period, or if Purchaser does not allow Seller any and all access to the Property needed to correct the defect during reasonable business hours, then Purchaser shall be deemed to have waived any claim against Seller for failure to correct such defect or condition. Notwithstanding any other provision herein, all of Seller's obligations and responsibilities pursuant to this subsection shall automatically expire one year from the date of Closing. Also, the following matters are excluded from Seller's Warranty:

- (1) Landscaping, including trees, shrubs, grass and flowers are not covered by any warranty.
- (2) Grading and drainage are not covered by any warranty, nor will they be maintained or modified by Seller after closing in any way whatsoever UNLESS the grading or drainage is found to be in violation of the applicable provision of the South Carolina Residential Construction Standards. Purchaser's closing of the sale constitutes an acceptance of the existing drainage and erosion controls of the Property, except for matters noted on a Punch List as provided in Section 21 below.
- (3) As of the date and time of the Closing, Seller shall have no further responsibility for soil erosion, soil conditions or the growth or death of grass, trees or shrubbery. Seller shall not be liable for trees or shrubs, or damage or destruction to same. Seller makes no warranty whatsoever as to the type, location or amount of trees which will exist on the Property after construction. Seller will plant grass seed or install sod, as the case may be, in certain locations at Seller's discretion; however, as part of its construction many areas will be left in their natural state and will not be landscaped in any way. Because the growth of grass seed and the health of sod are dependent on Purchaser's care and maintenance, Seller makes no warranty regarding the presence, absence, growth or death of grass. Because prevention of erosion is dependent on Purchaser's care and maintenance of the grass and sod, Seller makes no warranty regarding erosion.

(Purchaser's Initials) 20211123 11/23/21

(4) Seller shall not be responsible for the correction of any leakage or seepage caused by: (a) damaged water pipes or mains, (b) alteration of the landscaping by a party other than Seller (specifically including, without limitation, any changes which cause water to flow toward the dwelling), or (c) prolonged direction of water against the outside foundation wall from a spigot, sprinkler, hose or improperly maintained gutters or downspouts.

(5) Seller will not correct minor cosmetic defect after Closing unless the defect is listed on the Punch List prior to Closing. Unless a defect is noted on the Punch List, Seller does not warrant the installation or the quality of any carpet or flooring product.

**c. Disclaimer and Limitation on Seller's Liability.** THE WARRANTY MADE BY SELLER PURSUANT TO SUBSECTION b ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IN ADDITION, SELLER MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER REGARDING THE PAST, PRESENT OR FUTURE CONDITION OR USE OF ANY LANDS OR AREAS SURROUNDING THE PROPERTY OR IN THE VICINITY OF THE PROPERTY. AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR OBLIGATION TO PURCHASER OF ANY NATURE WHATSOEVER EXCEPT AS PROVIDED IN THIS SECTION 14 OF THIS AGREEMENT, IN SECTION 21 BELOW AND IN SELLER'S LIMITED WARRANTY DEED TO PURCHASER. SELLER SHALL NOT BE LIABLE FOR ANY REASON UNDER ANY CIRCUMSTANCES TO PURCHASER OR ANYONE CLAIMING THROUGH PURCHASER FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

**15. MANDATORY BINDING ARBITRATION.** PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS CONTRACT AND/OR THE PROPERTY, INCLUDING BUT NOT LIMITED TO ANY DISPUTES REGARDING: (A) SELLER'S CONSTRUCTION AND DELIVERY OF THE HOME; (B) SELLER'S PERFORMANCE UNDER ANY PUNCH LIST OR INSPECTION AGREEMENT; AND (C) SELLER'S WARRANTY PURSUANT TO SECTION 14 ABOVE. THE ARBITRATION SHALL BE CONDUCTED IN ACCORDANCE WITH THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (THE "ACT"), AND SHALL TAKE PLACE IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED. THE PROCEEDING SHALL BE CONDUCTED PURSUANT TO THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION (THE "AAA"), AND TO THE EXTENT POSSIBLE, UNDER RULES WHICH PROVIDE FOR AN EXPEDITED HEARING. IN THE EVENT OF A CONFLICT BETWEEN THE ACT AND THE RULES OF THE AAA, THE ACT SHALL CONTROL. THE FILING FEE FOR THE ARBITRATION SHALL BE PAID BY THE PARTY FILING THE ARBITRATION DEMAND, BUT THE ARBITRATOR SHALL HAVE THE RIGHT TO ASSESS OR ALLOCATE THE FILING FEES AND ANY OTHER COSTS OF THE ARBITRATION, INCLUDING REASONABLE ATTORNEY'S FEES, AS A PART OF THE ARBITRATOR'S FINAL ORDER. THE ARBITRATION SHALL BE BINDING AND FINAL, AND EITHER PARTY SHALL HAVE THE RIGHT TO SEEK JUDICIAL ENFORCEMENT OF THE ARBITRATION AWARD. NOTWITHSTANDING ANY OTHER PROVISION HEREIN, ANY DISPUTES ARISING UNDER THE STRUCTURAL WARRANTY PROVIDED TO PURCHASER BY THE NWP SHALL BE MEDIATED, ARBITRATED AND/OR JUDICIALLY RESOLVED PURSUANT TO THE TERMS, CONDITIONS, PROCEDURES AND RULES OF THAT WARRANTY PROGRAM.

**16. CLOSING.** The actual exchange of the Purchase Price for the Special Warranty Deed and possession of the Property is referred to herein as the "Closing." The date on which the exchange occurs is referred to herein as the "Closing Date." Closing shall not be complete until Seller has received full payment of the Purchase Price. Closing shall be scheduled and conducted as follow:

**a. Closing Date.** The subsection checked below shall apply:

(1) Closing shall take place on or before 07/25/2013. Seller shall notify Purchaser of the final date and time of Closing at least three (3) days in advance.

(2) Seller shall notify Purchaser of a tentative date for Closing at least thirty (30) days in advance. Not less than ten (10) days prior to the tentative date set by Seller, Seller shall notify Purchaser by telephone and/or email of the final date and time for Closing, which shall be no earlier than, but may be later than, the tentative date previously set by Seller. Subject only to the provisions of Section 20 below, Closing shall occur no later than that date which is two (2) years after the date that Purchaser signs this Agreement.

**b. Exchange at Closing.** At Closing, Seller shall deliver to Purchaser the Special Warranty Deed for the Property, possession of the Property, a certificate of occupancy for the house located on the Property issued by the applicable governmental authority, and, if applicable, a certificate of final approval by FHA or VA. At Closing, Purchaser shall pay to Seller the Purchase Price in full.

**c. Place of Closing.** Closing shall take place at the office of Morris Hardwick Schneider, 3527 Pelham Rd. Suite A, Greenville, SC 29615 Phone: (864)297-8944, or at such other place as the parties may agree in advance.

(Purchaser's Initials: 202-1113 11/23)

**d. Purchaser's Failure to Close.** Purchaser's failure to close on the final closing date set by Seller shall constitute a material breach of this Agreement by Purchaser. In such event, in addition to and without waiving any rights and remedies which Seller shall have pursuant to Section 18 below, Seller, at Seller's option, may extend the Closing Date until Purchaser tenders full payment of the Purchase Price; provided that Seller shall retain the right to terminate this Agreement and to retain Purchaser's Earnest Money at any time prior to actual Closing. If Seller does extend the Closing Date pursuant to this subsection, then at Closing Purchaser shall pay to Seller, in addition to the Purchase Price, liquidated damages in the amount of Two Hundred Fifty Dollars (\$250.00) per day, calculated from the final date for Closing set by Seller until the date on which Purchaser pays to Seller the full Purchase Price plus all liquidated damages due to Seller pursuant to this subsection, not to exceed Seven Thousand Five Hundred Dollars (\$7,500.00).

**e. Closing Costs.** Seller shall pay for preparation of the deed, Seller's attorney's fees and any property transfer tax (deed stamps) imposed by the State of South Carolina. Purchaser shall pay for all other costs related to the Closing. Real estate taxes on the Property for the calendar year in which the sale is closed shall be prorated as of the Closing Date. In the event the property is part of a Horizontal Property Regime, any prepaid hazard insurance shall be prorated at Closing.

**17. UTILITIES AND PERSONAL PROPERTY.** Purchaser shall transfer all utilities into Purchaser's name within three (3) business days after Closing. Purchaser shall not move any personal property onto the Property prior to Closing.

**18. DEFAULT; REMEDIES.** The remedies specified below shall be the sole and exclusive remedies available to the parties in the event of breach of this Agreement, and shall be to the exclusion of all other remedies at law or in equity.

**a. Purchaser's Default.** If Purchaser defaults on any of its obligations hereunder prior to Closing, Seller's sole and exclusive remedy shall be to terminate this Agreement by written notice to Purchaser; whereupon, Seller shall retain all Earnest Money and Option Money paid by Purchaser to Seller as liquidated damages and Seller may recover from Purchaser any liquidated damages due to Seller as of the date of termination pursuant to subsection e of Section 16 above. Thereafter, neither party shall have any further liability or obligation to the other hereunder.

**b. Seller's Default.** If Seller defaults on any of its obligations hereunder prior to Closing, Purchaser's sole and exclusive remedy shall be either: (a) to terminate this Agreement by written notice to Seller, whereupon Purchaser shall be entitled to recover all Earnest Money and Option Money (if any) paid to Seller; or (b) to seek specific performance of this Agreement by serving written notice of default on Seller and by instituting mandatory binding arbitration of Purchaser's claim of default and demand for specific performance. Notwithstanding the foregoing, subject to the provisions of Section 20 below and provided that Seller has not terminated this Agreement as a result of breach by Purchaser, if Seller is obligated by this Agreement to build a single-family residence on the Lot and Seller fails to complete construction of the residence within two (2) years of the date Purchaser signs this Agreement, then Purchaser may pursue whatever remedies it may have against Seller at law or in equity.

**19. TIME/DATE.** The Effective Date of this Agreement shall be the date of signing of this Agreement by the last of the parties to sign. **Time is of the essence** as to the occurrence of all events, the satisfaction of all conditions and the performance of all obligations hereunder.

**20. EXCUSED DELAYS.** Notwithstanding any other provision herein, if Seller is delayed in performing any of its obligations hereunder or meeting any specified completion dates by labor disputes, fire, delays in deliveries, adverse weather conditions, unanticipated damage to or destruction of the Property, governmental controls or moratoria, acts of God or any other causes beyond Seller's reasonable control, then the time-period specified herein for performance of such obligation and/or meeting such completion date shall be extended a sufficient number of working days to enable and allow Seller to perform and/or complete the obligation.

**21. WALK-THROUGH.** Not more than ten (10) days prior to Closing, Purchaser and Seller shall conduct a mutual examination of the Property, commonly referred to as a "walk-through." Seller shall schedule the walk-through during normal working hours (Mon. - Fri., 8:00AM to 4:00PM) and shall give Purchaser at least twenty-four (24) hours prior notice of the scheduled time by telephone. Immediately after the walk-through, Purchaser and Seller shall prepare a written list of items on the Property that the parties agree should be corrected, repaired or replaced (hereinafter, the "Punch List"). Seller shall thereafter correct, repair or replace the items listed on the Punch List. Under no circumstances shall Seller be required to correct, repair or replace any items on or of the Property that are not listed on a written Punch List that has been signed by Seller. Seller's obligation to correct, repair or replace any items that are listed on a written Punch List that has been signed by Seller shall survive Closing. **UNDER NO CIRCUMSTANCES SHALL CLOSING BE DELAYED DUE TO SELLER'S FAILURE TO COMMENCE OR COMPLETE CORRECTION, REPAIR OR REPLACEMENT OF ANY ITEMS ON A PUNCH LIST. UNDER NO CIRCUMSTANCES SHALL FUNDS BE ESCROWED AT CLOSING TO COVER THE COST OF CORRECTION, REPAIR OR REPLACEMENT OF ANY ITEMS ON A PUNCH LIST.**

*[Handwritten signature]*  
(Purchaser's Initials *[Handwritten initials]*)

22. RESTRICTIVE COVENANTS; HOMEOWNERS ASSOCIATION. Purchaser acknowledges receipt of a copy of that Declaration of Covenants, Conditions and Restrictions for Rose Hill 90' Subdivision of record at Anderson, County Registry, together with all amendments thereto (collectively, the "Declaration"). Purchaser acknowledges that the Property is subject to the Declaration and that upon purchase of the Property, Purchaser shall personally be subject to all the provisions of the Declaration, including but not limited to provisions requiring membership in and payment of assessment to Rose Hill 90' Homeowners Association (the "Association"). Purchaser acknowledges that the restrictive covenants governing this community require a payment of an initiation fee in the amount of \$100 at Closing as well as annual dues (presently \$400) and a quarterly sewer fee (presently \$99 per quarter) payable on a prorated basis at closing, which amount may change. PURCHASER FURTHER ACKNOWLEDGES THAT THE DECLARATION MAY BE AMENDED FROM TIME TO TIME AS PROVIDED THEREIN, AND THAT THE AMOUNTS TO BE PAID BY PURCHASER TO THE ASSOCIATION MAY CHANGE ACCORDINGLY.

23. SUCCESSORS AND ASSIGNS; INTERPRETATION. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their heirs, successors, administrators, executors and assigns. Purchaser shall not have the right to assign Purchaser's interest in this Agreement. As required by context herein, the singular shall include the plural, and the neuter shall include the masculine and the feminine.

24. ENTIRE AGREEMENT; AMENDMENT. This document contains the sole and entire agreement between the parties hereto with regard to the Property. All prior discussions have been merged into this Agreement. No representation, statement, promise or inducement shall be binding upon either party hereto unless specifically stated in this Agreement. This Agreement may not be modified except by a writing signed by both parties.

25. ADDENDA AND EXHIBITS.

a. Addenda. The following Addenda are attached hereto and incorporated herein: (Check those that apply)

- (1) Addendum 1, Buyer's Referral Incentives and Contributions Addendum
- (2) Addendum 2, Completed Construction Addendum
- (3) Addendum 2, Construction in Progress Addendum
- (4) Addendum 2, New Construction Addendum
- (4) Addendum 3, Design Center Voucher
- (5) Addendum 4, Sale of Current Residence Contingency Addendum
- (6) Addendum 5, Special Stipulations Addendum
- (7) Addendum 6, Teacher/Military/EMS Credit
- (8) Addendum 10, Federal Tax Credit Disclosure
- (9) Addendum 11, Variations in Materials and Components
- (10) Addendum \*, Community Specific Addendum: (List) \_\_\_\_\_
- (11) Exhibit E FHA/VA Amendatory Statement
- (12) Commission Rebate Certification
- (13) Commission Rebate Addendum

b. Exhibits. The following Exhibits are attached hereto and incorporated herein:

- (1) Exhibit A, Included Features List, Plat Map, Collaterals Plan and Elevation, Specifications
- (2) Exhibit B, Selected Options List
- (3) Exhibit C, Stage Matrix
- (4) Exhibit D, Community Specific: (List) \_\_\_\_\_
- (6) Notice of Seller's Business Affiliations

26. NOTICE. Except when specifically provided otherwise herein, any notices required to be given hereunder must be in writing. Notice shall be deemed delivered upon receipt or refusal if deposited in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid, properly addressed to the party to be served. Notice shall also be deemed given if delivered to the address for service of notice shown below by Federal Express, UPS or other nationally recognized overnight carrier service, with no signature or receipt required. Each party warrants that its correct mailing address for service of notice is shown below. Purchaser warrants that its correct telephone number and email address are shown below. A party may change its address for service of notice by giving the other party written notice of the change of address.

*gjm*

(Purchaser's Initials: gjm 11/23/20)

27. OFFER. This instrument shall be regarded as an offer by the first party to sign until fully executed by both parties, at which time it shall become binding on both parties.

NOTE: SELLER IS LICENSED AS A REAL ESTATE OFFICE IN SOUTH CAROLINA.

IN WITNESS WHEREOF, the parties hereto have executed this Home Purchase Agreement on the dates indicated below.

<b>Purchaser:</b> Paul Zitek <i>X Paul Zitek</i> Date: <i>X 2-17-13</i> Natalie Zitek <i>X Natalie Zitek</i> Date: <i>X 2-17-13</i> Purchaser's Current Mailing Address: 5614 N Overhill Chicago, IL 60631 <hr/> Purchaser's Home Phone: <u>(773) 206-3088</u> Mobile: <u>(773) 206-9279</u> Work: <u>(773) 206-3088</u> Purchaser's Email: <u>schoolcar@comcast.net</u>	<b>Seller:</b> D. R. Horton, Inc. By: <i>Shannon</i> Date: <i>2/20/13</i> Seller's Address: 1 Bronson Drive Simpsonville, SC 29680 Seller's Phone: <u>864-757-9930</u>
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(Purchaser's Initials: *Paul Zitek*)

**ADDENDUM 1  
BUILDER'S REFERRAL INCENTIVES AND CONTRIBUTIONS ADDENDUM**

This ADDENDUM is attached to and made a part of that Home Purchase Agreement between D.R. Horton, Inc., as Seller, and Paul Zitek and Natalie Zitek as Purchaser (the "Purchase Agreement"), regarding that parcel of real estate located in Anderson County, South Carolina, briefly described as Lot 0266, Rose Hill 90', and referred to in the Purchase Agreement as the "Lot." All terms defined in the main text of the Purchase Agreement shall have the same meanings used when used in this Addendum. This Addendum, together with the Purchase Agreement, constitutes the sole and entire agreement between Seller and Purchaser with regard to any incentives, allowances, adjustments, credits, discounts, rebates or other contributions of any kind or amount (collectively, the "Referral Incentives and Contributions") made, or to be made, by Seller to Purchaser in connection with Seller's referral of Purchaser to SELLER'S PREFERRED MORTGAGE LENDER(S) DESCRIBED BELOW ("PREFERRED LENDER"), and there are no agreements regarding such Referral Incentives and Contributions, whether written or unwritten, expressed or implied, between the parties except as set forth in this Addendum. In the event of any conflict between the terms and provisions of this Addendum and the terms and provisions of the main text of the Purchase Agreement, the terms and provisions of this Addendum shall control. The parties state, acknowledge and agree as follows:

Purchaser acknowledges receipt of that document entitled, "Notice of Seller's Business Affiliations," (the "Affiliation Notice"), and confirms its understanding that Seller has an affiliation with DHI MORTGAGE COMPANY, LTD. ("DHI MORTGAGE") and that Purchaser is not required to use this affiliated company or any Preferred Lender (described below) as a condition of Purchaser's purchase of the Property or Purchaser's access to settlement services in connection with the purchase of the Property.


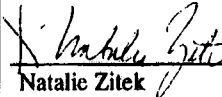
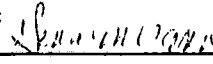
1. Seller shall provide for the benefit of Purchaser the Referral Incentives and Contributions listed in Section 2 below, provided that Purchaser chooses to use PREFERRED LENDER to finance the purchase of the Property and provided that each and all of the following occur:

- a. Purchaser applies to PREFERRED LENDER for a mortgage loan to finance the purchase of the Property within ten (10) business days after the date of this Purchase Agreement;
- b. Purchaser's loan application is approved by PREFERRED LENDER, and PREFERRED LENDER actually funds the loan and finances the purchase of the Property;
- c. Purchaser closes on the purchase of the Property on or before the Closing Date specified in the Purchase Agreement; and
- d. Purchaser uses the closing attorney recommended by Seller to act as settlement agent and close the purchase of the Property.

2. Provided that all the above conditions are satisfied and met in a timely manner, Purchaser shall be entitled to contributions to closing costs to be paid by Seller in the maximum amount of two percent (2.00%) of the final Purchase Price, provided that the total amount of such contributions may not exceed Ten Thousand Dollars (\$10,000). The contributions may be used by Purchaser to purchase multiple settlement services. Purchaser may apply these contributions, up to the total amount of two percent (2.00%) of the final Purchase Price (but not to exceed \$10,000), in full or partial payment of fees charged by the Lender, title insurance premiums, escrow fee or other title company charges, tax pre-payments required by the Lender (less any amounts credited to Purchaser pursuant to the provision of the Purchase Agreement regarding proration of real property taxes, and shown on lines 210 and/or 211 of the HUD-1 Settlement Statement), insurance pre-payments required by the Lender or other customary closing costs charged by other settlement service providers. No portion of this amount may be applied as a credit to, or in partial payment of, the Purchase Price of the Property or disbursed to Purchaser.

3. **Preferred Lender.** The preferred lenders relating to this Builder's Incentive and Concessions Addendum are: DHI Mortgage and USAA Federal Savings Bank, a federally chartered Savings Bank ("USAA FSB"). More information regarding DHI Mortgage is available at: [www.dhimortgage.com](http://www.dhimortgage.com). Please note that USAA FSB mortgages are limited to USAA members. More information regarding USAA FSB, its mortgages and USAA membership are available at: [www.usaa.com](http://www.usaa.com). USAA is not an affiliate of Seller.

IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM, HAVE SIGNED THIS ADDENDUM ON THE DATE SHOWN BELOW.

<b>Purchaser:</b>  Paul Zitek  Natalie Zitek	Date: <u>2-17-13</u> Date: <u>2-17-13</u>	<b>Seller:</b> D. R. Horton, Inc. By: 
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**ADDENDUM 2  
NEW CONSTRUCTION ADDENDUM**

This Addendum is attached to and made a part of that Home Purchase Agreement (the "Agreement") between Paul Zitek and Natalie Zitek as Purchaser and D.R. Horton, Inc. as Seller, regarding that parcel of land located in Anderson County, SC, briefly described as Lot 0266, Rose Hill 90', and referred to in the Agreement as the "Lot." All terms defined in the main text of the Agreement shall have the same meanings when used in this Addendum. Purchaser and Seller further agree as follows:

**1. CONSTRUCTION OF HOUSE.** Prior to Closing, Seller shall construct a single-family (✓) detached ( ) townhouse residence (the "House") on the Lot. Seller shall not be required to commence construction of the House unless and until: (a) the Loan has been approved by Purchaser's lender to Seller's satisfaction; (b) Purchaser has paid all amounts then due to Purchaser's lender and to Seller; (c) all contingencies to Purchaser's performance hereunder have been satisfied or removed to Seller's satisfaction; and (d) Purchaser has completed its selection of all colors and options for the House.

**2. HOUSE PLAN.** Seller shall construct the House according to the WESTERLY Plan, Elevation A-70953, plan revision date: thd, including those features listed on that Included Features List attached hereto as Exhibit A and incorporated herein, on a (✓) slab ( ) basement ( ) crawlspace (collectively, the "Base Plan"). Seller's obligation to construct the House shall be contingent on Seller's ability: (a) to place the House on the Lot without obtaining variances from any set-backs or other dimensional requirements, and (b) to construct the House on the Lot without incurring abnormal costs for foundation, slab or structural support walls. If Seller determines that either of these contingencies cannot be satisfied to Seller's satisfaction, then Seller may terminate this Agreement upon written notice to Purchaser, in which event the Earnest Money and the Option Money (if any) shall be refunded to Purchaser. Seller shall determine the placement and orientation of the House on the Lot in Seller's sole discretion. Purchaser acknowledges that the House shall be handmade and unique, and that although the House shall be based on the Base Plan, variations from the Base Plan will occur. Seller shall not be responsible for such variations from the Base Plan. Purchaser also acknowledges that brochures, models and displays used by Seller's sales agents are for general illustrative purposes only, and are not to be relied upon as representations of actual locations, dimensions, specifications or finished products. Subject only to the provisions of Sections 14 and 21 of this Agreement, Closing shall constitute acceptance of the House by Purchaser AS BUILT, and Purchaser hereby waives any right to object to any variation in construction from the Base Plan after Closing.

**3. HEATING AND AIR CONDITIONING.** The House shall be adequately and efficiently heated and air-conditioned with equipment having at least the minimum specifications for the House as established by Load Calculations, Manual J, of the Air-Conditioning Contractors of America, current edition. The clothes dryer shall vent to the outside.

**4. INSULATION.** Insulation shall be installed in the House to at least the following minimum standards: (a) exterior walls, excluding exterior garage walls, to be insulated with BATT insulation to a thickness of 3 5/8 inches which will, according to the manufacturer, yield an R-value of 13; (b) ceilings below attic areas to be insulated with BLOWN insulation to a thickness of 13 inches which will, according to the manufacturer, yield an R-value of 30; (c) vaulted ceilings to be insulated with BATT insulation to a thickness of 6 1/4 inches which will, according to the manufacturer, yield an R-value of 19; and (d) floor overhangs to be insulated with BATT insulation to a thickness of 3 5/8 inches which will, according to the manufacturer, yield an R-value of 13.

**5. PURCHASE PRICE.** The base price for the House, constructed on a lot in Rose Hill 90' according to the Base Plan, is **\$232,990.00** (the "Base Price"). The premium charged for the Lot (the "Lot Premium") is **\$3,000.00**. The total price of all options selected to date by Purchaser as of the Effective Date of the Agreement is **\$52,154.00** (see Exhibit B attached hereto and incorporated herein for an itemization of those options and their prices). Therefore, the initial Purchase Price for the Property, as stated in Section 2 of the Agreement, is:

*gm*

X	<i>gm</i>	2-17-13
X	<i>kg</i>	2-17-13

Buyer Paul Zitek / Subdivision Rose Hill 90' / Lot 0266 / Address 104 Starbridge Court / Job 70953-0266  
 Salesperson Angela H Mros / Date Printed 02/17/2013

Base Price	\$232,990.00
Plus Lot Premium	+ \$3,000.00
Plus Options Selected to Date	+ \$52,154.00
Total Purchase Price	\$288,144.00

The Purchase Price is subject to adjustment by amendment to this Agreement as provided herein.

**6. MANDATORY SELECTION MEETING; OPTION MONEY.**

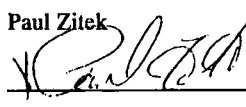
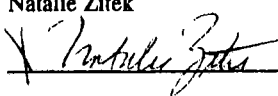
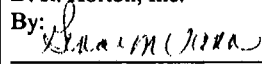
a. Within 14 working days of the Effective Date of this Agreement, Purchaser and Seller's representative will meet at Seller's Design Center, located at 75 Brookfield Oaks Dr. Suite 350, Greenville, SC 29607, to select and confirm all options to be used in the construction of the House, including all colors and finishes. Seller shall schedule this meeting (the "Selection Meeting") during normal working hours and shall give Purchaser at least twenty-four (24) hours prior notice of the scheduled date and time by telephone and/or email. If Purchaser fails to attend the Selection Meeting and complete selection of all options at the Selection Meeting, then Seller may terminate this Agreement upon written notice to Purchaser, in which event Seller shall retain all Earnest Money. At the conclusion of the Selection Meeting, Seller and Purchaser shall execute a First Amendment to this Agreement which shall specify all options chosen by Purchaser and any corresponding change to the Purchase Price. If the total cost of all non-structural options chosen by Purchaser at the Selections Meeting exceeds \$, then Purchaser shall pay to Seller, at the time of execution of the First Amendment, the full amount of that excess (the "Option Money").

b. Any Option Money paid to Seller at any time shall not be held in escrow, and shall be nonrefundable to Purchaser except in the event of: (1) breach of this Agreement by Seller, or (2) termination of this Agreement by Seller pursuant to Section 2 above. Upon Closing, all Option Money previously paid to Seller shall be credited to Purchaser against the Purchase Price. If Seller omits any option from the construction of the House, Purchaser shall be entitled to an additional credit at Closing against the Purchase Price in the amount of the specified price of the omitted option. Failure by Seller to install an option, including any of the options on Exhibit B, shall not constitute a breach of this Agreement by Seller, and Purchaser shall have no rights or remedies resulting from such failure except the right to a credit at Closing.

7. **CHANGES.** Seller shall not be required to allow any changes to Purchaser's selection of options after the execution of the First Amendment to this Agreement. If Purchaser requests a change in options and Seller agrees to the change, Purchaser shall pay to Seller a Change Fee in the amount of Two Hundred Fifty Dollars (\$250.00) for each such change at the time the request is approved by Seller. Any Change Fee paid shall be nonrefundable and shall not be credited against the Purchase Price. Any changes to options shall not be effective unless evidenced by a written amendment to this Agreement. At the time of execution of that amendment, Purchaser shall pay to the Seller the total increase in the Purchase Price resulting from the change in options as additional Option Money.

8. **COMPLETION.** Subject to the contingencies stated herein, Seller shall complete construction of the House prior to Closing. Seller shall construct the House according to all applicable governmental codes and regulations. Seller reserves the right to substitute materials or items to be used in the construction of the House with materials or items of equal or comparable value. Construction of the House shall be deemed complete when a certificate of occupancy is issued for the House by the applicable governmental authority. Seller shall deliver the completed House to Purchaser at Closing in "broom-clean" condition, ready to occupy. The House and Lot shall be free of all trash and debris.

9. **PURCHASER'S INQUIRIES.** Purchaser shall direct all inquiries and questions to Seller's on-site associate. The on-site associate will provide Purchaser with timely responses; however, the associate does not and shall not have authority to change the terms of this Agreement in any manner. This Agreement may be changed or modified only by a written amendment duly executed by both Purchaser and Seller. Purchaser acknowledges that Seller's sales associates, superintendents, closing staff, warranty staff and other employees do not have authority to modify this Agreement. Only an authorized corporate officer of Seller may modify this Agreement on Seller's behalf.

<p><b>Purchaser:</b></p> <p>Paul Zitek                    _____ Date: 2-17-13</p> <p>Natalie Zitek                    _____ Date: 2-17-13</p>	<p><b>Seller:</b></p> <p>D. R. Horton, Inc.                  By:                   _____ Date: 2/20/13</p>
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Buyer: Paul Zitek / Subdivision: Rose Hill 90' / Lot 0266 / Address: 104 Starbridge Court / Job: 70953-0266  
Salesperson: Angela H Moss / Date Printed: 02/17/2013


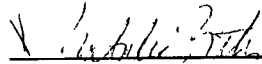
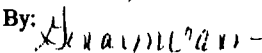
**ADDENDUM 5  
SPECIAL STIPULATIONS ADDENDUM**

This **ADDENDUM** is attached to and made a part of that Home Purchase Agreement (the "Agreement") between D.R. Horton, Inc., as Seller, and **Paul Zitek and Natalie Zitek**, as Purchaser, regarding that parcel of real estate located in Anderson County, SC, briefly described as **Lot 0266, Rose Hill 90'** and referred to in the Agreement as the "Lot." **Contrary to the incentive amount offered in the BRICA, Seller agrees to pay up to \$\_5000\_ of Purchaser's closing costs and/or prepaids on the first and second mortgage (if applicable), which amount shall include the State of South Carolina Transfer Tax, subject to any loan program restrictions.**

**All other terms of the BRICA remain in full force and effect.**

**Purchaser is using \_DHI\_ as their mortgage provider.?. All terms defined in the main text of the Agreement shall have the same meanings when used in this Addendum. Notwithstanding any other provision of the Agreement, Seller and Purchaser agree as follows:**

**IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM,  
HAVE SIGNED THIS ADDENDUM ON THE DATES SHOWN BELOW.**

<b>Purchaser:</b> Paul Zitek  _____ 2-17-13 Date:  Natalie Zitek  _____ 2-17-13 Date:	<b>Seller:</b> D. R. Horton, Inc. By:  _____ Date: 2/26/13
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**ADDENDUM 11  
VARIATIONS IN MATERIALS AND COMPONENTS**

This Addendum is attached to and made a part of that Home Purchase Agreement (the "Agreement") between Paul Zitek and Natalie Zitek as Purchaser and D.R. Horton, Inc. as Seller, regarding that parcel of land located in Anderson County, SC, briefly described as Lot 0266, Rose Hill 90' and referred to in the Agreement as the "Lot." All terms defined in the main text of the Agreement shall have the same meanings when used in this Addendum. Purchaser and Seller further agree as follows:

Many materials, both natural and man-made, used in the construction of homes contain variations and inconsistencies. Such variations and inconsistencies are beyond Seller's control, and Seller shall not be responsible or liable for them. Some of the materials and components which may exhibit variations and inconsistencies are as follows:

**CONCRETE**

Purchaser understands that when adding additional concrete to the existing concrete pad, the two pads may not match in color. Also, there may be visible seam between the two pads.

**INTERIOR PAINT**

Seller installs a level 4 drywall/Gypsum Board finish in its homes. White or light color flat paint is recommended for this type of finish and is a standard feature in DR Horton homes. Colored, gloss or semi-gloss paint are not recommended as they may magnify joint or patch photographing in critical lighting areas. Purchaser understands that Seller will install, upon Purchasers request, alternate colored paint on an "as is" basis and is not responsible for any additional drywall finishing or painting to reduce visible joint or patch photographing.

**OUTLET LOCATION**

Purchaser understands that any cable, phone and/or data outlet locations that are not specifically designated at the initial time of selections will be placed by the construction supervisor, and will not be moved.

**WOOD**

Purchaser understands that wood of the same species will vary in color, mineral streaking, texture, pitch pockets, and grain uniformity, depending on when, where and how the tree grew and the fact that different wood products come from different manufacturers. These characteristics may occur on adjacent cabinets, between pair of doors and/or drawers, with the same cabinet panels, between flooring, stair treads and railings and between flooring and cabinets/vanities. It is these differences, caused by nature, that create the warmth and individuality of fine woods. Darker finishes tend to hide some of these natural characteristics while lighter finishes tend to accentuate the differences. Because of this, the variations in color and contrast may be different than in a display or in a smaller sample.

Seller does not recommend to any Purchaser that hardwood flooring be placed in areas that may have excessive moisture present including but not limited to kitchens, powder rooms, laundry rooms, or any bath rooms. Upon the Purchaser's request, Seller will install hardwood in these areas only on an "as is" basis and will not warranty any moisture or wear related items at anytime. The Purchaser understands they will be totally responsible for all problems arising in the future concerning this type of flooring in the areas as described above.

**STUCCO**

The final appearance of your home may be impacted by sunlight angles, shadows from architectural details, application and texturing techniques, environmental surrounding and color lot to color lot variations.

**BRICK/STONE**

Brick and stone products are composed of earthen materials and go through many processes before firing and consequently each run or lot of brick/stone will vary. Photographs, samples and even completed homes are only a

*g.*

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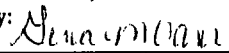
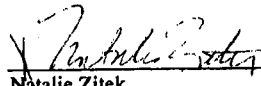
Buyer Paul Zitek / Subdivision Rose Hill 90' / Lot 0266 / Address 104 Sherbridge Court / Job 70953-0266  
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
representation of the color and each run or lot and even installation can vary from home to home. An exact replication of total color or percentages as displayed by samples or model homes cannot be guaranteed.

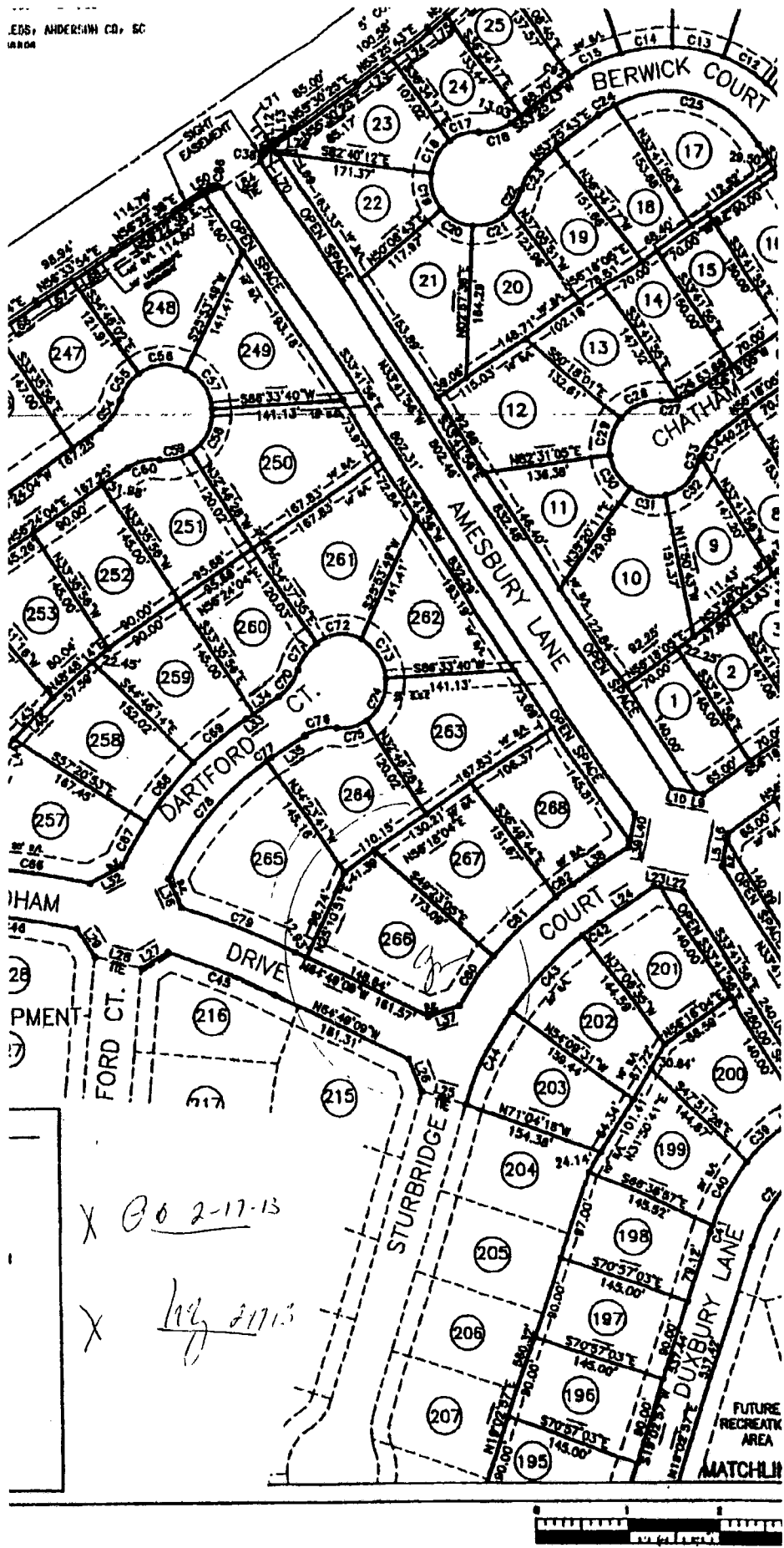
**GRANITE/CERAMIC/MARBLE**

The materials used in counter tops, fireplace surrounds/hearths, wall and floor tile contain color variations and "veining", natural blemishes, and grain. Accordingly, consistency cannot be guaranteed.

IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM, HAVE SIGNED THIS ADDENDUM ON THE DATES SHOWN BELOW.

<b>Purchaser:</b>  Paul Zitek Date: <u>2-17-13</u>	<b>Seller:</b> D.R. Horton, Inc. By:  Date: <u>2/20/13</u>
 Natalie Zitek Date: <u>2-17-13</u>	

X		<u>2-17-13</u>
X		<u>2-17-13</u>



The Westerly

Reverse Plan



Brick,  
stone,  
Hardi

Elevation A



Elevation B



Elevation C



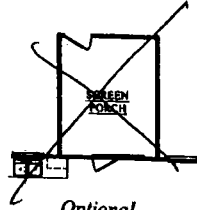
Renderings and floor plans are the artist's conception. Details and dimensions may differ from actual plans. Standard and optional features may vary. D.R. Horton reserves the right to institute changes without prior notice. See community Sales Associate for information.

X OR 2-17-13

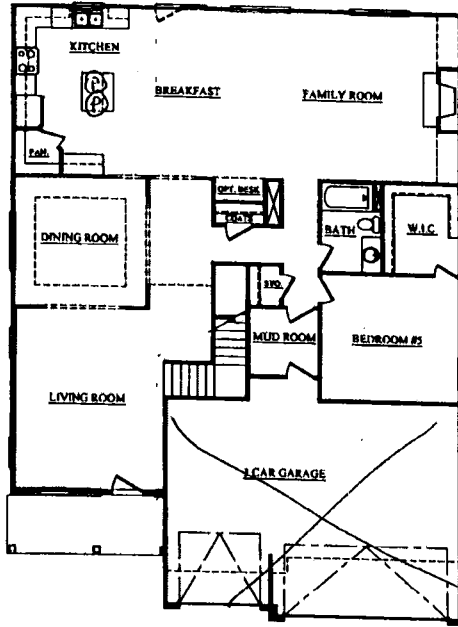
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*John*

# The Westerly

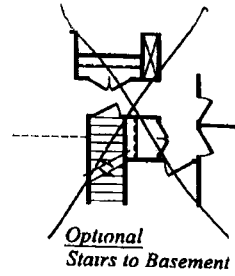


Optional Screen Porch

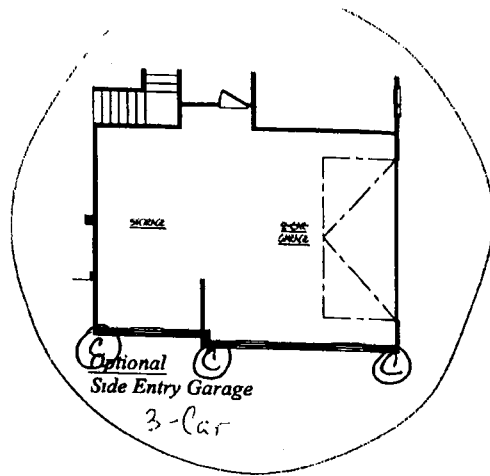


First Floor Plan

- Ⓜ - Recessed
- \* - Ceiling Fan Prewire
- ⊗ - Ceiling Fan w/ Light Kit
- ⓐ - Couch lights
- Ⓟ - Pendant Lights



Optional Stairs to Basement



Optional Side Entry Garage  
3-Car

Renderings and floor plans are the artist's conception. Details and dimensions may differ from actual plans. Standard and optional features may vary. D.R. Heron reserves the right to institute changes without prior notice. See community Sales Associate for information.

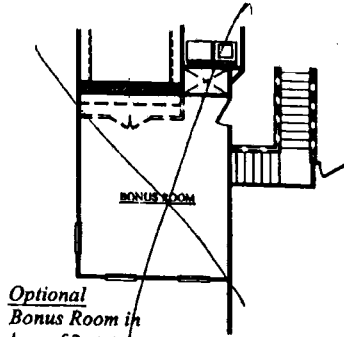


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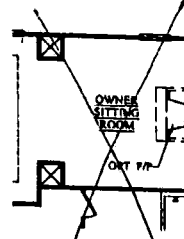
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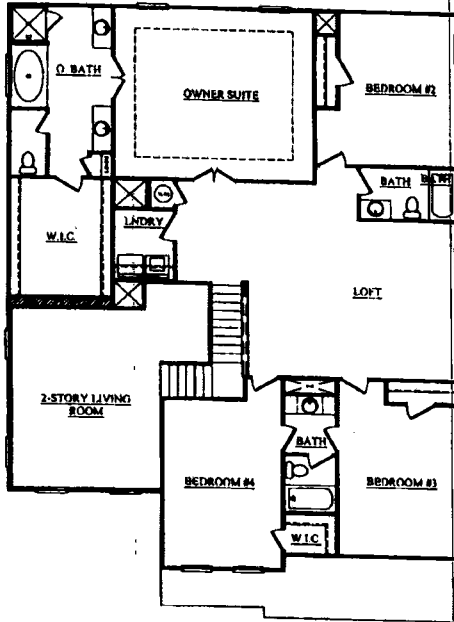
# The Westerly



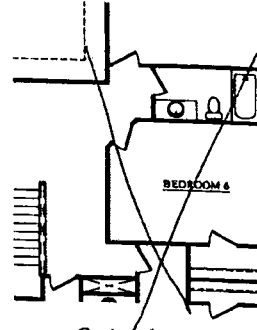
*Optional Bonus Room in lieu of 2 story Living Room*



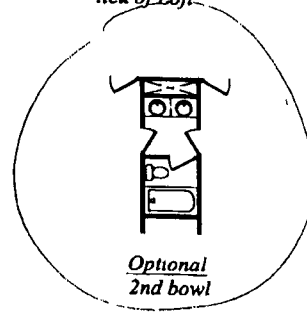
*Optional Master Sitting in lieu of Bedroom 2*



*Second Floor Plan*



*Optional Bedroom 6 in lieu of Loft*



*Optional 2nd bowl*

Renderings and floor plans are the artist's conception. Details and dimensions may differ from actual plan. Standard and optional features may vary. D.R. Heron reserves the right to initiate changes without prior notice. See community Sales Associates for information.



X 2-17-13

X 43 2-17-13

*Handwritten signature or initials.*



**The Estates**

**COMMUNITY**

- ♦ Community Amenity includes Swimming Pool, Cabana and Children's Playground
- ♦ Community sidewalks and streetlights for resident's enjoyment
- ♦ Community Homeowner's Association Covenants to protect your investment
- ♦ Strict design standards provide continuity within the community
- ♦ Professionally landscaped front entrance with architecturally designed entrance monument

**INTERIOR**

- ♦ Direct Vent Fireplace with Glass Doors, Gas Logs and Granite Surround
- ♦ Oak Plank Hardwood Flooring in the Foyer, Extended Foyer, Kitchen and Breakfast Area
- ♦ Wainscoting and chair rail in the Foyer and Dining Room
- ♦ One piece crown moulding in the Living Room, Dining Room and Owner's Suite tray (per plan)
- ♦ Designer 2 panel beaded smooth interior doors
- ♦ Energy efficient Kitchen appliances including GE® Dishwasher, Self Cleaning Electric Range and Built in Microwave over the Range
- ♦ Exquisitely crafted Aristokraft® Flat Panel Birch Kitchen cabinets with crown molding and decorator knobs
- ♦ Granite Kitchen countertop with under mount stainless steel sink
- ♦ Moen® Designer Chrome Fixtures in all Baths
- ♦ Cultured Marble vanity tops in all Baths
- ♦ Dual bowls in Owner's Suite Bath (per plan)
- ♦ Flat Panel Birch Cabinets in all Baths (Cabinet finish matches Kitchen)
- ♦ Designer tub and separate shower in Owner's Suite Bath (per plan)
- ♦ Ceramic tiled floor in the Owner's Suite Bath
- ♦ Elongated toilets in all Baths
- ♦ Ceiling Fan with light kit installed in Family Room
- ♦ Nibco® Dura-Pex Plumbing

**INTERIOR (cont')**

- ♦ Pre-wired for phone in Kitchen, Owner's Suite and Family Room (per plan)
- ♦ Pre-wired for cable in Owner's Suite and Family Room (per plan)
- ♦ Smooth ceilings
- ♦ 9' ceilings (per plan)
- ♦ Garage walls finished and painted
- ♦ Cased windows
- ♦ Edge Gold® Premium sub floor (Limited 50 yr warranty)

**EXTERIOR**

- ♦ Professionally landscaped with fully-sodded lawn (pine islands and natural areas excluded)
- ♦ Fiberglass Roof Shingles with a 20 year Manufacturer's Warranty
- ♦ LP® TechShield® radiant barrier roof sheathing
- ♦ Weather Proof Electrical Outlet at Front and Rear Entries
- ♦ Termite Monitoring System provided by Pestban® with one year of service included
- ♦ Full seamless Gutters and Down Spouts with Splash Blocks (Front and Rear)

**SAFETY AND ENERGY**

- ♦ Double Pane Low-E Vinyl Windows with double locks and tilt in'sash for easy maintenance
- ♦ Electrical 220V Outlet for Dryer
- ♦ Single HVAC system with two independent zones with digital thermostats for maximum comfort and efficiency (per plan)

**WARRANTY AND QUALITY CONTROL**

- ♦ Covered by Nationally Recognized 2 - 10 year Extended Warranty Program with Residential Warranty Corporation for New Homes
- ♦ Homeowner Orientation
- ♦ Final inspection by Homeowner

FOR MORE INFORMATION: (864) 644-8494

D R Horton, Inc. is continuously improving our product and reserves the right to change floor plans, specifications and prices. This brochure is for illustration purposes only and is not part of a legal contract. Information shown is believed to be accurate, but is not warranted and is subject to change without notice. ©Copyright D R Horton, Inc. 2011



*Dr*

X *Per 2-17-13*

X *173-217-13*

**EXHIBIT B**

**Selected Options List**

BLIN00D2	BLINDS LEVEL 1 - 2 STORY PLAN, 1 YR WTY DOES NOT INCL 2 STORY WNDWS FRT DR S/L TRNSM & BSMT		\$2,700.00	1	\$2,700.00
BOWL00EX	EXTRA BOWL		\$715.00	1	\$715.00
CHALETXX	DIMENSIONAL SHINGLES ILO STAND ARD SHINGLES		\$0.00	1	\$0.00
CLRPLUS1	COLOR PLUS COMMUNITY-USE A CP EXTERIOR COLOR SCHEME (Note: Siding- Navajo Beige, Brick - Autumn Beige, Door & Shutters - Rookwood Brown, Trim - Beige. Stone - Villa Grey)	Color: Color Scheme 3	\$0.00	1	\$0.00
CUSTOM01	DEC Custom Option (Note: Level 2 Granite Kitchen)	Color: Ferros Gold	\$1.00	550	\$550.00
DESK0002	DESK-LANDEN GLAZED	Color: Java Glaze	\$2,010.00	1	\$2,010.00
HSAS00WN	THIS PLAN TO BE BUILT AS DRAWN		\$0.00	1	\$0.00
J3SDS0BK	ADDITIONAL BRICK (LEFT & RIGHT) ON SLAB	Color: Autumn Ridge	\$0.00	1	\$0.00
J4SDS0BK	ADDITIONAL BRICK (LEFT, RIGHT, REAR) ON SLAB		\$5,800.00	1	\$5,800.00
JAOT00DE	ELECTRICAL- DEDICATED ELECTRIC AL OUTLET 110v		\$100.00	3	\$300.00
JAOT00EI	ADD INTERIOR 110 OUTLET OR SWITCH		\$50.00	6	\$300.00
JAP10106	RANGE-GE GAS JGB600DETB - BLACK SELF-CLEAN		\$760.00	1	\$760.00
JAP20201	MICROWAVE GE JVM1540DMBB - BLACK 1.5 CU FT		\$0.00	1	\$0.00
JAP30301	DISHWASHER GE GSD2100VBB - BLACK		\$0.00	1	\$0.00
JAP40403	REFRIGERATOR GE GSH25JGDBB - BLACK SIDE x SIDE 25.3 cu ft		\$1,390.00	1	\$1,390.00
JCB20053	ARISTOKRAFT LANDEN GLAZED FLAT PANEL MAPLE OR BRIARCLIFF MAPLE W/36" UPPERS (Note: Kitchen & Baths)	Color: Java Glazed	\$4,295.00	1	\$4,295.00
JCBU0014	SINGLE SLIDE OUT TRAYS PER PLAN		\$312.00	1	\$312.00
JCBU0015	REFRIGERATOR CABINET		\$0.00	1	\$0.00
JCBU0020	CABINETS-2" CROWN		\$0.00	1	\$0.00
JCBU0022	CABINETS-KNOBS	Color: H303	\$0.00	1	\$0.00
JCBU0025	VANITY - BATHROOM CABINET TO MATCH KITCHEN CABINETS		\$0.00	1	\$0.00
JCBU0031	CABINETS - MICROWAVE BUMP UP/BUMP OUT		\$0.00	1	\$0.00
JCBU0033	CABINETS - 36" TO 42"		\$375.00	1	\$375.00
JCBU0046	36" HIGH VANITY CABINETS IN MASTER BATH-SINCLAIR		\$0.00	1	\$0.00
JCT10001	CARPET BASE-ANGELUS	Color: Oat Straw	\$0.00	1	\$0.00
JCWN001P	1-PIECE CROWN MOULDING (PER ROOM) 1 STORY ROOM - OMS ONLY		\$250.00	13	\$3,250.00
JELC0010	OUTLET 220 (ELECTRICAL APPLIANCES)		\$250.00	1	\$250.00
JENT0002	CABLE OUTLET (RG6)		\$75.00	1	\$75.00
JENT0024	WIRING-PREWIRE AND BRACE FOR CEILING FAN		\$75.00	6	\$450.00
JGAS00LN	GAS STUB (FOR ADDITIONAL GAS APPLIANCES, STUB IS ON OUTSIDE CORNER OF PATIO) - REAR PATIO WALL ONLY)		\$275.00	1	\$275.00

Initials

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X	<i>Handwritten initials</i>	2-17-13
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Buyer Paul Zitek / Subdivision Rone Hill 90' / Lot 0266 / Address 104 Starbridge Court / Job 70953-0266  
 Salesperson Angela H Moss / Date Printed 02/17/2013

JGDO00XX	GARAGE DOOR OPENER-WITH TWO TRANSMITTER (PRO-DRIVE)		\$350.00	1	\$350.00
JGDOHDWR	GARAGE DOOR HARDWARE		\$0.00	1	\$0.00
JHEA00WM	STACK STONE (MANTLE HT. W/WD MANTLE)	Color: Villa Grey Location: Fireplace	\$700.00	1	\$700.00
JIPT0002	INTERIOR PAINT-(LARGE HOME) SUMMER BEIGE aka Desert Fawn WITH HIBELL WHITE CEILING	Color: Summer BeigeWhite Ceilings	\$1,150.00	1	\$1,150.00
JKSK0021	KITCHEN FAUCET - MOEN #7590 OIL RUBBED BRONZE		\$520.00	1	\$520.00
JPAT00SF	CONCRETE PATIO EXTENSION PER SQ. FOOT		\$6.00	680	\$4,080.00
JPB10021	PLUMBING-MASTER BATH FAUCET-MOEN BRANTFORD OIL RUB		\$500.00	1	\$500.00
JPB20009	PLUMBING-SECONDARY BATH FAUCET -MOEN EVA OIL RUB		\$420.00	3	\$1,260.00
JRAN00LT	RECESSED CAN LIGHT WITH ONE (1) SWITCH		\$110.00	27	\$2,970.00
JRVS00DR	THIS PLAN TO BE BUILT REVERSED		\$0.00	1	\$0.00
JSHG0025	SIDE ENTRY GARAGE-SERIES 200 ON SLAB (CONSTRUCTION TO CONFIRM EXTRA COST ON BASEMENT)		\$3,800.00	1	\$3,800.00
JSERS025	CLASSIC 200 + ON SLAB-REFER TO NEIGHBORHOOD SPECIFICATIONS		\$0.00	1	\$0.00
JSHWRDR2	SHOWER ENCLOSURE - BRONZE WITH CLEAR GLASS		\$190.00	1	\$190.00
JSNK00UT	UTILITY SINK (PER PLAN). NOT TO BE LOCATED IN UNHEATED AREA		\$584.00	1	\$584.00
JTOP00U9	GRANITE LEVEL 2 DESK TOP		\$558.00	1	\$558.00
JTOPOH12	12" GRANITE ISLAND OVERHANG LEVEL 2 (MUST ALSO PICK GRANITE ISLAND TOP OPTION)	Color: Ferros Gold	\$250.00	1	\$250.00
JUCP028P	CARPET PAD - 8 lb REBOND 2 STORY		\$1,500.00	1	\$1,500.00
JUV20001	VINYL-ARMSTRONG INITIATOR (Note: 66254 - Laundry & Mud Room & Downstairs Bath 66089 - Upstairs Hall Bath & Jack n Jill bath)		\$0.00	1	\$0.00
JWTR2532	WATER HEATER UPGRADE-RINNAI #2 532 TANKLESS (3 OR MORE BATHROOM PLANS) PRESALE ONLY!		\$2,120.00	1	\$2,120.00
LITG00B4	LIGHTING - BATHS (ALL) LEVEL 4 (SEABROOK OR BURNISHED CHESTNUT)	Color: Espresso	\$393.00	1	\$393.00
LHTG00C3	LIGHTING-EXTERIOR COACH 3	Color: P5878-31	\$95.00	3	\$285.00
LHTG00H4	LIGHTING - HOUSE LEVEL 4 (FORGED BRONZE)	Color: Espresso	\$421.00	1	\$421.00
LHTG00P2	LIGHTING-PENDANT LEVEL 2 (OXFORD SILVER OR COBBLESTONE)	Color: P5083-84 Espresso	\$128.00	2	\$256.00
MATRIX00	COMMUNITY SPECIFIC MATRIX		\$0.00	1	\$0.00
MSTRS01G	LEVEL 1 TILE-MASTER BATH ON SQUARE ON SLAB	Color: Pacific Natural Location: Master Bath	\$0.00	1	\$0.00
RAIL0002	OPEN RAIL W/PICKETS ON FIRST 3-5 STEPS (PER PLAN)		\$0.00	1	\$0.00
RAIL00WD	OPEN RAIL W/PICKETS ON ALL STEPS (NOT AVAILABLE W/THIRD FLOOR WALK-UP)		\$550.00	1	\$550.00
SIGTRM25	SIGNATURE TRIM PACKAGE - CLASSIC 200 PLUS SERIES		\$1,655.00	1	\$1,655.00

Initials

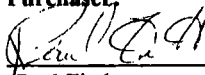
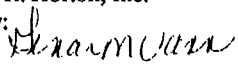

*Jh*

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
Buyer Paul Zitek / Subdivision Rose Hill 90' / Lot 0266 / Address 104 Sturbridge Court / Job 70953-0266  
 Salesperson Angela H Moss / Date Printed 02/17/2013

VTYTOPCM	VANITY TOPS CULTURED MARBLE		\$0.00	1	\$0.00
WOODS0D1	LEVEL 1 HARDWOOD - DINING ROOM ON SLAB	Color: Cherry Spice	\$1,435.00	1	\$1,435.00
WOODS0H1	LEVEL 1 HARDWOOD - REAR HALL ON SLAB	Color: Cherry Spice	\$1,225.00	1	\$1,225.00
WOODS0K1	LEVEL 1 HARDWOOD - KITCHEN/BREAKFAST ON Slab - ILO VINYL - BASEMENT	Color: Cherry Spice	\$2,325.00	1	\$2,325.00
WOODS0L1	LEVEL 1 HARDWOOD - LIVING ROOM ON SLAB	Color: Cherry Spice	\$2,220.00	1	\$2,220.00
WOODS0R1	LEVEL 1 HARDWOOD - FOYER ON SLAB	Color: Cherry Spice	\$205.00	1	\$205.00
XPOS0001	Sales & Marketing Incentive		\$-1.00	1,500	\$-1,500.00
XPOS0008	Sales & Marketing Incentive (Note: Signature Trim Pkg Included)		\$-1.00	1,655	\$-1,655.00

<b>Total Option Price:</b>	<b>\$52,154.00</b>
----------------------------	--------------------

<b>Purchaser:</b>  Paul Zitek Date: <u>2-17-13</u>	<b>Seller:</b> D. R. Horton, Inc. By:  Date: <u>2/20/13</u>
 Natalie Zitek Date: <u>2-17-13</u>	

Initials

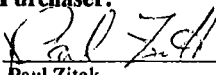
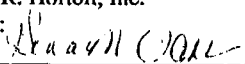

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**D.R. HORTON**  
**Stage of Option Availability Matrix**

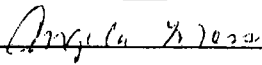
**Exhibit C**

Use the following table to determine if a Standard Change Order is allowable					
OPTIONS	PRIOR TO FOUNDATION	PRIOR TO FRAME	PRIOR TO ROUGH MECHANICAL	PRIOR TO INSULATE	PRIOR TO SHEETROCK
Additional Appliances	Y	Y	Y	Y	Y
Flooring Selections	Y	Y	Y	Y	Y
Exterior Concrete Changes	Y	Y	Y	Y	Y
Door and Shutter Color	Y	Y	Y	Y	Y
Kitchen Sink Option	Y	Y	Y	Y	Y
Electrical Appliance Option Upgrade	Y	Y	Y	Y	Y
Window Blinds	Y	Y	Y	Y	Y
Cabinet Crown Molding	Y	Y	Y	Y	N
Interior Trim Options/Plantation shutters	Y	Y	Y	N	N
Exterior/Interior Door Hardware	Y	Y	Y	N	N
Plumbing Fixtures (faucets)	Y	Y	Y	N	N
Kitchen Counter Color	Y	Y	N	N	N
Cabinet Options/Upgrades	Y	Y	N	N	N
Lighting & Fans (must have prewire)	Y	Y	N	N	N
Electrical Options/Upgrade	Y	Y	N	N	N
Microwave Option	Y	Y	N	N	N
Roof Color	N	N	N	N	N
Exterior Color Selections Vinyl/Stucco	N	N	N	N	N
Framing Options	N	N	N	N	N
Plumbing Options/Gas Line	N	N	N	N	N
Structural Options/Sunroom/	N	N	N	N	N
Screen Porch	N	N	N	N	N
Brick Color	N	N	N	N	N

**\*\*PURCHASER(S) ACKNOWLEDGE THAT NO CHANGES ARE ALLOWED AFTER SHEETROCK\*\***

<b>Purchaser:</b>  Paul Zitek Date: <u>2-17-13</u>	<b>Seller:</b> D. R. Horton, Inc. By:  Date: <u>2/20/13</u>
 Natalie Zitek Date: <u>2-17-13</u>	

**CURRENT STAGE OF HOME: None**

Agent Signature:   
 Date: 2/17/13

By signing this, Construction verifies that changes can be made to 70953-0266 per the restrictions of this stage matrix.

Construction Signature: \_\_\_\_\_

Buyer: Paul Zick and Natalie Zick / Subdivider: Rose Hill 99 / Lot/Block: 0000 / Address: 104 Buckeye Court / ZIP: 70302 0000  
Filed by: Amelia R. Mead on 02/17/2013

### FHAVA AMENDATORY STATEMENT EXHIBIT E

This Addendum is attached and made part of that certain Purchase Agreement by and between D.R. Horton, Inc./D.R.Horton, Inc. -Torrey, Seller, and Paul Zick and Natalie Zick, Purchaser, dated 02/17/2013, for the purchase and sale of Lot 0200, WESTERLY MODEL, Rose Hill 99, Subdivision.

A. FHA LOANS: It is expressly agreed that, notwithstanding any other provisions of this contract, the Purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise, unless the Purchaser has been given in accordance with HUD/FHA or VA requirements a written statement issued by the Federal Housing Commissioner/Department of Veterans Affairs or a Direct Endorsement lender setting forth the appraised value of the property of not less than \$228,144.00. The Purchaser shall, have the privilege and option of proceeding with the consummation of the contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development/Veterans Administration will insure. HUD/VA does not warrant the value or the condition of the property. The Purchaser should satisfy himself/herself that the price and condition of the property are acceptable.

B. VA LOANS: It is expressly agreed that, notwithstanding any other provisions of this contract, Purchaser shall not incur any penalty by forfeiture of earnest money or otherwise be obligated to complete the purchase of the property described herein, if the contract purchase price or cost exceeds the reasonable value of the property established by the Department of Veterans Affairs. Purchaser shall, however, have the privilege and option of proceeding with the consummation of this contract without regard to the amount of the reasonable value established by the Department of Veterans Affairs.

Purchaser: Paul Zick Date: 2-17-13 Seller: D.R. Horton, INC. / D.R. Horton, INC. -Torrey  
Amelia R. Mead Date: 2/22/13

Natalie Zick Date: 2-17-13

### FHAVA REAL ESTATE CERTIFICATION

The undersigned Sellers, Borrowers, and Real Estate Broker involved in this transaction do hereby certify that the terms of the sales contract are true to the best of their knowledge and belief. There are no other side agreements other than the agreement statement on the sales contract.

Purchaser: Paul Zick Date: 2-17-13 Seller: D.R. Horton, INC. / D.R. Horton, INC. -Torrey  
Amelia R. Mead Date: 2/22/13

Natalie Zick Date: 2-17-13

Amelia R. Mead Date: 2/22/13  
\_\_\_\_\_  
Buyer's Agent Signature

70953-0266

Buyer: Paul Zitek / Subdiv: Ross Hill 97 / Lot 0066 / Address: 104 Starbridge Court / Job: 70953-0266  
Subsequent: Angela M Moore / Date Printed: 02/17/2013

COMMISSION REBATE CERTIFICATION

Seller: D.R. Horton, Inc.  
  
Buyer(s): Paul Zitek and Natalia Zitek  
Contract Date: 02/17/2013  
Property Address: 104 Starbridge Court BASLEY, SC 29642  
  
Real Estate Agency: Keller Williams Realty Western Upstate  
Real Estate Agent: Candace Jordan  
Agency Address: 3332 Hwy 153 PO Box 8159 Greenville, SC 29604

This Commission Rebate Certification ("Certification") is being provided pursuant to the Purchase Agreement / Contract of Sale / Earnest Money Contract ("Contract") by and between Seller and Buyer(s), for the purchase and sale of the above-referenced Property.

1. Pursuant to the Contract, the Real Estate Agent/Broker ("Agent/Broker") will be paid a real estate sales commission ("Commission") of 6.7% as described in the Contract upon the closing and funding of the Property. For the purposes of this Certification, the term Commission is intended to include all commissions, incentives and bonuses to be received by Broker in connection with the Contract or from any prior transactions with the Buyer(s).

2. With regard to the Commission, Agent/Broker hereby acknowledges and certifies that they (check applicable box):

WILL NOT rebate\* to the Buyer(s) part or all of the Commission.

Broker acknowledges and agrees that no rebate of any portion of this commission will be made directly to, or indirectly on behalf of, the Buyer or any other interested and/or related party, or used to pay Buyer costs associated with purchase and sale of the above-referenced Property.

WILL rebate\* to the Buyer(s) part or all of the Broker Commission.

Broker acknowledges and agrees to execute a "Commission Rebate Addendum" to the Contract to disclose the terms of such rebate in order to create transparency with regard to how such rebate applies to the purchase and sale of the above-referenced Property.

\* The term "rebate" is intended to include any incentive related to the purchase and sale of the above-referenced Property, including but not limited to: a cash rebate, credit rebate of closing costs, buy-out of a lease or related borrower financial obligation, purchase of appliances or related merchandise, prizes and/or trips.

3. Agent/Broker recognizes that Seller is relying on this Certification as verification of whether or not any rebate of Commission is to take place. A rebate occurring outside of the closing of the purchase and sale of the above-referenced Property does not preclude the Agent/Broker from acknowledging that such a rebate will occur.

4. In the event that a change of circumstance arises where Agent/Broker decides at a later date to rebate to Buyer(s), Agent/Broker agrees to execute a "Commission Rebate Addendum" to the Contract to disclose the terms of such rebate in order to create transparency with regard to how such rebate applies to the purchase and sale of the above-referenced Property and to deliver the Commission Rebate Addendum (executed by Agent/Broker and Buyer(s)) to Seller.

AGENT OR BROKER  
Candace Jordan Candace Jordan Date: 2/2/13

Seller: Veramare 2/2/13

**NOTICE OF SELLER'S BUSINESS AFFILIATIONS**

**TO:** Paul Zitek and Natalie Zitek **PROPERTY:** 104 Sturbridge Court EASLEY, SC 29642  
 [Homebuyer(s)]

**FROM:** **D.R. HORTON, INC.**  
 1 Bronson Drive  
 Simpsonville, SC 29680  
 [Seller]

**DATE:** 02/17/2013

This is to give you notice that the above referenced seller has a business relationship with:

**DHI MORTGAGE COMPANY, LTD.**  
 101 Sturbridge Court  
 Easley, SC 29642

**D.R. HORTON INSURANCE AGENCY, INC.**  
 301 Commerce St Suite 500  
 Fort Worth, TX 76102

The nature of this business relationship is that these companies are corporate affiliates, each being 100% wholly owned by, or by a subsidiary of, the same parent corporation. Because of this relationship, this referral may provide seller a financial or other benefit.

Set forth below is the estimated charge or range of charges by each company for settlement services listed. You are **NOT** required to use these companies as a condition of your purchase of the property from seller or as a condition of your application for, or settlement of, a mortgage loan on the property in connection with your purchase. **THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.**

DHI MORTGAGE COMPANY, LTD.	
Service	Charge or Range
Loan Origination Charge:	1% of Loan Amount plus \$595.00
	An additional 1% of the Loan Amount may apply for certain Affordable Housing Loan Programs

Mortgage fees may vary depending upon whether the loan is originated or brokered by DHI Mortgage Company, Ltd.

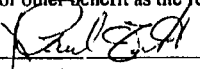
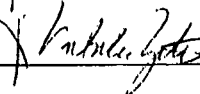
**Note:** If you apply with DHI Mortgage Company, Ltd., a Good Faith Estimate of all settlement charges will be provided to you by DHI Mortgage Company, Ltd. at or within three business days after loan application.

You may be entitled to additional builder discounts/credits paid by the seller to purchase multiple settlement services as set forth in the Builder's Incentive and Concessions Addendum to your purchase contract.

D. R. HORTON INSURANCE AGENCY, INC.
D.R. HORTON INSURANCE AGENCY, INC. is a licensed insurance agent that offers policies of property insurance as agent for one or more insurance companies qualified to transact insurance business in the state of South Carolina. You will be provided a separate proposal or quote of the terms and conditions of any policy of insurance offered by D.R. HORTON INSURANCE AGENCY, INC. in which you express an interest. For comparison purposes, the cost for a hazard insurance policy for a home valued at \$211,000 with commonly selected coverage items and deductibles would range between: \$200 and \$1,923 per annum. The specific premium depends on various factors, including but not limited to, the value of the home, the location of the home, deductibles selected, and the amount of coverage selected. The quote will set out the estimated premium and other charges, or range of charges, by D.R. HORTON INSURANCE AGENCY, INC. for its insurance products or services.

**ACKNOWLEDGMENT:**

I/we have read this disclosure form and understand that seller is referring me/us to purchase the above-described settlement services from **DHI MORTGAGE COMPANY, LTD.**, and **D.R. HORTON INSURANCE AGENCY, INC.**, and may receive a financial or other-benefit as the result of this referral.

	<u>2-17-13</u>	_____
	Homebuyer	Homebuyer
	<u>2-17-13</u>	_____
	Homebuyer	Homebuyer

*Handwritten initials*



**Change Order Number 1**

**ADDENDUM TO CONTRACT BETWEEN**  
 Paul Zlak and Natalie Zlak, Buyer  
 And  
 DR Horton Incorporated, Seller

Date: 03/14/2013  
 Change Order Type: DEC  
 Change Order Status: Open  
 Change Order Status Date: 03/14/2013  
 Change Order Approved By:  
 Change Order Created By: Karrie Hillis  
 Change Order Created Date: 03/14/2013  
 Change Order Notes:

Community: Rose Hill 90' Section/Phase: .  
 Plan/Elevation/Series: WSLY / A-70863  
 Plan/Elevation Name: WESTERLY  
 Lot #: 0296 Block: -  
 Lot Address: 104 Starbridge Court  
 EASLEY, SC 29642  
 Lot Swing: R

**Added Options:**

Option Code	Description	Package	Unit	Unit Price	Qty	Extended Amt
JCBU0047	Java Glaze	36" HIGH VANITY CABINETS IN MA STER BATH-ALL OTHER LEVELS	F	\$210.00	1	\$210.00
JSTR0001		BOXED STAIRS W/STAINED STEPS W /PAINTED RISER	F	\$1,925.00	1	\$1,925.00

**Deleted Options:**

Option Code	Description	Package	Unit	Unit Price	Qty	Extended Amt
JCBU0046		36" HIGH VANITY CABINETS IN MA STER BATH-SINCLAIR	F	\$0.00	1	Standard

**Change Order Price Summary:**

<b>Total Amount of Option Changes</b>		<b>\$2,135.00</b>
<b>Old Sales Price</b>		<b>\$266,144.00</b>
<b>New Sales Price</b>		<b>\$290,279.00</b>

**APPRAISED VALUE (Applicable to VA and PHA Loans Only).** It is expressly agreed that notwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise, unless the purchaser has been given, in accordance with HUD/FHA or VA requirements, a written statement by the Federal Housing Commissioner, Department of Veterans Affairs, or a Direct Endorsement lender setting forth the appraised value of the property of not less than \$290,279.00. The purchaser shall have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development or the VA, as applicable, will insure. HUD/VA, as applicable, does not warrant the value or condition of the property. The purchaser should satisfy himself/herself that the price and condition of the property are acceptable.

*SM*

Initial PE Date 3-14-13  
 Initial NS Date 3-14-13



Change Order Number 1

ADDENDUM TO CONTRACT BETWEEN  
Paul Zitek and Natalie Zitek, Buyer  
And  
DR Horton Incorporated, Seller

Date: 03/14/2013  
Change Order Type: DEC  
Change Order Status: Open  
Change Order Status Date: 03/14/2013  
Change Order Approved By:  
Change Order Created By: Karris Hills  
Change Order Created Date: 03/14/2013  
Change Order Notes:

Community: Rose Hill 90' Section/Phase:  
Plan/Elevation/Series: WSLY / A-70953  
Plan/Elevation Name: WESTERLY  
Lot #: 0266 Block: -  
Lot Address: 104 Sturbridge Court  
EASLEY, SC 29642  
Lot Swing: R

Paul Zitek 3-14-13  
Paul Zitek Date

Karris Hills  
Sales Representative Date

Natalie Zitek 3-14-13  
Natalie Zitek Date

Swamian 3/19/13  
Seller Date

Initials \_\_\_\_\_ Date \_\_\_\_\_  
Initials \_\_\_\_\_ Date \_\_\_\_\_

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-1942
	)	
Natalie Zitek, individually, and on behalf of all others similarly situated,	)	
	)	
Plaintiff,	)	<b>PLAINTIFF’S MEMORANDUM</b>
	)	<b>SUPPORTING HER MOTION FOR</b>
v.	)	<b>CLASS CERTIFICATION</b>
	)	
D.R. Horton, Inc.; Jane Doe #1-10; and, John Doe #1-50,	)	
	)	
Defendants.	)	

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Plaintiff submits this Memorandum Supporting her Motion for Class Certification (“Class Motion”),<sup>1</sup> and respectfully states as follows:

**SUMMARY OF ARGUMENT**

This Court should grant Zitek’s Class Motion because all five Rule 23 class prerequisites are met here. The proposed class is adequately represented and consists of more than 234 homeowners whose homes, built and sold by Horton, contain similar defects and damages that require similar (and costly) repairs.

The ultimate question shared by all putative class members is whether Horton’s standard construction practices caused these common defects and damages which include leaky windows and patio doors; insufficiently supported brick that is cracking along walls; loosely embedded stone that is separating away from walls; and, insufficiently supported slab foundations that are

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<sup>1</sup> There are three motions pending in this case: (1) Plaintiff’s Motion for Class Certification originally filed March 30, 2020, refiled October 20, 2020; (2) Horton’s Motion to Compel Arbitration originally filed May 27, 2020, refiled October 19, 2020; and, (3) Horton’s Motion to Stay Discovery filed November 13, 2020.

cracking in many places. (Compl., para. 27); (Whitlock Aff., paras. 23-32); (Zitek Aff., paras. 4, 7).<sup>2</sup>

As such, this case is perfectly suited for class treatment and South Carolina's policy favoring class actions supports certification.<sup>3</sup>

## **DISCUSSION**

### **A. Rosehill Background and Common Facts**

Rose Hill is an upstate subdivision that contains 234 single-family homes built by Horton. Horton purchased most of the Rose Hill lots in approximately 2012. Over the next five years, Horton developed out the neighborhood by, among other things, constructing and selling 234 homes. (Compl., paras. 1, 7); (Whitlock Aff., paras. 17-18); *see also* (Sample C.O.s, Ex. A); (Rose Hill Layout, Ex. B). Horton sold its last home in June 2017. (Kruglewicz Aff., para. 8).

The construction of all 234 homes is very similar. All were built by Horton who used most of the same materials and subcontractors that were hired to perform "similar, if not identical, scopes of work". (Whitlock Aff., para. 31); (Kruglewicz Aff., para. 18); *see also* (Sample Permits, Ex. C) (showing that Horton's MEP subcontractors were substantially the same); (Sample Horton Brochures, Ex. D) (Horton brochures showing that the homes were constructed with the same hardwood floors, subfloors, roof shingles, radiant barrier roof sheathing, and HVAC systems).

All 234 homes: (1) are wood-framed; (2) are supported by slab-on-grade foundations; (3) contain the same type of windows; (4) are clad with siding and masonry veneer; and, (5) have

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<sup>2</sup> A copy of the Affidavits referenced herein are already on file with the Court. Dr. Rhett Whitlock ("Whitlock" or "Dr. Whitlock") is a highly experienced professional engineer who evaluated the defects.

<sup>3</sup> Plaintiff notes that, in certifying the class, this Court should adjust the class definition as stated in her Complaint to remove all references to "Defendants" and replace them with "D.R. Horton". The class definition as stated in Plaintiff's proposed Class Notice makes this slight adjustment.

experienced the same weather conditions over the years having been constructed within a few square miles of each other. (Whitlock Aff., para. 20).

**B. Common Defects, Damages, and Building Code Violations**

Not surprisingly, the commonalities in the construction of these homes resulted in many of the same defects. (Whitlock Aff., paras. 31-32); (Whitlock Reply Aff., paras. 4-8); (Zitek Aff., paras 7, 9). Plaintiffs' expert, Dr. Whitlock, inspected 76 of these homes and documented common defects and damages that exist in all 76. (Whitlock Supp. Aff., paras. 2-4).<sup>4</sup>

Most of these common defects and damages are found in the homes' exterior envelope. (Whitlock Reply Aff., paras. 4-8). In other words, all homes have the same, singular problem – an exterior envelope that is defective because it contains, e.g., windows and patio doors with insufficient water resistance and masonry veneer that is improperly flashed, poorly weeped, and inadequately supported. *Id.* In fact, a life safety letter has been issued by Dr. Whitlock regarding this dangerous condition. (Life Safety Letter, Ex. E). All homes also have similar damages commonly caused by their defective exterior envelopes such as water intrusion, wood framing and trim deterioration, compromised claddings, and stained finishes. (Whitlock Supp. Aff., Exs. B-E).

Further, many of these defects violate similar provisions in the building codes applicable to Rose Hill.<sup>5</sup> For example, the stone masonry does not comply with the code-prescribed 4" clearance above raw earth and 2" clearance above paved areas. *See, e.g.*, (Whitlock Supp. Aff., Ex. F). The wall ties used to anchor the brick masonry do not comply with code-prescribed dimensions (i.e., they are not wide enough) and do not satisfy the codes' spacing, fastening, and

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<sup>4</sup> This 76-home inspection sample included at least one home from all 16 streets in the neighborhood. (Whitlock Supp. Aff., para. 2).

<sup>5</sup> The applicable building codes are the 2006, 2012, and 2015 International Residential Code for One and Two-Family Dwellings (IRC 2006, 2012 or 2015). There is little difference in these codes as they relate to the defects documented here. (Whitlock Aff., para. 18).

corrosive resistant requirements. The brick masonry also does not satisfy the codes' flashing, weep, and water resistance requirements because, among other things, flashings do not extend fully; weeps are missing, improperly spaced, and/or clogged; and, air cavities are frequently filled with mortar. *See, e.g.*, (Whitlock Supp. Aff., Ex. G).

Dr. Whitlock has concluded that all Rose Hill homes have these same defective conditions based, in part, on the common pattern of problems he observed at 1/3<sup>rd</sup> of these homes and the fact that all homes were all designed and constructed by Horton. (Whitlock Aff., para. 31); (Whitlock Supp. Aff., paras. 2-3).

### **C. Common Repairs**

Dr. Whitlock has also concluded that all homes will require essentially the same repair, and he developed a single damage model that can calculate the cost to repair the defects shared by all homes. (Whitlock Aff., paras. 33-35). These repair costs are comprehensive, unit costs such that the cost to replace a window is estimated at a single amount (inclusive of all materials and labor) that applies to all windows in all homes. (Whitlock Aff., para 34). This allows for defects such as the leaky windows common to all homes to be commonly priced from home to home. *Id.*

### **D. Pertinent Procedural History**<sup>6</sup>

Zitek's Complaint was filed on September 25, 2019 and it asserts the following claims against Horton: negligence/gross negligence, breach of implied warranties, and unfair trade practices.<sup>7</sup> (Compl., pp. 11-14). Zitek's Complaint was served on January 8, 2020 amongst initial negotiations involving class compliance with the Right to Cure Act. These negotiations ceased on February 28, 2020 when Horton filed a Motion to Stay for compliance with this Act. Zitek

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<sup>6</sup> Plaintiff's Memo Opposing Horton's Arbitration Motion outlines the full procedural history.

<sup>7</sup> The Unfair Trade Practices Claim is brought by the homeowners individually.

responded with her March 30, 2020 Motion for Class Certification seeking certification fully on the merits or conditionally for purposes of class compliance with the Act. This Court heard these Motions on May 29, 2020 and took both under advisement. The Court also encouraged the parties to reach an agreement on, among other things, class member compliance with the Act.

Between May and July 2020, the parties negotiated an agreement that was finalized on July 2, 2020 and approved by this Court on July 20, 2020. Under this plan, Horton had the opportunity to inspect and cure 50 or so homes half of which were represented by Plaintiffs' Counsel (Lucey Clients) and half of which were not (Non-Clients). In the meantime, both parties would withdraw their respective Motions.

Horton ultimately inspected and offered to cure 47 homes – 25 Lucey Clients which were randomly selected and 22 Non-Clients which were selected by Horton – who responded to a notice sent based upon a list approved by Horton. This process concluded on October 18, 2020. The next day, Horton filed its Arbitration Motion; and, on October 20, 2020, Zitek filed her Class Certification Motion.

### **IMPORTANT LEGAL POINTS**

Rule 23 of the South Carolina Rules of Civil Procedure provides that a class should be certified where:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the class, and (5) . . .the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRPC.

Three fundamental principles are pertinent to the Court's analysis of these five requirements. First, the Court must accept the plaintiff's substantive allegations as true. Second,

the Court may not to reach the merits of the class claims. *King v. American General Finance, Inc.*, 386 S.C. 82, 88, 687 S.E.2d 321, 324 (2009) (South Carolina courts “may not look to the merits when determining whether to certify a class.”); 1 *Newberg on Class Actions* §7:4 (5<sup>th</sup> Ed. 2016) (“[T]he language of Rule 23 does not require an evidentiary hearing, and other courts view it as the exception, not the rule.”). Third, there is a presumption favoring class certification such that the Court should rule in favor of class treatment even in doubtful cases. *Salmonsens v. CGD*, 377 S.C. 442, 455, 661 S.E.2d 81, 88 (2008) (recognizing South Carolina favors class actions and that South Carolina’s Rule 23 “endorses a more expansive view of class action availability than its federal counterpart.”).<sup>8</sup> For these reasons, a Plaintiff’s allegations of class facts, especially when coupled with supporting Affidavits, usually satisfy Rule 23’s requirements.

## **ARGUMENTS**

### **A. This Court Should Certify this Class and Approve Zitek’s Proposed Class Plan**

#### **1. The Court Should Certify This Class Because Rule 23 Requirements Are Satisfied**

##### *a. Joinder of All Class Members is Impractical*

Rule 23(a)(1), SCRCF, requires the class to be so numerous that joinder of all members is impracticable. Impracticable does not mean impossible. *Newberg on Class Actions* § 3:11. In fact, the difficulty inherent in joining as few as 40 class members should raise a presumption that

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<sup>8</sup> See also *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) (“The class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.”); *Littlefield v. S.C. Forestry Comm’n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) “Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, [SCRCF] intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), [FCRP]. By omitting the additional requirements, Rule 23, SCRCF, endorses a more expansive view of class action availability than its federal counterpart.”). Note that recent Supreme Court decisions like *Grazia* and *Salmonsens* continue to cite to *Littlefield*, which is dated December 20, 1999.

joinder is impracticable, and the plaintiff whose class is that large or larger should meet Rule 23(a)(1)'s "numerosity" element. *Id.* at § 3:12 ("[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.").

Here, there are 234 Horton-built homes whose owners are members of the proposed class. Tax records indicate that several of these homes are owned by multiple owners, and therefore, the proposed class consists of more than 234 class members. (Mixson Aff., paras. 4-5). The large size of the proposed class, alone, suggests that a class action is the better avenue to efficiently litigate the claims of these homeowners. *Newberg on Class Actions* § 3:12.

Many of these homeowners do not have the ability to bring their own claim because of a lack of time, expertise, or financial resources required to satisfy the costs of litigation. Ignoring the typical costs associated with pursuing claims of this size, the cost of proper and thorough engineering investigation, alone, cannot be sustained by a single or even several claims. As commentators have noted: "If the persons are unable to sue, then joinder may be deemed impractical because permissive joinder presupposes a 'group of economically powerful parties who are obviously able and willing to take care of their own interests.'" *Newberg on Class Actions* §3:11 *citing* Charles Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. Indus. & Com. L. Rev. 527, 531 *citing* Marvin Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 Antitrust L.J. 295, 298 (1966).

Even if each of these homeowners had the funds to proceed individually, this Court would be overrun with claims. The class action device solves both problems because it saves the resources of both this Court and the parties by permitting common issues to be litigated in an economical fashion.

*b. Common Questions of Fact and Law Exist*

Rule 23(a)(2) requires a showing of the existence of “questions of law or fact common to the class.” In practical terms, this means the Plaintiff must show the existence of common, legal, or factual issues which bind the proposed class together. *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200. Not every issue must be common to all class members; and, even a single common issue will suffice. As explained by our Court of Appeals in *McGann v. Mungo*:

It is important to note that the subsection does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status.

There is no qualitative or quantitative test in the Rule. Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.

The amended complaint alleges that “[t]he rights of the individual [p]laintiffs and the . . . class involve common questions of law and fact.” Among these questions are whether the developers complied with minimum standards for subdivision development, whether Coldstream’s streets are defective and substandard, whether the drainage systems in Coldstream are adequate, and whether the developers failed to repair the streets and drainage systems within Coldstream. **Obviously, the allegations of the amended complaint satisfy the pleading requirements of Rule 23(a)(2),** which we also apply retrospectively, as to a community of interest among the members of the alleged class in the questions of law and fact involved.

287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) *quoting* H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* at 194 (2d ed. 1985) (emphasis added).

Here, like *McGann*, Zitek’s Complaint alleges that “questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class”. (Compl., para. 37). In construction defect cases, the “ultimate question” typically shared by all class members “is whether the defendants standard construction practices violated building codes and industry standards and damaged class members”. *Napier, et al v. Adiz, et al*, Case No. 2016-CP-02-263 (S.C. Com. Pl.) (Judge Bucker Jan. 12, 2018 Order Granting Class Certification, p. 12) (“Napier Order”) (Aiken County) (Ex. F); *see also* *Marcum, et al v. Adiz, et al*, Case No. 2012-CP-02-3191 (S.C. Com. Pl.) (Judge Early Apr. 21, 2014 Order

Granting Class Certification, pp. 10-11) (“Marcum Order”) (Aiken County) (Ex. G) (noting same). Zitek alleges that Horton violated building codes, deviated from industry standards, and damaged all putative class members. (Compl, paras. 29-31).

Based on the foregoing points, this Court need look no further than Zitek’s allegations to determine that there are common questions of law and fact here. However, if it does, the common nature of the claims at issue is further supported by the following:

- Records show that all 234 Rose Hill were built by Horton; and, that Horton used substantially the same materials and MEP subcontractors. (Exs. C, D). Horton also admits that all its subcontractors, MEP or otherwise, were hired to perform nearly identical scopes of work (Kruglewicz Aff., para. 18);
- Dr. Whitlock opined that all 234 homes contain many of the same components and have experienced the same weather conditions (Whitlock Aff., para. 20);
- Dr. Whitlock opined as to the as-built conditions, defects, building code violations, and damages common to these homes (Whitlock Aff., para. 20, 23-24, 27-32); (Whitlock Reply Aff., paras. 4-8); (Whitlock Supp. Aff., para. 3);
- Dr. Whitlock provided exemplar photos of six common, consistent conditions that he documented throughout these homes (Whitlock Supp. Aff., Exs. B-G); and,
- Dr. Whitlock opined as to the common repairs needed for these homes (Whitlock Aff., paras. 33-35).

This Court simply does not need to have 234 or so identical trials about each individual home in a neighborhood when all homes share common construction, common construction problems, and common repairs for these problems. These facts, plus Zitek’s allegations, satisfy Rule 23’s commonality requirement.

*c. Plaintiff’s Claims are Typical of the Class Claims*

Rule 23(a)(3) requires that the claims of the class representative be “typical of the claims of the class.” Typical does not mean identical. Rather, the threshold for establishing typicality is low and the test is “whether the class representatives’ claims share the same essential

characteristics as the claims of the class.” *Newberg on Class Actions* § 3:29 (“The test for typicality is not demanding and focuses on the similarity between the named plaintiffs’ legal and remedial theories and the theories of those whom they purport to represent. . . . However, the plaintiffs’ claims need not be identical to those of the class; typicality will be satisfied so long as the named representatives’ claims share the same essential characteristics as the claims of the class at large.”).

Here, Zitek’s claims share the same characteristics as the claims of the class. All claims arise out of a common pattern of alleged wrongdoing by Horton, and the same legal theories are asserted on behalf of all class members. Zitek has also presented facts that further support these points.<sup>9</sup> Accordingly, the typicality requirement has been satisfied.

*d. Plaintiff Zitek and Class Counsel Will Fairly and Adequately Protect the Class*

Rule 23(a)(4) requires that the class representative “will fairly and adequately protect the interest of the class”. To adequately represent the class, the class representative (1) should not have any significant antagonistic or conflicting interests to unnamed class members;<sup>10</sup> and, (2) should

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<sup>9</sup> See, e.g., (Kruglewicz Aff., para. 8) (Horton conceding that all homes were built by Horton); (Whitlock Aff., para. 20) (opining that all homes have typical components); (Whitlock Aff., paras. 27, 31) (opining that defects and damages observed are typical and consistent); (Whitlock Supp. Aff. Exs. B-E) (photos showing common window, masonry, and patio door damage); (Whitlock Aff., para. 25) (opining that several defects are violations of similar building codes); (Whitlock Aff., para. 34) (opining that all-inclusive unit cost for the repair of common defects are typical and consistent); (Ex. C) (permits showing that MEP subcontractors used during construction were typical); (Ex. D) (brochures showing that materials used during construction were typical).

<sup>10</sup> “The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class.” *Waller v. Seabrook Island Property Owners Ass’n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) (citations omitted). In *Waller*, a homeowner’s association assessed individual property owners for beach renourishment. The amounts assessed were different depending on property location - beachfront owners were assessed \$2,000; beachview owners were assessed \$200; and, other owners were assessed \$100. *Waller*, an “other owner”, paid his assessment under protest because he believed that beachfront owners should be the only ones to pay. He filed a class action lawsuit; however, his motion for

vigorously prosecute the interests of the class through qualified counsel. *Newberg on Class Actions* § 3:50.

Both prongs of the “adequacy” test are met here. First, Zitek voluntarily accepted her role as class representative and there is nothing to suggest that she has competing interests. (Zitek Aff., paras. 10-13). No material conflict exists between Zitek (an owner of a Horton-built Rose Hill home) and the class members she seeks to represent (also owners of Horton-built Rose Hill Homes). No claim asserted by Zitek is averse to the claims and interests of the proposed class. Rather, Zitek and the proposed class share the common interest of establishing that the Horton violated its duties and should be held liable for the defects and damages existing in these homes.

Second, Zitek retained the Lucey Law Firm to prosecute her and the proposed class’ claims. (Zitek Aff., paras. 10-13). The Lucey Law Firm is highly experienced in construction and class action litigation. (Lucey Aff., paras. 1-16). The firm is reputed to have three of the four largest negotiated, residential construction recoveries in South Carolina, and the largest construction verdicts; and, the firm’s principal, Mr. Lucey, has qualified as class counsel in many cases. *Id.* Both Zitek and the Lucey Law Firm are committed to the vigorous prosecution of these claims. Accordingly, the Court can be satisfied that Zitek and the Lucey Law Firm will fairly and adequately protect the interests of the class.

*e. The Amount in Controversy Exceeds \$100 for Each Class Member*

Rule 23(a)(5) requires that the amount in controversy must exceed one hundred dollars for each member of the class. Where the amount claimed by is greater than \$100, this requirement is satisfied. In this case, there is no doubt that each proposed class member has a claim exceeding

---

class certification was denied because his interest was adverse and antagonistic of the beachfront property owners. This is not the case here.

\$100 because Dr. Whitlock has opined that the cost to repair each of their homes is more than this amount. (Whitlock Aff., p. 5, n. 1).

Having established that all Rule 23 requirements have been met here, this Court should certify this class.

## **2. The Court Should Approve Zitek's Proposed Notice Plan**

In certifying the class, this Court should adopt Zitek's proposed Notice Plan. Under this plan, the class members will receive a Notice<sup>11</sup> setting forth a more detailed version of the following outline:

- 1) There is a class that has been certified;
- 2) You are in this class (i.e., if you own a home in Rose Hill built by Horton, you are a member of the class and class membership may affect your rights);
- 3) If you do not wish to participate in the class process, you may opt out of the class (approved form provided);
- 4) The class representative will consider their duties to protect your interests as a class member in inspections and in the consideration of offers; and,
- 5) The entire process is subject to the Court's approval if and as necessary.

This plan is consistent with South Carolina law, the demands of due process, and this Court's obligation to "impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf th[is] action is brought. . ." Rule 23(d)(2), SCRCF.

## **CONCLUSION**

In sum, this Court should certify the proposed class or a class or subsequent purchasers, and in certifying, should:

1. Find that Rule 23's requirements have been met;
2. Designate Zitek as Class Representative and the Lucey Law Firm as Class Counsel; and,
3. Approve Zitek's Notice Plan; and,
4. Consider and approve related matters necessary for the efficient and prompt adjudication of this case.

---

<sup>11</sup> Zitek's proposed Notice Plan was separately filed with the Court.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

/s/ Dabny Lynn

---

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Dabny Lynn, Esq.  
Sohayla R. Townes, Esq.  
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Mount Pleasant, SC 29465-0806  
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[stownes@lucey-law.com](mailto:stownes@lucey-law.com)  
*Attorneys for Plaintiff*

November 23, 2020  
Mount Pleasant, South Carolina

# EXHIBIT A



Anderson County  
Making News.  
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# ANDERSON COUNTY BUILDING & CODES

2015206

## CERTIFICATE OF OCCUPANCY

Date Issued: 4/14/2015

Building Permit No. 201409313

School District: 1

Acreage or Lot No: 75

TMS No: 213-12-01-084

Property Address: 302 AMESBURY LN

EASLEY

SC 29642 0000

Commercial

Residential

Other

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0

Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
- (X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:

D R HORTON INC

503 WANDO PARK BLVD SUITE 200

MT PLEASANT

SC 29464

(Building Official Signature)

JAMES WHITAKER, (B.S.)

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained.



Anderson County  
Making News.  
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# ANDERSON COUNTY BUILDING & CODES

20130406

## CERTIFICATE OF OCCUPANCY

Date Issued: 9/24/2013 Building Permit No. 201305071

School District: 1 Acreage or Lot No: 35

TMS No: 213-12-01-035

Property Address: 118 BERWICK CT  
EASLEY SC 29642 0000

Commercial \_\_\_\_\_ Residential  Other \_\_\_\_\_

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
- (X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:  
D R HORTON INC  
503 WANDO PARK BLVD SUITE 200  
MT PLEASANT SC 29464

(Building Official Signature) JAMES WHITTAKER, CBO

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,

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ANDERSON COUNTY BUILDING & CODES

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2016503

CERTIFICATE OF OCCUPANCY

Date Issued: 7/15/2016 Building Permit No. 201503716

School District: 1 Acreage or Lot No: 240

TMS No: 213-12-01-084

Property Address: 200 BUXTON CT
EASLEY SC 29642 0000

Commercial Residential X Other

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
(X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:
D R HORTON INC
503 WANDO PARK BLVD SUITE 200
MT PLEASANT SC 29464

(Building Official Signature) [Handwritten Signature]

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,

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ANDERSON COUNTY BUILDING & CODES

Making News. Making Progress.

20130162

CERTIFICATE OF OCCUPANCY

Date Issued: 4/30/2013 Building Permit No. 201203395

School District: 1 Acreage or Lot No: 6

TMS No: 213-12-01-006

Property Address: 1 CHATHAM CT
EASLEY SC 29642 0000

Commercial Residential X Other

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
(X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to: D R HORTON INC
503 WANDO PARK BLVD SUITE 200
MT PLEASANT SC 29464

(Building Official Signature) JAMES WHITTAKER, BSO

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,



# ANDERSON COUNTY BUILDING & CODES

Making News.  
Making Progress.

2015188

## CERTIFICATE OF OCCUPANCY

Date Issued: 4/08/2015 Building Permit No. 201407472

School District: 1 Acreage or Lot No: 53

TMS No: 213-12-01-084

Property Address: 502 CARDIFF CT  
 EASLEY SC 29642 0000

Commercial \_\_\_\_\_ Residential  Other \_\_\_\_\_

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
- (X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:  
 D R HORTON INC  
 503 WANDO PARK BLVD SUITE 200  
 MT PLEASANT SC 29664

(Building Official Signature) James L. LACTONER, (BO)

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,



ANDERSON COUNTY BUILDING & CODES

Making News. Making Progress.

2016069

CERTIFICATE OF OCCUPANCY

Date Issued: 1/29/2016 Building Permit No. 201503200

School District: 1 Acreage or Lot No: 219

TMS No: 213-12-01-084

Property Address: 107 DARTFORD COURT
EASLEY SC 29642 0000

Commercial Residential X Other

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
(X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to: D R HORTON INC
503 WANDO PARK BLVD SUITE 200
MT PLEASANT SC 29464

(Building Official Signature) [Handwritten Signature]

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained.

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# ANDERSON COUNTY BUILDING & CODES

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20130312

## CERTIFICATE OF OCCUPANCY

Date Issued: 8/21/2013 Building Permit No. 201201784

School District: 1 Acreage or Lot No: 145

TMS No: 213-12-01-095

Property Address: 28 DUXBURY LN  
EASLEY SC 29642 0000

Commercial \_\_\_\_\_ Residential X Other \_\_\_\_\_

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.5 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
- (X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:  
D R HORTON INC  
503 WANDO PARK BLVD SUITE 200  
MT PLEASANT SC 29464

(Building Official Signature) JAMES WHITTAKER, CBO

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,

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ANDERSON COUNTY BUILDING & CODES

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20130030

CERTIFICATE OF OCCUPANCY

Date Issued: 1/24/2013 Building Permit No. 201203133

School District: 1 Acreage or Lot No: 163

TMS No: 213-12-01-113

Property Address: 1 HARWICK CT
EASLEY SC 29642 0000

Commercial Residential X Other

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
(X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to: D R HORTON INC
503 WANDO PARK BLVD SUITE 200
MT PLEASANT SC 29464

(Building Official Signature) James W. Hittaker, CEO

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,

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# ANDERSON COUNTY BUILDING & CODES

2017194

## CERTIFICATE OF OCCUPANCY

Date Issued: 3/15/2017 Building Permit No. 201605514

School District: 1 Acreage or Lot No: 76

TMS No: 213-12-01-217

Property Address: 141 HAVERHILL LN  
EASLEY SC 29642 0000

Commercial \_\_\_\_\_ Residential X Other \_\_\_\_\_

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
- (X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:  
 % D R HORTON INC  
 503 WANDO PARK BLVD SUITE 200  
 FT PLEASANT SC 29464

(Building Official Signature) 

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,



ANDERSON COUNTY BUILDING & CODES

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20140301

CERTIFICATE OF OCCUPANCY

Date Issued: 6/24/2014 Building Permit No. 201406645
School District: 1 Acreage or Lot No: 254
TMS No: 213-12-01-070
Property Address: 6 KETTERING CT
EASLEY SC 29642 0000
Commercial Residential X Other
Proposed Use: PRIVATE RESIDENCE - LEGAL
Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
(X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:
% D R HORTON INC
503 WANDO PARK BLVD SUITE 200
MT PLEASANT SC 29464

(Building Official Signature) James W. Hittaker, CBO

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,



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# ANDERSON COUNTY BUILDING & CODES

2016349

## CERTIFICATE OF OCCUPANCY

Date Issued: 5/18/2016

Building Permit No. 201503834

School District: 1

Acreage or Lot No: 116

TMS No: 213-12-01-084

Property Address: 201 MARSHFIELD CT  
EASLEY SC 29642 0000

Commercial \_\_\_\_\_ Residential X Other \_\_\_\_\_

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 1.5 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
- (X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:  
% D R HORTON INC  
503 WANDO PARK BLVD SUITE 200  
MT PLEASANT SC 29464

(Building Official Signature) *[Signature]*

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained.

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# ANDERSON COUNTY BUILDING & CODES

2016369

## CERTIFICATE OF OCCUPANCY

Date Issued: 5/25/2016 Building Permit No. 201503837

School District: 1 Acreage or Lot No: 112

TMS No: 213-12-01-084

Property Address: 306 READING CT  
 EASLEY SC 29642 0000

Commercial \_\_\_\_\_ Residential X Other \_\_\_\_\_

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
- (X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:  
 D R HORTON INC  
 503 WANDO PARK BLVD SUITE 200  
 MT PLEASANT SC 29464

(Building Official Signature) *[Signature]*

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,

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ANDERSON COUNTY BUILDING & CODES

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2015240

CERTIFICATE OF OCCUPANCY

Date Issued: 4/27/2015 Building Permit No. 201409263

School District: 1 Acreage or Lot No: 64

TMS No: 213-12-01-145

Property Address: 404 ROWLEY CT  
 EASLEY SC 29642 2109

Commercial \_\_\_\_\_ Residential  X  Other \_\_\_\_\_

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories:  2.0  Number of Units:  000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
- (X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:  
 † D R HORTON INC  
 503 WANDO PARK BLVD SUITE 200  
 MT PLEASANT SC 29464

(Building Official Signature)  [Signature] CBO

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,

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# ANDERSON COUNTY BUILDING & CODES

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20130260

## CERTIFICATE OF OCCUPANCY

Date Issued: 7/17/2013 Building Permit No. 201304508

School District: 1 Acreage or Lot No: 266

TMS No: 213-12-01-058

Property Address: 104 STURBRIDGE CT  
EASLEY SC 29642 0000

Commercial \_\_\_\_\_ Residential X Other \_\_\_\_\_

Proposed Use: PRIVATE RESIDENCE - LEGAL

Number of Stories: 2.0 Number of Units: 000

- (X) This certifies that the building located at the property address above complies with all applicable codes and ordinances.
- (X) This certificate is issued pursuant to the requirements of section 12-37-670 of the Code of Laws of South Carolina and complies with applicable local ordinances.

This certificate issued to:  
D R HORTON INC  
503 WANDO PARK BLVD SUITE 200  
MT PLEASANT SC 29464

(Building Official Signature)

*James Wattaker, CSO*

Any change to the type of Occupancy, or part of premises thereof, will render this certificate void and a new certificate must be obtained,

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# EXHIBIT B

D.R. Horton Homes = Yellow



**D.R. HORTON**  
*America's Builder*

- The Glens
- The Estates
- The Enclaves



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# EXHIBIT C

PHONE: #280-4758

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201305071

DATE: 5/24/2013

PHONE: 30+

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 118 BERWICK CT  
NR-SINGLE FAMILY DWELLING

LOT NO. 35

TMS # 02131201035 00000  
TAX DIST: 100  
NUMBER OF STORIES 2.0  
\* = RENEWED

ELECTRICAL:

FEE: \$60.00

PLUMBING:

NUMBER OF FIXTURES 16.00

FULL BATHS 3

HALF BATHS 1

FEE: \$60.00

MECHANICAL:

UNIT TYPE HOT AIR

FUEL GAS TYPE

AIR OTHER

FEE: \$40.00

FOUNDATION ONLY: YES  NO

FEE: .00

HEATED UNHEATED

BUILDING: EXT VINYL SQ FT 3,958 SQ FT 478

FEE: \$496.40

OTHER CHARGES:

FEE:

CHECK NO: CARD AMT: \$656.40

TOTAL PERMIT FEE: \$656.40  
TOTAL AMOUNT DUE: \$656.40

TAKE I-85 TO HWY 153 TO 3 G RD, TURN RIGHT INTO S/D

DIRECTIONS:

COMMENTS:

COMPLIANCE 201300571 AUTHORIZATION ON FILE  
EASLEY COMBINED UTILITIES ON FILE

E-911 118 BERWICK CT EASLEY SC 29642

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC

PHONE:

PLUMBING CONTRACTOR: DAVID ANDREW NORRIS

PHONE:

MECHANICAL CONTRACTOR: LONG HEATING & AIR

PHONE:

BUILDING CONTRACTOR: D R HORTON INC

PHONE:

TOTAL VALUATION \$ 288,600.00

BUILDING SIZE: 4,436

ISSUED BY: TEDOWDY

I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regarding building construction  
(3) I am the owner or authorized to act as the owner's agent for the herein described work:

Date: 5-24-13 SIGNATURE

Printed Name: Will Westmoreland

By Owner or Authorized Agent

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

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PHONE: # 280-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

RP  
PERMIT  
NUMBER  
201409313

DATE: 12/11/2014

PHONE:

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 302 AMESBURY LN LOT NO. 75 TMS # 02131201084 00000  
NR-SINGLE FAMILY DWELLING TAX DIST: 100  
NUMBER OF STORIES 2.0  
\* = RENEWED

<b>ELECTRICAL:</b>				<b>FEE:</b>	\$60.00
<b>PLUMBING:</b>	NUMBER OF FIXTURES 14.00	FULL BATHS 3	HALF BATHS	<b>FEE:</b>	\$55.00
<b>MECHANICAL:</b>	UNIT TYPE HOT AIR	FUEL GAS TYPE	AIR OTHER	<b>FEE:</b>	\$60.00
<b>FOUNDATION ONLY:</b> YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>				<b>FEE:</b>	.00
		HEATED SQ FT 3,019	UNHEATED SQ FT 410	<b>FEE:</b>	\$392.40
<b>BUILDING: EXT OTHER</b>				<b>FEE:</b>	
<b>OTHER CHARGES:</b>				<b>FEE:</b>	

CHECK NO: CARD AMT: \$567.40  
TOTAL PERMIT FEE: \$567.40  
TOTAL AMOUNT DUE: \$567.40

DIRECTIONS: TAKE HWY 81N, LEFT ON MT AIRY CHURCH RD, TURN RIGHT INTO ROSEHILL S/D

COMMENTS: COMPLIANCE 201401311 AUTHORIZATION ON FILE  
BASLEY COMBINED UTILITIES SEWER  
3019 SQ FT HOUSE W/ 410 SQ FT ATT GARAGE  
E-911 302 AMESBURY LN BASLEY SC 29642

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE:  
PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE:  
MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE:  
BUILDING CONTRACTOR: D R HORTON INC PHONE:  
TOTAL VALUATION \$ 223,840.00 BUILDING SIZE: 3,429

ISSUED BY: TEDOWDY  
I hereby certify: (1) I have read the application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regulating building construction  
(3) I am the owner or authorized to act as the owner's agent for the herein described work.  
Date: 12-11-14 SIGNATURE [Signature]  
Printed Name: Will Westmoreland By Owner or Authorized Agent

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

PHONE: # 260-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201503716

DATE: 12/02/2015

PHONE: \_\_\_\_\_

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 200 BUXTON CT LOT NO. 240 TMS # 02131201084 00000  
NR-SINGLE FAMILY DWELLING TAX DIST: 100  
NUMBER OF STORIES 2.0  
\* = RENEWED

ELECTRICAL:				FEE:	\$60.00
PLUMBING:	NUMBER OF FIXTURES 14.00	FULL BATHS 3	HALF BATHS	FEE:	\$55.00
MECHANICAL:	UNIT HOT AIR TYPE	FUEL GAS TYPE	AIR OTHER	FEE:	\$70.00
FOUNDATION ONLY:	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>			FEE:	.00
BUILDING: EXT OTHER	HEATED SQ FT 3,019	UNHEATED SQ FT 410			FEE: \$392.40
OTHER CHARGES:				FEE:	

CHECK NO: CARD AMT: \$577.40

TOTAL PERMIT FEE:	\$577.40
TOTAL AMOUNT DUE:	\$577.40

DIRECTIONS: TAKE HWY 81N, TURN LEFT ON MT AIRY CHURCH RD, TURN RIGHT ON THREE BRIDGES RD, TURN RIGHT INTO ROSEHILL S/D

COMMENTS: COMPLIANCE 201501335 \*AUTHORIZATION ON FILE\*  
EASLEY COMBINED UTILITIES SEWER TMS 2131201084 P/O  
2 STORY HOUSE W/ BONUS ROOM + ATT GARAGE

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE: \_\_\_\_\_

PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE: \_\_\_\_\_

MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE: \_\_\_\_\_

BUILDING CONTRACTOR: D R HORTON INC PHONE: \_\_\_\_\_

TOTAL VALUATION \$ 223,630.00 BUILDING SIZE: 3,429

ISSUED BY: TEDOWDY

Date: 12-3-15 SIGNATURE: [Signature]

Printed Name: [Name] By: [Signature] or Authorized Agent

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

PHONE: # 260-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201203395

DATE: 11/30/2012

PHONE:

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 1 CHATHAM CT LOT NO. 6 TMS # 02131201006 0000  
NR-SINGLE FAMILY DWELLING TAX DIST: 100  
NUMBER OF STORIES 2.0  
\* = RENEWED

<b>ELECTRICAL:</b>				<b>FEE:</b>	\$60.00
<b>PLUMBING:</b>	NUMBER OF FIXTURES 11.00	FULL BATHS 3	HALF BATHS	<b>FEE:</b>	\$47.50
<b>MECHANICAL:</b>	UNIT TYPE HOT AIR	FUEL GAS TYPE	AIR OTHER	<b>FEE:</b>	\$40.00
<b>FOUNDATION ONLY:</b> YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>				<b>FEE:</b>	.00
HEATED UNHEATED					
<b>BUILDING:</b>	EXT VINYL	SQ FT 3,019	SQ FT 400	<b>FEE:</b>	\$397.20
<b>OTHER CHARGES:</b>				<b>FEE:</b>	

CHECK NO: CABD AMT: \$544.70  
TOTAL PERMIT FEE: \$544.70  
TOTAL AMOUNT DUE: \$544.70

HWY 153 TO 3 BRIDGES RD TO ROSE HILL PLANTATION

DIRECTIONS:

COMMENTS: COMPLIANCE 201201046 EASLEY COMBINED UTILITIES LETTER ON  
FILE / AUTHORIZATION ON FILE  
3019SF HOUSE + 400SF ATT GAR  
E-911: 1 CHATHAM CT EASLEY SC 29642

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE:  
PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE:  
MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE:  
BUILDING CONTRACTOR: D R HORTON INC PHONE:  
TOTAL VALUATION \$ 226,150.00 BUILDING SIZE: 3,419

ISSUED BY: RSANANDAN  
I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regulating building construction  
(3) I am the owner or authorized to act as the owner's agent for the herein described work:  
Date: 11/30/12 SIGNATURE [Signature]  
Printed Name: [Name] By Owner or Authorized Agent

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

ELECTRONICALLY FILED - 2012 Nov 23 3:22 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

PHONE: # 280-4168

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201407472

DATE: 4/29/2014

PHONE:

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 502 CARDIFF CT LOT NO. 53 TMS # 02131201084 00000  
NR-SINGLE FAMILY DWELLING TAX DIST: 100  
NUMBER OF STORIES 2.0  
\* = RENEWED

<b>ELECTRICAL:</b>				<b>FEE:</b>	\$60.00
<b>PLUMBING:</b>	NUMBER OF FIXTURES 13.00	FULL BATHS 2	HALF BATHS 1	<b>FEE:</b>	\$52.00
<b>MECHANICAL:</b>	UNIT TYPE HOT AIR	FUEL GAS TYPE	AIR OTHER	<b>FEE:</b>	\$40.00
<b>FOUNDATION ONLY:</b> YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>				<b>FEE:</b>	.00
HEATED				UNHEATED	
<b>BUILDING: EXT VINYL</b>	SQ FT 2,476	SQ FT 402		<b>FEE:</b>	\$331.00
<b>OTHER CHARGES:</b>				<b>FEE:</b>	

CHECK NO: CARD AMT: \$484.10  
TOTAL PERMIT FEE: \$484.10  
TOTAL AMOUNT DUE: \$484.10

DIRECTIONS: 81N LFT ON MT AIRY CHURCH RD, RIGHT ON THREE BRIDGES RD, S/D ON RIGHT

COMMENTS: COMPLIANCE 201400437 BASLEY COMBINED UTILITIES  
AUTHORIZATION ON FILE FROM CONTRACTOR USING P/O TMS #  
2476SF HOUSE W/ 402SF ATT GARAGE  
E-911: 502 CARDIFF CT BASLEY SC 29642

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE:  
PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE:  
MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE:  
BUILDING CONTRACTOR: D R HORTON INC PHONE:  
TOTAL VALUATION \$185,380.00 BUILDING SIZE: 2,878

ISSUED BY: RSARANDAN Date: 4-30-14 SIGNATURE  
Printed Name: Will Westmoreland

I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regulating building construction  
(3) I am the owner or authorized to act as the owner's agent for the herein described work.

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.  
This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

ELECTRONICALLY FILED - 020 Nov 23:25 PM ANDERSON - COMMON PLEAS - CASE#2019CP0401942

PHONE: # 260-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201503200

DATE: 9/22/2015

PHONE: \_\_\_\_\_

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 107 DARTFORD COURT LOT NO. 219 TMS # 02131201084 0000  
NR-SINGLE FAMILY DWELLING TAX DIST: 100  
NUMBER OF STORIES 2.0  
\* = RENEWED

<b>ELECTRICAL:</b>			<b>FEE:</b>	\$60.00
<b>PLUMBING:</b>	NUMBER OF FIXTURES 14.00	FULL BATHS 3	HALF BATHS	<b>FEE:</b> \$55.00
<b>MECHANICAL:</b>	UNIT TYPE HOT AIR	FUEL GAS TYPE	AIR OTHER	<b>FEE:</b> \$70.00
<b>FOUNDATION ONLY:</b> YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>			<b>FEE:</b>	.00
			HEATED	UNHEATED
<b>BUILDING:</b> EXT OTHER	SQ FT 3,165	SQ FT 400	<b>FEE:</b>	\$408.40
<b>OTHER CHARGES:</b>			<b>FEE:</b>	

CHECK NO: CARD AMT: \$593.40  
**TOTAL PERMIT FEE:** \$593.40  
**TOTAL AMOUNT DUE:** \$593.40

**DIRECTIONS:** TAKE HWY 81 NORTH, LEFT ONTO MT AIRY CHURCH RD, RIGHT  
ONTO THREE BRIDGES RD, SD ON RIGHT

**COMMENTS:** COMPLIANCE 201501092 SEWER LETTER FROM COMBINED UTILITIES  
3565 SF 2 STORY HOUSE WITH GARAGE  
AUTHORIZATION ON FILE  
PART OF 2131201004

**ELECTRICAL CONTRACTOR:** L+M ELECTRIC INC **PHONE:** \_\_\_\_\_  
**PLUMBING CONTRACTOR:** DAVID ANDREW NORRIS **PHONE:** \_\_\_\_\_  
**MECHANICAL CONTRACTOR:** LONG HEATING & AIR **PHONE:** \_\_\_\_\_  
**BUILDING CONTRACTOR:** D R HORTON INC **PHONE:** \_\_\_\_\_  
**TOTAL VALUATION** \$ 233,550.00 **BUILDING SIZE:** 3,565

**ISSUED BY:** JLWH/TM [Signature] **Date:** 9-22-15 **SIGNATURE** [Signature]  
**Printed Name:** Bill Westwood  
I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regulating building construction.  
(3) I am the owner or authorized to act as the owner's agent for the herein described work.  
By Owner or Authorized Agent

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

ELECTRONICALLY FILED - 2020 Nov 23 2:22 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

PHONE: # 260-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201201784

DATE: 4/10/2012

PHONE:

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 28 DUXBURY LN LOT NO. 145 TMS # 02131201095 0000  
NR-SINGLE FAMILY DWELLING TAX DIST: 100  
NUMBER OF STORIES 2.5  
\* = RENEWED

<b>ELECTRICAL:</b>			<b>FEE:</b>	\$60.00	
<b>PLUMBING:</b>	NUMBER OF FIXTURES 14.00	FULL BATHS 2	HALF BATHS 1	<b>FEE:</b>	\$55.00
<b>MECHANICAL:</b>	UNIT TYPE HOT AIR	FUEL GAS TYPE	AIR OTHER	<b>FEE:</b>	\$40.00
<b>FOUNDATION ONLY:</b> YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>			<b>FEE:</b>	.00	
<b>BUILDING:</b> EXT VINYL HEATED SQ FT 2,437 UNHEATED SQ FT 465			<b>FEE:</b>	\$330.00	
<b>OTHER CHARGES:</b>			<b>FEE:</b>		

CHECK NO: CARD AMT: \$40.00  
**TOTAL PERMIT FEE: \$485.00**  
**TOTAL AMOUNT DUE: \$40.00**

**DIRECTIONS:** TAKE HWY 153, TURN 1ST RIGHT PAST HI INTERSECTION, RIGHT ONTO THREE BRIDGES RD, TURN LEFT INTO ROSE HILL S/D

**COMMENTS:** COMPLIANCE 201200368 AUTHORIZATION ON FILE  
EASLEY COMBINED UTILITIES SEWER LETTER ON FILE  
E-911 28 DUXBURY LN EASLEY SC 29642

**ELECTRICAL CONTRACTOR:** L+M ELECTRIC INC PHONE: \_\_\_\_\_  
**PLUMBING CONTRACTOR:** DAVID ANDREW NORRIS PHONE: \_\_\_\_\_  
**MECHANICAL CONTRACTOR:** LONG HEATING & AIR PHONE: \_\_\_\_\_  
**BUILDING CONTRACTOR:** D R HORTON INC PHONE: \_\_\_\_\_  
**TOTAL VALUATION** \$ 184,540.00 **BUILDING SIZE:** 2,902

**ISSUED BY:** TEPONDY [Signature] I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regulating building construction  
(3) I am the owner or authorized to act as the owner's agent for the herein described work.  
Date: 4-3-13 **SIGNATURE** [Signature]  
Printed Name: Will Westmoreland By Owner or Authorized Agent

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* REISSUE-MODIFICATION \*\*

ELECTRONICALLY FILED - 2012 Nov 23 2:22 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

PHONE: # 260-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

RP  
PERMIT  
NUMBER  
201304508

DATE: 3/15/2013

PHONE

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 104 STURBRIDGE CT  
NR-SINGLE FAMILY DWELLING

LOT NO. 266

TMS # 02131201058 0000  
TAX DIST: 100  
NUMBER OF STORIES 2.0  
\* = RENEWED

<b>ELECTRICAL:</b>				<b>FEE:</b>	\$60.00
<b>PLUMBING:</b>	NUMBER OF FIXTURES 16.00	FULL BATHS 4	HALF BATHS 1	<b>FEE:</b>	\$60.00
<b>MECHANICAL:</b>	UNIT TYPE HOT AIR	FUEL GAS TYPE	AIR OTHER	<b>FEE:</b>	\$40.00
<b>FOUNDATION ONLY:</b>	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	HEATED UNHEATED		<b>FEE:</b>	.00
<b>BUILDING: EXT VINYL</b>	SQ FT 3,905	SQ FT 625	<b>FEE:</b>		\$502.80
<b>OTHER CHARGES:</b>				<b>FEE:</b>	

CHECK NO: CARD AMT: \$662.80

TOTAL PERMIT FEE: \$662.80  
TOTAL AMOUNT DUE: \$662.80

DIRECTIONS: TAKE I-85 TO 153, CROSS 81, TURN LEFT ON THREE BRIDGES, S/D ON LEFT

COMMENTS: COMPLIANCE 201300298 \*AUTHORIZATION ON FILE\*  
EASLEY COMBINED UTILITIES ON FILE

E-911 104 STURBRIDGE CT EASLEY SC 29642

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE: 74

PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE:

MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE:

BUILDING CONTRACTOR: D R HORTON INC PHONE:

TOTAL VALUATION \$ 292,100.00 BUILDING SIZE: 4,530

ISSUED BY: TEDOWDY

I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and rules regulating building construction  
(3) I am the owner or authorized agent for the owner's agent for the herein described work:

Date: 3-18-13 SIGNATURE [Signature] BY Owner or Authorized Agent

Printed Name: Will Westmont

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

ELECTRONICALLY FILED 2020 NOV 20 12:22 PM ANDERSON - COMMON PLEAS - CASE#2019CP0401942

PHONE: # 260-4158

ANDERSON COUNTY
BUILDING & CODES DEPARTMENT
PERMIT

PERMIT NUMBER
201203133

DATE: 10/18/2012

PHONE:

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM
WORK AS DESCRIBED AT:

LOCATION: 1 HARWICK CT LOT NO. 163 TMS # 02131201113 0000
NR-SINGLE FAMILY DWELLING TAX DIST: 100
NUMBER OF STORIES 2.0
\* = RENEWED

Table with columns for ELECTRICAL, PLUMBING, MECHANICAL, FOUNDATION ONLY, BUILDING, and OTHER CHARGES, including fees and specifications.

CHECK NO: CARD AMT: \$438.40 TOTAL PERMIT FEE: \$438.40
TOTAL AMOUNT DUE: \$438.40

DIRECTIONS: TAKE HWY 153, TURN RIGHT ON 1ST RD PAST HWY 81 INTERSECTION
TURN RIGHT ON THREE BRIDGES RD, TURN LEFT INTO ROSE HILL S/D

COMMENTS: COMPLIANCE 201200952 \*AUTHORIZATION ON FILE\*
EASLEY COMBINED UTILITIES ON FILE
E-911 1 HARWICK CT EASLEY SC 29642

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE:
PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE:
MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE:
BUILDING CONTRACTOR: D R HORTON INC PHONE:
TOTAL VALUATION \$158,730.00 BUILDING SIZE: 2,515

ISSUED BY: TED OWDY Date: 10-18-12 SIGNATURE
Printed Name: Will Winstone/H...

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

ELECTRONICALLY FILED - 2012 Nov 23 2:22 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

PHONE: # 260-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

*Wes*

PERMIT  
NUMBER  
01605514

DATE: 6/07/2016

PHONE: \_\_\_\_\_

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 141 HAVERHILL LN LOT NO. 76 TMS # 02131201217 0000  
NR-SINGLE FAMILY DWELLING TAX DIST: 100  
Rosehill NUMBER OF STORIES 2.0  
= RENEWED

ELECTRICAL:			FEE:	\$60.00	
PLUMBING:	NUMBER OF FIXTURES <u>14.00</u>	FULL BATHS <u>3</u>	HALF BATHS	FEE:	\$55.00
MECHANICAL:	UNIT TYPE <u>HOT AIR</u>	FUEL GAS TYPE	AIR OTHER	FEE:	\$60.00
FOUNDATION ONLY: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>			FEE:	.00	
HEATED			UNHEATED		
BUILDING: EXT OTHER	SQ FT <u>2,433</u>	SQ FT <u>400</u>	FEE:	\$326.80	
OTHER CHARGES:			FEE:		

CHECK NO: CARD AMT: \$501.80 TOTAL PERMIT FEE: \$501.80  
TOTAL AMOUNT DUE: \$501.80

DIRECTIONS: TAKE 81N, LEFT ON MT AIRY CHURCH RD, RIGHT ON THREE BRIDGES  
TURN RIGHT INTO ROSEHILL S/D

COMMENTS: COMPLIANCE 201600782 AUTHORIZATION ON FILE  
EASLEY COMBINED UTILITIES SEWER  
2 STORY/ATTACHED GARAGE

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE: \_\_\_\_\_  
PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE: \_\_\_\_\_  
MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE: \_\_\_\_\_  
BUILDING CONTRACTOR: D R HORTON INC PHONE: \_\_\_\_\_  
TOTAL VALUATION \$ \$182,310.00 BUILDING SIZE: 2,833

ISSUED BY: TEDOWDY *[Signature]*  
I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regulating building construction  
(3) I am the owner or authorized to act as the owner's agent for the herein described work:  
Date: 6-8-16 SIGNATURE *[Signature]*  
By Owner or Authorized Agent  
Printed Name: William Howard

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

PHONE: # 260-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201406645

DATE: 1/10/2014

PHONE:

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 6 KETTERING CT LOT NO. 254 TMS # 02131201070 00000  
NR-SINGLE FAMILY DWELLING TAX DIST. 100  
NUMBER OF STORIES 2.0  
= RENEWED

ELECTRICAL:				FEE:	\$60.00
PLUMBING:	NUMBER OF FIXTURES 14.00	FULL BATHS 3	HALF BATHS	FEE:	\$55.00
MECHANICAL:	UNIT TYPE HOT AIR	FUEL GAS TYPE	AIR OTHER	FEE:	\$40.00
FOUNDATION ONLY:	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	HEATED	UNHEATED	FEE:	0
BUILDING:	EXT VINYL	SQ FT 3,019	SQ FT 410	FEE:	\$392.40
OTHER CHARGES:				FEE:	

CHECK NO: CARD AMT: \$547.40 TOTAL PERMIT FEE: \$547.40  
TOTAL AMOUNT DUE: \$547.40

DIRECTIONS: TAKE HWY 81N, LEFT ON MT AIRY, RIGHT ON THREE BRIDGES, TURN  
RIGHT INTO S/D

COMMENTS: COMPLIANCE 201400022 AUTHORIZATION ON FILE  
EASLEY COMBINED UTILITIES

E-911 6 KETTERING CT EASLEY SC 29642

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE:  
PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE:  
MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE:  
BUILDING CONTRACTOR: D R HORTON INC PHONE:  
TOTAL VALUATION \$ 223,630.00 BUILDING SIZE: 3,429

ISSUED BY: TEDOWDY Date: 1-10-14 SIGNATURE: [Signature]  
Printed Name: Will Westmoreland  
I hereby certify: (1) I have read this application and that all information contained herein is true and correct.  
(2) I agree to comply with all county ordinances and state laws regarding building construction.  
(3) I am the owner or authorized to act as the owner's agent for the herein described work.

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

PHONE: # 260-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201503834

DATE: 12/17/2015

PHONE \_\_\_\_\_

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 201 MARSHFIELD CT LOT NO. 116 TMS # 02131201084 0000  
NR-SINGLE FAMILY DWELLING TAX DIST: 100  
NUMBER OF STORIES 1.5  
\* = RENEWED

<b>ELECTRICAL:</b>			<b>FEE:</b>	\$60.00
<b>PLUMBING:</b>	NUMBER OF FIXTURES <u>11.00</u>	FULL BATHS <u>2</u>	HALF BATHS	<b>FEE:</b> \$47.50
<b>MECHANICAL:</b>	UNIT TYPE <u>HOT AIR</u>	FUEL GAS TYPE	AIR OTHER	<b>FEE:</b> \$60.00
<b>FOUNDATION ONLY:</b> YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>			<b>FEE:</b>	.00
HEATED			UNHEATED	
<b>BUILDING:</b> EXT OTHER	SQ FT <u>2,362</u>	SQ FT <u>452</u>	<b>FEE:</b>	\$320.40
<b>OTHER CHARGES:</b>			<b>FEE:</b>	

CHECK NO: CARD AMT: \$487.90 TOTAL PERMIT FEE: \$487.90  
TOTAL AMOUNT DUE: \$487.90

DIRECTIONS: 81N LEFT ON MT AIRY CHURCH RD, RIGHT ON 3 BRIDGES RD  
ROSEHILL ON RIGHT

COMMENTS: COMPLIANCE 201503834; EASLEY COMBINED UTILITES SEWER  
PT OF 213-12-01-084  
AUTHORIZATION ON FILE  
1 STORY; FINISHED BONUS ROOM WITH ATTACHED GARAGE

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE: \_\_\_\_\_  
PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE: \_\_\_\_\_  
MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE: \_\_\_\_\_  
BUILDING CONTRACTOR: D R HORTON INC PHONE: \_\_\_\_\_  
TOTAL VALUATION \$ \$178,900.00 BUILDING SIZE: 2,814

ISSUED BY: LJMOON  
I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regulating building construction  
(3) I am the owner or authorized to act as the owner's agent for the herein described work:  
Date: 12-17-15 SIGNATURE [Signature]  
Printed Name: [Signature] By Owner or Authorized Agent

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

ELECTRONICALLY FILED - 2020 Nov 23 12:22 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

PHONE: #280-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201503837

DATE: 12/17/2015

PHONE

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 306 READING CT LOT NO. 112 TMS # 02131201084 00000  
NR-SINGLE FAMILY DWELLING  
Base Hall  
TAX DIST: 100  
NUMBER OF STORIES 2.0  
\* = RENEWED

<b>ELECTRICAL:</b>			<b>FEE:</b>	\$60.00
<b>PLUMBING:</b>	NUMBER OF FIXTURES 14.00	FULL BATHS 3	HALF BATHS	<b>FEE:</b> \$55.00
<b>MECHANICAL:</b>	UNIT TYPE HOT AIR	FUEL GAS TYPE	AIR OTHER	<b>FEE:</b> \$70.00
<b>FOUNDATION ONLY:</b> YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>			<b>FEE:</b>	.00
HEATED			UNHEATED	
<b>BUILDING:</b> EXT OTHER	SQ FT 3,019	SQ FT 410	<b>FEE:</b>	\$392.40
<b>OTHER CHARGES:</b>			<b>FEE:</b>	

CHECK NO: CARD AMT: \$577.40  
TOTAL PERMIT FEE: \$577.40  
TOTAL AMOUNT DUE: \$577.40

DIRECTIONS: 81N LEFT ON MT AIRY CH RD, RIGHT ON 3 BRIDGES RD, ROSEHILL  
ON RIGHT

COMMENTS: COMPLIANCE 201501403; EASLEY COMBINED SEWER  
AUTHORIZATION ON FILE  
PART OF TMS 213-12-01-084  
2 STORY; FINISHED BONUS; ATTACHED GARAGE

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC PHONE:  
PLUMBING CONTRACTOR: DAVID ANDREW NORRIS PHONE:  
MECHANICAL CONTRACTOR: LONG HEATING & AIR PHONE:  
BUILDING CONTRACTOR: D R HORTON INC PHONE:  
TOTAL VALUATION \$ \$223,630.00 BUILDING SIZE: 3,429

ISSUED BY: LJM00N  
I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regulating building construction  
(3) I am the owner or authorized to act as the owner's agent for the herein described work.  
Date: 12-17-15 SIGNATURE  
Printed Name: Bill Westmoreland By Owner or Authorized Agent

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

ELECTRONICALLY FILED - 2020 Nov 28 2:22 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

PHONE: # 280-4158

ANDERSON COUNTY  
BUILDING & CODES DEPARTMENT  
PERMIT

PERMIT  
NUMBER  
201409263

DATE: 12/04/2014

PHONE: !

THE COUNTY BUILDING AND CODES DEPARTMENT GRANTS PERMISSION TO PERFORM  
WORK AS DESCRIBED AT:

LOCATION: 404 ROWLEY CT  
NR-SINGLE FAMILY DWELLING

LOT NO. 64

TMS # 02131201145 00000

TAX DIST: 100

NUMBER OF STORIES 2.0

\* = RENEWED

ELECTRICAL:

FEE: \$60.00

PLUMBING: NUMBER OF FIXTURES 14.00

FULL BATHS 3

HALF BATHS

FEE: \$55.00

MECHANICAL: UNIT TYPE HOT AIR

FUEL GAS TYPE

AIR OTHER

FEE: \$70.00

FOUNDATION ONLY: YES  NO

FEE: .00

BUILDING: EXT OTHER HEATED SQ FT 2,942

UNHEATED

SQ FT 442

FEE: \$386.00

OTHER CHARGES:

FEE:

CHECK NO: CARD AMT: \$571.00

TOTAL PERMIT FEE: \$571.00  
TOTAL AMOUNT DUE: \$571.00

81N LT ON MT AIRY CH RD, RT ON 3 BRIDGES RD, BOB DIV ON RT

DIRECTIONS:

COMMENTS: COMPLIANCE 201401295  
PART OF 213-12-01-145  
EABLEY COMBINED UTILITIES SEWER ON FILE

ELECTRICAL CONTRACTOR: L+M ELECTRIC INC

PHONE:

PLUMBING CONTRACTOR: DAVID ANDREW NORRIS

PHONE:

MECHANICAL CONTRACTOR: LONG HEATING & AIR

PHONE:

BUILDING CONTRACTOR: D R HORTON INC

PHONE:

TOTAL VALUATION \$ \$219,200.00

BUILDING SIZE: 3,384

ISSUED BY: LJMOON

I hereby certify: (1) I have read this application and that all information contained herein is true and correct  
(2) I agree to comply with all county ordinances and state laws regulating building construction  
(3) I am the owner or authorized to act as the owner's agent for the herein described work.

Date: 12-5-14

SIGNATURE [Signature]

By Owner or Authorized Agent

Printed Name: William Westmoreland

This permit is issued, subject to full compliance with all requirements of the Building Code and all pertinent laws and ordinances of the County of Anderson regulating the use and construction of structures. Otherwise the permit shall become void and the party liable to such penalties as may be provided for violation of said ordinances.

This permit shall expire per County Ordinance Sec. 10-112.

This permit shall be construed as permission to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of the Building Code and other pertinent laws and ordinances, nor shall the issuance of this permit prevent the building official from thereafter requiring correction of errors in plans or in construction, or of violations of the Building Code of the County of Anderson, South Carolina.

\*\* ORIGINAL \*\*

# EXHIBIT D



**The Glens**

**COMMUNITY**

- Community Amenity includes Swimming Pool, Cabana and Children's Playground
- Community sidewalks and streetlights for resident's enjoyment
- Community Homeowner's Association Covenants to protect your investment
- Strict design standards provide continuity within the community
- Professionally landscaped front entrance with architecturally designed entrance monument

**INTERIOR**

- Direct Vent Fireplace with Glass Doors, Gas Logs and Granite Surround
- Oak Plank Hardwood Flooring in the Foyer, Extended Foyer
- Wainscot and Chair Rail in Foyer, Extended Foyer, Dining Room
- One piece Crown in Dining, Owners Suite Tray Ceiling
- Designer 2 panel beaded smooth interior doors
- Energy efficient Kitchen appliances including: **GE**® Dishwasher, Electric Range and Built in Microwave over the range
- Exquisitely crafted **Aristokraft**® Flat Panel Birch Kitchen cabinets with crown molding
- Granite Kitchen countertop with under mount stainless steel sink
- **MOEN**® Designer Chrome Fixtures in all Baths
- Cultured Marble vanity tops in all Baths
- Dual bowls in Owner's Suite Bath (per plan)
- Flat Panel Birch Cabinets in all Baths (Cabinet finish matches Kitchen)
- Designer tub and separate shower in Owner's Suite Bath (per plan)
- Elongated toilets in all Baths
- Ceiling Fan with light kit installed in Family Room
- Pre-wired for phone in Kitchen, Owner's Suite and Family Room (per plan)
- Pre-wired for cable in Owner's Suite and Family Room (per plan)
- Smooth ceilings
- 9' ceilings (per plan)

**INTERIOR (cont')**

- Garage walls finished and painted
- Cased windows
- **Edge Gold**® Premium sub floor (Limited 50 year warranty)
- **Nibco**® Dura-Pex Plumbing

**EXTERIOR**

- Professionally landscaped yards fully sodded up to 30' from house back corners (pine islands and natural areas excluded)
- Fiberglass Roof Shingles with a 20 year Manufacturer's Warranty
- Radiant barrier roof sheathing
- Weather Proof Electrical Outlet at Front and Rear Entries
- Termite Monitoring System provided by **Pestban**® with one year of service included
- Full seamless Gutters and Down Spouts with Splash Blocks (Front and Rear)

**SAFETY AND ENERGY**

- Double Pane **Low-E** Vinyl Windows with double locks and tilt in sash for easy maintenance
- Electrical 220V Outlet for Dryer
- Single HVAC system with two independent zones with digital thermostats for maximum comfort and efficiency (per plan)

**WARRANTY AND QUALITY CONTROL**

- Covered by Nationally Recognized 2 - 10 year Extended Warranty Program with Residential Warranty Corporation for New Homes
- Homeowner Orientation
- Final inspection by Homeowner
- 1 year D.R. Horton exclusive in-house warranty with 11 month customer care review on request

**FOR MORE INFORMATION: (864) 644-8494**

D.R. Horton, Inc. is continuously improving our product and reserves the right to change floor plans, specifications, and prices. This brochure is for illustration purposes only and is not part of a legal contract. Information shown is believed to be accurate, but is not warranted and is subject to change without notice. ©Copyright D.R. Horton, Inc. 2011. Rev.3-18-14



X *sluc* 10-12-14

X *KLC* 10-12-14



**The Estates**

**COMMUNITY**

- ◆ Community Amenity includes Swimming Pool, Cabana and Children's Playground
- ◆ Community sidewalks and streetlights for resident's enjoyment
- ◆ Community Homeowner's Association Covenants to protect your investment
- ◆ Strict design standards provide continuity within the community
- ◆ Professionally landscaped front entrance with architecturally designed entrance monument

**INTERIOR**

- ◆ Direct Vent Fireplace with Glass Doors, Gas Logs and Granite Surround
- ◆ Oak Plank Hardwood Flooring in the Foyer, Extended Foyer, Kitchen and Breakfast Area
- ◆ Wainscoting and chair rail in the Foyer and Dining Room
- ◆ One piece crown moulding in the Living Room, Dining Room and Owner's Suite tray (per plan)
- ◆ Designer 2 panel beaded smooth interior doors
- ◆ Energy efficient Kitchen appliances including: **GE**® Dishwasher, Self Cleaning Electric Range and Built in Microwave over the Range
- ◆ Exquisitely crafted **Aristokraft**® Flat Panel Birch Kitchen cabinets with crown molding and decorator knobs
- ◆ Granite Kitchen countertop with under mount stainless steel sink
- ◆ **MOEN**® Designer Chrome Fixtures in all Baths
- ◆ Cultured Marble vanity tops in all Baths
- ◆ Dual bowls in Owner's Suite Bath (per plan)
- ◆ Flat Panel Birch Cabinets in all Baths (Cabinet finish matches Kitchen)
- ◆ Designer tub and separate shower in Owner's Suite Bath (per plan)
- ◆ Ceramic tiled floor in the Owner's Suite Bath
- ◆ Elongated toilets in all Baths
- ◆ Ceiling Fan with light kit installed in Family Room
- ◆ **Nibco**® Dura-Pex Plumbing

**INTERIOR (cont')**

- ◆ Pre-wired for phone in Kitchen, Owner's Suite and Family Room (per plan)
- ◆ Pre-wired for cable in Owner's Suite and Family Room (per plan)
- ◆ Smooth ceilings
- ◆ 9' ceilings (per plan)
- ◆ Garage walls finished and painted
- ◆ Cased windows
- ◆ **Edge Gold**® Premium sub floor (Limited 50 yr. warranty)

**EXTERIOR**

- ◆ Professionally landscaped yards fully sodded up to 30' from house back corners (pine islands and natural areas excluded)
- ◆ Fiberglass Roof Shingles with a 20 year Manufacturer's Warranty
- ◆ Radiant barrier roof sheathing
- ◆ Weather Proof Electrical Outlet at Front and Rear Entries
- ◆ Termite Monitoring System provided by **Pestban**® with one year of service included
- ◆ Full seamless Gutters and Down Spouts with Splash Blocks (Front and Rear)

**SAFETY AND ENERGY**

- ◆ Double Pane **Low-E** Vinyl Windows with double locks and tilt in sash for easy maintenance
- ◆ Electrical 220V Outlet for Dryer
- ◆ Single HVAC system with two independent zones with digital thermostats for maximum comfort and efficiency (per plan)

**WARRANTY AND QUALITY CONTROL**

- ◆ Covered by Nationally Recognized 2 - 10 year Extended Warranty Program with Residential Warranty Corporation for New Homes
- ◆ Homeowner Orientation
- ◆ Final inspection by Homeowner

# EXHIBIT E

March 20, 2020



Justin O'Toole Lucey, PA  
Attorneys At Law  
Post Office Box 806  
Mount Pleasant, South Carolina 29465

Attention: Dabny Lynn

Reference: Rose Hill, Easley, South Carolina  
WDP Project No. 19202

Myrtle Beach, SC

Manassas, VA

Charlottesville, VA

Blacksburg, VA

New York, NY

Dear Ms. Lynn:

As you are aware, I have been to the Rose Hill Community on three occasions to observe the conditions of the single-family residences throughout the neighborhood. Many common construction deficiencies exist throughout. However, I am immediately concerned about the conditions of the masonry (brick and/or stone) throughout the neighborhood.

I have seen areas of masonry that have cracked extensively as well as areas of masonry that have fallen from some homes. I have a concern that there is a significant chance that additional masonry could fall and potentially cause damage or personal injury if someone happens to be close by.

I recommend that each homeowner be made aware of this concern. I also recommend that homeowners: (1) monitor existing cracks/looseness in the masonry of their homes and (2) regularly look for new cracks/looseness that may develop in the masonry of their homes. Should they see worsening conditions or other issues of concern, they should contact your office.<sup>1</sup>

Sincerely,

**WDP & Associates Consulting Engineers, Inc.**

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



<sup>1</sup> Some homeowners do not have masonry, but they should exercise caution when visiting neighbors' homes that have masonry.

# EXHIBIT F

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )  
 )  
ROBIN NAPIER, individually and on behalf )  
of all others similarly situated, )  
 )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ADIZ, LLC, ATC DEVELOPMENT CORP., )  
ATC DEVELOPMENT, LLC, d/b/a ATC )  
DEVELOPMENT OF FLORIDA, ATC )  
APARTMENT MANAGEMENT, LLC )  
F/K/A ATC DEVELOPMENT CORP. OF )  
FLORIDA, ATC CONSTRUCTION, LLC, )  
HALLUM, LLC, TCA, LLC, JANE DOE 1- )  
10, HOBBS HEATING AND AIR )  
CONDITIONING, INC., A-1 HOBBS, INC., )  
EDWARD F. DINKINS D/B/A EDWARD )  
DINKINS PLUMBING, MADDOX )  
CONSTRUCTION, INC., MABUS )  
CONSTRUCTION COMPANY, INC., )  
BUILDERS SERVICES GROUP, INC. )  
D/B/A DAVIS INSULATION, INC., )  
ROBERT RENEW D/B/A RENEW SIDING, )  
BRUCE DOLFORD D/B/A B&D CEMENT )  
FINISHING, MA MAGDALENA CASIANO )  
BIBIVANO D/B/A MA ROOFING, AARON )  
RIDGDILL, FRANK JOHNSON, WILLIE )  
ROLLAND, KEITH NEWMAN D/B/A )  
NEWMAN COMPANY, RUSSELL )  
DOLFORD CONST, LLC, LNI ROOFING, )  
LNI PHILLIPS ROOFING, LLP D/B/A LNI )  
ROOFING, DENNIS LAGRONE, BEN )  
MCMANUS, MUNDY'S CONSTRUCTION, )  
INC. D/B/A MUNDY CONSTRUCTION, )  
COMPLETE RESIDENTIAL SIDING & )  
INSULATION, INC., MASTERS MIRRORS )  
& SHELVING, INC., CARL NEWMAN, )  
VERNON DAVIS D/B/A DAVIS )  
FLOORING, DAVIS FLOORING, LLC, )  
TONY DAVIS D/B/A DAVIS FLOORING, )  
SCOTT BALLARD D/B/A SCOTT )  
BALLARD PAINTING, SMB PAINTING, )  
INC., RONNIE MYERS D/B/A TCB PAINT )

IN THE COURT OF COMMON PLEAS  
FOR THE SECOND JUDICIAL  
CIRCUIT  
CASE NO. 2016-CP-02-0263

**ORDER GRANTING CLASS  
CERTIFICATION**

**CONTRACTORS, AND IBP ASSET II, LLC )  
D/B/A COMPLETE RESIDENTIAL )  
SIDING AND INSULATION, AND JOHN )  
DOE 25-50, )  
)  
)  
Defendants. )**

**THIS MATTER** came before the Court on Plaintiff’s Motion for Class Certification on November 27, 2017 in the Aiken County Courthouse. Justin O’Toole, esquire, was present for the Plaintiff Robin Napier. Robert Boineau, esquire, was present for the Defendants: Adiz LLC, Atc Apartment Management, Atc Construction, Atc Development Corp., Atc Development Corp. of Florida, Atc Development, Atc Development of Florida, Hallum, TCA LLC. Christy Elizabeth Mahon, esquire, was present for Defendants: Bibivano, Ma Magdalena Casiano, Ma Roofing, Mabus Brothers Construction Company. James Andrew Yoho, esquire, was present for Defendants B & D Cement Finishing and Bruce Dolford. Samuel Ross Shealy, esquire, was present for the Defendant IBP Asset II. Nosizi Ralephata, esquire, was present for Defendant Carl Newman.

Plaintiff Robin Napier is an owner of a residence located in the Spencer Drive Extension neighborhood in Aiken, South Carolina. Plaintiff alleges her residence and all other homes in the Spencer Drive Extension neighborhood (hereinafter “the Residences”) were developed, constructed, and/or sold by the General Contractor Defendants<sup>1</sup> and the Subcontractor Defendants. The homes in the Spencer Drive Extension neighborhood were built and sold between 2005 and 2009.

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<sup>1</sup> The “General Contractor Defendants” collectively consist of Defendants ADIZ, LLC; ATC Development Corp.; ATC Development, LLC, d/b/a ATC Development of Florida; ATC Apartment Management, LLC F/K/A ATC Development Corp. of Florida; ATC Construction, LLC; HALLUM, LLC; and TCA, LLC.

The General Contractor Defendants and Defendant Masters Mirrors & Shelving, Inc. submitted Memorandums in Opposition to Class Certification prior to the hearing on November 27, 2017. None of the other Defendants submitted an opposition brief.

### **BACKGROUND**

In 1996, the General Contractor Defendants began developing and constructing what would ultimately be hundreds of single-family attached homes across multiple single and two street/block neighborhoods in Aiken, South Carolina. The majority of these neighborhoods are located along Spencer Drive. The Spencer Drive Extension neighborhoods at issue here (New Haven Lane, Amity Lane, Bennington Lane, and Hillsborough Lane) were the last series of homes the General Contractor Defendants built along Spencer Drive. Building permits for these homes were issued between August 2005 and February 2008. Each neighborhood is essentially one (1) street, and the four (4) streets adjoin each other along the back end of Spencer Drive. These homes were completed between November 2005 and January 2009.

Plaintiff alleges that the construction of all the homes the General Contractor Defendants built off of Spencer Drive, behind the Aiken Mall, are almost identical. The homes were built using either identical or almost identical floorplans. All of these homes, including those in the Spencer Drive Extension neighborhoods, are approximately 1,100 to 1,240 sq. ft., 2-bedroom/2-bathroom units with vinyl siding, architectural shingles, single-hung aluminum windows, and slab-on-grade foundations. There are only three (3) types of units in the Spencer Drive Extension neighborhoods: 1) end units with carports; 2) end units without carports; and 3) interior units.<sup>2</sup> There are no custom homes in any of the neighborhoods. Further, there were no significant customizable options offered to buyers.

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<sup>2</sup> The majority of the Residences are triplexes, so the interior units do not have carports and have less exterior perimeter square footage.

Plaintiff alleges that the Spencer Drive Extension neighborhoods were not only constructed by the same principal Developer/General Contractor Defendants, but also constructed by many of the same Subcontractors that constructed the nearby subdivisions that were the subject of the following lawsuits, which the Honorable D. A. Early, III previously certified as class actions:

- a) Laubenstein, et al. v. Adiz, et al., 2010-CP-02-02873 (Aiken County, South Carolina);
- b) Martinez, et al. v. Adiz, et al., 2011-CP-02-00545 (Aiken County, South Carolina);
- c) Knight, et al. v. Adiz, et al., 2011-CP-02-02653 (Aiken County, South Carolina); and,
- d) Marcum, et al. v. Adiz, et al., 2012-CP-02-03191 (Aiken County, South Carolina).

Each of the foregoing lawsuits were certified as class action prior to settlement, subsequently litigated, and each eventually received final approval of later class settlements by the Court.

Based on engineering investigation and surveys, Plaintiff asserts that most of the same common, latent construction defects exist in the Spencer Drive Extension neighborhoods as those documented in the prior class action lawsuits. Plaintiff contends these common defects include improperly installed fasteners, windows, doors, roofing, siding, flashing, trim, HVAC duct insulation; missing kick-out flashing and building wrap; improper site work; cracking foundations; and various other building defects, which have resulted in repeated water intrusion, compromised foundations, and other damage.

Plaintiff alleges Defendants' violations of their legal duties to design, construct, and repair the Residences in a workmanlike manner, and free from latent defects, have resulted in the above-referenced building deficiencies, consequential damages, and partial loss of use and enjoyment. Defendants deny these allegations.

On February 8, 2008, Plaintiff Napier purchased her home on Bennington Lane. She (and Plaintiff's engineers) contend that most of the above-referenced defects have manifested within the interior and exterior areas of her unit and mirror the same latent construction deficiencies that Plaintiff's experts have documented in the buildings throughout the proposed class.

### **PROCEDURAL HISTORY**

As briefed by Plaintiffs and not contested by the General Contractor Defendants, the procedural history of this matter is as follows. On February 8, 2016, Plaintiff filed this lawsuit as a putative class action to recover damages owed to her and others similarly situated due to latent defects in the construction of their homes. The General Contractor Defendants filed a Notice of Removal to Federal Court on May 5, 2016, asserting federal jurisdiction based on the Class Action Fairness Act ("CAFA"). The District Court held CAFA jurisdiction did not exist and remanded the case to the Aiken County Court of Common Pleas on March 23, 2017.

Plaintiffs filed Amended Complaints on March 8, 2016, April 7, 2017, and July 28, 2017, asserting claims against additional subcontractors revealed through discovery. Plaintiffs' Third Amended Complaint alleges two (2) causes of action against all Defendants: Negligence/Gross Negligence and Breach of Warranty.

Plaintiff filed her Motion for Class Certification on September 18, 2017. Supporting Affidavits were filed contemporaneously with the Motion, including the Affidavits of forensic engineering experts Dr. Rhett Whitlock and Robert Sisroy, P.E. Both Dr. Whitlock and Engineer Sisroy document the common latent construction defects found in numerous homes in the proposed class through their extensive engineering investigations. An Affidavit of Class Counsel and an Affidavit of Lee Weiland were also filed with the Motion. The supporting Affidavit of

Plaintiff Napier was subsequently filed on October 11, 2017. Plaintiff filed a Memorandum in Support of her Motion on November 21, 2017.

The General Contractor Defendants and Defendant Masters Mirrors & Shelving, Inc. filed Memorandums in Opposition to Class Certification. However, at the hearing on this Motion, these Defendants withdrew their opposition to class certification. The General Contractor Defendants now consent to the certification of the class.

### **PROPOSED CLASS**

Plaintiff has requested that this Court certify the following class:

A class of all persons and entities that own structures located on New Haven Lane, Amity Lane, Bennington Lane, and Hillsborough Lane in Aiken, South Carolina, excluding the Defendants, their owners, members and employees; and, further excluding any homeowner who has already filed a construction defect lawsuit or who has previously completely released these Defendants.<sup>3</sup>

Plaintiff proposes an opt-out class be certified pursuant to Salmonsens v. CGD, Inc., 377 S.C. 442, 459-60, 661 S.E.2d 81, 91 (2008).

#### **I. GENERAL CLASS ACTION PRINCIPLES**

This action has been brought and may be maintained as a class action pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure. Under this rule, the proponent of the class must show:

(1) [T]he class is so numerous that joinder of all members is impracticable, (2) there are common questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interest of the class, and (5) ... the amount in controversy exceeds one hundred dollars for each member of the class.

On several occasions, the South Carolina Supreme Court has recognized and endorsed an expansive view and treatment of class actions. Grazia v. S.C. State Plastering, LLC, 390 S.C. 562,

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<sup>3</sup> Counsel is unaware of any other suits or releases, but simply includes this caveat to prevent any intra-class conflict.

576, 703 S.E.2d 197, 204 (S.C. 2010); Littlefield v. S.C. Forestry Comm’n, 337 S.C. 348, 523 S.E.2d 781 (S.C. 2000). “Since the adoption of Rule 23, SCRCF, this court has heard many cases that have used the class action procedure to allow adequate representatives to address issues which affect large groups of citizens in our state.” Littlefield, 337 S.C. at 355, 523 S.E.2d at 784 (citations omitted).

The United States Supreme Court has noted that “[c]lass actions serve an important function in our system of civil justice.” Gulf Oil Co. v. Bernard, 452 U.S. 89, 99, 101 S. Ct. 2193, 2199 (1981). The Court has also recognized that the class action procedure is necessary for private rights of action to be initiated. Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 1174 (1980), reh’g denied, 446 U.S. 947, 100 S. Ct. 2177 (1980). As stated in Deposit Guar. Nat’l Bank, class actions serve an important function in our system of civil justice, because they permit plaintiffs to “vindicate the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the costs.” Id at 338, 1174.

In moving for class certification, the Plaintiff bears the burden of proving compliance with the Rule 23, SCRCF, prerequisites. Gardner, et al. v. S.C. Dept. of Revenue, et al., 353 S.C. 1, 20, 577 S.E.2d 190 (S.C. 2003). In deciding whether to certify the class, the court must undertake a rigorous analysis in order to determine whether the plaintiff has met the requirements of each prerequisite. Id. at 21. If the facts as alleged by the plaintiffs do not materialize, the court has the ability to later decertify the class. Salmonsens v. CGD, Inc., 377 S.C. 442, 447, 661 S.E.2d 81, 85 (2008).

Having carefully considered the oral and written arguments of and having reviewed materials submitted by counsel for both parties, this Court makes the following determinations and

on the basis of those determinations and the applicable law concludes that the Plaintiff's cause of action be conditionally certified as a class action.

## **II. THIS ACTION MEETS THE RULE 23 PREREQUISITES FOR CLASS CERTIFICATION**

This Court finds that this action should be certified as a class action because all requirements of Rule 23(a) have been met. First, the class is so numerous and of such a nature that joinder of all members is impractical. Second, as documented by Plaintiff's engineers, there are questions of fact and law common to the class which predominate over any questions affecting only individual class members since the design, construction methods, and deficiencies are universal. Third, Plaintiff's claims are typical of the claims of the class, which all arise from the same operative facts and are based on the same legal theories. Fourth, Plaintiff will fairly and adequately protect the interests of the class and has retained counsel experienced in handling class claims and multi-unit defective construction claims. Finally, all claims made by members of the proposed class exceed the required amount of \$100.00. Further, a class action is the superior method for the fair and efficient adjudication of this controversy.

### **A. Joinder of All Members is Impracticable – Rule 23(a)(1)**

The class is sufficiently numerous and of such a nature that joinder of all members is impractical. A court must consider the number of members of the putative class together with other factors, including the size of the class members' claims. Middleton v. SunStar Acceptance Corp., 2000 WL 33385388 (S.C. Cir. Ct. 2000). Further the Court should consider the size of the class, the nature of the action, the location of class members, the expediency of joinder, and the practicality of multiple lawsuits. McGlothlin v. Connors, 142 F.R.D. 626, 632 (W.D. Va. 1992). It is not necessary for the class proponent to know the precise size of the class. *see Id.* Apart from class size, factors relevant to the joinder impracticability issues include judicial economy arising

from avoidance of a multiplicity of actions, geographic disbursements of class members, size of individual claims, financial resources of class members, and the ability of claimants to institute individual suits. 1 Conte & Newberg, supra, § 3.6, at 250-52; *see also* McGlothin v. Connors, 142 F.R.D. 626, 632 (W.D. Va. 1992).

### **1. The Proposed Class is Sufficiently Large**

In the case at hand, Plaintiff has asserted that there are eighty-six (86) townhomes on the four (4) streets involved in this lawsuit. Further, tax records suggest in excess of one hundred (100) class members, when co-owners are considered. Thus, the size of the putative class alone suggests that a class action is the better avenue to efficiently litigate the claims of the unit owners. The Court finds that the proposed class is so numerous that the joinder of all members is impracticable.

Likewise, the nature of this putative class is supported by the aforementioned factors. First, judicial economy is better served by certifying the class. One (1) representative suit would better serve judicial economy than trying eighty-six (86) individual suits involving the same Defendants, construction defects, causes of action, and the same or similar damage. Second, some of the Residences' owners do not live in Aiken County. See Ex. 4 to Pls.' Mot. Class Cert (Weiland Affidavit). Based on the allegations of Plaintiff involving eighty-six (86) individual suits, the Court is satisfied that joinder of individual class members is impracticable and would unduly and unnecessarily strain judicial resources.

### **2. Fluid Changing Membership of Putative Class**

Further, an alleged class that has a fluid, changing membership can be accommodated by the class action device. McGann v. Mungo, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (S.C. Ct. App.

1986).<sup>4</sup> This is especially true where the alleged class has constant defining characteristics. *Id.* The change in membership of a class caused by death or other factors may make a representative suit more suitable than individual actions. *see* James F. Flannagan, South Carolina Civil Procedure, 184 (3rd ed. 2010).

Here, the proposed class, consisting of residents of the Spencer Drive Extension neighborhoods, may have changing membership based on the sale and purchase of the improved real estate. In fact, the sale and purchase of some of the units in this subdivision has already occurred since this suit was filed. As such, the chance for change in membership gives all the more reason to certify a representative suit; and, like McGann, the construction defects caused by the Defendants within the houses are the constant defining characteristic within the class, rather than the individual owners.

### **3. Numerosity is Satisfied**

Consequently, this Court finds that the requirement of Rule 23(a) in this case is not only satisfied by the sheer number of putative class members, but also by additional factors such as potential change in ownership, the transient nature of many of the current owners, and because of lack of time or resources and the fluid, changing nature of class membership.

#### **B. There are Questions of Law and Fact Common to All the Potential Class Members - Rule 23(a)(2)**

Rule 23(a)(2) requires a showing of the existence of “questions of law or fact common to the class.” SCRCP 23(a)(2). In practical terms, this means the party must articulate the existence of significant common, legal, or factual issues, which bind the proposed class together. Gardner v. S.C. Dept. of Revenue, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) (internal quotations omitted);

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<sup>4</sup> Property owners’ amended complaint alleging that class consisted of residents and owners of improved residential properties in subdivision sufficiently defined class, even though class had fluid, changing membership at pleading stage.

*See also* Flannagan, *supra*, at 185. Not every issue must be common to all class members. Gardner, et al. v. S.C. Dept. of Revenue, et al., 353 S.C. 1, 21, 577 S.E.2d 200 (S.C. 2003), *citing* O'Connor v. Boeing North Amer., Inc., 184 F.R.D. 311, 329 (C.D. Cal 1998). Commonality is met where the class shares a determinative issue. Gardner, et al. v. S.C. Dept. of Revenue, et al., 353 S.C. 1, 21, 577 S.E.2d 200-01 (S.C. 2003) The South Carolina Court of Appeals discussed the issue of common questions of law or fact in the case of McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (S.C. Ct. App. 1986). The Court stated that:

It is important to note that the subsection does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status.

There is no qualitative or quantitative test in the Rule. Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.

Id. at 157-58.<sup>5</sup> Where a question involves standardized conduct of the defendant toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement is usually met. Id. at 154.

In the present case, the Court finds that common questions of law and fact predominate over individual concerns and are at the very heart of all claims, including but not limited to: whether the construction of the Residences is defective due to improperly performed site work; improperly installed windows, doors, roofs, and siding; and other conditions, such as omitted building materials, *e.g.*, flashings and house wrap; and, whether the putative class members have been damaged as a result of such defective conditions. Plaintiff's experts have both opined that the construction deficiencies observed and the required repairs are common to the homes throughout the Spencer Drive Extension neighborhoods, based on their inspections of numerous homes on

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<sup>5</sup> Quoting H. Lightsey & J. Flannagan, SOUTH CAROLINA CIVIL PROCEDURE at 198 (Second Ed. 1985).

each of the streets. (Ex. 2 to Pls.' Mot. Class Cert (Whitlock Aff.); Ex. 1 to Pls.' Mot. Class Cert (Sisroy Aff.)). At the very core is the ultimate issue shared by the class representative and all putative class members, which is whether the Defendants' standard construction practices violated building codes and industry standards and damaged class members.

Plaintiff provided examples of common, consistent conditions that Plaintiff's experts have documented throughout the Residences in the proposed class, including cracking in the concrete slabs and foundations exhibiting vertical deviations of 0.5 inches or more. (Ex. 2b to Pls.' Mot. Class Cert (Whitlock Report)). Another example of a common condition found throughout the Residences in the proposed class is the universal absence of kick-out flashing at the sloped roof terminations (Ex. 1b to Pls.' Mot. Class Cert at pp. 2-11 (Sisroy Report)). Plaintiff also alleges that the global deficiency in the complete lack of a weather barrier and associated flashings has permitted the extensive water damage observed and documented by Plaintiff's expert. (Ex. 1c to Pls.' Mot. Class Cert (Sisroy Scope of Repairs)).

The Plaintiff contends that the common nature of the claims is further evidenced by the fact that every house in the Spencer Drive Extension neighborhood allegedly was designed, constructed, and sold by the General Contractor Defendants in an identical manner. For example, Plaintiff offered testimony from the principal designee for the General Contractor Defendants that described using the same architectural plans without any design changes in the different neighborhoods. (Sherwood Belangia Dep. at p. 91 line 8 through p. 94 line 3, Jan. 21, 2011, Ex. C to Pls.' Memo in Support).

Based upon the foregoing and the other materials submitted by the Plaintiff, this Court finds there is a core common nucleus of agreed upon facts giving rise to the claims of the Plaintiff and putative class members.

C. **Claims of the Representative Plaintiff is Typical of the Claims of the Potential Class Members- Rule 23(a)(3).**

Rule 23(a)(3) requires that the claims of the class representative be “typical of the claims of the class.” SCRCP 23(a)(3). The typicality requirement of Rule 23(a)(3) mandates that a class representative be part of the class and possess the same interest and suffer the same injury as the class members. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982) (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)); see also Cent. Wesleyan Coll., 143 F.R.D. 628, 637 (D.S.C. 1992), aff’d, 6 F.3d 177 (4th Cir. 1993) (for the purposes of Rule 23(a), the representative party’s claims are “typical” if they arise from the same course of conduct that gives rise to the claims of the class members and if the claims of the claimants are based on the same legal theories); 1 Conte & Newberg, supra, § 3.13, at 317. Allegations that the plaintiffs’ action arose out of the defendant’s common course of conduct satisfy the typicality requirement. S.C. Nat’l Bank v. Stone, 139 F.R.D. 335, 329 (D.S.C. 1991).

As stated by Judge Sol Blatt, Jr.:

The typicality requirement does not require that the representatives have identical claims which other members of the class might present. The question of typicality focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs. The plaintiffs’ claims for damages stem from effects of the defendants’ activities on the plaintiffs’ property and their health, now, in the past and in the future. *Whether each potential member of the class has suffered the same degree of harm, or each and every type of harm, does not preclude a finding of typicality.*

Bates v. Tenco Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990) (emphasis added).

Commonality and typicality tend to merge in practice, because both serve as guideposts for determining whether a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Gen Tel. Co. of Sw., 457 U.S. at 158 n.13. The use of the word

“typical” suggests that the claims or defenses do not need to be coextensive, but rather similar to, or shared by, most of the members of the class. Flannagan, supra, at 186. The emphasis is on the core issue, rather than minor differences. Flannagan, supra, at 186. Further, in a class action involving construction defects, all that may be necessary to satisfy this requirement is that “the class representatives claimed damages arising from construction defects and loss of use.” see Pope, et al. v. Heritage Communities, Inc., et al., 395 S.C. 404, 420-422 (S.C. Ct. App. 2011).

In this case, Plaintiff’s allegations, causes of action, and facts are the same and/or similar to every proposed class member. The Class Representative is the owner of improved real estate within the four (4) subdivisions developed, constructed, and sold by the Defendants. Additionally, like the commonality requirement, the alleged fact pattern is the same with respect to all proposed class members, and the same legal theory is asserted on behalf of all. Specifically, because the construction of every Residence and the resulting deficiencies arise from the same nucleus of operative facts and questions of law (described supra), the Class Representative’s claims are naturally typical of the remainder of the putative class members and include, but are not limited to:

- 1) whether the site work and/or construction of the Residences is defective;
- 2) whether Defendants were negligent/grossly negligent in the construction of the Residences;
- 3) whether Defendants breached their implied and express warranties; and
- 4) whether Defendants’ conduct was negligent, reckless, willful, wanton, or the like, entitling Plaintiffs to punitive damages from the Defendants.

At the very core of the foregoing questions, is the ultimate issue shared by the Class Representative and all putative class members, which is whether they are entitled to recover damages arising from construction defects and loss of use.

Given the Class Representative's causes of action and claim for damages is naturally shared by the remainder of the putative class members, the Court finds that the typicality requirement has been satisfied.

**D. Plaintiff Napier and Her Chosen Counsel Will Fairly and Adequately Protect the Interests of the Class – Rule 23(a)(4)**

To determine adequacy of representation, the Court should consider whether the Class Representative has common interests with the unnamed members of the class and whether the Class Representative will vigorously prosecute the interests of the class through qualified counsel. Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C. 1983), cited with approval in Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (S.C. 1990). Another factor that must be considered is whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class. Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465 468, 388 S.E.2d. 799, 801 (S.C. 1990). The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class. Id.<sup>6</sup>

There are two criteria to which Courts look in determining whether the class representative adequately protects the interests of the class: (1) the class representative should not have any significant antagonistic or conflicting interests to the unnamed class members; and (2) it must appear that the class representative will vigorously prosecute the interests of the class through qualified counsel. Runion v. U.S. Shelter, 98 F.R.D. 313, 316 (D.S.C. 1983); see also Waller v.

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<sup>6</sup> In Waller, the homeowner association imposed assessments upon property owners within the development to finance the renourishment of the island's beaches and for the repair of several bridges. Id. at 466, 800. The amounts assessed were different, depending on the location of the property: beachfront property owners were assessed \$2,000.00, beach-view property owners were assess \$200.00, and all other property owners were assessed \$100.00. Id. Waller paid the assessment under protest, arguing it was to the responsibility of the beachfront property owners to renourish the beaches, and that, as marshfront property owners, they did not benefit from the renourishment. Id. The motion for class certification was denied, as Plaintiff's interests were found to be adverse and antagonistic of the beachfront property owners. Id. at 468, 801.

Seabrook Island Property Owners, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). In addition, it must appear that the class representative must voluntarily accept the fiduciary relationship towards all the members of the putative class. Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C.1983). The adequacy of plaintiff's counsel, like that of the individual plaintiff, is presumed in the absence of specific proof to the contrary. South Carolina Nat'l Bank v. Stone, 139 F.R.D. 335, 330-31 (D.S.C. 1991), citing Falcon v. General Tel. Co., 626 F.2d 369, 376 n.8 (5<sup>th</sup> Cir. 1980), vacated on other grounds, 450 U.S. 1036, 101 S. Ct. 1752, 68 L.Ed.2d 234 (1981). Furthermore, Courts generally hold that the employment of competent counsel assures vigorous prosecution. South Carolina Nat'l Bank v. Stone, 139 F.R.D. 335, 330 (D.S.C. 1991).

Both prongs of the "adequacy" test are met here. First, as previously described, the proposed class representative, Mrs. Napier, shares in the alleged construction defects and, as such, common questions of law or fact with the proposed class. As a representative of the class, her claims appear typical of the entire proposed class. Second, unlike Waller, there is nothing to suggest that the Class Representative has any interest adverse or antagonistic to the vigorous pursuit of the class claims against Defendants. The Class Representative is seeking adjudication for construction defects in her home, and no cause of action is adverse to the claims and interests of the members of the proposed class. The Class Representative and members of the proposed class share the interest of establishing that the Defendants' conduct is a violation of their legal duties and, thus, should be held liable for the damages to their homes. Thus, Plaintiff Napier adequately represents the interests of the class.

Finally, Plaintiff has retained counsel highly experienced in construction and class action litigation to prosecute her claims and those of the putative class members. Plaintiff's counsel has also been appointed as class counsel in each of the four (4) prior class action lawsuits involving

the General Contractor Defendants and has successfully prosecuted each of these to a conclusion. Plaintiff's counsel has further shown their competence and dedication in pursuit of the instant motion. Both criteria have been satisfied, therefore, fulfilling the adequacy requirement.

**E. The amount in Controversy Exceeds One-Hundred Dollars for Each Class Member – Rule 23(a)(5)**

The final prerequisite in Rule 23 is the amount in controversy must exceed one hundred dollars (\$100.00) for each member of the class. This amount is based on the amount claimed by the plaintiffs if it is apparent that the claim is made in good faith. Gardner v. Newsome Chevrolet-Buick, 304 S.C. 328, 404 S.E.2d 200, 201 (S.C. 1991). Where the amount claimed by the plaintiffs is greater than one hundred dollars (\$100.00), this requirement shall be satisfied.

In this case, the Court finds that all class members have alleged in good faith that their claims are in excess of the required one hundred dollars (\$100.00). Plaintiff's expert has estimated the repair costs due to the construction defect in the Residences to be far in excess of the required one hundred dollars (\$100.00). Therefore, these estimated damages are well above the \$100.00 requirement, and this element is satisfied.

**III. THE DEFENDANTS' OPPOSITION TO CLASS CERTIFICATION IS OVERRULED**

The General Contractor Defendants and Defendant Masters Mirrors & Shelving, Inc. submitted Memorandums in Opposition to Class Certification prior to the hearing on November 27, 2017. None of the other defendants submitted any brief or formal opposition to class certification prior to the hearing. During the hearing on this Motion, both the General Contractor Defendants and Defendant Masters Mirrors & Shelving, Inc. informed the Court that they no longer opposed Plaintiff's Motion for Class Certification and consented to the Court certifying the requested class, so long as their consent carried no precedential value in the event the General

Contractor Defendants move for decertification following the completion of discovery. Plaintiff has stipulated that this consent to certification shall have no precedential effect on such a motion.

At the Hearing, the General Contractor Defendants withdrew their memorandum opposing class certification. Various subcontractor defendants, who had attempted to join in the General Contractor Defendants' former opposition, continued to oppose class certification at the hearing.<sup>7</sup> Therefore, the Court will briefly address the primary arguments submitted in opposition to class certification only as to the subcontractor defendants who continue to oppose class certification.

A primary argument of the subcontractor defendants was that Plaintiff Napier was not an adequate class representative, because she had been unable to testify that many of the latent construction defects were present in her home. However, in response to the General Contractor Defendants' Memorandum, three (3) days prior to the hearing, Plaintiff Napier produced a supplemental photo log from Sisroy Engineering that is specific to her home. This supplemental photo log confirms that Plaintiff's home has almost all of the same latent construction defects that Plaintiff alleges are present throughout the class. Therefore, the fact that Plaintiff Napier, a lay witness, could not testify to the presence of many of the latent construction defects in her home does not support denying class certification.

The subcontractor defendants also offered arguments that certain issues, such as the applicability of the defenses of the Statute of Limitations and economic loss rule, made class certification inappropriate. However, these subcontractor defendants offered only speculative arguments that these potential issues will require the extensive amount of individualized inquiries in order for class certification to be inappropriate. This Court will not deny class certification based

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<sup>7</sup> Following the hearing, counsel for Defendant Bruce Dolford d/b/a B&D Cement Finishing and counsel for IBP Asset II, LLC d/b/a Complete Residential Siding and Insulation both withdrew their client's opposition to Plaintiff's Motion for Class Certification provided their clients receive the benefit of the foregoing stipulation—to which Plaintiff has agreed.

on mere speculation rather than facts that establish individualized inquiries outweigh the benefits of class treatment. Further, as noted above, the Court finds that Plaintiff and Plaintiff's engineers have offered extensive evidence of a documented pattern of defects and damages.

### CONCLUSION

The Court finds that the parties who filed memorandums in opposition to class certification withdrew their opposition and now consent to certification of the proposed class. Therefore, the Court **GRANTS** the motion for class certification. The following class is certified:

An opt-out class of all persons and entities that own structures located on New Haven Lane, Amity Lane, Bennington Lane, and Hillsborough Lane in Aiken, South Carolina, excluding the Defendants, their owners, members and employees; and further excluding any homeowner who has already filed a construction defect lawsuit or who has previously completely released these defendants.

Robin Napier is hereby appointed as Class Representative.

Justin Lucey and James L. Floyd, III of Justin O'Toole Lucey, P.A. are hereby appointed as class counsel.

The previously submitted notice plan, notice form, and opt-out form are approved for implementation by class counsel as detailed in the documents.

The Defendants retain the right to move for decertification following the completion of discovery; and any Defendant who has consented to certification herein shall not have any precedential effect upon such a motion.

AND IT IS SO ORDERED!

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The Honorable Perry M. Buckner, III  
Presiding Judge for the 2<sup>nd</sup> Judicial Circuit

Walterboro, South Carolina

January \_\_\_\_\_, 2018



Aiken Common Pleas

**Case Caption:** Robin Ind/Behalf Of All Ot Napier VS Adiz Llc , defendant, et al

**Case Number:** 2016CP0200263

**Type:** Order/Class Certification

It is so Ordered

s/ Perry M Buckner III 2122

Electronically signed on 2018-01-12 10:12:11 page 20 of 20

# EXHIBIT G

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF AIKEN ) FOR THE SECOND JUDICIAL CIRCUIT  
CASE NO. 2012-CP-02-03191

DIETER MARCUM, Trustee on behalf of the )  
ERWIN KAESTNER TRUST, individually )  
and on behalf of all other similarly situated, )  
Plaintiffs, )

vs. )

**ORDER GRANTING CLASS  
CERTIFICATION**

ADIZ, LLC, ATC DEVELOPMENT CORP., )  
ATC CONSTRUCTION, LLC, HALLUM, )  
LLC AND TCA, LLC, )  
Defendants. )

FILED 4.22.14  
*Liz Anderson*  
C.C.P. & O.S.  
*Anita Knoepfle*  
Deputy Clerk

ADIZ, LLC, )  
Third-Party Plaintiff, )

vs. )

M.A. MAGDELINA, ROBERT RENEW )  
D/B/A RENEW SIDING, SCOTT BALLARD, )  
LEROY JONES, A1 HOBBS, VERNON )  
DAVIS, WILLIE ROLLAND, KEITH )  
NEWMAN D/B/A NEWMAN COMPANY, )  
MADDOX CONSTRUCTION, ROBERTSON )  
GRADING, BRUCE DOLFORD, CARLTON )  
ROLLAND AND MULHERIN LUMBER )  
COMPANY, )  
Third-Party Defendants. )

This matter came before the Court on Plaintiff's Motion for Class Certification. Plaintiff Dieter Marcum is an owner of a residence located in the Spencer Drive neighborhood in Aiken, South Carolina. Plaintiff alleges his residence and all other homes in the Spencer Drive neighborhood (hereinafter "the Residences") were developed, constructed, and/or sold by

Defendants Adiz, LLC; ATC Development Corp.; ATC Construction, LLC; Hallum, LLC; and TCA, LLC (hereinafter "General Contractor Defendants") between 2003 and 2006. Plaintiff alleges that the Residences have latent construction defects and are suffering consequential damages. Defendants timely answered Plaintiff's Complaint, asserted various defenses, and filed third-party actions against various subcontractors and suppliers.

On June 20, 2013, Plaintiff filed his Motion for Class Certification, along with the Affidavit of Robert Sisroy, PE, in support thereof. Additional affidavits of Justin Lucey, Anne Stites, and Dieter Marcum were filed in support of certification.

While Defendants do not agree with all the assertions, analysis, or language of this Order Granting Plaintiff's Motion for Class Certification, Defendants do consent to the Court Certifying the Class in this matter. Defendants further reserve the right to move for decertification following the completion of discovery in the event new discovery provides Defendants with grounds to do so.

#### BACKGROUND

In 2003, one or more of the Defendants commenced construction of 128 townhomes in Aiken, SC on five (5) streets, Middlebury Lane East, Middlebury Lane West, Melville Lane, Stonington Lane, and Portofino Lane, in the Spencer Drive neighborhood. Building permits were issued circa October 2003 – April 2006 and certificates of occupancy were issued from March 2004 – December 2006. This subdivision was allegedly developed and constructed by the same Defendants as the following nearby subdivisions: 1) Single Tree and Double Tree (the subject of the *Laubenstein*<sup>1</sup> class action, previously certified by this Court and thereafter settled); 2) the Triple Tree neighborhood (the subject of the *Martinez*<sup>2</sup> class action, which has been

<sup>1</sup> *Laubenstein, et al. v. Adiz, LLC, et al.*, 2010-CP-02-02873 (Aiken County, South Carolina).

<sup>2</sup> *Martinez, et al. v. Adiz, LLC, et al.*, 2011-CP-02-00545 (Aiken County, South Carolina).

certified as a class, has reached partial settlement); and 3) the Christopher Downs neighborhood (the subject of the *Knight*<sup>3</sup> class action, which has been certified as a class and remains pending).

The townhomes within Spencer Drive are some of the last townhomes to be constructed by Defendants in this area of Aiken, South Carolina. All Residences were constructed using the same floor plan layouts and in substantially the same manner and method by substantially the same primary subcontractors, with the same or very similar building materials. This subdivision was constructed under the 2000 and 2003 International Residential Code for One and Two Family Dwellings (IRC 2000 and IRC 2003). All Residences are approximately 1,100 to 1,240 square feet, single floor, 2 bedroom/2 bathroom units with vinyl siding, architectural shingles, single-hung aluminum windows, and slab-on-grade foundations. All floor plans are substantially the same or similar; the presence of carports or a sunroom appear to be the only major variations in the initial floor plans from unit to unit.

Plaintiff, through intrusive testing and investigations, contends evidence of alleged latent defects, including improperly installed framing, fasteners, walls, windows, doors, roofing, siding, flashing, trim, HVAC components, absence of building wrap, and various other building defects which have resulted in water intrusion and other damage. The alleged Spencer Drive defects are the same or similar to those alleged and documented in the Trees and Christopher Downs, resulting in the *Laubenstein*, *Martinez*, and *Knight* class certifications. Plaintiff alleges Defendants' negligence and violation of their legal duties to design, construct, and repair the Residences in a workmanlike manner, and free from latent defects, have resulted in the above-referenced building deficiencies, consequential damages, and partial loss of use and enjoyment. Defendants deny these allegations.

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<sup>3</sup> *Knight, et al. v. Adiz, LLC, et al.*, 2011-CP-02-02653 (Aiken County, South Carolina).

## PROCEDURAL HISTORY AND DEFENDANTS

On December 26, 2012, Plaintiff filed this suit as a putative class action in the Court of Common Pleas for the Second Judicial Circuit to recover damages owed to him and others similarly situated. The Defendants accepted service on March 28, 2013. Defendants have asserted third-party claims against a number of subcontractors that performed work constructing the Residences.<sup>4</sup>

The Motion for Class Certification was filed on June 20, 2013. A supporting affidavit of Plaintiff's engineering expert was filed contemporaneously with the Motion. Additional affidavits were subsequently filed. The Defendants consent to the certification of the class.

### PROPOSED CLASS

The class Plaintiff requests this Court to certify it defined as follows:

An opt-out class of all persons and entities that own a structure located on Middlebury Lane East, Middlebury Lane West, Melville Lane, Portofino Lane, and Stonington Lane in Aiken, South Carolina.

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

#### I. GENERAL CLASS ACTION PRINCIPLES

This action has been brought and may be maintained as a class action pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure. Under this rule, the proponent of the class must show:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are common questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class,
- (4) the representative parties will fairly and adequately protect the interest of the class, and
- (5) in cases in which the

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<sup>4</sup> Many of the properly named Third-Party Defendants were also Third-Party Defendants in the Beard, Laubenstein, and Knight suits, and direct defendants in the Martinez suit, and have been served, have answered, and are participating in this lawsuit.

relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

S.C.R.C.P. 23(a).

Recently, and on several occasions, the South Carolina Supreme Court has recognized and endorsed an expansive view and treatment of class actions. Littlefield v. S. C. Forestry Comm'n, 337 S.C. 348, 355, 523 S.E.2d 781, 784 (2000) (“By omitting the additional requirements [of 23(b) from the federal rules of civil procedure], Rule 23, SCRCPP, endorses a more expansive view of class action availability than its federal counterpart.”); see also Salmonsens v. CGD, Inc., 377 S.C. 442, 447, 661 S.E.2d 81, 85 (2008). “Since the adoption of Rule 23, SCRCPP, this court has heard many cases that have used the class action procedure to allow adequate representatives to address issues which affect large groups of citizens in our state.” Littlefield, 337 S.C. at 355, 523 S.E.2d at 784 (citations omitted). This expansive view was reaffirmed in Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 577, 703 S.E.2d 197, 204 (2010).

In moving for class certification, the Plaintiff bears the burden of proving compliance with the Rule 23, S.C.R.C.P. prerequisites. Gardner, et al. v. South Carolina Dept. of Revenue, et al., 353 S.C. 1, 20, 577 S.E.2d 190 (2003). In deciding whether to certify the class, the court must undertake a rigorous analysis in order to determine whether the plaintiff has met the requirements of each prerequisite. Id. at 21. Failure to satisfy even one of the Rule 23 criteria is fatal to class certification. Id. If the facts as alleged by the plaintiffs do not materialize, the court has the ability to later decertify the class. Salmonsens, 377 S.C. at 447, 661 S.E.2d at 85 (the trial court retains the power to decertify or modify the class at any time prior to final judgment).

## II. THIS ACTION MEETS THE RULE 23 PREREQUISITES FOR CLASS CERTIFICATION

This action should be certified as a class action because all requirements of Rule 23(a) have been met.

### 1. Joinder of All Members is Impracticable – Rule 23(a)(1).

The class is sufficiently numerous and of such a nature that joinder of all members is impractical. The Spencer Drive neighborhood comprises approximately one hundred twenty-eight (128) members of the class before counting co-owners. Further, many class members are absentee owners living away from Aiken and outside of South Carolina.<sup>5</sup> Additionally, due to the temporal length of litigation and the transitive nature of home ownership, the identity of some absent class members will likely change during the litigation.

#### A. Numerosity of the Proposed Class

The proposed class is so numerous that the joinder of all members is impracticable. In determining whether a proposed class satisfies the numerosity requirement, the Court should consider the size of the class, the nature of the action, the location of class members, the expediency of joinder, and the practicality of multiple lawsuits. McGlothlin v. Connors, 142 F.R.D. 626 at 632 (W.D. Va. 1992).

To make a determination of joinder impracticability, a court must make a practical judgment based on the facts of the case. I Conte & Newberg, supra, §3:3, at 220-21. See e.g. Reeb v. Ohio Dept. of Rehab., 203 F.R.D. 315, 321 (S.D. Ohio 2001) (vacated and remanded on other grounds) (the court certified a class of 59 women noting that courts have certified smaller classes when the circumstances deemed it appropriate, judicial economy is served by allowing these women to bring their claims together in one action rather than individually, and it was

<sup>5</sup> Tax records, which can be found online at [www.cityofaikensc.com](http://www.cityofaikensc.com), show several property owners reside full- or part-time in California, Georgia, Michigan, Florida, New York, and Tennessee. Stites Affidavit.

unlikely that the majority of the class members had the financial resources necessary to bring individual suits.)

Impracticable does not mean impossible. *I Conte & Newberg*, supra, § 3:4, at 230. In fact, it has been held that it is not necessary for the class proponent to know the precise size of the class. *McGlothlin*, 142 F.R.D. at 632. Moreover, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone. *I Conte & Newberg*, supra, § 3:5, at 247<sup>6</sup>.

In the case at hand, Plaintiff has asserted that there are one hundred twenty-eight (128) townhomes on the five streets involved in this lawsuit. Further, tax records suggest in excess of one hundred twenty-eight (128) class members. Thus, the size of the putative class alone suggests that a class action is the better avenue to efficiently litigate the claims of the unit owners. Further supporting this is the efficient resolution of the Laubenstein certified class, comprised of 67 owners, which was mediated efficiently and successfully settled as a class action; and the partial resolution of the Martinez certified class, comprised of 45 owners, which was also recently mediated efficiently as a class action.<sup>7</sup>

#### B. Nature of Putative Class.

Apart from class size, factors relevant to the joinder impracticability issues include judicial economy arising from avoidance of a multiplicity of actions, geographic disbursement of

<sup>6</sup> See e.g., Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 183 (4<sup>th</sup> Cir. 1993) (Fourth Circuit approving certification of class containing 480 potential members); Cypress v. Newport News General & Nonsectarian Hospital Ass'n., 375 F.2d 648, 652-54 (4<sup>th</sup> Cir. 1967) (Fourth Circuit approving certification of class containing 18 potential members); Thomas v. Louisiana-Pacific Corp. and ABT Building Products Corp., a/k/a ABTCO, 246 F.R.D. 505 (D.S.C. 2007) (130 plaintiffs satisfied Rule 23(a)'s numerosity requirement; Bates v. Tenco Services, Inc., 132 F.R.D. 160, 162 (D.S.C. 1990) (180 plaintiffs in one subdivision satisfied Rule 23(a)'s numerosity requirement).

<sup>7</sup> The Martinez matter has reached partial settlement as to certain Subcontractor Defendants and a hearing for Preliminary Approval of Class Action Settlement is scheduled for March 31, 2014. Mediation with the remaining Defendants is scheduled for April 18, 2014.

class members, size of individual claims, financial resources of class members, and the ability of claimants to institute individual suits. *Id.* § 3.6, at 250-52; see also *McGlothlin v. Connors*, 142 F.R.D. 626, 632 (W.D. Va. 1992) (in determining whether a proposed class satisfies the numerosity requirement, the Court should consider the size of the class, the nature of the action, the location of class members, the expediency of joinder, and the practicality of multiple lawsuits). The judicial economy objective of class actions is obviously served when the Rule 23(a)(1) requirement for joinder impracticability has been satisfied, and several courts have stressed the efficiency and economy of the class device to adjudicate common issues among those who are similarly situated. 1 Conte & Newberg, *supra*, § 3:6, at 254. See e.g. *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968) (“While 25 members is a small number compared to the size of the other classes being considered, it is a large number when compared to a single unit. I see no necessity for encumbering the judicial process with 25 lawsuits if one will do.”)

Certification of this putative class is supported by the aforementioned factors. First, judicial economy is better served by certifying the class. One representative suit would better serve judicial economy than trying one hundred twenty-eight (128) individual suits involving the same Defendants and Third-Party Defendants, construction defects, causes of action, and the same or similar damage.

Second, some of the Residences’ owners are dispersed geographically throughout the state and country. Specifically, several property owners reside full- or part-time in California, Georgia, Michigan, Florida, New York, Tennessee, and all across South Carolina. Some of the homes are investment properties, second homes, vacation homes, or owned by trusts. Many of the in-state property owners do not even live in Aiken, SC. Thus, for this type of owner,

pursuing an individual construction claim would prove extremely difficult and cause substantial hardships that would not otherwise materialize if they were able to participate in a class action.

Third, many of the homeowners do not have the ability to bring their own claim because of a lack of time or financial resources required to satisfy the costs of litigation. Ignoring the typical costs associated with pursuing claims of this size, the cost of engineering investigation alone cannot be sustained by a single claim. As such, participation as a claimant in a class action suit provides an avenue for recovery which may not have otherwise been practical.

C. Fluid Changing Membership of Putative Class.

Further, an alleged class that has a fluid, changing membership can be accommodated by the class action device. McGann v. Mungo, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (S.C. Ct. App. 1986) (property owners' amended complaint alleging that class consisted of residents and owners of improved residential properties in subdivision sufficiently defined class, even though class had fluid, changing membership at pleading stage). The change in membership of a class caused by death or other factors may make a representative suit more suitable than individual actions. James F. Flannagan, South Carolina Civil Procedure, 184 (3rd ed. 2010).

Here, the proposed class, may have changing membership based on the sale and purchase of the improved real estate. The resale of units already during the pendency of this action is demonstrated by tax records. The likelihood of continued change in membership provides additional support for certification of this class.

**2. There are Questions of Law and Fact Common to All the Potential Class Members - Rule 23(a)(2).**

Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." S.C.R.C.P. 23(a)(2). In practical terms this means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together.

Gardner v. S.C. Dept. of Revenue, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) (internal quotations omitted); See also Flannagan, supra, at 185 (commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated.). Not every issue must be common to all class members. Gardner, 353 S.C. at 21, 577 S.E.2d at 200. Commonality is met only where the class shares a determinative issue. Gardner, 353 S.C. at 21, 577 S.E.2d at 200-1. The South Carolina Court of Appeals discussed the issue of common questions of law or fact in the case of McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986). The Court stated that:

It is important to note that the subsection does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status.

There is no qualitative or quantitative test in the Rule. Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.

Id at 157-58 (quoting H. Lightsey & J. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE at 198 (Second Ed. 1985)). Where a question involves standardized conduct of the defendant toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement is usually met. Flanagan, supra, at 154.

In the present case, common questions of law and fact clearly predominate over individual concerns and are at the very heart of all claims, including but not limited to: whether the construction of the residences deviated from the industry standard of care which existed at the time of construction, and whether the putative class members have been damaged as a result of such deviations. At the very core is the ultimate issue shared by class representative and all

putative class members, which is whether the Defendants' standard construction practices violated industry standards and damaged class members.

**3. Claims of the Representative Plaintiff Are Typical of the Claims of the Potential Class Members - Rule 23(a)(3).**

Rule 23(a)(3) requires that the claims of the class representative be "typical of the claims of the class." SCRCP 23(a)(3). The typicality requirement of Rule 23(a)(3) mandates that a class representative be part of the class and possess the same interest and suffer the same injury as the class members. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982) (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)); see also Cent. Wesleyan Coll., 143 F.R.D. 628, 637 (D.S.C. 1992), aff'd, 6 F.3d 177 (4th Cir. 1993) (for the purposes of Rule 23(a), the representative party's claims are "typical" if they arise from the same course of conduct that gives rise to the claims of the class members and if the claims of the claimants are based on the same legal theories); 1 Conte & Newberg, supra, § 3.13, at 317. Allegations that the plaintiffs' action arose out of the Defendant's common course of conduct satisfy the typicality requirement. South Carolina Nat'l Bank v. Stone, 139 F.R.D. 325, 329 (1991).

As articulated by Judge Sol Blatt, Jr.:

The typicality requirement does not require that the representatives have identical claims which other members of the class might present. The question of typicality focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs. The plaintiffs' claims for damages stem from effects of the defendants' activities on the plaintiffs' property and their health, now, in the past and in the future. Whether each potential member of the class has suffered the same degree of harm, or each and every type of harm, does not preclude a finding of typicality.

Bates v. Tenco Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990).

Commonality and typicality tend to merge in practice because both serve as guideposts for determining whether a class action is economical and whether the named plaintiff's claim and

the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Gen Tel. Co. of SW., 457 U.S. at 158 n.13. The use of the word “typical” suggests that the claims or defenses do not need to be coextensive, but rather similar to, or shared by, most of the members of the class. Flannagan, supra, at 186. The emphasis is on the core issue rather than minor differences. Flannagan, supra, at 186. See also Pope, et al. v. Heritage Communities, Inc., 395 S.C. 404, 420-22, 717 S.E.2d 765, 773-75 (2011)(affirming the trial court’s refusal to decertify the class based upon appellants’ argument that the criteria of commonality and typicality were not met because class representatives and class members sustained varying degrees of damage or utilized their units in different ways).

In this case, Plaintiff’s causes of action are the same and certain of the alleged facts appear to be similar to those of every proposed class member. The class representative owns a residence in a subdivision developed, constructed, and sold by the Defendants. Additionally, like the commonality requirement, the fact pattern is the same with respect to all proposed class members, and the same legal theory is asserted on behalf of all. Specifically, because the construction of every unit and resulting typical deficiencies arise from the same nucleus of operative facts and questions of law, the class representative’s claims are naturally typical of the remainder of the putative class members. At the very core is the ultimate issue shared by class representative and all putative class members, which is whether the Defendants’ standard construction practices violated industry standards and damaged class members.

An action seeking to hold Defendants accountable for their standard method of construction applied to the entire group of homeowners is well-suited for the class certification. Given that the class representative’s claims and defects are similar, the typicality requirement has been satisfied.

**4. Named Plaintiff and Their Chosen Counsel will Fairly and Adequately Protect the Interests of the Class – Rule 23(a)(4).**

To determine adequacy of representation, the Court should consider whether the representative has common interests with the unnamed members of the class and whether the representative will vigorously prosecute the interests of the class through qualified counsel. Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C. 1983), cited with approval in Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) (Stating that Runion “sets forth all criteria to be considered in determining whether a particular named plaintiff will adequately represent a proposed class”). Another factor that must be considered is whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class. Waller, 300 S.C. at 468, 388 S.E.2d. at 801. The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class. Id.<sup>8</sup>

There are two criteria to which Courts look in determining whether the class representative adequately protects the interests of the class: (1) the class representative should not have any significant antagonistic or conflicting interests to the unnamed class members; and (2) it must appear that the class representative will vigorously prosecute the interests of the class through qualified counsel. Runion v. U.S. Shelter, 98 F.R.D. 313, 316 (D.S.C. 1983) see also Waller v. Seabrook Island Property Owners, 388 S.E.2d 799 (S.C. 1990). In addition, it must

<sup>8</sup> In Waller, the homeowner association imposed assessments upon property owners within the development to finance the renourishment of the island’s beaches and for the repair of several bridges. Id. at 466, 800. The amounts assessed were different depending on the location of the property; beachfront property owners were assessed \$2,000.00, beachview property owners were assessed \$200.00, and all other property owners were assessed \$100.00. Id. Waller paid the assessment under protest, arguing it was the responsibility of the beachfront property owners to renourish the beaches and that, as marshfront property owners, they did not benefit from the renourishment. Id. The motion for class certification was denied as Plaintiff’s interests were found to be adverse and antagonistic of the beachfront property owners. Id. at 468, 801.

appear that the class representative must voluntarily accept the fiduciary relationship towards all the members of the putative class. Runion, 98 F.R.D. at 317. Furthermore, Courts generally hold that the employment of competent counsel assures vigorous prosecution. South Carolina Nat'l Bank v. Stone, 139 F.R.D. at 330.

Both prongs of the "adequacy" test are met here. First, as previously described, class representative Marcum shares in the construction defects and as such has common questions of law or fact with the proposed class. His claim is typical of the entire proposed class. There is nothing to suggest that the class representative has any interest adverse or antagonistic to the vigorous pursuit of the class claims against Defendants, unlike the situation in Waller. This class representative shares with the class the interest in establishing that the Defendants' conduct is a violation of their legal duties and thus should be held accountable. Thus, Marcum adequately represents the interests of the class.

Second, Plaintiff has retained counsel highly experienced in construction and class action litigation to prosecute his claims and those of the putative class members. See Lucey Affidavit. All factors have been satisfied, therefore fulfilling the adequacy requirement.

**5. The amount in Controversy Exceeds One Hundred Dollars for Each Class Member – Rule 23(a)(5).**

The final prerequisite is that the amount in controversy must exceed one hundred dollars for each member of the class. This amount is based on the amount claimed by the Plaintiff if it is apparent that the claim is made in good faith. Gardner v. Newsome Chevrolet-Buick, 404 S.E.2d 200, 201 (S.C. 1991).

In this case, there is no doubt that all class members have alleged in good faith a claim in excess of the required one hundred dollars. (Sisroy Affidavit, para. 10, setting forth that each member's damages exceed one hundred dollars).

**CONCLUSION**

Plaintiff has satisfied all the requirements under Rule 23(a) of the South Carolina Rules of Civil Procedure. While Defendants do not agree with all the assertions, analysis, or language of Plaintiff's Motion for Class Certification, affidavits filed in support thereof, or of this Order Granting Plaintiff's Motion for Class Certification, Defendants do consent to the Court certifying the class. Therefore, the Court GRANTS the motion for class certification. The following class is certified:

An opt-out class of all persons and entities that own a structure on Middlebury Lane East, Middlebury Lane West, Melville Lane, Portofino Lane, and Stonington Lane in Aiken, South Carolina.

Dieter Marcum is hereby appointed as class representative.

Justin Lucey and Harper L. Todd of Justin O'Toole Lucey, P.A. are hereby appointed as class counsel.

The attached notice plan, notice form, and opt-out form are approved for implementation by class counsel as detailed in the attached documents.

Defendants retain the right to move for decertification following the completion of discovery in the event new discovery provides Defendants with grounds to do so.

AND IT IS SO ORDERED!



Doyet A. Early, III  
Circuit Court Judge of the 2<sup>nd</sup> Judicial Circuit

Aiken, South Carolina

April 21, 2014

FORM 4

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

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2012CP0203191

Dieter Marcum	Edwin Kaestner Trust	Adiz LLC ATC Constructin LLC TCA LLC  M A Magdalena Renew Siding	ATC Development Corp Hallum LLC Mulherin Lumber Company Robert Renew
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

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

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

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge	Judge Code	Date
		4/22/2014

CPFORM4Cm  
 SCCA SCRPC Form 4C (Revised 3/2013)

**For Clerk of Court Office Use Only**

This judgment was entered on 4-22-14, and a copy mailed first class or placed in the appropriate attorney's box on 4-22-14, to attorneys of record or to parties (when appearing pro se) as follows:

Justin O'Toole Lucey PO Box 806 Mt. Pleasant, SC 29465

Robert Trippett Boineau III PO Box 12519 Columbia, SC 29211  
J. Arthur Davison PO Box 1477 Augusta, GA 30903  
Susan C Mulherin One 10th Street Suite 700 Augusta, GA 30903  
Dorothy Holley Hogg PO Box 1477 Augusta, GA 30903-1477  
Kenneth M. Mathews PO Box 7335 Columbia, SC 29202  
Karl Stephen Brehmer PO Box 7966 Columbia, SC 29202  
Paul Eliot Sperry Carlock Copeland & Stair 40 Calhoun Street, Suite 400 Charleston, SC 29401  
Catherine Robinson Graham 40 Calhoun Street Suite 400 Charleston, SC 29401  
Emily Ruth Gifford PO Drawer 7788 Columbia, SC 29202

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

*Liz Godard by Stenapple*

\_\_\_\_\_  
Court Reporter

Liz Godard - Clerk of Court

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

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

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\_\_\_\_\_  
\_\_\_\_\_

STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON  
Natalie Zitek, individually, and on behalf of  
all others similarly situated,

Plaintiff

vs

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

Defendant

---

D.R. HORTON, INC.

Third-Party Plaintiff

vs

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

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

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

) **DEFENDANT D.R. HORTON, INC.'S**  
) **MOTION FOR DECERTIFICATION**

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

**TO: PLAINTIFF AND HER COUNSEL OF RECORD JUSTIN O'TOOLE LUCEY, ESQUIRE, DABNEY LYNN, ESQUIRE, AND SOHAYLA R. TOWNES ESQUIRE**

PLEASE TAKE NOTICE that Defendant, D.R. Horton, Inc. (“D.R. Horton”), by and through its undersigned counsel, shall, and hereby does, move before the Presiding Judge of the Anderson County Court of Common Pleas, on the tenth (10<sup>th</sup>) day after service hereof, or as soon thereafter as Counsel may be heard, for an Order decertifying this class action, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure.

### **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”).<sup>1</sup> The parties have conducted a significant amount of discovery since this time, the results of which have lead D.R. Horton to maintain its position that the alleged construction defects cannot be resolved on a class-wide basis.

### **Rose Hill Neighborhood**

The Rose Hill Neighborhood has 261 homes, 234 of which were built by D.R. Horton between 2011 and 2017 after the original developer became insolvent. The initial homebuyers were able to customize their home, choosing from twenty-six different model plans, each with multiple options for exterior materials and window type and placement, resulting in sixty-seven unique configurations and home designs in Rose Hill. These designs vary between one-story

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<sup>1</sup> At least thirteen (13) homeowners have opted out of this class action, making the class size 221. (Pl.’s Report Notice Opt-Outs (Mar. 3, 2021)). D.R. Horton is aware that multiple homes have sold since the original opt-out period expired on March 1, 2021. Plaintiff has not provided any updated information as to whether these new potential class members have been given notice of this class action and an opportunity to opt-out and whether any new opt-outs must be added to this number. Should this action not be decertified, this issue must be addressed before a trial in this matter.

ranches, one-story homes with a single room over the garage, and a full two-story home that consists of multiple rooms and bathrooms on the second floor. Of the 221 Homes in the putative class, only a handful have just one exterior material (brick or vinyl). The vast majority have a combination of two or more exterior materials. There are approximately 150 brick homes with varying combinations of brick, stone, cement siding, and vinyl siding. There are another approximately 66 homes that have no brick but are a combination of stone and vinyl. (Affidavit L. Steven Moore ¶ 18 (May 1, 2023), attached as **Exhibit A**.)

The topography of Rose Hill is hilly, which resulted in variations in the foundations and soil supporting the foundations. These variations include slab-on-grade on cut material, slab-on-grade on fill material, homes with basements, and lots with and without soil retaining walls. The hilly topography also resulted in variations in site drainage methods and conditions on each lot at the time of construction. As demonstrated below, such variations prevent uniform conclusions about breach of duty, causation, and damages related to the alleged construction defects.<sup>2</sup>

### **Findings in Discovery**

Since conditional class certification, through numerous home inspections, homeowner and expert depositions, and other discovery, it has become abundantly clear that material facts underlying the proof of Plaintiff's class claims vary significantly among the named class representative and the opt-in class members, making class-wide treatment inappropriate. Such factual differences include, but are not limited to, the following:

- Allegations of construction defects in home exteriors varies widely based on the construction material (*i.e.*, brick, stone, vinyl, cement siding);

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<sup>2</sup> D.R. Horton fully incorporates herein its previously filed Memorandums in Opposition to Class Certification along with all supporting affidavits.

- The approximately 4,000 windows at issue in this case vary significantly in type, size, location, ratings, and orientation, all of which impact the expected and observed performance;
- The topography among the Rose Hill lots varies widely because of the hilly condition of the neighborhood, resulting in varying foundation types and drainage characteristics of the Homes;
- Grading and landscaping differs greatly from home to home, and homeowners have varyingly improved their properties to add pools, porches, patios, fences, retaining walls, landscaping, drainage pipes, etc., all of which alters the drainage patterns from original construction;
- The existence and extent of the alleged construction defects and resulting damages varies widely from home to home;
- Homeowners have undertaken varying levels of periodic maintenance (*e.g.*, painting and sealing) of doors and windows, impacting the performance of these systems.

D.R. Horton has also discovered that a number of Homes have been sold since the date of original purchase. Some of those subsequent purchasers bought with knowledge of the alleged defects and some did not. Some homeowners have repaired the alleged defects while others have not. Homeowner depositions have also revealed that certain homeowners have known about certain alleged defects for more than three years, making their claims barred by the statute of limitations. Only through individual homeowner examination and home-by-home evaluation will D.R. Horton be able to adequately and fairly defend against allegations that are home-specific.

Where similarly situated individuals buy the same product with the same manufacturing defect (*i.e.*, Volkswagen emissions scandal) or are all defrauded by the same deceptive conduct

(*i.e.*, Enron securities fraud), class treatment is appropriate. However, where, as here, each potential class member buys a different product, built by a different group of subcontractors, and then complains of different defects with varying potential causes and different damages, it is no longer practical and efficient to move forward as a class action. The question for continued class certification is whether it can be fairly stated that: “as goes the claim of the named plaintiff, so go the claims of the class.” Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006) (citations omitted). Because of the numerous factual differences among the Plaintiff and absent class members—as identified through home inspections, depositions, and other discovery—it cannot fairly be stated that as goes the claims of Plaintiff Zitek, so go the claims of the class. For that reason, decertification of this conditionally certified class action is appropriate.

Accordingly, D.R. Horton moves for decertification of this class action pursuant to Rule 23(d), SCRCP, on the grounds that through discovery it has become clear that Plaintiff cannot show the commonality, typicality, adequacy of representation, and numerosity required to maintain this as a class action.

### **LEGAL STANDARD**

At any time after conditional class certification but before a decision on the merits, this Court has the discretion to decertify a class action. Salmonsens v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). Decertification is appropriate when it has become apparent that individualized inquiries of class members are necessary to resolve the issues in the case. Gardner v. S.C. Dept. Rev., 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). That is the exact situation here, individual home inspections and individual homeowner examinations are necessary to resolve each class member’s individual claims.

In this Motion for Decertification, D.R. Horton specifically contests commonality, typicality, adequacy of representation, and numerosity. Generally, commonality, typicality, and

adequacy of representation blend together in the analysis of whether proof of Plaintiff's claims will sufficiently advance the claims of the absent class members. Deiter, 436 F.3d at 466 (citing Supreme Court precedent, which are omitted).

To establish commonality, a party must show that "there are questions of law or fact common to the class." Rule 23, SCRCR. Class certification is not appropriate where factual differences are the crux of a predominant legal issue and the success or failure of each class member's claim turns on individualized issues. Gardner, 353 S.C. at 22, 577 S.E.2d at 201. In considering the commonality requirement, the plaintiff must "demonstrate that the class members 'have suffered the *same* injury.'" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-50 (2011) (emphasis added).

To establish typicality, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011). "The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." Deiter, 436 F.3d at 466-67. The typicality analysis focuses on the elements and facts needed to prove Plaintiff's claims and whether those facts would prove the absent class members' claims. Id. at 467.

### **GROUND FOR DECERTIFICATION**

#### **I. The Alleged Defects, Causation, and Damages are Not Uniform Among the Rose Hill Homes.**

In her complaint, Plaintiff alleged numerous defective conditions in the Rose Hill Homes, including: (1) failure in load-bearing components; (2) failure in exterior cladding systems; (3) water intrusion into and through windows, doors, and exterior building envelopes; (4) failure of other various building components. (Compl. ¶ 27). Plaintiff's Notice and Opportunity to Cure Letter identified thirteen separate improper construction conditions. (See Cure Letter, Def.'s

Mtn. to Stay, Ex. A, at 9-10). Despite this long list of defects, Plaintiff's experts have not testified that all of these alleged defects actually exist in the Rose Hill Homes. As such, D.R. Horton will only address those construction conditions that Plaintiff has pursued and not address the other construction conditions that Plaintiff appears to have abandoned.<sup>3</sup>

**a. Brick Veneer**

Plaintiff alleges that brick veneer was improperly installed resulting in cracking, separation, water intrusion and resulting damage. Of the 221 Rose Hill Homes, approximately 150 have some amount of brick exterior. Home inspections have not revealed uniform cracking, separation, water intrusion, or damages in the brick veneer homes. (Moore Aff. ¶¶ 18, 27, Ex. A). Plaintiff's experts have raised a specific issue related to the installation of the garage brick lintel. ABS, one of D.R. Horton's experts, has conducted destructive testing on seven homes with garage brick lintels. Of these, ABS observed the majority to be properly tied and anchored, with proper air gaps, and flashing in place. (Moore Aff. ¶ 27, Ex. A). While the garage brick lintel installation has been identified as an issue in a very small number of homes with brick on the front and sides, and where the house above the rear corner of garage is over twelve feet high, these lintel installations complied with the applicable building code because they were designed. (Moore Aff. ¶ 27, Ex. A).

Plaintiff's home is one of the few Rose Hill Homes that has brick on the front and sides and where the height of her home over rear corner of garage over twelve feet. As such, Plaintiff has not proven that there is a numerosity of claimants with these common issues, or that there are factual issues as to Plaintiff's home are common and typical of the absent class members. Given

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<sup>3</sup> To the extent Plaintiff claims that these other alleged defects are not abandoned, Defendant reserves the right to brief these other defects in the context of decertification. Moreover, Defendant is moving for summary judgment on these other alleged defects for which no evidence has been provided by Plaintiff.

the limited circumstances where brick veneer may be at issue, the varying factual and legal issues, and the varying injuries and related damages, the Rose Hill Homes must be evaluated one-by-one for brick veneer claims.

**b. Manufactured Stone Veneer**

Plaintiff alleges that manufactured stone veneer was improperly installed on the Rose Hill Homes resulting in loose embedment, cracking, separation, and water intrusion and resulting damage. Of the 221 Rose Hill homes, approximately sixty-six have a combination of stone and vinyl exteriors, and another forty-nine have a combination of brick, stone, and either cement or vinyl siding. Of these, ABS conducted destructive testing on eight homes with stone exteriors. (Moore Aff. ¶ 28, Ex. A). Of these eight inspections, ABS did not observe uniform defects or deterioration. Rather, the majority of inspections revealed properly installed stone with good adhesion, low moisture readings, no rust on the metal lathe to which the stone adheres, presence of felt behind lathe, and weather barrier behind the felt. Any bonding or moisture issues observed were not uniform among the Homes. (Moore Aff. ¶ 28, Ex. A). There are a very limited number of Rose Hill Homes with stone adhered directly to brick veneer; with stone on the front of the house and brick on sides where there is some separation at that connection point, and where stone was installed to the base of the wall. Even where these conditions have been observed, any such related damage varies house-to-house and in some instances, there is little to no damage. (Moore Aff. ¶ 28, Ex. A). There is no uniformity as to this construction condition among the 221 Rose Hill Homes, or even within the more limited number of Homes with manufactured stone veneer.

To establish commonality, Plaintiff must establish the existence of common questions of law or fact and injury resulting from improperly installed stone siding such that resolving these issues on Plaintiff's house resolves issues on all other homes with stone veneer. To establish typicality, Plaintiff must establish that the facts necessary to prove the elements of her cause of

action for breach of contract (*i.e.*, breach, duty, causation, damages) will necessarily prove the absent class members' claims.

Here, Plaintiff's home has a very limited amount of stone, it has a very limited amount of stone adhered directly to brick, and it does not have stone-to-brick corner connection. As such, resolving Plaintiff's stone claims will not resolve the claims of the absent class members and Plaintiff has failed to establish commonality and typicality with respect to the alleged stone defects and has failed to show that she will adequately represent these absent class members. Further, Plaintiff has not established the numerosity of claimants with this issue.

For these reasons, continued class treatment is not appropriate.

**c. Windows**

Plaintiff alleges that the windows in all 221 Rose Hill Homes were defectively installed resulting in water leaks, cracking, separation, and resulting damage. Each of the 221 Rose Hill Homes has approximately 15-20 windows, totaling between 3,300 and 4,500 windows at issue in the putative class. ABS conducted destructive testing on approximately 28 windows in 25 homes. (Moore Aff. ¶ 29, Ex. A). In the vast majority of these inspections, ABS found properly installed and taped windows, moisture levels in the acceptable range, and no evidence of water intrusion or stains. (Moore Aff. ¶ 29, Ex. A). Even in the instances where destructive testing revealed sections of the weather barrier not taped, there was still no evidence of water intrusion or stains. (Moore Aff. ¶ 29, Ex. A). Further, ABS's spray testing and sill dam testing within appropriate ratings did not result in leaks in the tested windows, contradicting Plaintiff's claim of uniform problems in all windows of all Rose Hill Homes. (Moore Aff. ¶ 29, Ex. A). Moreover, ABS identified variations in homeowner window maintenance, which may cause or contribute to any window issues identified at the Homes. (Moore Aff. ¶ 29, Ex. A).

Homeowner depositions align with ABS's findings. Homeowners have variously testified to no known issues with leaky windows, or knowledge of a single window with evidence of possible water intrusion. No homeowner has testified that every window in their house leaks and must be replaced. Homeowners have also testified to varying levels of regular or periodic maintenance on their windows. Maintenance, or a lack thereof, can impact whether a window has water intrusion issues. The only way to evaluate the existence of actual leaking windows and the extent of homeowner window maintenance is to evaluate each Home individually and question each homeowner individually. There are no facts that can be established on a representative basis from which class-wide conclusions can be drawn.

Therefore, Plaintiff has not established the commonality and typicality among the class members such that this claim can be pursued on a representative basis. Accordingly, decertification is appropriate.

**d. Doors**

Plaintiff alleges that the front and rear patio doors of all 221 Rose Hill Homes were defectively installed resulting in water leaks and resulting damage. There has been no evidence of any construction defects with the front doors. (Moore Aff. ¶ 30, Ex. A). ABS conducted destructive testing on approximately twenty rear patio doors. (Moore Aff. ¶ 30, Ex. A). Of these inspections, ABS found a variety of conditions that were not uniform among the inspected Homes. Some Homes no longer have the original doors that were installed at construction, some Homes have doors that are covered, and some homeowners have painted and maintained the rear patio doors while others have not. Some doors have evidence of water intrusion and deterioration, and others did not. (Moore Aff. ¶ 30, Ex. A). Where there was observed door deterioration, the primary cause appeared to be lack of homeowner maintenance, (Moore Aff. ¶ 30, Ex. A), which can only be established on a home-by-home basis through homeowner testimony and home-

specific documentation. Plaintiff herself has performed no periodic maintenance on her patio door such as painting or recaulking throughout the nine years that she has lived there. Lack of maintenance can cause or contribute to door deterioration.

Plaintiff's expert engineer Rhett Whitlock testified during his deposition that certain Homes had rear patio doors that showed no visible signs of deterioration or needing to be fixed or fully replaced, and that he did not talk with homeowners about whether these doors had been replaced or ever had any damage. In fact, where such patio doors are covered, Whitlock agreed that such doors would be fine and should not be part of the class. Even where there is deterioration, the extent of such deterioration varies as does the necessary scope of repair. Whitlock conceded that certain doors could be repaired with brickmold trim only, while others would need to be fully pulled out and replaced.

The only way to identify which Homes have doors with possible deterioration, the scope of such deterioration and necessary repair, and cause of the deterioration, is to go home-by-home. There are no common factual questions that can be answered for all other Rose Hill Homes simply by an evaluation of Plaintiff's home. As such, class treatment for door defects is inappropriate.

**e. Concrete/Soil**

Plaintiff alleges that the foundations of the Rose Hill Homes suffer from insufficiently supported concrete/inadequate soil, resulting cracking, and water damage. ABS did not find concrete slabs with uniform cracking or displacement in excess of performance standards and has not seen any evidence of such deviations with the exception of one such slab. (Moore Aff. ¶ 31, Ex. A). Plaintiff has not provided any testing below slab or of the concrete slab to evidence any conditions that fall outside of the performance standards. As such, class treatment of this issue is inappropriate.

**f. Grading / Drainage**

Plaintiff alleges that the Rose Hill Home lots were insufficiently or improperly installed grading and/or drainage resulting in water damage, ponding, unevenness, and landscaping difficulties.

ABS's inspections revealed Rose Hill Homes with significant modifications of the backyard to include pools, decks, landscaping, and fences. (Moore Aff. ¶ 32, Ex. A). Each of these modifications can impact drainage. ABS has seen no evidence of ponding water outside of the standards. (Moore Aff. ¶ 32, Ex. A). Specifically at Plaintiff Zitek's home, the Ziteks have made significant changes to their backyard that has modified the original drainage design, including installing a pool, deck, and significant landscaping. Such changes are supposed to be submitted to the homeowner's association for review of potential changes in grading and drainage and it is unclear whether these steps were ever taken. Regardless, given these significant changes to Plaintiff's home, she cannot establish commonality, typicality, numerosity as among Plaintiff and the absent class members as to the alleged grading and drainage defects.

Additionally, through homeowner depositions, it has become clear that numerous other homeowners have improved and/or modified their yards such that uniform class treatment of grading and drainage issues cannot be done. Review of all such alleged grading and drainage defects must go home-by-home.

**II. D.R. Horton's Statute of Limitations Defense is Fact-Intensive and Homeowner-Specific.**

Through deposition testimony and a review of warranty claims, D.R. Horton has learned that some homeowners were on notice of the alleged defects more than three years before the Complaint was filed in this action and either took no action or in some circumstances filed a warranty claim. Homeowners were required to bring their claim within three (3) years of

discovery, S.C. Code Ann. § 15-3-530, and not every homeowner's claims are timely.

Accordingly, D.R. Horton may have a statute of limitations defense against certain homeowners. The only way for D.R. Horton to fairly develop this defense is to question each individual homeowner about when they first noticed the claimed defects and what actions they took to preserve their claim. For this reason, class certification is inappropriate.

### **III. Plaintiff's Sampling Methodology and Sample Selection Bias Do Not Support Class Certification.**

In pursuing this class action, Plaintiff is attempting to draw inferences and conclusions about construction defects, causation, and damages across the entire class of absent members and uninspected Homes from a sample set of inspected homes. In order to draw statistically significant and meaningful inferences about uninspected Rose Hill Homes, the sample set of inspected Homes needed to be identified using proper statistical probability sampling methodology, such as random sampling or stratified sampling. (Affidavit Charles L. Alford ¶ 8 (May 1, 2023), attached as **Exhibit B**).

Here, Plaintiff provided its expert Rhett Whitlock with a list of homes to inspect. These homes had known issues or complaints. Whitlock did not select a random sample of Rose Hill Home for inspection. The result is sample selection bias, and a sample set from which class-wide inferences cannot be drawn. (Alford Aff. ¶¶ 8-9, Ex. B). According to Dr. Charles Alford, an expert in forensic economics and statistics, Dr. Whitlock's "methodology is fatally flawed and his conclusions are statistically invalid . . . ." (Alford Aff. ¶ 8, Ex. B).

To make valid statistical inferences about the non-inspected homes, Whitlock needed to identify the sample set of homes using random sampling, or another valid statistical methodology. Here, no such statistically valid tool was used. As such, Whitlock's inferences and conclusions

about the population of Rose Hill Homes lack statistical confidence and are invalid. (Alford Aff. ¶ 9, Ex. B).

It would be improper to move forward as a class action and allow Plaintiff to present inferences and conclusions about construction defects across the entire population of Rose Hill Homes where the sample set was not properly selected according to proper statistical methodology and does not result in statistically meaningful findings. Accordingly, class treatment is not appropriate.

#### **IV. Plaintiff's Damages Model Does Not Support Class Certification.**

Plaintiff's experts have presented a damages model that does not account for the variations among the Rose Hill Homes observed during discovery. If Plaintiff is successful in proving her claims, the class members would only be entitled to damages for the defectively constructed conditions at their Homes. Where the Homes have no such injuries and related damages, they are not entitled to recovery.

Plaintiff's experts have developed a highly speculative and arbitrary damages model that demonstrates the significant problems with class-wide determinations across all Rose Hill Homes. See Comcast Corp. v. Behrend, 569 U.S. 27 (2013) (ruling that damages model did not support class treatment). Whitlock's damages model does not simply calculate a unit cost for labor and materials, which would vary based on the extent of proven damages at each Home. Instead, Whitlock has concluded, based on his biased sample set, that not only do the defective conditions need to be fixed, but 100% of each construction condition must be wholly replaced. For example, Whitlock calculates replacement for 100% of the windows in every Rose Hill Home. There is no evidence that every window in every Home is defective and must be replaced. Even in the Homes that Whitlock has actually inspected, there is no evidence that every window

is defective. Whitlock makes the same conclusory statements about manufactured stone veneer, brick veneer, brick lintels, and patio doors.

Whitlock's damages model does not align with the variations among Rose Hill Homes and further demonstrates why Plaintiff's claims are not appropriate for class-wide determination. For this reason, this class action should be decertified.

**CONCLUSION**

This Motion for Class Decertification is supported by the record in this case, including the pleadings, affidavits, depositions, memoranda to be filed ahead of any hearing on this motion.

Respectfully submitted,

**KENISON, DUDLEY & CRAWFORD, LLC**

*s/ John T. Crawford, Jr.*

\_\_\_\_\_  
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*Attorneys for Defendant D.R. Horton, Inc.*

May 1, 2023  
Greenville, South Carolina

**EXHIBIT A**

ELECTRONICALLY FILED - 2023 May 01 5:48 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

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

COUNTY OF ANDERSON )  
 ) 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 )

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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 )

**AFFIDAVIT OF  
L. STEVEN MOORE**

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

PERSONALLY APPEARED BEFORE ME, L. STEVEN MOORE, PE, RRC, REWC, who, being first duly sworn, deposes and avers the following:

1. My name is L. Steven Moore, PE, RRC, REWC. I am a citizen and resident of Union County, North Carolina. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.

2. I am a member of Applied Building Sciences, Inc. ("ABS"). Our firm offers consulting services in the construction industry, including reviewing and providing advice concerning residential homes.

3. ABS has been retained by Kenison, Dudley, & Crawford, LLC ("KDC") concerning existing construction conditions in a neighborhood known as Rose Hill located in Easley, South Carolina to examine potential construction defects as alleged by Plaintiff, Ms. Zitek.

4. At all times relevant, I have overseen ABS's involvement with KDC regarding the above-captioned matter.

5. I have reviewed all findings made by ABS throughout the course of this action.

6. I have a Bachelor of Science in Civil Engineering from North Carolina State University.

7. I am a licensed professional engineer in the state of South Carolina and have been licensed in South Carolina for over 25 years.

8. I am also a licensed professional engineer in additional states including North Carolina, Kentucky, Georgia, Tennessee, and Virginia.

9. I am licensed General Contractor in the State of South Carolina and have held this license for over five years.

10. I am also a licensed General Contractor in the State of North Carolina.

11. I am a certified arbitrator, issued by the American Arbitration Association Construction Industry National Panel of Arbitrators.

12. I am a registered roof consultant and a registered exterior wall consultant.

13. I am a member of several professional organizations, including the American Society of Civil Engineers, ICRI and IIBEC.

14. I specialize in the forensic engineering of residential homes and investigation of construction materials used on residential homes. I analyze how buildings are designed, constructed, and/or manufactured. I analyze the conditions of the site and the residential home.

15. I have testified and arbitrated similar cases involving similar construction defects.

16. In most cases in which I testify that proceed to a jury's verdict, the jury renders a verdict that aligns with my testimony and findings.

17. In this case, ABS was asked to evaluate and inspect approximately one hundred fifteen (115) homes (the "Homes") within the Rose Hill subdivision. ABS conducted destructive testing on twenty-five (25) Homes. It is my understanding that D.R. Horton built 234 homes in Rose Hill and approximately 221 homes are at issue in this lawsuit.

18. ABS's cataloging of home exteriors shows only a few homes with just one cladding material (brick or vinyl). There are approximately one hundred fifty (150) brick homes with varying combinations of brick, stone, cement siding, and vinyl siding. There are approximately sixty-six (66) homes that have no brick but are a combination of stone and vinyl.

19. Upon my information and belief, KDC and opposing counsel agreed to a certain set of homes, and ABS was not authorized to inspect additional homes within Rose Hill except for the Homes.

20. The inspections occurred on June 22, 2020, August 18-19, 2020, September 23 and

24, 2020, December 12-14, 2022, January 9-12, 2023, January 27, 2023, February 6-14, 2023, February 28-March 2, 2023, and March 20-22, 2023.

21. The Homes make up almost Fifty Percent (50%) of Rose Hill Homes constructed by D.R. Horton.

22. The Rose Hill Homes were all built between 2011 and 2017, meaning differing versions of the International Residential Code may be applied.

23. The Homes and each lot the Home was built on are different in many ways, including that (1) they vary greatly in square footage; (2) some homes are one floor whereas others have multiple floors; (3) the home's exterior finishing may vary from home to home, and (4) there are multiple different variations of the Homes which may include the amount of windows/window location, the number of bedrooms, and number of bathrooms in each Home.

24. During ABS's inspections, ABS noted that, while there may be a couple of issues reoccurring at multiple homes, there was not one (1) issue that was common and present at all of the Homes.

25. ABS noted that certain deficiencies that appeared at one Home were not necessarily found at the next Home. Further, some issues were limited to only one particular Home, with the issue not resurfacing throughout the course of ABS's inspections.

26. Where issues are currently present, an individualized scope of repair must be prepared for each individual Home. Given the variation from lot to lot, certain conditions on a lot may require a different scope of repair.

27. Of the Homes with some amount of brick exterior, ABS's inspections have not revealed uniform cracking, separation, water intrusion, or damages in the brick veneer. ABS conducted destructive testing of garage brick lintels on seven Homes. ABS observed the majority

to be properly tied and anchored, with proper air gaps, and flashing in place. Additionally, the garage brick lintel installation which is identified as an issue in a very small number of homes with brick on the front and sides, and where the house above the rear corner of garage is over twelve feet high, is also compliant with the building code because it is designed.

28. ABS conducted destructive testing on eight Homes with stone exteriors. These inspections did not reveal uniform defects or deterioration, but properly installed stone with good adhesion, low moisture readings, no rust on the metal lathe to which the stone adheres, presence of felt behind lathe, and weather barrier behind the felt. Any bonding or moisture issues observed were not uniform among the Homes. There are a very limited number of Rose Hill Homes with stone adhered directly to brick veneer, with stone on the front of the house and brick on sides where there is some separation at that connection point, and where stone was installed to the base of the wall. Even where these conditions were observed, any such related damage varies house-to-house and in some instances, there is little to no damage.

29. ABS conducted destructive testing on approximately 28 windows in 25 Homes. In the vast majority of these inspections, ABS found properly installed and taped windows, moisture levels in the acceptable range, and no evidence of water intrusion or stains. Where destructive testing revealed sections of the weather barrier not taped, there was still no evidence of water intrusion or stains. ABS's spray testing and sill dam testing within the appropriate ratings did not result in leaks in the tested windows. ABS identified variations in homeowner window maintenance, which may cause or contribute to any window issues identified at the Homes.

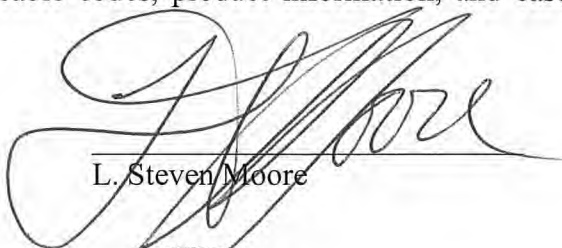
30. ABS has seen no evidence of construction defects on front doors. ABS conducted destructive testing on approximately twenty rear patio doors. During these inspections, ABS found a variety of conditions that were not uniform among the inspected Homes. Some Homes no longer

have the original doors that were installed at the time of initial construction, some Homes have doors that are covered, and some homeowners have painted and maintained the rear patio doors while others have not. Some doors have evidence of water intrusion and deterioration, and others did not. Where there was observed door deterioration, the primary cause appeared to be lack of homeowner maintenance.

31. Of the more than one hundred slabs visually inspected, ABS only found potentially one concrete slab with cracking or displacement in excess of performance standards. Otherwise, all other slabs were within performance standards with no evidence of such deviations.

32. ABS's inspections revealed Rose Hill Homes with significant modifications of the backyard to include pools, decks, landscaping, and fences. Each of these modifications can impact drainage. ABS has seen no evidence of ponding water outside of the standards.

33. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training, and experience in my fields of expertise as well as my review of applicable codes, product information, and case-related materials available to date.

  
L. Steven Moore

Sworn to and subscribed in my presence  
this 1st day of May, 2023.

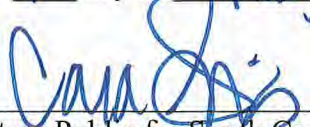
  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: 5-14-2030



EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

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

Plaintiff

vs

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

Defendant

D.R. HORTON, INC.

Third-Party Plaintiff

vs

AJ LANDSCAPING & GRADING, T.L.C., 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

IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT

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

AFFIDAVIT OF CHARLES L. ALFORD

ELECTRONICALLY FILED - 2023 May 01 5:48 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

FOUNDATIONS, I.L.C.; GALLOWAY-BELL, INC. A/K/A GALLOWAY-BELL, INC. II; GET FLOORED, LLC; GBS BUILDING SUPPLY - US LBM, I.L.C., 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, I.L.C.; LANDSHAPERS, LLC; LADE-DANLAR, INC.; LANSING BUILDING PRODUCTS, INC.; LONG HEATING & AIR CONDITIONING, INC.; L&M ELECTRIC, INC.; MANALE LANDSCAPING, LLC; MI COWBOYS, LLC; M&L GENERAL CONSTRUCTION, LLC, A/K/A M&L GENERAL CONSTRUCTION, INC.; M&L REYNA CONSTRUCTION, LLC; M&M FOUNDATIONS, I.L.C.; NAZARETH BUILDERS, LLC; NB CONTRACTORS, LLC; POINSETT DEVELOPMENT, I.L.C.; POINSETT HOMES, LLC; P&T CONSTRUCTION, INC., A/K/A P&T CONSTRUCTION, INC.; P&L ENTERPRISES, LLC; PROBUID COMPANY, LLC A/K/A PROBUID HOLDINGS, INC.; RTE 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.; DUPRET PLUMBING COMPANY, INC. AND WILLOW TREE LANDSCAPING, INC;

---

Third-Party Defendants

PERSONALLY APPEARED BEFORE ME, CHARLES L. ALFORD, Ph.D., who, being first duly sworn, deposes and avers the following:

1. I, Charles L. Alford, am a citizen and resident of Abbeville County, South Carolina. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.

2. I graduated from Wofford College in 1968 with a bachelor of arts degree, majoring in Economics.

3. I received the Ph.D. degree from the University of Alabama in 1972, with fields in Marketing, Economics, and Quantitative Methods.

4. I served on the faculty of the Department of Economics and Business Administration at Furman University from 1971-2003. Among my teaching assignments were Quantitative Methods in Business, Marketing Research, and Statistics, all of which addressed topics of sampling, sample design, and statistical analysis.

5. I have consulted in the field of forensic economics for over 50 years. I have been qualified as an expert in economic and business affairs in federal district courts and state courts in South Carolina, North Carolina, Georgia, and Tennessee.

6. I have reviewed various filings and affidavits in this case, including affidavits of A. Rhen Whitlock, Ph.D., P.E., and the deposition testimony of Dr. Whitlock.

7. Dr. Whitlock testified that based on his sample set of inspected Rose Hill Homes, the entire population of Rose Hill Homes has similar defective construction conditions, similar causes, and a similar extent of damages and scope of repair. Dr. Whitlock's testimony suggests that all or most of the Rose Hill Homes in his sample were identified and provided to him by Plaintiff's counsel. These homes appear to have been chosen and provided to Dr. Whitlock because of known issues or complaints.

8. Regarding Dr. Whitlock's attempts at inferences applicable to the total population of residences in Rose Hill Homes, his methodology is fatally flawed and his conclusions are statistically invalid for the following reasons.

- i. Despite deposition testimony in which Dr. Whitlock asserts his belief in the scientific method, he has not applied it in the present analysis. He has provided no evidence of having developed a research methodology; he formulated no hypotheses based on preliminary research; and he tested no hypotheses.
- ii. Formulaic methods are readily available for determining appropriate sample size. These methods include consideration of population size, population variability, desired precision, and desired confidence, factors which are incorporated into formulae for determining standard errors of the mean and proportion. It appears that Dr. Whitlock disregarded these factors in determining an appropriate sample size, instead simply gathering data and attempting to justify his sample size after the fact.
- iii. By far, the most glaring flaw in his attempt to draw inferential conclusions is related to his sampling procedure.
  1. The term "statistical inference" refers to the process of estimating population parameters (quantitative descriptive measures of a population) using sample statistics (quantitative descriptive measures of a sample). For example, in the present case, population parameters include proportions of all Rose Hill Homes with certain construction flaws and the arithmetic mean cost per home of remediating the

llaws; sample statistics include the same measures for sampled observations.

2. The foundational requirement of valid statistical inference is that sample data must be gathered using a probability sampling procedure, *i.e.*, each member of the population has a known, non-zero probability of inclusion in the sample. If inferences are based on non-probability sampling, zero statistical confidence is applicable to the conclusions.
3. Types of probability samples are simple random, systematic, stratified, and cluster sampling. Simple random sampling and systematic sampling procedures were readily available to Dr. Whitlock. Stratified sampling may have been appropriate. Cluster sampling was not applicable.
4. It is abundantly evident that Dr. Whitlock's conclusions are based on non-probability sampling. Among non-probability samples are those based on respondent self-selection, convenience, and judgment. All of these appear to apply in his work, the most significant of which is evidenced by his testimony that plaintiff's counsel identified for him homes for his evaluations.


9. Instead of scientifically designing a research methodology to include validly testable hypotheses, Dr. Whitlock simply gathered sample data based on convenience and/or judgment, calculated sample statistics, and invalidly reached conclusions regarding population parameters with no ability to express statistical confidence in his conclusions.

10. If a physician were informed that a number of residents in a neighborhood had an illness, confirmed those illnesses by examining the afflicted residents, and then concluded that all residents in the neighborhood must have the illness, it would be obvious even to those uninformed regarding statistics that the physician's conclusion about the entire neighborhood was not supported by his observations of the afflicted individuals. Yet this approach is representative of Dr. Whitlock's methodology.

11. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training, and experience in my fields of expertise as well as my review of case-related materials available and provided to me to date.

 5/1/23  
Charles L. Afford

Sworn to and subscribed in my presence  
this 1 day of May, 2023.

  
Notary Public for South Carolina  
My Commission Expires: 8/5/2031

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ANDERSON )

IN THE COURT OF COMMON PLEAS  
FOR THE TENTH JUDICIAL CIRCUIT

2019-CP-04-1942

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

Plaintiff

vs

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

Defendant

**JLS MASONRY, INC.'S MOTION FOR  
SUMMARY JUDGMENT**

---

D.R. HORTON, INC.

Third-Party Plaintiff

vs

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

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

SUPPLY, LLC; TOPBUILD HOME )  
SERVICES, INC., A/K/A GALE )  
CONTRACTORS SERVICE; TUCKER )  
MATERIALS, INC., A/K/A GYPSUM; )  
UTM ENTERPRISES, INC; AND )  
WILLOW TREE LANDSCAPING, INC;  
Third-Party Defendants.

COMES NOW Third Party Defendant JLS Masonry, Inc. (“JLS”), by and through the undersigned counsel, and pursuant to Rule 56, SCRPC, moves the Court for an order granting final summary judgment in favor of JLS on all of D.R. Horton’s claims against it. There are no genuine issues of material fact in dispute and JLS is entitled to judgment as a matter of law. This motion is based on the pleadings, discovery, affidavits, forthcoming memorandum of law, and oral argument at the hearing on this matter.

This the 1st of May, 2023

/s/ Blinn L. Cushman

Elizabeth A. Martineau (S.C. Bar # 78732)

Lee M. Thomas (S.C. Bar # 103034)

Blinn L. Cushman (S.C. Bar #104486)

P.O. Box 241268

Charlotte, NC 28224

Telephone: (704) 247-8524

Facsimile: (704) 247-8582

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[lthomas@martineauking.com](mailto:lthomas@martineauking.com)

[bcushman@martineauking.com](mailto:bcushman@martineauking.com)

*Attorneys for Defendant JLS Masonry, Inc.*

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., Blue Ridge Building )  
Products, LLC, Builders Designhouse, )  
LLC, BMC East LLC, Builders )  
FirstSource Southeast Group, LLC, a/k/a )  
Builders FirstSrouce, 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, )

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

FOURTH-PARTY DEFENDANT  
HARRELSON PAINTING, LLC'S  
MOTION FOR DECERTIFICATION

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/ka/ 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. )

\_\_\_\_\_  
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, )

C.A. No.: 2019-CP-04-01942

**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., Vinny’s Perfection Flooring,** )  
**LLC, Ismael Vasquez a/k/a Promesa** )  
**Flooring, LLC** )  
**Fourth-Party Defendants.** )  
 \_\_\_\_\_ )

**TO: PLAINTIFF AND HER ATTORNEYS, JUSTIN O’TOOLE LUCEY, DABNEY LYNN AND SOHAYLA R. TOWNES:**

PLEASE TAKE NOTICE that Fourth-Party Defendant, Harrelson Painting, LLC (hereinafter “Harrelson Painting”), by and through its undersigned counsel, shall, and hereby does, move before the Presiding Judge of the Anderson County Court of Common Pleas, on the tenth (10<sup>th</sup>) day after service hereof, or as soon thereafter as Counsel may be heard, for an Order decertifying this class action, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure.

**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”).<sup>1</sup> The parties have conducted a significant amount of discovery since this time, the results of which have lead D.R. Horton to maintain its position that the alleged construction defects cannot be resolved on a class-wide basis.

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<sup>1</sup> At least thirteen (13) homeowners have opted out of this class action, making the class size 221. (Pl.’s Report Notice Opt-Outs (Mar. 3, 2021)). D.R. Horton is aware that multiple homes have sold since the original opt-out period expired on March 1, 2021. Plaintiff has not provided any updated information as to whether these new potential class members have been given notice of this class action and an opportunity to opt-out and whether any new opt-outs must be added to this number. Should this action not be decertified, this issue must be addressed before a trial in this matter.

## Rose Hill Neighborhood

The Rose Hill Neighborhood has 261 homes, 234 of which were built by D.R. Horton between 2011 and 2017 after the original developer became insolvent. The initial homebuyers were able to customize their home, choosing from twenty-six different model plans, each with multiple options for exterior materials and window type and placement, resulting in sixty-seven unique configurations and home designs in Rose Hill. These designs vary between one-story ranches, one-story homes with a single room over the garage, and a full two-story home that consists of multiple rooms and bathrooms on the second floor. Of the 221 Homes in the putative class, only a handful have just one exterior material (brick or vinyl). The vast majority have a combination of two or more exterior materials. There are approximately 150 brick homes with varying combinations of brick, stone, cement siding, and vinyl siding. There are another approximately 66 homes that have no brick but are a combination of stone and vinyl. (Affidavit L. Steven Moore ¶ 18 (May 1, 2023), attached as **Exhibit A.**)

The topography of Rose Hill is hilly, which resulted in variations in the foundations and soil supporting the foundations. These variations include slab-on-grade on cut material, slab-on-grade on fill material, homes with basements, and lots with and without soil retaining walls. The hilly topography also resulted in variations in site drainage methods and conditions on each lot at the time of construction. As demonstrated below, such variations prevent uniform conclusions about breach of duty, causation, and damages related to the alleged construction defects.<sup>2</sup>

## Findings in Discovery

Since conditional class certification, through numerous home inspections, homeowner and

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<sup>2</sup> D.R. Horton fully incorporates herein its previously filed Memorandums in Opposition to Class Certification along with all supporting affidavits.

expert depositions, and other discovery, it has become abundantly clear that material facts underlying the proof of Plaintiff's class claims vary significantly among the named class representative and the opt-in class members, making class-wide treatment inappropriate. Such factual differences include, but are not limited to, the following:

- Allegations of construction defects in home exteriors varies widely based on the construction material (*i.e.*, brick, stone, vinyl, cement siding);
- The approximately 4,000 windows at issue in this case vary significantly in type, size, location, ratings, and orientation, all of which impact the expected and observed performance;
- The topography among the Rose Hill lots varies widely because of the hilly condition of the neighborhood, resulting in varying foundation types and drainage characteristics of the Homes;
- Grading and landscaping differs greatly from home to home, and homeowners have varyingly improved their properties to add pools, porches, patios, fences, retaining walls, landscaping, drainage pipes, etc., all of which alters the drainage patterns from original construction;
- The existence and extent of the alleged construction defects and resulting damages varies widely from home to home;
- Homeowners have undertaken varying levels of periodic maintenance (*e.g.*, painting and sealing) of doors and windows, impacting the performance of these systems.

D.R. Horton has also discovered that a number of Homes have been sold since the date of original purchase. Some of those subsequent purchasers bought with knowledge of the alleged defects and some did not. Some homeowners have repaired the alleged defects while others have not.

Homeowner depositions have also revealed that certain homeowners have known about certain alleged defects for more than three years, making their claims barred by the statute of limitations. Only through individual homeowner examination and home-by-home evaluation will D.R. Horton be able to adequately and fairly defend against allegations that are home- specific.

Where similarly situated individuals buy the same product with the same manufacturing defect (*i.e.*, Volkswagen emissions scandal) or are all defrauded by the same deceptive conduct (*i.e.*, Enron securities fraud), class treatment is appropriate. However, where, as here, each potential class member buys a different product, built by a different group of subcontractors, and then complains of different defects with varying potential causes and different damages, it is no longer practical and efficient to move forward as a class action. The question for continued class certification is whether it can be fairly stated that: “as goes the claim of the named plaintiff, so go the claims of the class.” Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006) (citations omitted). Because of the numerous factual differences among the Plaintiff and absent class members—as identified through home inspections, depositions, and other discovery—it cannot fairly be stated that as goes the claims of Plaintiff Zitek, so go the claims of the class. For that reason, decertification of this conditionally certified class action is appropriate.

Accordingly, Harrelson Painting moves for decertification of this class action pursuant to Rule 23(d), SCRCPP, on the grounds that through discovery it has become clear that Plaintiff cannot show the commonality, typicality, adequacy of representation, and numerosity required to maintain this as a class action.

### **LEGAL STANDARD**

At any time after conditional class certification but before a decision on the merits, this Court has the discretion to decertify a class action. Salmonsens v. CGD, Inc., 377 S.C. 442, 454,

661 S.E.2d 81, 88 (2008). Decertification is appropriate when it has become apparent that individualized inquiries of class members are necessary to resolve the issues in the case. Gardner v. S.C. Dept. Rev., 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). That is the exact situation here, individual home inspections and individual homeowner examinations are necessary to resolve each class member's individual claims.

In this Motion for Decertification, Harrelson Painting specifically contests commonality, typicality, adequacy of representation, and numerosity. Generally, commonality, typicality, and adequacy of representation blend together in the analysis of whether proof of Plaintiff's claims will sufficiently advance the claims of the absent class members. Deiter, 436 F.3d at 466 (citing Supreme Court precedent, which are omitted).

To establish commonality, a party must show that "there are questions of law or fact common to the class." Rule 23, SCRCP. Class certification is not appropriate where factual differences are the crux of a predominant legal issue and the success or failure of each class member's claim turns on individualized issues. Gardner, 353 S.C. at 22, 577 S.E.2d at 201. In considering the commonality requirement, the plaintiff must "demonstrate that the class members 'have suffered the *same* injury.'" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-50 (2011) (emphasis added).

To establish typicality, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Pope v. Heritage Cmty., Inc., 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011). "The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." Deiter, 436 F.3d at 466-67. The typicality analysis focuses on the elements and facts needed to prove Plaintiff's claims and whether those facts would prove the absent class members' claims. Id. At

467.

## **GROUND FOR DECERTIFICATION**

### **I. The Alleged Defects, Causation, and Damages are Not Uniform Among the Rose Hill Homes.**

In her complaint, Plaintiff alleged numerous defective conditions in the Rose Hill Homes, including: (1) failure in load-bearing components; (2) failure in exterior cladding systems; (3) water intrusion into and through windows, doors, and exterior building envelopes; (4) failure of other various building components. (Compl. ¶ 27). Plaintiff's Notice and Opportunity to Cure Letter identified thirteen separate improper construction conditions. (See Cure Letter, Def.'s Mtn. to Stay, Ex. A, at 9-10). Despite this long list of defects, Plaintiff's experts have not testified that all of these alleged defects actually exist in the Rose Hill Homes. As such, D.R. Horton will only address those construction conditions that Plaintiff has pursued and not address the other construction conditions that Plaintiff appears to have abandoned.<sup>3</sup>

#### **a. Brick Veneer**

Plaintiff alleges that brick veneer was improperly installed resulting in cracking, separation, water intrusion and resulting damage. Of the 221 Rose Hill Homes, approximately 150 have some amount of brick exterior. Home inspections have not revealed uniform cracking, separation, water intrusion, or damages in the brick veneer homes. (Moore Aff. ¶¶ 18, 27, Ex. A). Plaintiff's experts have raised a specific issue related to the installation of the garage brick lintel. ABS, one of D.R. Horton's experts, has conducted destructive testing on seven homes with garage

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<sup>3</sup> To the extent Plaintiff claims that these other alleged defects are not abandoned, Defendant reserves the right to brief these other defects in the context of decertification. Moreover, Defendant is moving for summary judgment on these other alleged defects for which no evidence has been provided by Plaintiff.

brick lintels. Of these, ABS observed the majority to be properly tied and anchored, with proper air gaps, and flashing in place. (Moore Aff. ¶ 27, Ex. A). While the garage brick lintel installation has been identified as an issue in a very small number of homes with brick on the front and sides, and where the house above the rear corner of garage is over twelve feet high, these lintel installations complied with the applicable building code because they were designed. (Moore Aff. ¶ 27, Ex. A).

Plaintiff's home is one of the few Rose Hill Homes that has brick on the front and sides and where the height of her home over rear corner of garage over twelve feet. As such, Plaintiff has not proven that there is a numerosity of claimants with these common issues, or that there are factual issues as to Plaintiff's home are common and typical of the absent class members. Given the limited circumstances where brick veneer may be at issue, the varying factual and legal issues, and the varying injuries and related damages, the Rose Hill Homes must be evaluated one-by-one for brick veneer claims.

**b. Manufactured Stone Veneer**

Plaintiff alleges that manufactured stone veneer was improperly installed on the Rose Hill Homes resulting in loose embedment, cracking, separation, and water intrusion and resulting damage. Of the 221 Rose Hill homes, approximately sixty-six have a combination of stone and vinyl exteriors, and another forty-nine have a combination of brick, stone, and either cement or vinyl siding. Of these, ABS conducted destructive testing on eight homes with stone exteriors. (Moore Aff. ¶ 28, Ex. A). Of these eight inspections, ABS did not observe uniform defects or deterioration. Rather, the majority of inspections revealed properly installed stone with good adhesion, low moisture readings, no rust on the metal lathe to which the stone adheres, presence of felt behind lathe, and weather barrier behind the felt. Any bonding or moisture issues observed were not uniform among the Homes. (Moore Aff. ¶ 28, Ex. A). There are a very limited number

of Rose Hill Homes with stone adhered directly to brick veneer; with stone on the front of the house and brick on sides where there is some separation at that connection point, and where stone was installed to the base of the wall. Even where these conditions have been observed, any such related damage varies house-to-house and in some instances, there is little to no damage. (Moore Aff. ¶ 28, Ex. A). There is no uniformity as to this construction condition among the 221 Rose Hill Homes, or even within the more limited number of Homes with manufactured stone veneer.

To establish commonality, Plaintiff must establish the existence of common questions of law or fact and injury resulting from improperly installed stone siding such that resolving these issues on Plaintiff's house resolves issues on all other homes with stone veneer. To establish typicality, Plaintiff must establish that the facts necessary to prove the elements of her cause of action for breach of contract (*i.e.*, breach, duty, causation, damages) will necessarily prove the absent class members' claims.

Here, Plaintiff's home has a very limited amount of stone, it has a very limited amount of stone adhered directly to brick, and it does not have stone-to-brick corner connection. As such, resolving Plaintiff's stone claims will not resolve the claims of the absent class members and Plaintiff has failed to establish commonality and typicality with respect to the alleged stone defects and has failed to show that she will adequately represent these absent class members. Further, Plaintiff has not established the numerosity of claimants with this issue.

For these reasons, continued class treatment is not appropriate.

**c. Windows**

Plaintiff alleges that the windows in all 221 Rose Hill Homes were defectively installed resulting in water leaks, cracking, separation, and resulting damage. Each of the 221 Rose Hill Homes has approximately 15-20 windows, totaling between 3,300 and 4,500 windows at issue in

the putative class. ABS conducted destructive testing on approximately 28 windows in 25 homes. (Moore Aff. ¶ 29, Ex. A). In the vast majority of these inspections, ABS found properly installed and taped windows, moisture levels in the acceptable range, and no evidence of water intrusion or stains. (Moore Aff. ¶ 29, Ex. A). Even in the instances where destructive testing revealed sections of the weather barrier not taped, there was still no evidence of water intrusion or stains. (Moore Aff. ¶ 29, Ex. A). Further, ABS's spray testing and sill dam testing within appropriate ratings did not result in leaks in the tested windows, contradicting Plaintiff's claim of uniform problems in all windows of all Rose Hill Homes. (Moore Aff. ¶ 29, Ex. A). Moreover, ABS identified variations in homeowner window maintenance, which may cause or contribute to any window issues identified at the Homes. (Moore Aff. ¶ 29, Ex. A).

Homeowner depositions align with ABS's findings. Homeowners have variously testified to no known issues with leaky windows, or knowledge of a single window with evidence of possible water intrusion. No homeowner has testified that every window in their house leaks and must be replaced. Homeowners have also testified to varying levels of regular or periodic maintenance on their windows. Maintenance, or a lack thereof, can impact whether a window has water intrusion issues. The only way to evaluate the existence of actual leaking windows and the extent of homeowner window maintenance is to evaluate each Home individually and question each homeowner individually. There are no facts that can be established on a representative basis from which class-wide conclusions can be drawn.

Therefore, Plaintiff has not established the commonality and typicality among the class members such that this claim can be pursued on a representative basis. Accordingly, decertification is appropriate.

**d. Doors**

Plaintiff alleges that the front and rear patio doors of all 221 Rose Hill Homes were defectively installed resulting in water leaks and resulting damage. There has been no evidence of any construction defects with the front doors. (Moore Aff. ¶ 30, Ex. A). ABS conducted destructive testing on approximately twenty rear patio doors. (Moore Aff. ¶ 30, Ex. A). Of these inspections, ABS found a variety of conditions that were not uniform among the inspected Homes. Some Homes no longer have the original doors that were installed at construction, some Homes have doors that are covered, and some homeowners have painted and maintained the rear patio doors while others have not. Some doors have evidence of water intrusion and deterioration, and others did not. (Moore Aff. ¶ 30, Ex. A). Where there was observed door deterioration, the primary cause appeared to be lack of homeowner maintenance, (Moore Aff. ¶ 30, Ex. A), which can only be established on a home-by-home basis through homeowner testimony and home-specific documentation. Plaintiff herself has performed no periodic maintenance on her patio door such as painting or recaulking throughout the nine years that she has lived there. Lack of maintenance can cause or contribute to door deterioration.

Plaintiff's expert engineer Rhett Whitlock testified during his deposition that certain Homes had rear patio doors that showed no visible signs of deterioration or needing to be fixed or fully replaced, and that he did not talk with homeowners about whether these doors had been replaced or ever had any damage. In fact, where such patio doors are covered, Whitlock agreed that such doors would be fine and should not be part of the class. Even where there is deterioration, the extent of such deterioration varies as does the necessary scope of repair. Whitlock conceded that certain doors could be repaired with brickmold trim only, while others would need to be fully pulled out and replaced.

The only way to identify which Homes have doors with possible deterioration, the scope of such deterioration and necessary repair, and cause of the deterioration, is to go home-by-home. There are no common factual questions that can be answered for all other Rose Hill Homes simply by an evaluation of Plaintiff's home. As such, class treatment for door defects is inappropriate.

**e. Concrete/Soil**

Plaintiff alleges that the foundations of the Rose Hill Homes suffer from insufficiently supported concrete/inadequate soil, resulting cracking, and water damage. ABS did not find concrete slabs with uniform cracking or displacement in excess of performance standards and has not seen any evidence of such deviations with the exception of one such slab. (Moore Aff. ¶ 31, Ex. A). Plaintiff has not provided any testing below slab or of the concrete slab to evidence any conditions that fall outside of the performance standards. As such, class treatment of this issue is inappropriate.

**f. Grading / Drainage**

Plaintiff alleges that the Rose Hill Home lots were insufficiently or improperly installed grading and/or drainage resulting in water damage, ponding, unevenness, and landscaping difficulties.

ABS's inspections revealed Rose Hill Homes with significant modifications of the backyard to include pools, decks, landscaping, and fences. (Moore Aff. ¶ 32, Ex. A). Each of these modifications can impact drainage. ABS has seen no evidence of ponding water outside of the standards. (Moore Aff. ¶ 32, Ex. A). Specifically at Plaintiff Zitek's home, the Ziteks have made significant changes to their backyard that has modified the original drainage design, including installing a pool, deck, and significant landscaping. Such changes are supposed to be submitted to the homeowner's association for review of potential changes in grading and drainage

and it is unclear whether these steps were ever taken. Regardless, given these significant changes to Plaintiff's home, she cannot establish commonality, typicality, numerosity as among Plaintiff and the absent class members as to the alleged grading and drainage defects.

Additionally, through homeowner depositions, it has become clear that numerous other homeowners have improved and/or modified their yards such that uniform class treatment of grading and drainage issues cannot be done. Review of all such alleged grading and drainage defects must go home-by-home.

## **II. D.R. Horton's Statute of Limitations Defense is Fact-Intensive and Homeowner-Specific.**

Through deposition testimony and a review of warranty claims, Harrelson Painting has learned that some homeowners were on notice of the alleged defects more than three years before the Complaint was filed in this action and either took no action or in some circumstances filed a warranty claim. Homeowners were required to bring their claim within three (3) years of discovery, S.C. Code Ann. § 15-3-530, and not every homeowner's claims are timely.

Accordingly, D.R. Horton may have a statute of limitations defense against certain homeowners. The only way for D.R. Horton to fairly develop this defense is to question each individual homeowner about when they first noticed the claimed defects and what actions they took to preserve their claim. For this reason, class certification is inappropriate.

## **III. Plaintiff's Sampling Methodology and Sample Selection Bias Do Not Support Class Certification.**

In pursuing this class action, Plaintiff is attempting to draw inferences and conclusions about construction defects, causation, and damages across the entire class of absent members and uninspected Homes from a sample set of inspected homes. In order to draw statistically significant and meaningful inferences about uninspected Rose Hill Homes, the sample set of inspected Homes

needed to be identified using proper statistical probability sampling methodology, such as random sampling or stratified sampling. (Affidavit Charles L. Alford ¶ 8 (May 1, 2023), attached as **Exhibit B**).

Here, Plaintiff provided its expert Rhett Whitlock with a list of homes to inspect. These homes had known issues or complaints. Whitlock did not select a random sample of Rose Hill Home for inspection. The result is sample selection bias, and a sample set from which class-wide inferences cannot be drawn. (Alford Aff. ¶¶ 8-9, Ex. B). According to Dr. Charles Alford, an expert in forensic economics and statistics, Dr. Whitlock’s “methodology is fatally flawed and his conclusions are statistically invalid . . . .” (Alford Aff. ¶ 8, Ex. B).

To make valid statistical inferences about the non-inspected homes, Whitlock needed to identify the sample set of homes using random sampling, or another valid statistical methodology. Here, no such statistically valid tool was used. As such, Whitlock’s inferences and conclusions about the population of Rose Hill Homes lack statistical confidence and are invalid. (Alford Aff. ¶ 9, Ex. B).

It would be improper to move forward as a class action and allow Plaintiff to present inferences and conclusions about construction defects across the entire population of Rose Hill Homes where the sample set was not properly selected according to proper statistical methodology and does not result in statistically meaningful findings. Accordingly, class treatment is not appropriate.

#### **IV. Plaintiff’s Damages Model Does Not Support Class Certification.**

Plaintiff’s experts have presented a damages model that does not account for the variations among the Rose Hill Homes observed during discovery. If Plaintiff is successful in proving her claims, the class members would only be entitled to damages for the defectively constructed

conditions at their Homes. Where the Homes have no such injuries and related damages, they are not entitled to recovery.

Plaintiff's experts have developed a highly speculative and arbitrary damages model that demonstrates the significant problems with class-wide determinations across all Rose Hill Homes. See Comcast Corp. v. Behrend, 569 U.S. 27 (2013) (ruling that damages model did not support class treatment). Whitlock's damages model does not simply calculate a unit cost for labor and materials, which would vary based on the extent of proven damages at each Home. Instead, Whitlock has concluded, based on his biased sample set, that not only do the defective conditions need to be fixed, but 100% of each construction condition must be wholly replaced. For example, Whitlock calculates replacement for 100% of the windows in every Rose Hill Home. There is no evidence that every window in every Home is defective and must be replaced. Even in the Homes that Whitlock has actually inspected, there is no evidence that every window is defective. Whitlock makes the same conclusory statements about manufactured stone veneer, brick veneer, brick lintels, and patio doors.

Whitlock's damages model does not align with the variations among Rose Hill Homes and further demonstrates why Plaintiff's claims are not appropriate for class-wide determination. For this reason, this class action should be decertified.

### **CONCLUSION**

This Motion for Class Decertification is supported by the record in this case, including the pleadings, affidavits, depositions, memoranda to be filed ahead of any hearing on this motion.

THE WARD LAW FIRM, P.A.  
Attorneys for Fourth-Party Defendant Harrelson  
Painting, LLC

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June 20, 2023

EXHIBIT A

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

COUNTY OF ANDERSON )

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

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

Plaintiff

vs

AFFIDAVIT OF
L. STEVEN MOORE

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

Defendant

D.R. HORTON, INC.

Third-Party Plaintiff

vs

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

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; )  
 )  
 )  
 )

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Third-Party Defendants

PERSONALLY APPEARED BEFORE ME, L. STEVEN MOORE, PE, RRC, REWC, who, being first duly sworn, deposes and avers the following:

1. My name is L. Steven Moore, PE, RRC, REWC. I am a citizen and resident of Union County, North Carolina. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.

2. I am a member of Applied Building Sciences, Inc. ("ABS"). Our firm offers consulting services in the construction industry, including reviewing and providing advice concerning residential homes.

3. ABS has been retained by Kenison, Dudley, & Crawford, LLC ("KDC") concerning existing construction conditions in a neighborhood known as Rose Hill located in Easley, South Carolina to examine potential construction defects as alleged by Plaintiff, Ms. Zitek.

4. At all times relevant, I have overseen ABS's involvement with KDC regarding the above-captioned matter.

5. I have reviewed all findings made by ABS throughout the course of this action.

6. I have a Bachelor of Science in Civil Engineering from North Carolina State University.

7. I am a licensed professional engineer in the state of South Carolina and have been licensed in South Carolina for over 25 years.

8. I am also a licensed professional engineer in additional states including North Carolina, Kentucky, Georgia, Tennessee, and Virginia.

9. I am licensed General Contractor in the State of South Carolina and have held this license for over five years.

10. I am also a licensed General Contractor in the State of North Carolina.

11. I am a certified arbitrator, issued by the American Arbitration Association Construction Industry National Panel of Arbitrators.

12. I am a registered roof consultant and a registered exterior wall consultant.

13. I am a member of several professional organizations, including the American Society of Civil Engineers, ICRI and IIBEC.

14. I specialize in the forensic engineering of residential homes and investigation of construction materials used on residential homes. I analyze how buildings are designed, constructed, and/or manufactured. I analyze the conditions of the site and the residential home.

15. I have testified and arbitrated similar cases involving similar construction defects.

16. In most cases in which I testify that proceed to a jury's verdict, the jury renders a verdict that aligns with my testimony and findings.

17. In this case, ABS was asked to evaluate and inspect approximately one hundred fifteen (115) homes (the "Homes") within the Rose Hill subdivision. ABS conducted destructive testing on twenty-five (25) Homes. It is my understanding that D.R. Horton built 234 homes in Rose Hill and approximately 221 homes are at issue in this lawsuit.

18. ABS's cataloging of home exteriors shows only a few homes with just one cladding material (brick or vinyl). There are approximately one hundred fifty (150) brick homes with varying combinations of brick, stone, cement siding, and vinyl siding. There are approximately sixty-six (66) homes that have no brick but are a combination of stone and vinyl.

19. Upon my information and belief, KDC and opposing counsel agreed to a certain set of homes, and ABS was not authorized to inspect additional homes within Rose Hill except for the Homes.

20. The inspections occurred on June 22, 2020, August 18-19, 2020, September 23 and

24, 2020, December 12-14, 2022, January 9-12, 2023, January 27, 2023, February 6-14, 2023, February 28-March 2, 2023, and March 20-22, 2023.

21. The Homes make up almost Fifty Percent (50%) of Rose Hill Homes constructed by D.R. Horton.

22. The Rose Hill Homes were all built between 2011 and 2017, meaning differing versions of the International Residential Code may be applied.

23. The Homes and each lot the Home was built on are different in many ways, including that (1) they vary greatly in square footage; (2) some homes are one floor whereas others have multiple floors; (3) the home's exterior finishing may vary from home to home, and (4) there are multiple different variations of the Homes which may include the amount of windows/window location, the number of bedrooms, and number of bathrooms in each Home.

24. During ABS's inspections, ABS noted that, while there may be a couple of issues reoccurring at multiple homes, there was not one (1) issue that was common and present at all of the Homes.

25. ABS noted that certain deficiencies that appeared at one Home were not necessarily found at the next Home. Further, some issues were limited to only one particular Home, with the issue not resurfacing throughout the course of ABS's inspections.

26. Where issues are currently present, an individualized scope of repair must be prepared for each individual Home. Given the variation from lot to lot, certain conditions on a lot may require a different scope of repair.

27. Of the Homes with some amount of brick exterior, ABS's inspections have not revealed uniform cracking, separation, water intrusion, or damages in the brick veneer. ABS conducted destructive testing of garage brick lintels on seven Homes. ABS observed the majority

to be properly tied and anchored, with proper air gaps, and flashing in place. Additionally, the garage brick lintel installation which is identified as an issue in a very small number of homes with brick on the front and sides, and where the house above the rear corner of garage is over twelve feet high, is also compliant with the building code because it is designed.

28. ABS conducted destructive testing on eight Homes with stone exteriors. These inspections did not reveal uniform defects or deterioration, but properly installed stone with good adhesion, low moisture readings, no rust on the metal lathe to which the stone adheres, presence of felt behind lathe, and weather barrier behind the felt. Any bonding or moisture issues observed were not uniform among the Homes. There are a very limited number of Rose Hill Homes with stone adhered directly to brick veneer, with stone on the front of the house and brick on sides where there is some separation at that connection point, and where stone was installed to the base of the wall. Even where these conditions were observed, any such related damage varies house-to-house and in some instances, there is little to no damage.

29. ABS conducted destructive testing on approximately 28 windows in 25 Homes. In the vast majority of these inspections, ABS found properly installed and taped windows, moisture levels in the acceptable range, and no evidence of water intrusion or stains. Where destructive testing revealed sections of the weather barrier not taped, there was still no evidence of water intrusion or stains. ABS's spray testing and sill dam testing within the appropriate ratings did not result in leaks in the tested windows. ABS identified variations in homeowner window maintenance, which may cause or contribute to any window issues identified at the Homes.

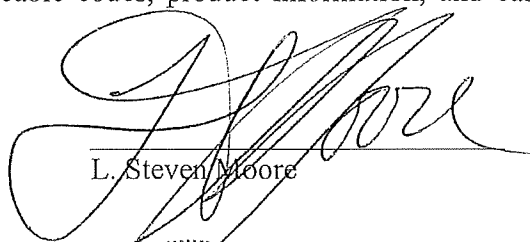
30. ABS has seen no evidence of construction defects on front doors. ABS conducted destructive testing on approximately twenty rear patio doors. During these inspections, ABS found a variety of conditions that were not uniform among the inspected Homes. Some Homes no longer

have the original doors that were installed at the time of initial construction, some Homes have doors that are covered, and some homeowners have painted and maintained the rear patio doors while others have not. Some doors have evidence of water intrusion and deterioration, and others did not. Where there was observed door deterioration, the primary cause appeared to be lack of homeowner maintenance.

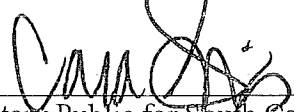
31. Of the more than one hundred slabs visually inspected, ABS only found potentially one concrete slab with cracking or displacement in excess of performance standards. Otherwise, all other slabs were within performance standards with no evidence of such deviations.

32. ABS's inspections revealed Rose Hill Homes with significant modifications of the backyard to include pools, decks, landscaping, and fences. Each of these modifications can impact drainage. ABS has seen no evidence of ponding water outside of the standards.

33. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training, and experience in my fields of expertise as well as my review of applicable codes, product information, and case-related materials available to date.

  
L. Steven Moore

Sworn to and subscribed in my presence  
this 1<sup>st</sup> day of May, 2023.

  
Notary Public for South Carolina  
My Commission Expires: 5-14-2030

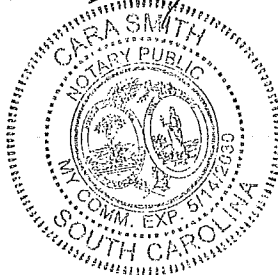


EXHIBIT B

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

COUNTY OF ANDERSON )  
 ) 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 )

----- )  
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 CEN- )  
TER; 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; BUILD- )  
ERS FIRSTSOURCE SOUTHEAST )  
GROUP, LLC, A/K/A BUILDERS )  
FIRSTSOURCE, INC; BRAVO CARPEN- )  
TERS, INC.; CARYI MECHANICS II, )  
INC., A/K/A CARYI MECHANICALS, )  
INC.; CANNADAY SIDING & GUTTER, )  
INC.; CORTES PAINTING, LLC; CBU EN- )  
TERPRISES, INC.; CPI SECURITY SYS- )  
TEMS, INC.; DOM GROUP, LLC; FERGU- )  
SON ENTERPRISES, INC.; FIVE STAR )  
CONSTRUCTION INC.; FIVE STAR )

AFFIDAVIT OF  
CHARLES L. ALFORD

PERSONALLY APPEARED BEFORE ME, CHARLES L. ALFORD, Ph.D., who, being first duly sworn, deposes and avers the following:

1. I, Charles L. Alford, am a citizen and resident of Abbeville County, South Carolina. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.

2. I graduated from Wofford College in 1968 with a bachelor of arts degree, majoring in Economics.

3. I received the Ph.D. degree from the University of Alabama in 1972, with fields in Marketing, Economics, and Quantitative Methods.

4. I served on the faculty of the Department of Economics and Business Administration at Furman University from 1971-2003. Among my teaching assignments were Quantitative Methods in Business, Marketing Research, and Statistics, all of which addressed topics of sampling, sample design, and statistical analysis.

5. I have consulted in the field of forensic economics for over 50 years. I have been qualified as an expert in economic and business affairs in federal district courts and state courts in South Carolina, North Carolina, Georgia, and Tennessee.

6. I have reviewed various filings and affidavits in this case, including affidavits of A. Rhett Whitlock, Ph.D., P.E., and the deposition testimony of Dr. Whitlock.

7. Dr. Whitlock testified that based on his sample set of inspected Rose Hill Homes, the entire population of Rose Hill Homes has similar defective construction conditions, similar causes, and a similar extent of damages and scope of repair. Dr. Whitlock's testimony suggests that all or most of the Rose Hill Homes in his sample were identified and provided to him by Plaintiff's' counsel. These homes appear to have been chosen and provided to Dr. Whitlock because of known issues or complaints

8. Regarding Dr. Whitlock's attempts at inferences applicable to the total population of residences in Rose Hill Homes, his methodology is fatally flawed and his conclusions are statistically invalid for the following reasons.

- i. Despite deposition testimony in which Dr. Whitlock asserts his belief in the scientific method, he has not applied it in the present analysis. He has provided no evidence of having developed a research methodology; he formulated no hypotheses based on preliminary research; and he tested no hypotheses.
- ii. Formulaic methods are readily available for determining appropriate sample size. These methods include consideration of population size, population variability, desired precision, and desired confidence, factors which are incorporated into formulae for determining standard errors of the mean and proportion. It appears that Dr. Whitlock disregarded these factors in determining an appropriate sample size, instead simply gathering data and attempting to justify his sample size after the fact.
- iii. By far, the most glaring flaw in his attempt to draw inferential conclusions is related to his sampling procedure.
  1. The term "statistical inference" refers to the process of estimating population parameters (quantitative descriptive measures of a population) using sample statistics (quantitative descriptive measures of a sample). For example, in the present case, population parameters include proportions of all Rose Hill Homes with certain construction flaws and the arithmetic mean cost per home of remediating the

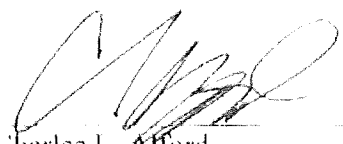
flaws: sample statistics include the same measures for sampled observations.

2. The foundational requirement of valid statistical inference is that sample data must be gathered using a probability sampling procedure, *i.e.*, each member of the population has a known, non-zero probability of inclusion in the sample. If inferences are based on non-probability sampling, zero statistical confidence is applicable to the conclusions.
3. Types of probability samples are simple random, systematic, stratified, and cluster sampling. Simple random sampling and systematic sampling procedures were readily available to Dr. Whitlock. Stratified sampling may have been appropriate. Cluster sampling was not applicable.
4. It is abundantly evident that Dr. Whitlock's conclusions are based on non-probability sampling. Among non-probability samples are those based on respondent self-selection, convenience, and judgment. All of these appear to apply in his work, the most significant of which is evidenced by his testimony that plaintiff's counsel identified for him homes for his evaluations.

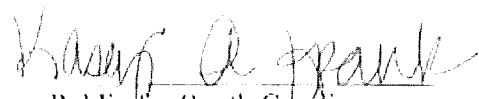
9. Instead of scientifically designing a research methodology to include validly testable hypotheses, Dr. Whitlock simply gathered sample data based on convenience and/or judgment, calculated sample statistics, and invalidly reached conclusions regarding population parameters with no ability to express statistical confidence in his conclusions.

10. If a physician were informed that a number of residents in a neighborhood had an illness, confirmed those illnesses by examining the afflicted residents, and then concluded that all residents in the neighborhood must have the illness, it would be obvious even to those uninformed regarding statistics that the physician's conclusion about the entire neighborhood was not supported by his observations of the afflicted individuals. Yet this approach is representative of Dr. Whitlock's methodology.

11. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training, and experience in my fields of expertise as well as my review of case-related materials available and provided to me to date.

 5/1/23  
Charles L. Afford

Sworn to and subscribed in my presence  
this 1 day of May, 2023.

  
Notary Public for South Carolina  
My Commission Expires: 8/5/2031

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., Blue Ridge Building )  
Products, LLC, Builders Designhouse, )  
LLC, BMC East LLC, Builders )  
FirstSource Southeast Group, LLC, a/k/a )  
Builders FirstSrouce, 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, )

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

FOURTH-PARTY DEFENDANT NM  
ALEX CARPET, INC.'S MOTION  
FOR DECERTIFICATION

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/ka/ 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. )

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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, )

C.A. No.: 2019-CP-04-01942

**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., Vinny’s Perfection Flooring,** )  
**LLC, Ismael Vasquez a/k/a Promesa** )  
**Flooring, LLC** )  
**Fourth-Party Defendants.** )  
 \_\_\_\_\_ )

**TO: PLAINTIFF AND HER ATTORNEYS, JUSTIN O’TOOLE LUCEY, DABNEY LYNN AND SOHAYLA R. TOWNES:**

PLEASE TAKE NOTICE that Fourth-Party Defendant, NM Alex Carpet, Inc. (hereinafter “NM Alex”), by and through its undersigned counsel, shall, and hereby does, move before the Presiding Judge of the Anderson County Court of Common Pleas, on the tenth (10<sup>th</sup>) day after service hereof, or as soon thereafter as Counsel may be heard, for an Order decertifying this class action, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure.

**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”).<sup>1</sup> The parties have conducted a significant amount of discovery since this time, the results of which have lead D.R. Horton to maintain its position that the alleged construction defects cannot be resolved on a class-wide basis.

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<sup>1</sup> At least thirteen (13) homeowners have opted out of this class action, making the class size 221. (Pl.’s Report Notice Opt-Outs (Mar. 3, 2021)). D.R. Horton is aware that multiple homes have sold since the original opt-out period expired on March 1, 2021. Plaintiff has not provided any updated information as to whether these new potential class members have been given notice of this class action and an opportunity to opt-out and whether any new opt-outs must be added to this number. Should this action not be decertified, this issue must be addressed before a trial in this matter.

## **Rose Hill Neighborhood**

The Rose Hill Neighborhood has 261 homes, 234 of which were built by D.R. Horton between 2011 and 2017 after the original developer became insolvent. The initial homebuyers were able to customize their home, choosing from twenty-six different model plans, each with multiple options for exterior materials and window type and placement, resulting in sixty-seven unique configurations and home designs in Rose Hill. These designs vary between one-story ranches, one-story homes with a single room over the garage, and a full two-story home that consists of multiple rooms and bathrooms on the second floor. Of the 221 Homes in the putative class, only a handful have just one exterior material (brick or vinyl). The vast majority have a combination of two or more exterior materials. There are approximately 150 brick homes with varying combinations of brick, stone, cement siding, and vinyl siding. There are another approximately 66 homes that have no brick but are a combination of stone and vinyl. (Affidavit L. Steven Moore ¶ 18 (May 1, 2023), attached as **Exhibit A.**)

The topography of Rose Hill is hilly, which resulted in variations in the foundations and soil supporting the foundations. These variations include slab-on-grade on cut material, slab-on-grade on fill material, homes with basements, and lots with and without soil retaining walls. The hilly topography also resulted in variations in site drainage methods and conditions on each lot at the time of construction. As demonstrated below, such variations prevent uniform conclusions about breach of duty, causation, and damages related to the alleged construction defects.<sup>2</sup>

## **Findings in Discovery**

Since conditional class certification, through numerous home inspections, homeowner and

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<sup>2</sup> D.R. Horton fully incorporates herein its previously filed Memorandums in Opposition to Class Certification along with all supporting affidavits.

expert depositions, and other discovery, it has become abundantly clear that material facts underlying the proof of Plaintiff's class claims vary significantly among the named class representative and the opt-in class members, making class-wide treatment inappropriate. Such factual differences include, but are not limited to, the following:

- Allegations of construction defects in home exteriors varies widely based on the construction material (*i.e.*, brick, stone, vinyl, cement siding);
- The approximately 4,000 windows at issue in this case vary significantly in type, size, location, ratings, and orientation, all of which impact the expected and observed performance;
- The topography among the Rose Hill lots varies widely because of the hilly condition of the neighborhood, resulting in varying foundation types and drainage characteristics of the Homes;
- Grading and landscaping differs greatly from home to home, and homeowners have varyingly improved their properties to add pools, porches, patios, fences, retaining walls, landscaping, drainage pipes, etc., all of which alters the drainage patterns from original construction;
- The existence and extent of the alleged construction defects and resulting damages varies widely from home to home;
- Homeowners have undertaken varying levels of periodic maintenance (*e.g.*, painting and sealing) of doors and windows, impacting the performance of these systems.

D.R. Horton has also discovered that a number of Homes have been sold since the date of original purchase. Some of those subsequent purchasers bought with knowledge of the alleged defects and some did not. Some homeowners have repaired the alleged defects while others have not.

Homeowner depositions have also revealed that certain homeowners have known about certain alleged defects for more than three years, making their claims barred by the statute of limitations. Only through individual homeowner examination and home-by-home evaluation will D.R. Horton be able to adequately and fairly defend against allegations that are home- specific.

Where similarly situated individuals buy the same product with the same manufacturing defect (*i.e.*, Volkswagen emissions scandal) or are all defrauded by the same deceptive conduct (*i.e.*, Enron securities fraud), class treatment is appropriate. However, where, as here, each potential class member buys a different product, built by a different group of subcontractors, and then complains of different defects with varying potential causes and different damages, it is no longer practical and efficient to move forward as a class action. The question for continued class certification is whether it can be fairly stated that: “as goes the claim of the named plaintiff, so go the claims of the class.” Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006) (citations omitted). Because of the numerous factual differences among the Plaintiff and absent class members—as identified through home inspections, depositions, and other discovery—it cannot fairly be stated that as goes the claims of Plaintiff Zitek, so go the claims of the class. For that reason, decertification of this conditionally certified class action is appropriate.

Accordingly, NM Alex moves for decertification of this class action pursuant to Rule 23(d), SCRCR, on the grounds that through discovery it has become clear that Plaintiff cannot show the commonality, typicality, adequacy of representation, and numerosity required to maintain this as a class action.

### **LEGAL STANDARD**

At any time after conditional class certification but before a decision on the merits, this Court has the discretion to decertify a class action. Salmonsens v. CGD, Inc., 377 S.C. 442, 454,

661 S.E.2d 81, 88 (2008). Decertification is appropriate when it has become apparent that individualized inquiries of class members are necessary to resolve the issues in the case. Gardner v. S.C. Dept. Rev., 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). That is the exact situation here, individual home inspections and individual homeowner examinations are necessary to resolve each class member's individual claims.

In this Motion for Decertification, NM Alex specifically contests commonality, typicality, adequacy of representation, and numerosity. Generally, commonality, typicality, and adequacy of representation blend together in the analysis of whether proof of Plaintiff's claims will sufficiently advance the claims of the absent class members. Deiter, 436 F.3d at 466 (citing Supreme Court precedent, which are omitted).

To establish commonality, a party must show that "there are questions of law or fact common to the class." Rule 23, SCRCF. Class certification is not appropriate where factual differences are the crux of a predominant legal issue and the success or failure of each class member's claim turns on individualized issues. Gardner, 353 S.C. at 22, 577 S.E.2d at 201. In considering the commonality requirement, the plaintiff must "demonstrate that the class members 'have suffered the *same* injury.'" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-50 (2011) (emphasis added).

To establish typicality, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Pope v. Heritage Cmty., Inc., 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011). "The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." Deiter, 436 F.3d at 466-67. The typicality analysis focuses on the elements and facts needed to prove Plaintiff's claims and whether those facts would prove the absent class members' claims. Id. At

467.

## **GROUND FOR DECERTIFICATION**

### **I. The Alleged Defects, Causation, and Damages are Not Uniform Among the Rose Hill Homes.**

In her complaint, Plaintiff alleged numerous defective conditions in the Rose Hill Homes, including: (1) failure in load-bearing components; (2) failure in exterior cladding systems; (3) water intrusion into and through windows, doors, and exterior building envelopes; (4) failure of other various building components. (Compl. ¶ 27). Plaintiff's Notice and Opportunity to Cure Letter identified thirteen separate improper construction conditions. (See Cure Letter, Def.'s Mtn. to Stay, Ex. A, at 9-10). Despite this long list of defects, Plaintiff's experts have not testified that all of these alleged defects actually exist in the Rose Hill Homes. As such, D.R. Horton will only address those construction conditions that Plaintiff has pursued and not address the other construction conditions that Plaintiff appears to have abandoned.<sup>3</sup>

#### **a. Brick Veneer**

Plaintiff alleges that brick veneer was improperly installed resulting in cracking, separation, water intrusion and resulting damage. Of the 221 Rose Hill Homes, approximately 150 have some amount of brick exterior. Home inspections have not revealed uniform cracking, separation, water intrusion, or damages in the brick veneer homes. (Moore Aff. ¶¶ 18, 27, Ex. A). Plaintiff's experts have raised a specific issue related to the installation of the garage brick lintel. ABS, one of D.R. Horton's experts, has conducted destructive testing on seven homes with garage

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<sup>3</sup> To the extent Plaintiff claims that these other alleged defects are not abandoned, Defendant reserves the right to brief these other defects in the context of decertification. Moreover, Defendant is moving for summary judgment on these other alleged defects for which no evidence has been provided by Plaintiff.

brick lintels. Of these, ABS observed the majority to be properly tied and anchored, with proper air gaps, and flashing in place. (Moore Aff. ¶ 27, Ex. A). While the garage brick lintel installation has been identified as an issue in a very small number of homes with brick on the front and sides, and where the house above the rear corner of garage is over twelve feet high, these lintel installations complied with the applicable building code because they were designed. (Moore Aff. ¶ 27, Ex. A).

Plaintiff's home is one of the few Rose Hill Homes that has brick on the front and sides and where the height of her home over rear corner of garage over twelve feet. As such, Plaintiff has not proven that there is a numerosity of claimants with these common issues, or that there are factual issues as to Plaintiff's home are common and typical of the absent class members. Given the limited circumstances where brick veneer may be at issue, the varying factual and legal issues, and the varying injuries and related damages, the Rose Hill Homes must be evaluated one-by-one for brick veneer claims.

**b. Manufactured Stone Veneer**

Plaintiff alleges that manufactured stone veneer was improperly installed on the Rose Hill Homes resulting in loose embedment, cracking, separation, and water intrusion and resulting damage. Of the 221 Rose Hill homes, approximately sixty-six have a combination of stone and vinyl exteriors, and another forty-nine have a combination of brick, stone, and either cement or vinyl siding. Of these, ABS conducted destructive testing on eight homes with stone exteriors. (Moore Aff. ¶ 28, Ex. A). Of these eight inspections, ABS did not observe uniform defects or deterioration. Rather, the majority of inspections revealed properly installed stone with good adhesion, low moisture readings, no rust on the metal lathe to which the stone adheres, presence of felt behind lathe, and weather barrier behind the felt. Any bonding or moisture issues observed were not uniform among the Homes. (Moore Aff. ¶ 28, Ex. A). There are a very limited number

of Rose Hill Homes with stone adhered directly to brick veneer; with stone on the front of the house and brick on sides where there is some separation at that connection point, and where stone was installed to the base of the wall. Even where these conditions have been observed, any such related damage varies house-to-house and in some instances, there is little to no damage. (Moore Aff. ¶ 28, Ex. A). There is no uniformity as to this construction condition among the 221 Rose Hill Homes, or even within the more limited number of Homes with manufactured stone veneer.

To establish commonality, Plaintiff must establish the existence of common questions of law or fact and injury resulting from improperly installed stone siding such that resolving these issues on Plaintiff's house resolves issues on all other homes with stone veneer. To establish typicality, Plaintiff must establish that the facts necessary to prove the elements of her cause of action for breach of contract (*i.e.*, breach, duty, causation, damages) will necessarily prove the absent class members' claims.

Here, Plaintiff's home has a very limited amount of stone, it has a very limited amount of stone adhered directly to brick, and it does not have stone-to-brick corner connection. As such, resolving Plaintiff's stone claims will not resolve the claims of the absent class members and Plaintiff has failed to establish commonality and typicality with respect to the alleged stone defects and has failed to show that she will adequately represent these absent class members. Further, Plaintiff has not established the numerosity of claimants with this issue.

For these reasons, continued class treatment is not appropriate.

**c. Windows**

Plaintiff alleges that the windows in all 221 Rose Hill Homes were defectively installed resulting in water leaks, cracking, separation, and resulting damage. Each of the 221 Rose Hill Homes has approximately 15-20 windows, totaling between 3,300 and 4,500 windows at issue in

the putative class. ABS conducted destructive testing on approximately 28 windows in 25 homes. (Moore Aff. ¶ 29, Ex. A). In the vast majority of these inspections, ABS found properly installed and taped windows, moisture levels in the acceptable range, and no evidence of water intrusion or stains. (Moore Aff. ¶ 29, Ex. A). Even in the instances where destructive testing revealed sections of the weather barrier not taped, there was still no evidence of water intrusion or stains. (Moore Aff. ¶ 29, Ex. A). Further, ABS's spray testing and sill dam testing within appropriate ratings did not result in leaks in the tested windows, contradicting Plaintiff's claim of uniform problems in all windows of all Rose Hill Homes. (Moore Aff. ¶ 29, Ex. A). Moreover, ABS identified variations in homeowner window maintenance, which may cause or contribute to any window issues identified at the Homes. (Moore Aff. ¶ 29, Ex. A).

Homeowner depositions align with ABS's findings. Homeowners have variously testified to no known issues with leaky windows, or knowledge of a single window with evidence of possible water intrusion. No homeowner has testified that every window in their house leaks and must be replaced. Homeowners have also testified to varying levels of regular or periodic maintenance on their windows. Maintenance, or a lack thereof, can impact whether a window has water intrusion issues. The only way to evaluate the existence of actual leaking windows and the extent of homeowner window maintenance is to evaluate each Home individually and question each homeowner individually. There are no facts that can be established on a representative basis from which class-wide conclusions can be drawn.

Therefore, Plaintiff has not established the commonality and typicality among the class members such that this claim can be pursued on a representative basis. Accordingly, decertification is appropriate.

**d. Doors**

Plaintiff alleges that the front and rear patio doors of all 221 Rose Hill Homes were defectively installed resulting in water leaks and resulting damage. There has been no evidence of any construction defects with the front doors. (Moore Aff. ¶ 30, Ex. A). ABS conducted destructive testing on approximately twenty rear patio doors. (Moore Aff. ¶ 30, Ex. A). Of these inspections, ABS found a variety of conditions that were not uniform among the inspected Homes. Some Homes no longer have the original doors that were installed at construction, some Homes have doors that are covered, and some homeowners have painted and maintained the rear patio doors while others have not. Some doors have evidence of water intrusion and deterioration, and others did not. (Moore Aff. ¶ 30, Ex. A). Where there was observed door deterioration, the primary cause appeared to be lack of homeowner maintenance, (Moore Aff. ¶ 30, Ex. A), which can only be established on a home-by-home basis through homeowner testimony and home-specific documentation. Plaintiff herself has performed no periodic maintenance on her patio door such as painting or recaulking throughout the nine years that she has lived there. Lack of maintenance can cause or contribute to door deterioration.

Plaintiff's expert engineer Rhett Whitlock testified during his deposition that certain Homes had rear patio doors that showed no visible signs of deterioration or needing to be fixed or fully replaced, and that he did not talk with homeowners about whether these doors had been replaced or ever had any damage. In fact, where such patio doors are covered, Whitlock agreed that such doors would be fine and should not be part of the class. Even where there is deterioration, the extent of such deterioration varies as does the necessary scope of repair. Whitlock conceded that certain doors could be repaired with brickmold trim only, while others would need to be fully pulled out and replaced.

The only way to identify which Homes have doors with possible deterioration, the scope of such deterioration and necessary repair, and cause of the deterioration, is to go home-by-home. There are no common factual questions that can be answered for all other Rose Hill Homes simply by an evaluation of Plaintiff's home. As such, class treatment for door defects is inappropriate.

**e. Concrete/Soil**

Plaintiff alleges that the foundations of the Rose Hill Homes suffer from insufficiently supported concrete/inadequate soil, resulting cracking, and water damage. ABS did not find concrete slabs with uniform cracking or displacement in excess of performance standards and has not seen any evidence of such deviations with the exception of one such slab. (Moore Aff. ¶ 31, Ex. A). Plaintiff has not provided any testing below slab or of the concrete slab to evidence any conditions that fall outside of the performance standards. As such, class treatment of this issue is inappropriate.

**f. Grading / Drainage**

Plaintiff alleges that the Rose Hill Home lots were insufficiently or improperly installed grading and/or drainage resulting in water damage, ponding, unevenness, and landscaping difficulties.

ABS's inspections revealed Rose Hill Homes with significant modifications of the backyard to include pools, decks, landscaping, and fences. (Moore Aff. ¶ 32, Ex. A). Each of these modifications can impact drainage. ABS has seen no evidence of ponding water outside of the standards. (Moore Aff. ¶ 32, Ex. A). Specifically at Plaintiff Zitek's home, the Ziteks have made significant changes to their backyard that has modified the original drainage design, including installing a pool, deck, and significant landscaping. Such changes are supposed to be submitted to the homeowner's association for review of potential changes in grading and drainage

and it is unclear whether these steps were ever taken. Regardless, given these significant changes to Plaintiff's home, she cannot establish commonality, typicality, numerosity as among Plaintiff and the absent class members as to the alleged grading and drainage defects.

Additionally, through homeowner depositions, it has become clear that numerous other homeowners have improved and/or modified their yards such that uniform class treatment of grading and drainage issues cannot be done. Review of all such alleged grading and drainage defects must go home-by-home.

## **II. D.R. Horton's Statute of Limitations Defense is Fact-Intensive and Homeowner-Specific.**

Through deposition testimony and a review of warranty claims, NM Alex has learned that some homeowners were on notice of the alleged defects more than three years before the Complaint was filed in this action and either took no action or in some circumstances filed a warranty claim. Homeowners were required to bring their claim within three (3) years of discovery, S.C. Code Ann. § 15-3-530, and not every homeowner's claims are timely.

Accordingly, D.R. Horton may have a statute of limitations defense against certain homeowners. The only way for D.R. Horton to fairly develop this defense is to question each individual homeowner about when they first noticed the claimed defects and what actions they took to preserve their claim. For this reason, class certification is inappropriate.

## **III. Plaintiff's Sampling Methodology and Sample Selection Bias Do Not Support Class Certification.**

In pursuing this class action, Plaintiff is attempting to draw inferences and conclusions about construction defects, causation, and damages across the entire class of absent members and uninspected Homes from a sample set of inspected homes. In order to draw statistically significant and meaningful inferences about uninspected Rose Hill Homes, the sample set of inspected Homes

needed to be identified using proper statistical probability sampling methodology, such as random sampling or stratified sampling. (Affidavit Charles L. Alford ¶ 8 (May 1, 2023), attached as **Exhibit B**).

Here, Plaintiff provided its expert Rhett Whitlock with a list of homes to inspect. These homes had known issues or complaints. Whitlock did not select a random sample of Rose Hill Home for inspection. The result is sample selection bias, and a sample set from which class-wide inferences cannot be drawn. (Alford Aff. ¶¶ 8-9, Ex. B). According to Dr. Charles Alford, an expert in forensic economics and statistics, Dr. Whitlock’s “methodology is fatally flawed and his conclusions are statistically invalid . . . .” (Alford Aff. ¶ 8, Ex. B).

To make valid statistical inferences about the non-inspected homes, Whitlock needed to identify the sample set of homes using random sampling, or another valid statistical methodology. Here, no such statistically valid tool was used. As such, Whitlock’s inferences and conclusions about the population of Rose Hill Homes lack statistical confidence and are invalid. (Alford Aff. ¶ 9, Ex. B).

It would be improper to move forward as a class action and allow Plaintiff to present inferences and conclusions about construction defects across the entire population of Rose Hill Homes where the sample set was not properly selected according to proper statistical methodology and does not result in statistically meaningful findings. Accordingly, class treatment is not appropriate.

#### **IV. Plaintiff’s Damages Model Does Not Support Class Certification.**

Plaintiff’s experts have presented a damages model that does not account for the variations among the Rose Hill Homes observed during discovery. If Plaintiff is successful in proving her claims, the class members would only be entitled to damages for the defectively constructed

conditions at their Homes. Where the Homes have no such injuries and related damages, they are not entitled to recovery.

Plaintiff's experts have developed a highly speculative and arbitrary damages model that demonstrates the significant problems with class-wide determinations across all Rose Hill Homes. See Comcast Corp. v. Behrend, 569 U.S. 27 (2013) (ruling that damages model did not support class treatment). Whitlock's damages model does not simply calculate a unit cost for labor and materials, which would vary based on the extent of proven damages at each Home. Instead, Whitlock has concluded, based on his biased sample set, that not only do the defective conditions need to be fixed, but 100% of each construction condition must be wholly replaced. For example, Whitlock calculates replacement for 100% of the windows in every Rose Hill Home. There is no evidence that every window in every Home is defective and must be replaced. Even in the Homes that Whitlock has actually inspected, there is no evidence that every window is defective. Whitlock makes the same conclusory statements about manufactured stone veneer, brick veneer, brick lintels, and patio doors.

Whitlock's damages model does not align with the variations among Rose Hill Homes and further demonstrates why Plaintiff's claims are not appropriate for class-wide determination. For this reason, this class action should be decertified.

### **CONCLUSION**

This Motion for Class Decertification is supported by the record in this case, including the pleadings, affidavits, depositions, memoranda to be filed ahead of any hearing on this motion.

THE WARD LAW FIRM, P.A.  
Attorneys for Fourth-Party Defendant NM Alex  
Carpet, Inc.

s/ John E. Rogers, II  
John E. Rogers, II (SC Bar # 72779)  
P.O. Box 5663  
Spartanburg, SC 29304  
864-591-2366  
864-585-3090 Fax  
Email: [jrogers@wardfirm.com](mailto:jrogers@wardfirm.com)

June 20, 2023

EXHIBIT A

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

Natalie Zitek, individually, and on behalf of )
all others similarly situated, ) C.A. No. 2019-CP-04-1942

Plaintiff )

vs )

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

Defendant )

D.R. HORTON, INC. )

Third-Party Plaintiff )

vs )

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

AFFIDAVIT OF
L. STEVEN MOORE

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

PERSONALLY APPEARED BEFORE ME, L. STEVEN MOORE, PE, RRC, REWC, who, being first duly sworn, deposes and avers the following:

1. My name is L. Steven Moore, PE, RRC, REWC. I am a citizen and resident of Union County, North Carolina. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.

2. I am a member of Applied Building Sciences, Inc. ("ABS"). Our firm offers consulting services in the construction industry, including reviewing and providing advice concerning residential homes.

3. ABS has been retained by Kenison, Dudley, & Crawford, LLC ("KDC") concerning existing construction conditions in a neighborhood known as Rose Hill located in Easley, South Carolina to examine potential construction defects as alleged by Plaintiff, Ms. Zitek.

4. At all times relevant, I have overseen ABS's involvement with KDC regarding the above-captioned matter.

5. I have reviewed all findings made by ABS throughout the course of this action.

6. I have a Bachelor of Science in Civil Engineering from North Carolina State University.

7. I am a licensed professional engineer in the state of South Carolina and have been licensed in South Carolina for over 25 years.

8. I am also a licensed professional engineer in additional states including North Carolina, Kentucky, Georgia, Tennessee, and Virginia.

9. I am licensed General Contractor in the State of South Carolina and have held this license for over five years.

10. I am also a licensed General Contractor in the State of North Carolina.

11. I am a certified arbitrator, issued by the American Arbitration Association Construction Industry National Panel of Arbitrators.

12. I am a registered roof consultant and a registered exterior wall consultant.

13. I am a member of several professional organizations, including the American Society of Civil Engineers, ICRI and IIBEC.

14. I specialize in the forensic engineering of residential homes and investigation of construction materials used on residential homes. I analyze how buildings are designed, constructed, and/or manufactured. I analyze the conditions of the site and the residential home.

15. I have testified and arbitrated similar cases involving similar construction defects.

16. In most cases in which I testify that proceed to a jury's verdict, the jury renders a verdict that aligns with my testimony and findings.

17. In this case, ABS was asked to evaluate and inspect approximately one hundred fifteen (115) homes (the "Homes") within the Rose Hill subdivision. ABS conducted destructive testing on twenty-five (25) Homes. It is my understanding that D.R. Horton built 234 homes in Rose Hill and approximately 221 homes are at issue in this lawsuit.

18. ABS's cataloging of home exteriors shows only a few homes with just one cladding material (brick or vinyl). There are approximately one hundred fifty (150) brick homes with varying combinations of brick, stone, cement siding, and vinyl siding. There are approximately sixty-six (66) homes that have no brick but are a combination of stone and vinyl.

19. Upon my information and belief, KDC and opposing counsel agreed to a certain set of homes, and ABS was not authorized to inspect additional homes within Rose Hill except for the Homes.

20. The inspections occurred on June 22, 2020, August 18-19, 2020, September 23 and

24, 2020, December 12-14, 2022, January 9-12, 2023, January 27, 2023, February 6-14, 2023, February 28-March 2, 2023, and March 20-22, 2023.

21. The Homes make up almost Fifty Percent (50%) of Rose Hill Homes constructed by D.R. Horton.

22. The Rose Hill Homes were all built between 2011 and 2017, meaning differing versions of the International Residential Code may be applied.

23. The Homes and each lot the Home was built on are different in many ways, including that (1) they vary greatly in square footage; (2) some homes are one floor whereas others have multiple floors; (3) the home's exterior finishing may vary from home to home, and (4) there are multiple different variations of the Homes which may include the amount of windows/window location, the number of bedrooms, and number of bathrooms in each Home.

24. During ABS's inspections, ABS noted that, while there may be a couple of issues reoccurring at multiple homes, there was not one (1) issue that was common and present at all of the Homes.

25. ABS noted that certain deficiencies that appeared at one Home were not necessarily found at the next Home. Further, some issues were limited to only one particular Home, with the issue not resurfacing throughout the course of ABS's inspections.

26. Where issues are currently present, an individualized scope of repair must be prepared for each individual Home. Given the variation from lot to lot, certain conditions on a lot may require a different scope of repair.

27. Of the Homes with some amount of brick exterior, ABS's inspections have not revealed uniform cracking, separation, water intrusion, or damages in the brick veneer. ABS conducted destructive testing of garage brick lintels on seven Homes. ABS observed the majority

to be properly tied and anchored, with proper air gaps, and flashing in place. Additionally, the garage brick lintel installation which is identified as an issue in a very small number of homes with brick on the front and sides, and where the house above the rear corner of garage is over twelve feet high, is also compliant with the building code because it is designed.

28. ABS conducted destructive testing on eight Homes with stone exteriors. These inspections did not reveal uniform defects or deterioration, but properly installed stone with good adhesion, low moisture readings, no rust on the metal lathe to which the stone adheres, presence of felt behind lathe, and weather barrier behind the felt. Any bonding or moisture issues observed were not uniform among the Homes. There are a very limited number of Rose Hill Homes with stone adhered directly to brick veneer, with stone on the front of the house and brick on sides where there is some separation at that connection point, and where stone was installed to the base of the wall. Even where these conditions were observed, any such related damage varies house-to-house and in some instances, there is little to no damage.

29. ABS conducted destructive testing on approximately 28 windows in 25 Homes. In the vast majority of these inspections, ABS found properly installed and taped windows, moisture levels in the acceptable range, and no evidence of water intrusion or stains. Where destructive testing revealed sections of the weather barrier not taped, there was still no evidence of water intrusion or stains. ABS's spray testing and sill dam testing within the appropriate ratings did not result in leaks in the tested windows. ABS identified variations in homeowner window maintenance, which may cause or contribute to any window issues identified at the Homes.

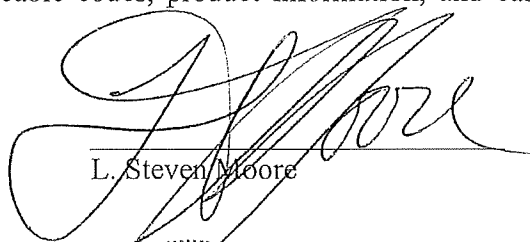
30. ABS has seen no evidence of construction defects on front doors. ABS conducted destructive testing on approximately twenty rear patio doors. During these inspections, ABS found a variety of conditions that were not uniform among the inspected Homes. Some Homes no longer

have the original doors that were installed at the time of initial construction, some Homes have doors that are covered, and some homeowners have painted and maintained the rear patio doors while others have not. Some doors have evidence of water intrusion and deterioration, and others did not. Where there was observed door deterioration, the primary cause appeared to be lack of homeowner maintenance.

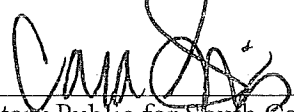
31. Of the more than one hundred slabs visually inspected, ABS only found potentially one concrete slab with cracking or displacement in excess of performance standards. Otherwise, all other slabs were within performance standards with no evidence of such deviations.

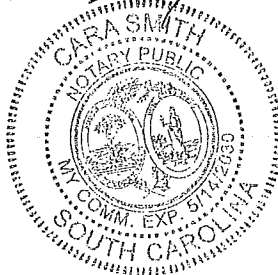
32. ABS's inspections revealed Rose Hill Homes with significant modifications of the backyard to include pools, decks, landscaping, and fences. Each of these modifications can impact drainage. ABS has seen no evidence of ponding water outside of the standards.

33. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training, and experience in my fields of expertise as well as my review of applicable codes, product information, and case-related materials available to date.

  
L. Steven Moore

Sworn to and subscribed in my presence  
this 1<sup>st</sup> day of May, 2023.

  
Notary Public for South Carolina  
My Commission Expires: 5-14-2030





PERSONALLY APPEARED BEFORE ME, CHARLES L. ALFORD, Ph.D., who, being first duly sworn, deposes and avers the following:

1. I, Charles L. Alford, am a citizen and resident of Abbeville County, South Carolina. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.

2. I graduated from Wofford College in 1968 with a bachelor of arts degree, majoring in Economics.

3. I received the Ph.D. degree from the University of Alabama in 1972, with fields in Marketing, Economics, and Quantitative Methods.

4. I served on the faculty of the Department of Economics and Business Administration at Furman University from 1971-2003. Among my teaching assignments were Quantitative Methods in Business, Marketing Research, and Statistics, all of which addressed topics of sampling, sample design, and statistical analysis.

5. I have consulted in the field of forensic economics for over 50 years. I have been qualified as an expert in economic and business affairs in federal district courts and state courts in South Carolina, North Carolina, Georgia, and Tennessee.

6. I have reviewed various filings and affidavits in this case, including affidavits of A. Rhett Whitlock, Ph.D., P.E., and the deposition testimony of Dr. Whitlock.

7. Dr. Whitlock testified that based on his sample set of inspected Rose Hill Homes, the entire population of Rose Hill Homes has similar defective construction conditions, similar causes, and a similar extent of damages and scope of repair. Dr. Whitlock's testimony suggests that all or most of the Rose Hill Homes in his sample were identified and provided to him by Plaintiff's' counsel. These homes appear to have been chosen and provided to Dr. Whitlock because of known issues or complaints

8. Regarding Dr. Whitlock's attempts at inferences applicable to the total population of residences in Rose Hill Homes, his methodology is fatally flawed and his conclusions are statistically invalid for the following reasons.

- i. Despite deposition testimony in which Dr. Whitlock asserts his belief in the scientific method, he has not applied it in the present analysis. He has provided no evidence of having developed a research methodology; he formulated no hypotheses based on preliminary research; and he tested no hypotheses.
- ii. Formulaic methods are readily available for determining appropriate sample size. These methods include consideration of population size, population variability, desired precision, and desired confidence, factors which are incorporated into formulae for determining standard errors of the mean and proportion. It appears that Dr. Whitlock disregarded these factors in determining an appropriate sample size, instead simply gathering data and attempting to justify his sample size after the fact.
- iii. By far, the most glaring flaw in his attempt to draw inferential conclusions is related to his sampling procedure.
  1. The term "statistical inference" refers to the process of estimating population parameters (quantitative descriptive measures of a population) using sample statistics (quantitative descriptive measures of a sample). For example, in the present case, population parameters include proportions of all Rose Hill Homes with certain construction flaws and the arithmetic mean cost per home of remediating the

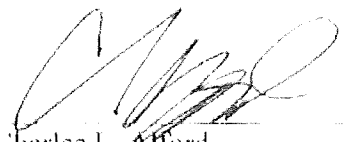
flaws: sample statistics include the same measures for sampled observations.

2. The foundational requirement of valid statistical inference is that sample data must be gathered using a probability sampling procedure, *i.e.*, each member of the population has a known, non-zero probability of inclusion in the sample. If inferences are based on non-probability sampling, zero statistical confidence is applicable to the conclusions.
3. Types of probability samples are simple random, systematic, stratified, and cluster sampling. Simple random sampling and systematic sampling procedures were readily available to Dr. Whitlock. Stratified sampling may have been appropriate. Cluster sampling was not applicable.
4. It is abundantly evident that Dr. Whitlock's conclusions are based on non-probability sampling. Among non-probability samples are those based on respondent self-selection, convenience, and judgment. All of these appear to apply in his work, the most significant of which is evidenced by his testimony that plaintiff's counsel identified for him homes for his evaluations.

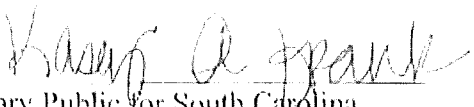
9. Instead of scientifically designing a research methodology to include validly testable hypotheses, Dr. Whitlock simply gathered sample data based on convenience and/or judgment, calculated sample statistics, and invalidly reached conclusions regarding population parameters with no ability to express statistical confidence in his conclusions.

10. If a physician were informed that a number of residents in a neighborhood had an illness, confirmed those illnesses by examining the afflicted residents, and then concluded that all residents in the neighborhood must have the illness, it would be obvious even to those uninformed regarding statistics that the physician's conclusion about the entire neighborhood was not supported by his observations of the afflicted individuals. Yet this approach is representative of Dr. Whitlock's methodology.

11. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training, and experience in my fields of expertise as well as my review of case-related materials available and provided to me to date.

 5/1/23  
Charles L. Afford

Sworn to and subscribed in my presence  
this 1 day of May, 2023.

  
Notary Public for South Carolina  
My Commission Expires: 8/5/2031

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, )  
 )  
 )

**DEFENDANT D.R. HORTON, INC.'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT AS TO DEFENDANT JLS  
MASONRY, INC.**

Plaintiff )

vs )

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

Defendant )

---

D.R. HORTON, INC. )  
 )  
 )

Third-Party Plaintiff )

vs )

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

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

Third-Party Defendants

**TO: DEFENDANT JLS MASONRY, INC. AND ITS COUNSEL OF RECORD ELIZABETH A. MARTINEAU, ESQUIRE, LEE M. THOMAS, ESQUIRE AND BLINN L. CUSHMAN, ESQUIRE:**

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service of this Notice upon you or as soon thereafter as counsel may be heard, the undersigned attorneys for Defendant D.R. Horton, Inc. (“Defendant” or “D.R. Horton”) will move before the presiding Judge of the Anderson County Court of Common Pleas for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting D.R. Horton partial summary judgment as to Defendant JLS Masonry, Inc. for defective stone and brick installation.

D.R. Horton’s Motion is based upon the pleadings, discovery, affidavits, exhibits, deposition transcripts, and other admissible evidence as well as the applicable common law and statutory law. D.R. Horton reserves the right to submit a Memorandum of Law in support of this Motion and to make additional arguments at a hearing on this Motion.

**KENISON, DUDLEY & CRAWFORD, LLC**

*s/ Jason M. Imhoff*

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

Jason Imhoff (S.C. Bar # 69355)

704 E. McBee Ave.

Greenville, SC 29601

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(864) 242-4844 (fax)

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*Attorneys for Defendant D.R. Horton*

June 23, 2023

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

COUNTY OF ANDERSON

CASE NO.: 2019-CP-04-01942

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

Plaintiffs, )

v. )

DR Horton, Inc., )

Defendant. )

---

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 )

**JOINT MOTION TO BIFURCATE**



- (3) The trial of Plaintiff's claims against DRH ("Phase 1") will last several weeks.
- (4) DRH's third-party claims are, by their very nature, derivative. *See* Rule 14, SCRCP.
- (5) Pursuant to Rule 42(b), SCRCP:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

(6) Construction defect lawsuits are highly technical and in Phase 1 the jury will be tasked with hearing and evaluating evidence from engineers, architects, statisticians, and other experts.

(7) Third-Party Defendants assert that bifurcation of this trial will, at a minimum, "be conducive to expedition and economy" and will avoid confusing the jury. For example, if not bifurcated, DRH will essentially present two cases within one – a defense to Plaintiff's claims, and an offense of "passing the buck" to its subcontractors on DRH's indemnity claims.

(8) Third-Party Defendants (and dozens of others) plan to call multiple experts.

(9) Third-Party Defendants believe that maintaining a streamlined trial in Phase 1 will benefit the parties, counsel, the Court, and the jury.

(10) Third-Party Defendants propose and move the Court to begin the trial of DRH's third-party claims (and other parties' fourth-party claims) ("Phase 2") immediately after the jury renders its verdict in Phase 1.

(11) Due to the intensely factual and technical nature of the case as well as the potential prejudice to Third Party Defendants, Third-Party Defendants propose and move the Court to retain the empaneled jury from Phase 1 to adjudicate Phase 2.

WHEREFORE, based on the foregoing, as well as any forthcoming brief(s) and oral argument at the hearing of this matter, Third-Party Defendants respectfully request the Court bifurcate the trial of this matter as set forth above.

Respectfully submitted this 23<sup>rd</sup> day of June, 2023.

/s/ Lee M. Thomas

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Lee M. Thomas (Bar: 103034)  
Blinn L. Cushman (Bar: 104486)  
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*Counsel for JLS Masonry, Inc. and  
MJ Cowboys, LLC*

/s/ Jeffrey A. Ross

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*Counsel for JLS Masonry, Inc.*

/s/ Kevin W. Mims

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[wperrin@lmlawllp.com](mailto:wperrin@lmlawllp.com)  
*Counsel for M&L Reyna Construction, LLC*

/s/ Stacey P. Canaday

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*Counsel for Jesus Jimenez*

/s/ Russell M. Racine

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[rracine@cshlaw.com](mailto:rracine@cshlaw.com)  
*Counsel for Jesus Robles Montes a/k/a  
Robles Construction*

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

COUNTY OF ANDERSON

CASE NO.: 2019-CP-04-01942

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

Plaintiffs, )

v. )

DR Horton, Inc., )

Defendant. )

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. )

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Inc.; Alpha EMC; A-Z, Inc.; Atlanta Floor )

Designs Center; A Grade Above Others, )

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Inc.; CPI Security Systems, Inc.; DOM )

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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. )

**MOTION TO DECERTIFY CLASS**



/s/ Lee M. Thomas

Elizabeth A. Martineau (Bar: 78732)

Lee M. Thomas (Bar: 103034)

Blinn L. Cushman (Bar: 104486)

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*MJ Cowboys, LLC*

/s/ Jeffrey A. Ross

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*Counsel for JLS Masonry, Inc.*

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

COUNTY OF ANDERSON

CASE NO.: 2019-CP-04-01942

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

Plaintiffs, )

v. )

DR Horton, Inc., )

Defendant. )

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 )

**JOINT MOTION TO BIFURCATE**



- (3) The trial of Plaintiff's claims against DRH ("Phase 1") will last several weeks.
- (4) DRH's third-party claims are, by their very nature, derivative. *See* Rule 14, SCRCP.
- (5) Pursuant to Rule 42(b), SCRCP:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

(6) Construction defect lawsuits are highly technical and in Phase 1 the jury will be tasked with hearing and evaluating evidence from engineers, architects, statisticians, and other experts.

(7) Third-Party Defendants assert that bifurcation of this trial will, at a minimum, "be conducive to expedition and economy" and will avoid confusing the jury. For example, if not bifurcated, DRH will essentially present two cases within one – a defense to Plaintiff's claims, and an offense of "passing the buck" to its subcontractors on DRH's indemnity claims.

(8) Third-Party Defendants (and dozens of others) plan to call multiple experts.

(9) Third-Party Defendants believe that maintaining a streamlined trial in Phase 1 will benefit the parties, counsel, the Court, and the jury.

(10) Third-Party Defendants propose and move the Court to begin the trial of DRH's third-party claims (and other parties' fourth-party claims) ("Phase 2") immediately after the jury renders its verdict in Phase 1.

(11) Due to the intensely factual and technical nature of the case as well as the potential prejudice to Third Party Defendants, Third-Party Defendants propose and move the Court to retain the empaneled jury from Phase 1 to adjudicate Phase 2.

WHEREFORE, based on the foregoing, as well as any forthcoming brief(s) and oral argument at the hearing of this matter, Third-Party Defendants respectfully request the Court bifurcate the trial of this matter as set forth above.

Respectfully submitted this 23<sup>rd</sup> day of June, 2023.

/s/ Lee M. Thomas

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*Counsel for M&L Reyna Construction, LLC*

/s/ Stacey P. Canaday

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*Counsel for Jesus Robles Montes a/k/a*

*Robles Construction*



PLEASE TAKE NOTICE that Plaintiff, by and through her undersigned counsel, and pursuant to Rule 56, SCRCPC, moves this Court for an Order granting summary judgment in favor of Plaintiff as to all negligence and implied warranty claims asserted against Defendant D.R. Horton, Inc. There are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law.

The grounds for this Motion are that the unconverted evidenced in this case shows:

- A) D.R. Horton, as the general contractor of Rose Hill, was admittedly responsible for ensuring that the construction of Plaintiff and the Class’s homes complied with applicable codes and was performed in a workmanlike manner.
- B) The following building components were installed in violation of the building code and therefore constitute construction defects:
  - 1. The brick veneer;
  - 2. The angle irons/garage lintels;
  - 3. The stone veneer; and,
  - 4. The building paper (“WRB”)
- C) The installation of the patio doors is in violation of the manufacturer’s installation instructions and therefore in violation of the building code.
- D) The vinyl windows suffer from a manufacturing defect and are fracturing.
- E) The D.R. Horton license holder failed to provide any guidance, supervision, administration, or quality control at Rose Hill during construction (and disclaimed all involvement and responsibility).
- F) The foregoing code violations and construction defects have damaged Plaintiff and the Class.

These and other grounds will be supported by the pleadings, discovery, affidavits, expert reports, memorandum of law, and oral argument at the hearing on this matter.

Respectfully submitted,

[SIGNATURE PAGE TO FOLLOW]

JUSTIN O'TOOLE LUCEY, P.A.

s/Charlotte Winckler

---

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*Attorneys for Plaintiff*

June 23, 2023  
Mount Pleasant, South Carolina



TO ALL COUNSEL OF RECORD:

Comes now, Plaintiff, above named, and MOVES this Court to adopt and enter as its Order the attached Trial Plan, or a trial plan similar thereto.

Plaintiff certifies that consultation with opposing counsel on the attached details would serve no useful purpose as there are too many counsel with divergent interests. However, Plaintiff did consult with many opposing counsel on the general trial plan concept and understands most third party counsel agree with the general concept.

JUSTIN O'TOOLE LUCEY, P.A.

s/ Charlotte B. Winckler

---

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*Attorneys for Plaintiff*

June 23, 2023  
Mount Pleasant, South Carolina



### **Order Establishing Trial Plan**

1. Trial shall commence with jury selection on Tuesday, September 5, 2023.
2. Plaintiff's claims will be tried to a verdict first ("the Main Case"), followed by DRH's claims being tried against Third-Party Defendants (and their Defendants, hereinafter, collectively, "Third Parties") in front of the same jury ("Phase II").
3. Unless the context suggests otherwise or otherwise impractical, Third Parties are required to attempt to integrate and consolidate any Third-Party submission referenced herein. In the event this does not occur, Third Parties shall accompany their submission with an explanation as to why integration and consolidation was not possible.
4. Exhibit Lists must be served by Friday, August 18, 2023, and objections thereto noted by Tuesday, August 22, 2023; an exhibit conference to resolve conflicts must occur by noon, Thursday, August 24, 2023; and any remaining exhibit disputes shall be submitted to the Court by Monday, August 28, 2023.
  - a. Each Party shall provide an electronic copy of (or link to) all proposed exhibits, pre-marked, to all other parties at the time the exhibit lists are served. Third Parties shall coordinate in the marking of their exhibits, which shall begin with the designator "TP" and be numbered sequentially.
  - b. Any Party renumbering deposition exhibits for trial shall provide a cross-reference to the original deposition exhibit name and number.
5. Witness Lists must be exchanged by Friday, August 18, 2023.
6. Defendant must elect bifurcation of punitive damages, if at all, by Tuesday, August 22, 2023.
7. Plaintiff and Defendant will submit proposed verdict forms by Wednesday, August 23, 2023. Defendant and Third Parties will also submit a proposed Phase II verdict forms.
8. Pretrial briefs and previously ordered submittals are due Friday, August 25, 2023, together with any Motions in Limine and a Statement of Undisputed Facts.
  - a. The parties shall attempt to cooperate on a joint *voir dire*, both before and after original submission.
  - b. If appropriate, the Court may use a consolidated undisputed statement of facts to simplify matters for the jury or streamline the trial.
9. With their consolidated pretrial brief and supporting materials, Third Parties must submit a proposed grouping of Third Party defendants by trade and designate a lead or liaison counsel for each trade group.

10. There will be a hearing on all pretrial matters on Thursday, August 31, 2023.
11. The Parties must inform the Court by Friday, September 1, 2023, as to whether they will accept a verdict from eight or more jurors if one or more juror(s) is excused after all the alternates are seated.
12. Deadline recap:
  - a. Friday August 18, Initial Exhibit & Witness Lists
  - b. Tuesday August 22, Exhibit Objections
  - c. Tuesday August 22, DRH Option to Bifurcate
  - d. Wednesday August 23, Verdict Forms
  - e. Thursday August 24, noon, Exhibit Conference
  - f. Friday August 25, pretrial briefs and submittals; Motions in Liminie; Statements of Undisputed Facts; Third party groupings
  - g. Monday August 28, remaining exhibit disputes submitted
  - h. Thursday August 31, Pretrial hearing
  - i. Friday September 1, minimum juror requirements
13. All evidence and arguments relating solely to Phase II issues, e.g., evidence relating to the failure to procure the insurance or endorsements allegedly required by the Subcontract(s), shall be deferred to Phase II.
14. Third-Party Defense counsel will have limited participation in the Main Case as follows:
  - a. Defendant and Third Parties shall share the four defense strikes; in the absence of agreement, Defendant will exercise three and Third Parties will exercise one.
  - b. Third Parties may select three (3) counsel to give a brief opening on behalf of all Third-Party Defendants (with all Third Parties reserving full openings and closings for Phase II). In the absence of an agreement otherwise by the Third Parties, the largest two trades shall each give one opening; and the remaining trades shall select one attorney to give the remaining Third-Party opening. "Largest trade" shall be the trade group which faces the largest monetary Third-Party claim.
  - c. Third-Party counsel may defend their client or expert if called as a witness in the Main Case.
  - d. Not more than one (1) Third-Party counsel may cross each witness in the Main Cases on issues missed by Plaintiff or Defendant; provided however, this may not be used for coordinated cross examination – Plaintiff and Defendant must examine in full. In the event Third Parties are unable to agree on the cross-examining attorney, the Third Parties will rotate by trade (e.g., masons, window installers, suppliers), with each trade getting one opportunity each rotation.
15. It is anticipated that the trial will last nineteen weekdays and consist of one hundred and twenty hours or so of testimony.

- a. Plaintiff shall have forty-eight hours to put on its direct testimony and to cross Defendant and its witnesses;
  - b. Defendant shall have forty-three hours to cross-examine Plaintiff's witnesses and to direct the Defendant's witnesses; and
  - c. Third Parties shall collectively have five hours to examine witnesses during the main case.
  - d. Thereafter, the remaining time will be split in a fashion analogous to the foregoing for Phase II.
16. Proposed deposition publications must served in accordance with the South Carolina Rules of Civil Procedure ("SCRCP"). Counter designations and objections must be served within twenty-four (24) hours or else are waived. Counter designations must clearly specify which designations are supplemental to the portions being published by Plaintiff (and need to be incorporated by original designating party) and which portions are simply counter-publications (to be published by counter party at the conclusion of the original publication, in the nature of rebuttal information). The time incurred by all forms of counter designation will be counted towards the countering party's witness time.
- a. If appropriate and feasible, parties are encouraged to reach agreement on the publication of deposition summaries in lieu of a longer verbatim reading. If this option is utilized, the Court will apprise the Jury of the process.
    - i. The option of partial verbatim publication of, e.g., publication of portions reflecting on witness credibility, and partial publication of summary of points, shall also be available, if appropriate for the context.
    - ii. The option of publishing a summary of points and moving extracted verbatim testimony into evidence as an exhibit shall also be available in appropriate circumstances.
17. Service hereunder shall be by electronic transmission; provided, however, a party serving time sensitive material while court is in session (or during daytime breaks) shall provide a printed copy to the principal opposing party(s) in Court.
18. The Court reserves its inherent authority to modify any of the foregoing at any time, *sua sponte*, or upon motion of a party upon good cause shown, and upon reasonable notice if time permits.

AND IT IS SO ORDERED!

Anderson, South Carolina  
Date: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Judge Sprouse

STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON

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

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 TO DECERTIFY CLASS  
AND FOR JOINDER**

\_\_\_\_\_  
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. )

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**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, in addition to the grounds and arguments addressed herein (if any), hereby moves, joins in, and incorporates herein by reference any and all of those arguments set forth for an Order decertifying this class action, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, that may be asserted, argued or otherwise put before the Court by other parties to the extent those arguments may be applicable to M&L Reyna. This includes, but may not be limited to, the Motion(s) filed by D.R. Horton, Inc., Manale Landscaping, LLC, Long Heating and Air Conditioning, Inc., and AJ Landscaping and

Grading, a/k/a AJ Landscaping & Grading, LLC. M&L Reyna also joins in any other Motions and arguments by other parties that may be forthcoming that are not inconsistent with this Motion and Joinder. M&L Reyna submits the following as grounds for this Motion:

1. Discovery has revealed Plaintiffs cannot satisfy the requirements of Rule 23, SCRPC.
2. There is neither a question of law nor fact common to the class regarding the scope of work performed by M&L Reyna.
3. The claims of the class representative, Natalie Zitek, are not typical to the claims of the entire class regarding the scope of work performed by M&L Reyna.
4. The class representative, Natalie Zitek, does not fairly and adequately protect the interests of the class regarding the scope of work performed by M&L Reyna.
5. M&L Reyna will be significantly prejudiced should the class not be decertified as it only performed work on a fraction of the single-family homes, and its scope varied on those single-family homes. The claims against M&L Reyna are not typical across the class and the amount in controversy does not need exceed one-hundred dollars (\$100.00) for each member of the class as to the work of M&L Reyna.

WHEREFORE for the foregoing reasons, M&L Reyna respectfully requests this Court enter an Order Decertifying the Class as to M&L Reyna Construction, LLC and its scope of work. M&L Reyna's Motion and Joinder is based upon the pleadings, discovery, affidavits, exhibits, deposition transcripts and other admissible evidence, as well as the applicable common and statutory law of the State of South Carolina and any Memorandum in Support that may be presented prior to or at the time of any hearing on the matter. Further, M&L Reyna reserves the

right supplement and/or amend this Motion and Joinder and present additional arguments as may be appropriate.

Pursuant to Rule 11, SCRPC, the undersigned affirms and certifies that consultation is not required prior to filing, would serve no useful purpose or could not be timely held. Finally, in the interests of judicial economy and efficiency, M&L Reyna would respectfully request that the above Motion and Joinder be scheduled for a hearing at the same time as any other similar Motion(s).

LUZURIAGA MIMS, LLP

*s/Rachel Stewart*

---

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

June 23, 2023

Charleston, South Carolina

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., 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, )

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

FOURTH-PARTY DEFENDANT NM  
ALEX CARPET, INC.'S BRIEF IN  
SUPPORT OF MOTION FOR  
CLARIFICATION

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/ka/ 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.**

---

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, )

**C.A. No.: 2019-CP-04-01942**

**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., Vinny’s Perfection Flooring, )**  
**LLC, Ismael Vasquez a/k/a Promesa )**  
**Flooring, LLC )**  
**)**  
**Fourth-Party Defendants. )**  
**)**

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Fourth-Party Defendant, NM Alex Carpet, Inc. (hereinafter “NM Alex”), by and through its undersigned counsel, hereby submits its Brief in Support of Motion for Clarification (the “Motion”). By way of this Motion, NM Alex respectfully requests a written ruling by the Court, clarifying that no flooring issue(s) are: a class issue, a class cause of action, or a class allegation (or in the alternative, an order decertifying this class action as to all flooring issues), pursuant to Rule 60(a) and (b)(6) of the South Carolina Rules of Civil Procedure.

**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”). The parties have conducted a significant amount of discovery since this time, the results of which have led D.R. Horton to maintain its position that the alleged construction defects cannot be resolved on a class-wide basis.

The Rose Hill Neighborhood has 261 homes, 234 of which were built by D.R. Horton between 2011 and 2017 after the original developer became insolvent. The initial homebuyers were able to customize their home, choosing from twenty-six different model plans, each with multiple options for exterior materials and window type and placement, resulting in sixty-seven unique configurations and home designs in Rose Hill. These designs vary between one-story ranches, one-story homes with a single room over the garage, and a full two-story home that consists of multiple

rooms and bathrooms on the second floor. Of the 221 Homes in the putative class, only a handful have just one exterior material (brick or vinyl). The vast majority have a combination of two or more exterior materials. There are approximately 150 brick homes with varying combinations of brick, stone, cement siding, and vinyl siding. There are another approximately 66 homes that have no brick but are a combination of stone and vinyl. (Affidavit L. Steven Moore ¶ 18 (May 1, 2023), **Exhibit A to Motion.**)

As stated in the Order Certifying Class (dated Jan. 27, 2021; “the Order”), the representative issues involved in the class action in this case can be described as follows: “[Class Representative] Zitek maintains that her home and all other Horton-built homes in Rose Hill contain common defects and damages such as leaky windows and patio doors; insufficiently supported brick that is cracking along walls; loosely embedded stone that is separating away from walls; and, insufficiently supported slab foundations that are cracking in many places.” (The Order, p. 2.)

Alternately to its separately-raised Motion to Decertify Class, NM Alex moves herein for clarification of the scope of this class action, on the grounds that the class/class action, as certified by the Order, does not include any flooring issue(s) as a class issue, a class cause of action, or a class allegation.

### **LEGAL STANDARD**

Pursuant to Rule 60(a), SCRCP, “The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice.” Rule 60(b)(6) goes on to provide that “the court may relieve a party or its legal representative from a final judgment, order, or proceeding” on the ground off “any reason that justifies relief.”

### **ARGUMENT**

Plaintiffs have designated three forensic expert witnesses in this case: Rhett Whitlock,

PhD, PE; Warren Maddox, PE; and Andy Sherard, PE, RLS. As shown by the attached Rhett Whitlock scope of repair (**Exhibit B to Motion**), Sherard was retained to provide opinions as to the grading and drainage around the homes. Additionally, Maddox was retained as “MEP” expert, meaning his opinions pertain to the trades of mechanical (HVAC), electrical, and plumbing. Id. at 4, 5. Whitlock is the only forensic expert witness retained to provide testimony concerning the vertical structural elements of the homes themselves.

As is clear from the Whitlock scope of repair, Whitlock did not provide opinions pertaining to the flooring installation(s) at Rose Hill. Upon questioning by Plaintiffs’ counsel at his deposition, Whitlock confirmed that he did not assess or consider flooring at all:

Q [Lucey]: First of all, were you ever tasked by my office in the effort to determine whether or not there were any flooring deficiencies as to installation at Rose Hill?

A [Whitlock]: No.

Q: Did you attempt to do so anyway?

A: No.<sup>1</sup>

Critically, in response to direct questioning by counsel for NM Alex, Whitlock went on to testify as follows:

Q [Rogers]: As far as the types of flooring you hold that opinion for, are you talking about hardwood flooring or other types of flooring with that opinion?

A [Whitlock]: All flooring.

Q: And that includes the carpet?

A: Yes.

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<sup>1</sup> See **Exhibit C to Motion**, Whitlock Dep. Vol. 7, 19:3-10.

Q: And do you have any criticisms of the carpet installers involved as the defendants in this case for failing to check the substrate before installing the carpet?

A: I have nothing specific in that regard.

Q: Yesterday you testified you had no criticisms of the carpet installers at Rose Hill. Do you still hold that opinion?

A: Yes.

Q: Do you have any opinions particular to my client, NM Alex Carpet?

A: I do not.

Q: Do you have any criticism of NM Alex Carpet assuming that their only scope of work was installing carpeting at Rose Hill homes?

A: I don't.

(See **Exhibit A to this Brief**, Whitlock Dep. Vol. 7, 1793:18 - 1794:15.)

From this testimony provided by the only Plaintiffs' expert to assess the interior construction of the homes, it is evident that the Plaintiffs' experts have provided no opinions critical of the flooring scope of work in this litigation.

Moreover, even if flooring were an issue to be considered in this case, flooring was not qualified as a class-certified issue. Referring back to the Order Certifying the Class, nowhere does the Order refer to flooring issue(s) as a class-certified issue/allegation.

Given that Plaintiffs' own experts have not assessed or attempted to criticize flooring installation(s) at Rose Hill to a reasonable degree of engineering certainty, and the fact that the Court has never held that any flooring issue(s) are included as an issue in the class action, it is clear that no flooring issue(s) were certified as a class issue. As such, NM Alex asserts that no flooring issue(s) are: a class issue, a class cause of action, or a class allegation.

**CONCLUSION**

Therefore, NM Alex respectfully requests a ruling by the Court, clarifying that no flooring issue(s) are: a class issue, a class cause of action, or a class allegation (or in the alternative, an order decertifying this class action as to all flooring issues).

This Motion and Brief are supported by the record in this case, including the pleadings, affidavits, depositions, and any arguments or materials presented before the Court on hearing of this motion.

THE WARD LAW FIRM, P.A.  
Attorneys for Fourth-Party Defendant NM Alex  
Carpet, Inc.

s/ John E. Rogers, II  
John E. Rogers, II (SC Bar # 72779)  
T. Jonathan Clark (SC Bar # 102672)  
P.O. Box 5663  
Spartanburg, SC 29304  
864-591-2366  
864-585-3090 Fax  
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July 11, 2023

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

4 DEPOSITION OF A. RHETT WHITLOCK, PhD, PE  
5 VOLUME 7, APRIL 12, 2023

6 NATALIE ZITEK, Individually and on behalf of all  
7 others similarly situated,

8 Plaintiff,

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

10 D.R. HORTON, INC.,

11 Defendant.

12 

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D.R. HORTON, INC.,

13 Third-Party Plaintiff,

14 vs.

15 AJ LANDSCAPING & GRADING, LLC a/k/a A J  
16 LANDSCAPING & GRADING, LLC, et al.,

17 Third-Party Defendants,

18 

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PROBUILD COMPANY, LLC, et al.,

19 Fourth-Party Plaintiffs,

20 vs.

21 HARRELSON PAINTING, LLC, et al.,

22 Fourth-Party Defendants,

23 

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

25 Fifth-Party Plaintiff,

vs.

TORIBIO ISLAS AND ALEJANDRO SOTO,

Fifth-Party Defendants.

1 TIME: 9:30 AM

2 LOCATION: JUSTIN O'TOOLE LUCEY, PA  
3 MOUNT PLEASANT, SOUTH CAROLINA  
4

5  
6

7 REPORTED BY: J. LYNN CLARK, RPR, CSR(IA)  
8 NCRA CERTIFIED MERIT REPORTER  
9 CLARK BOLEN  
10 CHARLESTON, SC 29415  
11 843-762-6294  
12 WWW.CLARKBOLEN.COM  
13 Lynn@ClarkBolen.com

14  
15  
16

A P P E A R A N C E S

17

18 ON BEHALF OF PLAINTIFF:

19 JUSTIN O'TOOLE LUCEY, P.A.  
20 BY: JUSTIN O'TOOLE LUCEY  
21 BY: DABNY LYNN (VIA VC)  
22 BY: AMANDA FUNAI  
23 415 Mill Street  
24 Mount Pleasant, SC 29465

25 ON BEHALF OF DR HORTON, INC.:

26 KENISON DUDLEY & CRAWFORD, LLC  
27 BY: JASON IMHOFF  
28 BY: KATHRYN L. HARDEN (VIA VC)  
29 704 East McBee Avenue  
30 Greenville, SC 29601

31

1 MR. ROGERS: On flooring, yes.

2 MR. LUCEY: Okay.

3 EXAMINATION

4 BY MR. ROGERS:

5 Q. Dr. Whitlock, I'm John Rogers. I  
6 represent NM Alex Carpet and also Harrelson  
7 Painting in this lawsuit. A few follow-up  
8 questions on that line of testimony.

9 You mentioned that you believe that some  
10 of the flooring installers should have further  
11 checked the substrate before installing flooring.  
12 Did I get that accurate?

13 MR. LUCEY: Objection.

14 A. I think that's something that flooring  
15 installers should do is check the substrate to  
16 make sure it's adequate for installing the  
17 products.

18 Q. As far as the types of flooring you hold  
19 that opinion for, are you talking about hardwood  
20 flooring or other types of flooring with that  
21 opinion?

22 A. All flooring.

23 Q. And that includes the carpet?

24 A. Yes.

25 Q. And do you have any criticisms of the

1 carpet installers involved as the defendants in  
2 this case for failing to check the substrate  
3 before installing the carpet?

4 A. I have nothing specific in that regard.

5 Q. Yesterday you testified you had no  
6 criticisms of the carpet installers at Rose Hill.  
7 Do you still hold that opinion?

8 A. Yes.

9 Q. Do you have any opinions particular to  
10 my client, NM Alex Carpet?

11 A. I do not.

12 Q. Do you have any criticism of NM Alex  
13 Carpet assuming that their only scope of work was  
14 installing carpeting at Rose Hill homes?

15 A. I don't.

16 MR. ROGERS: No further questions.  
17 Thank you.

18 MR. LUCEY: Chris Adams, do you  
19 have any follow-ups as to your truss questions or  
20 as to your flooring questions?

21 MR. ADAMS: Yeah. Just real quick.  
22 I'll be brief on those.

23 EXAMINATION

24 BY MR. ADAMS:

25 Q. Dr. Whitlock, on the framing on those

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., 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, )

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

FOURTH-PARTY DEFENDANT  
HARRELSON PAINTING, LLC'S  
BRIEF IN SUPPORT OF MOTION  
FOR DECERTIFICATION, AND  
NOTICE OF JOINDER IN BRIEFS  
OF OTHER PARTIES

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/ka/ 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.**

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, )

**C.A. No.: 2019-CP-04-01942**

**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., Vinny’s Perfection Flooring, )**  
**LLC, Ismael Vasquez a/k/a Promesa )**  
**Flooring, LLC )**  
**)**  
**Fourth-Party Defendants. )**  
**)**

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Fourth-Party Defendant, Harrelson Painting, LLC (hereinafter “Harrelson Painting”), by and through its undersigned counsel, hereby presents its Brief in Support of its Motion for Decertification (the “Motion”), and hereby moves before the Presiding Judge of the Anderson County Court of Common Pleas for an Order decertifying this class action, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure.

**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”).<sup>1</sup> The parties have conducted a significant amount of discovery since this time, the results of which have lead D.R. Horton to maintain its position that the alleged construction defects cannot be resolved on a class-wide basis.

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<sup>1</sup> At least thirteen (13) homeowners have opted out of this class action, making the class size 221. (Pl.’s Report Notice Opt-Outs (Mar. 3, 2021)). D.R. Horton is aware that multiple homes have sold since the original opt-out period expired on March 1, 2021. Plaintiff has not provided any updated information as to whether these new potential class members have been given notice of this class action and an opportunity to opt-out and whether any new opt-outs must be added to this number. Should this action not be decertified, this issue must be addressed before a trial in this matter.

**Rose Hill Neighborhood**

The Rose Hill Neighborhood has 261 homes, 234 of which were built by D.R. Horton

between 2011 and 2017 after the original developer became insolvent. The initial homebuyers were able to customize their home, choosing from twenty-six different model plans, each with multiple options for exterior materials and window type and placement, resulting in sixty-seven unique configurations and home designs in Rose Hill. These designs vary between one-story ranches, one-story homes with a single room over the garage, and a full two-story home that consists of multiple rooms and bathrooms on the second floor. Of the 221 Homes in the putative class, only a handful have just one exterior material (brick or vinyl). The vast majority have a combination of two or more exterior materials. There are approximately 150 brick homes with varying combinations of brick, stone, cement siding, and vinyl siding. There are another approximately 66 homes that have no brick but are a combination of stone and vinyl. (Affidavit L. Steven Moore ¶ 18 (May 1, 2023), attached to Motion as **Exhibit A.**)

The topography of Rose Hill is hilly, which resulted in variations in the foundations and soil supporting the foundations. These variations include slab-on-grade on cut material, slab-on-grade on fill material, homes with basements, and lots with and without soil retaining walls. The hilly topography also resulted in variations in site drainage methods and conditions on each lot at the time of construction. As demonstrated below, such variations prevent uniform conclusions about breach of duty, causation, and damages related to the alleged construction defects.<sup>2</sup>

### **Findings in Discovery**

Since conditional class certification, through numerous home inspections, homeowner and

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<sup>2</sup> D.R. Horton fully incorporates herein its previously filed Memorandums in Opposition to Class Certification along with all supporting affidavits.

expert depositions, and other discovery, it has become abundantly clear that material facts underlying the proof of Plaintiff's class claims vary significantly among the named class representative and the opt-in class members, making class-wide treatment inappropriate. Such

factual differences include, but are not limited to, the following:

- Allegations of construction defects in home exteriors varies widely based on the construction material (*i.e.*, brick, stone, vinyl, cement siding);
- The approximately 4,000 windows at issue in this case vary significantly in type, size, location, ratings, and orientation, all of which impact the expected and observed performance;
- The topography among the Rose Hill lots varies widely because of the hilly condition of the neighborhood, resulting in varying foundation types and drainage characteristics of the Homes;
- Grading and landscaping differs greatly from home to home, and homeowners have varyingly improved their properties to add pools, porches, patios, fences, retaining walls, landscaping, drainage pipes, etc., all of which alters the drainage patterns from original construction;
- The existence and extent of the alleged construction defects and resulting damages varies widely from home to home;
- Homeowners have undertaken varying levels of periodic maintenance (*e.g.*, painting and sealing) of doors and windows, impacting the performance of these systems.

D.R. Horton has also discovered that a number of Homes have been sold since the date of original purchase. Some of those subsequent purchasers bought with knowledge of the alleged defects and some did not. Some homeowners have repaired the alleged defects while others have not.

Homeowner depositions have also revealed that certain homeowners have known about certain alleged defects for more than three years, making their claims barred by the statute of limitations. Only through individual homeowner examination and home-by-home evaluation will D.R. Horton be able to adequately and fairly defend against allegations that are home- specific.

Where similarly situated individuals buy the same product with the same manufacturing defect (*i.e.*, Volkswagen emissions scandal) or are all defrauded by the same deceptive conduct (*i.e.*, Enron securities fraud), class treatment is appropriate. However, where, as here, each potential class member buys a different product, built by a different group of subcontractors, and then complains of different defects with varying potential causes and different damages, it is no longer practical and efficient to move forward as a class action. The question for continued class certification is whether it can be fairly stated that: “as goes the claim of the named plaintiff, so go the claims of the class.” Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006) (citations omitted). Because of the numerous factual differences among the Plaintiff and absent class members—as identified through home inspections, depositions, and other discovery—it cannot fairly be stated that as goes the claims of Plaintiff Zitek, so go the claims of the class. For that reason, decertification of this conditionally certified class action is appropriate.

Accordingly, Harrelson Painting moves for decertification of this class action pursuant to Rule 23(d), SCRCR, on the grounds that through discovery it has become clear that Plaintiff cannot show the commonality, typicality, adequacy of representation, and numerosity required to maintain this as a class action.

### **LEGAL STANDARD**

At any time after conditional class certification but before a decision on the merits, this Court has the discretion to decertify a class action. Salmonsens v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). Decertification is appropriate when it has become apparent that individualized inquiries of class members are necessary to resolve the issues in the case. Gardner v. S.C. Dept. Rev., 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). That is the exact situation here, individual home inspections and individual homeowner examinations are necessary to resolve each

class member's individual claims.

In this Motion for Decertification, Harrelson Painting specifically contests commonality, typicality, adequacy of representation, and numerosity. Generally, commonality, typicality, and adequacy of representation blend together in the analysis of whether proof of Plaintiff's claims will sufficiently advance the claims of the absent class members. Deiter, 436 F.3d at 466 (citing Supreme Court precedent, which are omitted).

To establish commonality, a party must show that "there are questions of law or fact common to the class." Rule 23, SCRPC. Class certification is not appropriate where factual differences are the crux of a predominant legal issue and the success or failure of each class member's claim turns on individualized issues. Gardner, 353 S.C. at 22, 577 S.E.2d at 201. In considering the commonality requirement, the plaintiff must "demonstrate that the class members 'have suffered the *same* injury.'" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-50 (2011) (emphasis added).

To establish typicality, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Pope v. Heritage Cmty., Inc., 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011). "The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." Deiter, 436 F.3d at 466-67. The typicality analysis focuses on the elements and facts needed to prove Plaintiff's claims and whether those facts would prove the absent class members' claims. Id. At 467.

### **GROUND FOR DECERTIFICATION**

#### **I. The Alleged Defects, Causation, and Damages are Not Uniform Among the Rose Hill Homes.**

In her complaint, Plaintiff alleged numerous defective conditions in the Rose Hill Homes,

including: (1) failure in load-bearing components; (2) failure in exterior cladding systems; (3) water intrusion into and through windows, doors, and exterior building envelopes; (4) failure of other various building components. (Compl. ¶ 27). Plaintiff's Notice and Opportunity to Cure Letter identified thirteen separate improper construction conditions. (See Cure Letter, Def.'s Mtn. to Stay, Ex. A, at 9-10). Despite this long list of defects, Plaintiff's experts have not testified that all of these alleged defects actually exist in the Rose Hill Homes. As such, D.R. Horton will only address those construction conditions that Plaintiff has pursued and not address the other construction conditions that Plaintiff appears to have abandoned.<sup>3</sup>

**a. Brick Veneer**

Plaintiff alleges that brick veneer was improperly installed resulting in cracking, separation, water intrusion and resulting damage. Of the 221 Rose Hill Homes, approximately 150 have some amount of brick exterior. Home inspections have not revealed uniform cracking, separation, water intrusion, or damages in the brick veneer homes. (Moore Aff. ¶¶ 18, 27, Ex. A). Plaintiff's experts have raised a specific issue related to the installation of the garage brick lintel. ABS, one of D.R. Horton's experts, has conducted destructive testing on seven homes with garage

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<sup>3</sup> To the extent Plaintiff claims that these other alleged defects are not abandoned, Defendant reserves the right to brief these other defects in the context of decertification. Moreover, Defendant is moving for summary judgment on these other alleged defects for which no evidence has been provided by Plaintiff.

brick lintels. Of these, ABS observed the majority to be properly tied and anchored, with proper air gaps, and flashing in place. (Moore Aff. ¶ 27, Ex. A). While the garage brick lintel installation has been identified as an issue in a very small number of homes with brick on the front and sides, and where the house above the rear corner of garage is over twelve feet high, these lintel installations complied with the applicable building code because they were designed. (Moore Aff. ¶ 27, Ex. A).

Plaintiff's home is one of the few Rose Hill Homes that has brick on the front and sides and where the height of her home over rear corner of garage over twelve feet. As such, Plaintiff has not proven that there is a numerosity of claimants with these common issues, or that there are factual issues as to Plaintiff's home are common and typical of the absent class members. Given the limited circumstances where brick veneer may be at issue, the varying factual and legal issues, and the varying injuries and related damages, the Rose Hill Homes must be evaluated one-by-one for brick veneer claims.

**b. Manufactured Stone Veneer**

Plaintiff alleges that manufactured stone veneer was improperly installed on the Rose Hill Homes resulting in loose embedment, cracking, separation, and water intrusion and resulting damage. Of the 221 Rose Hill homes, approximately sixty-six have a combination of stone and vinyl exteriors, and another forty-nine have a combination of brick, stone, and either cement or vinyl siding. Of these, ABS conducted destructive testing on eight homes with stone exteriors. (Moore Aff. ¶ 28, Ex. A). Of these eight inspections, ABS did not observe uniform defects or deterioration. Rather, the majority of inspections revealed properly installed stone with good adhesion, low moisture readings, no rust on the metal lathe to which the stone adheres, presence of felt behind lathe, and weather barrier behind the felt. Any bonding or moisture issues observed were not uniform among the Homes. (Moore Aff. ¶ 28, Ex. A). There are a very limited number

of Rose Hill Homes with stone adhered directly to brick veneer; with stone on the front of the house and brick on sides where there is some separation at that connection point, and where stone was installed to the base of the wall. Even where these conditions have been observed, any such related damage varies house-to-house and in some instances, there is little to no damage. (Moore Aff. ¶ 28, Ex. A). There is no uniformity as to this construction condition among the 221 Rose Hill Homes, or even within the more limited number of Homes with manufactured stone veneer.

To establish commonality, Plaintiff must establish the existence of common questions of law or fact and injury resulting from improperly installed stone siding such that resolving these issues on Plaintiff's house resolves issues on all other homes with stone veneer. To establish typicality, Plaintiff must establish that the facts necessary to prove the elements of her cause of action for breach of contract (*i.e.*, breach, duty, causation, damages) will necessarily prove the absent class members' claims.

Here, Plaintiff's home has a very limited amount of stone, it has a very limited amount of stone adhered directly to brick, and it does not have stone-to-brick corner connection. As such, resolving Plaintiff's stone claims will not resolve the claims of the absent class members and Plaintiff has failed to establish commonality and typicality with respect to the alleged stone defects and has failed to show that she will adequately represent these absent class members. Further, Plaintiff has not established the numerosity of claimants with this issue.

For these reasons, continued class treatment is not appropriate.

**c. Windows**

Plaintiff alleges that the windows in all 221 Rose Hill Homes were defectively installed resulting in water leaks, cracking, separation, and resulting damage. Each of the 221 Rose Hill Homes has approximately 15-20 windows, totaling between 3,300 and 4,500 windows at issue in

the putative class. ABS conducted destructive testing on approximately 28 windows in 25 homes. (Moore Aff. ¶ 29, Ex. A). In the vast majority of these inspections, ABS found properly installed and taped windows, moisture levels in the acceptable range, and no evidence of water intrusion or stains. (Moore Aff. ¶ 29, Ex. A). Even in the instances where destructive testing revealed sections of the weather barrier not taped, there was still no evidence of water intrusion or stains. (Moore Aff. ¶ 29, Ex. A). Further, ABS's spray testing and sill dam testing within appropriate ratings did not result in leaks in the tested windows, contradicting Plaintiff's claim of uniform problems in all windows of all Rose Hill Homes. (Moore Aff. ¶ 29, Ex. A). Moreover, ABS identified variations in homeowner window maintenance, which may cause or contribute to any window issues identified at the Homes. (Moore Aff. ¶ 29, Ex. A).

Homeowner depositions align with ABS's findings. Homeowners have variously testified to no known issues with leaky windows, or knowledge of a single window with evidence of possible water intrusion. No homeowner has testified that every window in their house leaks and must be replaced. Homeowners have also testified to varying levels of regular or periodic maintenance on their windows. Maintenance, or a lack thereof, can impact whether a window has water intrusion issues. The only way to evaluate the existence of actual leaking windows and the extent of homeowner window maintenance is to evaluate each Home individually and question each homeowner individually. There are no facts that can be established on a representative basis from which class-wide conclusions can be drawn.

Therefore, Plaintiff has not established the commonality and typicality among the class members such that this claim can be pursued on a representative basis. Accordingly, decertification is appropriate.

**d. Doors**

Plaintiff alleges that the front and rear patio doors of all 221 Rose Hill Homes were defectively installed resulting in water leaks and resulting damage. There has been no evidence of any construction defects with the front doors. (Moore Aff. ¶ 30, Ex. A). ABS conducted destructive testing on approximately twenty rear patio doors. (Moore Aff. ¶ 30, Ex. A). Of these inspections, ABS found a variety of conditions that were not uniform among the inspected Homes. Some Homes no longer have the original doors that were installed at construction, some Homes have doors that are covered, and some homeowners have painted and maintained the rear patio doors while others have not. Some doors have evidence of water intrusion and deterioration, and others did not. (Moore Aff. ¶ 30, Ex. A). Where there was observed door deterioration, the primary cause appeared to be lack of homeowner maintenance, (Moore Aff. ¶ 30, Ex. A), which can only be established on a home-by-home basis through homeowner testimony and home-specific documentation. Plaintiff herself has performed no periodic maintenance on her patio door such as painting or recaulking throughout the nine years that she has lived there. Lack of maintenance can cause or contribute to door deterioration.

Plaintiff's expert engineer Rhett Whitlock testified during his deposition that certain Homes had rear patio doors that showed no visible signs of deterioration or needing to be fixed or fully replaced, and that he did not talk with homeowners about whether these doors had been replaced or ever had any damage. In fact, where such patio doors are covered, Whitlock agreed that such doors would be fine and should not be part of the class. Even where there is deterioration, the extent of such deterioration varies as does the necessary scope of repair. Whitlock conceded that certain doors could be repaired with brickmold trim only, while others would need to be fully pulled out and replaced.

The only way to identify which Homes have doors with possible deterioration, the scope of such deterioration and necessary repair, and cause of the deterioration, is to go home-by-home. There are no common factual questions that can be answered for all other Rose Hill Homes simply by an evaluation of Plaintiff's home. As such, class treatment for door defects is inappropriate.

**e. Concrete/Soil**

Plaintiff alleges that the foundations of the Rose Hill Homes suffer from insufficiently supported concrete/inadequate soil, resulting cracking, and water damage. ABS did not find concrete slabs with uniform cracking or displacement in excess of performance standards and has not seen any evidence of such deviations with the exception of one such slab. (Moore Aff. ¶ 31, Ex. A). Plaintiff has not provided any testing below slab or of the concrete slab to evidence any conditions that fall outside of the performance standards. As such, class treatment of this issue is inappropriate.

**f. Grading / Drainage**

Plaintiff alleges that the Rose Hill Home lots were insufficiently or improperly installed grading and/or drainage resulting in water damage, ponding, unevenness, and landscaping difficulties.

ABS's inspections revealed Rose Hill Homes with significant modifications of the backyard to include pools, decks, landscaping, and fences. (Moore Aff. ¶ 32, Ex. A). Each of these modifications can impact drainage. ABS has seen no evidence of ponding water outside of the standards. (Moore Aff. ¶ 32, Ex. A). Specifically at Plaintiff Zitek's home, the Ziteks have made significant changes to their backyard that has modified the original drainage design, including installing a pool, deck, and significant landscaping. Such changes are supposed to be submitted to the homeowner's association for review of potential changes in grading and drainage

and it is unclear whether these steps were ever taken. Regardless, given these significant changes to Plaintiff's home, she cannot establish commonality, typicality, numerosity as among Plaintiff and the absent class members as to the alleged grading and drainage defects.

Additionally, through homeowner depositions, it has become clear that numerous other homeowners have improved and/or modified their yards such that uniform class treatment of grading and drainage issues cannot be done. Review of all such alleged grading and drainage defects must go home-by-home.

## **II. D.R. Horton's Statute of Limitations Defense is Fact-Intensive and Homeowner-Specific.**

Through deposition testimony and a review of warranty claims, Harrelson Painting has learned that some homeowners were on notice of the alleged defects more than three years before the Complaint was filed in this action and either took no action or in some circumstances filed a warranty claim. Homeowners were required to bring their claim within three (3) years of discovery, S.C. Code Ann. § 15-3-530, and not every homeowner's claims are timely.

Accordingly, D.R. Horton may have a statute of limitations defense against certain homeowners. The only way for D.R. Horton to fairly develop this defense is to question each individual homeowner about when they first noticed the claimed defects and what actions they took to preserve their claim. For this reason, class certification is inappropriate.

## **III. Plaintiff's Sampling Methodology and Sample Selection Bias Do Not Support Class Certification.**

In pursuing this class action, Plaintiff is attempting to draw inferences and conclusions about construction defects, causation, and damages across the entire class of absent members and uninspected Homes from a sample set of inspected homes. In order to draw statistically significant and meaningful inferences about uninspected Rose Hill Homes, the sample set of inspected Homes

needed to be identified using proper statistical probability sampling methodology, such as random sampling or stratified sampling. (Affidavit Charles L. Alford ¶ 8 (May 1, 2023), attached to Motion as **Exhibit B**).

Here, Plaintiff provided its expert Rhett Whitlock with a list of homes to inspect. These homes had known issues or complaints. Whitlock did not select a random sample of Rose Hill Home for inspection. The result is sample selection bias, and a sample set from which class-wide inferences cannot be drawn. (Alford Aff. ¶¶ 8-9, Ex. B). According to Dr. Charles Alford, an expert in forensic economics and statistics, Dr. Whitlock’s “methodology is fatally flawed and his conclusions are statistically invalid . . . .” (Alford Aff. ¶ 8, Ex. B).

To make valid statistical inferences about the non-inspected homes, Whitlock needed to identify the sample set of homes using random sampling, or another valid statistical methodology. Here, no such statistically valid tool was used. As such, Whitlock’s inferences and conclusions about the population of Rose Hill Homes lack statistical confidence and are invalid. (Alford Aff. ¶ 9, Ex. B).

It would be improper to move forward as a class action and allow Plaintiff to present inferences and conclusions about construction defects across the entire population of Rose Hill Homes where the sample set was not properly selected according to proper statistical methodology and does not result in statistically meaningful findings. Accordingly, class treatment is not appropriate.

#### **IV. Plaintiff’s Damages Model Does Not Support Class Certification.**

Plaintiff’s experts have presented a damages model that does not account for the variations among the Rose Hill Homes observed during discovery. If Plaintiff is successful in proving her claims, the class members would only be entitled to damages for the defectively constructed

conditions at their Homes. Where the Homes have no such injuries and related damages, they are not entitled to recovery.

Plaintiff's experts have developed a highly speculative and arbitrary damages model that demonstrates the significant problems with class-wide determinations across all Rose Hill Homes. See Comcast Corp. v. Behrend, 569 U.S. 27 (2013) (ruling that damages model did not support class treatment). Whitlock's damages model does not simply calculate a unit cost for labor and materials, which would vary based on the extent of proven damages at each Home. Instead, Whitlock has concluded, based on his biased sample set, that not only do the defective conditions need to be fixed, but 100% of each construction condition must be wholly replaced. For example, Whitlock calculates replacement for 100% of the windows in every Rose Hill Home. There is no evidence that every window in every Home is defective and must be replaced. Even in the Homes that Whitlock has actually inspected, there is no evidence that every window is defective. Whitlock makes the same conclusory statements about manufactured stone veneer, brick veneer, brick lintels, and patio doors.

Whitlock's damages model does not align with the variations among Rose Hill Homes and further demonstrates why Plaintiff's claims are not appropriate for class-wide determination. For this reason, this class action should be decertified.

### **CONCLUSION TO BRIEF**

Harrelson's Motion for Class Decertification is supported by the record in this case, including the pleadings, affidavits, depositions, memoranda to be filed ahead of any hearing on this motion.

**NOTICE OF JOINDER**

Harrelson hereby issues notice of joinder in the briefs, submissions, and memoranda issued by all parties in advance of the upcoming hearing.

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July 11, 2023

STATE OF SOUTH CAROLINA )

COUNTY OF ANDERSON )

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

Plaintiff )

vs )

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

Defendant )

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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 )

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

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

**DEFENDANT D.R. HORTON, INC.’S )  
MEMORANDUM IN OPPOSITION TO ALL )  
THIRD-PARTY DEFENDANTS’ )  
MOTIONS FOR SUMMARY JUDGMENT )**

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; )  
AND SILVER LINE BUILDING )  
PRODUCTS CORPORATION )  
)

Third-Party

Defendants

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**TO: ALL COUNSEL OF RECORD:**

COMES NOW, Defendant D.R. Horton, Inc. (“DRH”) and hereby responds to Third-Party Defendants Motions for Summary Judgment, showing this honorable Court as follows:

**I. PROCEDURAL HISTORY**

Various Third-Party Defendants are moving (some for the second time) for summary judgment based on the assertion that DRH’s claims for breach of contract, breach of warranties, and negligence/gross negligence/recklessness are merely disguised claims for indemnity and DRH’s claims for contractual indemnity are barred and unenforceable. These are the same grounds for summary judgment that Third-Party Defendants previously moved for in the fall of 2022, and that the Court denied by Order dated November 3, 2022. The Court previously determined that “there are genuine issues of material fact in the claims between the Defendant and Third-Party Defendants,” precluding summary judgment. As a practical matter, these issues have been decided by this Court and should not be revisited.

The Third-Party Defendants’ indemnity obligations and requirement to defend DRH were triggered the moment Plaintiff made her claim and continue until this action is concluded. Where third-party defendants are seeking summary judgment on the merits of Plaintiff’s underlying claims, even if such motions are granted, it would not end DRH’s indemnity claims against these

third-party defendants because DRH's indemnity claims seek recovery of its costs of litigating these claims to this point.

Accordingly, Third-Party Defendant's motions for summary judgment on DRH's third-party claims should be denied.

Because the Third-Party Defendants have not yet filed memoranda in support of their motions, DRH specifically reserves the right to supplemental briefing on these motions.

## II. STATEMENT OF FACTS

Plaintiff initiated this class action lawsuit on September 25, 2019, against DRH and Jane Doe #1-10 and John Doe #1-50 as Defendants. (See Plaintiff's Complaint). The lawsuit concerns the construction of approximately 234 homes (the "Subject Properties"). As noted in the Complaint, "Defendants Jane Doe #1-10, whose true names are unknown ("Jane Doe Defendants"), are other entities or individuals who are actual or de facto joint venturers and/or partners, control persons, and/or agents of DRH and/or each other in connection with the design, construction, and repair of the [Subject Properties]." (*Id.* at ¶8). Plaintiff further alleged "Defendants John Doe #1-50 ("John Doe Defendants") are persons or entities who participated in the design, development, marketing, construction, repair, and/or sale of the [Subject Properties] as contractors, subcontractors, manufacturers, material supplier, consultants, architects, engineers, real estate agents, managers, marketers, laborers, or otherwise." (*Id.* at ¶16). Plaintiff brought the following claims against Defendants: negligence and gross negligence, breach of implied warranties, and unfair trade practices. However, DRH 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 thirteen (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. DRH 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. DRH 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.

DRH entered into agreements with subcontractors, including the Third-Party Defendants, to perform the work (collectively hereinafter referred to as the “ICAs”).<sup>1</sup> Each of the ICAs included indemnity provisions (collectively hereinafter referred to as the “Indemnity Provisions”). Throughout the years DRH constructed homes in Rose Hill with various subcontractors, it had six slight variations of the ICA. (ICA’s attached as **Exhibits 1-6; Exhibit 7** (listing of ICA’s for each subcontractor)). Generally, these all incorporate the following applicable provisions:

**Subcontractor Standards:**

**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, methods 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 the assigned tasks and have all necessary licenses.

**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

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<sup>1</sup> D.R. Horton fully incorporates its Memorandum in Opposition to Third-Party Motions for Summary Judgments (Sep. 7, 2022) and all exhibits of representative ICAs attached thereto as Exhibit A.

suppliers' standards or specifications for use and installation, and all laws (statutory and common), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements).

**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, an 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.

**Subcontractor Indemnity and Insurance Requirements:**

**10.1 GENERALLY.** To the fullest extent permitted by law, contractor hereby agrees to hold harmless, indemnify, protect and defend owner, its parent corporation, subsidiaries, affiliates, successors and assigns, and each of the aforementioned entities' respective officers, directors, partners, employees, agents and insurers (individually or collectively hereinafter, "indemnatee") from and against any and all demands, claims, actions, causes of action, proceedings, lawsuits, settlements, judgments, fines, penalties, losses, attorneys fees, litigation costs, interest, and expenses of any kind (individually or collectively hereinafter, "losses") for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm, arising out of, or resulting from, or related in any way to the work performed and/ or the materials supplied under this contract, regardless of whether or not caused in part by indemnatee. Such losses specifically include, but are in no way limited to losses arising out of or attributable to: (1) a breach of any warranties, representations, covenants or obligations of contractor set forth herein; (2) the work performed or to be performed or materially supplied by contractor, contractor's agents or employees, suppliers or subcontractors and their respective agents and employees, and/or all other entities over whom the contractor may exercise control (individually or collectively hereinafter, "contractor's agents"); (3) any negligent, grossly negligent, and/or intentional. act and/or omission of contractor and/ or contractor's agents; or (4) any negligent, grossly negligent, and/or intentional act and/or omission of the indemnatee related in any way to the work. Notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnatee. The losses described herein shall include, but are not limited to, demands, claims, or actions asserted by (1) any present or future owner of the house incorporating the work; and (2) any

owner, contractor or any third party (including, but not limited to, personnel furnished by contractor and/or contractor's agents). The indemnification obligation under this contract shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for contractor under workers' compensation acts, disability benefit acts or other employee benefit acts. The indemnity provisions contained herein are intended to be as broad and inclusive as permitted by law.

**10.4 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 an Additional Insured on the CGL Policy or policies required above covering both on-going operations and completed operations (equivalent to form CG20101185 or form CG2037). Coverage obtained by Contractor naming Owner as an Additional Insured shall be primary with any insurance of Owner being excess coverage. The insurance coverage will be carried continuously during the term of this Agreement and thereafter is requested by this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion.

The Third-Party Defendants contend that they are entitled to summary judgment because DRH's claims for breach of contract, breach of warranties, and negligence/gross negligence/recklessness are merely disguised claims for indemnity and DRH's claims for contractual indemnity are barred and unenforceable. Various defendants also contend that they are entitled to summary judgment against DRH's contractual indemnity claims due to lack of a written contract or because DRH has unclean hands.

For the reasons set forth below, the Third-Party Defendants' motions must be denied.

**III. ARGUMENT & CITATION OF AUTHORITY**

**A. Applicable Standard**

Summary judgment is only appropriate where the evidence shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law on that claim. Rule 56(c), SCRCP. In considering a motion for summary judgment, the trial court “must view the facts in the light most favorable to the non-moving party.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Moreover, “[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.” *Murray v. Holnam, Inc.*, 344 S.C. 129, 137, 542 S.E.2d 743, 747 (Ct. App. 2001).

**B. The Indemnity Provisions are not Illegal and Unenforceable**

The Third-Party Defendants relying heavily on *DRH, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 148, 810 S.E.2d 41, 45 (Ct. App. 2018) contend that the Indemnity Provisions included in the ICAs are illegal and unenforceable because they are barred by S.C. Code § 32-2-10, *et. seq.* (the “Anti-Indemnity Statute”).

This perfunctory analysis 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.<sup>2</sup> 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. *Id.* However, the arbitration award did not indicate what

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<sup>2</sup> *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.”

damages the arbitrator found compensable. *Id.* Further, 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.

#### 1. **General Differences Between Zitek and Builders**

The development of the Zitek Class Action is distinguishable as D.R. Horton has brought claims against all relevant subcontractors in this suit. First, Zitek is a class action involving potentially hundreds of homes and dozens of subcontractors. As a result of this complex litigation, D.R. Horton has filed third party claims against all subcontractors whose scope of work has been implicated in the Zitek Class Action. Additionally, D.R. Horton has requested indemnification from all relevant subcontractors during the process of litigation with the Plaintiff. Overall, *Builders* is distinguishable based on the essential formation and development of the Zitek Class Action and therefore cannot be blindly applied to this case and requires further analysis.

Notwithstanding the clear differences between Builders and the current matter, the Third-party Defendants' position is further flawed because the Indemnity Provisions in this matter specifically exclude losses caused by the sole negligence of DRH.

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 *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, the South Carolina Court of Appeals found that a prior version of DRH's ICA violated S.C. Code § 32-2-10. The former ICA required the indemnitee to indemnify DRH for claims "related in any way to the work, even when the loss is caused by the fault or negligence of the indemnitee." 422 S.C. 144, 148, 810 S.E.2d 41, 45 (Ct. App. 2018). 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 specifically exclude claims arising out of the sole negligence of DRH by providing:

- “**10.1 GENERALLY.** ...nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnitee [DRH]” (See Exhibit 1);
- “**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 Exhibits 2, 3, 4, 5);
- “**10.1 GENERALLY.** ...It is the express intent of the parties in agreeing to this Section 10 that Contractor shall indemnify Indemnitee for the negligence of Contractor, its subcontractors, employees and anyone over whom Contractor exercises control as well as for Owner’s and/or indemnitee’s concurrent or joint negligence arising from a failure to properly supervise Contractor.” (See Exhibit 6)

Because the ICAs with the Third-Party Defendants exclude claims arising out of DRH’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*. (See Exhibits 1-6, the ICAs and Exhibit 7, listing of ICA’s for each subcontractor).

C. **The Indemnity Provisions Comply With The Requirements Set Forth In Concord & Cumberland Horizontal Prop. Regime V. Concord & Cumberland, LLC**

The Third-Party Defendants contend 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. 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 Muhler and its subcontractors.<sup>3</sup> *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

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<sup>3</sup> 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.

failed to include any reference to indemnification for the general contractor’s concurrent negligence.<sup>4</sup> *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 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 in Version 1 of the ICA provides in relevant part (See Exhibit 1):

**10.1 GENERALLY.** ...[Subcontractor] hereby agrees to hold harmless, indemnify, protect and defend [DRH]...from and against any and all demands, claims, actions, causes of action, proceedings, lawsuits...and expenses of any kind... for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm, arising out of, or resulting from, or related in any way to the work performed and/ or the materials supplied under this contract, **regardless of whether or not caused in part by indemnitee [DRH].**” (*Emphasis added*).

The indemnity provision in Versions 2, 3, and 4 of the ICA provides in relevant part (See Exhibits 2, 3, and 4):

“**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

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<sup>4</sup> 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.

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.**” (Emphasis added).

The indemnity provision in Version 5 of the ICA provides in relevant part (See Exhibit 5):

**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, reasonable settlement amounts, 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: (a) a breach of any warranties, representations, covenants, or other obligations of [subcontractor] set forth in this agreement; (b) the work...performed or material supplied by [subcontractor]... (c) any negligent or intentional act or omission of [subcontractor] **regardless of whether caused in part by [DRH]; or (d) any negligent or intentional act or omission... of [DRH] related in any way to the work...**” (Emphasis added).

The indemnity provision in Version 6 of the ICA provides in relevant part (See Exhibit 6):

**“10.1 GENERALLY. ...**[Subcontractor] shall hold harmless, indemnify [DRH].... against all demands, claims, actions, causes of action, proceedings, lawsuits...or expenses (including attorneys’ fees and interest), for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm.... arising out of, or resulting from, or related to the work performed and/ or the materials supplied under this Agreement, **including losses founded partially upon the negligent acts or omissions of [DRH] in failing to supervise contractor, attributable in whole or in part to:** (1) a breach of any warranties, representations, covenants or other obligations of contractor set forth in this Agreement; (2) the work performed.... or materials supplied by [subcontractor]...; or (3) any negligent or intentional act and/or omission of [Subcontractor] related in any way to the work...” (Emphasis added).

The Indemnity Provisions between DRH and the Third-Party Defendants closely track the language suggested by the court in *Concord* and provide that third-party defendants will indemnify DRH for certain losses regardless of whether or not the losses caused in part by DRH. The

Indemnity Provisions clearly and unequivocally show that the parties intended to absolve DRH of the consequences of its own concurrent negligence. Therefore, the Indemnity Provisions meet the standard set forth in *Concord* and are enforceable. See Exhibit A, the ICAs.

**D. DRH Claims for the Third-Party Defendants' contractual duty to defend is not applicable under S.C. Ann. Code § 32-2-10.**

The Third-Party Defendants contend that the Indemnity Provisions do not comply with the requirements laid out in the ICAs as they are contrary to each other and in violation of S.C. Ann. Code § 32-2-10. Specifically, Third Party Defendants reference Section 10.1, which addresses the Third-Party Defendants indemnification obligations under the ICA, and Section 10.2 in ICA versions one through five and Section 10.3 in ICA version 6 which establishes the duty of the Third-Party Defendants and their insurers to defend DRH, including but not limited to attorneys' fees and costs. Section 10.2 provides in relevant part (See Exhibit 1 and Exhibits 2-5 which provide similar language):

“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 indemnitees exclusive remedy... Indemnitee shall have the right, at its discretion... to defend... all claims which may be asserted...and contractor agrees to reimburse indemnitee for any and all expenditures which indemnitee may incur on account of any such claim.”

Section 10.3 provides in relevant part (See Exhibit 6):

“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 indemnitees exclusive remedy...”

Third-Party Defendants have attempted to conflate section 10.1 and 10.2 or 10.3 of the ICAs by stating that the provisions are contrary to each other and in violation of S.C. Ann. Code § 32-2-10. As a preliminary matter, the Anti-Indemnity Statute does not address the duty to defend

obligation but rather specifically addresses obligations to indemnify a party. Accordingly, Third-Party Defendants reliance on this statute is misplaced.

Further, these interpretations are contrary to the actual language of the indemnity clause. The section of the indemnity clause that excludes indemnity for sole acts of the indemnitee's negligence also applies to the duty to defend. The ICA specifically state that nothing "shall require the contractor **to defend**, insure, indemnify or hold indemnitee harmless for liability or claims arising out of bodily injury to person, death, or damage to property caused by or resulting from the sole negligence or sole intentional act or omission of indemnitee." Additionally, the first sentence in 10.1 indicates that the indemnity obligations are being provided to as permitted by law, "To the fullest extent permitted by Law, Contractor shall protect, defend indemnify..." These cited references clearly qualify the obligations of the contractor to D.R. Horton.

Finally, 16.2 of the ICA provides that, "The provisions of this Agreement shall be 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." (Exhibit 1).

"A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. **The entirety or severability of a contract depends primarily upon the intent of the parties** rather than upon the divisibility of the subject, although the latter aids in determining the intention. .... We think it a significant indication of the nature of the contract and the intent of the parties that the document embodying the agreement of the parties provides for a mutual exchange of performances which is indicative of a severable contract." *Columbia Architectural*

*Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980), citing *Field v. Byrd*, 73 S.C. 1, 6, 51 S.E. 678, 679 (1905) (emphasis added).

The presence of a severability clause argues in favor of the conclusion that the parties intended that the contract be severable rather than entire. “The Agreement here contains a severability clause, reflecting that if any part of the contract is found ‘unenforceable for any reason, the remainder shall remain enforceable.’ Given this intent and our belief that removing the unconscionable clause does not disrupt the core of the parties’ bargain, we disagree with the circuit court that the entire Agreement must fall.” *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (S.C. App. 2020) (voiding an arbitration clause for unconscionability but not invalidating the entire contract) (citing *Columbia Architectural Grp.*).

Therefore, to the extent 10.2 is found to be in violation of the Anti-Indemnity Statute, that section can be severed without rendering 10.1 unenforceable.

**E. DRH’s Claims For Negligence, Breach Of Warranties, And Breach Of Contract Are Independently Viable**

DRH could sue and recover damages against the Third-Party Defendants 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, DRH’s causes of action are not “disguised” equitable indemnity claims derivative of Plaintiff’s lawsuit. DRH’s rights to pursue these claims do not evaporate simply because DRH 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 do 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 DRH's legal rights against the Third-Party Defendants. DRH can bring claims of 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 DRH. 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 DRH's claim for equitable indemnity. Moreover, in addition to the damages DRH is incurring related to defending this lawsuit, DRH seeks to recover for extra workload, repairs or repair costs of the defective work, costs of investigation, and damage and harm to reputation. (DRH'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*, DRH 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, DRH 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*. DRH's damages are thus recoverable under the separate causes of action it has pled, and those claims must remain in this action.

**F. DRH Does Not Have Unclean Hands and Can Recover In Equity**

Various Third-Party Defendants contend that DRH cannot recover under its equitable indemnity claim because DRH is not without fault. However, they cannot meet their burden of proof to obtain judgment as a matter of law on DRH's equitable indemnity claim by arguing that the jury *might* find DRH liable to Plaintiff. Because there is a question of fact as to whether DRH is at fault for the alleged construction defects, the third-party defendants' motions for summary judgment as to DRH's claim for equitable indemnity should be denied.

South Carolina courts have consistently found that equitable indemnity claims may be brought against a negligent co-defendant during the initial action. *See, e.g., Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015) (stating that "[w]e agree *Addy* controls this case to the extent it shows Marick may assert a claim for equitable indemnity against a negligent co-defendant"). Additionally, *Stoneledge* held that the lower court erred in granting summary judgment on the merits of the general contractor's equitable indemnity crossclaim because the general contractor presented a question of fact as to whether it was at fault for the alleged construction defect.

"[T]he 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." *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010) (citation omitted). The third-party defendants bear the burden of proof in seeking summary judgment on such an

affirmative defense. However, they have failed to come forward with any evidence that DRH has unclean hands as a matter of law.

It is well settled that where a party is exposed to liability to a third party due to the conduct of another, through no fault of its own, that party may recover in equitable indemnity against the second party. See *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990). Moreover, a general contractor is not automatically responsible for the negligence of a subcontractor. See *Fields v. J. Haynes Waters Builders*, 376 S.C. 545, 658 S.E.2d 80 (S.C. 2008).

It is clear that there is a factual issue whether or not DRH appropriately supervised and oversaw the project. DRH did not self-perform any of the construction on the project, and therefore, relied on the subcontractors for their knowledge, expertise, experience and installation. Because there is a question of fact as to whether DRH had fault, the Third-Party Defendants' unclean hands defense does not preclude DRH's claim for equitable indemnity at this time.

### **CONCLUSION**

Based on the foregoing, the Third-Party Defendants have not met their burden of proof, and therefore, the Third-Party Defendants' Motions for Summary Judgment on DRH's Crossclaims must be denied.

WHEREFORE, Defendant DRH shall, and hereby does, move the Court for an Order denying the Third-Party Defendants' Motions for Summary Judgment on DRH's Crossclaims.

Respectfully submitted,

**KENISON, DUDLEY & CRAWFORD, LLC**

*s/ John Crawford*

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*Counsel for Defendant D.R. Horton, Inc.*

July 11, 2023

Greenville, South Carolina

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 MEMORANDUM IN SUPPORT  
OF ITS MOTION FOR  
DECERTIFICATION AND FOR  
JOINDER**

\_\_\_\_\_  
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. )

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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. )

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**TO: THE PARTIES ABOVE NAMED AND THEIR COUNSEL:**

M&L Reyna Construction, LLC (“M&L Reyna”), by and through the undersigned counsel, hereby submits this Memorandum in Support of its Motion for Decertification and for Joinder, and joins in and incorporates herein by reference any and all of those arguments set forth for an Order decertifying this class action, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, that may be asserted, argued or otherwise put before the Court by other parties to the extent those arguments may be applicable to M&L Reyna. M&L Reyna also joins in any other Motions, Memorandum, and arguments by other parties that may be forthcoming that are not inconsistent with this Memorandum in Support of its Motion and Joinder.

## INTRODUCTION

M&L Reyna performed its scope of work during construction of 23% of the 221 Rose Hill homes or less. M&L Reyna Construction, LLC was formed on September 30, 2013, and did not begin performing its scope of work at Rose Hill until late 2015, which is after the certificates of occupancy were issued on a majority of the homes in the putative class.

On January 27, 2021, this Court conditionally certified this class action against the sole Defendant DR Horton for certain homes in the Rose Hill subdivision in Easley, South Carolina. The class consists of 221 homes (collectively, the “Rose Hill Homes”, or the “Homes”, or individually, “Home”). A significant amount of discovery has been conducted resulting in M&L Reyna’s position that the alleged construction defects as to M&L Reyna and the other masonry subcontractors cannot be resolved on class-wide basis.

### **Rose Hill Neighborhood**

The Rose Hill Neighborhood has 261 homes, 234 of which were built by DR Horton between 2011 and 2017, and 221 of which are the subject of this lawsuit. The initial homebuyers were able to customize their home, choosing from twenty-six different model plans, each with multiple options for exterior cladding materials and window type and placement, resulting in sixty-seven unique configurations and home designs in Rose Hill. These designs vary between one-story ranch-style homes, one-story homes with a single room over the garage, and a full two-story home that consists of multiple rooms and bathrooms on the second floor. Of the 221 Homes in the putative class, only a handful have just one exterior material (brick or vinyl). The vast majority have a combination of brick, stone, cement siding, and vinyl siding. There are another approximately 66 homes that have no brick but are a combination of stone and vinyl. (Affidavit of L. Steve Moore ¶ 18 (May 1, 2023), attached as **Exhibit A.**)

The topography of Rose Hill is hilly, which resulted in variations in the foundations and soil supporting the foundations. These variations include slab-on-grade on cut material, slab-on-grade on fill material, homes with basements, and lots with and without soil retaining walls. The topography also resulted in variations in site drainage methods and conditions on each lot at the time of construction. As demonstrated below, such variations prevent uniform conclusions as to breach of duty, causation, and damages related to the alleged construction defects.<sup>1</sup>

### **LEGAL STANDARD & DISCUSSION**

At any time after conditional class certification but before a decision on the merits, this Court has the discretion to decertify a class action. Salmonsens v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). Decertification is appropriate when it has become apparent that individualized inquiries of class members are necessary to resolve the issues in this case. Gardner v. S.C. Dept. Rev., 353 S.C. 1, 20–21, 577 S.E.2d 190, 200 (2003). That is the exact situation here, individual home inspections and individual homeowner examinations are necessary to resolve each class member’s individual claims. Pursuant to Rule 23(a), SCRPC, the party seeking class certification must prove:

- (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class; (4) the representative parties [must] fairly and adequately protect the interests of the class; and (5) the amount in controversy must exceed one hundred dollars for each member of the class.

Gardner v. S.C. Dep’t of Revenue, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003) (citing Rule 23(a), SCRPC) (internal quotation marks omitted). “The first four criteria are often referred to as the requirements for numerosity, commonality, typicality and adequacy of representation.” Id.

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<sup>1</sup>M&L Reyna incorporates herein DR Horton’s previously filed Memorandum in Opposition to Class Certification along with all supporting affidavits and exhibits as well as its Memorandum in Support of its Motion for Decertification.

In this Memorandum in Support of its Motion for Decertification and for Joinder, M&L Reyna specifically contests commonality, typicality, adequacy of representation, and the amount of controversy as it applies to M&L Reyna. Generally, commonality, typicality, and adequacy of representation blend together in the analysis of whether proof of Plaintiff's claims will sufficiently advance the claims of the absent class members. Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006) (internal citations omitted).

To establish commonality, a party must show that "there are questions of law or fact common to the class." Rule 23, SCRC. Class certification is not appropriate where factual differences are the crux of a predominant legal issue, and the success or failure of each class member's claim turns on individualized issues. Gardner, 353 S.C. at 22, 577 S.E.2d at 201. When considering the commonality requirement, the plaintiff must "demonstrate that the class members 'have suffered the *same* injury.'" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 349–50 (2011) (emphasis added). "[A] representative plaintiff cannot establish commonality . . . if the court must investigate each plaintiff's individual claim." Gardner, 353 S.C. at 22, 577 S.E.2d at 201 (internal citations omitted) (emphasis added). "Requiring such individualized examination negates the benefits of a class action suit." Id. (citing O'Quinn v. Beach Associates, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C. 1978) ("The very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action.")).

To establish typicality, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class" Pope v. Heritage Cmty., Inc., 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011). "The representative party's interest in prosecuting his own case must simultaneously tend to advance the interest of the absent class members." Deiter, 436 F.3d at 466–67. The typicality analysis focuses on the elements and facts needed to prove

Plaintiff's claims and whether those facts would prove the absent class members' claims. *Id.* at 467. Accordingly, "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his *own individual* claim." *Id.* at 466–67 (emphasis added).

Finally, the party seeking class certification is required to prove "the amount in controversy must exceed one hundred dollars for *each* member of the class." *Gardner*, 353 S.C. at 20-21, 577 S.E.2d at 200 (citing Rule 23(a), SCRPC) (emphasis added). The "failure to satisfy even one of the prerequisites is fatal to class certification[.]" *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200.

### **DISCUSSION**

#### **I. PLAINTIFF CANNOT SATISFY THE COMMONALITY, TYPICALITY, OR ADEQUACY OF REPRESENTATION ELEMENTS REQUIRED BY RULE 23(A), SCRPC, REGARDING THE SCOPE OF WORK PERFORMED BY M&L REYNA at Rose Hill.**

In her Complaint, Plaintiff alleged numerous defective conditions at Rose Hill including: (1) failure in load-bearing components; (2) failure in exterior cladding systems; (3) water intrusion into and through windows, doors, and exterior building envelopes; and (4) failure of other building components. (Compl. ¶ 27). Plaintiff's Notice and Opportunity to Cure Letter identified thirteen (13) separate improper construction conditions. (See Cure Letter, Def. DR Horton's Mtn. to Stay, Exh. A, pp. 9-10). Despite this long list of defects, Plaintiff's experts have not testified that all of these alleged defects actually exist in the Rose Hill Homes. Nonetheless, M&L Reyna will only address those conditions that Plaintiff has pursued as it relates to work performed by M&L Reyna only—installation of brick, stone, and concrete on approximately 23% or less of the 221 Homes.

##### **A. Brick Veneer**

Plaintiff alleges that brick veneer was improperly installed resulting in cracking, separation, water intrusion and resulting damage. Of the 221 Rose Hill Homes, approximately 150

have some amount of brick exterior. Home inspections have not revealed uniform cracking, separation, water intrusion, or damages in the brick veneer homes. (Affidavit of L. Steve Moore ¶¶ 18, 27 (May 1, 2023), attached hereto as **Exhibit A**). Plaintiff's experts have raised a specific issue related to the installation of garage brick lintel. ABS, one of DR Horton's experts, has conducted destructive testing on seven homes with garage brick lintels. Of these, ABS observed the majority to be properly tied and anchored, with proper air gaps, and flashing in place. (Moore Aff. ¶ 27, **Exhibit A**). The garage brick lintel installation has been identified as an issue only in a very small number of homes with brick on the front and sides. (Moore Aff. ¶ 27, **Exhibit A**). Additionally, M&L Reyna's expert testified DR Horton's plans fail to adequately instruct its masonry subcontractors on many aspects of brick installation including the failure to isolate foundation-supported brick and frame-supported brick, and the failure to properly identify shelf angles vs. lintels, allegedly resulting in mixed application. (See Derek Hodgin Deposition Testimony (June 2, 2023) pp. 55:1-25 – 56:1-8; 57:22-25 – 58:1-6, attached hereto as **Exhibit B**). Therefore, there are two different conditions observed in the Homes at Rose Hill associated with lintels vs. shelf angles, some with a separation joint, and some without. Thus, in order to identify which home has which conditions, whether it is proper or improper, each individual home will need to be investigated.

Plaintiff's home is one of few Rose Hill Homes that has brick on the front and sides and where the height of her home over rear corner of the garage is over twelve feet. As previously discussed, there are approximately 66 homes that have **no brick** but have a combination of stone and vinyl. (Moore Aff. ¶ 18, **Exhibit A**). Additionally, M&L Reyna performed work on only a portion of the homes at Rose Hill. M&L Reyna allegedly performed original installation of all three of its scopes of work—brick, stone, and concrete—on approximately 50 of the 221 homes at

Rose Hill. This equates to approximately only 23% or less of the entire Rose Hill project. Accordingly, Plaintiff has not proven there is numerosity of claimants with these common issues as it relates to M&L Reyna, or that there are factual issues as to Plaintiff's home are common and typical of the absent class members. Given the limited circumstances where brick veneer may be at issue, the varying factual and legal issues, and the varying injuries and related damages, the Rose Hill Homes must be evaluated on an individual, one-by-one basis for brick veneer claims.

### **B. Manufactured Stone Veneer**

Plaintiff alleges that manufactured stone veneer was improperly installed on the Rose Hill Homes resulting in loose embedment, cracking, separation, and water intrusion and resulting damage. Of the 221 Rose Hill Homes, approximately sixty-six (66) have a combination of stone and vinyl exteriors, and another forty-nine (49) have a combination of brick, stone, and either cement or vinyl siding. Of these, ABS conducted destructive testing on eight (8) homes with stone exteriors. (Moore Aff. ¶ 28, **Exhibit A**). Of these eight inspections, ABS did not observe uniform defects or deterioration. Rather, the majority of inspections revealed properly installed stone adheres, presence of felt behind lathe, and weather barrier behind the felt. Any bonding or moisture issues observed were not uniform among the Homes. (Moore Aff. ¶ 28, **Exhibit A**). There are a very limited number of Rose Hill Homes with stone adhered directly to brick veneer; with stone on the front of the house and brick on sides where there is some separation at that connection point; and where stone was installed to the base of the wall. Even where these conditions have been observed, any such related damage varies house-to-house and in some instances, there is little to no damage. (Moore Aff. ¶ 28, **Exhibit A**). There is no uniformity as to this construction condition among the 221 Rose Hill Homes, or even within the more limited number of Homes with manufactured stone veneer.

To establish commonality, Plaintiff must establish the existence of common questions of law or fact and injury resulting from improperly installed stone siding such that resolving these issues on Plaintiff's house resolves issues on all other homes with stone veneer. To establish typicality, Plaintiff must establish that the facts necessary to prove the elements of her causes of action will necessarily prove the absent class members' claims.

Here, Plaintiff's home has a very limited amount of stone, it has a very limited amount of stone adhered directly to brick, and it does not have stone-to-brick corner connection. As such, resolving Plaintiff's stone claims will not resolve the claims of the absent class members. First, M&L Reyna did not perform the original brick or stone installation, or any original concrete work at Plaintiff Zitek's home. Additionally, not all homes have stone and not all homes have brick and therefore would lack the "common" or "typical" alleged deficiencies compared to other homes. Moreover, M&L Reyna did not perform work on every single home in Rose Hill. Over two-thirds of the homes in Rose Hill are unassociated with the original scope of work performed by M&L Reyna at the Project. Thus, Plaintiff has failed to establish commonality and typicality with respect to the alleged stone defects and has failed to show that she will adequately represent these absent class members. For these reasons, continued class treatment is not appropriate.

### **C. Concrete/Soil**

Plaintiff alleges foundations of the Rose Hill Homes suffer from insufficiently supported concrete/inadequate soil, resulting in cracking, and water damage. ABS did not find concrete slabs with uniform cracking or displacement in excess of performance standards and has not seen any evidence of such deviations with the exception of one such slab. (Moore Aff. ¶ 31, **Exhibit A**). Plaintiff has not provided any testing below slab or of the concrete slab to evidence any conditions

that fall outside of the performance standards. As such, class treatment of this issue is inappropriate.

**II. THE AMOUNT IN CONTROVERSY DOES NOT EXCEED ONE-HUNDRED DOLLARS FOR EACH MEMBER OF THE CLASS AS TO THE WORK OF M&L REYNA AS M&L REYNA ONLY PERFORMED WORK ON A FRACTION OF THE HOMES IN ROSE HILL.**

Pursuant to the Rule 23(a), SCRCPP, the party seeking class certification is required to prove “the amount in controversy must exceed one hundred dollars for *each* member of the class.” Gardner, 353 S.C. at 20-21, 577 S.E.2d at 200 (emphasis added). While indicating in a footnote that the Court declined to address the requirement of typicality, the South Carolina Supreme Court further notes in Gardner that “a plaintiff may not sue a defendant unless the plaintiff has suffered an injury at the hands of defendant.” Gardner, 353 S.C. at 23 n.14, 577 S.E.2d at 201. Though M&L Reyna is a third-party defendant sued by DR Horton, it logically follows that class action treatment is inappropriate if each and every class member has not been harmed by each third-party defendant named in the lawsuit. See id. (“A plaintiff cannot maintain a class action where record indicates he was not directly harmed by defendants’ actions.”). Because M&L Reyna did not work on the entire Rose Hill Project, there would be zero amount in controversy as it relates to M&L Reyna as to the class members’ homes on which it did not perform any work. Therefore, Plaintiff has filed to show that the amount in controversy exceeds one hundred dollars for each member of the class. Additionally, because of the various irregularities in observed conditions at the inspected homes as it relates to brick and stone, the only way to properly evaluate the existence of a “common” or “typical” element among each class member to establish a class action is to investigate each Home individually and question each homeowner individually. There are no facts that can be established on a representative basis from which class-wide conclusions can be drawn. Thus, decertification is appropriate.

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

Defendant DR Horton, and multiple third- and fourth-party defendants have or may file analogous Motions to Decertify before this Court. To the extent any other grounds for decertification 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 Decertification and for Joinder and issue an Order Decertifying this Class.

LUZURIAGA MIMS, LLP

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*Attorneys for M&L Reyna Construction, LLC*

Charleston, South Carolina  
July 11, 2023

# Exhibit A

EXHIBIT A

FILED FROM C:\ALTY\FILED -- 2023 May 01 15:48 PM -- ANDERSON -- COMMON PLEAS -- CASE# 20190401942

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

\_\_\_\_\_  
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 )

**AFFIDAVIT OF  
L. STEVEN MOORE**

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

PERSONALLY APPEARED BEFORE ME, L. STEVEN MOORE, PE, RRC, REWC, who, being first duly sworn, deposes and avers the following:

1. My name is L. Steven Moore, PE, RRC, REWC. I am a citizen and resident of Union County, North Carolina. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.

2. I am a member of Applied Building Sciences, Inc. (“ABS”). Our firm offers consulting services in the construction industry, including reviewing and providing advice concerning residential homes.

3. ABS has been retained by Kenison, Dudley, & Crawford, LLC (“KDC”) concerning existing construction conditions in a neighborhood known as Rose Hill located in Easley, South Carolina to examine potential construction defects as alleged by Plaintiff, Ms. Zitek.

4. At all times relevant, I have overseen ABS’s involvement with KDC regarding the above-captioned matter.

5. I have reviewed all findings made by ABS throughout the course of this action.

6. I have a Bachelor of Science in Civil Engineering from North Carolina State University.

7. I am a licensed professional engineer in the state of South Carolina and have been licensed in South Carolina for over 25 years.

8. I am also a licensed professional engineer in additional states including North Carolina, Kentucky, Georgia, Tennessee, and Virginia.

9. I am licensed General Contractor in the State of South Carolina and have held this license for over five years.

10. I am also a licensed General Contractor in the State of North Carolina.

11. I am a certified arbitrator, issued by the American Arbitration Association Construction Industry National Panel of Arbitrators.

12. I am a registered roof consultant and a registered exterior wall consultant.

13. I am a member of several professional organizations, including the American Society of Civil Engineers, ICRI and IIBEC.

14. I specialize in the forensic engineering of residential homes and investigation of construction materials used on residential homes. I analyze how buildings are designed, constructed, and/or manufactured. I analyze the conditions of the site and the residential home.

15. I have testified and arbitrated similar cases involving similar construction defects.

16. In most cases in which I testify that proceed to a jury's verdict, the jury renders a verdict that aligns with my testimony and findings.

17. In this case, ABS was asked to evaluate and inspect approximately one hundred fifteen (115) homes (the "Homes") within the Rose Hill subdivision. ABS conducted destructive testing on twenty-five (25) Homes. It is my understanding that D.R. Horton built 234 homes in Rose Hill and approximately 221 homes are at issue in this lawsuit.

18. ABS's cataloging of home exteriors shows only a few homes with just one cladding material (brick or vinyl). There are approximately one hundred fifty (150) brick homes with varying combinations of brick, stone, cement siding, and vinyl siding. There are approximately sixty-six (66) homes that have no brick but are a combination of stone and vinyl.

19. Upon my information and belief, KDC and opposing counsel agreed to a certain set of homes, and ABS was not authorized to inspect additional homes within Rose Hill except for the Homes.

20. The inspections occurred on June 22, 2020, August 18-19, 2020, September 23 and

24, 2020, December 12-14, 2022, January 9-12, 2023, January 27, 2023, February 6-14, 2023, February 28-March 2, 2023, and March 20-22, 2023.

21. The Homes make up almost Fifty Percent (50%) of Rose Hill Homes constructed by D.R. Horton.

22. The Rose Hill Homes were all built between 2011 and 2017, meaning differing versions of the International Residential Code may be applied.

23. The Homes and each lot the Home was built on are different in many ways, including that (1) they vary greatly in square footage; (2) some homes are one floor whereas others have multiple floors; (3) the home's exterior finishing may vary from home to home, and (4) there are multiple different variations of the Homes which may include the amount of windows/window location, the number of bedrooms, and number of bathrooms in each Home.

24. During ABS's inspections, ABS noted that, while there may be a couple of issues reoccurring at multiple homes, there was not one (1) issue that was common and present at all of the Homes.

25. ABS noted that certain deficiencies that appeared at one Home were not necessarily found at the next Home. Further, some issues were limited to only one particular Home, with the issue not resurfacing throughout the course of ABS's inspections.

26. Where issues are currently present, an individualized scope of repair must be prepared for each individual Home. Given the variation from lot to lot, certain conditions on a lot may require a different scope of repair.

27. Of the Homes with some amount of brick exterior, ABS's inspections have not revealed uniform cracking, separation, water intrusion, or damages in the brick veneer. ABS conducted destructive testing of garage brick lintels on seven Homes. ABS observed the majority

to be properly tied and anchored, with proper air gaps, and flashing in place. Additionally, the garage brick lintel installation which is identified as an issue in a very small number of homes with brick on the front and sides, and where the house above the rear corner of garage is over twelve feet high, is also compliant with the building code because it is designed.

28. ABS conducted destructive testing on eight Homes with stone exteriors. These inspections did not reveal uniform defects or deterioration, but properly installed stone with good adhesion, low moisture readings, no rust on the metal lathe to which the stone adheres, presence of felt behind lathe, and weather barrier behind the felt. Any bonding or moisture issues observed were not uniform among the Homes. There are a very limited number of Rose Hill Homes with stone adhered directly to brick veneer, with stone on the front of the house and brick on sides where there is some separation at that connection point, and where stone was installed to the base of the wall. Even where these conditions were observed, any such related damage varies house-to-house and in some instances, there is little to no damage.

29. ABS conducted destructive testing on approximately 28 windows in 25 Homes. In the vast majority of these inspections, ABS found properly installed and taped windows, moisture levels in the acceptable range, and no evidence of water intrusion or stains. Where destructive testing revealed sections of the weather barrier not taped, there was still no evidence of water intrusion or stains. ABS's spray testing and sill dam testing within the appropriate ratings did not result in leaks in the tested windows. ABS identified variations in homeowner window maintenance, which may cause or contribute to any window issues identified at the Homes.

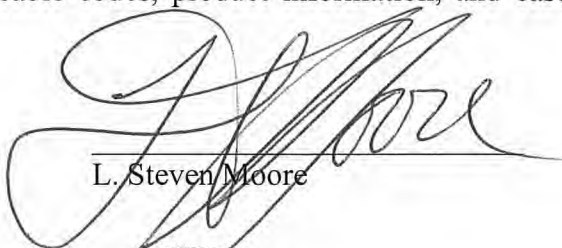
30. ABS has seen no evidence of construction defects on front doors. ABS conducted destructive testing on approximately twenty rear patio doors. During these inspections, ABS found a variety of conditions that were not uniform among the inspected Homes. Some Homes no longer

have the original doors that were installed at the time of initial construction, some Homes have doors that are covered, and some homeowners have painted and maintained the rear patio doors while others have not. Some doors have evidence of water intrusion and deterioration, and others did not. Where there was observed door deterioration, the primary cause appeared to be lack of homeowner maintenance.


31. Of the more than one hundred slabs visually inspected, ABS only found potentially one concrete slab with cracking or displacement in excess of performance standards. Otherwise, all other slabs were within performance standards with no evidence of such deviations.

32. ABS's inspections revealed Rose Hill Homes with significant modifications of the backyard to include pools, decks, landscaping, and fences. Each of these modifications can impact drainage. ABS has seen no evidence of ponding water outside of the standards.

33. My opinions in this Affidavit are provided to a reasonable degree of professional certainty and are based on my knowledge, skill, education, training, and experience in my fields of expertise as well as my review of applicable codes, product information, and case-related materials available to date.

  
L. Steven Moore

Sworn to and subscribed in my presence  
this 1st day of May, 2023.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: 5-14-2030



# Exhibit B

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

DEPOSITION OF DEREK HODGIN, PE  
JUNE 2, 2023

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

Plaintiff,

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

D.R. HORTON, INC.,

Defendant.

---

D.R. HORTON, INC.,

Third-Party Plaintiff,

vs.

AJ LANDSCAPING & GRADING, LLC a/k/a A J  
LANDSCAPING & GRADING, LLC, et al.,

Third-Party Defendants,

---

PROBUILD COMPANY, LLC, et al.,

Fourth-Party Plaintiffs,

vs.

HARRELSON PAINTING, LLC, et al.,

Fourth-Party Defendants,

---

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

Fifth-Party Plaintiff,

vs.

TORIBIO ISLAS AND ALEJANDRO SOTO,

Fifth-Party Defendants.

1 originates with WDP, but doesn't that confusion  
2 actually originate with DR Horton treating that  
3 piece of steel as both a shelf angle and a  
4 lintel?

5 MR. IMHOFF: Object to the form.

6 A. Well, it could, yes.

7 Q. And have you seen, in fact, that the DR  
8 Horton way of installing those garage steel  
9 pieces is to both bolt them to the framing and to  
10 lay them in the masonry courses?

11 A. I don't know that I've seen that. I've  
12 seen it bolted, and I've seen it as a lintel. I  
13 haven't seen a steel angle that's bearing on  
14 brick and is bolted. That would still be a shelf  
15 angle.

16 Q. It would be a mixed application, right?

17 A. Well, as soon as you're taking the load  
18 off the brick and putting it on the wall, I would  
19 have concerns about there -- the need for a  
20 movement -- a vertical movement joint.

21 Q. Not just concerns. The building code  
22 expressly requires it, correct?

23 A. For differential support, yes.

24 Q. The building code expressly states that  
25 there must be a joint between frame-supported

1 brick and foundation-supported brick, correct?

2 A. I believe so, yes.

3 Q. Which is essentially what you were just  
4 explaining to me, right?

5 A. Yes.

6 Q. Because of the risk of differential  
7 movement, correct?

8 A. Correct.

9 Q. And at all the -- at almost all or all  
10 the brick garage openings at Rose Hill, that  
11 code-required joint does not exist, does it?

12 A. I don't believe so.

13 Q. And that is what's causing the step  
14 cracking at the corners of those garage facades,  
15 correct?

16 A. I wouldn't think so. I would need to  
17 look at it a little bit more. Here's my  
18 experience, is that if you have a shelf angle and  
19 you don't have a vertical movement joint, you're  
20 going to get a clean vertical crack propagating  
21 from the point of the differential support.

22 If you have step cracking, it's  
23 typically a lintel condition because the lintel  
24 is a simple supported beam that is bearing on  
25 brick at either end, and as it deflects, the end

1 of the lintel will put in part stresses on the  
2 adjacent brick and cause that stairstep. So if  
3 you have a stairstep crack, it's more than likely  
4 it's a lintel problem. If you have a straight up  
5 and down --

6 Q. You're getting way too deep for me.

7 A. Well --

8 Q. Way too deep.

9 A. I'm just trying to explain --

10 Q. I want --

11 A. -- the symptoms.

12 Q. I want to back up.

13 A. Okay. I'm sorry.

14 Q. First of all, you agree with me that the  
15 failure to isolate foundation-supported brick and  
16 frame-supported brick is a building code  
17 violation, correct?

18 A. Yes, sir.

19 Q. And there's a commonsense reason for  
20 that that goes with that, right?

21 A. Yes, sir.

22 Q. You agree with me that in all the photos  
23 we've seen at Rose Hill, the brick piece of steel  
24 at the garage is both frame supported and masonry  
25 supported, correct?

1           A. I've seen photographs of both, and I  
2 haven't seen a photograph that has a combination  
3 of a lintel -- of a steel piece bearing on brick  
4 that's also bolted to the wall. I haven't seen  
5 that. As far as I knew, it would be one or the  
6 other.

7           Q. Well, I don't mind sharing with you I  
8 haven't seen one picture that's not both. It's  
9 just sometimes you have to work harder at finding  
10 that out because obviously you can't see the bolt  
11 unless you take the brick out.

12          A. Right, but the ones that you know are  
13 not the lintel are the ones where you have a  
14 photograph looking up at the corner of the garage  
15 opening, and you see a joint between the end of  
16 the steel and the adjacent brick. That has to be  
17 a shelf angle. There's no bearing on the brick  
18 adjacent to the garage. And it's a bolted shelf  
19 angle. So I know that that exists.

20          Q. Well, let's take one -- let's look at  
21 one word that might be confusing --

22          A. Okay.

23          Q. -- me. You keep qualifying your  
24 discussion by using the word bearing. Without  
25 investigation, sometimes we don't really know if

# Exhibit C

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

4 DEPOSITION OF SHAWN KRUGLEWICZ  
5 RULE 30(b)(6) DR HORTON

6 JUNE 15, 2022

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

9 Plaintiff,

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

11 DR HORTON, INC., et al.,

12 Defendants,

13 

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DR HORTON, INC.,

14 Third-Party Plaintiff,

15 vs.

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

18 Third-Party Defendants,

19 

---

PROBUILD COMPANY, LLC, et al.,

20 Fourth-Party Plaintiffs,

21 vs.

22 HARRELSON PAINTING, LLC, et al.,

23 Fourth-Party Defendants,

24 

---

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

Fifth-Party Plaintiff,

vs.

TORIBIO ISLAS AND ALEJANDRO SOTO,

1 that -- as scopes that were employed from time to  
2 time in the Greenville market?

3 A. I've gone through -- at least through  
4 page 19, and they seem to be scopes that were for  
5 the Greenville market.

6 Q. Thank you. And you'd agree with me that  
7 some of these details are -- excuse me -- some of  
8 these scopes are lacking in any detail as to how  
9 the sub is supposed to perform his  
10 responsibilities, and other scopes are rather  
11 detailed like the framing scope at page 11?

12 MR. IMHOFF: Object to the form.

13 A. I did not look at those in that detail  
14 but I can.

15 Q. Sure. Just the first few.

16 A. There's some detail in the scopes, yes.  
17 I'm sure there's some detail left out that we  
18 rely on our vendors to perform.

19 Q. Right. Tell me, does DR Horton  
20 systemically delegate the selection of means and  
21 methods to its subcontractors?

22 MR. IMHOFF: Object to the form.

23 A. I don't understand your question.

24 Q. What don't you understand about it?

25 A. Well, means in what aspect?

1 MR. LUCEY: Read the question back  
2 slowly.

3 (The pending question was read back  
4 by the reporter.)

5 MR. IMHOFF: Object to the form.

6 A. It's a very broad question. I'm not  
7 sure exactly what you're referring to.

8 Q. Do you know what means and methods are?

9 A. In general terms, yes, I do.

10 Q. Does DR Horton set the means and methods  
11 that it expects its subcontractors to utilize, or  
12 does it leave it to the subcontractor's  
13 discretion?

14 A. Yeah, that's very general terms. I  
15 think it's a combination of some detail. Also,  
16 we hire experienced vendors that have the  
17 knowledge, depending what trade you're talking  
18 about. Some trades obviously we rely on having a  
19 lot more knowledge than we do. So that's --  
20 again, that's a very general question to answer.

21 Q. Okay. So if there is some construction  
22 detail in the scope that we look at for that sub,  
23 then DR Horton has specified the means and  
24 methods to that extent. If there's other details  
25 not there, DR Horton is permitting the

1 subcontractor to select the means and methods for  
2 those details.

3 MR. IMHOFF: Object to the form.

4 A. Well, I think it's a team effort. It  
5 would be very administrative tasking, for  
6 instance, if we put -- we update these every time  
7 a code changed, so we rely -- it's a team effort  
8 to make sure we're following code. That's just  
9 one example, between our scope of work, our  
10 vendor, our superintendent and our  
11 municipalities.

12 Q. Now, the court reporter won't record  
13 when you point out --

14 A. Oh, sorry.

15 Q. -- Exhibit 1.46 with your hand so I'll  
16 have to say that.

17 A. Got it.

18 Q. You pointed to Exhibit 1.46 and you  
19 indicated to me that as a matter of course DR  
20 Horton updates their scopes when the code  
21 changes; is that correct?

22 A. No, sir. I did not say that. I was  
23 actually contradicting that. We could not update  
24 our scopes every time a code changed, I'm saying,  
25 so we don't.

# Exhibit D

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

DEPOSITION OF MAURICIO REYNA

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

Plaintiff,

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

D.R. HORTON, INC.,

Defendant.

---

D.R. HORTON, INC.,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants,

---

PROBUILD COMPANY, LLC, et al.,

Fourth-Party Plaintiffs,

vs.

HARRELSON PAINTING, LLC, et al.,

Fourth-Party Defendants,

---

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

Fifth-Party Plaintiff,

vs.

TORIBIO ISLAS AND ALEJANDRO SOTO,

Fifth-Party Defendants.

---

1 DEPONENT: MAURICIO REYNA  
 2 DATE: FEBRUARY 23, 2023  
 3 TIME: 10:00 AM  
 4 LOCATION: CLARK BOLEN  
 GREENVILLE, SOUTH CAROLINA  
 5  
 6 REPORTED BY: VALERIE G. MELKUS, RPR  
 NCRA REGISTERED PROFESSIONAL  
 7 REPORTER  
 CLARK BOLEN  
 8 CHARLESTON, SC 29415  
 843-762-6294  
 Office@clarkbolen.com  
 9

A P P E A R A N C E S

11 ON BEHALF OF PLAINTIFFS:

12 JUSTIN O'TOOLE LUCEY, P.A.  
 13 BY: JUSTIN O'TOOLE LUCEY  
 BY: AMANDA FUNAI (VIA VC)  
 14 415 Mill Street  
 Mount Pleasant, SC 29465

15 ON BEHALF OF D.R. HORTON, INC.:

16 KENISON DUDLEY & CRAWFORD, LLC  
 17 BY: JASON IMHOFF  
 704 East McBee Avenue  
 18 Greenville, SC 29601

19 ON BEHALF OF M&L REYNA CONSTRUCTION, LLC:

20 LUZURIAGA MIMS, LLP  
 21 BY: KEVIN W. MIMS  
 1156 King Street  
 22 Charleston, SC 29403

23 ON BEHALF OF JLS MASONRY, INC. and MJ COWBOYS:

24 MARTINEAU KING, PLLC  
 25 BY: BLINN L. CUSHMAN  
 P.O. Box 31188  
 Charlotte, NC 28231

1 A. Yes.

2 Q. Did they hand you paper or did they make  
3 you go on a computer to what they call a portal,  
4 an Internet portal to get your purchase order?

5 A. I don't remember at that time, but we  
6 had the purchase orders.

7 Q. You had the what, please?

8 A. We had the purchase orders. I think  
9 they -- I'm not sure -- I don't remember if they  
10 hand it over to us or we have to print them.

11 Q. Did they e-mail them to you and you had  
12 to print your own?

13 A. I think we had to print them. I don't  
14 remember them giving us on hand the purchase  
15 order.

16 Q. You're not sure how you got the purchase  
17 order, but you know that you had to print your  
18 own?

19 A. (Nodded.)

20 Q. That's a yes for the court reporter?

21 A. Yes.

22 Q. What other information would D.R. Horton  
23 give you besides the purchase orders that you can  
24 recall, what other printed information? For  
25 example, would they give you a set of plans --

1 architectural plans for a house, would they hand  
2 those to you for you to do your work on a house?

3 A. Yes.

4 Q. Would they be a different set for each  
5 house?

6 A. Yes.

7 Q. And would it be a set like 85 pages long  
8 or would it be more like four, five, six pages?

9 A. Four or five.

10 Q. Would it be a complete house building  
11 set or would it just be the exterior elevations  
12 to show you where the brick was to go and where  
13 the stone was to go?

14 A. That was depending on what I'm supposed  
15 to do. If I'm doing the slab, they must give us  
16 the entire plan to see on frame, concrete and all  
17 the elevations. But if I'm doing only brick and  
18 stone, they give us only elevations, which is  
19 only three or four per house.

20 Q. Okay. Sir, I'm going to pull out a  
21 couple documents to keep us organized as we talk  
22 about stuff to give us a reference, but I want  
23 you to remember where we are because I'm going to  
24 come back to this.

25 We've talked about your work on the

1 A. No.

2 Q. Do you recall whether it was Jeremy or  
3 Brian that told you to cut the flashing back away  
4 from the face of the brick?

5 MR. IMHOFF: Object to the form.

6 A. Yes.

7 Q. Which one? Jeremy?

8 MR. IMHOFF: Object to the form.

9 A. Not remember who, but that was what we  
10 do -- what we did. I mean, if we install it past  
11 the brick, the homeowner don't like them -- if we  
12 install it and the homeowner didn't like it,  
13 don't want to see them, we have to come back and  
14 trim it.

15 So we came up to the point to leave the  
16 flashing half inch inside in the brick to avoid  
17 all the cutting. From that point moving forward,  
18 nobody ever says anything about it, so we  
19 continue doing it.

20 Q. Okay. What inspections if any did D.R.  
21 Horton perform during your work? And when I use  
22 the word inspections, anything from stopping by  
23 and taking a look or coming by with a clipboard.  
24 I'm -- very informally, what inspections do you  
25 recall D.R. Horton performing?

1           A. The superintendent, he was in and out.  
2 I mean, he's all day in the neighborhood. I  
3 never have an inspection set up so that he can  
4 look.

5                       There wasn't a point where he stop to  
6 look only at the brick. I didn't have a time  
7 where he said, I wanted to inspect it. All the  
8 time, he was in and out and checking, and I  
9 figured out that's the inspection he was doing by  
10 looking every day -- the process on the job.

11           Q. Every day he was in and out?

12           A. Every day.

13           Q. He was in and out enough that he would  
14 have had the opportunity to see every aspect of  
15 your brick installation?

16           A. Yes.

17                       MR. IMHOFF: Object to the form.

18           Q. But you don't recall him ever pulling  
19 out a checklist or anything?

20           A. No.

21           Q. And he never gave you a checklist?

22           A. No.

23           Q. Now, we talked about needing to have  
24 that 1-inch space between the facade and the  
25 building free for moisture to travel down.

1 in Charlotte doing brick masonry work?

2 A. Yes.

3 Q. And at that time you were a supervisor?

4 A. Yes.

5 Q. Were you ever told by D.R. Horton to  
6 keep the brickwork, the brick veneer off of the  
7 roofs?

8 A. No.

9 Q. Did D.R. Horton supply the brick ties?

10 A. Yes.

11 Q. Did they supply all the lintels?

12 A. Yes.

13 Q. Did they supply all the accessories  
14 whatsoever?

15 A. Yes.

16 Q. So whatever they wanted you to use and  
17 which style they wanted you to use was supplied  
18 by them?

19 A. Yes.

20 Q. Did the lintels come pre-sized; in other  
21 words, some lintels are 4-by-6, some lintels are  
22 4-by-8, some are 5 feet wide, some are 30 feet  
23 wide. Did they come pre-cut or pre-sized?

24 A. Yes.

25 Q. And was it only the garage lintels that

# Exhibit E

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

DEPOSITION OF L. STEVEN MOORE, PE  
VOLUME 3, MAY 11, 2023

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

Plaintiff,

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

D.R. HORTON, INC.,

Defendant.

---

D.R. HORTON, INC.,

Third-Party Plaintiff,

vs.

AJ LANDSCAPING & GRADING, LLC a/k/a A J  
LANDSCAPING & GRADING, LLC, et al.,

Third-Party Defendants,

---

PROBUILD COMPANY, LLC, et al.,

Fourth-Party Plaintiffs,

vs.

HARRELSON PAINTING, LLC, et al.,

Fourth-Party Defendants,

---

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

Fifth-Party Plaintiff,

vs.

TORIBIO ISLAS AND ALEJANDRO SOTO,

Fifth-Party Defendants.

1 discussion earlier this morning.

2 Q. And if D.R. Horton has no records of  
3 what subcontractor performed any given scope of  
4 work at a project, they can't hold anybody but  
5 themselves responsible for that work, right?

6 MR. IMHOFF: Object to the form.

7 A. If there was absolutely no records  
8 whatsoever, that would be an interesting  
9 question. If they had absolutely no records,  
10 they're ultimately responsible for the work.

11 Q. And would you agree with me that  
12 D.R. Horton is at least 1 percent responsible for  
13 any defects or deficiencies which exist at Rose  
14 Hill?

15 MR. IMHOFF: Object to the form.

16 A. I'm not going to assign responsibility.  
17 I think there are a couple of issues that is a  
18 D.R. Horton responsibility for.

19 Q. And what issues are those?

20 A. That would be the MSV, the interfaces at  
21 the edge of the brick and the MSV that was  
22 adhered to the brick, especially over the garage.

23 Q. Okay. Anything else?

24 A. Not that I recall at this point, sir.

25 Q. Are you aware of any individual lot

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

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

Plaintiff,

v.

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

Defendants.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

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

IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-01942

**JLS MASONRY, INC. AND MJ COWBOYS, LLC’S JOINDER TO M&L REYNA CONSTRUCTION, LLC’S MOTION TO DECERTIFY**

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.

ProBuild Company, LLC,

Fourth-Party Plaintiff,

V.

Harrleson Painting, LLC; Aaron D. Peris; Therma-Tru, LTD; and Huttig Building Products,

Fourth-Party Defendants.

Builders FirstSource- Southeast Group, LLC,

Fourth-Party Plaintiff,

V.

Harrleson Paintinf, LLC; Aaron D. Peris;  
Therma-Tru, Ltd.; and Huttig Building  
Products,

Fourth-Party Defendants.

**TO ALL PARTIES ABOVE NAMED AND THEIR ATTORNEYS OF RECORD:**

YOU WILL PLEASE TAKE NOTICE the Third-Party Defendants JLS Masonry, Inc. (hereinafter “JLS”) and MJ Cowboys, LLC (hereinafter “MJ Cowboys”) by and through their undersigned counsel, submit their Joinder to Third-Party Defendant M&L Reyna Construction, LLC’s (hereinafter “M&L Reyna”) Motion and Memorandum in Support of its Motion to Decertify the Class.

JLS and MJ Cowboys incorporate the facts, arguments, and pray for relief pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure. The Court should decertify the class because substantial evidence exists showing that the common elements required to be met by the Plaintiff cannot be met. To allow this matter to continue as a class action would unduly prejudice JLS and MJ Cowboys.

Therefore, JLS and MJ Cowboys join in M&L Reyna’s Motion and Memorandum in Support of its Motion to Decertify the Class and respectfully requests that the Motion to Decertify be granted.

*Signature Page to Follow*

ROSS & CRISTALDI, LLC

s/Emily C. Sheets

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