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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2018-CP-07-00911
Appellant Case No. 2022-000016

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III and Alayshia Smith and Nichole J. Verstegen; Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource-Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors, II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; and Valim Construction, LLC, Defendants,

Of Whom Sarmed and Jessica M. Shafi, Lather Construction, Inc., Lather Construction SC, Inc., Hutton's Landscapes, Inc., and East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc. are the Respondents,

And

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

**RECORD ON APPEAL
VOLUME I**

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP0700911

Richard W Dreier et al
PLAINTIFF(S)

Huttons Landscapes Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Lather Construction's Motion for Summary Judgement as to claims of D.R. Horton is denied based due to the Court finding genuine issues of material fact.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/12/2021 .

Armor Building Solutions Inc
Garcia Reza Rodiles
Graciela Reza
Americo Roofing Concepts Inc
Classy Maintenance Services
Diaz Handyman
Camargo Plumbing, Llc
Salvador Diaz
Construction Pros, Llc
Jorge Pilar Ramirez
Cayetano Cordova

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Beaufort Common Pleas

Case Caption: Richard W Dreier , plaintiff, et al VS Atlas Surveying Inc , defendant,
et al
Case Number: 2018CP0700911
Type: Order/Electronic Form 4

H. Steven DeBerry, IV

Circuit Court Judge 2771

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

FORM 4

JUDGMENT IN A CIVIL CASE

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- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Hutton Landscapes Inc. Motion for Summary Judgment on the Crossclaims of D.R. Horton is Denied as the court finds genuine issues of material facts exist.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/12/2021 .

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Cayetano Cordova

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Beaufort Common Pleas

Case Caption: Richard W Dreier , plaintiff, et al VS Atlas Surveying Inc , defendant,
et al
Case Number: 2018CP0700911
Type: Order/Electronic Form 4

H. Steven DeBerry, IV

Circuit Court Judge 2771

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1 clarity? I heard as you were sitting up there and you were
2 talking, before we asked you for a ruling, you said, "I think
3 the contract is unenforceable," for the indemnity provision at
4 least is unenforceable.

5 Can we proceed based on that?

6 THE COURT: I haven't made my ruling yet. I was
7 just trying to figure out what we are doing.

8 MR. ROSS: That's why I am trying to ask for some
9 clarity.

10 There is nothing we can do. I mean, the staff has
11 to eat, and so does everybody else.

12 MS. LUCEY: I could eat too, Your Honor.

13 THE COURT: Yeah. Everybody has to eat. There is
14 nothing we can do. I mean, I hate to do it to the jury, but it
15 is what it is.

16 Yeah. I will find that the contract
17 indemnification and Subsection 10 is unenforceable. I think
18 it's an adhesion contract. I think it's take-it-or-leave-it.
19 I think it's similar and likened to a non-compete in the sense
20 that if the opposing party doesn't have a whole lot of
21 negotiating power, then it can be deemed unenforceable. I
22 don't think it's enforceable. I think it violates public
23 policy.

24 So I am going to grant the motion, and we are going
25 to take an hour break so everyone can eat and we will come

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Richard W. and Rebecca A. Drier, et al.,

Plaintiff,

vs.

Americo Roofing, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2018-CP-07-00911

**ORDER DENYING DEFENDANT D.R.
HORTON, INC.,’S MOTION TO ALTER
OR AMEND JUDGMENT**

The Defendant D.R. Horton Inc. filed a motion asking this Court to alter or amend its November 16, 2021 bench ruling dismissing D.R. Horton Inc.’s cross-claims.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent “highly unusual circumstances.” U.S. ex rel. Becker v. Washington Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court’s ruling will not support Rule 59(e) relief).¹ Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or “to raise argument or present evidence that could have been presented prior to the entry of judgment.” Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, “[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” Stevens & Wilkinson

¹ Rule 59 is substantially the same as the Federal Rule. See Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) (“Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.”).

of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does “[a] party’s mere disagreement with the court’s ruling . . . warrant a Rule 59(e) motion.” In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat’l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Defendant D.R. Horton, Inc.’s motion, the Court hereby DENIES Defendant D.R. Horton, Inc.’s Motion to Alter or Amend Judgment.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW



Beaufort Common Pleas

Case Caption: Richard W Dreier , plaintiff, et al VS Atlas Surveying Inc , defendant,
et al
Case Number: 2018CP0700911
Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP0700911

Richard W Dreier et al
PLAINTIFF(S)

Huttons Landscapes Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter came before the Court as Defendant D.R. Horton, Inc.'s Motion for Set Off and Defendant D.R. Horton, Inc.'s Motion for a New Trial.

Defendant D.R. Horton, Inc.'s Motion for Set Off is granted. Defendant D.R. Horton, Inc.'s Motion for a New Trial is denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/03/2021 .

Armor Building Solutions Inc
Garcia Reza Rodiles
Graciela Reza
Americo Roofing Concepts Inc
Classy Maintenance Services
Diaz Handyman
Camargo Plumbing, Llc
Salvador Diaz
Construction Pros, Llc
Jorge Pilar Ramirez
Cayetano Cordova

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Beaufort Common Pleas

Case Caption: Richard W Dreier , plaintiff, et al VS Atlas Surveying Inc , defendant,
et al
Case Number: 2018CP0700911
Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2021-12-03 13:44:38 page 3 of 3

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP0700911

Richard W Dreier Michael B Johnson Avarae Hall Karen M Rodriguez Michael Rodriguez	Nicole J Versteegen Jessica M Shafi Sarmed Shafi Lori Anne Gecy	Huttons Landscapes Inc D R Horton Inc Professional Exteriors II Llc Builders Firstsource Southeast Group LLC SC Cleanup Co Inc	East Coast Construction Cleanup Corp Crossroads Enterprises Llc Lather Construction, Inc. Dean Custom Air LLC

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit)
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:
ORDER INFORMATION

SEE ATTACHED VERDICT FORM

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

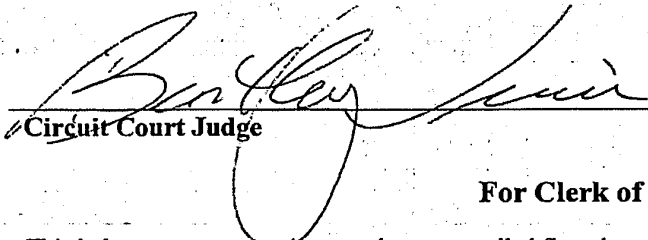
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Plaintiff's Sarmed and Jessica Shafi	DR Horton	\$ 140,000.00

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.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2766

Judge Code

11/19/2021

Date

For Clerk of Court Office Use Only

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

Alexandra Scott Williams 171 Church Street Suite 340
Charleston, SC 29401
J. Olin McDougall II PO Box 1336 Beaufort, SC 29901-1107
Benjamin Alexander Crute Traywick 171 Church Street,
#340 Charleston, SC 29401
William Thomas Bacon IV PO Box 1336 Beaufort, SC 29901

Paul Elliot Sperry 40 Calhoun Street Suite 400 Charleston, SC
29401
Steven Michael Nail 300 North Main Street Suite 500
Greenville, SC 29601
Philip Paul Cristaldi III 863 Coleman Blvd., Ste B Mt.
Pleasant, SC 29464
Douglas Charles Baxter PO Box 3646 Myrtle Beach, SC
29578
Emily Gifford Lucey 235 Magrath Darby Blvd Ste 100 Mt.
Pleasant, SC 29464
Clarke W. DuBose PO Box 11889 Columbia, SC 29211
Michael Lawrence Leech 126 Seven Farms Dr, Ste. 200
Charleston, SC 29492-8144
Stacey Patterson Canaday PO Box 2055 Beaufort, SC 29901
Francis Heyward Grimball 235 Magrath Darby Suite 100
Mt. Pleasant, SC 29464

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Jerri Ann Roseneau - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Sarmed and Jessica Shafi

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

Case No. 2018-CP-07-00911

VERDICT FORM FOR CLAIMS AGAINST DEFENDANT, D.R. HORTON, INC.

NEGLIGENCE

1. Do you find by a preponderance of the evidence that defendant, D.R. Horton, was negligent in the construction and supervision of Plaintiffs' Shafi property?

As to Defendant D.R. Horton, Inc.:

Yes ☒

No ☐

2. Do you find that defendant's negligence was the foreseeable and actual cause of damages to the Plaintiffs Shafi?

Yes ☒

No ☐

BREACH OF CONTRACT

3. Do you find by a preponderance of the evidence that defendant breached a contract with the Plaintiffs Shafi?

As to Defendant D.R. Horton, Inc.:

Yes ☒

No ☐

4. Do you find that Plaintiffs Shafi are entitled to actual damages for harm to their property as a result of defendant's breach of contract?

Yes ☒ No ☐

UNFAIR TRADE PRACTICES

5. Do you find by clear and convincing evidence that defendant committed an unfair or deceptive trade practice in violation of the South Carolina Unfair Trade Practice Act as to Plaintiffs Shafi?

As to Defendant D.R. Horton, Inc.:

Yes ☐

No ☒

6. Do you find that Plaintiffs Shafi are entitled to actual damages for harm to their property as a result of defendant's unfair or deceptive trade practices?

Yes ☐

No ☒

**IF YOU ANSWERED "YES" TO AT LEAST ONE OF THE PREVIOUS QUESTIONS,
PLEASE ANSWER THE LAST QUESTION**

7. The amount of actual damages, if any, to be awarded to the Plaintiffs Shafi for harm to their property as a result of the defendant's violation of any of the causes of action:

\$ 140,000.00

YOU ARE FINISHED.

Rhiana Clifford
JURY FOREPERSON

Beaufort, South Carolina

November 19, 2021

49359553.1

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11/19/21

GROSS NEGLIGENCE

GROSS NEGLIGENCE IS THE FAILURE TO EXERCISE A SLIGHT DEGREE OF CARE. A PERSON WHO IS SO INDIFFERENT TO THE CONSEQUENCES OF HIS CONDUCT AS TO NOT GIVE A SLIGHT CARE AS TO WHAT HE IS DOING ACTS WITH GROSS NEGLIGENCE.

No

Diane Clifford

ELECTRONICALLY FILED - 2021 Nov 22 4:49 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Richard W. and Rebecca A. Drier;
Yolanda J. Drier; John B. and Lori Anne
Gecy; Adam F. Grooms; AvaRae Hall;
Michael B. and Cheyenne M. Johnson;
Kenny Manuel Lopez and Kelsey Trudel
Lopez; Dylan C. and Samantha Dawn
Machado; Marvin K. and Maryalice
Mamaril; Cory M. McDaniel; Thomas R.
and Melissa S. McFeely; Michael and
Karen M. Rodriguez; Sarned and Jessica
M. Shafi; Nicole J. Verstegen;

Plaintiffs,

v.

Atlas Surveying, Inc.; Atlas Surveying
BFT, LLC individually and f/k/a Atlas
Surveying Holding Company, LLC;
Crossroads Enterprises, LLC; D.R.
Horton, Inc.; East Coast Construction
Cleanup Corp. f/k/a S.C. Cleanup Co.,
Inc.; Hutton's Landscapes, Inc.; Lather
Construction SC, Inc.; Lather
Construction, Inc.; and Professional
Exteriors II, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-07-_____

COMPLAINT
(Jury Trial Demanded)

COME NOW THE PLAINTIFFS, complaining of the Defendants, alleging as follows:

PARTIES AND JURISDICTION

1. The Plaintiffs are residents of the Tidewater Creek neighborhood in Beaufort County, South Carolina, and are the owners of real property situated at 4926 Tidal Walk Lane, Beaufort, SC (Richard Drier and Rebecca Adams); 4898 Breeze Way, Beaufort, SC (Yolanda Drier); 4836 Breeze Way, Beaufort, SC (John B. and Lori Anne Gecy); 4946 Tidal Walk Lane,

Beaufort, SC (Adam Grooms); 4915 Tidal Walk Drive, Beaufort, SC (AvaRae Hall); 4881 Tidal Walk Drive, Beaufort, SC (Michael and Cheyenne Johnson); 4884 Breeze Way, Beaufort, SC (Kenny and Kelsey Lopez); 4897 Tidal Walk Lane, Beaufort, SC (Dylan and Samantha Machado); 4908 Tidal Walk Lane, Beaufort, SC (Marvin and Maryalice Mamaril); 4871 Tidal Walk Drive, Beaufort, SC (Cory McDaniel); 4942 Tidal Walk Lane, Beaufort, SC (Thomas and Melissa McFeely); 4855 Tidal Walk Drive, Beaufort, SC (Michael and Karen Rodriguez); 4892 Breeze Way, Beaufort, SC (Sarmed and Jessica Shafi); 4899 Tidal Walk Drive, Beaufort, SC (Nicole Verstegen).

2. The Defendant Atlas Surveying, Inc. is a domestic corporation which conducts business in Beaufort County, South Carolina; Defendant Atlas Surveying BFT, LLC, Inc. is a domestic limited liability corporation which conducts business in Beaufort County, South Carolina; Defendant Crossroads Enterprises, LLC is a domestic limited liability company which conducts business and owns property in Beaufort County, South Carolina; Defendant D.R. Horton, Inc. is a foreign corporation which conducts business and owns property in Beaufort County, South Carolina; Defendant East Coast Construction Cleanup Corp. is a domestic corporation which conducts business in Beaufort County, South Carolina; Defendant Hutton's Landscapes, Inc. is a foreign corporation which conducts business in Beaufort County, South Carolina; Defendant Lather Construction SC, Inc. is a domestic corporation which conducts business and owns property in Beaufort County, South Carolina; Defendant Lather Construction, Inc. is a domestic corporation which conducts business and owns property in Beaufort County, South Carolina; Defendant Professional Exteriors II, LLC is a domestic limited liability corporation which conducts business and owns property in Beaufort County, South Carolina.

3. This civil action concerns the wrongful conduct of all Defendants in connection with the land purchase, design, development, construction, sale, and management of the Tidewater Creek neighborhood, including the Plaintiffs' property and the common areas owned by the HOA.

4. This Court has subject matter and personal jurisdiction, and venue is proper.

GENERAL ALLEGATIONS

5. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

6. For a period spanning approximately October 2015 through July 2017, the Plaintiffs purchased the individual properties identified above, which were owned, surveyed, platted, subdivided, constructed, marketed, sold, and maintained by the Defendants, individually and collectively.

7. Upon moving into their houses the Plaintiffs began to notice the products of a host of defective, wrongful, and negligent practices on the part of the Defendants related to their ownership, survey, platting, subdividing, construction, marketing, selling and/or maintenance of their properties; all of which constituted breaches of the contracts between and among the parties and breaches of other legal and equitable duties held by the Defendants. Among the issues noticed are: improper site preparation; improper and inadequate infrastructure installation; inadequate inspections and testing of the site during surveying, platting and subdividing; rusted metal, broken glass, and other hazardous debris strewn throughout the properties; premature erosion; water intrusion; improperly installed siding; dead and dying trees; and other deficiencies which shall be demonstrated through discovery and at trial. The Plaintiffs submitted these issues to the Defendants for remediation, but the Defendants refused and/or failed to rectify them. These deficiencies, and others which shall be shown through discovery and at trial, were the result of

negligent, grossly negligent, and otherwise wrongful conduct by the Defendants in their ownership, survey, platting, subdividing, construction, marketing, selling and/or maintenance of the Tidewater Creek neighborhood.

8. In developing, surveying, platting, subdividing, constructing, maintaining, marketing and selling the Tidewater Creek neighborhood, the Defendants made, without limitation, the following misrepresentations of material fact, and concealments of material facts the disclosure of which was necessary to make the representations truthful:

- a. That the site preparation and other construction work had been conducted in accordance with the law, when in fact it had not;
- b. That the Plaintiffs' properties were habitable, when in fact they were not;
- c. That the Plaintiffs' properties were built in accordance with industry standards and good construction practices, when in fact they were not;
- d. That the site preparation and other construction work had been conducted in a workmanlike fashion, when in fact it violated City and/or County ordinances, was substandard, and violated building code requirements;
- e. That the site preparation and other construction work had been conducted by competent workmen, when in fact it had been conducted by unskilled and incompetent contractors and subcontractors;
- f. That they provided a viable, legitimate warranty under which they would be responsive, when in fact the warranty was a ruse to mislead the Plaintiffs into accepting limitations of their rights which were false; and
- g. In other and further ways to be shown through discovery and at trial.

9. As a result of the Defendants' wrongful conduct, described above, and as shall be shown in greater particularity as discovery progresses; and as the further result of loss which resulted from accidental occurrences and from intentional and/or foreseeable acts of these Defendants, the Plaintiffs have suffered recoverable damages including, without limitation: loss of use of their properties, constructive eviction from their properties, the denial of the benefit of

their bargain, personal injury, expert expenses, legal expenses, diminution in value of their properties, repair costs, environmental consulting costs, incidental and consequential damages, and such other and further damages as shall be proved in discovery and at trial. For these damages and such other damages as will be revealed in discovery, the Plaintiffs are entitled to recover actual damages, punitive damages, attorney and other litigation fees, treble damages and all other available special and general damages.

FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligent Misrepresentation/ Recission)

10. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

11. The Defendants' false statements and concealments of material facts, as outlined above, were false; any Defendants who did not make specific misrepresentations or concealments, knew or had reason to know of the false statements and concealments being made.

12. Each of the Defendants profited from the misrepresentations.

13. The Defendants owed a duty of care to the Plaintiffs to ensure that all material information was disclosed, and that it was disclosed accurately and truthfully; the Defendants breached these duties via misrepresentations made or permitted, or via failure to correct them once made.

14. The Plaintiffs justifiably relied on the Defendants—each of whom held itself out as having expertise and specific reliability in these fields—with the proximate result being pecuniary loss as set forth above.

15. As a result, the Plaintiffs are entitled to recover actual and punitive damages, consequential and incidental damages, all in amounts to be determined at trial. Alternatively, the

Plaintiffs are entitled to rescind the contracts for purchase of their properties, on the grounds that the Defendants' fraud, and fraud in the inducement, invalidates the contracts *ab initio*.

FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence/Gross Negligence)

16. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

17. Having held themselves out as being knowledgeable, experienced, and trustworthy in the relevant fields, and having solicited the Plaintiffs' trust, reliance, and investment, the Defendants owed a duty of care to the Plaintiffs to act with the knowledge, experience, and trustworthiness they claimed to possess, and which are customary in the development, construction, marketing, and sales settings.

18. As set forth above, and as shall be shown through discovery, the Defendants breached these duties—negligently, grossly negligently, recklessly, willfully, and wantonly—via the conduct described above, which proximately caused the Plaintiffs to suffer the injuries and losses described above, entitling them to a judgment for all recoverable actual and, should the jury deem them appropriate, punitive damages.

FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Unfair Trade Practices Act)

19. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

20. The Defendants' wrongful and unlawful scheme and conspiracy to victimize the Plaintiffs for their own financial enrichment—in particular, both their deliberate and unlawful effort to conceal what they knew to be improperly prepared home sites, and their intentionally misleading warranty and action pursuant thereto—their many and material misrepresentations of

their competence, expertise and trustworthiness, and subsequent misappropriation of the Plaintiffs' funds, were unfair and deceptive practices in the conduct of trade and commerce, within the meaning of the South Carolina Unfair Trade Practices Act. S.C. Code Section 39-5-10 *et seq.*

21. As set forth above, these unfair and deceptive practices proximately caused the Plaintiffs to suffer an ascertainable loss of money: The entirety of the sums expended in the purchase and occupancy of their properties.

22. The Defendants' wrongful conduct and violations of the Act certainly are capable of repetition: The Plaintiffs are some of thousands who have purchased houses from a combination of these Defendants, all of whom remain active in the Beaufort metropolitan market and throughout the State.

23. As a result, the Plaintiffs are entitled to recover actual and punitive damages, consequential and incidental damages, interest, attorney's fees and costs, and treble damages, all in an amount to be determined at trial.

FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Express and Implied Warranties)

24. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

25. The Defendants gave various warranties, express and implied, including without limitation that the Property was habitable, was lawfully constructed, and was fit for its intended purpose, and that the site preparation and other construction work had been performed in a good and workmanlike fashion.

26. As set forth above, the Defendants breached these warranties in a host of particulars, entitling the Plaintiffs to judgment for all recoverable actual, incidental, consequential, and punitive damages.

FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Breach of Contract/Breach of Duty of Good Faith and Fair Dealing)

27. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

28. The Plaintiffs entered into binding contracts with the Defendants.

29. As set forth above and as shall be shown more fully via discovery and at trial, the Defendants breached the contracts in various particulars, including but in no way limited to breaching the implied covenant of good faith and fair dealing, proximately causing the Plaintiffs' losses described above, and entitling the Plaintiffs to a judgment for the same.

FOR A SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Fraud in the Inducement/Rescission)

30. The Plaintiffs reiterate every prior paragraph of this Complaint as fully as if set forth herein verbatim.

31. As set forth above, the Defendants made a host of misrepresentations, fraudulent and otherwise, concerning material elements of the contracts, with the intent that these misrepresentations would induce the Plaintiffs to enter into the agreements.

32. These misrepresentations and fraud were relied upon by the Plaintiffs, justifiably; absent the misrepresentations and fraudulent statements and omissions, the Plaintiffs would not have entered into the contracts, which has resulted in extensive losses and damages by the Plaintiffs, as described hereinabove.

33. As a result, the Plaintiffs are entitled to rescind the contract, which should be deemed void *ab initio*, and recover all incidental and consequential damages, and interest.

WHEREFORE, having set forth their causes of action, the Plaintiffs request trial by jury, and a judgment for all recoverable actual, special, general, incidental, consequential, punitive, treble, and statutory damages, for rescission of the contracts, for costs, fees and interest, and for such other and further relief as the Court deems appropriate and just.

Respectfully Submitted,

s/Alexandra Scott Williams

Benjamin A.C. Traywick, S.C. Bar No. 74027
Alexandra Scott Williams, S.C. Bar No. 102862
BEN TRAYWICK LAW FIRM, LLC
171 Church Street, Suite 340
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William Thomas Bacon, IV, S.C. Bar No. 72581
McDOUGALL LAW FIRM, LLC
Post Office Box 1336
115 Lady's Island Commons
Beaufort, SC 29901-1336
(843) 379-7000

Attorneys for the Plaintiffs

May 1, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Richard W. and Rebecca A. Drier;
Yolanda J. Drier; John B. and Lori Anne
Gecy; Adam F. Grooms; AvaRae Hall;
Michael B. and Cheyenne M. Johnson;
Kenny Manuel Lopez and Kelsey Trudel
Lopez; Dylan C. and Samantha Dawn
Machado; Marvin K. and Maryalice
Mamaril; Cory M. McDaniel; Thomas R.
and Melissa S. McFeely; Michael and
Karen M. Rodriguez; Sarmed and Jessica
M. Shafi; Nicole J. Verstegen;

Plaintiffs,

v.

Atlas Surveying, Inc.; Atlas Surveying
BFT, LLC individually and f/k/a Atlas
Surveying Holding Company, LLC;
Crossroads Enterprises, LLC; D.R.
Horton, Inc.; East Coast Construction
Cleanup Corp.; Hutton's Landscapes, Inc.;
Lather Construction SC, Inc.; Lather
Construction, Inc.; and Professional
Exteriors II, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-07-_____

SUMMONS
(Jury Trial Demanded)

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint on the subscriber, at the address shown below, within thirty (30) days after service hereof, not including the day of such service, and if you fail to answer the complaint within the time stated above, judgment by default will be rendered against you for the relief demanded in the complaint. In addition, your answer should be filed with the court within five (5) days after service thereof.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

s/Alexandra Scott Williams

Benjamin A.C. Traywick, S.C. Bar No. 74027
Alexandra Scott Williams, S.C. Bar No. 102862
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Post Office Box 1336
115 Lady's Island Commons
Beaufort, SC 29901-1336
(843) 379-7000

Attorneys for the Plaintiffs

May 1, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-07-00911

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Verstegen;

Plaintiffs,

v.

**SECOND AMENDED SUMMONS
(Jury Trial Demanded)**

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource - Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; Valim Construction, LLC;

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint on the subscriber, at the address shown below, within thirty (30) days after service hereof, not including the day of such service, and if you fail to answer the complaint within the time stated above, judgment by default will be rendered against you for the relief demanded in the complaint. In addition, your answer should be filed with the court within five (5) days after service thereof.

Respectfully Submitted,

s/Alexandra Scott Williams

Benjamin A.C. Traywick, S.C. Bar No. 74027
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115 Lady's Island Commons
Beaufort, SC 29901-1336
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Attorneys for the Plaintiffs

November 20, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Verstegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource - Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; Valim Construction, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-07-00911

**SECOND AMENDED COMPLAINT
(Jury Trial Demanded)**

COME NOW THE PLAINTIFFS, complaining of the Defendants, alleging as follows:

PARTIES AND JURISDICTION

1. The Plaintiffs are residents of the Tidewater Creek neighborhood in Beaufort County, South Carolina, and are the owners of real property situated at 4926 Tidal Walk Lane, Beaufort, SC (Richard Dreier and Rebecca Adams); 4898 Breeze Way, Beaufort, SC (Yolanda Dreier); 4953 Tidal Walk Lane, Beaufort, SC (Jacob and Carla Emerson); 4836 Breeze Way, Beaufort, SC (John B. and Lori Anne Gecy); 4861 Tidal Walk Drive, Beaufort, SC (Aaron and Stasha Grooms); 4915 Tidal Walk Drive, Beaufort, SC (AvaRae Hall); 4881 Tidal Walk Drive, Beaufort, SC (Michael and Cheyenne Johnson); 4884 Breeze Way, Beaufort, SC (Kenny and Kelsey Lopez); 4897 Tidal Walk Lane, Beaufort, SC (Dylan and Samantha Machado); 4908 Tidal Walk Lane, Beaufort, SC (Marvin and Maryalice Mamaril); 4942 Tidal Walk Lane, Beaufort, SC (Thomas and Melissa McFeely); 4855 Tidal Walk Drive, Beaufort, SC (Michael and Karen Rodriguez); 4892 Breeze Way, Beaufort, SC (Sarmed and Jessica Shafi); 4846 Breeze Way, Beaufort, SC (James and Alayshia Smith); 4899 Tidal Walk Drive, Beaufort, SC (Nicole Ash née Verstegen).

2. Defendants Americo Roofing Concepts, Inc., East Coast Construction Cleanup Corp.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; and Quality Electric of the Coastal Carolinas Incorporated are domestic corporations that conduct business in Beaufort County, South Carolina. Defendants Archer Exteriors, Inc. and Hutton's Landscapes, Inc. are foreign corporations that conduct business in Beaufort County, South Carolina. Defendant D.R. Horton, Inc. is a foreign corporation which conducts business and owns property in Beaufort County, South Carolina. Defendants Lather Construction SC, Inc. and Lather Construction, Inc. are domestic corporations which conduct business and own property in Beaufort County, South Carolina. Defendant Valim Construction, LLC is a domestic limited liability company that

conducts business in Beaufort County, South Carolina. Defendants Armor Building Solutions, LLC; Crossroads Enterprises, LLC; Dean Custom Air, LLC; Professional Exteriors II, LLC; and Superior Association Services, LLC are domestic limited liability companies that conduct business and own property in Beaufort County, South Carolina. Defendants Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Builders FirstSource - Southeast Group, LLC; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; and Professional Exteriors II, LLC are foreign limited liability companies which conduct business in Beaufort County, South Carolina.

3. This civil action concerns the wrongful conduct of all Defendants in connection with the land purchase, design, development, construction, sale, and management of the Tidewater Creek neighborhood, including the Plaintiffs' property and the common areas owned by the HOA.

4. This Court has subject matter and personal jurisdiction, and venue is proper.

GENERAL ALLEGATIONS

5. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

6. For a period spanning approximately October 2015 through July 2017, the Plaintiffs purchased the individual properties identified above, which were owned, surveyed, platted, subdivided, constructed, marketed, sold, and maintained by the Defendants, individually and collectively.

7. Upon moving into their houses the Plaintiffs began to notice the products of a host of defective, wrongful, and negligent practices on the part of the Defendants related to their ownership, survey, platting, subdividing, construction, marketing, selling and/or maintenance of their properties; all of which constituted breaches of the contracts between and among the parties

and breaches of other legal and equitable duties held by the Defendants. Among the issues noticed are: improper site preparation; improper and inadequate infrastructure installation; inadequate inspections and testing of the site during surveying, platting and subdividing; rusted metal, broken glass, and other hazardous debris strewn throughout the properties; premature erosion; water intrusion; improperly installed siding; dead and dying trees; and other deficiencies which shall be demonstrated through discovery and at trial; and which are further detailed in the Notice and Opportunity to Cure correspondence sent to the Defendants and incorporated herein by reference. The Plaintiffs submitted these issues to the Defendants for remediation, but the Defendants refused and/or failed to rectify them. These deficiencies, and others which shall be shown through discovery and at trial, were the result of negligent, grossly negligent, and otherwise wrongful conduct by the Defendants in their ownership, survey, platting, subdividing, construction, marketing, selling and/or maintenance of the Tidewater Creek neighborhood.

8. In developing, surveying, platting, subdividing, constructing, maintaining, marketing and selling the Tidewater Creek neighborhood, the Defendants made, without limitation, the following misrepresentations of material fact, and concealments of material facts the disclosure of which was necessary to make the representations truthful:

- a. That the site preparation and other construction work had been conducted in accordance with the law, when in fact it had not;
- b. That the Plaintiffs' properties were habitable, when in fact they were not;
- c. That the Plaintiffs' properties were built in accordance with industry standards and good construction practices, when in fact they were not;
- d. That the site preparation and other construction work had been conducted in a workmanlike fashion, when in fact it violated City and/or County ordinances, was substandard, and violated building code requirements;

- e. That the site preparation and other construction work had been conducted by competent workmen, when in fact it had been conducted by unskilled and incompetent contractors and subcontractors;
- f. That they provided a viable, legitimate warranty under which they would be responsive, when in fact the warranty was a ruse to mislead the Plaintiffs into accepting limitations of their rights which were false; and
- g. In other and further ways to be shown through discovery and at trial.

9. As a result of the Defendants' wrongful conduct, described above, and as shall be shown in greater particularity as discovery progresses; and as the further result of loss which resulted from accidental occurrences and from intentional and/or foreseeable acts of these Defendants, the Plaintiffs have suffered recoverable damages including, without limitation: loss of use of their properties, constructive eviction from their properties, the denial of the benefit of their bargain, personal injury, expert expenses, legal expenses, diminution in value of their properties, repair costs, environmental consulting costs, incidental and consequential damages, and such other and further damages as shall be proved in discovery and at trial. For these damages and such other damages as will be revealed in discovery, the Plaintiffs are entitled to recover actual damages, punitive damages, attorney and other litigation fees, treble damages and all other available special and general damages.

FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligent Misrepresentation/ Rescission)

10. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

11. The Defendants' false statements and concealments of material facts, as outlined above, were false; any Defendants who did not make specific misrepresentations or concealments, knew or had reason to know of the false statements and concealments being made.

12. Each of the Defendants profited from the misrepresentations.

13. The Defendants owed a duty of care to the Plaintiffs to ensure that all material information was disclosed, and that it was disclosed accurately and truthfully; the Defendants breached these duties via misrepresentations made or permitted, or via failure to correct them once made.

14. The Plaintiffs justifiably relied on the Defendants—each of whom held itself out as having expertise and specific reliability in these fields—with the proximate result being pecuniary loss as set forth above.

15. As a result, the Plaintiffs are entitled to recover actual and punitive damages, consequential and incidental damages, all in amounts to be determined at trial. Alternatively, the Plaintiffs are entitled to rescind the contracts for purchase of their properties, on the grounds that the Defendants' fraud, and fraud in the inducement, invalidates the contracts *ab initio*.

FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence/Gross Negligence)

16. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

17. Having held themselves out as being knowledgeable, experienced, and trustworthy in the relevant fields, and having solicited the Plaintiffs' trust, reliance, and investment, the Defendants owed a duty of care to the Plaintiffs to act with the knowledge, experience, and trustworthiness they claimed to possess, and which are customary in the development, construction, marketing, and sales settings.

18. As set forth above, and as shall be shown through discovery, the Defendants breached these duties—negligently, grossly negligently, recklessly, willfully, and wantonly—via the conduct described above, which proximately caused the Plaintiffs to suffer the injuries and

losses described above, entitling them to a judgment for all recoverable actual and, should the jury deem them appropriate, punitive damages.

FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Unfair Trade Practices Act)

19. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

20. The Defendants' wrongful and unlawful scheme and conspiracy to victimize the Plaintiffs for their own financial enrichment—in particular, both their deliberate and unlawful effort to conceal what they knew to be improperly prepared home sites, and their intentionally misleading warranty and action pursuant thereto—their many and material misrepresentations of their competence, expertise and trustworthiness, and subsequent misappropriation of the Plaintiffs' funds, were unfair and deceptive practices in the conduct of trade and commerce, within the meaning of the South Carolina Unfair Trade Practices Act. S.C. Code Section 39-5-10 *et seq.*

21. As set forth above, these unfair and deceptive practices proximately caused the Plaintiffs to suffer an ascertainable loss of money: The entirety of the sums expended in the purchase and occupancy of their properties.

22. The Defendants' wrongful conduct and violations of the Act certainly are capable of repetition: The Plaintiffs are some of thousands who have purchased houses from a combination of these Defendants, all of whom remain active in the Beaufort metropolitan market and throughout the State.

23. As a result, the Plaintiffs are entitled to recover actual and punitive damages, consequential and incidental damages, interest, attorney's fees and costs, and treble damages, all in an amount to be determined at trial.

FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Express and Implied Warranties)

24. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

25. The Defendants gave various warranties, express and implied, including without limitation that the Property was habitable, was lawfully constructed, and was fit for its intended purpose, and that the site preparation and other construction work had been performed in a good and workmanlike fashion.

26. As set forth above, the Defendants breached these warranties in a host of particulars, entitling the Plaintiffs to judgment for all recoverable actual, incidental, consequential, and punitive damages.

FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Breach of Contract/Breach of Duty of Good Faith and Fair Dealing)

27. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

28. The Plaintiffs entered into binding contracts with the Defendants.

29. As set forth above and as shall be shown more fully via discovery and at trial, the Defendants breached the contracts in various particulars, including but in no way limited to breaching the implied covenant of good faith and fair dealing, proximately causing the Plaintiffs' losses described above, and entitling the Plaintiffs to a judgment for the same.

FOR A SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

(Fraud in the Inducement/Rescission)

30. The Plaintiffs reiterate every prior paragraph of this Complaint as fully as if set forth herein verbatim.

31. As set forth above, the Defendants made a host of misrepresentations, fraudulent and otherwise, concerning material elements of the contracts, with the intent that these misrepresentations would induce the Plaintiffs to enter into the agreements.

32. These misrepresentations and fraud were relied upon by the Plaintiffs, justifiably; absent the misrepresentations and fraudulent statements and omissions, the Plaintiffs would not have entered into the contracts, which has resulted in extensive losses and damages by the Plaintiffs, as described hereinabove.

33. As a result, the Plaintiffs are entitled to rescind the contract, which should be deemed void *ab initio*, and recover all incidental and consequential damages, and interest.

WHEREFORE, having set forth their causes of action, the Plaintiffs request trial by jury, and a judgment for all recoverable actual, special, general, incidental, consequential, punitive, treble, and statutory damages, for rescission of the contracts, for costs, fees and interest, and for such other and further relief as the Court deems appropriate and just.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

s/Alexandra Scott Williams

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Attorneys for the Plaintiffs

November 20, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2018-CP-07-00911

Richard W. and Rebecca A. Drier; Yolanda)
J. Drier; Jacob R. and Carla Emerson; John)
B. and Lori Anne Gecy; Aaron M. and)
Stasha R. Grooms; AvaRae Hall; Michael B.)
and Cheyenne M. Johnson; Kenny Manuel)
Lopez and Kelsey Trudel Lopez; Dylan C.)
and Samantha Dawn Machado; Marvin K.)
and Maryalice Mamaril; Thomas R. and)
Melissa S. McFeely; Michael and Karen)
M. Rodriguez; Sarmed and Jessica M. Shafi;)
James J. Smith, III and Alayshia Smith; and)
Nicole J. Verstegen;)

Plaintiffs,
v.

Advanced Flooring & Design Division of)
ISI, LLC f/k/a Advanced Flooring and)
Design, LLC; Americo Roofing Concepts,)
Inc.; Archer Exteriors, Inc.; Armor Building)
Solutions, LLC; Builders FirstSource –)
Southeast Group, LLC; Crossroads)
Enterprises, LLC; D.R. Horton, Inc.;)
Dean Custom Air, LLC; East Coast)
Construction Cleanup Corp. f/k/a)
S.C. Cleanup Co., Inc.; Freedom Homes,)
Inc. f/k/a Armor Building Solutions, Inc.;)
Hutton's Landscapes, Inc.; Lather)
Construction SC, Inc.; Lather Construction,)
Inc.; Masco Cabinetry, LLC; ProBuild East,)
LLC; Professional Drywall & Paint Services)
LLC; Professional Exteriors II, LLC;)
Quality Electric of the Coastal)
Carolinas Incorporated;)
Superior Association Services, LLC; Valim)
Construction, LLC;)

Defendants.

**ANSWER TO THE PLAINTIFFS' SECOND AMENDED
COMPLAINT AND CROSS-CLAIMS
ON BEHALF OF D.R. HORTON, INC.
(Jury Trial Demanded)**

Defendant, D.R. Horton, Inc. (hereinafter referred to as "DRH" or "Defendant"), answering the Second Amended Complaint of the Plaintiffs ("the Second Amended Complaint") and asserting Cross Claims and demanding a trial by jury, would allege and show unto the Court as follows:

FOR A FIRST DEFENSE

Defendant responds to the separately numbered paragraphs of the Second Amended Complaint as follows. Any allegation contained in the Second Amended Complaint not expressly admitted, explained, or modified is denied.

1. DRH admits the allegations of paragraph 1 upon information and belief.
2. Responding to paragraph 2 of the Second Amended Complaint, DRH affirmatively states only that it is a Delaware corporation authorized to transact business in South Carolina, including Beaufort County. DRH lacks knowledge or information sufficient to admit or deny the remaining allegations and inferences contained in paragraph 2, and therefore denies the same.
3. Responding to paragraph 3 of the Second Amended Complaint, DRH asserts that paragraph 3 does not contain any allegations of fact which might require a response, but rather, simply sets forth a characterization of the Plaintiffs' purported claims, to which no response from DRH is required. To the extent that paragraph 3 may contain any allegations to which a response is required, DRH denies the allegations.
4. Responding to paragraph 4 of the Second Amended Complaint, DRH is presently unaware of grounds upon which to object to this Court's jurisdiction over this action or DRH or to

venue as laid. DRH denies any and all remaining allegations and inferences contained in paragraph 4.

5. Responding to paragraph 5 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 4 as if restated verbatim herein.

6. Responding to paragraph 6 of the Second Amended Complaint, DRH admits, upon information and belief, only so much of the allegations contained therein as allege that the named Plaintiffs purchased the properties referred to therein within or about the referenced time period. DRH denies any and all remaining allegations and inferences contained in paragraph 6.

7. Responding to paragraphs 7 through 9 of the Second Amended Complaint, including all sub-parts, DRH denies the allegations contained therein.

8. Responding to paragraph 10 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 9 as if restated verbatim herein.

9. Responding to paragraphs 11 through 15 of the Second Amended Complaint, DRH denies the allegations contained therein.

10. Responding to paragraph 16 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 15 as if restated verbatim herein.

11. Responding to paragraph 17 of the Second Amended Complaint, DRH asserts that paragraph 17 does not contain any allegations of fact, but instead sets forth one or more assertions of law, to which no response by DRH is required. To the extent that a response may be required, DRH denies the allegations contained in paragraph 17.

12. Responding to paragraph 18 of the Second Amended Complaint, DRH denies the allegations contained therein.

13. Responding to paragraph 19 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 18 as if restated verbatim herein.

14. Responding to paragraphs 20 through 23 of the Second Amended Complaint, DRH denies the allegations contained therein.

15. Responding to paragraph 24 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 23 as if restated verbatim herein.

16. Responding to paragraph 25 of the Second Amended Complaint, DRH asserts that so much of the allegations contained therein as pertain to alleged implied warranties do not assert any allegations of fact requiring a response, but instead, purport to set forth one or more conclusions of law to which no response by DRH is required. To the extent that a response may be required, DRH denies the allegations. Responding to so much of the allegations as are directed to DRH and pertain to one or more alleged express warranties, DRH craves reference to such document(s) as Plaintiffs will allege to evidence such warranties, and denies so much of the allegations as are inconsistent with the accurate and authentic contents thereof. Further responding, DRH lacks knowledge or information sufficient to admit or deny so much of the allegations as are directed to one or more Defendants other than itself and pertain to one or more alleged express warranties given thereby, and therefore denies the same. DRH denies any and all remaining allegation and inferences as may be contained in paragraph 25.

17. Responding to paragraph 26 of the Second Amended Complaint, DRH denies the allegations contained therein.

18. Responding to paragraph 27 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 26 as if restated verbatim herein.

19. Responding to paragraph 28 of the Second Amended Complaint, DRH craves reference to the documents evidencing any alleged contract between any Plaintiff and DRH, and denies so much of the allegations contained in paragraph 28 as are inconsistent with the accurate and authentic contents thereof. DRH lacks knowledge or information sufficient to form a belief as to the truth of so much of the allegations contained in paragraph 28 as are directed to any other named Defendant, and therefore denies the same. DRH denies any and all remaining allegations and inferences contained in paragraph 28.

20. Responding to paragraph 29 of the Second Amended Complaint, DRH denies the allegations contained therein.

21. Responding to paragraph 30 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 29 as if restated verbatim herein.

22. Responding to paragraphs 31 through 33 of the Second Amended Complaint, DRH denies the allegations contained therein.

23. Responding to that portion of the Second Amended Complaint which purports to assert a prayer for relief, DRH denies that Plaintiffs are entitled to any of the relief requested therein.

Further, without assuming any burden of proof, persuasion, or production not otherwise legally assigned to it as to any element of the claims alleged in the Second Amended Complaint, DRH asserts the following additional defenses:

FOR A SECOND DEFENSE

24. The Second Amended Complaint, in whole or in part, fails to state facts sufficient to constitute a cause of action, and it should be dismissed pursuant to SCRCP 12(b)(6).

FOR A THIRD DEFENSE

25. Plaintiffs' claims for breach of implied warranty are barred by virtue of the effective contractual disclaimer of the same.

FOR A FOURTH DEFENSE

26. Plaintiffs' claims are subject to mandatory, binding arbitration and should be dismissed or, alternatively, stayed pending the same.

FOR A FIFTH DEFENSE

27. Plaintiffs have failed to mitigate their alleged damages, if any, as required by law.

FOR A SIXTH DEFENSE

28. Any recovery by Plaintiffs, their entitlement to which is denied, should be reduced or barred pursuant to the doctrine of comparative negligence.

FOR A SEVENTH DEFENSE

29. If Plaintiffs have incurred damages, which are denied, such damages are the result of the acts or omissions of one or more third parties, over which DRH does not have authority or control.

FOR AN EIGHTH DEFENSE

30. Plaintiffs' claims for breach of express or implied warranty are barred as the result of Plaintiffs' failure to provide DRH with notice and opportunity to cure.

FOR A NINTH DEFENSE

31. Certain of the damages alleged by Plaintiffs are barred by the economic loss rule.

FOR A TENTH DEFENSE

32. Plaintiffs' claim for punitive damages seeks a remedy that is unconstitutional.

FOR AN ELEVENTH DEFENSE

33. Plaintiffs' claims are barred by the doctrines of waiver and estoppel.

FOR A TWELFTH DEFENSE

34. If Plaintiffs have incurred damages, which are denied, such damages are the result of the intervening or supervening conduct of one or more third parties, for which DRH is not responsible, and but for which, no such damages would be incurred.

FOR A THIRTEENTH DEFENSE

35. Plaintiffs have failed to provide DRH with adequate notice and opportunity to cure pursuant to S.C. Code Ann. § 40-59-810 *et seq.*, and Plaintiffs' claims should be stayed until such time as Plaintiffs have satisfied the statutory requirements and for ninety (90) days thereafter.

FOR A FOURTEENTH DEFENSE

36. Plaintiffs' claims are barred by their unreasonable assumption of risk.

FOR A FIFTEENTH DEFENSE

37. So much of Plaintiffs' claims as may sound in equity are barred due to the availability of an adequate remedy at law and by the doctrine of laches and unclean hands.

FOR A SIXTEENTH DEFENSE

38. To the extent Plaintiffs seek overlapping or duplicative remedies or are pursuing inconsistent and/or mutually exclusive legal theories as to any alleged single wrong, Plaintiffs must elect their remedies at the appropriate time.

FOR A SEVENTEENTH DEFENSE

39. Plaintiffs' respective claims are improperly joined and should be severed for purposes of discovery and trial.

FOR AN EIGHTEENTH DEFENSE

40. DRH reserves and does not waive any and all other defenses which may be available to it.

FOR A NINETEENTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
AMERICO ROOFING CONCEPTS, INC.

41. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

53. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

54. DRH and Americo Roofing Concepts, Inc. ("Americo") entered into an Independent Contractor Agreement pursuant to which Americo agreed to provide, among other things, labor and materials for the roofing, and related components thereof, for certain of the Subject Properties (hereinafter "the Contract").

55. Americo so provided labor and materials for, among other things, the roofing for certain of the Subject Properties, which scope of work included, without limitation, supply and installation of the roof, and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Americo performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

56. At the times relevant to this case, Americo acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

57. As a result, a special relationship exists between DRH and Americo such that Americo is obligated by equity to indemnify DRH.

58. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Americo, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Americo or its agents and not the result of any actions or omissions on the part of DRH.

59. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Americo in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Americo should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

60. Americo entered into the Contract with DRH pursuant to which Americo agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Americo's performance under the Contract and caused in whole or in part by Americo's conduct.

61. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Americo or

its agents in connection with Americo's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Americo or its agents and not a result of any actions or omissions on the part of DRH.

62. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Americo in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTIETH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
ARCHER EXTERIORS, INC.

63. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

64. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

65. DRH and Archer Exteriors, Inc. ("Archer") entered into an Independent Contractor Agreement pursuant to which Archer agreed to provide, among other things, labor and materials for the roofing and related components thereof, for certain of the Subject Properties (hereinafter "the Contract").

66. Archer so provided labor and materials for, among other things, the roofing of certain of the Subject Properties, which scope of work included, without limitation, supply and installation of the roofing, and all related components thereof (all of which is hereinafter

collectively referred to as “the Work”). Archer performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

67. At the times relevant to this case, Archer acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

68. As a result, a special relationship exists between DRH and Archer such that Archer is obligated by equity to indemnify DRH.

69. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Archer, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Archer or its agents and not the result of any actions or omissions on the part of DRH.

70. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Archer in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Archer should reimburse it for the costs of this action, including but not limited to attorneys’ fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

71. Archer entered into the Contract with DRH pursuant to which Archer agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Archer's performance under the Contract and caused in whole or in part by Archer's conduct.

72. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Archer or its agents in connection with Archer's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Archer or its agents and not a result of any actions or omissions on the part of DRH.

73. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Archer in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-FIRST DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
ARMOR BUILDING SOLUTIONS, LLC

74. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

75. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

76. DRH and Armor Building Solutions, LLC ("Armor") entered into an Independent Contractor Agreement pursuant to which Armor agreed to provide, among other things, labor and materials for the windows, and related components thereof, for the Subject Properties (hereinafter "the Contract").

77. Armor so provided labor and materials for, among other things, installation of the windows, to include hurricane protection accessories for the Subject Properties, which scope of work included, without limitation, installation of hurricane shutters, mounting hardware for each window, and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Armor performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

78. At the times relevant to this case, Armor acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

79. As a result, a special relationship exists between DRH and Armor such that Armor is obligated by equity to indemnify DRH.

80. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Armor, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Armor or its agents and not the result of any actions or omissions on the part of DRH.

81. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Armor in the same

amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Armor should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

82. Armor entered into the Contract with DRH pursuant to which Armor agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Armor's performance under the Contract and caused in whole or in part by Armor's conduct.

83. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Armor or its agents in connection with Armor's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Armor or its agents and not a result of any actions or omissions on the part of DRH.

84. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Armor in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-SECOND DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
DEAN CUSTOM AIR, LLC

85. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

86. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

87. DRH and Dean Custom Air, LLC ("Dean Custom Air") entered into an Independent Contractor Agreement pursuant to which Dean Custom Air agreed to provide, among other things, labor and materials for the design, supply and installation of turnkey heating and air conditioning systems and related components thereof, for the Subject Properties (hereinafter "the Contract").

88. Dean Custom Air so provided labor and materials for, among other things, the mechanical, duct work, return outlets, and supply outlets components of the heating and air conditioning systems, and all components thereof, for the Subject Properties (all of which is hereinafter collectively referred to as "the Work"). Dean Custom Air performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

89. At the times relevant to this case, Dean Custom Air acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

90. As a result, a special relationship exists between DRH and Dean Custom Air such that Dean Custom Air is obligated by equity to indemnify DRH.

91. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials

supplied by, work performed by and or other acts and/or omissions of Dean Custom Air, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Dean Custom Air or its agents and not the result of any actions or omissions on the part of DRH.

92. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Dean Custom Air in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Dean Custom Air should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

93. Dean Custom Air entered into the Contract with DRH pursuant to which Dean Custom Air agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Dean Custom Air's performance under the Contract and caused in whole or in part by Dean Custom Air's conduct.

94. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Dean Custom Air or its agents in connection with Dean Custom Air's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Dean Custom Air or its agents and not a result of any actions or omissions on the part of DRH.

95. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Dean Custom Air in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-THIRD DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
EAST COAST CONSTRUCTION CLEANUP CORP. F/K/A
S.C. CLEANUP CO., INC.

96. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

97. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

98. DRH and East Coast Construction Cleanup Corporation f/k/a S.C. Cleanup Co., Inc. ("East Coast") entered into an Independent Contractor Agreement pursuant to which East Coast agreed to provide, among other things, labor for the exterior cleaning of the Subject Properties (hereinafter "the Contract").

99. East Coast so provided labor for exterior cleaning which incorporated, among other things, removing construction debris from the Subject Properties, , hauling off construction debris left by other trades, hauling off debris in concrete washout, cleaning streets, and repairing silt fences as needed (all of which is hereinafter collectively referred to as "the Work"). East Coast performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

100. At the times relevant to this case, East Coast acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

101. As a result, a special relationship exists between DRH and East Coast such that East Coast is obligated by equity to indemnify DRH.

102. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of East Coast, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct, and proximate result of the wrongful acts and omissions of East Coast or its agents and not the result of any actions or omissions on the part of DRH.

103. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against East Coast in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, East Coast should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

104. East Coast entered into the Contract with DRH pursuant to which East Coast agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and

damages, including but not limited to claims for property damage, pertaining to East Coast's performance under the Contract and caused in whole or in part by East Coast's conduct.

105. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of East Coast or its agents in connection with East Coast's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of East Coast or its agents and not a result of any actions or omissions on the part of DRH.

106. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against East Coast in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-FOURTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
HUTTON'S LANDSCAPES, INC.

107. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

108. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

109. DRH and Hutton's Landscapes, Inc. ("Hutton's") entered into an Independent Contractor Agreement pursuant to which Hutton's agreed to provide, among other things, labor

and materials for rough grade, final grade, turnkey landscaping, turnkey flatwork, slab backfill, turnkey house slab and related components of the Subject Properties (hereinafter "the Contract").

110. Hutton's so provided labor and materials for, among other things, the landscaping and slabs at the Subject Properties, which scope of work included, without limitation, grading the lots, pouring the cement slabs and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Hutton's performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

111. At the times relevant to this case, Hutton's acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

112. As a result, a special relationship exists between DRH and Hutton's such that Hutton's is obligated by equity to indemnify DRH.

113. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Hutton's, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Hutton's or its agents and not the result of any actions or omissions on the part of DRH.

114. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Hutton's in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately

exonerated or not, Hutton's should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

115. Hutton's entered into the Contract with DRH pursuant to which Hutton's agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Hutton's performance under the Contract and caused in whole or in part by Hutton's conduct.

116. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Hutton or its agents in connection with Hutton's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Hutton's or its agents and not a result of any actions or omissions on the part of DRH.

117. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Hutton's in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimburse and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs

FOR A TWENTY-FIFTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
LATHER CONSTRUCTION, INC. AND LATHER CONSTRUCTION, SC, INC.

118. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

119. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Amended Complaint in this case.

120. DRH and Lather Construction, Inc., for itself and for Lather Construction, SC, Inc., (collectively "Lather") entered into an Independent Contractor Agreement pursuant to which Lather agreed to provide, among other things, labor and materials for the staking, as built, drainage, erosion control, earthwork, grading, asphalt paving, concrete curbs, installation of sewer, installation of water and related components at the Subject Properties during the development phase as the general contractor (hereinafter "the Contract").

121. Lather so provided labor, materials and supervision for the development of the Tidewater Creek subdivision, which included, among other things, staking of lots, installing catch basins, installing curb inlets, installing junction boxes, tree protection, installing temporary gravel, installing silt fences, seeding and sod work, installing rip-rap sediment basins, grubbing, grading, backfill, lot preparation, asphalt paving, installing concrete curbs, creating record drawings of utilities, installing the sewer system, installing the water system and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Lather performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

122. At the times relevant to this case, DRH was the owner of the subject property, and Lather acted in the capacity of general contractor for DRH and provided labor, materials and supervision for the Work.

123. As a result, a special relationship exists between DRH and Lather such that Lather is obligated by equity to indemnify DRH.

124. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Lather, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Lather or its agents and not the result of any actions or omissions on the part of DRH.

125. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Lather in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Lather should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

126. Lather entered into the Contract with DRH pursuant to which Lather agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Lather's performance under the Contract and caused in whole or in part by Lather's conduct.

127. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Lather or its agents in connection with Lather's performance under the Contract and were a direct and

proximate result of the wrongful acts and omissions of Lather or its agents and not a result of any actions or omissions on the part of DRH.

128. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Lather in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-SIXTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
PROFESSIONAL DRYWALL & PAINT
SERVICES, LLC

129. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

130. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

131. DRH and Professional Drywall & Paint Services, LLC ("Professional Drywall") entered into an Independent Contractor Agreement pursuant to which Professional Drywall agreed to provide, among other things, labor and materials for the painting and drywall, and related components of the Subject Properties (hereinafter "the Contract").

132. Professional Drywall so provided labor and materials for, among other things, the painting and drywall installation in the Subject Properties, which scope of work included, without limitation, installation of the drywall, painting, and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Professional Drywall performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

133. At the times relevant to this case, Professional Drywall acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

134. As a result, a special relationship exists between DRH and Professional Drywall such that Professional Drywall is obligated by equity to indemnify DRH.

135. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Professional Drywall, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Professional Drywall or its agents and not the result of any actions or omissions on the part of DRH.

136. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Professional Drywall in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Professional Drywall should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

137. Professional Drywall entered into the Contract with DRH pursuant to which Professional Drywall agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage,

pertaining to Professional Drywall's performance under the Contract and caused in whole or in part by Professional Drywall's conduct.

138. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Professional Drywall or its agents in connection with Professional Drywall's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Professional Drywall or its agents and not a result of any actions or omissions on the part of DRH.

139. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Professional Drywall in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-SEVENTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
PROFESSIONAL EXTERIORS II, LLC

140. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

141. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

142. DRH and Professional Exteriors, II ("Professional Exteriors") entered into an Independent Contractor Agreement pursuant to which Professional Exteriors agreed to provide,

among other things, labor and materials for the exterior siding, wooden decks, screened porches and related components of the Subject Properties (hereinafter "the Contract").

143. Professional Exteriors so provided labor and materials for, among other things, the fiber cement siding, vinyl siding, wooden decks, and screened porches at the Subject Properties, and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Professional Exteriors performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

144. At the times relevant to this case, Professional Exteriors acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

145. As a result, a special relationship exists between DRH and Professional Exteriors such that Professional Exteriors is obligated by equity to indemnify DRH.

146. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Professional Exteriors, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Professional Exteriors or its agents and not the result of any actions or omissions on the part of DRH.

147. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Professional Exteriors in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is

ultimately exonerated or not, Professional Exteriors should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

148. Professional Exteriors entered into the Contract with DRH pursuant to which Professional Drywall agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Professional Exteriors' performance under the Contract and caused in whole or in part by Professional Exteriors' conduct.

149. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Professional Exteriors or its agents in connection with Professional Exteriors' performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Professional Exteriors or its agents and not a result of any actions or omissions on the part of DRH.

150. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Professional Exteriors in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-EIGHTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
QUALITY ELECTRIC OF THE COASTAL
CAROLINAS INCORPORATED

151. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

152. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

153. DRH and Quality Electric of the Coastal Carolinas Incorporated ("Quality Electric") entered into an Independent Contractor Agreement pursuant to which Quality Electric agreed to provide, among other things, labor and materials for the turnkey electrical work for the Subject Properties (hereinafter "the Contract").

154. Quality Electric so provided labor and materials for, among other things at the Subject Properties, turnkey electrical work (all of which is hereinafter collectively referred to as "the Work"). Quality Electric performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

155. At the times relevant to this case, Quality Electric acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

156. As a result, a special relationship exists between DRH and Quality Electric such that Quality Electric is obligated by equity to indemnify DRH.

157. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Quality Electric, DRH

alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Quality Electric or its agents and not the result of any actions or omissions on the part of DRH.

158. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Quality Electric in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Quality Electric should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

159. Quality Electric entered into the Contract with DRH pursuant to which Quality Electric agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Quality Electric's performance under the Contract and caused in whole or in part by Quality Electric's conduct.

160. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Quality Electric or its agents in connection with Quality Electric's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Quality Electric or its agents and not a result of any actions or omissions on the part of DRH.

161. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Quality Electric in the

same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-NINTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
VALIM CONSTRUCTION, LLC

162. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

163. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

164. DRH and Valim Construction, LLC ("Valim") entered into an Independent Contractor Agreement pursuant to which Valim agreed to provide, among other things, labor and materials for the framing, floor trusses, roof trusses, fireplace chases, installation of tubs and showers, and related components thereof, for the Subject Properties (hereinafter "the Contract").

165. Valim so provided labor and materials for, among other things the framing, floor trusses, roof trusses, fireplace chases, and installation of tubs and showers, and all related components thereof, for the Subject Properties (all of which is hereinafter collectively referred to as "the Work"). Valim performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

166. At the times relevant to this case, Valim acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

167. As a result, a special relationship exists between DRH and Valim such that Valim is obligated by equity to indemnify DRH.

168. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Valim, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Valim or its agents and not the result of any actions or omissions on the part of DRH.

169. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Valim in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Valim should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

170. Valim entered into the Contract with DRH pursuant to which Valim agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Valim's performance under the Contract and caused in whole or in part by Valim's conduct.

171. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Valim or its agents in connection with Valim's performance under the Contract and were a direct and proximate

result of the wrongful acts and omissions of Valim or its agents and not a result of any actions or omissions on the part of DRH.

172. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Valim in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

WHEREFORE, having fully answered the Plaintiffs' Second Amended Complaint, and having asserted its Cross-claims, Defendant D.R. Horton, Inc., prays this Court enter the following relief:

- a. Dismissal of Plaintiffs' Second Amended Complaint with prejudice;
- b. Relief pursuant to its Cross-claims;
- b. An award of Defendant's attorneys' fees and costs to defend this action; and
- c. For all such other and further relief this Court deems just and proper.

Dated this 2nd day of December, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL
CIRCUIT

Case No.: 2018-CP-07-00911

**DEFENDANT LATHER
CONSTRUCTION SC, INC.'s MOTION
FOR SUMMARY JUDGMENT AS TO
CLAIMS OF PLAINTIFFS AND D.R.
HORTON, INC.**

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier, Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Versteegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource – Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; Valim Construction, LLC;

Defendants.

**TO: PLAINTIFFS' AND D.R. HORTON, INC.'S COUNSEL AND ALL OTHER
PARTIES**

PLEASE TAKE NOTICE that Defendant Lather Construction SC, Inc., by and through the undersigned counsel, and respectfully requests that this Honorable Court grant an Order Dismissing the Claims of all Plaintiffs (hereinafter referred to as "Plaintiffs") and D.R. Horton, Inc. (hereinafter referred to as "D.R. Horton") with prejudice pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

The basis for this motion is that Lather Construction SC, Inc. is entitled to judgment as a matter of law as to all causes of action asserted by Plaintiffs and D.R. Horton because there are no genuine issues of material fact that exist concerning the allegations and causes of action asserted by Plaintiffs and D.R. Horton in the above-captioned lawsuit. Specifically, Lather Construction SC, Inc. asserts the following as the basis for its Motion for Summary Judgment:

1. This case concerns alleged defects in the construction of Tidewater Creek, a neighborhood located in Beaufort County, South Carolina. D.R. Horton, Inc., served as developer and general contractor for the construction of the neighborhood.
2. Each of the twenty-nine (29) named Plaintiffs in this lawsuit are residents and/or homeowners at Tidewater Creek. The Plaintiffs collectively own fifteen (15) separate and unique parcels of property.
3. The Certificates of Occupancy on those homes have various dates in 2015 and 2016, with the latest date in time being August 26, 2016. (See **Exhibit A.**)
4. Plaintiffs brought claims against Lather Construction, Inc. and Lather Construction SC, Inc. for Negligent Misrepresentation/Rescission, Negligence/Gross Negligence, Unfair Trade Practices Act, Breach of Express and Implied Warranties, Breach of Contract/Breach of Duty of

Good Faith and Fair Dealing, and Fraud in the Inducement/Rescission. (See Plaintiffs' Second Amended Complaint attached as **Exhibit B.**)

5. Defendant D.R. Horton brought cross-claims against Lather Construction, Inc. and Lather Construction SC, Inc. for Equitable Indemnity and Contractual Indemnity. (See Amended Answer to the Plaintiffs' Second Amended Complaint and Cross-Claims of Behalf of D.R. Horton, Inc. attached as **Exhibit C.**)

6. Lather Construction, Inc. is a corporation formed under the laws of South Carolina on October 31, 2013, and was dissolved on December 14, 2018. (See **Exhibit D.**)

7. Defendant Lather Construction, Inc. was a subcontractor of D.R. Horton. (See Standard Form of Agreement Between Owner and Contractor, effective August 1, 2014, attached as **Exhibit E.**)

8. Lather Construction, Inc. performed site work at Tidewater Creek.

9. Lather Construction SC, Inc. is a corporation formed under the laws of South Carolina on February 21, 2017, and was dissolved on June 8, 2020. (See **Exhibit F.**)

10. Defendant Lather Construction SC, Inc. was NOT a subcontractor of D.R. Horton and did not perform any work at Tidewater Creek.

11. On the date of the most recent certificate of occupancy for any home at Tidewater Creek, August 26, 2016, Lather Construction SC, Inc. did not exist.

12. Sean Lather, former owner of Lather Construction SC, Inc. testified as follows:

Page 12

18 Q Leaving aside your subs, I mean,

19 Lather Construction, Inc., as opposed to one of

20 these subsequent Lather companies, was all of the

21 work done under Lather Construction, Inc.?

22 A That was the only company established at

Page 3 of 5

22 that time.

24 Q So the answer is yes?

25 A Yes.

Page 13

1 Q So Lather Construction SC, Inc. did it

2 do any business – did it do any work at Tidewater

3 Creek?

4 A No.

5 Q Whether with its own people or through

6 subcontractors?

7 A No.

(See Depo. Shawn Lather, p. 12-13, attached as **Exhibit G.**)

13. That is is a factual impossibility for Lather Construction SC, Inc. to have performed any work on this project when it did not exist until after the completion of all homes at Tidewater Creek.

14. Plaintiffs and D.R. Horton have not produced any documents or evidence to show that Lather Construction SC, Inc. performed work on the project. Neither has any other party to this case.

CONCLUSION

Accordingly, the Plaintiffs and D.R. Horton have failed to meet their burden as to their claims against Lather Construction SC, Inc. Lather Construction SC, Inc, on the other hand, has met its burden for summary judgment. *See, e.g. Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (holding that once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the non-moving party's case, the non-moving party may not simply rest on mere allegations or denials contained in the pleadings.")

WHEREFORE, Lather Construction SC, Inc respectfully moves this Honorable Court for an order granting summary judgment in its favor as to the claims by Plaintiffs and D.R. Horton.

This Defendant reserves the right to support this motion with additional supporting exhibits and a supplemental memorandum or reply memorandum if necessary.

Respectfully submitted,

ROSS & CRISTALDI, LLC

s/ Scott H. Winograd

Jeffrey A. Ross, Bar No.: 74254

Philip P. Cristaldi, Bar No.: 102219

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Attorneys for Lather Construction SC, Inc.

Mt. Pleasant, South Carolina

August 12, 2021

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 2018-CP-07-00911

Richard W. and Rebecca A. Drier; Yolanda)
J. Drier; Jacob R. and Carla Emerson; John)
B. and Lori Anne Gecy; Aaron M. and)
Stasha R. Grooms; AvaRae Hall; Michael B.)
and Cheyenne M. Johnson; Kenny Manuel)
Lopez and Kelsey Trudel Lopez; Dylan C.)
and Samantha Dawn Machado; Marvin K.)
and Maryalice Mamaril; Thomas R. and)
Melissa S. McFeely; Michael and Karen)
M. Rodriguez; Sarmed and Jessica M. Shafi;)
James J. Smith, III and Alayshia Smith; and)
Nicole J. Verstegen;)

Plaintiffs,)

v.)

Advanced Flooring & Design Division of)
ISI, LLC f/k/a Advanced Flooring and)
Design, LLC; Americo Roofing Concepts,)
Inc.; Archer Exteriors, Inc.; Armor Building)
Solutions, LLC; Builders FirstSource –)
Southeast Group, LLC; Crossroads)
Enterprises, LLC; D.R. Horton, Inc.;)
Dean Custom Air, LLC; East Coast)
Construction Cleanup Corp. f/k/a)
S.C. Cleanup Co., Inc.; Freedom Homes,)
Inc. f/k/a Armor Building Solutions, Inc.;)
Hutton's Landscapes, Inc.; Lather)
Construction SC, Inc.; Lather Construction,)
Inc.; Masco Cabinetry, LLC; ProBuild East,)
LLC; Professional Drywall & Paint Services)
LLC; Professional Exteriors II, LLC;)
Quality Electric of the Coastal)
Carolinas Incorporated;)
Superior Association Services, LLC; Valim)
Construction, LLC;)

Defendants.)

**SECOND AMENDED ANSWER TO THE PLAINTIFFS' SECOND AMENDED
COMPLAINT AND CROSS-CLAIMS ON BEHALF OF D.R. HORTON, INC.**
(Jury Trial Demanded)

Defendant, D.R. Horton, Inc. (hereinafter referred to as "DRH" or "Defendant"), amending its answer the Second Amended Complaint of the Plaintiffs ("the Second Amended Complaint") and asserting Cross Claims and demanding a trial by jury, would allege and show unto the Court as follows:

FOR A FIRST DEFENSE

Defendant responds to the separately numbered paragraphs of the Second Amended Complaint as follows. Any allegation contained in the Second Amended Complaint not expressly admitted, explained, or modified is denied.

1. DRH admits the allegations of paragraph 1 upon information and belief.
2. Responding to paragraph 2 of the Second Amended Complaint, DRH affirmatively states only that it is a Delaware corporation authorized to transact business in South Carolina, including Beaufort County. DRH lacks knowledge or information sufficient to admit or deny the remaining allegations and inferences contained in paragraph 2, and therefore denies the same.
3. Responding to paragraph 3 of the Second Amended Complaint, DRH asserts that paragraph 3 does not contain any allegations of fact which might require a response, but rather, simply sets forth a characterization of the Plaintiffs' purported claims, to which no response from DRH is required. To the extent that paragraph 3 may contain any allegations to which a response is required, DRH denies the allegations.
4. Responding to paragraph 4 of the Second Amended Complaint, DRH is presently unaware of grounds upon which to object to this Court's jurisdiction over this action or DRH or to

venue as laid. DRH denies any and all remaining allegations and inferences contained in paragraph 4.

5. Responding to paragraph 5 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 4 as if restated verbatim herein.

6. Responding to paragraph 6 of the Second Amended Complaint, DRH admits, upon information and belief, only so much of the allegations contained therein as allege that the named Plaintiffs purchased the properties referred to therein within or about the referenced time period. DRH denies any and all remaining allegations and inferences contained in paragraph 6.

7. Responding to paragraphs 7 through 9 of the Second Amended Complaint, including all sub-parts, DRH denies the allegations contained therein.

8. Responding to paragraph 10 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 9 as if restated verbatim herein.

9. Responding to paragraphs 11 through 15 of the Second Amended Complaint, DRH denies the allegations contained therein.

10. Responding to paragraph 16 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 15 as if restated verbatim herein.

11. Responding to paragraph 17 of the Second Amended Complaint, DRH asserts that paragraph 17 does not contain any allegations of fact, but instead sets forth one or more assertions of law, to which no response by DRH is required. To the extent that a response may be required, DRH denies the allegations contained in paragraph 17.

12. Responding to paragraph 18 of the Second Amended Complaint, DRH denies the allegations contained therein.

13. Responding to paragraph 19 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 18 as if restated verbatim herein.

14. Responding to paragraphs 20 through 23 of the Second Amended Complaint, DRH denies the allegations contained therein.

15. Responding to paragraph 24 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 23 as if restated verbatim herein.

16. Responding to paragraph 25 of the Second Amended Complaint, DRH asserts that so much of the allegations contained therein as pertain to alleged implied warranties do not assert any allegations of fact requiring a response, but instead, purport to set forth one or more conclusions of law to which no response by DRH is required. To the extent that a response may be required, DRH denies the allegations. Responding to so much of the allegations as are directed to DRH and pertain to one or more alleged express warranties, DRH craves reference to such document(s) as Plaintiffs will allege to evidence such warranties, and denies so much of the allegations as are inconsistent with the accurate and authentic contents thereof. Further responding, DRH lacks knowledge or information sufficient to admit or deny so much of the allegations as are directed to one or more Defendants other than itself and pertain to one or more alleged express warranties given thereby, and therefore denies the same. DRH denies any and all remaining allegation and inferences as may be contained in paragraph 25.

17. Responding to paragraph 26 of the Second Amended Complaint, DRH denies the allegations contained therein.

18. Responding to paragraph 27 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 26 as if restated verbatim herein.

19. Responding to paragraph 28 of the Second Amended Complaint, DRH craves reference to the documents evidencing any alleged contract between any Plaintiff and DRH, and denies so much of the allegations contained in paragraph 28 as are inconsistent with the accurate and authentic contents thereof. DRH lacks knowledge or information sufficient to form a belief as to the truth of so much of the allegations contained in paragraph 28 as are directed to any other named Defendant, and therefore denies the same. DRH denies any and all remaining allegations and inferences contained in paragraph 28.

20. Responding to paragraph 29 of the Second Amended Complaint, DRH denies the allegations contained therein.

21. Responding to paragraph 30 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 29 as if restated verbatim herein.

22. Responding to paragraphs 31 through 33 of the Second Amended Complaint, DRH denies the allegations contained therein.

23. Responding to that portion of the Second Amended Complaint which purports to assert a prayer for relief, DRH denies that Plaintiffs are entitled to any of the relief requested therein.

Further, without assuming any burden of proof, persuasion, or production not otherwise legally assigned to it as to any element of the claims alleged in the Second Amended Complaint, DRH asserts the following additional defenses:

FOR A SECOND DEFENSE

24. The Second Amended Complaint, in whole or in part, fails to state facts sufficient to constitute a cause of action, and it should be dismissed pursuant to SCRCP 12(b)(6).

FOR A THIRD DEFENSE

25. Plaintiffs' claims for breach of implied warranty are barred by virtue of the effective contractual disclaimer of the same.

FOR A FOURTH DEFENSE

26. Plaintiffs' claims are subject to mandatory, binding arbitration and should be dismissed or, alternatively, stayed pending the same.

FOR A FIFTH DEFENSE

27. Plaintiffs have failed to mitigate their alleged damages, if any, as required by law.

FOR A SIXTH DEFENSE

28. Any recovery by Plaintiffs, their entitlement to which is denied, should be reduced or barred pursuant to the doctrine of comparative negligence.

FOR A SEVENTH DEFENSE

29. If Plaintiffs have incurred damages, which are denied, such damages are the result of the acts or omissions of one or more third parties, over which DRH does not have authority or control.

FOR AN EIGHTH DEFENSE

30. Plaintiffs' claims for breach of express or implied warranty are barred as the result of Plaintiffs' failure to provide DRH with notice and opportunity to cure.

FOR A NINTH DEFENSE

31. Certain of the damages alleged by Plaintiffs are barred by the economic loss rule.

FOR A TENTH DEFENSE

32. Plaintiffs' claim for punitive damages seeks a remedy that is unconstitutional.

FOR AN ELEVENTH DEFENSE

33. While denying that Plaintiffs are entitled to an award of punitive damages in any amount, if and to the extent that Plaintiffs might be awarded punitive damages in this case, any such award of punitive damages must be limited by the applicable statutory cap(s) imposed pursuant to S.C. Code Ann. § 15-32-530. Additionally, while DRH denies that it has engaged in any wrongful conduct at all, it expressly asserts for purposes of the application of S.C. Code Ann. § 15-32-530, that DRH has not engaged in any conduct sufficient to (i) increase the punitive damages recovery limit from the caps established pursuant to S.C. Code Ann. § 15-32-530(a) to the higher caps permissible pursuant to S.C. Code Ann. § 15-32-530(b)(1) & (2); or (ii) eliminate the statutory limitations on recovery of punitive damages pursuant to S.C. Code Ann. § 15-32-530(c).

FOR A TWELFTH DEFENSE

34. Plaintiffs' claims are barred by the doctrines of waiver and estoppel.

FOR A THIRTEENTH DEFENSE

35. If Plaintiffs have incurred damages, which are denied, such damages are the result of the intervening or supervening conduct of one or more third parties, for which DRH is not responsible, and but for which, no such damages would be incurred.

FOR A FOURTEENTH DEFENSE

36. Plaintiffs have failed to provide DRH with adequate notice and opportunity to cure pursuant to S.C. Code Ann. § 40-59-810 *et seq.*, and Plaintiffs' claims should be stayed until such time as Plaintiffs have satisfied the statutory requirements and for ninety (90) days thereafter.

FOR A FIFTEENTH DEFENSE

37. Plaintiffs' claims are barred by their unreasonable assumption of risk.

FOR A SIXTEENTH DEFENSE

38. So much of Plaintiffs' claims as may sound in equity are barred due to the availability of an adequate remedy at law and by the doctrine of laches and unclean hands.

FOR A SEVENTEENTH DEFENSE

39. To the extent Plaintiffs seek overlapping or duplicative remedies or are pursuing inconsistent and/or mutually exclusive legal theories as to any alleged single wrong, Plaintiffs must elect their remedies at the appropriate time.

FOR AN EIGHTEENTH DEFENSE

40. Plaintiffs' respective claims are improperly joined and should be severed for purposes of discovery and trial.

FOR A NINETEENTH DEFENSE

41. DRH reserves and does not waive any and all other defenses which may be available to it.

FOR A TWENTIETH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
AMERICO ROOFING CONCEPTS, INC.

42. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

43. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

44. DRH and Americo Roofing Concepts, Inc. ("Americo") entered into an Independent Contractor Agreement pursuant to which Americo agreed to provide, among other

things, labor and materials for the roofing, and related components thereof, for certain of the Subject Properties (hereinafter "the Contract").

45. Americo so provided labor and materials for, among other things, the roofing for certain of the Subject Properties, which scope of work included, without limitation, supply and installation of the roof, and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Americo performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

46. At the times relevant to this case, Americo acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

47. As a result, a special relationship exists between DRH and Americo such that Americo is obligated by equity to indemnify DRH.

48. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Americo, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Americo or its agents and not the result of any actions or omissions on the part of DRH.

49. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Americo in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately

exonerated or not, Americo should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

50. Americo entered into the Contract with DRH pursuant to which Americo agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Americo's performance under the Contract and caused in whole or in part by Americo's conduct.

51. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Americo or its agents in connection with Americo's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Americo or its agents and not a result of any actions or omissions on the part of DRH.

52. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Americo in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-FIRST DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
ARCHER EXTERIORS, INC.

53. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

54. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

55. DRH and Archer Exteriors, Inc. ("Archer") entered into an Independent Contractor Agreement pursuant to which Archer agreed to provide, among other things, labor and materials for the roofing and related components thereof, for certain of the Subject Properties (hereinafter "the Contract").

56. Archer so provided labor and materials for, among other things, the roofing of certain of the Subject Properties, which scope of work included, without limitation, supply and installation of the roofing, and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Archer performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

57. At the times relevant to this case, Archer acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

58. As a result, a special relationship exists between DRH and Archer such that Archer is obligated by equity to indemnify DRH.

59. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Archer, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Archer or its agents and not the result of any actions or omissions on the part of DRH.

60. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Archer in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Archer should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

61. Archer entered into the Contract with DRH pursuant to which Archer agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Archer's performance under the Contract and caused in whole or in part by Archer's conduct.

62. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Archer or its agents in connection with Archer's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Archer or its agents and not a result of any actions or omissions on the part of DRH.

63. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Archer in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-THIRD DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
DEAN CUSTOM AIR, LLC

64. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

65. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

66. DRH and Dean Custom Air, LLC ("Dean Custom Air") entered into an Independent Contractor Agreement pursuant to which Dean Custom Air agreed to provide, among other things, labor and materials for the design, supply and installation of turnkey heating and air conditioning systems and related components thereof, for the Subject Properties (hereinafter "the Contract").

67. Dean Custom Air so provided labor and materials for, among other things, the mechanical, duct work, return outlets, and supply outlets components of the heating and air conditioning systems, and all components thereof, for the Subject Properties (all of which is hereinafter collectively referred to as "the Work"). Dean Custom Air performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

68. At the times relevant to this case, Dean Custom Air acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

69. As a result, a special relationship exists between DRH and Dean Custom Air such that Dean Custom Air is obligated by equity to indemnify DRH.

70. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials

supplied by, work performed by and or other acts and/or omissions of Dean Custom Air, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Dean Custom Air or its agents and not the result of any actions or omissions on the part of DRH.

71. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Dean Custom Air in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Dean Custom Air should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

72. Dean Custom Air entered into the Contract with DRH pursuant to which Dean Custom Air agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Dean Custom Air's performance under the Contract and caused in whole or in part by Dean Custom Air's conduct.

73. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Dean Custom Air or its agents in connection with Dean Custom Air's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Dean Custom Air or its agents and not a result of any actions or omissions on the part of DRH.

74. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Dean Custom Air in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-FOURTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
EAST COAST CONSTRUCTION CLEANUP CORP. F/K/A
S.C. CLEANUP CO., INC.

75. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

76. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

77. DRH and East Coast Construction Cleanup Corporation f/k/a S.C. Cleanup Co., Inc. ("East Coast") entered into an Independent Contractor Agreement pursuant to which East Coast agreed to provide, among other things, labor for the exterior cleaning of the Subject Properties (hereinafter "the Contract").

78. East Coast so provided labor for exterior cleaning which incorporated, among other things, removing construction debris from the Subject Properties, , hauling off construction debris left by other trades, hauling off debris in concrete washout, cleaning streets, and repairing silt fences as needed (all of which is hereinafter collectively referred to as "the Work"). East Coast performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

79. At the times relevant to this case, East Coast acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

80. As a result, a special relationship exists between DRH and East Coast such that East Coast is obligated by equity to indemnify DRH.

81. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of East Coast, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of East Coast or its agents and not the result of any actions or omissions on the part of DRH.

82. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against East Coast in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, East Coast should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

83. East Coast entered into the Contract with DRH pursuant to which East Coast agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and

damages, including but not limited to claims for property damage, pertaining to East Coast's performance under the Contract and caused in whole or in part by East Coast's conduct.

84. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of East Coast or its agents in connection with East Coast's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of East Coast or its agents and not a result of any actions or omissions on the part of DRH.

85. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against East Coast in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-FIFTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
HUTTON'S LANDSCAPES, INC.

86. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

87. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

88. DRH and Hutton's Landscapes, Inc. ("Hutton's") entered into an Independent Contractor Agreement pursuant to which Hutton's agreed to provide, among other things, labor

and materials for rough grade, final grade, turnkey landscaping, turnkey flatwork, slab backfill, turnkey house slab and related components of the Subject Properties (hereinafter "the Contract").

89. Hutton's so provided labor and materials for, among other things, the landscaping and slabs at the Subject Properties, which scope of work included, without limitation, grading the lots, pouring the cement slabs and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Hutton's performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

90. At the times relevant to this case, Hutton's acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

91. As a result, a special relationship exists between DRH and Hutton's such that Hutton's is obligated by equity to indemnify DRH.

92. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Hutton's, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Hutton's or its agents and not the result of any actions or omissions on the part of DRH.

93. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Hutton's in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately

exonerated or not, Hutton's should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

94. Hutton's entered into the Contract with DRH pursuant to which Hutton's agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Hutton's performance under the Contract and caused in whole or in part by Hutton's conduct.

95. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Hutton or its agents in connection with Hutton's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Hutton's or its agents and not a result of any actions or omissions on the part of DRH.

96. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Hutton's in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimburse and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-SIXTH DEFENSE AND BY WAY OF CROSS-CLAIM
AGAINST LATHER CONSTRUCTION, INC. AND LATHER
CONSTRUCTION, SC, INC.

97. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

98. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Amended Complaint in this case.

99. DRH and Lather Construction, Inc., for itself and for Lather Construction, SC, Inc., (collectively "Lather") entered into an Independent Contractor Agreement pursuant to which Lather agreed to provide, among other things, labor and materials for the staking, as built, drainage, erosion control, earthwork, grading, asphalt paving, concrete curbs, installation of sewer, installation of water and related components at the Subject Properties during the development phase as the general contractor (hereinafter "the Contract").

100. Lather so provided labor, materials and supervision for the development of the Tidewater Creek subdivision, which included, among other things, staking of lots, installing catch basins, installing curb inlets, installing junction boxes, tree protection, installing temporary gravel, installing silt fences, seeding and sod work, installing rip-rap sediment basins, grubbing, grading, backfill, lot preparation, asphalt paving, installing concrete curbs, creating record drawings of utilities, installing the sewer system, installing the water system and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Lather performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

101. At the times relevant to this case, DRH was the owner of the subject property, and Lather acted in the capacity of general contractor for DRH and provided labor, materials and supervision for the Work.

102. As a result, a special relationship exists between DRH and Lather such that Lather is obligated by equity to indemnify DRH.

103. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Lather, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Lather or its agents and not the result of any actions or omissions on the part of DRH.

104. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Lather in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Lather should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

105. Lather entered into the Contract with DRH pursuant to which Lather agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Lather's performance under the Contract and caused in whole or in part by Lather's conduct.

106. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Lather or its agents in connection with Lather's performance under the Contract and were a direct and

proximate result of the wrongful acts and omissions of Lather or its agents and not a result of any actions or omissions on the part of DRH.

107. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Lather in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-SEVENTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
PROFESSIONAL DRYWALL & PAINT SERVICES, LLC

108. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

109. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

110. DRH and Professional Drywall & Paint Services, LLC ("Professional Drywall") entered into an Independent Contractor Agreement pursuant to which Professional Drywall agreed to provide, among other things, labor and materials for the painting and drywall, and related components of the Subject Properties (hereinafter "the Contract").

111. Professional Drywall so provided labor and materials for, among other things, the painting and drywall installation in the Subject Properties, which scope of work included, without limitation, installation of the drywall, painting, and all related components thereof (all of which is hereinafter collectively referred to as "the Work"). Professional Drywall performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

112. At the times relevant to this case, Professional Drywall acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

113. As a result, a special relationship exists between DRH and Professional Drywall such that Professional Drywall is obligated by equity to indemnify DRH.

114. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Professional Drywall, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Professional Drywall or its agents and not the result of any actions or omissions on the part of DRH.

115. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Professional Drywall in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Professional Drywall should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

116. Professional Drywall entered into the Contract with DRH pursuant to which Professional Drywall agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage,

pertaining to Professional Drywall's performance under the Contract and caused in whole or in part by Professional Drywall's conduct.

117. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Professional Drywall or its agents in connection with Professional Drywall's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Professional Drywall or its agents and not a result of any actions or omissions on the part of DRH.

118. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Professional Drywall in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-EIGHTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
PROFESSIONAL EXTERIORS II, LLC

119. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

120. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

121. DRH and Professional Exteriors, II ("Professional Exteriors") entered into an Independent Contractor Agreement pursuant to which Professional Exteriors agreed to provide,

among other things, labor and materials for the exterior siding, wooden decks, screened porches and related components of the Subject Properties (hereinafter “the Contract”).

122. Professional Exteriors so provided labor and materials for, among other things, the fiber cement siding, vinyl siding, wooden decks, and screened porches at the Subject Properties, and all related components thereof (all of which is hereinafter collectively referred to as “the Work”). Professional Exteriors performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

123. At the times relevant to this case, Professional Exteriors acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

124. As a result, a special relationship exists between DRH and Professional Exteriors such that Professional Exteriors is obligated by equity to indemnify DRH.

125. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Professional Exteriors, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Professional Exteriors or its agents and not the result of any actions or omissions on the part of DRH.

126. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Professional Exteriors in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is

ultimately exonerated or not, Professional Exteriors should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

127. Professional Exteriors entered into the Contract with DRH pursuant to which Professional Drywall agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Professional Exteriors' performance under the Contract and caused in whole or in part by Professional Exteriors' conduct.

128. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Professional Exteriors or its agents in connection with Professional Exteriors' performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Professional Exteriors or its agents and not a result of any actions or omissions on the part of DRH.

129. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Professional Exteriors in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A TWENTY-NINTH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
QUALITY ELECTRIC OF THE COASTAL
CAROLINAS INCORPORATED

130. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

131. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

132. DRH and Quality Electric of the Coastal Carolinas Incorporated ("Quality Electric") entered into an Independent Contractor Agreement pursuant to which Quality Electric agreed to provide, among other things, labor and materials for the turnkey electrical work for the Subject Properties (hereinafter "the Contract").

133. Quality Electric so provided labor and materials for, among other things at the Subject Properties, turnkey electrical work (all of which is hereinafter collectively referred to as "the Work"). Quality Electric performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

134. At the times relevant to this case, Quality Electric acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

135. As a result, a special relationship exists between DRH and Quality Electric such that Quality Electric is obligated by equity to indemnify DRH.

136. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Quality Electric, DRH

alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Quality Electric or its agents and not the result of any actions or omissions on the part of DRH.

137. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Quality Electric in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Quality Electric should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

138. Quality Electric entered into the Contract with DRH pursuant to which Quality Electric agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Quality Electric's performance under the Contract and caused in whole or in part by Quality Electric's conduct.

139. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Quality Electric or its agents in connection with Quality Electric's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Quality Electric or its agents and not a result of any actions or omissions on the part of DRH.

140. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Quality Electric in the

same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

FOR A THIRTIETH DEFENSE
AND BY WAY OF CROSS-CLAIM AGAINST
VALIM CONSTRUCTION, LLC

141. DRH incorporates herein the preceding responses and any of the above defenses that are consistent with this defense.

142. This Court has jurisdiction over the subject matter of this Cross-Claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

143. DRH and Valim Construction, LLC ("Valim") entered into an Independent Contractor Agreement pursuant to which Valim agreed to provide, among other things, labor and materials for the framing, floor trusses, roof trusses, fireplace chases, installation of tubs and showers, and related components thereof, for the Subject Properties (hereinafter "the Contract").

144. Valim so provided labor and materials for, among other things the framing, floor trusses, roof trusses, fireplace chases, and installation of tubs and showers, and all related components thereof, for the Subject Properties (all of which is hereinafter collectively referred to as "the Work"). Valim performed the Work pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

145. At the times relevant to this case, Valim acted in the capacity of a subcontractor to DRH and provided labor and materials for the Work.

146. As a result, a special relationship exists between DRH and Valim such that Valim is obligated by equity to indemnify DRH.

147. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by and or other acts and/or omissions of Valim, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Valim or its agents and not the result of any actions or omissions on the part of DRH.

148. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Valim in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts it may pay to Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Valim should reimburse it for the costs of this action, including but not limited to attorneys' fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

149. Valim entered into the Contract with DRH pursuant to which Valim agreed to defend, indemnify and hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Valim's performance under the Contract and caused in whole or in part by Valim's conduct.

150. To the extent that Plaintiffs are entitled to recover damages against DRH for injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Valim or its agents in connection with Valim's performance under the Contract and were a direct and proximate

result of the wrongful acts and omissions of Valim or its agents and not a result of any actions or omissions on the part of DRH.

151. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Valim in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to, attorneys' fees and costs.

WHEREFORE, having fully answered the Plaintiffs' Second Amended Complaint, and having asserted its Cross-claims, Defendant D.R. Horton, Inc., prays this Court enter the following relief:

- a. Dismissal of Plaintiffs' Second Amended Complaint with prejudice;
- b. Relief pursuant to its Cross-claims;
- b. An award of Defendant's attorneys' fees and costs to defend this action; and
- c. For all such other and further relief this Court deems just and proper.

[DATE & SIGNATURE BLOCK ON NEXT PAGE]

Dated this 23rd day of August 2021.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: s/ S. Michael Nail

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ELECTRONICALLY FILED - 2021 Aug 23 10:58 AM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Richard W. and Rebecca A. Drier; Yolanda J. Drier, Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Versteegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource - Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; Valim Construction, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL
CIRCUIT

Case No. 2018-CP-07-00911

**LATHER CONSTRUCTION, INC. AND
LATHER CONSTRUCTION, SC,
INC.'S ANSWER TO D.R. HORTON,
INC.'S SECOND AMENDED CROSS-
CLAIMS AS ASSERTED IN ITS
SECOND AMENDED ANSWER TO
PLAINTIFFS' SECOND AMENDED
COMPLAINT**

(JURY TRIAL DEMANDED)

TO: MICHAEL NAIL, ESQ. AND KRISTEN PETERSON, ESQ., ATTORNEYS FOR
D.R. HORTON, INC.:

The Defendants, Lather Construction, Inc. and Lather Construction SC, Inc. (hereinafter collectively referred to as "Defendant" or "Lather Construction"), answering the Second Amended Cross-Claims of D.R. Horton, Inc. (hereinafter DRH) as asserted in its Second Amended Answer to the Second Amended Complaint of the Plaintiffs, and out of an abundance of caution, answering any prior pleadings of DRH, alleges and says as follows:

1. That Defendant is not required to admit or deny the truth of the allegations of paragraphs 1 through 96 because, upon information and belief, such allegations are not intended to state a claim against Lather Construction. If and to the extent that such allegations are later held or taken to state a claim against Lather Construction, then such allegations together with all inferences to be derived therefrom are denied.
2. Responding to paragraph 97, the Defendant reiterates and re-alleges each and every preceding allegation as if the same were set forth herein verbatim.
3. That paragraph 98 contains allegations of law to which no response is required by Defendant. If and to the extent a response is required, the allegations are denied.
4. That Defendant denies the allegations in paragraphs 99 through 104.
5. In response to paragraph 105, Defendant would crave reference to the contract(s) (if a valid and enforceable contract is found to exist) for the allegations therein and denies each and every allegation inconsistent therewith.
6. That Defendant denies the allegations in paragraphs 106 through 107.
7. Responding to paragraph 108, the Defendant reiterates and re-alleges each and every preceding allegation as if the same were set forth herein verbatim.
8. That Defendant is not required to admit or deny the truth of the allegations of paragraphs 109 through 118 because, upon information and belief, such allegations are not

intended to state a claim against Lather Construction. If and to the extent that such allegations are later held or taken to state a claim against Lather Construction, then such allegations together with all inferences to be derived therefrom are denied.

9. Responding to paragraph 119, the Defendant reiterates and re-alleges each and every preceding allegation as if the same were set forth herein verbatim.

10. That Defendant is not required to admit or deny the truth of the allegations of paragraphs 120 through 129 because, upon information and belief, such allegations are not intended to state a claim against Lather Construction. If and to the extent that such allegations are later held or taken to state a claim against Lather Construction, then such allegations together with all inferences to be derived therefrom are denied.

11. Responding to paragraph 130, the Defendant reiterates and re-alleges each and every preceding allegation as if the same were set forth herein verbatim.

12. That Defendant is not required to admit or deny the truth of the allegations of paragraphs 131 through 140 because, upon information and belief, such allegations are not intended to state a claim against Lather Construction. If and to the extent that such allegations are later held or taken to state a claim against Lather Construction, then such allegations together with all inferences to be derived therefrom are denied.

13. Responding to paragraph 141, the Defendant reiterates and re-alleges each and every preceding allegation as if the same were set forth herein verbatim.

14. That Defendant is not required to admit or deny the truth of the allegations of paragraphs 142 through 151 because, upon information and belief, such allegations are not intended to state a claim against Lather Construction. If and to the extent that such allegations are later held or taken to state a claim against Lather Construction, then such allegations together with

all inferences to be derived therefrom are denied.

15. Defendant denies the allegations of the "Wherefore" clause and the relief and remedies sought therein.

16. Each and every allegation contained herein above not specifically admitted, modified, or otherwise addressed is denied.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Failure to State a Claim)

17. One or more causes of action in DRH's Amended Cross-Claims fail to state any claim upon which relief can be granted as to Defendant, and DRH's Amended Cross-Claims should, therefore, be dismissed pursuant to Rule 12(b)(6), *SCRCP*.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Failure to State Facts Sufficient)

18. That DRH's Amended Cross-Claims fail to state facts sufficient to constitute a cause of action for equitable and/or contractual indemnity and should be dismissed pursuant to the provisions of *SCRCP* Rule 12(b)(6).

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Contractual Responsibility Limited by Scope of Agreement)

19. That the conditions and deficiencies alleged to exist in the pleadings are not within the scope of services which were requested of Defendant, and that Defendant's responsibility is limited only to those conditions and deficiencies, if any, which are within the scope of series described in the agreement, and such constitutes a complete defense to the claims for breach of contract.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Payment in Full)

20. That Defendant has been paid in full for all work performed under the subcontract agreement and Defendant therefore pleads full payment as a bar and complete defense to all the claims arising under contract.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Final Payment as Waiver or Release)

21. That the owner of the project has previously made final payment to Defendant for all work performed pursuant to the agreement between the parties, and such final payment, according to the terms of the agreement and the customs of the industry, constitutes a waiver and release of all claims of the nature set forth herein, and therefore such final payment constitutes a defense to all claims arising under contract.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Failure to Comply with the Limitations within Agreement)

22. That DRH failed to commence this action within the time required by the applicable provisions of the agreement between the parties and the failure to timely commence the action constitutes a bar and complete defense to all claims.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Acceptance of Work)

23. That DRH accepted the work of Defendant after inspecting it and is now barred from asserting claims upon that work.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Estoppel by Contract)

24. That the claims of DRH are contrary to the plain language of the agreement, and DRH is therefore estopped by the terms and provisions of the agreement from asserting the claims and matters set forth in its pleadings.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Notice and Opportunity to Correct Workmanship)

25. That DRH failed to give any reasonable and meaningful notice as to the existence of the alleged breach and failed to give a reasonable opportunity to correct such alleged defects (the existence of which is denied), and such failure to give notice constitutes a complete defense to all claims.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Indemnity Not Allowed Between Joint Tortfeasors)

26. That DRH was negligent, grossly negligent, willful, wanton, and reckless in the particulars set forth elsewhere in the pleadings herein, and the damages sustained by DRH, if any, were due to, caused by, and were the direct and proximate result of the negligence, gross negligence, recklessness, willfulness, and wantonness of DRH, combining and concurring with the alleged negligence of Defendant (the existence of which is expressly denied), and therefore DRH is at best a joint tortfeasor, and such constitutes a complete defense to any claim for indemnity.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Unclean Hands)

27. That to the extent that Lather Construction was negligent, grossly negligent, willful, wanton, and reckless (the existence of which is expressly denied), resulting in the damages allegedly sustained (the existence of which is expressly denied), DRH comes to Court with unclean hands, and such inequitable conduct on the part of DRH constitutes a bar and complete defense to any claim for equitable relief in the form of indemnity.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Broad Form Indemnity in a Construction Contract is Void)

28. That pursuant to the provisions of S.C. Code Ann. §32-2-10 (1976, as amended), the indemnity clause which DRH seeks to enforce against Defendant is void and is against public policy.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(No Relationship Sufficient to Support Indemnity)

29. That there does not exist any relationship between Defendant and DRH sufficient to support a claim for indemnity between them and such constitutes a complete defense to the claims for indemnity.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Breach of Warranty as to Plans and Specifications)

30. That DRH furnished plans, specifications, and drawings for use in the construction of the project and thereby warranted the sufficiency of the plans, specifications, and drawings for the purpose in view, and impliedly warranted that they fully and accurately disclosed all

information necessary for the proper construction of the project. That the plans, specifications, and drawings furnished were defective, insufficient, conflicting, and incomplete and thereby breached the foregoing warranties which are implied by law, and such constitutes a complete defense to all claims.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Duties Alleged Beyond Scope of Services)

31. That the duties and obligations alleged are not within the scope of services which were provided by this Defendant, and such duties and obligations lie beyond the scope of services provided, and such constitutes a complete defense to all claims.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Failure to Join Parties)

32. DRH's claims are barred by its failure to join as a party to this action a party or parties in whose absence complete relief cannot be accorded among those already parties thereby subjecting this Defendant to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Setoff)

33. Any recovery by DRH must be reduced or offset by amounts DRH has received or will recover from others for the same injuries and/or damages claimed in this suit.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Punitive Damages Unconstitutional – Procedural Due Process)

34. That to the extent that DRH seek punitive or exemplary damages, such claims violate the right of Defendant to procedural due process under the Fourteenth Amendment of the United States Constitution and the Constitution of the State of South Carolina.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Punitive Damages Unconstitutional – Substantive Due Process)

35. That to the extent that DRH seeks punitive or exemplary damages, such claims violate the right of Defendant to substantive due process under the Fifth and Fourteenth Amendments of the United States Constitution and the Constitution of the State of South Carolina.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Bifurcated Trial)

36. This Defendant requests that the trial of this matter be bifurcated on the issue and award of punitive damages pursuant to South Carolina Code Ann. § 15-32-520. Pursuant to the statute, evidence relevant only to the issue of punitive damages is not admissible during the first stage of a bifurcated trial.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Punitive Damages Recovery Limits)

37. Defendants invokes the punitive damage recovery limits set forth in South Carolina Code § 15-32-530.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Punitive and Multiple Damages Not Allowed)

38. That the various claims set forth herein seek both punitive damages and multiple damages on different theories for the same loss, and DRH is not entitled to recover both punitive damages and multiple damages for the same loss as such constitutes a double recovery.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Laches)

39. That DRH neglected for an unreasonable and unexplained length of time to provide notice of any alleged deficiencies to Defendant who has been prejudiced by the delay, and such unreasonable delay and resulting prejudice constitutes a complete defense to all claims.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Spoliation of Evidence)

40. That the primary evidence and proof of the facts alleged has been destroyed, altered, or otherwise lost to the prejudice and detriment of Lather Construction. That DRH knew or should have known of the importance of such evidence and had a duty to preserve same and such constitutes a complete defense to all claims.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Statute of Limitations/Statute of Repose)

41. That all claims asserted against the Defendant are barred by the applicable statute of limitations and/or the applicable statute of repose.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Rule 8(c) SCRCP)

42. To the extent applicable, this Defendant raises all affirmative defenses required by

Rule 8(c) SCRCP.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Improper Filing of Amended Pleading)

43. This defendant moves to dismiss the crossclaims against it because DRH has failed to comply with Rule 15 SCRCP.

44. DRH did not seek leave of the Court to Amend its Answer a second time to Plaintiff's Second Amended Complaint nor did DRH seek written consent of this Defendant.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Incorporation of Defenses Raised by Others)

45. Defendant hereby incorporates the defenses raised by any other Defendant to the extent said defenses might be applicable to it.

**FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE**
(Reservation and Non-Waiver)

46. This Defendant reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, having fully answered the Amended Cross-Claims of Defendant DRH this Defendant, prays for a trial by jury and that the Amended Cross-Claims be dismissed, together with the costs and disbursements of this action, reimbursement for the attorney's fees, and for such other and further relief as this Court may deem just and proper.

SIGNATURE PAGE FOLLOWING

Lather Construction's Answer to DRH 2nd AXC
Case No: 2018-CP-07-00911

ROSS & CRISTALDI, LLC

s/ Philip P. Cristaldi

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Attorneys for Lather Construction, Inc. and Lather
Construction SC, Inc.

Mt. Pleasant, South Carolina
August 27, 2021

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Richard W. and Rebecca A. Drier; Yolanda J. Drier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; Adam F. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machada; Marvin K. and Maryalice Mamaril; Cory M. McDaniel; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Verstegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Armor Building Solutions, LLC; Atlas Surveying BFT, LLC f/k/a Atlas Surveying Holding Company, LLC; Atlas Surveying, Inc.; Builders FirstSource-Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Jenkins Plumbing Company, LC; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Stier Supply Company f/k/a Stier-Holman Supply Co.; Superior Association Services, LLC; and Valim Construction, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2018-CP-07-00911

**HUTTON'S LANDSCAPES, INC.'S
ANSWER TO D.R. HORTON, INC.'S
SECOND AMENDED ANSWER TO
PLAINTIFFS' SECOND AMENDED
COMPLAINT AND CROSS-CLAIMS**

**TO: S. MICHAEL NAIL, ESQUIRE AND KIRSTEN PETERSON, ESQUIRE,
ATTORNEYS FOR D.R. HORTON, INC.:**

The Defendant, Hutton's Landscapes, Inc. ("Hutton's"), answering the Cross-Claims of the Defendant D.R. Horton Inc., ("D.R. Horton") as contained within the Second Amended Answer to the Plaintiffs' Second Amended Complaint and Cross-Claims filed by D.R. Horton on August 23, 2021 (hereinafter "D.R. Horton Cross-Claims"), herein alleges:

FOR A FIRST DEFENSE

1. That Paragraphs 1 through 41 appear to be Defendant D.R. Horton's Second Amended Answer to the Second Amended Complaint and do not purport to state any claims as to this Defendant; however, to the extent any such claims or allegations may be construed as to this Defendant, they are denied.

2. That Paragraphs 42 through 85 do not appear to relate to this Defendant; however, to the extent Paragraphs 42 through 85 may be construed to contained any allegations as to this Defendant, they are denied.

3. That it incorporates by reference all of the allegations contained within Paragraphs 1 through 2 by way of response to Paragraph 86.

4. That it admits Paragraph 87 upon information and belief; however, it reserves the right to contest jurisdiction as discovery progresses.

5. That it admits Paragraphs 88 and 89 to the extent that D.R. Horton and Hutton's may have had an Independent Contractor Agreement related to this Project and to the extent any such Independent Contractor Agreement exists, it would crave reference to the terms of that agreement by way of response to Paragraphs 88 and 89, and it would deny any allegations contained within Paragraphs 88 and 89 that differ from, or inconsistent with, or seek to expand

Hutton's scope of work and it denies any remaining allegations contained within Paragraphs 88 and 89.

6. That it incorporates by reference all of the allegations contained within Paragraphs 1 through 5 by way of response to Paragraph 90 of the D.R. Horton Cross-Claims.

7. That Paragraph 91 contains a legal conclusion to which no response is required to this Defendant; however, to the extent any such response is required, Paragraph 91 is denied.

8. That this Defendant denies Paragraphs 92 and 93.

9. That by way of response Paragraph 94, to the extent any such contract or agreement exists between D.R. Horton and Hutton's, Defendant Hutton's would crave reference to the terms of that contract agreement by way response to Paragraph 94, and it would deny allegations contained within Paragraph 94 that differ from, or inconsistent with, or seek to expand the obligations of Defendant Hutton's and it denies any remaining allegations contained within Paragraph 94.

10. That it denies Paragraphs 95 and 96.

11. That Paragraphs 97 through 151 do not purport to state a claim as to this Defendant, however, to the extent any such claims maybe construed against it in Paragraphs 97 through 151, they are denied.

12. This Defendant further denies D.R. Horton's Wherefore provision.

FOR A SECOND DEFENSE
(Fails to State a Claim)

13. That D.R. Horton's Cross-Claims fail to state facts sufficient to constitute a cause of action against this Defendant.

FOR A THIRD DEFENSE
(Sole Negligence of Owners – Failure to Maintain)

14. That any damages alleged in the D.R. Horton Cross-Claims are due to and caused by the sole negligence of the Plaintiffs in their failure to properly and timely maintain and repair the properties and this Defendant pleads the sole negligence as a bar to this action.

FOR A FOURTH DEFENSE
(Mitigation – Failure to Maintain)

15. That the Plaintiffs have failed to properly and timely maintain and repair their properties and have failed to mitigate their damages. This Defendant pleads this failure to mitigate as a complete bar to this action.

FOR A FIFTH DEFENSE
(Statute of Limitations/Repose)

16. That the Plaintiffs and/or D.R. Horton's Cross-Claims may be barred by the statute of limitations and/or the statute of repose.

FOR A SIXTH DEFENSE
(Contributory Negligence – Failure to Maintain)

17. That the Plaintiffs have failed to exercise due care in the operation, maintenance and repair of their properties and have been negligent, careless, willful, wanton, reckless and grossly negligent in failing to properly operate, maintain and repair their properties and this Defendant pleads contributory negligence as a complete bar to this action.

FOR A SEVENTH DEFENSE
(Lack of Notice)

18. That the Plaintiffs and/or D.R. Horton have failed to give proper notice to this Defendant of any alleged defects or deficiencies in the construction of the project and this Defendant pleads lack of notice as a complete bar to this action.

FOR AN EIGHTH DEFENSE
(Economic Loss Rule)

19. That D.R. Horton has alleged solely economic losses and D.R. Horton has failed to state a claim upon which relief can be granted as to this Defendant.

FOR A NINTH DEFENSE
(Sole Negligence of Others)

20. That any damages sustained by D.R. Horton and/or the Plaintiffs are the result of the sole negligence and/or breaches of contract of third parties, such as contractors, subcontractors, suppliers and/or service and maintenance personnel for which this Defendant has no liability and this Defendant pleads sole negligence of third parties as a complete bar to this action.

FOR A TENTH DEFENSE
(Punitive Damages)

21. That Plaintiffs and/or D.R. Horton's claims for punitive damages, to the extent any such damages are claimed, is in violation of the United States Constitution, Fourteenth Amendment (Due Process Clause) and the South Carolina Constitution in that there is no objective standard to gauge or limit the amount of punitive damages which can be awarded with sufficient instruction provided in determining the amount of punitive damages which should be awarded.

22. The award of punitive damages, if any, is subject to the limitations and provisions set forth in S.C. Code Ann. §§15-32-520 and 15-32-530.

FOR AN ELEVENTH DEFENSE
(Right to Cure)

23. That Plaintiffs and/or D.R. Horton's causes of action against this Defendant may be barred because Plaintiffs and/or D.R. Horton failed to provide this Defendant with notice and right to cure the problems alleged at the project pursuant to the South Carolina Notice and Opportunity Cure Construction Dwellings Defect Act.

FOR A TWELFTH DEFENSE
(Exclusion/Modification/Waiver/Limitation of Warranties)

24. That D.R. Horton's causes of action against this Defendant may be barred in whole and in part because to the extent any warranties existed, D.R. Horton's own actions have resulted in the exclusion, modification, waiver or limitation of any such warranties.

FOR A THIRTEENTH DEFENSE
(Expiration of Warranties)

25. That to the extent any warranties existed from this Defendant, D.R. Horton's causes of action against this Defendant are barred in whole or in part because to the extent the warranties existed, all such warranties have expired.

FOR A FOURTEENTH DEFENSE
(Compliance with Industry Customs, Practices and Standards)

26. That D.R. Horton's causes of action against this Defendant are barred in whole or in part because at this Defendant complied with the industry customs, practices and standards given the state of the art in the industry at the time of construction on these homes.

FOR A FIFTEENTH DEFENSE
(Claim Not Ripe)

27. To the extent D.R. Horton seeks to assert a contribution claim against this Defendant, any such contribution claim is not yet ripe.

FOR A SIXTEENTH DEFENSE
(Limited Agreement)

28. That the scope of its services to the between this Defendant and D.R. Horton, if any such agreement exists, and if any services were provided by this Defendant, this Defendant craves reference to any such Agreement for its terms and conditions, and it denies it owes any duty to D.R. Horton greater than or different from the contractual obligations that may be within any such Agreement.

FOR A SEVENTEENTH DEFENSE
(Superseding – Intervening Negligence)

29. That if this Defendant was negligent, which is expressly denied, the superseding and intervening acts of third parties broke the chain of causation and were the proximate cause of any injuries as alleged by the Plaintiffs and/or D.R. Horton and this Defendant pleads superseding, intervening negligence of third parties as a complete bar to this action.

FOR AN EIGHTEENTH DEFENSE
(Comparative Negligence)

30. That Plaintiffs' alleged injuries, if any, are due to and proximately caused by the D.R. Horton's own contributory negligence and recklessness in an amount exceeding any alleged negligence or recklessness on the part of this Defendant and that this Defendant pleads comparative negligence as a complete bar to this action.

31. That D.R. Horton's alleged injuries, if any, are due to and proximately caused by D.R. Horton's own contributory negligence or recklessness and the D.R. Horton's claims should be reduced by the comparative portion of D.R. Horton's fault.

FOR A NINETEENTH DEFENSE
(Exclusion/Modification/Limitation of Warranty)

32. That some and/or all applicable warranties may have been properly and effectively excluded, modified, and/or limited by this Defendant.

FOR A TWENTIETH DEFENSE
(Disclaimer of Warranty)

33. The any and/or all applicable warranties may have been properly and effectively disclaimed by this Defendant.

FOR A TWENTY-FIRST DEFENSE
(Spoliation)

34. That the Plaintiffs and/or D.R. Horton's claims may be barred or otherwise limited by the doctrine of Spoliation of Evidence.

FOR A TWENTY-SECOND DEFENSE
(Failure to Satisfy Statutory Conditions Precedent)

35. That the Plaintiffs and/or D.R. Horton have failed to comply with any applicable statutory or common law conditions precedent to asserting this claim, and such failure is a barred to the claims against this Defendant.

FOR A TWENTY-THIRD DEFENSE
(Latches, Waiver and Estoppel)

36. That the Plaintiffs and/or D.R. Horton's claims are barred by the doctrine of latches, waiver and/or estoppel.

FOR A TWENTY-FOURTH DEFENSE
(Acceptance)

37. That the final completion and acceptance of any work undertaken by this Defendant, in connection with the homes at issue, constitutes a complete defense to all claims asserted by the Plaintiffs and/or D.R. Horton.

FOR A TWENTY-FIFTH DEFENSE

38. This Defendant hereby gives notice that it intends to rely upon any other defenses, including affirmative defenses, or claims that may become available or appear during discovery proceedings in this case and hereby reserves the right to amend its Answer to D.R. Horton's Cross-Claims.

39. This Defendant further gives notice that it intends to rely upon any other affirmative defenses pled by any other Defendant and not pled by this Defendant to the extent they do not conflict with this Defendant's affirmative defenses.

WHEREFORE, having fully answered the Cross-Claims asserted by D.R. Horton in its Second Amended Answer to the Second Amended Complaint of Plaintiffs, this Defendant demands that the same be dismissed with costs and attorney's fees and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Emily Gifford Lucey

Emily Gifford Lucey, S.C. Bar No. 72785

Megan C. White, S.C. Bar No. 101895

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**ATTORNEY FOR HUTTON'S LANDSCAPES,
INC.**

August 31, 2021

Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Richard W. and Rebecca A. Drier; Yolanda J. Drier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. And Stasha R. Grooms; Adam F. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Cory M. McDaniel; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III and Alayshia Smith; and Nicole J. Verstegen,

Plaintiffs,

vs.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Armor Building Solutions, LLC; Atlas Surveying BFT, LLC f/k/a Atlas Surveying Holding Company, LLC; Atlas Surveying, Inc.; Builders FirstSource - Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Jenkins Plumbing Company, LC; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Stier Supply Company f/k/a Stier-Holman Supply Co.; Superior Association Services, LLC; Valim Construction, LLC,

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL
CIRCUIT

CASE NO.: 2018-CP-07-00911

**DEFENDANT EAST COAST
CONSTRUCTION CLEANUP
CORPORATION F/K/A S.C. CLEANUP
CO., INC.'S ANSWER TO DEFENDANT
DR HORTON'S CROSS-CLAIMS
ASSERTED IN ITS SECOND AMENDED
ANSWER TO PLAINTIFFS' SECOND
AMENDED COMPLAINT
(Jury Trial Demanded)**

Defendants.

To: **S. Michael Nail, Esq. and Olivia B. Broderick, Esq., Attorneys for D.R. Horton, Inc.**

The Defendant, East Coast Construction Cleanup Corp. f/k/a SC Cleanup Co., Inc. (hereinafter, "East Coast"), answering the Cross-claims of Defendant D.R. Horton, Inc. (hereinafter, "D.R. Horton") above named, alleges and says as follows:

1. Each and every allegation of the Cross-claims which is not specifically admitted, qualified or explained is denied and strict proof is demanded thereof.
2. Paragraphs 1 through 41 of the Cross-claims consist of D.R. Horton's Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint and therefore, do not require a response from this Defendant. To the extent any allegations contained therein could be construed against East Coast, the same are denied and strict proof is demanded thereof.
3. Paragraphs 42 through 74 of the Cross-claims contain allegations against other Defendants and therefore, do not require a response from this Defendant. To the extent any allegations contained therein could be construed against East Coast, the same are denied and strict proof is demanded thereof.
4. In response to Paragraph 75 of the Cross-claims, East Coast repeats all allegations as if restated fully herein.
5. East Coast admits only those portions of Paragraph 76 of the Cross-claims that relate to jurisdiction and venue. The remaining allegations within, if any, are denied.
6. East Coast denies the allegations contained in Paragraphs 77 through 85

of the Cross-claims.

7. Paragraphs 86 through 151 of the Cross-claims contain allegations against other Defendants and therefore, do not require a response from this Defendant. To the extent any allegations contained therein could be construed against East Coast, the same are denied and strict proof is demanded thereof.

8. East Coast denies D.R. Horton is entitled to the relief requested in the "Wherefore" paragraph on Page 31 of the Cross-claims

**FURTHER ANSWERING THE CROSS-CLAIMS
AND AS AN AFFIRMATIVE DEFENSE THERETO,
THE DEFENDANT ALLEGES AND SAYS:
(Failure to State a Claim)**

9. That the Cross-claims fail to state facts sufficient to constitute a cause of action and D.R. Horton's Cross-claims should be dismissed pursuant to the provisions of SCRCP Rule 12(b)(6).

**FURTHER ANSWERING THE CROSS-CLAIMS
AND AS AN AFFIRMATIVE DEFENSE THERETO,
THE DEFENDANT ALLEGES AND SAYS:
(Acceptance)**

10. The final acceptance of the work undertaken by this Defendant pursuant to the original contract and all modifications thereto constitutes a complete defense to all claims.

**FURTHER ANSWERING THE CROSS-CLAIMS
AND AS AN AFFIRMATIVE DEFENSE THERETO,
THE DEFENDANT ALLEGES AND SAYS:
(Unclean Hands)**

11. The claims against this Defendant are barred by the doctrine of unclean hands.

**FURTHER ANSWERING THE CROSS-CLAIMS
AND AS AN AFFIRMATIVE DEFENSE THERETO,
THE DEFENDANT ALLEGES AND SAYS:
(Indemnity Not Allowed Between Joint Tortfeasors)**

12. That D.R. Horton was negligent, grossly negligent, willful, wanton, and reckless in the particulars set forth elsewhere in the pleadings herein, and the damages sustained by D.R. Horton, if any, were due to, caused by, and were the direct and proximate result of the negligence, gross negligence, recklessness, willfulness, and wantonness of D.R. Horton, combining and concurring with the alleged negligence of East Coast (the existence of which is expressly denied), and therefore, D.R. Horton is at best a joint tortfeasor, and such constitutes a complete defense to any claim for indemnity.

**FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
THE DEFENDANT ALLEGES AND SAYS:
(Punitive Damages Unconstitutional - Procedural Due Process)**

13. That the Cross-claims to the extent that it seeks punitive or exemplary damages violates the right of this Defendant to procedural due process under the Fourteenth Amendment of the United States Constitution and the Constitution of the State of South Carolina, and therefore fails to state a cause of action upon which either exemplary or punitive damages can be awarded.

**FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
THE DEFENDANT ALLEGES AND SAYS:
(Punitive Damages Unconstitutional - Substantive Due Process)**

14. That the Cross-claims to the extent that it seeks punitive or exemplary damages, violates this Defendant's right to substantive due process as provided in the Fifth and Fourteenth Amendments of the United States Constitution and

the Constitution of the State of South Carolina, and therefore fails to state a cause of action upon which either exemplary or punitive damages can be awarded.

**FURTHER ANSWERING BFS' THIRD-PARTY CLAIMS
AND AS AN AFFIRMATIVE DEFENSE THERETO,
C&C ALLEGES AND SAYS:
(S.C. Code Ann. § 15-32-530)**

15. To the extent that punitive damages are claimed, this Defendant reserves its right to request a bifurcated jury trial and to request the court limit any award of punitive damages which the jury may make in accordance with the provisions of S.C. Code Annotated §15-32 530.

WHEREFORE, having fully answered the Cross-claims of D.R. Horton, the Defendant prays for a trial by jury and that the Cross-claims be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

CLAWSON and STAUBES, LLC

s/ Michael L. Leech

Michael L. Leech

Bar No.: 100516

Tyler E. Cloud

Bar No.: 103155

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Attorney for East Coast Construction Cleanup
Corporation, Inc. f/k/a S.C. Cleanup Co., Inc.

Charleston, South Carolina
September 22, 2021

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL
CIRCUIT

Case No.: 2018-CP-07-00911

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier, Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Verstegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource – Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; Valim Construction, LLC;

Defendants.

**DEFENDANTS LATHER
CONSTRUCTION, INC. AND LATHER
CONSTRUCTION SC, INC.'S MOTION
FOR SUMMARY JUDGMENT AS TO
CLAIMS OF D.R. HORTON, INC.**

TO: D.R. HORTON, INC.'S COUNSEL AND ALL OTHER PARTIES

PLEASE TAKE NOTICE that Defendants Lather Construction, Inc and Lather Construction SC, Inc. (hereinafter referred to as "Lather"), by and through the undersigned counsel, and respectfully requests that this Honorable Court grant an Order Dismissing the Claims of D.R. Horton, Inc. (hereinafter referred to as "D.R. Horton") with prejudice pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

The basis for this motion is that Lather is entitled to judgment as a matter of law as to all causes of action asserted by D.R. Horton because there are no genuine issues of material fact that exist concerning the allegations and causes of action asserted by D.R. Horton in the above-captioned lawsuit. Specifically, Lather asserts the following as the basis for its Motion for Summary Judgment:

1. This case concerns alleged defects in the construction of Tidewater Creek, a neighborhood located in Beaufort County, South Carolina. D.R. Horton, Inc., served as developer and general contractor for the construction of the neighborhood ("Project").

2. Each of the twenty-nine (29) named Plaintiffs in this lawsuit are residents and/or homeowners at Tidewater Creek. The Plaintiffs collectively own fifteen (15) separate and unique parcels of property.

3. Defendant D.R. Horton brought cross-claims against Lather Construction, Inc. and Lather Construction SC, Inc. for Contractual Indemnity and Equitable Indemnity.

4. That D.R. Horton's contract with Lather for the Project does not contain an indemnification provision.

5. In the alternative, to the extent the court finds there is a contractual indemnity provision in D.R. Horton's contract with Lather for the Project, D.R. Horton's claims are barred

by the Anti-Indemnity Statute. See S.C. Code § 32-2-10 et seq. and *D.R. Horton, Inc. v. Builder FirstSource-Southeast Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018);

6. In the alternative, to the extent the court finds there is a contractual indemnity provision in D.R. Horton's contract with Lather for the Project, D.R. Horton's Contract is illegal and thus unenforceable. See *D.R. Horton, Inc. v. Builder FirstSource-Southeast Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018);

7. In the alternative, to the extent the court finds there is a contractual indemnity provision in D.R. Horton's contract with Lather for the Project, D.R. Horton's Contractual Indemnity Provision violates the requirements outlined in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (S.C. App. 2018);

8. D.R. Horton's claim for equitable indemnity is not ripe; and

9. D.R. Horton has unclean hands and thus its claim in equity fails as a matter of law.

WHEREFORE, Lather respectfully moves this Honorable Court for an order granting summary judgment in its favor as to the claims by D.R. Horton.

This Defendant reserves the right to support this motion with additional supporting exhibits and a supplemental memorandum or reply memorandum if necessary.

SIGNATURE ON THE FOLLOWING PAGE

Respectfully submitted,

ROSS & CRISTALDI, LLC

s/ Scott H. Winograd

Jeffrey A. Ross, Bar No.: 74254

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***Attorneys for Lather Construction, Inc., and
Lather Construction SC, Inc.***

Mt. Pleasant, South Carolina

October 08, 2021

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Richard W. and Rebecca A. Drier; Yolanda J. Drier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; Adam F. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Cory M. McDaniel; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Versteegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Armor Building Solutions, LLC; Atlas Surveying BFT, LLC f/k/a Atlas Surveying Holding Company, LLC; Atlas Surveying, Inc.; Builders FirstSource-Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Jenkins Plumbing Company, LC; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Stier Supply Company f/k/a Stier-Holman Supply Co.; Superior Association Services, LLC; and Valim Construction, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2018-CP-07-00911

**HUTTON'S LANDSCAPES, INC.'S
MOTION FOR SUMMARY
JUDGMENT ON THE CROSS-
CLAIMS OF
D.R. HORTON, INC.**

**TO: S. MICHAEL NAIL AND KIRSTEN PETERSON, ATTORNEYS FOR
DEFENDANT D.R. HORTON, INC.**

NOW COMES Defendant, Hutton's Landscapes, Inc. ("Hutton's Landscapes"), who, by and through its counsel, moves for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on the contractual and equitable indemnity cross-claims asserted against it by Defendant D.R. Horton, Inc. ("D.R. Horton").

The Plaintiffs in the above-captioned case filed an action against D.R. Horton, who served as developer and general contractor for the construction of the Tidewater Creek neighborhood, and multiple subcontractors, including Hutton's Landscapes, arising out of alleged construction deficiencies in the neighborhood. D.R. Horton subsequently filed a cross-claims against Hutton's Landscapes for contractual and equitable indemnity. Hutton's Landscapes now seeks summary judgment on the contractual and equitable indemnity claim for the following reasons:

1. The Indemnity Clause contained in the Independent Contractor Agreement between D.R. Horton and Hutton's Landscapes is void and unenforceable under South Carolina's Anti-Indemnity Statute, S.C. CODE ANN. § 32-2-10, because the Indemnity Clause requires Hutton's Landscapes to defend D.R. Horton against all of the Plaintiffs' claims, including those based on D.R. Horton's sole negligence;
2. The Indemnity Clause is void and unenforceable as against public policy because it requires Hutton's Landscapes to indemnify D.R. Horton for its intentional acts; and
3. **D.R. Horton's claim for equitable indemnity fails as a matter of law because it is not ripe and D.R. Horton has unclean hands.**

This Motion is based upon the pleadings, any discovery which has been conducted in this case, the applicable Rules of Civil Procedure and their related authority, case law, as more fully set forth in the Hutton's Landscapes' Memorandum of Law in Support on this Motion, and on such additional discovery, affidavits or stipulations as may hereafter be timely filed. This Defendant reserves the right to assert additional grounds for dismissal and/or summary judgment as further discovery

dictates. This Defendant also adopts and incorporates by reference as if fully stated herein any and all grounds for dismissal and/or summary judgment asserted at any time by the other Defendants in the above referenced case, to the extent they are consistent with the positions that Hutton's Landscapes has taken in this case.

Respectfully submitted,

October 19, 2021
Mt. Pleasant, South Carolina

s/ Emily Gifford Lucey

Emily Gifford Lucey, S.C. Bar No. 72785

Megan C. White, S.C. Bar No. 101895

RICHARDSON PLOWDEN & ROBINSON, PA

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mwhite@richardsonplowden.com

Counsel for Hutton's Landscapes, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-07-00911

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier, Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Verstegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource – Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; Valim Construction, LLC;

Defendants.

**DEFENDANTS LATHER
CONSTRUCTION, INC. AND LATHER
CONSTRUCTION SC, INC.'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY
JUDGMENT AS TO CLAIMS OF D.R.
HORTON, INC.**

Lather Construction SC, Inc. and Lather. Construction, Inc. (hereinafter collectively "Lather") submits the following Memorandum in Support of Lather's Motion for Summary Judgment as to Claims of D.R. Horton, Inc.

Lather is entitled to judgment as a matter of law as to all causes of action asserted by D.R. Horton because there are no genuine issues of material fact that exist concerning the allegations and causes of action asserted by D.R. Horton in the above-captioned lawsuit.

BACKGROUND

This case concerns alleged defects in the construction of Tidewater Creek, a neighborhood located in Beaufort County, South Carolina. D.R. Horton, Inc., served as developer and general contractor for the construction of the neighborhood (hereinafter "Project"). Each of the twenty-nine (29) named Plaintiffs in this lawsuit are residents and/or homeowners at Tidewater Creek. The Plaintiffs collectively own fifteen (15) separate and unique parcels of property. Defendant D.R. Horton brought cross-claims against Lather Construction, Inc. and Lather Construction SC, Inc. for Contractual Indemnity and Equitable Indemnity.

STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(a), SCRCF. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Schmidt v. Courtney*, 357 S.C. 310, 316, 592 S.E.2d 326, 330 (Ct. App. 2003) (citations omitted). "Nonetheless, a court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.'" *Bloom v. Ravoir*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (quoting *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996)).

ARGUMENT

I. D.R. Horton's contract with Lather for the Project does not contain an indemnification provision.

D.R. Horton's contract with Lather for the Project does not contain an indemnification provision and therefore a claim of contractual indemnity fails as a matter of law.

The law in South Carolina as it relates to the construction and interpretation of contracts is well settled. *ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct.App.2011). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *D.A. Davis Constr. Co. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct.App.2004); see also *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377–78, 373 S.E.2d 584, 586 (1988) (observing where a contract is clear and unambiguous, "[e]xtrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible"); *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 497–98, 649 S.E.2d 494, 501–02 (Ct.App.2007) (stating a court must first look to the language of the entire contract to determine the parties' intent and if the language is perfectly plain, "it alone determines the document's force and effect"). At the end of the day, the Parties will be governed by their outward expressions and the court is not free to consider their covert intentions." *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976).

D.R. Horton and Lather Construction Company, Inc.¹ entered into a Standard Form of Agreement Between Owner and Contractor ("Contract"), which is dated August 1, 2014, and executed by both parties. See attached as **Exhibit A**. That document is ten pages long. It covers the scope of work, time, liquidated damages, price, payments, and outlines the various contract documents that make up this agreement. Those documents include general conditions, price and payment procedures, administrative requirements, submittal procedures, quality requirements, execution requirements, and drawings. The agreement is specific to the project which is referred to in the agreement as Tidewater Creek (aka. Crossroad subdivision or Lady's Lake). This agreement is the operative contract for this project and does not contain a contractual indemnification provision. Therefore, D.R. Horton cannot seek contractual indemnity when it did not exist in the contract.

Counsel anticipates D.R. Horton's attorneys will argue that an earlier-dated Master Subcontractor Agreement with Lather, which included an indemnification clause, applies to this project. Attached as **Exhibit B**. However, DR Horton's attorneys cannot testify for their client and such a position is contrary to DR Horton's own 30(b)6 witness testimony. Ronald Bunner, Assistant Vice President for D.R. Horton was their 30(b)(6) designee and testified as follows after being presented with the Contract that is attached as **Exhibit A**.

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5 Q Okay. So is it your understanding that

6 this would be the contract that would govern the

7 work for this project?

8 A Yeah. This is the contract the governs

¹ A contract was not entered into with Lather Construction SC, Inc. In fact, Lather Construction SC, Inc. was not formed until February 21, 2017, after the certificates of occupancy for all the homes were issued. Lather Construction SC, Inc. has filed a separate Motion for Summary Judgment specific to that issue as it is a factual impossibility for Lather Construction SC, Inc. to have worked on the property.

*9 the scope and pricing and agreement for this
10 project.*

(See Depo. Ronald Bunner, p. 168, attached as **Exhibit C.**)

As Mr. Bunner's testimony continued he testified that the Contract, along with the referenced contract documents in Article 9 of the agreement, formed the universe of what Lather needed to be familiar with and be responsible for complying with.

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*15 So these documents listed here it says,
16 Article 9, Contract Documents, and then 901. It
17 lists a bunch of things. These are the kind of
18 documents that were forming the entire universe
19 of what Lather would have to be familiar with and
20 be responsible for complying with?
21 A. I would say yes.*

(See Depo. Ronald Bunner, p. 171, attached as **Exhibit C.**)

The list does not mention the Master Agreement and neither is it mentioned anywhere in the Contract. The operative contract, by DR Horton's own admission between D.R. Horton and Lather for the Project, does not contain an indemnification provision and therefore, a claim for contractual indemnity should be dismissed.

II. D.R. Horton has unclean hands and the claim is not ripe so its claim in equity fails as a matter of law.

In order to recover under an equitable indemnity claim, a party must prove:

(1) the indemnitor was liable for causing the plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor.

Fowler v. Hunter, 697 S.E.2d 531, 388 S.C. 355 (S.C. 2010). It is undisputed that D.R. Horton had overall responsibility for the project. See Depo. Ronald Bunner, p. 177. In addition, D.R. Horton chose the site, the layout, and the design. They decided on the scope of work for the contractors, wrote the contracts, hired the contractors, scheduled the work, approved the work, paid the contractors (including Lather), and performed project oversight. DR Horton then sold the properties when they determined that they were complete, code-compliant, built according to plans and specifications, and in compliance with the industry standards. At the end of the day, their legal and statutory responsibility for their involvement in the project including their overall supervision of the project, means they bear some liability in this action if and to the extent any liability exists as to anybody involved in the construction. Thus their claim for equitable indemnification fails because D.R. Horton has unclean hands. Further, the claim for equitable indemnity is not ripe as D.R. Horton has not been "exonerated from any liability for those damages." See *Fowler*. Until such an exoneration, a claim for equitable indemnity does not exist and cannot be brought in the current suit.

- III. Additionally, Lather joins in the arguments of codefendants' motions for summary judgment and incorporates those arguments herein to the extent applicable.**

CONCLUSION

For the reasons set forth above, D.R Horton's claims against Lather should be dismissed as a matter of law.

SIGNATURE ON THE FOLLOWING PAGE

Respectfully submitted,

ROSS & CRISTALDI, LLC

s/ Scott H. Winograd

Jeffrey A. Ross, Bar No.: 74254

Philip P. Cristaldi, Bar No.: 102219

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*Attorneys for Lather Construction, Inc., and
Lather Construction SC, Inc.*

Mt. Pleasant, South Carolina

October 19, 2021

**CONTRACT DOCUMENTS
AND
SPECIFICATIONS

FOR

TIDEWATER CREEK**

PREPARED FOR:

**D.R. HORTON, INC.
209 ARGO CIRCLE
OKATIE, SC 29909**

**JUNE 30, 2014
JOB NUMBER - 1715**

PREPARED BY:

**CAROLINA ENGINEERING CONSULTANTS, INC
1402 KING STREET
BEAUFORT, SC 29902
(843) 322-0553**

DOCUMENT 00010

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DOCUMENT 00505

STANDARD FORM OF AGREEMENT
BETWEEN OWNER AND CONTRACTOR

THIS AGREEMENT is by and between, DR. Horton, Inc. (hereinafter called OWNER) and Lather Construction Company, Inc. (hereinafter called CONTRACTOR).

OWNER and CONTRACTOR, in consideration of the mutual covenants hereinafter set forth, agree as follows:

ARTICLE I - WORK

1.01 CONTRACTOR shall complete all Work as specified or indicated in the Contract Documents. The Work is generally described as follows:

Work generally consists of clearing, grading and constructing the water, sewer, drainage, and roads for the proposed residential subdivision.

ARTICLE 2 - THE PROJECT

2.01 The Project for which the Work under the Contract Documents may be the whole or only a part is generally described as follows:

Tidewater Creek (aka: Crossroad Subdivision or Lady's Lake)

ARTICLE 3 - ENGINEER

3.01 The Project has been designed by

Andrews & Burgess, Inc.
Mr. Steve Andrews, PE
2712 Bull Street
Beaufort, SC 29902

and construction observation, certifications and contract management will be performed by:

Carolina Engineering Consultants, Inc.
Jeff P. Ackerman, PE
Post Office Box 294
Beaufort, SC 29901

1402 King Street
Beaufort, SC 29902

(843) 322-0553 (O)
(843) 322-0556 (F)

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who is hereinafter called ENGINEER and who is to act as OWNER's representative, assume all duties and responsibilities, and have the rights and authority assigned to ENGINEER in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.

ARTICLE 4 - CONTRACT TIMES

4.01 Time of the Essence

- A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

4.02 Days to Achieve Substantial Completion and Final Payment

- A. The Work will be substantially completed within 150 days after the date when the Notice to Proceed is issued and shall be completed and ready for final payment in accordance with paragraph 14.07 of the General Conditions within 180 days after the date when the Notice to Proceed is issued.

4.03 Liquidated Damages

- A. CONTRACTOR and OWNER recognize that time is of the essence of this Agreement and that OWNER will suffer financial loss if the Work is not completed within the times specified in paragraph 4.02 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. The parties also recognize the delays, expense, and difficulties involved in proving in a legal or arbitration proceeding the actual loss suffered by OWNER if the Work is not completed on time. Accordingly, instead of requiring any such proof, OWNER and CONTRACTOR agree that as liquidated damages for delay (but not as a penalty), CONTRACTOR shall pay OWNER \$ 500.00 for each day that expires after the time specified in paragraph 4.02 for Substantial Completion until the Work is substantially complete. After Substantial Completion, if CONTRACTOR shall neglect, refuse, or fail to complete the remaining Work within the Contract Time or any proper extension thereof granted by OWNER, CONTRACTOR shall pay OWNER \$ 500.00 for each day that expires after the time specified in paragraph 4.02 for completion and readiness for full payment until the Work is completed and ready for final payment.

ARTICLE 5 - CONTRACT PRICE

- 5.01 OWNER shall pay CONTRACTOR for completion of the Work in accordance with the Contract Documents an amount in current funds equal to the sum of the amounts determined pursuant to paragraphs 5.01.A, 5.01.B, and 5.01.C below:

A. Lump Sum of:

One Million, Fourteen Thousand, Four Hundred Twenty Three and Sixty Three Cents (\$1,014,423.63)

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As presented in the attached Contractor's Bid, attached hereto as an exhibit. All specific cash allowances are included in the above price and have been computed in accordance with paragraph 11.02 of the General Conditions.

- B. This is a lump sum contract and the Contractor's Bid is attached as a reference in order to determine percentage complete.
- C. The lump sum price includes all work as indicated in the Specifications and Drawings referenced in this agreement.

ARTICLE 6 - PAYMENT PROCEDURES

6.01 Submittal and Processing of Payments:

- A. CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be processed by ENGINEER as provided in the General Conditions.

6.02 Progress Payments; Retainage

- A. OWNER shall make progress payments on account of the Contract Price on the basis of CONTRACTOR's Applications for Payment on or about the 15th day of each month during performance of the Work as provided in paragraphs 6.02.A.1 and 6.02.A.2 below. All such payments will be measured by the estimated percent complete by each lump sum item. Retainage will be withheld at a rate of 15%.
 - 1. Omitted
 - 2. Upon Substantial Completion, OWNER shall pay an amount sufficient to increase total payments to CONTRACTOR to 98 % of the Work completed, less such amounts as ENGINEER shall determine in accordance with paragraph 14.02.B.5 of the General Conditions and less the value of Work to be completed or corrected as shown on the tentative list of items to be completed or corrected attached to the certificate of Substantial Completion.
 - 3. Omitted
 - 4. Providing all payments have been made in full without retention for the water, sanitary sewer work and pump station (if applicable), the CONTRACTOR is required to execute the BJWSA documents for NON-LITIGATION and CONTRACTOR'S GUARANTEE and forward to the ENGINEER, in addition to other required documentation and inspections, in order to obtain BJWSA and DHEC acceptance of the work.

6.03 Final Payment:

- A. Upon full completion and acceptance of the Work in accordance with paragraph 14.07 of the General Conditions, OWNER shall pay the remainder of the Contract Price as recommended by ENGINEER as provided in said paragraph 14.07.

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ARTICLE 7 - INTEREST

- 7.01 All moneys not paid when due as provided in Article 14 of the General Conditions shall bear interest at the maximum rate allowed by law at the place of the Project.

ARTICLE 8 - CONTRACTOR'S REPRESENTATIONS

- 8.01 In order to induce OWNER to enter into this Agreement CONTRACTOR makes the following representations:
- A. CONTRACTOR has examined and carefully studied the Contract Documents and the other related data identified in the Bidding Documents.
 - B. CONTRACTOR has visited the Site and become familiar with and is satisfied as to the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
 - C. CONTRACTOR is familiar with and is satisfied as to all federal, state, and local Laws and Regulations that may affect cost, progress, and performance of the Work.
 - D. Omitted
 - E. Omitted
 - F. CONTRACTOR does not consider that any further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract Documents.
 - G. CONTRACTOR is aware of the general nature of work to be performed by OWNER and others at the Site that relates to the Work as indicated in the Contract Documents.
 - H. CONTRACTOR has correlated the information known to CONTRACTOR, information and observations obtained from visits to the Site, reports and drawings identified in the Contract Documents, and all additional examinations, investigations, explorations, tests, studies, and data with the Contract Documents.
 - I. CONTRACTOR has given ENGINEER written notice of all conflicts, errors, ambiguities, or discrepancies that CONTRACTOR has discovered in the Contract Documents, and the written resolution thereof by ENGINEER is acceptable to CONTRACTOR.
 - J. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.

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ARTICLE 9 - CONTRACT DOCUMENTS

9.01 Contents

- A. The Contract Documents consist of the following:
 1. This Agreement (pages 1 to 00505-5 inclusive);
 2. Omitted
 3. Omitted
 4. General Conditions (pages 00700-1 to 00700-42 inclusive);
 5. Supplementary Conditions (pages 00815-1 to 00815-5 inclusive);
 6. Summary (pages 01100-1 to 01100-1 inclusive);
 7. Price and Payment Procedures (pages 01200-1 to 01200-4 inclusive);
 8. Administrative Requirements (pages 01300-1 to 01300-2 inclusive);
 9. Submittal Procedures (pages 01330-1 to 01330-4 inclusive);
 10. Quality Requirements (pages 01400-1 to 01400-4 inclusive);
 11. Execution Requirements (pages 01700-1 to 01700-3 inclusive);
 12. Specifications as listed in the table of contents of the Project Manual;
 - a) Drawings consisting of a cover sheet and sheets numbered 1 through 48 bearing the following general title: Site Development Plan for Cross Roads Subdivision, Little Capers Road, Lady's Island, Beaufort County, South Carolina, Dated 9/1/2010.
 13. Addenda (numbers ___ to ___ inclusive);
 14. Exhibits to this Agreement (enumerated as follows):
 - a) Contractors Bid Form dated 8/1/2014
 - b) Omitted
 - c) Omitted
 15. The following which may be delivered or issued on or after the Effective Date of the Agreement and are not attached hereto:
 - a) Written Amendments;
 - b) Work Change Directives;
 - c) Change Order(s).

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- B. The documents listed in paragraph 9.01A are attached to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 9.
- D. The Contract Documents may only be amended, modified, or supplemented as provided in paragraph 3.05 of the General Conditions.

ARTICLE 10 - MISCELLANEOUS

10.01 Terms

- A. Terms used in this Agreement will have the meanings indicated in the General Conditions.

10.02 Assignment of Contract

- A. No assignment by a party hereto of any rights under or interests in the Contract will be binding on another party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, moneys that may become due and moneys that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

10.03 Successors and Assigns

- A. OWNER and CONTRACTOR each binds itself, its partners, successors, assigns, and legal representatives to the other party hereto, its partners, successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

10.04 Severability

- A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon OWNER and CONTRACTOR, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

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DRH-000467
Dier, et al v. DRH

IN WITNESS WHEREOF, OWNER and CONTRACTOR have signed this Agreement in duplicate. One counterpart each has been delivered to OWNER and CONTRACTOR. All portions of the Contract Documents have been signed or identified by OWNER and CONTRACTOR or on their behalf.

This Agreement will be effective on 1 August 2014 (which is the Effective Date of Agreement).

OWNER:

DR HORTON INC

By: [Signature]

[CORPORATE SEAL]

Attest: [Signature]

Address for giving notices:

209 Algo Circle
Bluffton SC 29919

(If OWNER is a corporation, attach evidence of authority to sign. If Owner is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of OWNER-CONTRACTOR Agreement.)

Designated Representative:

Name: Tara O'Kelley

Title: Land Development Mgr.

Address: 209 Algo Circle

Bluffton SC 29919

Phone: 843-473-5200

Facsimile: _____

CONTRACTOR:

[Signature]

By: [Signature]

[CORPORATE SEAL]

Attest: [Signature]

Address for giving notices:

390 Parris Island Gateway
Beaufort, SC 29906

License No. G118818

Agent for service of process: _____

(If CONTRACTOR is a corporation or a partnership, attach evidence of authority to sign.)

Designated Representative:

Name: Shawn Lather

Title: President/Owner

Address: 390 Parris Island Gateway

Beaufort SC 29906

Phone: 843-322-1978

Facsimile: _____

00505-7

DRH-000468

Dier, et al v. DRH

Lather Construction - Proposal for
Tidewater Creek (aka: Crossroads Subdivision)
1-Aug-14

Item Number	Description	Unit Price	Quantity	Units	Total
1	Layout and Mobilization	\$ 42,500.00	1	LS	\$ 42,500.00
2	Erosion Control	\$ 47,000.00	1	LS	\$ 47,000.00
3	Construction Entrance				\$ -
4	Silt Fence				\$ -
5	Inlet Protection - Type A/Type F				\$ -
6	Hydro Seeding				\$ -
7	Tree Protection				\$ -
	Grading / Excavation / Pond				\$ -
8	Cuts (Pond)	\$ 3.00	15649	LF	\$ 46,947.00
9	Excess Stock Pile on Site	\$ 3.25	13649	LF	\$ 44,359.25
10	Four Acres of Select Clearing	\$ 39,000.00	1	LS	\$ 39,000.00
11	Fine Grade / Compacted	\$ 3.75	14925	LF	\$ 55,968.75
	Roadway	\$ 100,000.00	1	LS	\$ 100,000.00
12	Stripping / Stockpile				\$ -
13	Grading and Stripping				\$ -
14	Curb / Gutter				\$ -
	Aggregate Base for Roadway				\$ -
15	Rock	\$ 23.75	3554	LF	\$ 84,400.13
	SC DOT - Right of Way				\$ -
16	Type 1 Asphalt	\$ 9,280.50	1	LF	\$ 9,280.50
	Roadway Asphalt				\$ -
17	Type 1 Asphalt	\$ 38,248.50	1	LS	\$ 38,248.50
	Water Distribution System				\$ -
18	Connect to Existing Water Main (Cut in Tree)	\$ 2,742.30	1	LS	\$ 2,742.30
19	8" PVC Water Main	\$ 14.38	1838	LF	\$ 26,430.44
20	8" Dip Water Main	\$ 27.07	160	LF	\$ 4,331.20
21	Jack and Bore 16" Steel Casing	\$ 249.66	28	EA	\$ 6,990.48
22	Fire Hydrant Assembly	\$ 3,682.22	5	EA	\$ 18,411.10
23	8" Gate Valve and Box	\$ 1,638.11	4	EA	\$ 6,552.44
24	8" x 8" Tee	\$ 629.31	2	EA	\$ 1,258.62
25	8" 90 Bend	\$ 503.54	1	EA	\$ 503.54
26	8" Cap	\$ 388.65	2	EA	\$ 777.30
27	1" Service Connection	\$ 408.17	23	EA	\$ 9,387.91
28	1" HDPE Service Lateral	\$ 3.71	544	LF	\$ 2,018.24
	Sewer				\$ -
29	Pump Station	\$ 142,494.87	1	EA	\$ 142,494.87
30	8" PVC Sanitary Sewer 14-16	\$ 31.89	56	EA	\$ 1,785.84
31	8" PVC Sanitary Sewer 12-14	\$ 29.18	194	EA	\$ 5,657.04
32	8" PVC Sanitary Sewer 10-12	\$ 27.11	529	EA	\$ 14,341.19
33	8" PVC Sanitary Sewer 8-10	\$ 25.52	443	EA	\$ 11,305.36
34	8" PVC Sanitary Sewer 6-8	\$ 24.24	141	EA	\$ 3,417.84
35	8" PVC Sanitary Sewer	\$ 22.33	48	EA	\$ 1,071.84
36	Standard Manhole Line 12-14	\$ 16,915.80	1	EA	\$ 16,915.80

37	Standard Manhole 12-14	\$ 1,317.07	3	EA	\$ 3,951.20
38	Standard Manhole 10-12	\$ 2,090.00	5	EA	\$ 10,449.99
39	Standard Manhole 8-10	\$ 15,572.85	1	EA	\$ 15,572.85
40	Control Manhole 8-10	\$ 7,376.60	1	EA	\$ 7,376.60
41	Connect to and Coat Existing Manhole	\$ 4,818.00	1	EA	\$ 4,818.00
42	4" PVC Force Main	\$ 7.39	3395	LF	\$ 25,089.05
43	Air Release Valve in Manhole	\$ 3,855.50	2	EA	\$ 7,711.00
44	Directional Drill 4" FPVC Force Main	\$ 28.60	650	EA	\$ 18,590.00
45	Directional Drill 8" FPVC Casing w/ 4" Carrier Pipe	\$ 133.05	35	EA	\$ 4,656.75
46	4" 45 Bend	\$ 492.57	3	EA	\$ 1,477.71
47	4" 90 Bend	\$ 503.92	3	EA	\$ 1,511.76
48	Double Sewer Services	\$ 485.19	9	EA	\$ 4,366.71
49	Single Sewer Services	\$ 335.24	8	EA	\$ 2,681.92
50	6" PVC Sewer Service Lateral	\$ 9.86	237	EA	\$ 2,336.82
51	4" PVC Sewer Service Lateral	\$ 8.68	330	EA	\$ 2,864.40
	Storm				\$ -
52	15" RCP Road Crossings	\$ 25.12	100	EA	\$ 2,512.00
53	15" HDPE	\$ 17.73	268	EA	\$ 4,752.08
54	18" RCP Road Crossings	\$ 30.25	52	EA	\$ 1,573.00
55	18" HDPE	\$ 19.39	1032	EA	\$ 20,010.48
56	24" RCP Road Crossings	\$ 39.04	47	EA	\$ 1,834.88
57	24" HDPE	\$ 27.24	1006	EA	\$ 27,403.44
58	Grade Inlet	\$ 2,672.27	3	EA	\$ 8,016.81
59	Junction Box	\$ 3,456.35	4	EA	\$ 13,825.40
60	Gurb Inlet	\$ 2,713.67	10	EA	\$ 27,136.70
61	Outfall Structure	\$ 3,086.60	1	EA	\$ 3,086.60
62	4" Subgrade Drain	\$ 6.72	1000	EA	\$ 6,720.00
Total =					\$ 1,014,423.63

NOTICE TO PROCEED

Dated: August 4, 2014

TO:

Lather Construction

ADDRESS:

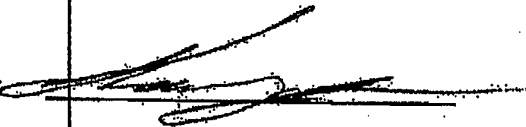
390 Parris Island Gateway
Beaufort SC 29901

CONTRACT:

Tidewater Creek

You are notified that the Contract Times under the above contract will commence to run on 1 August 2014. By that date, you are to start performing your obligations under the Contract Documents. In accordance with Article 4 of the Agreement the date of Substantial Completion is Jan 31 2015 and the date of readiness for final payment is Feb 28 2015.

Before you may start any Work at the Site, paragraph 2.05.C of the General Conditions provides that you and Owner must each deliver to the other (with copies to Carolina Engineering Consultants, PO Box 294, Beaufort, SC 29901 and other identified additional insureds) certificates of insurance, which is required to purchase and maintain in accordance with the Contract Documents.

By: 

TIDEWATER CREEK - PHASE 1



Lather Construction
 390 Parris Island Gateway
 Beaufort, SC 29906
 Phone/ Fax: (843) 322-1978
 Email: office@latherconstruction.com

Date: August 18, 2014
 Proposal: 0001-0026
 Pages: 3

GENERAL CONTRACTOR	JOB: TIDEWATER CREEK- PHASE 1
D.R. Horton, Inc. Hilton Head/Savannah Coastal Carolina Division 209 Argo Circle Okatie, SC 29909 843-473-5200 (c)	LOCATION: LADY'S ISLAND, SOUTH CAROLINA

Quantity	Item#	Description	U/M	Unit Price	CY Total	Total Price
1		Layout & Mobilization		\$ 42,500.00		\$ 42,500.00
TOTAL:						\$ 42,500.00
1		Rock Turn Around		\$ 5,000.00		\$ 5,000.00
TOTAL:						\$ 5,000.00
Erosion Control						
		Construction Entrance	EA			
		Silt Fence	LS			
		Inlet Protection- Type A / Type F	LS			
		Hydro Seeding	LS			
		Tree Protection	LS			
TOTAL:						\$ 47,000.00
Storm						
268		15" HDPE	LF	\$ 17.06		\$ 4,572.08
100		15" RCP Road Crossings	LF	\$ 25.12		\$ 2,512.00
1032		18" HDPE	LF	\$ 19.39		\$ 20,010.48
52		18" RCP Road Crossings	LF	\$ 30.25		\$ 1,573.00
1006		24" HDPE	LF	\$ 27.24		\$ 27,403.44
47		24" RCP Road Crossings	LF	\$ 39.04		\$ 1,834.88
3		GRATE INLET	EA	\$ 2,672.27		\$ 8,016.81
10		CURB INLET	EA	\$ 2,731.67		\$ 27,316.70
4		JUNCTION BOX	EA	\$ 3,456.35		\$ 13,825.40
1		OUTFALL STRUCTURE	EA	\$ 3,086.60		\$ 3,086.60
1000		4" SUBGRADE DRAIN	LF	\$ 6.72		\$ 6,720.00
TOTAL:						\$ 116,871.39
Sanitary Sewer System						
48		8" PVC SEWER (0-6)	LF	\$ 22.33		\$ 1,071.84
141		8" PVC SEWER (6-8)	LF	\$ 24.24		\$ 3,417.84
443		8" PVC SEWER (8-10)	LF	\$ 25.52		\$ 11,305.36
529		8" PVC SEWER (10-12)	LF	\$ 27.11		\$ 14,341.19
194		8" PVC SEWER (12-14)	EA	\$ 29.16		\$ 5,657.04
56		8" PVC SEWER (14-16)	EA	\$ 31.89		\$ 1,785.84
5		4' MANHOLE (8-10)	EA	\$ 3,114.57		\$ 15,572.85
3		4' MANHOLE (10-12)	EA	\$ 3,483.33		\$ 10,449.99
1		4' MANHOLE (12-14)	EA	\$ 3,951.20		\$ 3,951.20
2		4' MANHOLE (12-14) LINED	EA	\$ 8,457.90		\$ 16,915.80
1		CONTROL MANHOLE (8-10)	EA	\$ 7,376.60		\$ 7,376.60

We appreciate the opportunity to work with you!

DRH-000472
 Drier, et al v. DRH

TIDEWATER CREEK - PHASE 1

1	CONNECT TO AND COAT EXISTING	EA	\$ 4,818.00	\$ 4,818.00
9	DOUBLE SEWER SERVICES	EA	\$ 485.19	\$ 4,366.71
8	SINGLE SEWER SERVICES	EA	\$ 335.24	\$ 2,681.92
330	4" PVC SERVICE LATERAL	LF	\$ 8.68	\$ 2,864.40
237	6" PVC SERVICE LATERAL	LF	\$ 9.86	\$ 2,336.82
1	PUMP STATION	EA	\$ 140,562.17	\$ 140,562.17
3395	4" PVC FORCE MAIN	LF	\$ 7.39	\$ 25,089.05
650	DIRECT DRILL 4" FORCE MAIN	LF	\$ 28.60	\$ 18,590.00
35	DIRECT DRILL 8" CASING W/ 4" FM	EA	\$ 133.05	\$ 4,656.75
3	4" 45 BEND	EA	\$ 492.57	\$ 1,477.71
3	4" 90 BEND	EA	\$ 503.92	\$ 1,511.76
2	ARV MANHOLE	EA	\$ 3,855.50	\$ 7,711.00
1	CORE DRILL & BOOT EXIST MANHOLE	EA	\$ 1,932.70	\$ 1,932.70
			TOTAL:	\$ 310,444.54
Water Distribution System				
1	CONNECT TO EXISTING WL	EA	\$ 2,742.30	\$ 2,742.30
28	JACK & BORE 16" CASING	EA	\$ 249.66	\$ 6,990.48
1838	8" PVC WL	EA	\$ 14.38	\$ 26,430.44
160	8" DIP WL	EA	\$ 27.07	\$ 4,331.20
5	FIRE HYDRANT ASSEMBLY	EA	\$ 3,682.22	\$ 18,411.10
4	8" GATE VALVE & BOX	EA	\$ 1,638.11	\$ 6,552.44
2	8" X 8" TEE	EA	\$ 629.31	\$ 1,258.62
1	8" MJ 90 BEND	EA	\$ 503.54	\$ 503.54
2	8" CAP	EA	\$ 388.65	\$ 777.30
23	8"X1" SERVICE CONNECTIONS	EA	\$ 408.17	\$ 9,387.91
544	1" PE SERVICE LATERAL	EA	\$ 3.71	\$ 2,018.24
			TOTAL:	\$ 79,403.57
Grading / Excavation / Pond				
15649	Cuts (Pond)	CY	\$ 3.00	\$ 46,947.00
13649	Excess- Stock Pile on Site	CY	\$ 3.25	\$ 44,359.25
1	Four Acres of Select Clearing	LS	\$ 39,000.00	\$ 39,000.00
14925	Fine Grade / Compacted	CY	\$ 3.75	\$ 55,968.75
			TOTAL:	\$ 186,275.00
Roadway				
1	Roadway Earthwork	LS	\$ 54,612.50	\$ 54,612.50
3631	Curb / Gutter	LF	\$ 12.50	\$ 45,387.50
			TOTAL:	\$ 100,000.00
SC DOT- Right of Way				
138	Type 1 Asphalt	TON	\$ 32.25	\$ 4,450.50
138	Type 2 Asphalt	TON	\$ 35.00	\$ 4,830.00
			TOTAL:	\$ 9,280.50
Roadway Asphalt				
1	Type 1 Asphalt (\$32.25/ton)	LS	\$ 53,000.00	\$ 53,000.00
			TOTAL:	\$ 53,000.00
Aggregate Base for Roadway				
1	Rock (\$47.50/ton)	LS	\$ 84,400.13	\$ 84,400.13
			TOTAL:	\$ 84,400.13
Striping and Signage				
1		LS	\$ 5,500.00	\$ 5,500.00
			TOTAL:	\$ 5,500.00

COMBINED JOB TOTAL: \$ 1,039,675.13**We appreciate the opportunity to work with you!**DRH-000473
Drier, et al v. DRH

TIDEWATER CREEK - PHASE 1

NOTES

** Sidewalks by others*

** House pads not scheduled*

** Fence and gate for pump station by others*

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DRH-000474
Drier, et al v. DRH

TIDEWATER CREEK - PHASE 1

POND @ LADY LAKE / CROSSROADS Per Lot Breakdown of CY

Lot #	Existing	Proposed	Raise	CY
1	14	17.3	3.3	427
2	16	17.3	1.3	168
3	17	17.3	0.3	38
4	15	17.3	2.3	298
5	14	16.3	2.3	298
6	13	17.3	4.3	557
7	14	17.3	3.3	427
8	17	17.3	0.3	38
9	17	16.3	-70	-90
10	15.5	17.3	1.8	233
11	9	15.3	6.33	820
12	16	15.3	0.7	-90
13	16	15.3	0.7	-90
14	14	15.3	1.3	168
15	12	15.3	3.3	427
16	15	15.3	0.3	38
17	15	16.3	1.3	168
18	14	17.3	3.3	427
19	16	16.3	0.3	38
20	14	14.3	0.3	38
21	14	17.3	3.3	427
22	13	17.3	4.3	557
23	12	17.3	5.3	687
24	13	16.3	3.3	427
25	16	16.3	0.3	38
26	14	15.3	1.3	168
27	14	14.3	0.3	38
28	16	15.3	-0.7	-0.91
29	17	17	0	0
30	17	17	0	0
31	16	16	0	0
32	14	17.3	3	388
33	13	16.3	3.3	427
34	12	15.3	3.3	427
35	17	17	0	0
36	16	16	0	0
37	14	15.3	1.3	168
38	14	16.3	2.3	298
39	15	15.3	0.3	38
40	15	15.3	0.3	38
41	12	15.3	3.3	427
42	11	16.3	5.3	687
43	11	16.5	5.5	712
44	13	17.3	4.3	557
45	13	17.3	4.3	557
46	14	17.3	3.3	427
47	14	16.3	2.3	298
48	11	15.8	4.8	622
49	11	15.3	4.3	557
50	13	15.3	2.3	298
51	13	15.3	2.3	298
52	14	15.3	1.3	168
53	12	15.3	3.3	427

NOTES

* Pond has 15,649 CY

* 1,999 CY needed to fill in pond corner

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We appreciate the opportunity to work with you!

DRH-000475
Drier, et al v. DRH

TIDEWATER CREEK - PHASE 1

- * 1,364 CY needed to fill in road from pond
- * Total of 12,386 CY is needed

2,539.09 needed for house pads: w/out optional
existing pit to the right of the pond.

54	12	15.3	3.3	427
TOTAL	Existing Pit	Proposed	Raise	C/Y
5759.5	874.4	48.13	14,925.09	
Optional: Existing Pit 130x95 to the right of pond				
7	15.8	8.8	4,180	

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We appreciate the opportunity to work with you! DRH-000476
DRH, et al v. DRH

TIDEWATER CREEK - PHASE 2



Lather Construction
 390 Parris Island Gateway
 Beaufort, SC 29906
 Phone/ Fax: (843) 322-1978
 Email: office@latherconstruction.com

Date: June 6, 2014
 Proposal: 0001-0026
 Pages: 3

GENERAL CONTRACTOR	JOB: TIDEWATER CREEK- PHASE 2
D.R. Horton, Inc. Hilton Head/Savannah Coastal Carolina Division 209 Argo Circle Okatie, SC 29909 843-473-5200 (c)	LOCATION: LADY'S ISLAND, SOUTH CAROLINA

Quantity	Item#	Description	U/M		CY Total	Total Price
1		Remobilization		\$ 5,000.00		\$ 5,000.00
TOTAL:						\$ 5,000.00
Storm						
64		15" HDPE	LF	\$ 17.06		\$ 1,091.84
129		15" RCP Road Crossings	LF	\$ 25.12		\$ 3,240.48
340		18" HDPE	LF	\$ 19.39		\$ 6,592.60
31		18" RCP Road Crossings	LF	\$ 30.25		\$ 937.75
330		24" HDPE	LF	\$ 27.24		\$ 8,989.20
60		24" RCP Road Crossings	LF	\$ 39.04		\$ 2,342.40
8		CURB INLET	EA	\$ 2,731.67		\$ 21,853.36
2		JUNCTION BOX	EA	\$ 3,456.35		\$ 6,912.70
800		4" SUBGRADE DRAIN	LF	\$ 6.72		\$ 5,376.00
TOTAL:						\$ 57,336.33
Sanitary Sewer System						
377		8" PVC SEWER (0-6)	LF	\$ 22.33		\$ 8,418.41
710		8" PVC SEWER (6-8)	LF	\$ 24.24		\$ 17,210.40
346		8" PVC SEWER (8-10)	LF	\$ 25.52		\$ 8,829.92
132		8" PVC SEWER (10-12)	LF	\$ 27.11		\$ 3,578.52
1		4' MANHOLE (0-6)	EA	\$ 2,585.49		\$ 2,585.49
6		4' MANHOLE (6-8)	EA	\$ 2,795.10		\$ 16,770.60
1		4' MANHOLE (8-10)	EA	\$ 3,114.57		\$ 3,114.57
1		4' MANHOLE (10-12)	EA	\$ 3,483.33		\$ 3,483.33
13		DOUBLE SEWER SERVICES	EA	\$ 493.91		\$ 6,420.83
2		SINGLE SEWER SERVICES	EA	\$ 352.55		\$ 705.10
169		4" PVC SERVICE LATERAL	LF	\$ 8.68		\$ 1,466.92
375		6" PVC SERVICE LATERAL	LF	\$ 9.86		\$ 3,697.50
TOTAL:						\$ 76,281.59
Water Distribution System						
1		CONNECT TO EXISTING WL	EA	\$ 1,755.60		\$ 1,755.60
1685		8" PVC WL	EA	\$ 14.38		\$ 24,230.30
100		8" DIP WL	EA	\$ 27.07		\$ 2,707.00
3		FIRE HYDRANT ASSEMBLY	EA	\$ 3,682.22		\$ 11,046.66
3		8" GATE VALVE & BOX	EA	\$ 1,638.11		\$ 4,914.33
2		8" X 8" TEE	EA	\$ 629.31		\$ 1,258.62
1		8" CAP	EA	\$ 388.65		\$ 388.65
30		8"X1" SERVICE CONNECTIONS	EA	\$ 408.17		\$ 12,245.10
918		1" PE SERVICE LATERAL	EA	\$ 3.71		\$ 3,405.78
TOTAL:						\$ 61,952.04

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We appreciate the opportunity to work with you!

DRH-000477

Drier, et al v. DRH

TIDEWATER CREEK - PHASE 2

1 3820	Roadway				
	Roadway Earthwork	LS	\$ 21,050.25	\$	21,050.25
	Curb / Gutter	LF	\$ 12.50	\$	47,750.00
				TOTAL: \$	68,800.25
1	Roadway Asphalt				
	Type 1 Asphalt (\$32.25/ton)	LS	\$ 47,000.00	\$	47,000.00
				TOTAL: \$	47,000.00
1	Aggregate Base for Roadway				
	Rock (\$47.50 per ton)	LS	\$ 84,400.13	\$	84,400.13
				TOTAL: \$	84,400.13
1	Striping and Signage	LS	\$ 5,500.00	\$	5,500.00
				TOTAL: \$	5,500.00

COMBINED JOB TOTAL: \$ 406,270.34

\$ 1,445,945.47

NOTES

* Sidewalks by others

* House pads not scheduled

* Fence and gate for pump station by others

POND @ LADY LAKE / CROSSROADS Per Lot Breakdown of CY

Lot #	Existing	Proposed	Raise	C/Y
1	14	17.3	3.3	427
2	16	17.3	1.3	168
3	17	17.3	0.3	38
4	15	17.3	2.3	298
5	14	16.3	2.3	298
6	13	17.3	4.3	557
7	14	17.3	3.3	427
8	17	17.3	0.3	38
9	17	16.3	-70	-90
10	15.5	17.3	1.8	233
11	9	15.3	6.33	820
12	16	15.3	0.7	-90
13	16	15.3	0.7	-90
14	14	15.3	1.3	168
15	12	15.3	3.3	427
16	15	15.3	0.3	38
17	15	16.3	1.3	168
18	14	17.3	3.3	427
19	16	16.3	0.3	38
20	14	14.3	0.3	38
21	14	17.3	3.3	427
22	13	17.3	4.3	557
23	12	17.3	5.3	687
24	13	16.3	3.3	427
25	16	16.3	0.3	38
26	14	15.3	1.3	168
27	14	14.3	0.3	38
28	16	15.3	-0.7	-90.1
29	17	17	0	0
30	17	17	0	0
31	16	16	0	0
32	14	17.3	3	388
33	13	16.3	3.3	427

DRH-000478

We appreciate the opportunity to work with you!

Drier, et al v. DRH

TIDEWATER CREEK - PHASE 2

34	12	15.3	3.3	427
35	17	17	0	0
36	16	16	0	0
37	14	15.3	1.3	168
38	14	16.3	2.3	298
39	16	15.3	0.3	38
40	15	15.3	0.3	38
41	12	15.3	3.3	427
42	11	16.3	5.3	687
43	11	16.5	5.5	712
44	13	17.3	4.3	557
45	13	17.3	4.3	557
46	14	17.3	3.3	427
47	14	16.3	2.3	298
48	11	15.8	4.8	622
49	11	15.3	4.3	557
50	13	15.3	2.3	298
51	13	15.3	2.3	298
52	14	15.3	1.3	168
53	12	15.3	3.3	427
54	12	15.3	3.3	427
TOTAL	Existing Plt	Proposed	Raise	C/Y
	759.5	874.4	48.13	14,925.09
Optional: Existing Plt 130x95 to the right of pond				
7	15.8	8.8		4,180

NOTES

- * Pond has 15,649 CY
- * 1,999 CY needed to fill in pond corner
- * 1,364 CY needed to fill in road from pond
- * Total of 12,386 CY is needed

2,539.09 needed for house pads: w/out optional existing plt to the right of the pond.



Exhibit B

SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR igther Construction ("Contractor")
Sole Proprietorship ☐ Partnership ☐ Corporation ☒ LLC ☐ Other (ATTACH W-9)
Social Security No. or Tax ID No.: 46-4003042
Name of Owner(s)/Officer(s): Shawn Lathur
Division Name: Central Carolina Area Name: Hilton Head/SEA Assigned Vendor No.: 1100967
Address for All Notices: 1 East River Dr
City: Beaufort State: SC Zip Code: 29907
Telephone: (F) 252-3667 Fax: () _____ E-Mail Address: shawn.lathur@igtherconstruction.com
Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
This agreement (the "Agreement") is entered into on this 2nd day of December, 2013, between DR Horton, Inc ("Owner") and Contractor.

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

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

3. CONTRACT PRICE.

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

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

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

4. PAYMENT.

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

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 29-6-30 AND 29-6-50 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR AGREES THAT OWNER DOES, AND WILL, NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

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

Executed this 2nd day of December, 2013.

Owner: RON BUNNEL
By: Assistant Vice-President
Title: Assistant Vice-President

Contractor: Shawn Lathur
By: Shawn Lathur
Name: Shawn Lathur
Title: Owner

INITIALS: OWNER RLB CONTRACTOR SL

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

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

5. SCHEDULE OF WORK.

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

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

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

6. PERFORMANCE OF THE WORK.

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

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

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

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

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

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

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

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

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

INITIALS: OWNER WV CONTRACTOR [Signature]

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

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

7. SAFETY.

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

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

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

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

8. CONTRACTOR'S WARRANTIES.

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

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

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

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

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

INITIALS: OWNER WJ CONTRACTOR WJ

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

9. LIENS AND RETAINAGE.

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

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

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

10. CONTRACTOR'S INDEMNITY.

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

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

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

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

11. INSURANCE.

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

INITIALS: OWNER WJ CONTRACTOR [Signature]

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

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

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

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

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

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

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

12. REMEDIES.

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

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

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

INITIALS: OWNER LM CONTRACTOR LM

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

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

13. ALTERNATIVE DISPUTE RESOLUTION.

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

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

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

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

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

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

14. TERMINATION.

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

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

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

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

16. GENERAL CONTRACT PROVISIONS.

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

INITIALS: OWNER CONTRACTOR

law, the Master National Independent Contractor Agreement shall control.

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

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

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

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

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

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

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

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

SOUTH CAROLINA VERSION (REV. 12 APRIL 2013)

INITIALS: OWNER MM, CONTRACTOR MM



Exhibit "A" Part I-General Scope Of Work

General & Miscellaneous

- Mobilization
- Layout and staking
- Build construction entrance
- Asbuilts
- Installation of stop and street signs
- Installation of conduit

Clearing and Demolition

- Clear and grub site

Drainage

- Installation of RCP
- Insulation of HDPE
- Install catch basins, curb inlets, and junction boxes

Erosion Control

- Tree protection
- Temporary gravel
- Silt fence
- Seeding and sod
- Rip-rap sediment basin

Earthwork

- Strip/respreads topsoil
- Off-site fill
- Demucking and backfill
- Rough grade

Initials: Owner: 

Contractor: 

Grading

- Fine grade for curb and base
- Fine grade shoulders and easements

Asphalt Paving & Pavement Marking

- Asphalt surface and binder

Concrete

- Concrete curb
- Installation of handicap ramps

Utilities

- Utility layout and record drawings

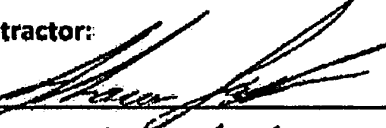
Sanitary Sewer

- Installation of sewer
- Pump stations

Water Distribution

- Installation of water

Owner:
By: 
Name: Ron Bunner
Title: Assistant Vice-President
Date: 12/21/13

Contractor:
By: 
Name: Shawn Lecher
Title: Owner
Date: 11-26-13

Initials: Owner: 

Contractor: 

Page 1 1 IN THE COURT OF COMMON PLEAS 2 FOR THE STATE OF SOUTH CAROLINA 3 BEAUFORT COUNTY 4 DEPOSITION OF RONALD BUNNER 5 30(B)(6) D.R. HORTON, INC. 6 RICHARD W. AND REBECCA A. DREIER; YOLANDA J. 7 DRIER; JACOB R. AND CARLA EMERSON; JOHN B. AND 8 LORI ANNE GECY; AARON M. AND STASHA R. 9 GROOMS; ADAM F. GROOMS; AVARAE HALL; 10 MICHAEL B. AND CHEYENNE M. JOHNSON; KENNY 11 MANUEL LOPEZ AND KELSEY TRUDEL LOPEZ; DYLAN 12 C. AND SAMANTHA DAWN MACHADA; MARVIN K. AND 13 MARYALICE MAMARIL; CORY M. MCDANIEL; 14 THOMAS R. AND MELISSA S. MCFEELY; MICHAEL 15 AND KAREN M. RODRIGUEZ; SARMED AND JESSICA 16 M. SHAFI; JAMES J. SMITH, III, AND ALAYSHIA 17 SMITH; AND NICOLE J. VERSTEGEN, 18 Plaintiffs, 19 vs. CASE NO. 2018-CP-07-00911 20 ADVANCED FLOORING & DESIGN DIVISION OF ISI, 21 LLC f/k/a ADVANCED FLOORING AND DESIGN, LLC; 22 ARMOR BUILDING SOLUTIONS, LLC; ATLAS 23 SURVEYING BFT, LLC f/k/a ATLAS SURVEYING 24 HOLDING COMPANY, LLC; ATLAS SURVEYING, INC.; 25 BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC; CROSSROADS ENTERPRISES, LLC; D.R. HORTON, INC.; DEAN CUSTOM AIR, LLC; EAST COAST CONSTRUCTION CLEANUP CORP. f/k/a CLEANUP CO., INC.; FREEDOM HOMES, INC. f/k/a ARMOR BUILDING SOLUTIONS, INC.; HUTTON'S LANDSCAPES, INC.; JENKINS PLUMBING COMPANY, LC; LATHER CONSTRUCTION SC, INC.; LATHER CONSTRUCTION, INC.; MASCO CABINETRY, LLC; PROBUILD EAST, LLC; PROFESSIONAL DRYWALL & PAINT SERVICES, LLC; PROFESSIONAL EXTERIORS II, LLC; QUALITY ELECTRIC OF THE COASTAL CAROLINAS INCORPORATED; STIER SUPPLY COMPANY f/k/a STIER-HOLMAN SUPPLY CO.; SUPERIOR ASSOCIATION SERVICES, LLC; and VALIM CONSTRUCTION, LLC, Defendants.	Page 2 1 DEPONENT: RONALD BUNNER 2 DATE: SEPTEMBER 23, 2021 3 TIME: 10:05 AM 4 LOCATION: VIA REMOTE VIDEOCONFERENCE 5 REPORTED BY: DARAH BOLEN, RPR, CSR(IA) 6 CLARK BOLEN 7 CHARLESTON, SC 29415 8 843-762-6294 9 WWW.CLARK-ASSOCIATES.COM 10 Darah@clark-associates.com
Page 3 1 APPEARANCES 2 ON BEHALF OF PLAINTIFFS: 3 BEN TRAYWICK LAW FIRM, LLC 4 BY: BENJAMIN A.C. TRAYWICK 5 BY: ALEXANDRA SCOTT WILLIAMS 6 171 Church Street, Suite 340 7 Charleston, SC 29401 8 ON BEHALF OF LATHER CONSTRUCTION, INCORPORATED, 9 AND LATHER CONSTRUCTION, SOUTH CAROLINA, 10 INCORPORATED, and QUALITY ELECTRIC OF THE COASTAL 11 CAROLINAS INCORPORATED: 12 ROSS & CRISTALDI 13 BY: SCOTT WINOGRAD 14 863 Coleman Boulevard 15 Suite B 16 Mount Pleasant, SC 29464 17 ON BEHALF OF D.R. HORTON, INC.: 18 OGLETREE DEAKINS 19 BY: MICHAEL NAIL 20 BY: KIRSTEN PETERSON 21 300 North Main Street 22 Greenville, SC 29601 23 ON BEHALF OF PROFESSIONAL EXTERIORS II, LLC: 24 CARLOCK COPELAND & STAIR, LLP 25 BY: CAROLINE RINEHART NILAND 40 Calhoun Street, Suite 400 Charleston, SC 29401 ON BEHALF OF DEAN CUSTOM AIR, LLC and ARCHER EXTERIORS, INC.: RICHARDSON, PLOWDEN & ROBINSON, PA BY: HEYWARD GRIMBALL 235 Magrath Darby Boulevard Suite 100 Mount Pleasant, SC 29464	Page 4 1 ON BEHALF OF EAST COAST CONSTRUCTION CLEANUP 2 CORP.: 3 CLAWSON & STAUBES LAW FIRM 4 BY: MICHAEL L. LEECH 5 126 Seven Farms Drive, Suite 200 6 Charleston, SC 29492 7 ON BEHALF OF PROBUILD EAST, LLC, and BUILDERS 8 FIRSTSOURCE SOUTHEAST GROUP, LLC: 9 HOWELL GIBSON & HUGHES, P.A. 10 BY: WILLIAM H. COX, III 11 BY: DAVID S. BLACK 12 P.O. Box 40 13 Beaufort, SC 29901 14 ON BEHALF OF HUTTON'S LANDSCAPES, INC.: 15 RICHARDSON, PLOWDEN & ROBINSON, PA 16 BY: EMILY GIFFORD LUCEY 17 235 Magrath Darby Boulevard 18 Suite 100 19 Mount Pleasant, SC 29464 20 ON BEHALF OF PROFESSIONAL DRYWALL & PAINT 21 SERVICES, LLC: 22 MURPHY & GRANTLAND, P.A. 23 BY: JOHN DOUGLAS ELLIOTT 24 Post Office Box 6648 25 Columbia, SC 29260 - and - HAYNSWORTH SINKLER BOYD BY: CLARKE W. DuBOSE P.O. Box 11889 Columbia, SC 29211-1889 ON BEHALF OF BLUE MESA CONSTRUCTION: GRIFFITH, FREEMAN & LIIPFERT, LLC BY: MICHAEL D. FREEMAN 600 Monson Street Beaufort, SC 29902

Page 5

1 ON BEHALF OF ARMOR BUILDING SOLUTIONS, LLC:

2 LUZURIAGA MIMS, LLP
3 BY: TIM DARGAN
4 50 Immigration Street, Suite 200
Charleston, SC 29403

5 ON BEHALF OF CROSSROADS ENTERPRISES, LLC:

6 HARVEY & BATTEY
7 BY: AUSTIN BLAKE
8 1001 Craven Street
Beaufort, SC 29901

9 ON BEHALF OF VALIM CONSTRUCTION, LLC:

10 TUPPER, GRIMSLEY, DEAN & CANADAY
11 BY: STACEY CANADAY
12 Post Office Box 2055
13 611 Bay Street
Beaufort, SC 29901-2055

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1 Exhibit No. 13 E-mail, 10-20-14, from 184
Lather construction to
2 Jared O'Sako, DRH 013338
3 Exhibit No. 14 E-mail exchange, 10-20-14, 184
DRH 0013352
4 Exhibit No. 15 Bid analysis, 8-4-14, DRH 185
5 000426

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1 RONALD BUNNER, 30(B)(6) D.R. HORTON
2 having been first duly sworn, was examined and
3 testified as follows:

EXAMINATION

5 BY MS. LUCEY:
6 Q. Good morning, Mr. Bunner. How are you
7 this morning?
8 A. I'm well. How are you?
9 Q. I'm well. I don't believe I officially
10 introduced myself this morning. My name is Emily
11 Gifford Lucey, and I represent one of the
12 defendants in this case, Hutton's Landscape, Inc.
13 And we are here today to take the 30(b)(6)
14 deposition of D.R. Horton.
15 Before we begin, I'll cover a few ground
16 rules with you. Have you ever been deposed
17 before, sir?
18 A. Yes.
19 Q. Tell me about your prior depositions.
20 A. I don't remember what they were for.
21 Q. Can you tell me when they occurred?
22 A. It's probably been five or six years ago
23 I think was the last one I've done.
24 Q. Was it in connection with your work at
25 D.R. Horton?

Page 9

1 A. Yes.
 2 Q. Was it in South Carolina?
 3 A. Yes.
 4 Q. Was Mr. Nail or his law firm
 5 representing D.R. Horton at the time?
 6 A. In that particular one, yes. It was
 7 Ogletree.
 8 Q. Do you remember the name of the
 9 plaintiff's lawyer?
 10 A. I do not.
 11 Q. Was it a single home or a series of
 12 homes that your deposition involved?
 13 A. That was a single home.
 14 Q. Where was the home located?
 15 A. I don't remember. It was somewhere in
 16 the Charleston Tri-County area.
 17 Q. Well, I will review some of the rules
 18 under our Rules of Civil Procedure, one, because
 19 it's helpful to you and, two, because I'm
 20 required do so.
 21 First, is there any reason that you are
 22 unable to testify truthfully and accurately
 23 today?
 24 A. No.
 25 Q. Are you feeling good? You're not under

Page 11

1 question or the question being asked. And unless
 2 you are specifically instructed not to answer by
 3 Horton's attorney, you must answer. Do you
 4 understand that?
 5 A. I do.
 6 Q. Do you understand that you're under oath
 7 today, sir?
 8 A. Yes.
 9 Q. And it is the same oath you would take
 10 as if you were sitting in a courtroom?
 11 A. Yes.
 12 Q. If you answer my questions, I'm going to
 13 assume that you understood them; is that fair?
 14 A. Yes.
 15 Q. If you don't understand a question,
 16 please ask me or the attorney presenting the
 17 question to rephrase it or restate it in another
 18 way. Fair enough?
 19 A. Fair enough.
 20 Q. I like to take a break every hour or
 21 every hour and 10 minutes or so just for a
 22 comfort break. However, if you need a break at
 23 any point, please let me know. I would only
 24 request that you answer your -- the question that
 25 is on the table before we take a break. Fair

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1 the influence of any medication, alcohol, drugs,
 2 et cetera?
 3 A. I'm feeling good. I'm not under the
 4 influence of any medications, alcohol, or
 5 et cetera -- drugs or et cetera.
 6 Q. Except maybe some caffeine. I'm
 7 certainly under the influence of some caffeine
 8 this morning.
 9 Again, as I said, we're here to take
 10 your deposition today. We have a court reporter
 11 who is taking down everything that we say, so I
 12 would ask that you provide me with the courtesy
 13 of allowing me to finish my questions and I will
 14 offer you the same courtesy in allowing you to
 15 finish your answer.
 16 Additionally, it may be helpful because
 17 we are conducting this deposition by Zoom to
 18 pause a beat before answering, and I will try to
 19 do the same thing in case we have any kind of
 20 technical issues.
 21 During the deposition today, you may
 22 hear D.R. Horton's attorney or other attorneys
 23 participating say, I object to the form or object
 24 to the form of the question. They are preserving
 25 their objections to the question -- to my

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1 enough?
 2 A. Sure. Fair.
 3 Q. Would you please state your full name
 4 for the record, sir?
 5 A. Ronald Keith Bunner.
 6 Q. And what is your role -- first of all,
 7 are you comfortable if I refer to D.R. Horton
 8 only as Horton?
 9 A. That's fine.
 10 Q. Okay. Can you tell me your current role
 11 at Horton, Mr. Bunner?
 12 A. I am -- my local title is division vice
 13 president of operations.
 14 Q. Do you have a national title as opposed
 15 to a local title?
 16 A. I do have a title that's associated with
 17 signing rights issued by the board of directors,
 18 and that would be an assistant vice president for
 19 the corporation.
 20 Q. You mentioned your local title is
 21 division vice president. What division -- for
 22 what division are you vice president?
 23 A. At this point in time, Charleston.
 24 Q. What does that division include
 25 geographically?

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1 A. The Charleston Tri-County area.
 2 Q. Okay. Does it include Beaufort then?
 3 A. I do have -- Charleston does not include
 4 Beaufort, but the Beaufort area is somewhat under
 5 my responsibilities.
 6 Q. Is it under the responsibilities of
 7 anyone else in addition to yourself?
 8 A. Yes.
 9 Q. And who is that?
 10 A. Anybody that is actually working in the
 11 Hilton Head/Savannah market. It's a large number
 12 of people.
 13 Q. Is there a person within that market who
 14 you deal directly with as your -- in your role as
 15 division vice president or is there a similar
 16 division vice president in the Hilton Head area?
 17 A. No, there's not. Okay. I'm answering
 18 the second part of that question because, no --
 19 can you repeat the first part of that question?
 20 Q. Well, tell me how the Hilton
 21 Head/Beaufort area is organized in terms of
 22 corporate structure.
 23 A. Okay. There is a division president and
 24 there is a -- currently a -- I believe it's a
 25 CFO. There are -- there's a local land

Page 15

1 and/or constructed?
 2 A. Yes.
 3 Q. Who was that?
 4 A. Jared and Melissa.
 5 Q. How long has Jared been with
 6 D.R. Horton?
 7 A. This will be a rough guess. I'm
 8 thinking somewhere between 8 and 10 years maybe.
 9 Q. Has that employment with Horton been
 10 continuous?
 11 A. As far as I'm aware, it has been.
 12 Q. In preparation for your deposition
 13 today, Mr. Bunner, did you speak with Mr. O'Sako
 14 or Melissa?
 15 A. Briefly with Mr. O'Sako. Not with
 16 Melissa.
 17 Q. Was anyone with you when you spoke to
 18 Mr. O'Sako? Was anyone on the phone with you or
 19 present with you?
 20 A. Yes.
 21 Q. Who was with you?
 22 A. Michael Nail.
 23 Q. Mr. Bunner, do you personally have any
 24 relatives by blood or marriage in Beaufort
 25 County?

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1 development/land acquisitions manager, a
 2 construction manager, a sales manager, and an
 3 assistant operations -- sorry, assistant
 4 purchasing manager who reports to me.
 5 Q. Is it just the assistant purchasing
 6 manager that reports to you or do all of the
 7 positions that you just discussed report to you?
 8 A. Just the assistant purchasing manager.
 9 Q. Who is the assistant purchasing manager
 10 right now?
 11 A. Melissa Overcash.
 12 Q. Who is the sales manager?
 13 A. She's fairly new. I'd have to look that
 14 up. I can't remember her name.
 15 Q. Who is the construction manager?
 16 A. Mason Cloy.
 17 Q. Who is the land development manager?
 18 A. Jared O'Sako.
 19 Q. Who is the CFO?
 20 A. Sean Warc.
 21 Q. Who is the division president?
 22 A. Sharonda Rahming.
 23 Q. Do you know if any of the individuals we
 24 have just discussed were with Horton during the
 25 time the Tidewater neighborhood was developed

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1 A. I do not.
 2 Q. Do you hold any licenses or
 3 certifications, sir, other than a driver's
 4 license in South Carolina?
 5 A. Yes.
 6 Q. Okay. Tell me about your licenses or
 7 certifications, please, sir.
 8 A. I have a concealed weapons permit in the
 9 state of South Carolina.
 10 Q. Anything else?
 11 A. I do not believe so.
 12 Q. Do you have a contractor's license?
 13 A. No.
 14 Q. Not residential, not commercial license,
 15 sir?
 16 A. No. None.
 17 Q. Do you have any training or education in
 18 the fields of architecture or engineering?
 19 A. Yes.
 20 Q. Tell me about that.
 21 A. I have a bachelor's degree in chemical
 22 engineering.
 23 Q. From what institution did you earn that
 24 degree, sir?
 25 A. University of Mississippi.

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1 Q. What year did you earn the degree?
 2 A. 1992.
 3 Q. Are you a licensed engineer in any
 4 state?
 5 A. I am not.
 6 Q. Have you ever been a licensed engineer?
 7 A. No.
 8 Q. Tell me about your work experience
 9 following your time at University of Mississippi.
 10 A. Let's see. I began working with a
 11 small -- more renovations contractor. I did that
 12 for approximately -- I believe it's about four
 13 years or so. Then for a period, I believe just
 14 close to a year, not quite a full year, I worked
 15 as a site superintendent for a commercial
 16 construction company. Then I began the next -- I
 17 began working with D.R. Horton.
 18 Q. And your work with the renovation
 19 contractor and the site contractor, where was
 20 that?
 21 A. That was in Virginia.
 22 Q. And then when did you start working with
 23 Horton?
 24 A. In 1998.
 25 Q. And walk me through your employment

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1 About a year after that we took over
 2 management of Myrtle Beach in a similar fashion.
 3 At that point I believe my title became --
 4 somewhere right in that area I became the vice
 5 president of operations for the division, which
 6 was at that time named Coastal Carolina Division,
 7 which would be now at that time Myrtle Beach,
 8 Charleston, Hilton Head, Savannah.
 9 I performed that until roughly late 2003
 10 when I was asked to move back to Bluffton and
 11 became the city manager for Hilton Head/Savannah.
 12 I performed that task until I believe roughly
 13 July of 2008 and -- in which case I became the
 14 vice president of operations for Coastal Carolina
 15 again, which at that time I believe included
 16 Columbia along with Myrtle Beach.
 17 I have been essentially in that role
 18 ever since. You know, Wilmington had come in to
 19 part of the division, and Columbia left as part
 20 of the division.
 21 And then roughly -- I think it's about
 22 two years ago, they -- due to their size, they
 23 split to Coastal Carolina North and Coastal
 24 Carolina South, which grouped Hilton Head,
 25 Savannah, and Charleston together and Myrtle

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1 history with Horton starting in 1998.
 2 A. Okay. I was hired out of -- for lack of
 3 a better term, more of a region office to support
 4 the individual divisions in multiple states,
 5 multiple markets, as an estimator, construction
 6 estimator.
 7 And approximately a little over a year
 8 after that, I was assigned to the Hilton
 9 Head/Savannah -- at the time we didn't have any
 10 actual construction going on in Savannah, but it
 11 was mainly the Hilton Head area, Beaufort County
 12 area.
 13 And then approximately a year after
 14 that, I actually moved to Bluffton as the
 15 operations manager for that division, Hilton
 16 Head/Savannah. The -- actually, no. I was a
 17 purchasing manager.
 18 About a year after that, I became the --
 19 we took over management of the Charleston area,
 20 and I became the operations manager for
 21 Charleston and Hilton Head/Savannah.
 22 Q. When was that?
 23 A. Let me count up my years here. I
 24 believe that was -- I believe that was in early
 25 2001. Okay?

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1 Beach and Wilmington as a separate entity
 2 together. And that reduced my coverage to
 3 Charleston and Hilton Head/Savannah.
 4 Sometime -- less than a year after
 5 that -- or I think it was the following year.
 6 They somewhat split the management on the
 7 executive level of management of Hilton
 8 Head/Savannah and Charleston, but I was asked
 9 to -- due to my experience in the field of
 10 operations and purchasing, I was asked to oversee
 11 the purchasing staff in Hilton Head/Savannah,
 12 which I continue to this day.
 13 Q. What are your duties and obligations as
 14 the vice president of operations or the division
 15 vice president of the current division that
 16 you're in?
 17 A. I'm in charge of all aspects of
 18 purchasing, all aspects of product development,
 19 design. I maintain our specifications. I
 20 maintain the scopes of work. I oversee the
 21 home's starts process.
 22 Q. I'm sorry. The what?
 23 A. The home permitting and starts process
 24 where you permit and to start the actual
 25 construction of a home, issuing the budgets,

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1 maintaining those budgets throughout the process.

2 I also coordinate between other
3 departments, any information pertinent between
4 the departments that each one would need to be
5 able to perform their duties.

6 I am trying not to leave anything out.
7 I coordinate the house construction engineering
8 by outsource to professional engineers. That's
9 just a coordination effort to make sure it's done
10 and we have it.

11 Our home selections, things that go in
12 the house that are -- like I said, just for lack
13 of a better word, options that go in the homes,
14 that falls underneath me. It's what is offered
15 and the pricing for that.

16 I also handle sales pricing. Now, this
17 I handle mainly sales pricing for Charleston.
18 Hilton Head/Savannah is done separately. I'm
19 currently also in charge of all warranty -- all
20 the warranty operations in the city of
21 Charleston, not Hilton Head/Savannah. Going back
22 to that, that starts process, the permitting
23 process, that is only for Charleston as well.

24 I think that's pretty much -- that's it
25 in a nutshell, yeah.

Page 23

1 obligations at the time the Tidewater
2 neighborhood was, one, being developed and, two,
3 being constructed?

4 A. No.

5 Q. What were your duties and obligations at
6 the time the Tidewater neighborhood was being
7 developed?

8 A. It might be easier if we just take away
9 some of the duties I mentioned.

10 Q. Sure.

11 A. I was not involved with warranty -- or
12 not -- the warranty didn't report to me for
13 Charleston. I was not involved with the starts
14 process for Charleston nor Hilton Head/Savannah.
15 And I think those are the only two that I was not
16 doing at that time.

17 MS. LUCEY: Michael, it doesn't
18 appear that we have marked a copy of the 30(b)(6)
19 notice. Do you have a copy there with you that
20 Mr. Bunner could look at?

21 MR. NAIL: Yes.

22 (Exhibit No. 12 marked for
23 identification.)

24 Q. Mr. Bunner, you have in front of you
25 what we will mark as Exhibit 12, which is the

Page 22

1 Q. Does your work or do you oversee land
2 development in the Charleston area or is that
3 separate?

4 A. That's separate.

5 Q. Okay. And same question, is the land
6 development in the Beaufort/Hilton Head area also
7 separate?

8 A. That's correct. Currently separate,
9 yes.

10 Q. We're here today to talk about the
11 Tidewater -- I call it the Tidewater Creek
12 neighborhood. I think it's also Lady's Lake in
13 some documents. Are you familiar with that
14 neighborhood?

15 A. I am.

16 Q. Is it acceptable to you if I just refer
17 to it today as Tidewater?

18 A. That's fine.

19 Q. Did you have the same roles you just
20 discussed at the time -- let me back up. The
21 current duties and obligations we've discussed
22 are your current duties and obligations; is that
23 correct?

24 A. Yes, that's correct.

25 Q. Did you have the same duties and

Page 24

1 30(b)(6) Notice of Deposition of D.R. Horton. It
2 has attached to it Exhibit A. Do you have
3 Exhibit A in front of you, sir?

4 A. I do.

5 Q. Have you seen that list of topics on
6 Exhibit A before today?

7 A. I do believe so, yes.

8 Q. Do you understand -- are you being
9 offered on all topics included on Exhibit A? Are
10 you being offered -- excuse me, sorry. Are you
11 being offered as the witness who will provide
12 testimony as to all of the topics on Exhibit A?

13 A. As far as I know. I believe so, yes.

14 Q. Do you understand that you are offering
15 testimony today on behalf of D.R. Horton?

16 A. Yes.

17 Q. And that your answers are the answers of
18 D.R. Horton?

19 A. Yes.

20 Q. In terms of providing information about
21 the proposed topics, how did you go about
22 learning information or about the topics or
23 securing documents related to the topics on
24 Exhibit A?

25 A. Is that the -- these specific topics or

Page 25

1 Tidewater Creek in general?
 2 Q. Well, the topics that are listed in
 3 Exhibit A, I'm entitled to ask you questions
 4 about those topics.
 5 A. Okay.
 6 Q. And you've been designated as the
 7 witness.
 8 A. Yes. It would just have been recently
 9 that I actually became aware of this list of
 10 topics within, I don't know, a few weeks. I
 11 think this was recently revised.
 12 Q. It was, yes, sir.
 13 A. So, I don't know, anywhere from two to
 14 four weeks rough guess.
 15 Q. What have you done to prepare yourself
 16 to respond to questions about the topics listed
 17 on Exhibit A to Deposition Exhibit 12?
 18 A. I have briefly gone over some documents.
 19 I believe there's a lot of documents involved
 20 with this case, but, you know, there's just
 21 really too much for me to go over in a certain
 22 period of time to really familiarize myself with
 23 everything. You know, I looked at a few items.
 24 More than a few. You know, as much as I could
 25 read in time allowance.

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1 Q. Who else?
 2 A. I believe Sean Ware. Sean Ware and
 3 basically a similar conversation that I had with
 4 Sharonda Rahming, just that I would be involved
 5 with this. No specifics.
 6 Q. Where is Mr. Aten currently based?
 7 A. He's out -- he's basically in the Hilton
 8 Head/Savannah area.
 9 Q. Do you know what role he had in
 10 connection with the development and/or
 11 construction of Tidewater?
 12 A. At the time I do believe he was the
 13 construction manager in the Hilton Head/Savannah
 14 market.
 15 Q. When did Sharonda join D.R. Horton?
 16 A. Sharonda has been with D.R. Horton -- I
 17 think Sharonda's been with us somewhere around 20
 18 years. I don't know the exact date of employment
 19 with her, but she's been with D.R. Horton for a
 20 long time.
 21 Q. When did she come to the Hilton
 22 Head/Beaufort division or area?
 23 A. I think it's been three years ago.
 24 Q. Okay.
 25 A. She was not here during the Tidewater

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1 Q. Have you spoken with anyone other than
 2 Horton's lawyers about the case or about this
 3 deposition?
 4 A. Just -- yes.
 5 Q. Who?
 6 A. I told my boss that I would be busy
 7 today in a deposition for the Tidewater case.
 8 Q. Who is your boss?
 9 A. Excuse me?
 10 Q. Who is your boss?
 11 A. Bryan Doster.
 12 Q. Who else have you have spoken with?
 13 A. Sharonda Rahming, division president for
 14 Hilton Head/Savannah. That was more just whether
 15 I was going to be involved with this. A very
 16 brief discussion. No specifics discussed.
 17 Q. Anyone else?
 18 A. My fiancée to tell her I wouldn't be
 19 answering the phone.
 20 Q. I think you said you spoke with Jared?
 21 A. I did speak with Jared.
 22 Q. Anyone else?
 23 A. Carl Aten.
 24 Q. Is Mr. Aten still with Horton?
 25 A. He is.

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1 development, construction.
 2 Q. To the extent you were around for the
 3 development and/or construction of Tidewater,
 4 were you involved in the day-to-day management of
 5 that project?
 6 A. No.
 7 Q. Who was involved in the day-to-day
 8 management of that project for Horton?
 9 A. Let's see. Well, the land side, I
 10 believe, was -- it was either Jared or -- I can't
 11 remember if Jared was the land development
 12 manager then or if it was a previous land
 13 development manager. I can't get the -- I don't
 14 know the exact dates of people coming in and
 15 taking over as far as lead management.
 16 I think Jared -- I know he was land
 17 development. I don't know if he was the land
 18 development manager or project manager. Carl
 19 Aten was the construction manager, and we would
 20 have had site superintendents for the
 21 construction of the homes. And I know Nicholas
 22 Yannarella was one of those. And Brad Federinko
 23 I believe was one of those. And Peter Delgado as
 24 well for a short period I believe.
 25 Q. Are Mr. Federinko, Mr. Yannarella, or

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1 Mr. Delgado still with Horton?
 2 A. No.
 3 Q. Who is or was Nina Bragg or Nina Bragg?
 4 A. I believe she was -- she worked in our
 5 customer service warranty department, and I am
 6 trying to remember. This is a tough one. I
 7 don't know if she actually did some construction
 8 as well, but I'm pretty sure she was more
 9 involved with our warranty department.
 10 Q. What about Michelle Gorman?
 11 A. Michelle Gorman -- I know that she did
 12 some HOA type duties for us. Helped coordinate
 13 with the management companies that we -- in our
 14 HOA management or property owners association
 15 management, whichever you prefer. I don't
 16 remember her handling it for Hilton
 17 Head/Savannah. She may have. I just don't
 18 remember it. It wasn't really something that I
 19 oversaw.
 20 Q. Dominic Hayes?
 21 A. I'm not familiar with Dominic.
 22 Q. Marsha Collett?
 23 A. Yes. She was one of our sales
 24 representatives.
 25 Q. And Doug Nicoll?

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1 scanned in proper orientation, but can you tell
 2 me what you believe Exhibit 1 to be?
 3 A. That appears to be a snapshot -- a
 4 partial snapshot of a -- I'm looking for the word
 5 on here. Looks like a plat. But I don't see the
 6 word plat on here. It's done by a surveyor and
 7 looks like it's been recorded, so it appears to
 8 be a plat of Tidewater Creek.
 9 Q. Do you believe the plat shows the
 10 boundaries of the Tidewater Creek subdivision?
 11 A. I believe it does.
 12 Q. Okay. So do you believe this is an
 13 accurate representation of the Tidewater
 14 subdivision?
 15 A. I would say yes.
 16 Q. Okay. And for the benefit of the
 17 record, I believe this was prepared by an expert
 18 of one of the parties, and it has identified on
 19 it the lot numbers of the plaintiffs in this
 20 case. I did not do that, but I do believe it's
 21 accurate.
 22 A. Yeah. I'm not even familiar with all of
 23 the names in the case to be honest with you, so I
 24 will take it as -- it was prepared and accepted
 25 by our attorneys as well as you as accurate.

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1 A. Doug Nicoll was more of a land
 2 acquisition manager.
 3 Q. Ali Heavener?
 4 A. Ali was the -- and at the time she might
 5 have been the vice president of city operations
 6 or it could have been the city manager. I don't
 7 know exactly. You know, it depends on the time
 8 frame.
 9 MS. LUCEY: Off the record.
 10 (Discussion off the record.)
 11 (Exhibit No. 1 marked for
 12 identification.)
 13 Q. Mr. Bunner, let's go ahead and look at
 14 Exhibit 1. I just want to make sure we're on the
 15 same page when we talk about the Tidewater
 16 neighborhood. If you can pull that open.
 17 A. You're talking about -- I'm showing an
 18 Exhibit A?
 19 Q. No. Exhibit 1.
 20 A. Oh, I'm sorry. Okay. As far as files.
 21 Okay. Exhibit 1, is that on the -- let's see.
 22 Lots 1 through 54 TC?
 23 Q. Yes, sir.
 24 A. I have it open.
 25 Q. All right. It looks like it's been

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1 Q. Okay. And just for the benefit -- your
 2 benefit, Mr. Bunner, it's the blue -- I assume
 3 you can see this in color; is that correct?
 4 A. I am color blind, but I can tell the
 5 difference, I believe. I think some of it looks
 6 yellow and some of it might be a light blue.
 7 Q. Yes. The light blue is highlighting the
 8 lots. The yellow is the name of the homeowner,
 9 the street address, and the lot number.
 10 A. Okay. That sounds accurate.
 11 Q. So for someone who has not looked at a
 12 plat like this, how do I know where the
 13 boundaries of the subdivision are on this
 14 document?
 15 A. Let me zoom in so I can see a little bit
 16 better here. You're basically going to be
 17 looking for what I refer to our meets and bounds
 18 lines and markers. And they would be the ones on
 19 the -- further away from the center of the
 20 community down the lot line -- or down the lots.
 21 Q. Let's take a particular corner, sort of
 22 narrow it down. I'm looking at the corner that
 23 has lot 15, 16, 17, 18, 19, 20 and then common
 24 area. Do you see that?
 25 A. Hold on just a second. Okay.

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1 Q. Bottom left-hand corner.
 2 A. Yeah. I see that and that would be a --
 3 the line would be the line separating lots 15,
 4 16, 17, 18, and 19 from the -- Shirley Chaplin
 5 listed property below it.
 6 Q. Okay.
 7 A. And then for lot 20 and the common
 8 area -- and forgive me. It's cut off. I don't
 9 know what this name is to the left, but it's the
 10 vertical line that would be to the left side of
 11 lot 20 and the left side of the common area and
 12 to the right of the -- there's property names
 13 there of who the owners are. I just don't --
 14 it's cut off.
 15 Q. Okay. So that is the outside edge in
 16 that particular corner of the property of the
 17 subdivision; is that correct?
 18 A. That is correct.
 19 Q. Now let's stick with the same bottom
 20 left corner. Within the property, there are
 21 various lot numbers. Does each property owner
 22 own a discrete parcel of property?
 23 A. Yes.
 24 Q. And their property, those limits, are
 25 shown with the boundary lines on the map; is that

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1 Q. -- as part of the development of the
 2 subdivision?
 3 A. No.
 4 Q. So you -- Horton doesn't pay its
 5 subcontractors to work on property that is
 6 outside of the subdivision?
 7 A. I would say no.
 8 Q. All right. Have you ever been out to
 9 the Tidewater subdivision, Mr. Bunner?
 10 A. Yes. Two or three times I believe.
 11 Q. And when were those visits?
 12 A. They were -- I don't have the exact
 13 date -- years. They were during the actual home
 14 construction. Not during the development. I
 15 believe I -- I can't remember if this was done in
 16 two phases of development. But I went out there
 17 to observe home construction and talked with the
 18 superintendent on-site.
 19 Q. Okay. How often were the
 20 superintendents on-site? I believe you
 21 identified Mr. Federinko, Mr. Yannarella and
 22 Mr. Delgado as superintendents. Was there only
 23 one superintendent assigned to this particular
 24 project for D.R. Horton?
 25 A. No. Okay. The first part of the

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1 correct?
 2 A. At the time that this was taken, I would
 3 say yes, but I don't know if any properties have
 4 transferred or changed hands to make it a not
 5 accurate representation as of today.
 6 Q. And if we set aside who owns it but just
 7 in terms of the property, each homeowner has a
 8 specific parcel of property that they own; is
 9 that correct?
 10 A. I would say yes.
 11 Q. And it doesn't extend to, for example,
 12 Shirley Chaplin's property?
 13 A. It should not, no.
 14 Q. And it doesn't extend to the property to
 15 the left of lot 20, for example?
 16 A. No, it doesn't extend.
 17 Q. Does any individual homeowner own the
 18 common area or is that owned by the homeowners
 19 association?
 20 A. That would be owned by the homeowners
 21 association.
 22 Q. Okay. Would D.R. Horton expect any of
 23 its subcontractors to work on areas outside of
 24 the Tidewater Creek subdivision --
 25 A. No.

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1 question, how often, typically you're going to
 2 have a site superintendent at least visit the
 3 site at least daily during the week. Weather
 4 dependent on it, vacation, things like that, sick
 5 days, you may not have it. Someone else may fill
 6 in for them if they have time, like their
 7 manager.
 8 The second part of the question over the
 9 period of this that I am aware of, I believe
 10 Peter Delgado was there when we first started the
 11 first few homes out there. Then Nicholas
 12 Yannarella came in and I'm thinking that maybe --
 13 I don't know if they were there together or if
 14 Peter left the company and then Nicholas was by
 15 himself. I think at one point Nicholas did not
 16 have Peter with him.
 17 And then I believe Brad Federinko was
 18 hired and placed out there with Nicholas to train
 19 to be a superintendent under Nicholas's
 20 supervision.
 21 Q. Under ideal circumstances, how many
 22 superintendents would Horton prefer or like to
 23 have on-site that has I think 54 lots?
 24 A. It's not -- it's not really a function
 25 of the number of lots. It has to do with the

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1 number of homes under construction at any one
 2 time. So the number of lots doesn't allow me to
 3 provide an answer of what is ideal.
 4 Q. Based on your experience with the
 5 Tidewater subdivision, how many superintendents
 6 would you have preferred to have on-site during
 7 this ongoing construction?
 8 A. One. This -- it's definitely one.
 9 Typical superintendent would be able to handle 30
 10 homes at one time under construction. I don't
 11 know if this community ever had 30 at one time.
 12 Q. Was there ever anyone else out there
 13 from Horton on a daily basis other than a
 14 superintendent?
 15 A. During the home construction?
 16 Q. Yes.
 17 A. In the same -- just as we're using the
 18 daily term, which is your typical workweek, in a
 19 shifted workweek, typically the salesperson would
 20 be there.
 21 Now, I would say -- you would refer to
 22 it as daily, although they typically would work
 23 on the weekends and have two days off during the
 24 week.
 25 Q. The salespeople?

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1 working in more than one community at the same
 2 time.
 3 Q. How would we find that out?
 4 A. That would be whether some -- I guess
 5 whether someone that was more on that -- on the
 6 construction side, more involved with the
 7 construction management of -- down there would be
 8 able to recall it.
 9 Q. Do the superintendents keep daily logs
 10 of their visits to a particular construction
 11 site?
 12 A. They -- each one may do different note
 13 taking that I'm not aware of. What they are
 14 required to do is update a schedule.
 15 Q. So is there any means of knowing --
 16 looking back at the project, for example, who may
 17 have been working on-site on a particular
 18 Wednesday in September? Which subcontractors
 19 were on-site and which superintendent was
 20 on-site?
 21 A. Not that I'm aware of.
 22 Q. How was the schedule updated? Was it in
 23 a software system?
 24 A. Yes. It's an online system. So they
 25 can update it from anywhere that they have a

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1 A. Yes.
 2 Q. Were the salespeople out there in a
 3 model home?
 4 A. Once the model home was actually
 5 completed and we were able to work out of it,
 6 yes.
 7 Q. Did the salespeople have anything to do
 8 with the actual construction of the homes?
 9 A. No.
 10 Q. What about a project manager -- did you
 11 have a project manager or is the Horton
 12 nomenclature construction manager?
 13 A. It would be more construction manager.
 14 Project manager doesn't really fit our roles
 15 because project manager typically handles
 16 budgets, costs, as well as construction
 17 operations; whereas, this is more just
 18 construction operations.
 19 Q. The superintendents, would they be
 20 assigned to only one subdivision or, for example,
 21 would Mr. Yannarella be working the Tidewater
 22 subdivision and another subdivision under
 23 construction in the area?
 24 A. I can't -- I don't know about this
 25 particular case of whether there was -- they were

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1 Wi-Fi signal.
 2 Q. What is the name of that online system?
 3 A. At that time I believe it was called
 4 OnSchedule.
 5 Q. How did the superintendents record their
 6 hours working? Were they salary or how did that
 7 work?
 8 A. They were not hourly employees.
 9 Q. So they were, I guess, exempt employees?
 10 A. Whatever the term would be. I can't
 11 remember whether it was exempt or nonexempt as
 12 for who. They did not work hourly and, as far as
 13 I'm aware, didn't get paid overtime. They were
 14 based on a salary and bonus structure.
 15 Q. How was their bonus structure calculated
 16 or what was their bonus dependent upon?
 17 A. I'm not sure what it was at that time.
 18 They varied from year to year, and that would --
 19 I can't answer that accurately.
 20 Q. Well, in general, was it performance
 21 based to the specific individual or was it based
 22 upon the company's overall performance?
 23 A. It would have been the individual --
 24 individual performance.
 25 Q. And how -- what type of metric was in

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1 place to evaluate individual performance?

2 A. That's what varies from year to year,
3 and I -- I don't have an actual bonus program
4 that they had under that period of time for me to
5 reference. There could be quite a few
6 parameters.

7 Q. Did the bonus program change from year
8 to year?

9 A. Yes. They typically did.

10 Q. And what changed in general? What
11 parameters changed?

12 A. In this specific case, I don't know
13 where the baseline is to know where it might have
14 changed to or from. Or from or to.

15 Q. What are some of the elements of the
16 performance bonus now?

17 A. In Charleston, I know customer survey
18 scores is one of the parameters that they're
19 under. Let's see. Getting -- I believe they get
20 bonused if they get what's called a 30-day walk
21 completed with the homeowner. That's post close.

22 Q. Is this on the sales side or the
23 construction side?

24 A. Construction. Construction.

25 Q. Okay.

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1 structuring the construction bonuses.

2 Q. Are the 30-day walks documented for each
3 home in any way?

4 A. If they occurred, they would be
5 documented.

6 Q. Are there circumstances in which they
7 would not occur?

8 A. The homeowner didn't have any issues or
9 items for us to address.

10 Q. Do you know if -- to the extent there
11 were 30-day walk-throughs for the homes at issue
12 in this litigation, do you know if the 30-day
13 walk-through reports were produced or provided?

14 A. I do not know.

15 Q. Let me ask you this. Does each home --
16 let's -- you know, looking, for example, lot 18,
17 Shafi, is there a file at D.R. Horton that is the
18 Shafi file that has warranty information, closing
19 information, all of that in one place, or is it
20 housed within the purchasing department and the
21 warranty department and, you know, the sales
22 department?

23 A. I don't -- I wouldn't say it's all in
24 one space, one space, but -- or one exact file
25 location or folder location, but you would

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1 A. They get a base bonus just for closing a
2 house. Once the house is completed and it's
3 closed, they get a base bonus, and then there's
4 some more -- then I know that they have -- most
5 of them typically -- especially now, there's
6 customer service scores. They have been a big
7 item. Getting a 30-day walk.

8 Q. What do you mean getting a 30-day walk?

9 A. The 30 days after closing, we typically
10 give a homeowner time to get acclimated to the
11 house to see if they find -- typically cosmetic
12 items that would be listed under your -- within a
13 warranty term, warrantable items. But if they're
14 cosmetic or anything else within the first 30
15 days, we like to give them a chance to go -- to
16 be in the house and take a look at everything,
17 and then that would fall under the
18 superintendent. And then once you get to 11
19 month, it falls into the warranty department.
20 But that's just an example of what -- of some
21 today.

22 Q. Sure.

23 A. There are -- there may be other
24 parameters as well, and it changed from year to
25 year, and I wasn't involved on that -- on

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1 typically -- the construction department would
2 have a central location that they would put those
3 documents.

4 Q. And would these be in that construction
5 file? I call it the construction file.

6 A. That's fine. Construction file. They
7 would have a place that they -- if they performed
8 that task -- now, keep in mind on the 30-day,
9 that's up to both -- the homeowner contacts us,
10 so not every house is going to have that type of
11 document.

12 Q. What about the 11-month walk-through?

13 A. Same thing. And here is another thing,
14 is everything changes over time. Back then I
15 can't recall if we had a warranty department
16 because for the longest time, the builders
17 handled the construction of the house, their
18 30-day walk, and the 11-month walk. And that was
19 just part of their responsibilities.

20 So they may have gotten bonused on the
21 11-month if that was part of their duties.

22 That's what I'm saying. These things changed so
23 much as the needs change of the division.

24 Q. Is there a way to go back and get a
25 snapshot of the departments in place during the

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1 time of the construction of Tidewater?
 2 A. Can you repeat that?
 3 Q. Yes. Is there a way to go back in time
 4 and get a snapshot of how the departments were
 5 structured during the time Tidewater was being
 6 built?
 7 A. I wouldn't say like an actual -- for
 8 operational document of this is how the structure
 9 is, but more of a -- maybe an overview picture
 10 that you could assume from it based on the
 11 documents that are retained.
 12 Q. Okay. Does Horton have any guidelines
 13 or policies regarding a superintendent's
 14 obligations and responsibilities during
 15 construction?
 16 A. Not as a blanket document because it's
 17 done differently everywhere. Typically by
 18 division.
 19 Q. Did the Beaufort/Hilton Head division
 20 have policies or guidelines in place for
 21 superintendents regarding their responsibilities
 22 during construction?
 23 A. I believe they had -- I mean, I know
 24 there's certain standards that we've used, and
 25 this is in general. They have been modified over

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1 A. And I would assume -- I'm not looking at
 2 one. I would assume if they were going to do it,
 3 it would be organized by lot number or address or
 4 something so they weren't all jumbled together.
 5 But without looking at it, I can't guarantee
 6 anything.
 7 Q. Right. Would you or someone at Horton
 8 please look to see if you have those progress
 9 checklists, either generally speaking or as they
 10 specifically relate to Tidewater?
 11 A. You said did we?
 12 Q. No. Would you please.
 13 A. Oh, so you're asking me to get
 14 something?
 15 Q. Yes.
 16 (This page contains Requested
 17 Information.)
 18 Q. I'll send a follow-up request to
 19 Michael. We will take care of that.
 20 A. Yeah, that's fine.
 21 Q. So at any given point, there's no way
 22 for us to look back during construction at
 23 Tidewater and know who from Horton was on site;
 24 is that accurate?
 25 A. On any particular day, that would be

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1 the years. But just basically progress
 2 checklists. I don't think there was an actual
 3 how-to book, so to speak. A lot of it was
 4 training. I guess train as you go. You know,
 5 this is -- you know, basically talk to you by
 6 another person, but we did have some checklists
 7 for them to use to basically -- to look and see
 8 if progress was being done properly.
 9 Q. Would you have access to those
 10 checklists now, Mr. Bunner?
 11 A. When did these houses close?
 12 Q. I think in the 2015 to '17 time frame.
 13 A. They may still be available.
 14 Q. Would you --
 15 A. That was actually -- certain ones of
 16 those -- there's another bonus point. I believe
 17 turning in certain ones of those was a bonus
 18 point as well, but that depends on whether that
 19 was at that time and in Hilton Head/Savannah, but
 20 they may be in a construction folder or -- that's
 21 where I would think they would be.
 22 Q. In a construction folder for a specific
 23 house or -- what kind of construction folder?
 24 A. Like I'm talking a computer folder.
 25 Q. Okay.

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1 accurate, yes.
 2 Q. Are you familiar with D.R. Horton's
 3 insurance as it relates to, I guess, defending
 4 this matter? Is D.R. Horton self-insured?
 5 A. We do have insurance policies. I don't
 6 know what they cover.
 7 Q. Do you know if Horton has an SIR or a
 8 deductible it has to meet?
 9 A. I don't know.
 10 Q. Who would know that?
 11 A. Oh, a deductible, so in case of an
 12 occurrence or a claim? I am just -- I don't
 13 know -- who would know that? Maybe someone at
 14 our corporate office.
 15 Q. Okay. Is D.R. Horton a residential
 16 builder? Does it have a residential builders
 17 license?
 18 A. Yes. I believe so. We have a
 19 residential builders license.
 20 Q. Do you know who the qualifying license
 21 holder is?
 22 A. Today in South Carolina I believe is
 23 Brad Brundage.
 24 Q. Do you know who it was at the time
 25 Tidewater was constructed?

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1 A. I believe that was Jay Henderson.
 2 Q. Does D.R. Horton also have a commercial
 3 general contractors license?
 4 A. Yeah. They may be one and the same.
 5 Q. Do you know was Tidewater constructed
 6 under a residential or a commercial license, do
 7 you know?
 8 A. It's residential construction.
 9 Q. Okay. For this particular project, did
 10 D.R. Horton hire subcontractors for work in the
 11 neighborhood?
 12 A. We hired independent contractors.
 13 Q. And tell me why you have distinguished
 14 subcontractors from independent contractors.
 15 A. That's the contract we use. It's titled
 16 Independent Contractor Agreement.
 17 Q. Does D.R. Horton act as the general
 18 contractor for the project?
 19 A. No. We're the owner.
 20 Q. So is it Horton's position that it was
 21 not a general contractor in connection with the
 22 construction of the Tidewater neighborhood?
 23 A. That's correct. We're the owner.
 24 Q. Who pulled the permit -- the building
 25 permits for construction of the various homes in

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1 Q. So what -- who was the general
 2 contractor that Horton hired to develop the
 3 Tidewater subdivision?
 4 A. The actual on-site work I believe was
 5 Lather.
 6 Q. What about with respect to the
 7 individual houses and lots? Is there a general
 8 contractor?
 9 A. I would not say general contractor.
 10 Q. Who was running the ship? Who was
 11 coordinating schedules?
 12 A. Horton was doing that, that's for sure,
 13 on the construction of the homes.
 14 Q. Who was managing and determining scopes
 15 of work?
 16 A. I managed it, but the determination was
 17 typically a group collaboration between
 18 construction management, purchasing manager, and
 19 myself.
 20 Q. But that was all within Horton; is that
 21 accurate?
 22 A. That's correct.
 23 Q. Who oversaw the work of the
 24 subcontractor or the -- what you describe as
 25 independent contractors?

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1 Tidewater?
 2 A. For the building permits -- the main
 3 building permit was pulled by D.R. Horton.
 4 Q. Okay. What do you mean by the main
 5 building permit? You mean a permit --
 6 A. Well, they require different -- like
 7 electricians have to pull their own permits.
 8 Mechanical contractors have to pull their own --
 9 they're like -- certain permits they're required
 10 to pull. It's in addition to the building
 11 permit.
 12 Q. Does an owner have different duties and
 13 obligations than a general contractor would when
 14 constructing -- I'm sorry?
 15 A. Yes. I'm sorry. I didn't let you
 16 finish. Go ahead.
 17 Q. That's okay.
 18 Does an owner have different duties and
 19 obligations than a general contractor when
 20 constructing a home or developing a subdivision?
 21 A. Yes.
 22 Q. Tell me what you believe the differences
 23 are.
 24 A. Well, in developing the subdivision,
 25 we're hiring a general contractor to do so.

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1 A. For the vertical construction on the
 2 homes would have been the superintendent.
 3 Q. Okay. What about for the landscaping
 4 and land clearing, grubbing, grading, et cetera?
 5 Who oversaw that work?
 6 A. Well, now you're crossing over between
 7 land development and vertical construction.
 8 Clearing and grading -- and without me having the
 9 actual development contract for the site
 10 development of Tidewater Creek, I don't know
 11 their scope of work, so it's hard for me to tell
 12 whether how much grading or clearing or grubbing
 13 was done by the site contractor.
 14 Q. Let's just focus on the construction of
 15 the home, completion of the lots, landscaping,
 16 et cetera, for now.
 17 A. Okay.
 18 Q. Who oversaw the work of those -- of the
 19 independent contractors completing that work?
 20 A. The superintendent.
 21 Q. Who was employed by Horton?
 22 A. That's correct.
 23 Q. Did the superintendent have supervisory
 24 obligations regarding the work of the independent
 25 contractors?

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1 A. No. I wouldn't say supervisory. I'd
2 say more of oversight and coordination.

3 Q. Could the superintendent or anyone else
4 from Horton direct the means and methods for
5 construction?

6 A. Means and methods -- I would say no,
7 because it's already part of the scopes of work
8 and contracts.

9 Q. So the scopes of work, who drafted and
10 prepared the scopes of work for this subdivision?

11 A. That would be me.

12 Q. And you would be part of Horton?

13 A. That's correct.

14 Q. So if a particular independent
15 contractor, to use your nomenclature, was not
16 doing something that complied with the project
17 specs, could the superintendent stop that
18 contractor and direct them on how to complete the
19 work in accordance with the scopes of work and
20 related specs?

21 A. I would say not stop, but ask the
22 question, if there's something that they may see
23 that's a question that they're not sure about,
24 but they would want to ask the contractor and
25 then typically ask the contractor's boss and

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1 individual whose name is listed or is it
2 D.R. Horton who is listed?

3 A. I would have to look. I'd have to see
4 one. It may be both.

5 Q. And I think you said the construction
6 manager for this project, the Tidewater project,
7 was Carl Aten?

8 A. Yes.

9 Q. And he's still with D.R. Horton?

10 A. He is.

11 Q. And I feel like I asked you where he
12 was, but I'm afraid I can't remember your answer.

13 A. He's still in the Beaufort/Savannah
14 area.

15 Q. What are the duties and obligations of a
16 construction manager, and specifically Mr. Aten,
17 with regard to Tidewater?

18 A. Mainly it's to make sure that the
19 superintendents are progressing on their
20 schedules on a regular basis.

21 Q. Does the construction manager visit the
22 project site?

23 A. Yes.

24 Q. How often would you typically expect a
25 construction manager to visit the site?

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1 then work their way up if there's something that
2 they may be -- think might be an issue, but keep
3 in mind that the contractor knows more about what
4 they're doing than we do.

5 Q. Yet Horton is the one who prepares the
6 project specifications; is that right?

7 A. Yes. For the vertical construction,
8 yes.

9 Q. And the scopes of work, correct?

10 A. That is correct.

11 Q. Could Horton terminate a contractor for
12 failing to follow the scopes of work and project
13 specifications?

14 A. Horton can terminate a contractor for
15 any reason they want.

16 Q. Did the work of the independent
17 contractors, was that under the residential
18 builders license held by Horton? Except for
19 those who had to pull their own permits, was the
20 other work performed under D.R. Horton's license?

21 A. The name's not actually in D.R. Horton's
22 name, how the licenses are. It's basically in
23 another person's name, but they're the qualifier
24 for D.R. Horton.

25 Q. On the building permits, is it the

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1 A. Probably at least a couple of times a
2 week.

3 Q. Would the construction manager have
4 authority or ability to question a contractor
5 about the kind of work they were performing and
6 whether it complied with the scopes of work and
7 project specs?

8 A. Yes.

9 Q. Was there a specific project manual for
10 Tidewater? I understand there were plans for
11 specific houses; is that correct?

12 A. There are -- yes. There are specific
13 house plans for each lot.

14 Q. Okay. There were civil engineering
15 plans; is that correct?

16 A. Yeah. We refer to them as structural
17 engineering but, yes, it's civil engineering
18 plans for each house.

19 Q. Tell me what you mean by that.

20 A. The structural?

21 Q. Yeah. How would you describe the
22 structural plans?

23 A. They're basically engineering details
24 and drawings to specify what materials and --
25 arrangement of materials and fastening patterns

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1 are to be used from the building pad all the way
2 through the roof.
3 Q. So those would be -- I guess I would
4 describe those more as architectural plans that
5 include mechanical, electrical, plumbing,
6 structural details.
7 A. We refer to structural as separate
8 because structural is something that we have
9 signed by a -- or sorry, sealed by a professional
10 engineer, where the architectural plans are not.
11 They're not sealed or signed by the -- in
12 general, not signed or sealed by an architect or
13 an engineer or any professional. So yeah, that's
14 why we designate the difference.
15 Q. Okay. What about civil plans related to
16 grading, how the lots are finished, how the
17 streets look, how the sewer system looks? What
18 do you call those plans?
19 A. Civil site plans.
20 Q. Who prepared the civil site plans for
21 Tidewater?
22 A. You know what, I don't know for sure.
23 For some reason I was thinking it was Thomas
24 Hutton, but I'm not 100 percent sure.
25 Q. Did Horton also have engineers on the

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1 about the land development side and what it did
2 in connection with the Tidewater neighborhood?
3 A. Are you talking about like the Horton
4 staff?
5 Q. Yes. And how did the process work with
6 regard to Tidewater?
7 A. Typically we would hire an engineer to
8 design it, engineer it, all of the civil site
9 drawings. And I believe they actually draft the
10 site development contract that -- and then with
11 that, we take the specifications and drawings
12 in -- the whole engineering package and put it
13 out to bid to different site development
14 contractors.
15 Then determine based on capacity and
16 price who we choose to do -- and capacity price
17 and whether they can meet a schedule, determine
18 who to use for the project, and then go into
19 contract with that general contractor.
20 Once that happens and we have the permit
21 to do the development, then they just follow
22 through with the engineering drawings. And
23 obviously they have a specific order that is most
24 efficient to do everything. I'm not exactly sure
25 what that is, but that's really the site

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1 sites evaluating the compaction of lots,
2 compaction of streets during construction?
3 A. Well, the compaction of lots -- and,
4 again, it's done differently on certain projects
5 or developments, locations. And it really
6 depends on the scope of work of the site
7 development contract of whether the lots were
8 being tested by the site development contractor
9 or by Horton.
10 But if it was done by Horton, yes, we
11 would have had a soils engineer. If it was done
12 as part of the -- and it might have been part of
13 the contract for the civil site engineer to
14 perform those as well as part of -- if it was
15 part of the scope for the site development
16 contractor, then I would believe that the
17 engineer would coordinate that as well because
18 the engineer is the one who determines the actual
19 progress of the site development.
20 Q. Okay. Mr. Bunner, it's 11:15. Let's
21 take a five-minute comfort break. We will
22 reconvene at 11:20, and then we'll run to 12:30
23 and then take a 30-minute lunch break.
24 (A recess was taken.)
25 Q. (MS. LUCEY) Can you tell me a little bit

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1 contractor that knows what that is.
2 Q. Prior to purchasing the parcel of land
3 that subsequently becomes the subdivision, does
4 Horton engage in any kind of due diligence?
5 A. Yes.
6 Q. Do you know the specifics of the due
7 diligence Horton performed related to Tidewater?
8 A. Typically you're going to confirm your
9 zoning, what your entitlements are. You need to
10 make sure what you're buying that you're allowed
11 to build houses on it. And, you know, plus how
12 many houses, what types of houses. There's --
13 zoning ordinances are -- can be very specific
14 so --
15 Q. What about the suitability of the land
16 for development?
17 A. Yes.
18 Q. Are there any reports or inspections
19 or --
20 A. Yeah. We do a phase one environmental.
21 Q. What is a phase one environmental?
22 A. It's basically a check to make sure
23 there's no environmental issues on the property.
24 Q. And did Horton have a phase one
25 performed prior to purchasing the Tidewater

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1 parcel?
 2 A. Yes. I have not seen the report but
 3 that's what I -- that's a standard for us to do.
 4 Q. Okay. So -- my next question was, do
 5 you know who performed the phase one?
 6 A. I do not know which company performed
 7 it.
 8 Q. Who would know that information?
 9 A. I don't think anyone knows it off the
 10 top of their head without having to look it up.
 11 Was it not provided as part of the documents?
 12 Q. Well, I'm asking you what you know as a
 13 representative for Horton.
 14 A. Oh. Land development or land
 15 acquisition would normally know those -- have
 16 those documents available to them.
 17 Q. Do you know if a phase two follow-up
 18 report was required or recommended for this
 19 parcel, the Tidewater parcel?
 20 A. It was not.
 21 Q. Are you aware of whether there was any
 22 soils testing conducted as part of the phase one
 23 or due diligence?
 24 A. I'm not aware of what the scope of work
 25 was for the phase one, and I'm not aware of what

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1 be affected or couldn't be moved?
 2 A. It would slow down the process
 3 tremendously and increase the cost.
 4 Q. Are you familiar with GHD, who was
 5 formerly known as Conestoga River? Are you
 6 familiar with that entity? Or Rovers, excuse me.
 7 Conestoga-Rovers?
 8 A. Did they have a previous name to that?
 9 Q. Well, I think it's GHD, which was
 10 formerly known as Conestoga-Rovers. Are you
 11 familiar with that firm?
 12 A. It sounds familiar. GHD sounds like it
 13 might be a name at one point in time of a company
 14 that we used for soil testing.
 15 Q. Do you know who performed soil testing
 16 for the Tidewater subdivision?
 17 A. Not without looking it up.
 18 Q. If there was an engineer on-site
 19 performing soil testing and other inspections,
 20 would you have expected that engineer to report
 21 any surface debris that it observed on the lots?
 22 A. I would say yes, you know, if they see
 23 something.
 24 Q. Are you aware of whether any engineers
 25 on-site in Tidewater ever reported or documented

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1 other testing may have been done.
 2 Q. What about any soils testing during the
 3 initial land clearing of the site?
 4 A. I'm not aware of any of that.
 5 Q. When Horton develops a property, does it
 6 typically clear the entire parcel prior to
 7 putting in roads, infrastructure, and lots?
 8 A. Every site is different, and every
 9 municipality is different. Every site has --
 10 some sites have trees that you either can't
 11 remove or don't want to remove. You know,
 12 there's different topo on sites. I mean, it's
 13 so -- every site is so different.
 14 Q. Are you aware of what restrictions, if
 15 any, Beaufort County or the authority having
 16 jurisdiction placed of the development of
 17 Tidewater?
 18 A. I do believe that we had to get approval
 19 for certain trees to be removed or not allowed
 20 to -- or be told not allowed to move.
 21 Q. How would that affect --
 22 A. That's typical for municipalities.
 23 Q. How would that affect the development
 24 and land clearing and building of building pads
 25 if there were limitations on trees that couldn't

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1 any surface debris during construction?
 2 A. I'm not aware of anything.
 3 Q. If they had, where would I find that
 4 information?
 5 A. In their reports.
 6 Q. Okay. And if surface debris had been
 7 reported to Horton, what would Horton do about
 8 it?
 9 A. Have a contractor clean it up.
 10 Q. Which contractor would you have clean it
 11 up? Would you hire someone to clean it up?
 12 A. Oh, yeah. We'd hire -- we really don't
 13 do any work ourself so we hire someone to do
 14 everything. It could be a trash contractor. It
 15 could be a landscaper. It all depends on when
 16 we're talking about, if this was during the --
 17 you know, are we talking about during the
 18 development, during the home building, both?
 19 Sometimes it's really what contractors are
 20 available to you.
 21 Q. Are contractors involved in vertical
 22 construction expected to clean up debris that
 23 they create or generate?
 24 A. Yes.
 25 Q. What did Atlas Surveying do for Horton

1 on this project?
 2 A. I saw their name on that Exhibit 1.
 3 From that, I'm thinking that might be a plat.
 4 I'm assuming they actually performed the
 5 recording of the plat work for us and recorded
 6 it.
 7 I don't know if they were the actual
 8 site -- individual lot surveyor for the
 9 construction of the home side of it or if they
 10 did some surveying for the land development side.
 11 I don't know. I don't know what their overall
 12 involvement was.
 13 Q. If Atlas was responsible for staking
 14 building pads, what does that mean?
 15 A. Basically that means they go out and
 16 place a marker at the, you know, four corners,
 17 assuming it's -- and it typically will be a
 18 rectangular pad. Then that would be based on --
 19 this all depends here. If we were going to go
 20 out and pad every lot during the land development
 21 phase or if we were going to pad them during the
 22 building -- the house building phase of
 23 construction, which we do differently, and a lot
 24 of times that's depending on trees that we're
 25 saving, and that we don't go out and just pad

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1 every lot and --
 2 Q. Do you know what was done with the
 3 Tidewater subdivision?
 4 A. I can't remember. You know, they
 5 typically would give them a list of our house --
 6 the houses that we plan to build and their
 7 footprints, and then they would attempt to build
 8 the pad to the largest pad they could depending
 9 on the lot size.
 10 So certain lots with certain same trees,
 11 it may end up being a much smaller pad where we
 12 end up having to use a much smaller footprint
 13 house. I don't know. I can't remember if the
 14 lots were padded when they were handed over to
 15 construction or if they had to do some padding
 16 themselves.
 17 Q. When you say they, who is they?
 18 A. The construction department.
 19 Q. And that would be Mr. Aten and the
 20 superintendents?
 21 A. That's correct.
 22 Q. Would they -- would Mr. Aten and the
 23 superintendents be responsible for determining
 24 the size of the pad?
 25 A. No. In a lot of cases, it's already a

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1 part of the engineering. You know, I do see a
 2 lot of it where the engineers have predone the
 3 pads based on the product that we gave them. And
 4 then, of course, they know by the tree and topo
 5 survey of what we're going to be allowed to keep
 6 or even sometimes what we want to keep as far as
 7 trees.
 8 Q. But you don't know what was done on this
 9 particular project?
 10 A. I didn't -- I don't remember exactly for
 11 every single lot how it was done.
 12 Q. Okay. Let's move on and talk about what
 13 you call the independent contractors. How does
 14 Horton select its independent contractors for a
 15 particular project?
 16 A. Normally we work with the same
 17 contractors in multiple projects. So it really
 18 depends on price negotiations, capacity,
 19 availability, which pretty much go in hand, and
 20 then -- that they can actually perform the scope
 21 of work.
 22 Q. My understanding based on some of your
 23 testimony is that Horton will enter into a
 24 contractor agreement with a particular
 25 contractor; is that correct?

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1 A. Yes.
 2 Q. And that is a master agreement; is that
 3 correct?
 4 A. That is correct.
 5 Q. And then are purchase orders issued for
 6 a particular project or house?
 7 A. Yes.
 8 Q. In Tidewater, was a purchase order
 9 issued for a particular house or the neighborhood
 10 in general? Do you know?
 11 A. For the house construction, it would
 12 typically be for each individual house would have
 13 its own set of purchase orders.
 14 Q. Okay. And as I also understand it, each
 15 master agreement has certain scopes of work
 16 appended to it; is that correct?
 17 A. That is correct.
 18 Q. And the scope of work is based upon, for
 19 example, rough grade or fine grade or framing; is
 20 that correct?
 21 A. That is correct.
 22 Q. Are those scopes of work general scopes
 23 of work meaning they're not tailored specifically
 24 for the Tidewater neighborhood; is that accurate?
 25 A. Yeah, that is accurate. They're not

1 typically neighborhood specific or community
2 specific.

3 Q. Okay. And the scopes of work, you
4 indicated you were involved in preparing some of
5 those scopes of work for the Hilton Head/Beaufort
6 area; is that accurate?

7 A. Yes.

8 Q. Would you have prepared the scopes of
9 work for contractors who ended up performing work
10 in the Tidewater neighborhood?

11 A. Yes.

12 Q. Would you be able to recognize any
13 scopes of work that you prepared if given the
14 opportunity to review them?

15 A. I mean, yes.

16 Q. What happens if there's a unique
17 circumstance for a particular neighborhood? Is a
18 supplemental scope issued? Are specific
19 instructions included on a purchase order, for
20 example?

21 A. It can be -- let's use -- I want to use
22 the term overridden in multiple ways. It could
23 be done in a specification or what we call a
24 specification rider by community. It could be
25 done as a separate agreement. It's very rare for

1 us to vary from the scopes of work that were in
2 place at the time.

3 Q. Are you aware of whether or not there
4 were any specification riders for any scopes of
5 work at Tidewater?

6 A. I'm not.

7 Q. You're not aware of or you don't know?

8 A. I'm not aware that any were created
9 to -- that would alter a scope of work.

10 Q. Are you aware of whether there were any
11 separate agreements that were entered into that
12 altered the scope of work at the Tidewater
13 neighborhood?

14 A. Other than our independent contractor
15 agreement?

16 Q. Well, I thought the independent
17 contractor agreement was a master agreement that
18 was not community specific. Did I misunderstand
19 that?

20 A. No. That's correct. Maybe I
21 misunderstood your question. Can you repeat it
22 please?

23 Q. You mentioned there were certain -- for
24 example, a specification rider could supersede
25 the standard scopes of work for Horton; is that

1 correct?

2 A. I mean, there could be -- it's -- but
3 it's not -- where scope of work is an actual
4 exhibit to the contract, it wouldn't have been --
5 it wouldn't have been -- I guess not a legal
6 document.

7 Q. What? Any specification rider?

8 A. Well, yeah. Yes. Maybe we're going off
9 on the wrong track here or maybe what I said led
10 us in the wrong way. I'm looking at things like
11 if we determine that there's not going to be any
12 fireplaces in a certain community, then -- or
13 there's no gas fireplaces in a certain community,
14 they're all wood burning, then you wouldn't
15 perform the gas fireplace scope of work. Does
16 that make sense?

17 Q. Right.

18 A. But it doesn't actually change the scope
19 of work.

20 Q. Sure.

21 A. So I think maybe I just misunderstood
22 and led that in the wrong direction.

23 Q. If there was a deviation from the
24 standard scope of work, would that be documented
25 anywhere?

1 A. It would have to be.

2 Q. And how would that be documented?

3 A. It would be a -- either some sort of way
4 to amend it to -- I like to say scopes of work
5 are blanket, and I will be honest with you, I
6 don't ever recall altering a scope of work for a
7 specific community.

8 Q. Okay. You mentioned that scopes of work
9 are blanket. So does a subcontractor accept the
10 scopes of work as written or can they negotiate a
11 scope of work as part of the master agreement?

12 A. Everything is negotiable on the scope of
13 work, but if we determine that something needs to
14 be done, then we may stick to it and it's up to
15 them whether they decide to do the work or not.

16 Q. Are there any job meeting minutes for
17 this particular development? For example, did
18 the super have a weekly meeting with the
19 contractors to discuss progress, issues, safety,
20 et cetera?

21 A. I'm not aware of whether there were any
22 weekly meetings amongst the -- by superintendent
23 or the construction manager with all or part of
24 the contractor base. You know, they would
25 typically meet with the contractors that are

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1 involved at a specific stage of construction
2 until they have completed that stage and then
3 those contractors move on and are replaced by the
4 next group.

5 You know, if there was some issue we
6 were having that he might need to bring -- you
7 know, someone didn't pick up their trash or
8 whatever it is or someone parked in front of the
9 model -- in the model home driveway or parked on
10 the wrong side of the street, he may have to have
11 conversations like that. You know, yes, he would
12 have certain -- I don't know if you call it
13 formal meetings.

14 Q. So is it fair to say that there likely
15 aren't any meeting minutes from any of those
16 meetings?

17 A. There's probably not. Not that I'm
18 aware of.

19 Q. How did the super coordinate the trades
20 that were working on a particular house?

21 A. The online scheduling system, which I
22 believe I -- I think it was OnSchedule at the
23 time.

24 Q. Do the subcontractors have access to
25 that scheduling system?

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1 Q. Who was it?

2 A. I don't know who that particular -- who
3 that was at the time.

4 Q. Did Horton have forms that were to be
5 filled out by the individuals making those
6 inspections?

7 A. I believe they have their own forms.

8 Q. Okay. To the extent there were action
9 items listed on those SWPPP reports, who would
10 determine who was responsible for addressing the
11 action items?

12 A. Well, it's -- a lot of times that's --
13 in some cases that's predetermined.

14 Q. How is it predetermined?

15 A. Depending on what the item is.

16 Q. Can you provide me an example?

17 A. Yeah. Let's say a silt fence is down in
18 a certain area or say a silt fence was damaged
19 and needs to be replaced or maybe just needs to
20 be stood back up, that would be whoever is
21 performing the silt fence scopes of work for us
22 in that community at that time.

23 And the intent there is -- and they
24 would be copied on these e-mails -- the parties
25 that needed to be involved with typically

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1 A. Yes.

2 Q. Can they make updates to that scheduling
3 system or can they only access it and review the
4 schedules?

5 A. As far as I'm aware, they just review
6 the schedules so they know when they're due to be
7 present, and the superintendent is the one that
8 typically does the updating based on his
9 observations.

10 Q. Okay. So the superintendent would be in
11 a position to say framer A completed the framing
12 for lot 20 and then schedule the framing for lot
13 21?

14 A. Yes.

15 Q. Okay. The framer would not be able to
16 log in and say I've completed the framing?

17 A. I don't know -- I don't think OnSchedule
18 had that availability, and it could have been
19 done by -- as simple as a phone call.

20 Q. Okay. Did D.R. Horton hire anyone to
21 conduct or prepare the SWPPP, the Stormwater
22 Pollution Prevention Plan, reports?

23 A. Yes.

24 Q. I'm sorry?

25 A. Yes. We hired somebody.

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1 anything that was stormwater or SWPPP related
2 would be on these e-mails or on those reports as
3 well as a Horton employee.

4 And the intent there is for the
5 contractor to go ahead and get the work done
6 immediately.

7 Q. Let's say the contractor who is
8 responsible for installing and maintaining the
9 silt fences is off-site that day. Would Horton
10 pay a different contractor to repair the silt
11 fences so it could get done as quickly as
12 possible?

13 A. Not unless we were specifically told by
14 the contractor that they could not get the job
15 done.

16 Q. But you would expect the contractor
17 responsible for that scope of work to do it as
18 part of their scope of work in their contract
19 price?

20 A. That is correct. But keep in mind, some
21 of this is issue specific. And the price is
22 determined at the time of the work or even
23 sometimes after they have done the work.

24 Q. But the contractor responsible for the
25 installation and maintenance of the silt fences,

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1 you would not pay that contractor to go out and
 2 repair a silt fence, would you, if maintaining it
 3 is part of their scope of work?
 4 A. Correct. If it was negotiated to
 5 maintain as part of their scope of work, then
 6 that is what it is. They just maintain it as
 7 they have to get out there and get it done.
 8 Q. How were the contractors paid? How did
 9 they -- would the superintendent note in the
 10 scheduling system that they completed their scope
 11 of work for a particular lot, and then would that
 12 contractor be issued payment?
 13 A. Let's see. And here is a timing thing
 14 again as far as what year. We did at some point
 15 switch over to what we determined -- referred to
 16 as auto pay. I believe it was active at that
 17 point in time during this project to where if it
 18 was a payable task that had a purchase order
 19 assigned to that task, then once the
 20 superintendent clicked off that the task was
 21 completed in the schedule, it would automatically
 22 send it into our accounts payable department to
 23 go through processing to pay out.
 24 Q. Is there a report that would show -- for
 25 example, my client, Hutton Landscapes, is there a

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1 name of the document be called that reflected a
 2 change to the contractor's scope?
 3 A. Normally it's going to be an extra
 4 purchase order.
 5 Q. So an extra purchase order would reflect
 6 work that is outside of the contractor's scope of
 7 work as agreed to?
 8 A. Not necessarily. It could be a redo of
 9 the scope of work because someone else may have
 10 damaged it.
 11 Q. Okay.
 12 A. In other words -- does that make sense?
 13 Q. Right. But with that -- for example,
 14 under that scenario, someone breaks a window with
 15 their ladder so you need to have someone come
 16 back in and install a new window, and then would
 17 you backcharge the contractor whose ladder fell
 18 through the window?
 19 A. Yes, we would issue the extra purchase
 20 order to fix the window and if we knew who broke
 21 the window, then we would issue a backcharge to
 22 them because we don't always know who did it.
 23 Q. What happens when Horton observes a
 24 contractor not completing work within its scope?
 25 A. We request them to go back and complete

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1 report that can be run that would show all
 2 payments made to Hutton for all of the homes in
 3 Tidewater?
 4 A. There should be.
 5 Q. I have seen the job detail per lot, but
 6 that includes all of the contractors, but you're
 7 telling me there was a way to run that report for
 8 my client, Hutton's Landscape, for each
 9 particular house; is that accurate?
 10 A. I would think so. It may come as a
 11 larger report that would have to be condensed
 12 down to just Hutton's, but it's not impossible to
 13 do. It's just whether it can be done, but I
 14 would think so.
 15 Q. Tell me D.R. Horton's process for change
 16 orders or additional work outside of a
 17 contractor's scope and specifically as it relates
 18 to Tidewater to do that.
 19 A. We would typically -- for a change
 20 order, we would typically, you know, determine
 21 what the scope is of the additional work and get
 22 a price for it from the contractor and then issue
 23 a purchase order for that work.
 24 Q. And I have seen purchase orders, and
 25 I've seen extra purchase orders. What would the

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1 it.
 2 Q. What if they don't complete it after
 3 that request?
 4 A. It's very rare that that happens, but if
 5 I had to -- well, if -- it depends. If they
 6 didn't complete it because of some professional
 7 reason that they came up with, then that would
 8 have to be discussed and to find out what that
 9 is. What is this reason that you're not -- if
 10 they just blatantly don't want to do it because
 11 they just don't feel like doing it, then I would
 12 call in another contractor to finish the scope of
 13 work, similar subcontractor. So a painter for a
 14 painter, a landscaper for a landscaper, framer
 15 for a framer.
 16 Q. What happens if a contractor performs
 17 work outside of its scope without a change order?
 18 They don't get the change order or the purchase
 19 order prior to performing the work. Do they get
 20 paid for it?
 21 A. In most cases, they would not. Well,
 22 let me take that back. In most cases they have
 23 agreed to not get paid for it.
 24 Q. That's part of the master contractor
 25 agreement?

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1 A. I believe that is in the independent
2 contractor agreement, and I believe it's also
3 typically listed in our -- either scopes of work
4 or general scope of work stressing them to get a
5 purchase order prior to doing the work. It's
6 mainly for the contractor's protection.
7 Q. What department do the purchase orders
8 and extra purchase orders go through? Do they go
9 through purchasing?
10 A. The regular purchase orders, which are
11 typically the purchase orders that are issued in
12 the very beginning of a house build, those come
13 directly out of purchasing. The system we have,
14 the contractors submit their numbers through an
15 online system that is uploaded into our system.
16 And then once they're approved, that's when we
17 hit -- when we put in what type of house it is
18 and the options and all that, and we hit a
19 button, and a purchase order pops out for them.
20 The extra purchase orders are
21 typically -- they can be requested through
22 purchasing. They can be issued through
23 purchasing. Majority of them are issued
24 through -- or requested by construction that goes
25 through a -- layers of approvals.

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1 depending on the dollar amount, it will go
2 through either the construction manager for their
3 approval -- a little bit higher dollar amount may
4 go all the way to the division president for
5 their approval, and then it goes through
6 purchasing for a final approval and issuance of
7 the PO.
8 Q. So there could be requests that were
9 made through DHIWorks that never make it to the
10 purchasing order stage because they were not
11 approved, correct?
12 A. That's true.
13 Q. Is there a way to go back into DHIWorks
14 to look at all requests made for Tidewater for
15 requests that were made but not approved within
16 DHIWorks?
17 A. You know, I don't know if the denied
18 ones are archived or anything or if once
19 something gets denied it just sends out a
20 notification you were denied and it just goes
21 away and it has to get recreated. I can't really
22 answer that.
23 Q. Who would it send the denial notice to?
24 A. The requester.
25 Q. Would that be the construction manager

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1 Q. Okay.
2 A. And they have a system to make those
3 requests.
4 Q. What system is that?
5 A. DHIWorks.
6 Q. So your superintendent sees the -- some
7 additional work needs to be done by a
8 subcontractor that is outside of its scope. The
9 super makes a request into DHIWorks; is that
10 right?
11 A. That's correct.
12 Q. And I guess details the additional scope
13 and the basis for it. Then what happens?
14 A. Well, they also have to have a price for
15 the contractor.
16 Q. Okay. So they enter all of the
17 necessary --
18 A. It's usually the contractor telling us
19 they need more money or the contractor saying,
20 Hey, somebody damaged my whatever. I need -- you
21 have to pay me to fix it. And -- but yes, once
22 they know that the -- get the dollar amount, they
23 put in their little description of what it's for,
24 enter the dollar amount, typically they get a
25 variance code and submit it, and it will go --

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1 or the contractor?
2 A. No. The superintendent.
3 Q. Oh, I'm sorry. The superintendent.
4 Okay.
5 Talk to me about the warranty process
6 for Tidewater. When requests are made, how does
7 that work in general? Say a homeowner makes a
8 warranty request.
9 A. Right. Typically we need to determine
10 whether they're still within a warranty period
11 based on the closing date of their home and then
12 what the type of request is because different
13 items have longer warranty periods than other
14 items. Once it's determined it's a warrantable
15 item, then -- depending on the item, whether
16 it's -- you know, some items are just one thing
17 and some items might take four contractors to
18 fix.
19 They would issue out the -- they would
20 send it over to -- at that time it could have
21 been the builder himself handling his own
22 warranty. They would create a -- what we call a
23 ticket in an online system that we have for
24 warranty. It would get assigned to that builder.
25 Q. When you say builder, you mean

1 contractor?

2 A. I'm sorry. Superintendent. Replace the
3 word "builder" with "superintendent."
4 And anyway, then the superintendent
5 would go ahead and -- sometimes it could be
6 something they just call a homeowner and then
7 call a contractor and have the contractor go over
8 and fix the item. Those -- a lot of those, the
9 purchase orders are done -- for warranty are done
10 after the fact because we don't necessarily know
11 how much -- some things, if we're going to
12 replace the garage door opener, we can get a
13 price, if it's even payable. Some warranty items
14 we don't have to pay. It's covered by the
15 contractor.

16 Q. Okay.

17 A. Some things -- if we end up having to do
18 a payable, then -- if they give us a price for
19 the work up front, we will issue them a purchase
20 order up front. If it's an item that they have
21 to go out and actually visit the house to see
22 what the issue is, then they will give us a
23 price.

24 Q. So you said some warrantable items are
25 not payable. They are covered by the contract.

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1 A. Yes.

2 Q. Can you provide me an example or explain
3 to me how that works?

4 A. Yes. I mean, typically your -- I
5 believe mechanical we -- I believe it's under a
6 two-year warranty. So if something goes wrong
7 with your HVAC system within that two years, that
8 contractor falls on to him to go out there and
9 fix it. Now, that's assuming it wasn't damaged
10 or anything by the homeowner.

11 Q. Okay.

12 A. But if it's just a system -- something
13 that's not working, your thermostat goes out or
14 whatever it is, and it falls under that warranty
15 period, then that -- the contractor who was paid
16 to do the -- install that HVAC system on that
17 particular house would need to carry the warranty
18 and go out there and do it for no extra charge.

19 Q. So no extra charge to Horton, no extra
20 charge to the homeowner; is that correct?

21 A. That is correct.

22 Q. What is an example of warranty work that
23 would be billable or payable?

24 A. The contractor who did the work no
25 longer works for us and when we have no real

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1 recourse of a backcharge, I have got to pay
2 another contractor to go out there and do the
3 warranty because it's warrantable -- it's under
4 our Horton warranty, so I have to pay someone to
5 go do it.

6 Q. But if the original contractor is still
7 working for Horton, most warranty items would be
8 not billable because they would be included under
9 the contractor's agreement with Horton?

10 A. Yes. That's in general the way it
11 works, yes.

12 Q. Let's talk about the final walk-through.
13 How many different walk-throughs -- does a
14 homeowner have a walk-through before closing and
15 then a one-month walk-through and then the
16 11-month walk-through? Let's talk about that.

17 A. Okay.

18 Q. How does that process go?

19 A. Well, typically -- and you know, every
20 home and every homeowner is different. Some
21 homeowners don't even come to the closing. They
22 will send some other representative for them.
23 Maybe it's a Realtor. We have had some that
24 don't come at all. We have had some people buy
25 homes from California. So pretty much almost

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1 sight unscen.

2 But in general, the ideal would be able
3 to have a walk with the homeowner a few weeks
4 before closing or at least a certain number of
5 days before closing to see if there's anything
6 that the homeowner saw. And these are typically
7 cosmetic issues, okay? It's -- the paint doesn't
8 look right on this piece of trim. There's a
9 cracked corner piece of tile. You know, a door
10 doesn't latch properly. Those are some examples.
11 Okay?

12 Then a superintendent would put those on
13 the list and then go get the contractors that
14 performed those -- that work was under their
15 scope, get them to come out to fix the item, and
16 then the goal would also be to rewalk the
17 customer and get them to sign off that the list
18 is complete. That would be preclosing.

19 Q. Does the preclosing walk-through include
20 both the interior and exterior of the home?

21 A. Yes.

22 Q. Does it include the yard?

23 A. Yes. I believe they're supposed to --
24 typically they're going to take them and show
25 them the property pins.

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1 Q. What do you mean by the property pins?

2 A. The corners of the property that the
3 homeowner is getting ready to close on. The
4 superintendent would normally walk with the
5 homeowner and point to the surveying pins --
6 stakes and pins that are set in the ground to
7 show the homeowner's corners so they can see
8 where their property lines are.

9 Q. So that's preclosing. Are there any
10 records kept of these preclosing walk-throughs?

11 A. There should be.

12 Q. Okay. And is it a checklist? Does it
13 say, you know, preclosing checklist at the top or
14 what should I look for?

15 A. It's something like that. Or it should
16 be a homeowner walk. I can't remember the
17 specific name. It's pretty obvious what it is.
18 And there's certain things that are standard that
19 must be done that are populated at the top of
20 that sheet, I believe. And then it's left blank
21 for items that -- if the homeowner is requesting
22 correction.

23 Q. And does Horton keep these as part of
24 the homeowner file, the closing file?

25 A. Yes. I don't know if it's part of

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1 scopes of work of the various contractors on this
2 project?

3 A. I am familiar of -- this is for vertical
4 construction. I'm familiar with them in the
5 extent of how much I remember what they were when
6 I drafted them, however many, you know, years
7 ago. Keep in mind they change over periods of
8 time. So probably on some scopes I may have
9 revised four or five times. Some scopes may be
10 almost identical to what they were back then. So
11 I would have to look at each specific scope.
12 Does that make sense?

13 Q. Yes. Let's back up for a minute to the
14 master agreement. How often would Horton sign a
15 master agreement -- master contractor agreement
16 with a particular contractor?

17 A. Typically -- tell you what, most of it
18 is because the contractors change their legal
19 name. That triggers it, and that happens quite
20 often. We do it if our corporate office
21 determines that they want to issue out new
22 contracts and update contracts.

23 Sometimes they will issue out new
24 contracts with the slightly updated language, and
25 they don't require everybody that is current

1 the -- we definitely keep them. Like I say, it
2 might be in a construction folder. I don't know
3 if it's in the closing folder, but we keep them.

4 Q. And then we have already talked about
5 the one-month and the 11-month post-closing
6 walk-through; is that right?

7 A. Yes. We spoke about it.

8 Q. And that is not compulsory. That is up
9 to the discretion of the homeowner, correct?

10 A. Yes.

11 Q. So if they're not having any issues, I
12 guess they won't contact Horton; is that correct?

13 A. That's correct. Or at least that's the
14 way it was then in Hilton Head/Savannah at that
15 time.

16 Q. Would the one-month walk-through include
17 a walk both interior and exterior to the home?

18 A. It depends on what the homeowner is
19 requesting.

20 Q. Okay.

21 A. So say a piece of siding came loose,
22 then it would be exterior.

23 Q. Okay. I want to talk for a few minutes
24 about the -- some of the contractors on this
25 particular project. Are you familiar with the

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1 contractors to come back and sign them.

2 Sometimes they do, but most of the time they
3 don't. But then every one going forward we
4 always use the latest and greatest contract.

5 Q. So the master -- I think you called it
6 independent contractor agreements. Those are
7 drafted and prepared by Horton; is that correct?

8 A. That is correct.

9 Q. Do you personally have any involvement
10 in drafting those contracts?

11 A. No. Those are attorneys.

12 Q. Okay. So that's a corporate -- when I
13 say corporate, I mean like big umbrella,
14 D.R. Horton issue; is that correct?

15 A. It's out of our -- it's out of our
16 corporate legal risk management department.

17 Q. It's not handled at a division level?

18 A. Not at all.

19 Q. Can the division make any changes to the
20 master independent contractor agreement?

21 A. Yes. But typically not without running
22 the change through risk management, through the
23 attorneys. And many cases we will let them do
24 the drafting of the change.

25 Q. Okay. In your experience, how many

1 times has an independent contractor agreement
2 been modified?
3 A. The ones that I've seen that were
4 modified maybe -- I don't know, in 23 years that
5 I've been with the company, maybe 8, 10 times.
6 Q. What were the circumstances in general?
7 A. I have -- it's been so long. I haven't
8 seen one modified in a long time.
9 Q. Okay.
10 A. But I can't remember. It could be -- I
11 have no idea. Whatever gave somebody heartburn.
12 Q. Right. So is it in general the
13 independent contractor is presented with the
14 agreement and Horton expects them to sign it,
15 agree to the scopes of work, and then they can
16 commence work for Horton; is that correct?
17 A. Well, they obviously have an opportunity
18 to -- and many of them do -- send it to their
19 legal advisor. They will come back with
20 comments. We will determine whether we're going
21 to do anything. We don't in a lot of cases, but
22 I can tell you these contractors are after us to
23 get work. So they determine whether they want to
24 sign it or not.
25 But, yes, once they -- typically I'm not

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1 necessarily willing to change the contract, and
2 if they're willing to agree to the terms and the
3 scopes of work and give me a price for it, then
4 we can do business.
5 Q. Right. And you mentioned the contractor
6 after the work. So is it fair that if contractor
7 A doesn't want to do it, you probably have
8 contractor B, C, and D waiting to sign a contract
9 if A won't do it?
10 A. Well, B, C -- I will probably have B, C,
11 and D already signed up.
12 Q. So you just don't sign up A and move on
13 to B?
14 A. Well, that could be the case.
15 Q. But in general, the independent
16 contractor agreement is a standard form agreement
17 that you have not seen modified in a long, long
18 time?
19 A. That's correct. I'm talking, you know,
20 six, seven, or more years. Not modified, but
21 modified in the request of a contractor.
22 Q. Right. Horton has the opportunity to
23 revise it as it sees fit, but it has been a long,
24 long time since a contractor's modification has
25 been accommodated?

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1 A. Yes. Well, part of the negotiation.
2 Q. Right. Are the scopes of work up for
3 negotiation that you have prepared?
4 A. Yes, they are. And keep in mind that
5 the scopes of work typically originated at some
6 point in time from contractors and, you know,
7 kind of working with us to develop them. Now
8 we're talking these things go back over 20 years.
9 And then they get updated. So if a code
10 changes -- the contractor is a professional.
11 They know what the codes are that governs what
12 their installs are or what work performance they
13 have to do. And in many cases they come to us
14 and say, hey, with this code change, this
15 changes, this changes, this changes. And then we
16 will need to go in and revise the scopes of work.
17 Q. Is Horton obligated as the license --
18 pulling a residential contractors license to know
19 when the codes had changed or need to be updated?
20 A. Our license holder is -- he's obligated
21 to understand those codes.
22 Q. And that's the license holder for
23 Horton, correct?
24 A. That's correct.
25 Q. Let's talk a little bit about the

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1 contractors. Do you recall the scope of work for
2 Hutton's Landscapes in connection with Tidewater?
3 A. I believe I glanced through it briefly.
4 Q. And what do you recall or what did you
5 see?
6 A. Can you be more specific with what
7 you're referring to?
8 Q. Well, we will look at some specific
9 documents after lunch. I am just asking you
10 generally.
11 A. Okay. I saw scopes of work for -- a
12 general scope of work, I saw a scope of work for
13 rough and final grade. I believe I saw one for
14 landscaping turnkey. I think I might have seen
15 one for slab grade or backfill slab grade maybe.
16 I think there was another one in there as well.
17 Over many years, Hutton has performed different
18 work for us.
19 Q. What about the scope of work for Lather
20 Construction, Inc.?
21 A. That would be part of the civil site
22 engineer and under a separate contract. I don't
23 have that.
24 Q. Okay. And then what about the scope of
25 work for East Coast Construction Cleanup Corp.,

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1 formerly known as SC Cleanup Co., Inc.?
 2 A. I'm aware it exists. I have not
 3 reviewed it.
 4 Q. So you don't know what specific
 5 contractors performed in terms of their scope for
 6 Tidewater without reviewing their contract?
 7 A. I would have to read the scope of work.
 8 Q. Have you reviewed the complaint and
 9 D.R. Horton's answer and cross-claims against its
 10 independent contractors in this case?
 11 A. Yes. I read through it. I couldn't
 12 remember exactly what it says right now because
 13 it's probably been three or four weeks ago.
 14 Q. Right.
 15 A. But I remember the gist of it.
 16 Q. Are you aware of what actions or
 17 inactions Horton faults my client, Hutton's
 18 Landscapes, for?
 19 A. I'd have to read that again.
 20 Q. Let's talk briefly -- were you involved
 21 in the remediation of the Stephens home in the
 22 Tidewater subdivision? When I say remediation, I
 23 mean the remediation of the backyard.
 24 A. I'm familiar with us performing an
 25 investigation out there. I was not involved with

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1 issue and presented him as a witness in that
 2 particular -- in the Stephens case?
 3 A. I'm aware that Matt Hutton or Hutton's
 4 Landscapes did perform some sort of scope on that
 5 property.
 6 Q. And why did Horton ask Hutton to perform
 7 or prepare a scope on that property?
 8 A. I would assume you would -- it is an
 9 assumption. I'm assuming you would go to your
 10 landscaper to do an investigation on the yard.
 11 Q. Okay. Do you know if the scope that --
 12 or pricing of the scope was -- back up. Do you
 13 know what repairs, if any, were made to the
 14 Stephens backyard?
 15 A. I'm not aware of the scope of any work
 16 done on that -- the exact scope, I'm not aware
 17 of.
 18 Q. Do you know who currently owns the
 19 Stephens residence?
 20 A. I believe D.R. Horton owns it.
 21 Q. Is anyone living in that residence?
 22 A. Not that I'm aware of.
 23 Q. Are you aware of the current condition
 24 of the Stephens backyard?
 25 A. I'm not.

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1 that investigation.
 2 Q. So are you aware of what the
 3 investigation revealed in terms of the Stephens
 4 backyard?
 5 A. I believe it may be a piece of metal the
 6 size of a dog tag.
 7 Q. Did you review any reports related to
 8 the individuals involved in the investigation?
 9 A. No.
 10 Q. Who would have reviewed those within
 11 Horton?
 12 A. Whoever it was -- would have been having
 13 these conversations with -- or you know, I'll be
 14 honest with you, I think it would have fell under
 15 construction -- construction management.
 16 Q. Are you aware of the litigation
 17 involving the Stephens residence?
 18 A. I'm aware there was.
 19 Q. Are you aware of any witnesses or
 20 experts D.R. Horton presented as it relates to
 21 the potential issues in the Stephens backyard?
 22 A. I'm aware there were people looking into
 23 it.
 24 Q. Do you know whether -- or are you aware
 25 that Horton asked Matt Hutton to look at the

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1 Q. Who would be in a better position to
 2 offer testimony about that?
 3 A. That's a tough one just because of
 4 people's -- you know, five years ago it might
 5 have been Carl Aten. Today it might be somebody
 6 else, like -- you know, I don't even know if the
 7 current construction manager has been by there.
 8 I don't know if anyone goes by there on a regular
 9 basis. I have no idea what the status is of that
 10 house.
 11 Q. Okay.
 12 A. And you know, I would hope somebody goes
 13 by there and checks on it periodically, but I
 14 don't know what the status is and who that person
 15 is.
 16 MS. LUCEY: For the group, it's
 17 12:18. I would say let's take a break until
 18 12:45 so everyone can grab a quick bite to eat,
 19 and we'll reconvene at 12:45. Does that work for
 20 the group?
 21 Mr. Bunner, does that work for you?
 22 THE WITNESS: Sure.
 23 (A recess was taken.)
 24 Q. (MS. LUCEY) We have just returned from
 25 the lunch break. During the lunch break,

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1 Mr. Bunner, did you speak with anyone about the
2 substance of your testimony?
3 A. The substance of my testimony, no.
4 Q. Yes, sir. Did you speak with anyone
5 during lunch about anything else?
6 A. I did ask my attorney a question about
7 an answer -- I asked Michael a question about an
8 answer I gave prior that I might need to give
9 some clarity to.
10 Q. What did he tell you about that answer?
11 A. That I may want to clarify.
12 Q. Did he tell you anything else?
13 A. No.
14 Q. Okay. What would you like to clarify
15 for the record, Mr. Bunner?
16 A. Back in the very early parts of this
17 deposition, you were asking about me and asked me
18 if I had any family or -- either family or
19 married family in Beaufort County. I am
20 divorced. I answered no because I am divorced.
21 But I wanted to clarify that I have an ex-wife
22 that does live there.
23 Q. All right. What is your --
24 A. Her son also lives there.
25 Q. Is it your son?

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1 because Carl pretty much took him in and trained
2 him prior to him being at Tidewater Creek. But I
3 know he was trained by Carl to do the -- to
4 perform those duties.
5 Q. Do you know if he had any background in
6 construction or had a degree, a technical or
7 associate degree or college degree, that would
8 benefit him in construction?
9 A. Not at all. Anything he would have
10 known would have been something he may have heard
11 out of my mouth as he was growing up.
12 Q. Does Horton have minimum qualifications
13 for its superintendents?
14 A. I believe there is. I'd have to look
15 and see what that is with our HR department out
16 of Texas.
17 Q. You mentioned Texas. The risk
18 management, risk transfer, legal corporate
19 department, is that based in Texas?
20 A. Yes.
21 Q. Does D.R. Horton have any in-house
22 counsel located in South Carolina?
23 A. We do have attorneys, very few, that may
24 work for us like helping -- like helping with the
25 land acquisition and entitlement items, and it's

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1 A. Not my son.
2 Q. What is your ex-wife's name?
3 A. Wendy Bunner.
4 Q. What is her son's name?
5 A. Nicholas Yannarella.
6 Q. Is he related to --
7 A. It's one and the same.
8 Q. So Mr. Yannarella was your stepson?
9 A. That is correct.
10 Q. If you don't mind me asking, when did
11 you get divorced?
12 A. Let's see. This is 2021. I think it
13 was final in August of 2016, I believe.
14 Q. Okay. And Mr. Yannarella continued
15 working for Horton after the divorce or did he
16 leave after the divorce?
17 A. No. He continued to work for Horton.
18 Q. And I can't remember if you told me if
19 he's still there or not.
20 A. He's not. He's not there anymore.
21 Q. Can you tell me about Mr. Yannarella's
22 experience or qualifications to act as
23 superintendent on the Tidewater project?
24 A. I kind of kept that at arm's length a
25 little bit as far as what he did with Carl,

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1 only a spot here and there whether the city or
2 division has one or not, and I think -- we do
3 have a region attorney, but I believe he's in
4 Georgia.
5 Q. Does Hilton Head/Beaufort office
6 currently have an attorney in-house?
7 A. Not that I'm aware of.
8 Q. Has it ever had an attorney in-house?
9 A. Not that I'm aware of, no.
10 Q. What about the Charleston division?
11 A. We did -- we do have an attorney that
12 works on land acquisition entitlements for us
13 here.
14 Q. And that's in-house?
15 A. Yes.
16 Q. Mr. Bunner, I'm going to move to some
17 exhibits.
18 (Exhibit No. 2 marked for
19 identification.)
20 Q. So if you could open Exhibit 2 for me.
21 It's a number of pages. Just go ahead. It's 21
22 pages. If you will just scroll through it and
23 let me know when you've had an opportunity to
24 look at it.
25 A. I scanned through it.

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1 Q. Can you tell me what you believe to be
2 Exhibit 2?
3 A. I believe it to be a contract with
4 Lather Construction with D.R. Horton for the
5 development -- or site development of -- let me
6 make sure it says it here. Hang on a second --
7 for Tidewater Creek, yes.
8 Q. The second page of the exhibit starts
9 with a table of contents for various divisions of
10 project specifications. Do you see that?
11 A. Yes, I do.
12 Q. But I have not seen the actual division
13 two specifications. Do you know where those
14 might be located?
15 A. They're not within this document?
16 That's a question -- you're saying you haven't
17 seen them.
18 Q. Well, I printed them out I think in the
19 order that they were in the D.R. Horton file so,
20 you know, D.R. Horton's produced over 18,000
21 pages, so it may be produced in those pages, but
22 it was not included as part of what I have marked
23 as Exhibit 2.
24 A. Okay. I don't know where they are.
25 They may be within those 18,000 pages, but if

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1 Q. What was the role of Carolina
2 Engineering Consultants, Inc.?
3 A. I believe they're the -- that they would
4 have done the actual civil site engineering.
5 Q. What do you mean by that?
6 A. Design the roads, the storm drainage,
7 water and sewer for the site development
8 community, the actual engineering.
9 Q. How do you distinguish that from Andrews
10 & Burgess, who it says the project has been
11 designed by Andrews & Burgess?
12 A. Oh, sorry. Okay. When I read the
13 little blurb between them -- so it was designed
14 by Andrews & Burgess, and apparently they have
15 worked -- either by contract, worked out
16 construction observations, certifications, and
17 contract management will be performed by Carolina
18 Engineering Consultants, Inc.
19 Q. Okay.
20 A. So Carolina Engineering Consultants,
21 Inc., was apparently not the design engineer.
22 Q. Have you reviewed any of the civil
23 engineering plans for this neighborhood either
24 during this litigation or in preparation for
25 today?

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1 they're not in this actual document we're looking
2 at, Exhibit 2, I don't know exactly where they
3 are.
4 Q. And I believe you said, I think turning
5 to page 4, it's a standard form of agreement
6 between D.R. Horton and Lather Construction
7 Company, Inc.; is that correct?
8 A. It looks to be fairly standard, yes.
9 Each engineer -- and I was wrong on who I thought
10 the engineer was what I said before. But each
11 engineer has their own format of contract, but
12 it's a general standard contract.
13 Q. And what was the role of Carolina
14 Engineering Consultants? They're listed on the
15 agreement.
16 A. It appears that they were the civil site
17 engineer that did the actual engineering of the
18 site. I believe -- it doesn't look like they did
19 the land planning part of that from the cover
20 page I believe. Or maybe not the cover page. I
21 thought I saw another firm listed as designed by.
22 Q. Right. Article 3 -- if you will turn to
23 Article 3, it says, The project has been designed
24 by Andrews & Burgess, Inc.
25 A. There it is.

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1 A. No.
2 Q. Did you read any deposition transcripts
3 in preparation for your testimony today?
4 A. I do not recall reading any deposition
5 transcripts.
6 Q. Did you read any summaries of deposition
7 transcripts or did anyone read excerpts for you
8 of transcripts?
9 A. I may have. I think I may have had
10 access to it, may have glanced through, but not
11 enough to actually say I read it.
12 Q. Okay.
13 A. Some of it is rather long.
14 Q. Yes. I would agree with that.
15 Article 5, the contract price, can you
16 tell me the contract price for Lather
17 Construction as represented on this document?
18 A. From 5.01-A, it appears to be
19 1,014,423.63.
20 Q. And then turning to I guess the last
21 page of the contract, it looks like Jared O'Sako
22 signed the agreement on behalf of Horton; is that
23 correct?
24 A. I see it. I went too far. What sheet
25 number are you on?

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1 Q. Well, it's --
 2 A. You're looking at a hard copy?
 3 Q. It's page 10 of the PDF.
 4 A. Thank you. It looks like a J.
 5 Q. Well, it looks like he signed as
 6 designated representative, his name; is that
 7 correct?
 8 A. Oh, yeah, that's Jared. Yeah, I see
 9 that. Okay. Yes, that is correct. Jared
 10 O'Sako.
 11 Q. If you continue turning through, there's
 12 reference to Tidewater Creek, phase one and phase
 13 two. If you move past the notice to proceed
 14 starting on page 15 of Exhibit 2, does that
 15 refresh your recollection of phase one versus
 16 phase two in any way?
 17 A. Is there an actual drawing? I see
 18 the -- what appears to be a price list for phase
 19 one items. And -- let's see here. I'm not
 20 seeing anything like -- in other words, I don't
 21 see anything showing the lots or like a map or a
 22 plat or an exhibit.
 23 Q. Would Lather have been responsible for
 24 building or shaping the building pads or the
 25 house pads?

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1 that lot in the form of maybe the original
 2 purchase orders. The schedule would be populated
 3 in the online scheduling tool. Like I said
 4 before, I believe that was OnSchedule at the
 5 time.
 6 And the superintendent would be notified
 7 of here is your house, the options that go in the
 8 home, the plot plan so he knows the orientation
 9 of the home, and then he would get started on
 10 construction.
 11 Q. What would be the first thing that would
 12 be done?
 13 A. Would be forming up for a slab -- a
 14 slab-on-grade in this case.
 15 Q. Is that digging footers?
 16 A. Setting the form boards followed by
 17 digging the footers.
 18 Q. And then would the plumbers come in and
 19 put anything they need to underground?
 20 A. Yeah. They would do that as well.
 21 Q. Okay.
 22 A. And then the concrete -- once they fill
 23 in their trenches, then the concrete guys would
 24 finish up putting in what they need for the slab
 25 based on the engineering and then call for an

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1 A. Looking at Tidewater Creek phase one
 2 appears to be a snap of a spreadsheet. It's
 3 indicating what appears to me to be soils being
 4 brought in on the lots in phase one to raise the
 5 height, and that would be pads for the house,
 6 building pad. So I would say it looks like their
 7 scope was to do that just based on these
 8 documents.
 9 Q. And then once the pads were in place,
 10 what happens next for a lot, particular lot?
 11 A. Well, next on the land site development
 12 side?
 13 Q. No. Let's say a lot is cleared. The
 14 house pad is prepared. Then what happens next?
 15 A. Once we have our final approvals or what
 16 we call a certificate of completion from the
 17 municipality that that phase of land development
 18 is complete and they have assigned addresses to
 19 that, we have a recorded plat and they have
 20 issued 911 addresses for those lots, then we
 21 would apply for a building permit.
 22 Q. Then what happens?
 23 A. Once we obtain the building permit or
 24 close to that point of obtaining it, we would
 25 issue the budgets for the house to be built on

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1 inspection from the municipality to go ahead and
 2 pour the concrete.
 3 Q. When the building pads were built, was
 4 there any testing performed by either Carolina
 5 Engineering Consultants or GHD or another company
 6 to test compaction and perhaps dig some
 7 excavation pits, do you know?
 8 A. We -- as a general guideline, we test
 9 every lot that we build a house. Every building
 10 pad is to be tested to determine compaction to
 11 make sure it meets the minimum requirements that
 12 our structural engineer -- that's our engineer
 13 for our house engineer -- that it meets his
 14 requirements for soil bearing capacity. Every
 15 house is required to do that.
 16 I don't know who would have been
 17 contracted to do that on these particular lots
 18 without going and looking it up. But it would
 19 have been done.
 20 Q. Okay. Do you know if excavation or test
 21 pits were dug on any of the lots or all of the
 22 lots?
 23 A. We would not have done that at that
 24 time.
 25 Q. Would you have done it at another time?

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1 A. They may have done that as part of a --
 2 maybe part of a due diligence process and we're
 3 only talking about -- not on each lot typically.
 4 You would be talking about trying to determine
 5 what the makeup is of that site, and if they
 6 observed like a lot of beach sand -- I was told
 7 it was a fairly sandy site. Then it could have
 8 limited the amount of investigation that was
 9 needed.
 10 Q. Sir, Mr. Bunner, if you will turn to
 11 Exhibit 3 for me.
 12 (Exhibit No. 3 marked for
 13 identification.)
 14 (Discussion off the record.)
 15 Q. (MS. LUCEY) Mr. Bunner, if you would
 16 look at Exhibit 3 and take a few moments to look
 17 through it and let me know when you're ready to
 18 discuss it.
 19 A. Okay.
 20 Q. Can you tell me what Exhibit 3 is,
 21 Mr. Bunner?
 22 A. The -- it appears to be a SWPPP report
 23 by GHD. I forgot GHD performed those services or
 24 had those available. That's what it appears to
 25 be.

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1 A. Okay. I see that.
 2 Q. Are you familiar with this log and how
 3 data is entered on to it?
 4 A. Yes.
 5 Q. Who enters the information on to the
 6 log?
 7 A. The person performing the SWPPP
 8 inspection.
 9 Q. And then I see across the top there's
 10 several columns. One is "corrected by" and then
 11 "explanation" so if it's --
 12 A. Yeah. You know, I don't know if this is
 13 an interactive thing that our people and their
 14 people can access and update as well. Does that
 15 make sense? It almost looks like it is because
 16 you're seeing -- unless somebody is entering all
 17 of this data for all the parties. Does that make
 18 sense?
 19 Q. Right.
 20 A. I see Nick Yannarella's name, but I
 21 don't know that Nick Yannarella put that comment
 22 in there. Same thing with Shara Frazier and
 23 Tempestt Taylor. I don't know -- I believe those
 24 to be not Horton employees.
 25 Q. And do you know who would have entered

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1 Q. And the cover page I think is maybe a
 2 transmittal e-mail to various folks?
 3 A. Yes.
 4 Q. And then the second page of the document
 5 appears to be on D.R. Horton letterhead. Was
 6 this information that GHD entered into a
 7 D.R. Horton computer program or did D.R. Horton
 8 enter it?
 9 A. I think they're just using our -- using
 10 our logo.
 11 Q. So this is a form that GHD --
 12 A. I'm not aware of us providing the forms
 13 to use for the -- I could be wrong, but I'm not
 14 aware of us providing the forms. That's why I'm
 15 assuming this is their form that they're using
 16 our letterhead -- or logo on, but I could be
 17 wrong.
 18 Q. You just don't have any information
 19 either way; is that fair?
 20 A. I'd have to ask.
 21 Q. Who would you ask?
 22 A. Somebody at GHD.
 23 Q. If you could turn with me to page 7 of
 24 the PDF. Are you familiar with the corrected
 25 responsive action log?

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1 the explanations in the next column?
 2 A. Well, the way that -- just by the
 3 descriptions, it says -- I'm looking at the first
 4 one on that sheet. Done Hutton's. Done
 5 Hutton's. Gives a date. This one says, Not
 6 Hutton's. That's an assumption of what that
 7 comment means to me. So it appears that it's
 8 Hutton making these comments. And whoever this
 9 HL person is. I'm thinking that's some initials.
 10 Q. Do you know whether Horton would have
 11 had an opportunity to review these action logs
 12 and make corrections? For example, that third
 13 line, it says, Not Hutton's. Do you know if
 14 representatives of Horton would have been able to
 15 review this and confirm if that was accurate or
 16 not?
 17 A. I would say that we had access to review
 18 this, yes.
 19 Q. And would a representative of Horton, do
 20 you believe, requested clarification or
 21 correction if that was not correct; for example,
 22 that entry that says not us or not Hutton's?
 23 A. I would make that assumption that, yes,
 24 it would -- either he has information of why
 25 that's not Hutton's -- I mean, I don't think

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1 remove trash from -- I am just looking at the
2 response action on one of these that says not
3 Hutton. It says, Remove trash from dumpsters. I
4 don't ever recall that being in Hutton's scope of
5 work.

6 Q. All right.

7 A. Unless we paid them an extra for doing
8 an additional scope of work that I'm not aware of
9 on this particular instance.

10 Q. Okay. If you would, sir, let's go ahead
11 and move to Exhibit 4, please.

12 MS. LUCEY: And for the record, and
13 for everyone's benefit, this is a composite
14 exhibit. I pulled different documents together
15 from different places out of Hutton's file, and
16 Horton's file, not suggesting they all belong
17 together, but it made sense to group them
18 together. So that's just for the benefit of the
19 record.

20 (Exhibit No. 4 marked for
21 identification.)

22 Q. Mr. Bunner, if you would take a look at
23 the documents included in Exhibit 4 and then let
24 me know when you're ready to discuss them.

25 A. It appears to be a group of purchase

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1 It's the purchase order number within Tidewater
2 Creek. In other words, if you're in another
3 neighborhood, you might have the same purchase
4 order number, but it's not associated with this
5 lot.

6 Q. Okay. So the -- what does the ON stand
7 for after the number 2006 --

8 A. Yeah. That's -- I can't remember what
9 it actually stands for, but that's what is called
10 an original PO. Those are -- an original PO, and
11 this is for the base landscaping and irrigation
12 on that particular lot.

13 Q. Okay. So is it the ON that signifies
14 it's the original PO?

15 A. Yes.

16 Q. And then it looks like --

17 A. It's designated -- in other words,
18 that's the difference between it and an extra --

19 Q. Okay.

20 A. -- is the ON.

21 Q. Okay. So the ON signifies it's for the
22 originally contemplated scope of work?

23 A. Yes.

24 Q. And then the sub number/BU ID number,
25 what are those numbers?

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1 orders -- I have looked at it. I'm ready.

2 Q. So the first page, is this a purchase
3 order that Horton would have issued to Hutton's
4 Landscapes?

5 A. Yes.

6 Q. So I just want to walk through -- I want
7 to understand sort of the general format of each
8 of these documents so when I'm looking at
9 purchase orders for other lots, I understand what
10 the documents mean. So this has a purchase order
11 date. Is that the date that the purchase order
12 was issued?

13 A. Yes.

14 Q. And then what is bid contract number?

15 A. Bid contract number is -- it's an
16 internal sort of a file folder computer ID
17 location number that withholds the pricing that
18 Hutton has submitted to us for doing work.

19 Q. Okay. Work for a particular lot or a
20 particular scope of work?

21 A. This would be -- this would be work for
22 the lots in Tidewater Creek.

23 Q. Okay. And then what is the purchase
24 order number?

25 A. That's the identifier of this document.

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1 A. That's the subdivision number. 51566
2 is -- it's a number within our operating system
3 that's assigned to Tidewater Creek, and the 0017
4 is the lot number.

5 Q. Okay. And then there's a vendor number
6 on the top right-hand corner. Is that the vendor
7 number for Hutton's Landscapes?

8 A. In Hilton Head/Savannah, yes.

9 Q. So would it -- if Hutton's was doing
10 work in Texas, would it have a different vendor
11 number?

12 A. Yes.

13 Q. So that's -- so that vendor number is
14 specific to Hilton Head/Beaufort?

15 A. Hilton Head Hutton -- Hilton

16 Head/Beaufort/Savannah/Hutton's Landscapes, yes.

17 Q. And then it looks like there's a
18 description of the work. Landscape turnkey, and
19 then there's a second line that's landscaping
20 irrigation front and side only, and then there's
21 an option number. What is that option number?

22 A. Yeah. Basically we categorize options
23 in our operating system. This is where we --
24 this is how we manage all of the bids that
25 contractors submit. So underneath the

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1 landscaping turnkey umbrella let's say, then you
2 have an option of whether they want to do --
3 include this irrigation on this lot, and it's a
4 payable option. So they chose the option
5 71101020, which is specifically linked to
6 landscaping -- turnkey landscape irrigation,
7 front and sides only.

8 Q. For the homes in the Tidewater
9 neighborhood, was sod and irrigation -- so that
10 was an option to include sod and irrigation in
11 the front yard or was just irrigation an option?

12 A. Just the irrigation was an option.

13 Q. So sod in the front yard was provided as
14 a baseline; is that correct?

15 A. I'd need to look at -- I would have to
16 look at the individual specifica- -- not scopes,
17 but specifications for what was bid to Hutton's.
18 I do believe it was front, sides, and rear up to
19 the clearing limits. In other words, we didn't
20 necessarily clear completely all of the
21 backyards.

22 And some of them were left natural with
23 trees, and they wouldn't have obviously sodded
24 those areas. Or they could have seeded the rear,
25 but without looking at the actual specifications

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1 Q. Okay. Let's flip to page 2 of that
2 exhibit.

3 A. Okay.

4 Q. And tell me what this is, please.

5 A. This is an extra purchase order
6 designated by the OP.

7 Q. With the purchase order number?

8 A. Yeah. That 201684 and ending with an
9 OP?

10 Q. Yes.

11 A. That OP is designating that it is an
12 extra.

13 Q. So tell me again what an extra purchase
14 order is.

15 A. That would either be for additional work
16 to be performed -- and it may be within a scope
17 of work, but that scope of work didn't have that
18 item, like an option.

19 Or in this particular case, they're
20 asking them to remove tree vines from live oak
21 tree at back right corner for closing. I don't
22 know if that was a customer request or if that
23 was something that either construction management
24 or the builder decided to do or the sales
25 representative asked us -- asked them to do.

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1 for Tidewater Creek as to what is included in the
2 base house package, I can't answer that question.
3 I'd be happy to look it up if it's part of the
4 documents.

5 Q. Well, that was my question. Where would
6 I find the Tidewater specifications? What was --

7 A. It's basically like a spreadsheet that
8 would have been either provided or -- sometimes
9 you will find it in a marketing document for
10 Tidewater Creek. It would be called included
11 feature sheet.

12 Q. So it wouldn't actually be a
13 specifications book. It's more likely an Excel
14 spreadsheet or something that reflects included
15 features for the neighborhood?

16 A. Exactly.

17 Q. All right. And let's turn to the next
18 page -- so let me back up. So most original --
19 or most purchase orders would look like what we
20 just talked about as page 1 of Exhibit 4; is that
21 correct?

22 A. Yes.

23 Q. Okay. So the information may change,
24 but the format does not?

25 A. Yes. You're correct.

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1 It's hard to say who -- why that was requested,
2 but somebody wanted to do it, and they would have
3 gotten a price from Hutton's to do that work and
4 then go through the process I explained to you
5 earlier about submitting.

6 Q. But would you assume that because the
7 extra purchase order was issued that Hutton was
8 paid \$250 to complete this work?

9 A. I'm assuming if the purchase order was
10 issued that as long as they actually -- I don't
11 know that they performed the work, but we issued
12 a purchase order with the intent to perform the
13 work. We have issued purchase orders that never
14 get filled for one reason or another. It's not
15 the norm, but it does happen.

16 Q. Is there a way -- we talked about the
17 vendor number that is specific to Hutton's for
18 the Hilton Head/Beaufort/Savannah area. Could
19 Horton run a vendor report to see what Hutton's
20 was paid during a specific time frame based on
21 their vendor number?

22 A. I would say yes. I don't know if it's
23 itemized, but they should be able to run
24 something to show them what the -- what they were
25 paid over a time frame.

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1 Q. Okay. If you will turn for me,
2 Mr. Bunner, to page 3 of Exhibit 4. And tell me
3 what this document is.
4 A. This would be a warranty -- okay. This
5 was issued by warranty. Let me scroll down here.
6 Which in this case was done by Peter Delgado, who
7 was actually a superintendent. So he obviously
8 was handling some form of warranty, whether it be
9 30-day or all the way to 11-month, but apparently
10 there was an irrigation leak. I don't know if it
11 chewed up a bunch of water. Obviously he's not
12 very specific other than just irrigation leak. I
13 don't know if it cost the homeowner a bunch of
14 water and we had may have had to reimburse the
15 homeowner for water usage, if there was some sort
16 of damage to some sort of personal property.
17 It's hard to say. Just not enough description.
18 It's a backcharge to Hutton's for that.
19 Q. So that was a charge applied against
20 anything Hutton's may have been owed or Hutton's
21 may have had to write a check to Horton for that
22 amount, 147?
23 A. Yeah. Hutton's would have most likely
24 at the time had a revolving balance, and it would
25 have gone against -- as an offset against any

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1 Hutton's to go out there and check out the
2 system.
3 Q. So the warranty service work order was
4 issued, and then the purchase order was issued
5 sounds like after the issue was investigated and
6 Horton apparently reimbursed the owner for what
7 we think is increased water fees, and then Horton
8 backcharged that to Hutton; is that accurate?
9 A. That sounds pretty accurate. Sounds
10 reasonable.
11 Q. Okay. Let's move on to page 6. And we
12 can look at page 6 and 7 together. It looks like
13 it's two warranty purchase orders that are the
14 same, but one notes that it was paid; is that
15 accurate?
16 A. I have gotten away from it now.
17 Q. 6 and 7 is where we're looking.
18 A. Oh, I thought you said a purchase order.
19 Okay. I'm on 6. It's a credit memo.
20 Q. No. We can skip past that. I'm on page
21 6. I skipped a few pages of the PDF.
22 A. I'm on page 6 of the PDF, and it's a
23 credit memo.
24 Q. Oh, sorry. Page 7. My fault. Excuse
25 me.

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1 money that we still had. And at the time
2 Hutton's did a lot of work, so it was a lot of
3 revolving money.
4 Q. But other warranty purchase orders would
5 look similar to this in their forms, just the
6 specific work and whether or not it's a
7 backcharge. That may change; is that fair?
8 A. They should, yes. General format is the
9 same.
10 Q. If you will turn to page 4 of Exhibit 4
11 and describe for me what we're looking at.
12 A. This is a warranty service work order.
13 This is basically requesting the presence of a
14 contractor at this location on this date -- let's
15 see. Homeowner suspects that high water usage is
16 related to sprinkler system malfunction. Please
17 assess -- this is on lot 17. I assume we're
18 talking about the same lot.
19 So apparently -- let me look at
20 something here. So apparently we issued this to
21 Hutton's to go out and check it out on December
22 4th, 2015, but it looks like we didn't do the
23 backcharge and reimbursement until April of 2016,
24 which is that previous purchase order we just
25 reviewed. That's what this is. It's requesting

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1 A. This is a warranty purchase order. It
2 says, Construction debris in backyard. Schedule
3 May 6th. Contact homeowner to confirm. Let me
4 see something here. So this looks like we issued
5 a purchase order for them to go out -- it doesn't
6 tell them what to do, but it says, Construction
7 debris in backyard.
8 Q. And then on page 8, does it appear that
9 Horton paid Hutton's to go do that work?
10 A. It does.
11 Q. If removing construction debris out of
12 the backyard had been within Hutton's scope,
13 would Horton have paid them to go back out there
14 and do that?
15 A. A mistake by a superintendent would
16 have, but it looks like I need to go back and get
17 150 bucks back from Hutton's right now.
18 Q. You think Mr. Yannarella made a mistake?
19 A. I don't know the circumstances of why he
20 would have thought that this wasn't part of their
21 scope of work.
22 Q. Why do you think it's part of their
23 scope of work?
24 A. Well, here's the deal. Actually, you
25 know what, construction debris, I don't have any

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1 idea what that is. But we have to go look at
 2 their scope of work and see what it says.
 3 Q. Okay.
 4 A. And I am happy to do that.
 5 Q. Well, we will get there. I can assure
 6 you. I promise. We will get there. We can
 7 circle back.
 8 Would construction debris be debris from
 9 ongoing construction, do you believe?
 10 A. Yes.
 11 Q. Do the contractors who are actually
 12 constructing the house have an obligation to pick
 13 up their debris?
 14 A. They do.
 15 Q. Did Horton also hire East Coast
 16 Construction Cleanup to do cleanup at the site?
 17 A. Well, it's trash haul typically but yes.
 18 Q. Did they also do interior and exterior
 19 cleanups, "they" being East Coast?
 20 A. They did in some neighborhoods but maybe
 21 not all the neighborhoods as far as doing both.
 22 They did perform those services. I'm not sure if
 23 they performed them within Tidewater Creek. They
 24 may have.
 25 Q. If East Coast performed exterior

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1 Hutton's debris.
 2 Q. How would I find if there had been a
 3 backcharge related to this warranty purchase
 4 order?
 5 A. Someone had to go look in the system and
 6 look it up. You'd have to look to see if there
 7 was a backcharge, like, typically right about the
 8 same time that this was issued, because normally
 9 they're issued -- not always, but normally
 10 they're issued about like one after the other.
 11 Q. Could you look it up by lot number? For
 12 example, this warranty purchase order is for lot
 13 number 18. Can you look it up by lot number?
 14 A. I will be honest with you, I'm not --
 15 somebody could. Either by lot number or -- let
 16 me look here. Hold on a second. I can't answer
 17 on the warranty purchase orders because they're
 18 handled differently in our system than the other
 19 purchase orders that are done by the purchasing,
 20 and I don't know how easy it is to track. I'm
 21 thinking you could probably find it by the lot
 22 number.
 23 Q. What does it mean when it says option 18
 24 in the description? Does that correlate to the
 25 lot number or is that just a coincidence?

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1 cleaning, what would that include in their scope?
 2 I'm not asking about Tidewater specifically. I'm
 3 just saying if they performed that service, what
 4 would it include, the exterior cleanup?
 5 A. I would need to review the scope because
 6 we have changed those multiple times over the
 7 years. At one time they actually did pick up
 8 debris that was adjacent to the dump -- at one
 9 time they used chicken pans and used to pick up
 10 debris that was around them, but as they changed
 11 the type of containers they used, their scopes of
 12 work changed. So I would be happy to look at
 13 that scope of work as well.
 14 Q. Well, you seem pretty certain about
 15 Hutton's scope. Why do you need to look at East
 16 Coast's -- you're not as certain about East
 17 Coast?
 18 A. Well, the construction debris, I don't
 19 know what that is. And that was my first
 20 comment, was I was pretty sure about Hutton's,
 21 but then when I went back and I thought about
 22 that as well and -- I don't know if it was
 23 Hutton's debris. And for all -- I also don't
 24 know if we didn't find out whose debris it was
 25 and backcharged another contractor, if it wasn't

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1 A. Do you have another warranty purchase
 2 order we can look at?
 3 Q. I'm sorry?
 4 A. I was just saying is there another
 5 warranty -- the other purchase order above it has
 6 the same thing.
 7 Q. Well, there may be another. We can keep
 8 looking, but as you sit here at the moment,
 9 you're not sure? That's okay.
 10 A. I mean, it looks like it is, but I don't
 11 know for sure.
 12 Q. Okay. If you will turn with me to -- I
 13 think it's page 13 of the exhibit, Exhibit 4.
 14 A. Okay.
 15 Q. And this appears to be another warranty
 16 purchase order. Do you know anything about the
 17 circumstances regarding this particular warranty
 18 purchase order on lot 18?
 19 A. No.
 20 Q. So you don't know the circumstances why
 21 they -- why sodding the backyard, hand rake
 22 entire yard prior to the sod, owner needs to
 23 inspect raking before sod is placed, no
 24 irrigation installed, you don't understand what
 25 that work was or why it was -- why Hutton's was

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1 paid to do it?
 2 A. Well, under the reasoning that typically
 3 no landscaping has any warranty at all. It says,
 4 Per Carl. Can you work with Carl -- sod the
 5 backyard, rake entire -- I'm assuming it was
 6 just -- maybe a homeowner that was just extremely
 7 persistent and Carl decided to give them
 8 something.
 9 Q. Well, the next page it looks -- which is
 10 a warranty purchase order, it looks like it's
 11 marked as paid. Would that suggest Hutton's was
 12 paid for that work?
 13 A. It would.
 14 Q. Okay.
 15 A. Same purchase order number. It does
 16 appear that way.
 17 Q. Do you know where Mr. Yannarella is now,
 18 Mr. Bunner?
 19 A. Where he resides or where he works?
 20 Q. Both.
 21 A. He resides in Bluffton, and he works for
 22 Lennar.
 23 Q. When did he last work for Horton?
 24 A. I think it's been a little over two
 25 years ago.

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1 Q. Okay. And let me know when you've had a
 2 chance to look at it. Can you tell me what the
 3 document is that we've marked as Exhibit 5,
 4 please, sir?
 5 A. Looks like -- it says job detail lots,
 6 but looks like a cost detail of lot 18 for the --
 7 looks like it's mainly the construction of the
 8 house.
 9 Q. How can you tell it's for lot 18?
 10 A. In the upper left-hand corner where it
 11 says 515660018 --
 12 Q. Yes.
 13 A. -- that is -- 51566 is the -- as we
 14 spoke before on the purchase orders, is the code
 15 for Tidewater Creek, and 0018 is the lot number.
 16 Q. And then there's various columns across
 17 the top. What does the cost code represent?
 18 A. Where is cost code on here? Cost code
 19 is just a classification to group costs. So we
 20 will group -- like painting cost codes are
 21 typically grouped together for interior paint,
 22 exterior paint. You might have more than one
 23 draw for a certain contractor. So like for HVAC
 24 you might have two draws. They will be grouped
 25 together, and we just use cost codes to do so.

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1 Q. And his position was either as a
 2 superintendent or a customer service
 3 representative for warranty service work; is that
 4 accurate?
 5 A. He was mainly a superintendent. I think
 6 when he first started, he might have been like an
 7 assistant superintendent, but for most of his
 8 period, he was a superintendent until the day he
 9 left.
 10 Q. He was never an owner or a principal of
 11 D.R. Horton?
 12 A. No.
 13 Q. Never a supervisor, never in a director,
 14 vice president, president role?
 15 A. No.
 16 Q. Mr. Bunner, I am going to try to move
 17 the process along. Let's, if you would, look at
 18 me -- not look at me. Look at Exhibit 5 with me
 19 and help me understand what Exhibit 5 is.
 20 (Exhibit No. 5 marked for
 21 identification.)
 22 Q. I am not going to ask you much of
 23 substance, so I don't think it necessarily
 24 handicaps you not to be able to turn it.
 25 A. I have it turned.

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1 Q. Okay. What is the cost type? What does
 2 that signify, particular cost type?
 3 A. I don't really know what the OV is.
 4 Wait a minute.
 5 Q. Okay.
 6 A. OV appears to be a paid purchase order;
 7 whereas, the ON is still an ON of an original
 8 unpaid purchase order. That's what this appears
 9 to designate.
 10 Q. So if it's got ON, that's associated
 11 with an original purchase order, and PV means
 12 it's with an extra purchase order; is that right?
 13 A. OP would be typically -- let me make
 14 sure that that is what that means on here. I
 15 don't see any OPs on the sheet I'm looking at.
 16 Q. Well, there's several different group --
 17 and that's under a column that says DO TY, and I
 18 see an ON. I see a PV, OB, DE, ON. I see -- and
 19 going on to the second page. So can you help me
 20 understand what those mean?
 21 A. I'm trying to figure out what they mean
 22 myself.
 23 Q. Okay.
 24 A. It looks like it's showing -- an ON is
 25 showing that it was a purchase order. The OV is

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1 showing a payment on that purchase order. Let me
 2 look for other things. I see an OP -- let me
 3 find another one. I'm not sure what the PV is
 4 yet.
 5 Q. If you don't mind, we will keep sort of
 6 talking through the document, and if it comes to
 7 you, just let me know and we can address it then,
 8 but there's a column that says Document Number.
 9 What does the document number represent?
 10 A. It's like purchase order numbers.
 11 Q. What's the G/L date?
 12 A. That would be -- I believe that's when
 13 they were paid. I think the G/L date on the ONs
 14 are the purchase order date and the -- the G/L on
 15 the OV's may be the -- may be the check date. I
 16 don't know for sure. That's what it appears to
 17 be.
 18 Q. Would you expect there to be one of
 19 these -- and by these, I mean job detail
 20 report -- for each lot in Tidewater.
 21 A. Yeah. I'm not that familiar with this
 22 particular report, but I would expect there to be
 23 one.
 24 Q. And if you turn to I think the last page
 25 or second to last page, I am just looking at the

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1 was done after the fact either.
 2 Q. What kind of report would include that?
 3 A. I believe there are reports to run --
 4 that's why I say I'm not familiar with this
 5 report. It doesn't look much of a useful report
 6 at all, but I'm not an accountant. An accounting
 7 person may love this report for some reason. I
 8 don't know.
 9 Q. Okay. But you don't believe personally
 10 that it's very useful?
 11 A. Not for what I do.
 12 Q. What is it that you do? I mean, what
 13 kind of report would be useful to you instead of
 14 what was produced to us?
 15 A. Something that's a little more
 16 condensed. It's useless to me to show money in
 17 and money out on the same -- for the same task.
 18 Does that make sense? Where you're showing the
 19 negative and the positive.
 20 Q. Would your report show how much Horton
 21 spent on the house versus how much it was paid
 22 for the house?
 23 A. There are reports for that, yes.
 24 Q. Okay. If you would, Mr. Bunner, move to
 25 Exhibit 6 for me. And it's a long exhibit, sir.

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1 total. Looks like total budgeted amount versus
 2 committed amount versus actual to date. Can you
 3 explain to me what those numbers mean?
 4 A. Committed is a term we use for
 5 commitments, which would be purchase orders.
 6 Budgets can be in the form of just budgets, not
 7 actual commitments or purchase orders or be also
 8 a purchase order.
 9 And in this particular system, options
 10 are not necessarily listed in your budget. It's
 11 an accounting thing, even though you may have
 12 commitments for that. And the actual to date is
 13 just -- apparently that's showing what was paid
 14 out to date on that job.
 15 Q. So --
 16 A. As of the date -- as of the date -- the
 17 as-of date, which is shown as October the 4th,
 18 2018.
 19 Q. So there doesn't appear to be a
 20 cumulative actual paid to date or am I missing
 21 it?
 22 A. That would be on this particular job
 23 from all time to date for that category. Only --
 24 but this doesn't include -- doesn't appear to
 25 include warranty purchase orders or anything that

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1 (Exhibit No. 6 marked for
 2 identification.)
 3 Q. I will tell you, this is how these
 4 documents were produced in discovery. There was
 5 a group obviously -- obviously there's a cover
 6 page that said Shafi, and then there's a series
 7 of purchase orders, et cetera, behind it that
 8 appear to all relate to Shafi. Would this
 9 represent a construction file for the Shafi home
 10 or for lot 18?
 11 A. Before I go through the whole 128, is it
 12 all purchase orders?
 13 Q. Well, I see warranty purchase orders. I
 14 see a purchase order, lots of purchase orders.
 15 A. Yeah. I see -- I saw some ONs. Let's
 16 see. If you have regular purchase orders that
 17 are ONs and you have a warranty purchase
 18 orders -- and there may be some OPs in here as
 19 well -- I would say that's a pretty accurate
 20 description of the majority of what was paid, but
 21 some of these could have been paid by invoice or
 22 things paid to municipalities like for your
 23 permits, things like that, impact fees that don't
 24 get purchase orders.
 25 Q. But in terms of what this packet of

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1 documents -- it appears to be the purchase orders
 2 related to the actual construction and warranty
 3 purchase orders following construction; is that
 4 fair?
 5 A. Yeah. That sounds correct.
 6 Q. And would you expect all purchase orders
 7 and warranty purchase orders to be included if
 8 they were issued for the Shafi house, which is
 9 lot 18, to be included in this packet of
 10 documents?
 11 A. As long as someone didn't make a mistake
 12 and not include them, yes, I would expect them to
 13 be there.
 14 Q. And to the extent there are similar
 15 packets for other lots, they would similarly, you
 16 believe, include purchase orders and warranty
 17 purchase orders and extra purchase orders for
 18 work related to that particular lot?
 19 A. Yes.
 20 Q. Is that correct?
 21 A. Yes. This should be available on all of
 22 the lots out there.
 23 Q. I'm going to skip to a particular --
 24 A. Oh, just one thing. I am seeing -- I
 25 did run into a purchase order that appears to be

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1 I think it's page 27 of the document, Exhibit 6,
 2 sir.
 3 A. Yes, I see it.
 4 Q. It's a purchase order for exterior clean
 5 1. Do you see that?
 6 A. I do.
 7 Q. I have seen throughout the documents
 8 exterior clean 1, exterior clean 2, and exterior
 9 clean 3. What do those represent?
 10 A. They are purchase orders to East Coast
 11 Construction Cleanup, Inc., to perform the
 12 contracted tasks along with the scope of work for
 13 that task for exterior clean.
 14 Q. Right. But is there a difference
 15 between exterior clean 1, 2, and 3 in terms of
 16 scope or is it just in timing that they're
 17 identified as 1, 2, and 3?
 18 A. Well, looks like -- do I see a 3? Yeah.
 19 There's 3. That's just spread out. It's a
 20 timing thing. It's to give them draws.
 21 Q. If East Coast was paid to do pressure
 22 washing, where would that come in the sequencing
 23 of the home, and more specifically would it occur
 24 before or after the landscaping was put in?
 25 A. After landscaping.

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1 an off-site, which would be a land development
 2 purchase order as well.
 3 Q. Is that way towards the back?
 4 A. Yes. They're down to like page 124,
 5 125. So there are some that do not -- that do
 6 not relate to any particular lot that are shown
 7 in this group.
 8 Q. Right. And that is a product of my
 9 scanning yesterday for the exhibits. So I didn't
 10 intend for those to be together, but --
 11 MS. LUCEY: So there is, for the
 12 benefit of counsel, at the conclusion of the
 13 Shafi documents, which ends at DRH 005943 within
 14 this Exhibit 6, the development -- there's a
 15 sheet that says development PO, which Mr. Bunner
 16 noted starting at 004576.
 17 Q. It appears to be a development purchase
 18 order and other purchase orders related to
 19 development; is that correct, Mr. Bunner?
 20 A. That is correct. Johnny gave me the
 21 sheet number so everybody knows. It looks like
 22 it begins on sheet number 113 of the PDF.
 23 Q. I believe you're correct, Mr. Bunner.
 24 Thank you. I would like to back it up just a
 25 moment. Let me get the page number for you, sir.

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1 Q. After landscaping?
 2 A. Yes.
 3 Q. Would that be one of the last things
 4 done on the exterior of the house?
 5 A. I would say once you pressure wash,
 6 you're getting pretty close to being completed.
 7 Q. Going back to -- in order for us to
 8 determine if sod was included in the backyards of
 9 these homes as a baseline, we would need to look
 10 at the features list for the spec sheet?
 11 A. I would say yes.
 12 Q. But you don't know as you sit here
 13 today?
 14 A. I can't remember if this was a sod, the
 15 front and the sides, and the seed in the rear or
 16 if we offered options for them to upgrade to sod
 17 in the rear. I just can't remember what that
 18 neighborhood was.
 19 Q. If you would go back to the development
 20 PO, sir, which I think you said -- you identified
 21 was page 113 of the exhibit.
 22 A. Yes.
 23 Q. And then within that, turning to pages
 24 to -- this is page 114.
 25 A. It's a development purchase order to

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1 Atlas Surveying.
 2 Q. Let's go to 115 then.
 3 A. Purchase order to Lather Construction.
 4 Q. Right. And the description is rough
 5 grading. What's the rough grading that's
 6 described there? What does it involve?
 7 A. That, I have to refer back to the
 8 contract -- development contract specifications.
 9 Remember you said there was some stuff missing
 10 from that scan?
 11 Q. Yes.
 12 A. It may be within that. We have to go
 13 back to that document because that's going to
 14 give them specifics of what they're required to
 15 do because this is totally separate than what's
 16 done on the vertical construction side. So I
 17 don't know what's on that -- that particular
 18 scope for Tidewater Creek, scope or specification
 19 or whatever that direction documents are, to tell
 20 them what is to be done for that 238,000 plus
 21 dollars.
 22 Q. Okay.
 23 A. But it does reference Tidewater Creek
 24 construction contract.
 25 Q. Let's move to Exhibit 8.

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1 A. It doesn't say that. I don't -- tell me
 2 if I'm wrong. I'm reading this to say what this
 3 means is that the fence is now hindering the
 4 drainage and runoff from the pond and into the
 5 pond when it rains. I don't see where it says
 6 anything about the -- what the drainage or grade
 7 was prior to the fence going in.
 8 Q. Well, the last paragraph, sir, I
 9 believe --
 10 A. Okay. Yeah. Read that.
 11 Q. The grade of the rear property was done
 12 correctly and should allow for proper drainage
 13 following any rain or event, end quote.
 14 A. Okay. So there you go. Stand
 15 corrected. It was there.
 16 Q. Do you know what is located other --
 17 obviously a pond, but anything about the property
 18 located behind the Shafi's lot?
 19 A. I don't know anything about it.
 20 Q. Has Horton ever spoken with that owner
 21 about the property or any issues with that
 22 property?
 23 A. I don't know.
 24 Q. If you would look at Exhibit 9 with me,
 25 sir.

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1 (Exhibit No. 8 marked for
 2 identification.)
 3 Q. And that's an e-mail exchange that
 4 you're not involved with, but if you would take a
 5 look at it, and let me know if you're familiar
 6 with the circumstances of it.
 7 A. I've read it.
 8 Q. Are you familiar with the particulars of
 9 this e-mail related to Mr. Shafi?
 10 A. I had been made aware in conversation
 11 that they had installed a fence that was not on
 12 their property and that it may -- it may have
 13 altered the drainage of the lot.
 14 Q. And you were made aware of that before
 15 today's deposition?
 16 A. Yes.
 17 Q. And it looks like Horton's response
 18 stated in part that, The grade of your rear
 19 property was done correctly and should allow for
 20 proper drainage following any rain or events.
 21 Do you believe -- did Horton believe
 22 that to be true at the time this e-mail was
 23 written? It was Horton's position that the grade
 24 on the Shafi's lot was completed or done
 25 properly; is that accurate?

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1 (Exhibit No. 9 marked for
 2 identification.)
 3 Q. It's a cover sheet and then a report.
 4 If you would scan that and let me know when
 5 you're ready to discuss it.
 6 A. Okay.
 7 Q. Have you seen what we have marked as
 8 Exhibit 9 before, sir?
 9 A. No. I don't recall seeing this before.
 10 Q. Are you --
 11 A. I know I have seen some photos that were
 12 just general photos, and these -- I may have seen
 13 some photos before, but I didn't see the
 14 narrative along with it. I know I haven't seen
 15 these photos where it's showing like where
 16 they -- some of this investigation stuff where
 17 they drag the soils.
 18 Q. So the second page -- well, the first
 19 page is an estimate from Dustcom for just shy of
 20 \$13,000. Do you know if Horton paid Dustcom that
 21 amount to complete the work contemplated in that
 22 estimate?
 23 A. I don't know what the final amount is.
 24 Q. How can we find that out?
 25 A. I can look it up. I can provide a

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1 report of it or a screenshot of it.

2 Q. Would you look that up and provide that
3 information to Mr. Nail.

4 (This page contains Requested
5 Information.)

6 Q. And then starting on the second page,
7 sir, there's a report from GHD regarding summary
8 of site observations, lot 19. Did Horton hire
9 GHD to be present during -- or for purposes of
10 investigating Stephens backyard?

11 A. It looks like GHD was there to observe
12 the conditions and what they saw while this soil
13 was being investigated.

14 Q. Okay. And I apologize if I asked this,
15 has the Stephens yard been backfilled and
16 restabilized since this work in May of 2018?

17 A. I would assume so.

18 (Exhibit No. 10 marked for
19 identification.)

20 Q. And then in conjunction with Exhibit 9,
21 sir, Exhibit 10 are some photographs that I
22 pulled that I believe are larger and clearer than
23 what is included in Exhibit 9. Do you believe
24 that to be accurate?

25 A. Yeah. I can actually kind of tell what

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1 Q. Are you aware of what was found or how
2 much Horton paid for the investigation?

3 A. I believe it was roughly \$15,000.

4 Q. Okay. Are you aware of what, if
5 anything, was found in that backyard?

6 A. I believe there was very little, if
7 anything, found in that backyard. But you --
8 well --

9 Q. What's that?

10 A. You asked me a question that would
11 require me to know exactly how many trees were in
12 his backyard from the time the house closed to
13 the time the investigation was done, and that's
14 why I gave you the answer I gave you.

15 Q. With all due respect, sir, I would
16 imagine that D.R. Horton paid attention to what
17 happened in that yard given the litigation with
18 the Stephens house, but I could be mistaken and
19 that's up to Horton as a business practice. So
20 why don't we move on to Exhibit 11, if you would
21 open that please, sir.

22 (Exhibit No. 11 marked for
23 identification.)

24 Q. Take a moment to look at it.

25 A. Okay. I have it.

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1 they are now.

2 Q. Right. On the third photograph in on
3 that exhibit, sir, is that an example of where
4 you can see the clearing limits of the lot but
5 that there are trees and sort of growth at the
6 back of the lot that weren't disturbed during
7 construction?

8 A. I don't know. I don't know what
9 happened to this lot from the time it closed to
10 the time that this investigation was done. I
11 don't know if trees have been removed. I just --
12 I don't know.

13 Q. Who at Horton would be in a better
14 position or would have knowledge and information
15 regarding the work that was performed by Horton
16 at the Stephens residence? If not you, who?

17 A. I would say Carl or Jared.

18 Q. Well, and Mr. Bunner, I will represent
19 to you that the Stephens remediation was one of
20 the topics included on the exhibit for the
21 30(b)(6) about which I notified Horton that I
22 would be inquiring, and you don't seem to have
23 any information about it; is that accurate?

24 A. I am aware of the investigation that was
25 conducted out there.

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1 Q. Can you identify it for me?

2 A. This is a South Carolina independent
3 contractor agreement between D.R. Horton, Inc.,
4 and Hutton's Landscapes, Inc.

5 Q. Does it appear to have a date on it,
6 sir?

7 A. It does have dates on it, yes.

8 Q. What are those dates that you can see?

9 A. 16th of May, 2014.

10 Q. Do you know if there is a subsequent
11 agreement entered into between Hutton's and
12 Horton in the 2016 time frame?

13 A. There may be. I'm not aware of one.

14 Q. Is it Horton's position that what we
15 marked as Exhibit 11 is the independent
16 contractor agreement that governs Hutton's work
17 in the Tidewater subdivision?

18 A. I'd say, yes.

19 Q. And this is the standard form contract
20 used by Horton during apparently the 2014
21 timeframe; is that correct?

22 A. Yes.

23 Q. Was the same independent contractor
24 agreement used with other contractors in South
25 Carolina?

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1 A. Yes.

2 Q. And the only difference would be the

3 appended scopes of work specific to each

4 contractor; is that fair?

5 A. That's fair.

6 Q. And as I review it and based upon your

7 earlier testimony, the terms of the contractor

8 agreement were not negotiated. They were

9 presented to Hutton's, and Hutton's could either

10 sign it or not; is that correct?

11 A. Of course.

12 Q. Do you recall discussing this agreement

13 with Matt Hutton because it appears that you

14 signed it on behalf of Horton?

15 A. I don't know that we discussed it at

16 all.

17 Q. You presented it to him and that was it?

18 A. Well, I don't know if this is the first

19 one that he signed. He may have signed a

20 previous version, so it may not have been new, so

21 to speak, but it would have been handled by other

22 people than me. The transfer of the documents

23 may have come by e-mail. It could have been

24 dropped off at the office and handed to me to

25 sign. But Matt never negotiated on these

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1 me what Exhibit A is?

2 A. It's a general scope of work.

3 Q. And does every independent contractor

4 agreement include an Exhibit A?

5 A. I'd say most of them would.

6 Q. Mr. Bunner, do you have a paper copy of

7 the contract in front of you?

8 A. No. I don't have a paper copy of the

9 contract in front of me. Actually I do have a

10 paper copy of it.

11 Q. You looked like you were looking at

12 something off to the side.

13 A. No. It is the same thing you have.

14 Q. On page 3 of 4 of that Exhibit A, I had

15 a question about item number 25. What is the

16 basis for that provision? Why are contractors

17 prohibited from discussing pricing or other

18 agreements with the owner with any other

19 contractors?

20 A. Because we don't want everybody's

21 contract -- what we pay each contractor. Common

22 knowledge.

23 Q. Okay. And then item number 30 deals

24 with scope of work violations. Do you see that?

25 A. Yes, I do.

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1 contract terms with me.

2 Q. Do you know -- just to confirm, this is

3 prepared and drafted by Horton in-house, correct?

4 A. The independent contractor agreement is

5 prepared by our corporate legal risk management

6 team.

7 Q. Are you aware that the agreement

8 includes a provision that the contractor must

9 waive statutory provision regarding timely

10 payment of undisputed money owed?

11 A. Okay. Yes.

12 Q. Yes, you know that? You're aware of

13 that?

14 A. Yes.

15 Q. Are you familiar with the terms of the

16 contract?

17 A. I am familiar with the terms of the

18 contract, yes.

19 Q. And then on I guess page 4, is this the

20 indemnity provision that Horton alleges applies

21 as part of its contract with Hutton's?

22 A. That is the standard of this contract,

23 the standard indemnity.

24 Q. Okay. Let's keep on moving to -- looks

25 like page 8, the Exhibit A. Can you identify for

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1 Q. Are you aware of whether or not there

2 are any scope of work violations issued to

3 Hutton's in connection with the Tidewater

4 division?

5 A. I'm not aware of it. If it was done --

6 if it was done without a purchase order, in other

7 words, maybe through accounting, that would have

8 to be looked up separately. But you may -- in

9 looking at all of the huge run of purchase orders

10 that you have for each lot, there may be some in

11 there.

12 Q. And then moving on to a different

13 Exhibit A, scope of work, rough grade, which I

14 think is page 12. Is this where the specific --

15 the scopes of work specific to Hutton's begin?

16 A. Yes. Those become more specific to

17 Hutton's, yes.

18 Q. But they're not specific to the

19 Tidewater project; is that correct?

20 A. That's correct.

21 Q. They are specific to the Horton Hilton

22 Head/Beaufort office; is that accurate?

23 A. It is.

24 Q. And you prepared these?

25 A. I did.

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1 Q. So my question -- the first one is rough
2 grade. How do you distinguish that from the
3 rough grade what Lather performed on the site?
4 Are they two different types of rough grading?
5 A. Yes. This would be rough grade after
6 the house slab has been installed while Lather is
7 during the development process.
8 Q. Okay. And I think even in the general
9 scope it says, Rough grade is defined as a,
10 quote, Fine grade suitable for the final
11 installation of sod, seed, and all of the
12 landscape materials; is that correct? That's
13 under section 5-A.
14 A. Where it says slab fine grade? Yes.
15 Oh, wait a minute. You said it was under A?
16 Q. Yes. 5-A, the last bullet point on the
17 page.
18 A. Yes.
19 Q. The third bullet point in section 5-A
20 says the contractor, I guess, must repair any
21 deficiencies from inspections/QC/homeowner/field
22 manager check within 24 hours.
23 Does D.R. Horton maintain records of
24 when these inspections or field manager checks
25 occurred?

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1 back?
2 A. They will look at the yards, yes.
3 Q. And if they saw, for example, something
4 that was not in accordance with the plans or the
5 scope of work for Hutton, would the
6 superintendent have contacted Hutton and
7 instructed them to fix it?
8 A. They would -- yes. They would -- and
9 then Hutton's would have fixed it unless it was
10 something that Hutton's determined that shouldn't
11 be fixed and there's nothing wrong with it, in
12 which case it would bring a discussion. So yeah.
13 I mean, there's plenty of times that a discussion
14 has to take place to determine if something needs
15 to be done.
16 Q. Okay. And what if something that the
17 superintendent asked Hutton's to do was outside
18 of Hutton's scope of work, would Hutton's submit
19 change order requests and if it was approved,
20 would an extra purchase order be issued?
21 A. Yes.
22 Q. And with regards to Hutton, do you have
23 any recollection of any discussions you
24 personally had with Matt Hutton regarding
25 Tidewater either before, during, or after

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1 A. No. It would be more of an e-mail
2 record, most likely. I see -- it's -- I don't
3 say that there's a written record of every one of
4 those. Now there would be a written record of
5 the -- that reference to the homeowner -- the
6 homeowner walk?
7 Q. Right.
8 A. And it's basically to say if there's any
9 deficiencies in -- amongst any of these items,
10 during any of these items, it needs to be
11 corrected within 24 hours. But I would still say
12 that's 24 hours of notification.
13 Q. Okay.
14 A. I mean, we would have had to notify
15 them.
16 Q. Right. Would the superintendents as
17 part of their responsibilities on-site walk the
18 front and backyards or would they just walk
19 inside?
20 A. I mean, they would walk the front and
21 backyards, walk around looking at the outside of
22 the house. They're -- my experience with the
23 superintendents, they're looking at that house
24 quite a bit.
25 Q. And what about the yards, both front and

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1 construction of the subdivision?
2 A. Not specific conversations. I'm sure
3 him and I talked about it here and there about
4 certain items. I don't really have any specific
5 memories of any specific conversation with Matt.
6 Q. How about anyone else from Hutton's
7 Landscapes, Kevin Chicharello [phonetic], Lisa
8 Hutton, Melissa Hutton, anyone else?
9 A. Well, I've had plenty of conversations
10 with them. Most of my dealings with Hutton's
11 would have been more pre -- before Tidewater
12 Creek. I dealt with him a lot more often in
13 earlier years. Directly.
14 Q. Why were you dealing with them less
15 during Tidewater Creek and subsequent to that?
16 A. Well, my title changed from city manager
17 back to VP of ops. So as city manager, I was
18 involved with all -- plenty of items in the
19 Hilton Head/Savannah area, but during Tidewater
20 Creek, I was back to VP of operations for -- at
21 the time, Hilton Head/Savannah all the way to --
22 I believe Wilmington, North Carolina.
23 So I guess I would speak with Matt. I
24 would have e-mails -- possible e-mails with Matt
25 and Melissa. Not as much with Kevin. But I had

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1 other people that I delegated that to.
 2 Q. Who would that be?
 3 A. At this deal, Matt Yeoman.
 4 Q. Who else?
 5 A. That would have been it, Matt Yeoman.
 6 If it was a conversation that needed to either be
 7 with someone like me, it would either be with me
 8 or Matt Yeoman.
 9 Q. Is Matt Yeoman still with Horton?
 10 A. No.
 11 Q. Do you know where he is?
 12 A. He is with Minto and that's in --
 13 actually, I believe Jasper County.
 14 Q. How do you spell Mr. Yeoman's last name?
 15 A. I believe that's Y-E-O-M-A-N.
 16 Q. During -- or did Hutton's continue to
 17 work with Horton after the Tidewater Creek
 18 subdivision?
 19 A. Yes.
 20 Q. Was anyone at Hutton's ever made aware
 21 of -- excuse me. Let me start over. Was anyone
 22 at Horton ever made aware that Hutton's was
 23 leaving debris in the yards at Tidewater during
 24 construction?
 25 A. Not that I'm aware of.

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1 Q. Right. So if there was construction
 2 debris brought to your attention, you may have
 3 paid Hutton's to remove it and backcharged the
 4 responsible contractor; is that fair?
 5 A. Yes. That's fair. I mean, there's
 6 certain things in the scope of work of -- like
 7 that they're supposed to remove, but I am pretty
 8 sure construction debris would not be one of them
 9 unless it was their own debris.
 10 Q. What things do you think they were
 11 supposed to remove?
 12 A. Rocks, things that needed -- things they
 13 find when they're performing the rough and final
 14 grades. Anything that's not going to provide
 15 that smooth -- basically a broomed -- not
 16 broomed, but kind of a hand-raked finish.
 17 Q. Yes.
 18 A. You don't want any large chunks, whether
 19 it's -- I don't care what it is. A rock is a
 20 good example. Anything that's not dirt basically
 21 that would provide a large chunk that you would
 22 feel or see once you lay sod on top of it, you
 23 wouldn't want to cover that up. You want to have
 24 it removed.
 25 Q. Would a superintendent from Horton walk

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1 Q. And had someone been made aware of that,
 2 what would Horton have done?
 3 A. And this goes back to our conversation
 4 about the scope of work. They shouldn't be
 5 covering up anything, whether it's theirs or --
 6 whether it was their debris or whatever you want
 7 to call it or somebody else's or -- I mean,
 8 covering up with sod. In other words, if it's
 9 seen, it should have been addressed. Whether it
 10 was addressed by them or they brought it to our
 11 attention to have it addressed, but under no
 12 circumstances should they have been -- anyone
 13 covered it up.
 14 Q. Well, do you have any evidence that
 15 Hutton did cover it up?
 16 A. No. I'm not saying that. I am just
 17 saying that if there was debris, I don't know
 18 that -- it depends on what it is. Whether -- if
 19 Hutton brought it to our attention that there's
 20 something there and it's not Hutton's, then it
 21 would be up to us to try to determine whose it
 22 is. We may end up paying Hutton's to remove it,
 23 but we would end up probably backcharging whoever
 24 left it there. We're talking construction
 25 debris.

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1 a yard before the sod was put down?
 2 A. Sometimes. But there's no guarantee of
 3 that. They may just walk by it and look to put
 4 an eye on it to see that it looks like it's going
 5 to drain and it has proper slopes. But to walk
 6 the entire yard, I doubt it.
 7 Q. In the process of the hand raking and
 8 preparing the lots, do you know how much dirt
 9 Hutton's would have disturbed -- how deep it
 10 would have disturbed the dirt with the hand
 11 raking and that type of grading?
 12 A. During the rough -- well, during the
 13 rough grade, not very much. You know, during
 14 construction -- well, during the concrete -- you
 15 know, depends on whether you bring a concrete
 16 truck on. You get a lot of ruts from vehicles.
 17 And you know, you get some weather -- you know,
 18 rain, erosion, whatever, that you have to reshape
 19 the lot so it's easier to work with, it's
 20 presentable, and you want to balance the dirt.
 21 A lot of that is not really digging very
 22 deep. You wouldn't go any deeper typically than
 23 the ruts created by vehicles that have been on
 24 the lot. Does that make sense?
 25 Q. Yes. So anything deeper would have been

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1 handled during the initial rough grade by Lather
 2 or whatever site contractor; is that correct?
 3 A. In general. I can't guarantee every
 4 single one that there's no reason someone had to
 5 do something, but that would be in general, yes.
 6 Q. And I think I asked you this. You're
 7 not aware of any evidence that would suggest
 8 Hutton's covered up any debris on these lots, are
 9 you?
 10 A. I'm not aware of it.
 11 MS. LUCEY: Mr. Bunner, I am going
 12 to take a break and pass you. There may be other
 13 attorneys who may have questions for you. I am
 14 going to review my notes, but in an effort to
 15 keep the deposition moving, I will hand over the
 16 reins to any of the other attorneys who are
 17 participating. Thank you, s.r.
 18 THE WITNESS: Thank you.
 19 (A recess was taken.)
 20 EXAMINATION
 21 BY MR. WINOGRAD:
 22 Q. Mr. Bunner, my name is Scott Winograd.
 23 I represent two Lather entities; Lather
 24 Construction, Incorporated, and Lather
 25 Construction South Carolina, Incorporated. I

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1 pulling that up, I want to talk about that again.
 2 I know there were some questions already asked,
 3 but I just wanted to look at a couple of things.
 4 Do you have it up?
 5 A. Yes.
 6 Q. Great. Let me just share so we're all
 7 kind of on the same page. Can you see it now?
 8 Let me see if I can get to the beginning. Can
 9 you see it now?
 10 A. You're going to share your screen?
 11 Q. Yeah, but you can look at yours. I am
 12 just doing it because I know people are following
 13 along, and it might help them. You can stick
 14 with yours.
 15 A. Let me see what you have.
 16 Q. We can use yours. Go ahead. I just
 17 want to make sure people can see it. You can use
 18 the one you have.
 19 A. I can see it.
 20 Q. Okay. So that's up there. I am going
 21 to go down to -- a few pages to where we looked
 22 at before. And I know we kind of talked about
 23 this already, but this -- what does this look
 24 like to you?
 25 A. Looks like a standard form contract.

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1 assume from your earlier testimony you have heard
 2 of Lather generally?
 3 A. Yes. I met Mr. Lather before.
 4 Q. In what context did you meet him?
 5 A. It was work related. I mean, just in
 6 general knowing that he worked for us.
 7 Q. Okay. Have you met with him as to a
 8 specific project?
 9 A. Could be way back in the day. I can't
 10 exactly remember. Sometimes it might have just
 11 been running into him in general conversation.
 12 Q. Fair enough. So sounds like you have an
 13 idea of what their scope of work might have been
 14 on this project in particular?
 15 A. Somewhat. I have not actually read
 16 that -- I mean, I know they performed the site
 17 development on that lot, but I did not study all
 18 of those contract documents and specifications to
 19 know specifically what every little thing was
 20 required of them.
 21 Q. Fair enough. Understood. If you
 22 wouldn't mind, I want to stick to some of
 23 Ms. Gifford Lucey's documents and if we could go
 24 to her Exhibit 2, which I believe is the contract
 25 documents for Lather. If you wouldn't mind

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1 Q. Okay. And what's the entity that -- the
 2 two entities involved?
 3 A. D.R. Horton, Inc., and Lather
 4 Construction Company, Inc.
 5 Q. Okay. So is it your understanding that
 6 this would be the contract that would govern the
 7 work for this project?
 8 A. Yeah. This is the contract that governs
 9 the scope and pricing and agreement for this
 10 project.
 11 Q. Okay. Got it. And maybe we will stay
 12 right there. What does it look like is kind of
 13 the scope of work for Lather on this project?
 14 A. What does it look like the scope of work
 15 is?
 16 Q. Yeah. Like reading and looking at the
 17 page we're on.
 18 A. Work generally consists of clearing,
 19 grading, and constructing the water, sewer
 20 drainage and roads for the proposed residential
 21 subdivision.
 22 Q. Is that in tune with kind of what you
 23 generally thought of before we looked at this?
 24 A. Yes. That's in general land
 25 development.

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1 Q. If you wouldn't mind kind of scrolling
2 down a little bit -- actually, I don't want to --
3 I can scroll down. Maybe you want to look at
4 yours. You looked it over already. Would you
5 mind taking a minute or two to just look through
6 the few pages. It's only the first 10 pages of
7 this whole document. I don't need you to look at
8 the other things yet. Just kind of the contract,
9 if you wouldn't mind looking at some of the
10 terms.

11 A. Yeah, I'm trying --

12 Q. If you want to go back to yours, that's
13 fine. I don't want to make you --

14 A. I'm not a big Zoom user.

15 Q. You can get off my screen share if you
16 want. There should be a way to exit out of it or
17 just escape.

18 A. Options. There it is. That's better.

19 Q. If it's easier, we could --

20 A. I'm good. I'll just scroll through it
21 again.

22 Q. You don't have to look at mine if you
23 don't want to. It's just for everyone else. So
24 if you maybe want to stop at the end, stop at
25 page 10 where the signatures are. So you have

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1 Q. And if you don't mind going to page 8,
2 maybe we can talk about that more.
3 A. Okay.
4 Q. And so you see here this kind of lists
5 the contract documents. Are these sort of the
6 things that you're talking about that would be
7 included in this contract and in the requirements
8 that Lather would have to follow?

9 A. I would say yes.

10 Q. And you're on -- let's see --

11 A. They reference number 12.
12 Specifications is listed in the table of contents
13 of the project manual. I think that might be
14 part of what is missing.

15 Q. So these documents listed here it says,
16 Article 9, Contract Documents, and then 901. It
17 lists a bunch of things. These are the kind of
18 documents that were forming the entire universe
19 of what Lather would have to be familiar with and
20 be responsible for complying with?

21 A. I would say yes.

22 Q. Okay. Perfect. And again, I'm just
23 scrolling down to show everybody that there is
24 more things listed, drawings, and such. We can
25 kind of put that aside for a second.

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1 identified -- looks like Jared O'Sako signed it
2 on behalf of D.R. Horton, and then it looks like
3 Sean Lather would have signed it on behalf of
4 Lather. Does that look right to you?

5 A. Yeah, that looks correct.

6 Q. Is there a date anywhere? What's the
7 date that it says this agreement is going to be
8 effective?

9 A. Is that further up?

10 Q. It should be on that same page. I see
11 it right above the --

12 A. The agreement will be effective on the
13 1st of August, 2014.

14 Q. Okay. And so does this agreement govern
15 the work that Lather was to perform on the site?

16 A. This agreement does although what the --
17 what we're looking at does not appear to have the
18 meat and potatoes of that. It has the pricing,
19 schedules, and that kind of deal, but it doesn't
20 have the -- what we spoke about in the actual
21 specifics of what the scopes are.

22 Q. So some of these things here in this
23 table of contents in the second page?

24 A. Right. Yeah, some of that does appear
25 to be included in this particular exhibit.

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1 So now I'm going to ask you to go to my
2 folder. I uploaded some documents too. I don't
3 know -- the same place where you found Emily's,
4 there should be a folder that's from me, from
5 Scott Winograd, and there should be some --

6 A. Got it. I'm opening it now.

7 Q. Great. If we can just -- we don't need
8 to look at 1. That's the contract that Emily
9 already had. If when you have a second, you want
10 to open up 2 --

11 A. Let's see what we have.

12 Q. Let's start with 3 actually. Look at
13 that e-mail and look it over and let me know when
14 you have it up.

15 MR. WINOGRAD: So if anyone on the
16 phone needs a Bates, it's D.R. Horton 013352.
17 It's an e-mail.

18 A. Looks like an e-mail from Jared O'Sako
19 to General Office. E-mail address at Lather
20 Construction. Tidewater Creek, contract
21 documents and technical specification. The
22 attachment is 1715-contract documents compressed,
23 yes.

24 Q. Got it. What's the date on this e-mail?

25 A. The e-mail is dated October 20th, 2014.

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1 Q. Okay. And do you see what it says --
 2 what does Jared O'Sako say?
 3 A. Please print and sign. Do not date.
 4 Q. Do you have any understanding of why
 5 Jared would ask them not to date it?
 6 A. No, I do not.
 7 Q. But if you want to keep that close. Now
 8 we can go look at 2. If you want to pull up 2,
 9 that should be another e-mail, and the Bates on
 10 that is D.R. Horton 013338.
 11 A. I am having a hard time opening it. Can
 12 you open it on your screen?
 13 Q. I can share it.
 14 A. And there's a return e-mail.
 15 Q. What happens now? Does it switch to the
 16 other one, the original one when I do that?
 17 A. That's what it looks like.
 18 Q. So I just want to go back to this one.
 19 This one is that same day at 11:10, right?
 20 A. Yeah.
 21 Q. And then it looks like this e-mail comes
 22 back from that same office e-mail at 11:42.
 23 A. Yes.
 24 Q. Does that look right?
 25 A. That does look correct, yes.

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1 know, that would be the entity that then
 2 performed the work on the project?
 3 A. As far as I know, yes.
 4 Q. Is D.R. Horton claiming that any portion
 5 of the project was breached or not followed?
 6 MR. NAIL: Objection.
 7 A. Can you ask me that question again.
 8 Q. Yes. I'm asking you if in this
 9 agreement here if D.R. Horton is claiming that
 10 any part of it was breached or hasn't been
 11 followed?
 12 A. Not that I'm aware of.
 13 Q. Do you see anything in this contract
 14 that talks about cleaning up yards?
 15 A. Well, I would say no because I can't see
 16 what the actual meat and potatoes of the
 17 directions of what this --
 18 Q. Right. Understood. But obviously you
 19 don't see that in this --
 20 A. No, I don't.
 21 Q. -- in this --
 22 (Overlapping dialogue.)
 23 Q. Sorry. I didn't wait for you to finish.
 24 I apologize.
 25 A. That's okay.

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1 Q. So assuming that these e-mails are about
 2 the same contract I just showed you, does it look
 3 like it was probably signed by at least Lather on
 4 October 20th, 2014?
 5 A. Whatever the attachment was, I'd like to
 6 know what those attachments were, but yeah,
 7 whatever that attachment was, according to the
 8 e-mails, says that they were signed.
 9 Q. Fair enough. And I will submit to you
 10 the best of my knowledge the way they were
 11 produced, there was this e-mail, and then those
 12 contracts were before and after it. So to the
 13 best of my knowledge, I would think so.
 14 A. Okay.
 15 Q. And one more thing. One more thing, if
 16 you would take a look back at that contract that
 17 we went through before. The name on that
 18 contract is Lather Construction Company, Inc.,
 19 correct? On the standard form agreement. Sorry.
 20 I'm jumping around on documents.
 21 A. I've got so many exhibits open right
 22 now. It is -- yeah, the name that we talked
 23 about earlier is Lather Construction Company,
 24 Inc.
 25 Q. Correct. Right. And as far as you

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1 Q. Are you aware of the entity Lather
 2 Construction South Carolina, Inc., performing any
 3 work on this project?
 4 A. I'm not aware of it. There may be
 5 documentation for that. Honestly, I didn't know
 6 there was a difference.
 7 Q. So are you aware of any documentation as
 8 you sit here today that Lather Construction South
 9 Carolina, Inc., performed any work on this
 10 project?
 11 A. Not the one I'm looking at.
 12 Q. Okay.
 13 A. Now I can't remember -- earlier in one
 14 of the exhibits had a whole bunch of purchase
 15 orders and they had the off-site purchase orders.
 16 I don't remember the entity, the exact entity
 17 that they were written to, but they may have
 18 been -- that may have been Lather Construction or
 19 Lather South Carolina. I just don't remember
 20 what they were.
 21 Q. Okay. Fair enough.
 22 A. But they're in the exhibits. You-all
 23 can look.
 24 Q. Okay. Fair enough. And I will submit
 25 to you that I haven't seen any documents that say

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1 the South Carolina entity worked on the project.
2 But we can leave it there for now.

3 A. I didn't even know there were two
4 different entities.

5 Q. As far as kind of getting back to the
6 overall project, was D.R. Horton the one who
7 chose this site for this development?

8 A. D.R. Horton chose the land, yes.

9 Q. Okay. And they're the ones who hired
10 the contractors for the project, correct?

11 A. Yes.

12 Q. And they're also the ones that sold the
13 properties?

14 A. Yes.

15 Q. And did they also oversee the work of
16 the -- the work at the properties?

17 A. They provided -- yeah. They performed
18 oversight, yes.

19 Q. Okay. And do they have an overall
20 responsibility for the construction process?

21 MR. NAIL: Objection.

22 A. I'd say not overall responsibility. We
23 do rely on our engineers for the development
24 process now. We do rely on our engineers to
25 confirm that the contract documents have been

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1 equipment is on-site.

2 You can sort of see -- that's just a
3 drive-by, look out there and see that the
4 equipment is on-site, they're doing something,
5 whatever the heck they're supposed to be doing,
6 whether they're putting in stormwater or sewer or
7 whatever or moving dirt. They're out there doing
8 something. Whether it's actually done correctly
9 is determined by the engineer.

10 Q. Okay. And as we discussed earlier, the
11 actual person for D.R. Horton that's on-site
12 providing, as you said, kind of daily supervision
13 is a superintendent; is that right?

14 A. For the home vertical construction, that
15 is correct.

16 Q. Okay. But it's -- okay. Let's kind of
17 parse that out a little bit, and maybe I wasn't
18 listening closely -- I should have been -- to
19 what you just said. So it's different for the
20 land development part.

21 A. That's correct. And with land
22 development, you'd have a land development
23 manager and/or land development project managers
24 that may be assigned to one or two or more
25 projects, depending on how many projects you have

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1 performed for each pay app.

2 Q. Okay.

3 A. In other words, the progress that the
4 contractor is claiming has been made, it has been
5 made and to the document specifications required.
6 We rely -- that's why we have an observing
7 engineer -- I believe it was a separate one than
8 the design engineer that we determined today --
9 that comes out and puts a professional eye on it
10 for us.

11 Q. And I believe we saw one of those
12 documents that looked like it was Carolina
13 Engineering Consultants. Does that sound right?

14 A. Yeah. That sounds right, yes.

15 Q. And so their role on this project might
16 have been to provide some sort of project
17 supervision type thing -- oversight as well?

18 A. Well, that would be our only
19 professional checking; in other words, that's why
20 we have them to make sure because we need a
21 professional just to check the professional -- or
22 the contractor's work.

23 So other than us really -- we do oversee
24 it as far as like scheduling, you know, going out
25 there and making sure contractors are there or

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1 going at any one time, and they do not

2 necessarily visit the site on a daily basis.

3 Q. So when we're doing the grading, who
4 would be the person overseeing that for
5 D.R. Horton?

6 A. I mean, overall that would have been
7 Jared, Jared O'Sako.

8 Q. And that's the land development manager.
9 That's the title of the position?

10 A. I don't know if he had that title -- I'm
11 thinking he did have the manager title at that
12 point in time. Yeah, that's what I'm thinking.

13 Q. And you mentioned earlier how you were
14 on-site a couple of times. I am just trying to
15 understand what was your actual role in the
16 project or connection with it? Did you have some
17 kind of --

18 A. Well, the purchasing departments
19 reported to me, and purchasing will periodically
20 make field visits, whether it's to make sure that
21 the right materials are being -- like
22 manufacturer's usage is being done. We select
23 certain manufacturers. Sometimes it's out there
24 just to count material. Like we can count studs
25 in the house for a framing package, that kind of

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1 thing.

2 But make sure I don't see anything that
3 might be a scope of work violation that -- just
4 putting another set of eyes on it as well as I
5 just sometimes stop in neighborhoods just to
6 speak with our own employees.

7 Q. And Ms. Gifford talked about the
8 Stephens home, and it's your understanding as we
9 sit here today that D.R. Horton still owns it?

10 A. Yes.

11 Q. Are you aware of their plans with that
12 home, if they're going to sell it?

13 A. I believe they're eventually going to
14 sell that house.

15 Q. But you don't know any sort of details
16 or timeline on that sort of thing?

17 A. I do not.

18 Q. There was some discussion earlier about
19 when we were clearing the land and some areas
20 that may not be able to be touched because of the
21 trees. I just want to come back to that a little
22 bit. Emily showed a picture, but that didn't
23 quite do it. What's your understanding as to
24 what kind of grading can't be reached as far as
25 if you get too close to the trees?

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1 A. I'm not. There may be but I'm not.

2 Q. Okay.

3 A. But sometimes -- I take it back.
4 Sometimes like a sales rep may take a picture of
5 the house to post -- to post in MLS, things of
6 that nature just for trying to sell a home.

7 Q. Who is Jay Marshall Henderson?

8 A. Jay Henderson was a D.R. Horton employee
9 for a good while. He held our contractor's
10 licenses for a long time in the state of South
11 Carolina. He was the qualifier.

12 Q. Okay. Does he still work for the
13 company?

14 A. He's been gone for about a year and nine
15 months.

16 Q. Are you aware that he was the 30(b)(6)
17 designee in that Stephens case?

18 A. I believe I was, yes.

19 Q. And have you ever read or looked over
20 that deposition?

21 A. No. Not Jay's.

22 Q. I may be done. Let me check my notes.
23 One other area I wanted to touch on was the bid
24 process and kind of generally how that works. I
25 mean, usually -- we can stick with land

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1 A. You have to be careful of your -- number
2 one, you have to be careful of disturbing roots.
3 You have to be careful of adding fill around
4 trees because if you put the fill on top of the
5 roots, it's going to kill the trees. So you may
6 have to lessen your footprint or shift your pad
7 to try to avoid those areas underneath of the
8 drip line of the trees. It makes it a more
9 difficult development.

10 Q. I apologize. I'm jumping around a
11 little bit. Does D.R. Horton take pictures
12 during the construction project, the various
13 stages, for example?

14 A. Of the vertical home construction or
15 development?

16 Q. Both. We can start with one and go to
17 the other.

18 A. Not normally on vertical construction.
19 If there was a reason to take a photo just to
20 communicate something with somebody else, take a
21 photo and text or e-mail it, maybe. I don't
22 think it's general recordkeeping. I'd say no.

23 Q. Are you aware of photos existing in
24 relation to these projects, vertical or
25 horizontal?

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1 development. You might solicit bids from a few
2 different entities. Is that how it starts?

3 A. Typically. And yeah, it's all market
4 driven. How many contractors you have, how many
5 have time to even bid it. So it could be four
6 contractors. It could be two.

7 Q. Okay. If you wouldn't mind pulling up
8 my number 4 and maybe we can -- let's go off the
9 record for a second.

10 (Discussion off the record.)

11 MR. WINOGRAD: I want to clarify
12 some of the exhibits. We used Emily's that is
13 already in. But I am going to look at -- let's
14 see the best way to do this. So I called this
15 Lather 2. Let's mark this as Exhibit 13.

16 (Exhibit No. 13 marked for
17 identification.)

18 MR. WINOGRAD: And then this one,
19 the Jared O'Sako e-mail, October 20th, 2014, I
20 called it Lather 3, and that's the title. Let's
21 do that as 14.

22 (Exhibit No. 14 marked for
23 identification.)

24 MR. WINOGRAD: And the next one I'm
25 going to have Mr. Bunner bring up is marked as

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1 Lather 4, so we will make that as 15, and I'm
2 going to ask him about that one.
3 (Exhibit No. 15 marked for
4 identification.)
5 Q. And that's it for now. So, Mr. Bunner,
6 if you want to bring up this --
7 A. I have it up.
8 Q. I was just curious if we can talk about
9 this bid analysis and what this document is and
10 how it might fit into the -- you know, the
11 process.
12 A. When we choose a contractor, we document
13 the reason for choosing that contractor.
14 Q. Okay.
15 A. We're a publicly traded company. We do
16 that as part of our audit procedures, and as you
17 can see, it's pretty self-explanatory what --
18 Jared is sending that to our controller.
19 Q. Okay. So this one particularly is the
20 bid analysis as it relates to Lather
21 Construction?
22 A. That's what it looks like to me, yes.
23 Tidewater Creek.
24 Q. Got it. And would this sort of be done
25 with every bid choice of contractor to choose for

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1 Q. Okay.
2 A. Unless for some reason we asked them to
3 do specific work on a particular lot after the
4 land development phase was done, no, they
5 wouldn't be on here at all. The payables and the
6 accounting done for land development is done
7 separately.
8 MR. WINOGRAD: Okay. I am going to
9 let some other people jump in. I may have a
10 follow-up or two later, but I don't want to keep
11 this going any longer than this needs to be.
12 Thank you for your time.
13 THE WITNESS: Thank you.
14 MR. DuBOSE: Clarke DuBose. I'll
15 jump in if nobody minds.
16 EXAMINATION
17 BY MR. DuBOSE:
18 Q. I appreciate you being here today. I
19 don't have a whole lot for you. I represent
20 Professional Paint & Drywall. Are you familiar
21 with that company?
22 A. I'm very familiar with them.
23 Q. Does D.R. Horton continue to use
24 Professional Paint & Drywall?
25 A. Absolutely.

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1 the different areas?
2 A. I would say it's a really good idea and
3 that we should be documenting it, yes.
4 Q. Okay.
5 A. The reason for choosing which bid you
6 chose -- because, again, it may not always be the
7 lowest bidder.
8 Q. Okay. If we can go back to Emily's --
9 the job cost detail you didn't like. I think it
10 was 5, the one you said -- you know, you kind of
11 said you wouldn't have done it this way sort of
12 thing.
13 A. Well, you get used to looking at certain
14 reports, and when someone throws it in a
15 different format, it's just -- you don't like it.
16 Yeah. Exhibit 5, I'm pulling that up.
17 Q. And when we talk about this just being
18 for a particular lot, lot 18 in a sense.
19 A. Okay.
20 Q. And I think you may have touched on
21 this. So if there was work -- for example, if
22 the grader did work for the whole area, they
23 wouldn't necessarily be on this individual sheet,
24 would they?
25 A. No. The Lather wouldn't be on this.

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1 Q. And are you aware that it was the paint
2 and drywall subcontractor for this particular
3 project we're here on?
4 A. I didn't look it up, but that's fine. I
5 knew they were named in this.
6 Q. Well, I will represent to you that they
7 are.
8 A. Actually I remember speaking with the
9 owner -- one of the owners of the company about
10 this. I do.
11 Q. Tell me what you-all talked about.
12 A. He informed me that he was being named
13 in a suit, and he was just telling me. He called
14 me up to tell me that. And that's basically the
15 gist of it.
16 Q. Did you talk to him or anybody else from
17 the company at any other time about this lawsuit?
18 A. No. He was -- just general complaint.
19 Q. I understand. You talked about
20 responsibility a few minutes ago for inspection
21 of the horizontal construction and vertical
22 construction. Who at D.R. Horton keeps track of
23 what is being done and how well it's being done?
24 A. Well, the superintendent does the
25 observing, yes. Of it, yes. Now, if it's

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1 certain critical items that's being inspected by
 2 the municipality, Beaufort County, or whatever
 3 the governing -- yeah, this is in Beaufort
 4 County. So their inspectors were framing,
 5 electrical, plumbing, mechanicals, but certain
 6 finish items that are not critical to that would
 7 typically be -- I am trying to find the word.
 8 They would be observed and governed by the
 9 superintendent.
 10 Q. Would painting and drywall fall within
 11 the latter category?
 12 A. Paint and drywall, yes.
 13 Q. I know you talked earlier about the
 14 superintendent. Would he be there on the job all
 15 day every day?
 16 A. No.
 17 Q. How often would the superintendent be
 18 expected to come on-site at a job like the
 19 Tidewater one?
 20 A. They would be expected to at least be
 21 there at some point during that day and be at
 22 every one of those houses at least once per day
 23 at the property or, again, depending on the stage
 24 of the house whether there was something to walk
 25 into or not. They're expected to at least

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1 Q. I follow that. Does that program track
 2 changes in the original schedule?
 3 A. Yes. If you move, you can move
 4 something off, it will move everything down the
 5 line off or you can bring something forward. Say
 6 the job was getting ahead of schedule, you can
 7 bring it forward and it brings everything back,
 8 and that way all contractors have access to this
 9 so they can see it. And that helps them schedule
 10 their week.
 11 Q. Is part of that inspection determining
 12 when work is performed so that other work that
 13 might come on top of it can begin?
 14 A. That's the main reason for that. Yes.
 15 Q. And so does that mean that your
 16 superintendent would inspect the drywall to make
 17 sure it's complete and in good shape before
 18 allowing priming and painting of that drywall?
 19 A. He's going to put his eye on it for
 20 sure. He's going to make sure he doesn't see
 21 anything unusual.
 22 Q. And once paint has been completed by the
 23 paint subcontractors, is that inspected by the
 24 superintendent as well?
 25 A. He's going to put his eyes on that as

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1 observe what is going on and record it because
 2 they need to advance their schedules and they
 3 need to know what's happened out there since the
 4 day before.
 5 Q. Did they keep a daily log of progress on
 6 each house?
 7 A. No. They basically just run a schedule.
 8 Q. Tell me what you mean by that.
 9 A. Excuse me, I'm sorry.
 10 Q. Tell us what you mean by that.
 11 A. It's an online scheduling tool, and I
 12 believe at the time it was called OnSchedule.
 13 Q. Right.
 14 A. And it's where basically the entire --
 15 at the time the job starts, it has a schedule,
 16 and for each task has a certain number of days
 17 that's allotted for each contractor all the way
 18 through the whole build process to complete their
 19 task. And each task is assigned out to a date.
 20 Every day as that house progresses or does not
 21 progress, the superintendent has to either pull
 22 the schedule back or push it because if something
 23 didn't get done, he's going to make sure the
 24 contractor was scheduled the next day does not
 25 show up and not be able to do their work.

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1 well. Like I said, I'm not saying that the
 2 superintendent is going to go through every room
 3 and every closet of every house, but he's going
 4 to look to see -- cruise through there and look
 5 to see if the task is complete before he moves it
 6 on.
 7 Q. And if there's problems or he finds a
 8 wall not painted, he's going to tell the
 9 contractor, and they will have to go back and
 10 complete that work, correct, or correct it if
 11 it's a correction rather than a completion?
 12 A. Yeah. He will put in that request if
 13 there's a -- as long as there's not some
 14 disagreement. In other words, the contractor
 15 might say that it's fine and in which case then
 16 you get to the higher-ups and they have their
 17 discussions and you figure it out.
 18 Q. Now, for this project, my understanding
 19 is that D.R. Horton specified what paint to use.
 20 Do I have that right?
 21 A. You are correct.
 22 Q. And so also, at least one of the homes,
 23 the Shafi home -- we talked about that one a
 24 little bit -- they bought the house -- or
 25 contracted to build the house before it was

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1 complete, and it looked like they could change
 2 that paint selection if they wanted to.
 3 A. That may be the case. If they went to
 4 contract at an early enough stage and we allowed
 5 that change, that's very possible.
 6 Q. And it could have been an add-on or a
 7 deduction?
 8 A. It would have been more of a -- yeah.
 9 It could have been if it was a more expensive
 10 color. Typically that would be a color change,
 11 not necessarily a paint change.
 12 Q. Do you know whether you-all had, other
 13 than in this lawsuit, complaints about this paint
 14 being chalky or rubbing off?
 15 A. No.
 16 Q. Have you been in any of these houses to
 17 determine -- to determine whether that complaint
 18 is valid among the houses at this development?
 19 A. I have not -- I have not been in those
 20 houses to examine those complaints.
 21 Q. Are you aware either directly or
 22 indirectly of anything that Professional Paint &
 23 Drywall may have done improperly in applying that
 24 paint that caused it to be chalky?
 25 A. I'm not aware of anything that

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1 settle on that house and negotiations begin?
 2 A. Absolutely. That is the normal.
 3 Q. And once they get a contract but before
 4 closing they have an opportunity to inspect the
 5 house within 10 days before closing I think it
 6 is?
 7 A. It's -- they have an opportunity to
 8 inspect, and I don't know if it's always going to
 9 be 10 days, two weeks, or a week. It really
 10 depends on the circumstances of the house and the
 11 schedule.
 12 Q. Looking at the contract that I did look
 13 at, it appears that the homeowner can, with the
 14 proper conditions, hire an independent home
 15 inspector to look at the house before they close
 16 on it as well?
 17 A. That is true.
 18 Q. And many of them take advantage of that?
 19 A. I don't know if it's 50 percent but
 20 quite a few people do.
 21 Q. When the homeowner does the prepurchase
 22 walk-throughs, am I correct that you-all jointly
 23 create a punchlist of anything they want done or
 24 that they think needs to be corrected or
 25 completed?

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1 Professional did to cause it to be chalky.
 2 MR. NAIL: I objected to that. I
 3 don't know if the court reporter heard that, but
 4 I just wanted to note that for the record.
 5 Q. I may have asked you this, but if not,
 6 have you had that complaint about this paint in
 7 any other communities?
 8 A. I'm not aware of any other complaints
 9 about this -- that particular paint.
 10 Q. Who manufactured the paint?
 11 A. Sherwin-Williams.
 12 Q. And it's a color called frosty white; is
 13 that correct?
 14 A. That is a color that we use as one of
 15 our base colors down there, yes.
 16 Q. You talked a little bit about the
 17 homeowner inspections of the property. I just
 18 want to run through that right quick to make sure
 19 I understand all of it. Presumably -- or I know
 20 when I bought a house I go look at it before I
 21 decide to put a contract on it. I know you said
 22 that sometimes people buy them from California
 23 and buy them through a lawyer, but is it possible
 24 that the prospective buyer will come look at one
 25 or more houses, and then if they find one, they

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1 A. That is true.
 2 Q. And many of them take advantage of that?
 3 A. I don't know if it's 50 percent but
 4 quite a few people do.
 5 Q. When the homeowner does the prepurchase
 6 walk-through, am I correct that you-all jointly
 7 create a punch list of anything they want done or
 8 that they think needs to be corrected or
 9 completed?
 10 A. That is true.
 11 Q. And is it right that you-all take that
 12 list, and assuming you agree that that needs to
 13 be taken care of and that there is a problem,
 14 you-all take care of that before closing and
 15 confirm that with the homeowner --
 16 A. Oh, I'm sorry. That is that standard
 17 procedure.
 18 Q. And is it correct that the homeowner
 19 actually signs off on that document?
 20 A. That is correct.
 21 Q. And after closing, within 30 days,
 22 there's another homeowner/D.R. Horton joint
 23 inspection if the homeowner has any problem that
 24 they wish to bring to your attention?
 25 A. That is correct.

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1 Q. And if the homeowner didn't bring
2 anything to your attention or didn't bring a
3 particular issue to your attention, is it fair to
4 understand that that was not an issue at that
5 time?
6 A. At that time, yes, that's correct.
7 Q. And then you also do an 11-month
8 warranty check?
9 A. Yeah. Well, basically that's to -- the
10 11-month, typically because a lot of -- a large
11 portion of warranties expire at 12 months. It's
12 to allow the homeowner to get through anything
13 that -- if it's not an emergency item like a
14 water leak, any of these cosmetic issues that may
15 have popped up after that 30 days and before the
16 one year, it gives us an opportunity for the
17 homeowner to let us know what all those items are
18 so we can get in and take care of those --
19 basically do another walk with them and have that
20 list, and then it's basically another procedure
21 like the preclosing except for warranty items.
22 Q. And that 11-month inspection or
23 complaint period creates -- or, rather, generates
24 a service request form; is that correct?
25 A. Or multiple, yes.

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1 written documentation of what those -- how those
2 procedures work.
3 Q. Does D.R. Horton take responsibility for
4 complaints, such as nail pops or dissatisfaction
5 with paint finishes, that arise only after the
6 expiration of the 12-month warranty on those
7 parts of the house?
8 A. No. Once it hits the 12-month warranty,
9 those items -- the warranty is expired for those
10 items. It would need to be prior to.
11 Q. And who would be responsible for those
12 items after the expiration of the 12-month
13 warranty if they have not been raised prior to
14 the end of the warranty period?
15 A. So if it wasn't -- if it wasn't raised
16 prior to the end of the warranty period, then
17 the -- it really falls on the homeowner.
18 Q. Has D.R. Horton done any kind of
19 investigation that you know of to get to the
20 bottom of the chalky paint complaint that some of
21 these homeowners are contending exists?
22 A. I am not aware of the conversations that
23 may have been had with Sherwin-Williams.
24 Q. Do you know whether or not there were
25 conversations with Sherwin-Williams?

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1 Q. Multiple forms?
2 A. Well, depending on -- well, work order
3 is what we call -- well, no, yes. We have that
4 one form, and then that form may have multiple
5 items on it.
6 Q. Right. Okay. And does D.R. Horton
7 assume that if the issues are not raised at that
8 point or had not been raised on the 30-day
9 walk-through or had not been raised in the
10 presale walk-through that the homeowner was
11 satisfied with such areas and was not complaining
12 about it?
13 A. I would say that's correct.
14 Q. Are nail pops a fairly typical or common
15 problem in houses like this?
16 A. All houses.
17 Q. Is the home inspection policy and
18 warranty procedures, are they explained to the
19 homeowners?
20 A. Yes.
21 Q. And are they contained in the written
22 contract that the homeowner signs for the
23 purchase of the house?
24 A. I don't believe it's part of the actual
25 contract. I believe we do provide them with

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1 A. I don't know. And the contractor may
2 have had conversations with them that I'm not
3 aware of as well. But as far as D.R. Horton, I
4 do not know whether those conversations were
5 made.
6 Q. You told me a minute ago that you-all
7 continue to use Professional Paint & Drywall. Is
8 it safe to assume that they're responsive to
9 warranty requests made by D.R. Horton and that's
10 one reason you continue to use them?
11 A. Yes.
12 MR. DuBOSE: I believe that is all
13 I have. Thank you very much.
14 THE WITNESS: Thank you.
15 EXAMINATION
16 BY MR. BLACK:
17 Q. Mr. Bunner, this is David Black. Can
18 you hear me okay?
19 A. Yes. I hear you fine.
20 Q. If I ask any questions that you do not
21 understand, simply ask me to repeat or rephrase,
22 okay?
23 A. Okay.
24 Q. And if the sound breaks off because
25 we're doing it by Zoom, just let me know, and I

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1 will be happy to repeat. Okay?

2 A. Okay.

3 Q. I represent Builders FirstSource as well
4 as ProBuild in this matter. I have just a couple
5 questions. Do you have any knowledge or
6 information regarding the scope of work or the
7 scope of involvement of Builders FirstSource on
8 this particular project?

9 A. I have access to the -- to whatever was
10 submitted, the exhibits. I will be happy to look
11 at those.

12 Q. Well, what I'm trying to find out now
13 is, as you sit here today for the deposition as a
14 30(b)(6) witness, do you have any personal
15 knowledge or information regarding the scope of
16 work or the scope of involvement of Builders
17 FirstSource at the Tidewater Creek project?

18 A. I have some general knowledge of it,
19 yes. But I do not have them memorized.

20 Q. I understand. What is your general
21 knowledge as to the scope of work or scope of
22 involvement with Builders FirstSource?

23 A. Well, it depends on what particular task
24 they were contracted to do.

25 Q. Do you know what task or tasks they were

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1 any kind of spreadsheet or notes that would
2 indicate who did what with regards to original
3 construction, or are you having to look back at
4 all the different contracts?

5 A. Yeah, I don't keep a spreadsheet on
6 that. And this file is so large, it's freezing
7 up on my computer.

8 Q. Well, in the interest of time, I will
9 keep moving. Off the top of your head, do you
10 have of any idea as to the number of homes that
11 Builders FirstSource may have furnished materials
12 or labor or both at Tidewater Creek?

13 A. I believe it was 54 homes.

14 Q. I am not necessarily asking you the
15 total number of homes within Tidewater. I'm
16 trying to find out if you have some idea, some
17 information or knowledge, as to how many homes
18 for which BFS provided materials and/or labor.

19 A. Well, they may have provided --

20 Q. If you know.

21 A. I don't know the exact number off the
22 top of my head, no.

23 Q. Did you ever have any communications
24 with Builders FirstSource at any time regarding
25 the Tidewater Creek project?

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1 contracted to perform?

2 A. I can look that up.

3 Q. Where would you look it up?

4 A. It's in the provided documents that we
5 provided for contracts and scopes of work. I
6 don't have it open right now.

7 Q. As you're looking, do you know if
8 Builders FirstSource was materials only or labor
9 only or both?

10 A. If it was framing material, I believe it
11 was material only. Windows would have been labor
12 and material. And if it was doors, it would have
13 been labor and material. Sorry, exterior doors.
14 If it was roof trusses, it would have been
15 material.

16 Q. Are you able to fairly quickly look at
17 any information that you have readily accessible
18 to determine what Builders FirstSource may have
19 furnished and/or installed?

20 A. Give me just a couple of minutes. I
21 should be able to pull something up. I found
22 what we provided for contracts and scopes of
23 work, and I'm just scrolling through because it's
24 got a handful of contractors here.

25 Q. And while you're looking, do you have

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1 A. Not that I recall.

2 Q. Do you recall the names of any employees
3 or representatives of Builders FirstSource with
4 respect to the Tidewater Creek project?

5 A. Yeah. Michael Lamb. And I can't
6 remember her last name. Her name is Gina. She
7 handles windows. And those are the only actual
8 names I can recall.

9 Q. And do you believe you spoke with either
10 of those individuals at all at any time regarding
11 Tidewater Creek?

12 A. To be honest, I don't know if I actually
13 spoke with them specifically about Tidewater
14 Creek.

15 Q. Do you know if you had any
16 communications with them regarding Tidewater
17 Creek, whether it be an e-mail, text message,
18 letter, or anything else?

19 A. I can't confirm that now.

20 Q. As the 30(b)(6) representative for
21 D.R. Horton today, do you have any criticisms of
22 Builders FirstSource with respect to their
23 involvement in vertical construction of any of
24 the homes at Tidewater Creek?

25 MR. NAIL: Object to the form.

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1 A. I don't.
 2 Q. You can answer it.
 3 A. I do not.
 4 Q. As the 30(b)(6) representative for
 5 D.R. Horton today, are you aware of any other
 6 employees or representatives of D.R. Horton who
 7 have any criticisms of Builders FirstSource with
 8 respect to Builders FirstSource's involvement in
 9 the vertical construction of Tidewater Creek?
 10 MR. NAIL: Object to the form.
 11 Q. You can answer it.
 12 A. I do not.
 13 Q. Are you aware of any criticisms by
 14 D.R. Horton's expert or experts in this case with
 15 respect to materials and/or labor provided by
 16 Builders FirstSource at Tidewater Creek?
 17 A. I'm not.
 18 Q. Do you know the name or names of the
 19 experts who have been named for D.R. Horton in
 20 this lawsuit?
 21 A. I do not know all of the names, no.
 22 Q. What names do you know?
 23 A. Actually, the one I was thinking of
 24 actually wasn't for D.R. Horton. Actually I
 25 don't know.

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1 Tell me briefly about those two or three visits
 2 that you made during structural construction.
 3 Meaning what was the purpose for your visit, how
 4 long did you stay, and what did you do while you
 5 were there?
 6 A. Okay. Purpose of the visit was to walk
 7 through the houses, see how they're progressing,
 8 make sure I didn't see anything out of the
 9 ordinary, speak with the superintendent on the
 10 site. And that was basically it. And I would
 11 have probably been there maybe an hour total.
 12 Q. For each visit?
 13 A. That's correct.
 14 Q. And those two or three visits, that was
 15 over what general time frame? Was that over a
 16 number of weeks or over a number of months?
 17 A. Oh, over months.
 18 Q. Have you made any visits back to
 19 Tidewater Creek since the vertical construction
 20 was completely finished?
 21 A. No.
 22 Q. Let me go back. As I indicated, I also
 23 represent ProBuild, so I'm going to ask you some
 24 questions that may seem very similar to earlier
 25 questions that I asked you about Builders

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1 Q. Can you name any of the experts that
 2 might have been named by or on behalf of
 3 D.R. Horton for this particular lawsuit?
 4 A. I don't know the D.R. Horton ones, no.
 5 Q. As far as your involvement with
 6 Tidewater Creek, can you tell me the number of
 7 visits that you made to the Tidewater Creek
 8 property prior to any clearing or sitework?
 9 A. Oh, zero.
 10 Q. How many visits did you make to the
 11 Tidewater Creek property during the clearing and
 12 sitework?
 13 A. Don't think I made any. Well, can I
 14 take that back? To correct myself, when I was
 15 visiting to look for vertical construction in
 16 phase one, phase two would have been under some
 17 land development. But I was not there to look at
 18 the land development part.
 19 Q. And the visit or visits that you just
 20 referred to, how many visits did you make?
 21 A. I believe I made three -- two to three.
 22 I think it was three total visits during the
 23 construction period, vertical construction
 24 period.
 25 Q. And that answered my next question.

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1 FirstSource.
 2 As you sit here today, do you have any
 3 knowledge or information regarding the scope of
 4 work or the scope of involvement or the role of
 5 ProBuild with regards to Tidewater Creek?
 6 A. The same exact answer I gave for
 7 Builders FirstSource.
 8 Q. Meaning that you would have to take some
 9 amount of time to look back through the contracts
 10 and scopes of work to figure out what the
 11 documents indicate?
 12 A. That is correct.
 13 Q. To your knowledge, did you ever have any
 14 communications at any time, communications,
 15 whether it be phone calls, e-mails, text
 16 messages, letters or otherwise, any
 17 communications at any time with ProBuild
 18 regarding the Tidewater Creek project?
 19 A. Actually, I think I had some confusion
 20 when I was thinking about this answering Builders
 21 FirstSource. I mentioned Michael Lamb, and
 22 Michael Lamb was a ProBuild employee at that
 23 time. I believe -- I wasn't thinking about this,
 24 but Builders FirstSource purchased ProBuild. I
 25 was thinking of them being as one and the same

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1 when I answered the first one. That's why I said
 2 Michael Lamb. But Michael Lamb would not be for
 3 Builders FirstSource. That would have been for
 4 ProBuild. But, no, I wouldn't have spoken with
 5 them specifically about Tidewater Creek.
 6 Q. Okay.
 7 A. Or anything that I can recall speaking
 8 about.
 9 Q. As the 30(b)(6) designee for D.R. Horton
 10 for today's deposition, do you have any
 11 criticisms with respect to ProBuild, as far as
 12 vertical construction of any of the homes at
 13 Tidewater Creek?
 14 MR. NAIL: Object to the form.
 15 Q. You can answer.
 16 A. No.
 17 Q. As a 30(b)(6) designee for D.R. Horton
 18 for today's deposition, are you aware of any
 19 other D.R. Horton employees or representatives
 20 who have criticisms with respect to ProBuild
 21 regarding the Tidewater Creek project?
 22 MR. NAIL: Object to the form.
 23 Q. You can answer.
 24 A. No.
 25 Q. And as far as any of D.R. Horton's

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1 EXAMINATION
 2 BY MR. TRAYWICK:
 3 Q. Mr. Bunner, can you hear me?
 4 A. I can hear you well.
 5 Q. My name is Ben Traywick. I represent
 6 the plaintiffs in this matter. I am going to try
 7 not to cover ground that's already been covered
 8 and try to be succinct.
 9 What were the factors that led
 10 D.R. Horton to hire Lather as the sitework
 11 contractor?
 12 A. From that exhibit we just looked at, it
 13 was a clear statement from Jared O'Sako in the
 14 e-mail to Pam Jarvis, copying Ali Heavener and
 15 Doug Nicoll.
 16 Q. And I'm sorry. I must have missed that
 17 part. Can you tell me what it said?
 18 A. Let me see if I can find it. It says, I
 19 choose Lather Construction primarily because they
 20 are low bidder and can meet our deadline.
 21 They're located down the street from our project
 22 site and are familiar with the job and the soils.
 23 Lather Construction's price also included
 24 clearing and constructing the building pads,
 25 which the other bidders did not include. We are

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1 experts, even though you might not know who they
 2 are or what their names are, are you aware of any
 3 criticisms on the part of an expert or experts
 4 named by D.R. Horton in this lawsuit as it
 5 relates to the scope of work or scope of
 6 involvement of ProBuild?
 7 A. I'm not aware of it, no.
 8 Q. And do you go by the initials RK?
 9 A. When you say go by, can you explain what
 10 "go by" means?
 11 Q. What do your friends and your co-workers
 12 call you? Do they call you RK, or do they call
 13 you Ronald or Ron or --
 14 A. They call me Ron.
 15 Q. And the only reason I ask, when I look
 16 on the Zoom screen, for your name, it just has RK
 17 Bunner, so I didn't know if you kind of went by
 18 RK or --
 19 A. No.
 20 MR. BLACK: Okay. I believe that's
 21 all I have. Thank you for your time today. I
 22 may have some follow-ups later, but I appreciate
 23 your time.
 24
 25

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1 confident they will be able to meet our schedule
 2 and respond well if issues arise.
 3 Q. And is that a fair characterization from
 4 Mr. O'Sako of why D.R. Horton selected Lather?
 5 A. I would say it is.
 6 Q. Do you know what the -- and I'm sorry if
 7 I'm covering ground that was already covered. Do
 8 you know what the deadline was?
 9 A. No, I don't have that information.
 10 Q. All right. Is it fair to say that
 11 meeting -- staying within budgets and meeting
 12 schedules is a point of emphasis within
 13 D.R. Horton?
 14 A. I'd say that's a great business practice
 15 for all businesses.
 16 Q. Is it a point of emphasis for
 17 D.R. Horton?
 18 A. Yes.
 19 Q. All right. Did D.R. Horton, when it was
 20 scouting this property, recognize and count on
 21 the Beaufort military community to be the buyers
 22 of many of these houses?
 23 A. I'm not aware of what the marketing
 24 analysis was as part of the due diligence.
 25 Q. I'm going to see if --

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1 (Discussion off the record.)
 2 Q. Do you recognize this document that
 3 we're looking at here? This is Plaintiffs'
 4 Exhibit 3. Do you know what this is?
 5 A. I'm just trying to read it here real
 6 quick. Okay. It's part of executive summary,
 7 part of pre -- pre-land purchase submittal.
 8 Q. And I'm happy to scroll down and show
 9 you as much of it as you like. This would have
 10 been something that would have been within Doug
 11 Nicoll's sort of realm.
 12 A. Okay.
 13 Q. Is that fair -- is that kind of your
 14 understanding?
 15 A. Yes.
 16 Q. I noted here where it says market
 17 information narrative, it points out a few
 18 characteristics of Lady's Island. And then it
 19 says, Lady's Island is a desired location for its
 20 secluded feel, yet convenient location to
 21 Beaufort and the surrounding bases. And that
 22 appears to allude back to the previous sentence
 23 that talks about how close this property would be
 24 to the naval air station and Parris Island.
 25 A. Okay. I agree with that.

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1 terminate the contract if they didn't like what
 2 they were seeing out at the property?
 3 A. I am -- most contracts have a due
 4 diligence period. You know, they all vary on the
 5 length. If you're saying it says 75, that's
 6 fine. It's not unusual. But, yes, there would
 7 be a due diligence period.
 8 Q. Were there any --
 9 A. Sometimes they can be extended on
 10 negotiation.
 11 Q. I get it. During that period, whatever
 12 length it was, were there any limitations imposed
 13 upon D.R. Horton, in terms of the testing,
 14 inspections, investigations, analyses that it was
 15 able to perform on the project -- on the
 16 property?
 17 A. I would say the only limitation would
 18 have been that we couldn't destroy any of the
 19 property while we were looking at it. As far as
 20 a limitation, no.
 21 Q. Do you know what all D.R. Horton did
 22 just in terms of sort of bullet points or
 23 categories of activities that D.R. Horton did as
 24 part of its due diligence?
 25 A. Well, we would have checked our zoning

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1 Q. And so, you know, it's not a big deal,
 2 but is it fair to say that D.R. Horton sort of,
 3 as they evaluated this market, intended and
 4 certainly foresaw that these houses would be sold
 5 to the local military community?
 6 A. I would say that that -- they definitely
 7 had that in consideration. Not necessarily would
 8 be all military, but yeah.
 9 Q. I get it. Bad question. But that was
 10 going to be a significant part of the market
 11 analysis for there being adequate customers?
 12 A. That's a general comment for anywhere in
 13 Beaufort, in north -- or whatever, that side of
 14 the Broad, any property over there.
 15 Q. Are you familiar, sir -- and I am going
 16 to try to ask this in a way that we don't have to
 17 dig back to the contract. And I'm thinking about
 18 the contract by which D.R. Horton purchased the
 19 property that would become Tidewater Creek.
 20 A. Okay.
 21 Q. On that subject, is it your
 22 understanding that there was a 75-day due
 23 diligence period, for lack of a better word, that
 24 D.R. Horton had after the contract was signed
 25 before closing during which D.R. Horton could

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1 to determine that you could actually build houses
 2 on it and how many homes you could build on it
 3 and what type of homes you would build on it. We
 4 would have checked to make sure there was water
 5 and sewer available, you know, got to make sure
 6 your utilities are there.
 7 So basically what you need to have a --
 8 what is considered a good, marketable community
 9 for modern homes. And we would have performed a
 10 phase one environmental study. It would have
 11 been contracted out. And we would have run
 12 preliminary numbers based off of all the zoning
 13 information and everything else to make sure it
 14 was feasible. But obviously, it has to pass a
 15 phase one environmental. That's the key to being
 16 able to do anything.
 17 Q. And let's take that apart a little bit
 18 because I understand that you have to check to
 19 make sure you have access to utilities. You have
 20 to -- and you mentioned that. You have to check
 21 the zoning. You have to run sort of pro formas
 22 that show whether the spreadsheets are going to
 23 work, whether the money is going to work.
 24 A. Right.
 25 Q. All of that is sort of off-site, right?

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1 I mean, that's done by people in offices or
2 talking on the phone, as opposed to being out
3 there on the job site; is that fair?
4 A. Yeah, for the most part. Other than
5 drive by to get a feel of the location, that's
6 correct, most of that is done elsewhere.
7 Q. And that's what I kind of gathered from
8 Mr. Nicoll and Mr. O'Sako is that they sort of
9 drove down there. You know, there was limited
10 clearing on the front end of this deal. They
11 drove down there, maybe got out of the car,
12 looked around, but stopped short of actually
13 walking the property. Is that your
14 understanding?
15 A. Yeah. That's my understanding, yes,
16 which is -- depending on the time of year, you
17 may not want to walk through some areas.
18 Q. Is it common for D.R. Horton to buy a
19 piece of property without anybody from the
20 company ever walking the property?
21 A. Yes. The entire property. We will
22 visit the property, but access to certain parcels
23 can be challenging sometimes.
24 Q. You don't know whether there were access
25 issues at this parcel, do you?

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1 done out of our corporate office. In other
2 words, ordered and -- I don't know if paid for,
3 but at least ordered out of the corporate office.
4 Q. Is it like \$1,000 or 2?
5 A. I would have to think it's more than
6 that. Just because your -- \$1,000 or 2 for a
7 professional's time doesn't go very long.
8 Q. Right. Let me show you another
9 document. And this is -- are you seeing that?
10 A. Yes, I am.
11 Q. This is too big. It is like -- this
12 came from the Lather bid for the job, and I'm
13 sorry -- I'm working with the computer. I'm not
14 really all that --
15 A. We looked at it earlier.
16 Q. You-all did?
17 A. Yes.
18 Q. I apologize. Can you -- and I'll try to
19 just get to the end here. Are you familiar with
20 the document? Do you know what this data is?
21 A. It looks pretty -- it's telling me what
22 it is without having a label on it.
23 Q. What are the -- up here where it says
24 lot 1 and then under the column existing, it says
25 14, what unit is that? 14 what?

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1 A. I'm talking about just thick growth of
2 trees. You know what I'm saying? It's just
3 not -- it's not a pleasant experience to walk it.
4 There's certain -- you might be able to walk
5 paths or trails or things like that. But there's
6 certain areas of properties that are just too
7 overgrown to access.
8 Q. But in the end, it sounds like
9 D.R. Horton relies on this phase one
10 environmental to confirm that the conditions on
11 the ground are suitable for residential
12 development.
13 A. Absolutely.
14 Q. Do you know how long -- the person who
15 conducted the phase one environmental for this
16 property, do you know how long he would have been
17 on site?
18 A. I do not.
19 Q. Do you know --
20 A. I do not know that, no.
21 Q. Do you know how much it costs, how much
22 D.R. Horton paid for the phase one?
23 A. To be honest with you, I believe a lot
24 of the phase -- or at this point in time, when
25 this time frame was, I believe those were all

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1 A. Feet.
2 Q. Above sea level?
3 A. Yes.
4 Q. And then is the 17.3 feet what the plans
5 call for?
6 A. That's correct.
7 Q. Do you know, is that the average
8 elevation of the lot, or are the lots all
9 supposed to be flat? Or is it --
10 A. That's referring to the pad, not the
11 lot. In my opinion of this document, it is not
12 referring to the entire lot. It's referring to
13 the pad.
14 Q. How do you determine that? Is that just
15 sort of like based on your experience, or is that
16 the number of cubic yards and the raise, it just
17 doesn't -- the math doesn't work for it to be the
18 whole yard?
19 A. Well, in general, we wouldn't go in and
20 just raise up an entire yard. You know, you
21 don't -- especially in an area where we're
22 retaining trees or trying to save all these trees
23 that we did in this community. So you're going
24 to do limited impact, and you're only going to
25 raise the building pad and then around it just to

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1 slope it back down to natural grade.
 2 Q. That leads me to another topic. You
 3 know, we know that -- or at least we presume that
 4 D.R. Horton had an engineer come in and test the
 5 building pads themselves for, you know,
 6 bearing -- load-bearing characteristics and
 7 whether it was suitable for building a house on
 8 top of, right?
 9 A. Yes. That's correct.
 10 Q. Do you know whether any similar testing
 11 or any testing of the soil is done outside of the
 12 footprint of the actual house, like out in the
 13 yard? Do they do similar testing?
 14 A. Not really that I'm aware of, unless it
 15 was -- now, there's no -- you're looking for it
 16 in your road areas, and you're looking for it in
 17 your -- where your houses are going to sit.
 18 That's where you're looking to have structural
 19 integrity of the soils, and that's where we're --
 20 you know, that's where we would be.
 21 Q. Or I guess if this were -- if this
 22 community were all on septic tanks, maybe you
 23 would have a different answer, but this was
 24 all --
 25 A. That is a -- yeah. With septic, you do

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1 Q. Why not?
 2 A. I just -- it's not -- I don't
 3 think that's -- it's just not the right thing to
 4 do. We wouldn't do that.
 5 Q. Mr. O'Sako and I think Mr. Higgs from
 6 Lather both told us that that would be illegal.
 7 Do you agree with that?
 8 A. I'm not familiar with the laws. I would
 9 say it's not the right thing to do. We wouldn't
 10 do it.
 11 Q. I'll show you a document. Are you
 12 seeing this, sir?
 13 A. Yes.
 14 Q. Are you familiar with it?
 15 A. I am.
 16 Q. Did you already look at this one in this
 17 deposition too?
 18 A. No.
 19 Q. What is it that we're looking at here?
 20 A. It's an area map that shows the
 21 locations of communities as it relates to the
 22 area, where our communities are located.
 23 Q. And it looks like there's a little key
 24 down here. So this is for the -- this is a
 25 snapshot, right, of the Hilton Head/Savannah sort

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1 have to consider the soils within the yard, so
 2 that is correct. As I recall, this community was
 3 a fairly sandy community. I believe you could
 4 see the sand visible at the surface in certain
 5 areas and -- which sand tends to tell you that
 6 you're in pretty good shape as far as the
 7 structural integrity of the ground.
 8 Q. What would D.R. Horton's policy be if on
 9 its site that it was going to build out as a
 10 residential development, either D.R. Horton or
 11 one of its subcontractors or one of its design
 12 people were to encounter widespread debris, solid
 13 waste, glass, metal, dock pilings, construction
 14 refuse, old appliances, et cetera? What should
 15 D.R. Horton -- what does D.R. Horton want its
 16 subcontractors to do in that situation?
 17 A. Notify us.
 18 Q. And what would you-all do? What should
 19 D.R. Horton do once it is notified of something
 20 like that?
 21 A. Investigate it.
 22 Q. Why not just cover it up with fill dirt
 23 and proceed with the project?
 24 A. I don't think that's -- that's not
 25 something we would do.

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1 of D.R. Horton activity in that region; is that
 2 fair?
 3 A. Yeah, that sounds right.
 4 Q. And then down at the bottom, it says map
 5 legend. And I can't -- the copy is so poor, it's
 6 kind of hard to connect them up, but it indicates
 7 that there are nine existing communities in this
 8 area as of the time that -- of this snapshot.
 9 A. That's what it says, yes.
 10 Q. What are -- and I'm not meaning to be
 11 obtuse here, but in you-all's parlance at
 12 D.R. Horton, what are existing communities?
 13 A. I would say that they're communities
 14 that are actively performing real estate
 15 transactions, selling and closing homes.
 16 Q. Very good. And then it says there are
 17 three close-out communities in this area. What
 18 are the -- what is a close-out community?
 19 A. That can be either we have sold all of
 20 the homes in there, and they just are, you know,
 21 completed and closed. I mean, there may be --
 22 whether they put it in the close-out communities
 23 while you might still have one or two left to
 24 sell, it could be, but you're getting down to
 25 almost done.

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1 Q. And then the next one, you can't really
2 make it out on this copy, but I think it says
3 mothball communities.

4 A. That would be communities that we are
5 not actively doing anything with.

6 Q. Is it where you -- where the company has
7 purchased land but is not -- is putting
8 construction and development on hold?

9 A. That could very well be the case. I
10 would say if its owned and mothballed, that would
11 be the case.

12 Q. And it looks like there are five new
13 deals. What are those?

14 A. That would be either -- either -- it
15 could either be raw land that we can buy to --
16 buy to develop and build houses, or it could be
17 finished lots that are on the ground that someone
18 wants to sell us for a community. That's what
19 that would be, stuff that we're looking at.

20 Q. It's in the scouting and acquisition
21 type phase?

22 A. That's correct.

23 Q. And then the last one, it says there is
24 one Express Homes, and it says potential. What
25 can you tell me about what that signifies?

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1 brand, so it was -- they wanted to know, what are
2 you doing? Are you -- so that's why they're
3 distinguishing it, just to point it out, just not
4 to throw it in a bucket with other deals.

5 Q. Once the sitework began at Tidewater
6 Creek, did D.R. Horton supervise Lather's work in
7 any meaningful way?

8 A. No. You know, we performed oversight
9 and coordination, basically just making sure that
10 someone shows up. Are they out there? Is there
11 equipment out there? You know, does the schedule
12 say they're supposed to be putting in storm sewer
13 today or this period, and they're out there; it
14 looks like they're putting in storm sewer.

15 That's what we're looking at. But I
16 believe this contract had monthly pay apps to
17 Lather built into it, and that's why we have the
18 engineer -- not the design engineer, but the
19 other engineer is listed in the contract to come
20 out and perform a professional inspection to
21 confirm that everything is in and done according
22 to specification and meets that pay app request.

23 Q. But in terms of day-to-day confirmation
24 that they're doing work in an appropriate
25 fashion, my understanding is that Lather -- as

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1 A. Yeah. That's basically designating that
2 a certain property might be -- I think Express
3 was fairly new at that time -- at this time. And
4 so it was identifying that we might be able to
5 get Express rolling, but that deal might be a
6 potential deal for Express Homes.

7 Q. What is the -- and what you just
8 described -- and I'm not arguing with you. I am
9 just trying to understand.

10 What you just described sounds like it's
11 in the new deal -- you know, what you basically
12 described is sort of a new deal situation. But
13 why does Express Homes -- I mean, you have
14 different divisions of D.R. Horton, why does
15 Express Homes have its own sort of category on
16 this map legend? Are there particular
17 characteristics of that product?

18 A. Well, this is -- I think this is
19 identifying to those that approve land deals
20 that, hey, we are looking for -- to find -- you
21 know, to roll out an Express Homes in the area.

22 And we're just saying that -- because I
23 said -- like I said, Express was brand-new back
24 in those years, what I'm talking about, what,
25 '14, '15. And so we were rolling out a new

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1 with pretty much everybody else, I mean,
2 D.R. Horton's model is to hire what it believes
3 to be reliable subs and let them do their work.

4 A. That is correct.

5 Q. All right. Does D.R. Horton acknowledge
6 that -- well, let me just ask you this. I think
7 you testified earlier you have not reviewed
8 deposition testimony from other witnesses in the
9 case?

10 A. I think I scanned through one, and I'm
11 thinking -- I can't remember if it was -- had to
12 do with SWPPPs or something else, but I only
13 glanced at it, just scanning down. And I might
14 have spent a few minutes at it, and that's the
15 most when I decided that I didn't have time to
16 look at that.

17 Q. You didn't read the deposition testimony
18 of Shawn Higgs, who was sort of a supervisor for
19 Lather?

20 A. No. No. I can't even recognize the
21 name or don't recognize the name.

22 Q. Well, his more colorful nickname is
23 Turtle. Do you recognize that?

24 A. I'm not familiar with Turtle.

25 Q. You don't know Turtle?

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1 A. No.

2 Q. He testified -- and I'm paraphrasing
3 here. And, you know, obviously you can't confirm
4 this, but I will just represent to you that he
5 testified that he brought -- you know, that he
6 saw trash, debris, solid waste, appliances,
7 metal, glass, in particular, you know, all over
8 Breeze Way, on 16, 17, 18 and 19 in particular
9 and that he talked to Jared O'Sako about it and
10 that they made an arrangement for removing that
11 debris. Is that something that D.R. Horton
12 believes is accurate, that testimony?

13 MR. NAIL: Object to the form.

14 A. I am not sure what -- I don't know what
15 Jared responded with that. But -- it's hard for
16 me to speak for Jared. I haven't reviewed those
17 documents to know what he said.

18 Ask the question -- that was kind of a
19 long -- what was the actual question again? Make
20 sure I get this right.

21 Q. I just want to know whether that's
22 accurate. I will ask you a different question
23 and then maybe we can get at it this way.

24 Did D.R. Horton pay anybody to remove
25 solid waste refuse like what is alleged by the

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1 on the site?

2 A. I don't know. If we didn't know it was
3 there, I don't think we would have required it or
4 made any demand of him to do so if we weren't
5 aware that there was anything there.

6 Q. Okay.

7 A. Now, he may have had a contractual --
8 some sort of contractual requirement. I'm not
9 looking at the land purchase contract in it right
10 now. I don't know if he had some sort of
11 contractual requirement to do so on his own if he
12 was aware of something, but I'm not aware of us
13 knowing anything to be able to make that demand
14 of him.

15 Q. Forgetting what D.R. Horton knew, you
16 know, during due diligence or up front,
17 forgetting what D.R. Horton knew during
18 construction, what is D.R. Horton's belief right
19 now as to the extent of the debris field that is
20 on the surface or just below the surface at
21 Tidewater Creek?

22 MR. NAIL: Object to the form.

23 A. I'm still -- I don't think I've seen any
24 evidence that there's anything on the property
25 that D.R. Horton actually purchased.

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1 plaintiffs to exist at Tidewater Creek?

2 A. Not that I'm aware of.

3 Q. Did you see anything in the contract or
4 anything in the pay apps or anything in the
5 invoices, work orders, that indicated that debris
6 removal, solid waste removal, was performed by a
7 subcontractor and paid for by D.R. Horton?

8 A. I haven't seen anything other than
9 construction trash is the only thing that I'm
10 aware of that I have seen.

11 Q. And when you say construction trash,
12 you're referring to trash generated by the
13 construction of the Tidewater Creek community?

14 A. That's correct, yes.

15 Q. What is D.R. Horton's understanding of
16 how many and what in particular employees of
17 D.R. Horton observed some of this debris and
18 refuse on the Tidewater Creek property during
19 construction?

20 A. I don't think that we're -- we're
21 actually acknowledging that anyone did -- anyone
22 from Horton did observe it.

23 Q. Did D.R. Horton insist on or require
24 Cross Roads, Mr. O'Quinn, the seller, to clean up
25 the site of solid waste, debris, refuse, that was

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1 Q. Or that it sold?

2 A. Well, it's one and the same. Right.
3 Either way. I don't think we -- I still don't
4 think we're aware of anything.

5 MR. TRAYWICK: I don't have any
6 other questions. Thank you for your time.

7 THE WITNESS: Thank you.

8 EXAMINATION

9 BY MR. LEECH:

10 Q. This is Mike Leech. I represent East
11 Coast Construction Cleanup. Are you familiar
12 with East Coast Construction Cleanup?

13 A. Yes, I am.

14 Q. How are you familiar with them?

15 A. I've known the owners and that company
16 by different names over the years for a very,
17 very long time.

18 Q. And what is your general experience with
19 them?

20 A. Now, I will be honest, I haven't had any
21 contact with them in five or six years that I
22 know of, as far as business or anything. But
23 prior to that, they were a hard working group of
24 people.

25 Q. Were you -- was D.R. Horton satisfied

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1 with the work that East Coast Construction
 2 Cleanup did on this particular job?
 3 MR. NAIL: Object to the form.
 4 A. Yes. It's hard for me to speak for --
 5 you know, as with any contractor, some days are
 6 good and some days are not. But since I wasn't
 7 necessarily there, that's a hard one for me to --
 8 I would say, I'm not aware of any issues.
 9 Q. With respect to East Coast Construction,
 10 were they paid -- Construction Cleanup, were they
 11 paid all of their money for all of the work that
 12 they performed on this job?
 13 A. As far as I know.
 14 Q. If you were unhappy with their work,
 15 would you have paid them for that work?
 16 MR. NAIL: Object to the form.
 17 A. Well, we would have made them aware of
 18 it and made them correct their work whether we
 19 paid them or not --
 20 Q. Do you know what the --
 21 A. -- because we had the right to offset.
 22 Q. I apologize. Do you know what the scope
 23 of work of East Coast Construction Cleanup was on
 24 this project?
 25 A. I would -- I am somewhat aware of the

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1 East Coast on this project?
 2 A. I do not.
 3 Q. And are you aware of any criticisms of
 4 East Coast --
 5 MR. NAIL: Object to the form.
 6 Q. -- from any --
 7 A. I am not aware of any, no.
 8 Q. And with respect to -- you have heard
 9 some of the claims, and I believe -- assuming
 10 that it's true, that there are cars and whatever
 11 else, massive debris out there, you wouldn't find
 12 any fault with East Coast's scope -- East Coast's
 13 work as it relates to not picking those sorts of
 14 things up because it's not within their scope of
 15 work; is that correct?
 16 MR. NAIL: Object to the form.
 17 A. I don't expect them to perform outside
 18 of their scope of work.
 19 Q. What is the -- understanding that
 20 D.R. Horton has a cross-claim against East Coast
 21 Construction Cleanup, do you -- can you testify
 22 as you sit here today as a representative of
 23 D.R. Horton what would be the factual basis for
 24 that cross-claim?
 25 A. Can you repeat the whole question again?

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1 exterior cleaning scope of work. But I would --
 2 for me to reference it, I would like to have it
 3 in front of me to read. Simply because there's
 4 been multiple versions of it over the years, I
 5 wouldn't want to falsely remember, you see what I
 6 mean, the scope of work that they were under at
 7 that period of time.
 8 Q. Is that something you can pull up or --
 9 A. I tried to pull this up for -- a little
 10 bit ago, and the file unfortunately was presented
 11 to me as a massive file, and I'm having a hard
 12 time maneuvering through that, but let me give it
 13 a shot.
 14 Q. Well -- and while you're doing that -- I
 15 appreciate that. But generally you understand
 16 that the exterior cleanup is the -- is to pick up
 17 construction debris; is that correct?
 18 A. Yes, that's exactly correct.
 19 Q. Not within their scope of work is to
 20 pick up things like old cars or refrigerators or
 21 whatever?
 22 A. That is not in their scope of work.
 23 Q. And so as you sit here as a
 24 representative of D.R. Horton, do you have any
 25 criticisms at all of any of the work performed by

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1 I'm sorry.
 2 Q. Sure. I will give you a little start.
 3 There's a cross-claim filed by D.R. Horton
 4 against East Coast Construction Cleanup. And my
 5 question to you is, do you know what -- as you
 6 sit here today as the representative of
 7 D.R. Horton, do you know what the factual basis
 8 for that cross-claim is?
 9 A. I do not know the -- I do not know the
 10 specifics of it.
 11 Q. How about generally?
 12 A. No.
 13 Q. Can you in any shape or form state or
 14 describe for me what D.R. Horton thinks that East
 15 Coast Construction Cleanup did wrong on this
 16 project?
 17 MR. NAIL: Object to the form.
 18 A. I'm not -- well, I didn't claim I had
 19 any complaints. I don't know that they did
 20 anything wrong. I'm not aware of anything myself
 21 at this time.
 22 Q. I guess the reason I'm asking is because
 23 D.R. Horton has -- in its responses to pleadings
 24 from the various plaintiffs, they have claimed
 25 that East Coast has done something wrong, and I

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1 need to know the factual basis for that.

2 And if you're sitting here as a
3 representative of D.R. Horton and saying there is
4 no factual basis for that, then I will take that
5 as your response; is that accurate?

6 MR. NAIL: Object to the form.

7 A. I'm just -- I may not be aware of that
8 particular thing.

9 Q. Do you know if there's anybody better
10 than you at D.R. Horton to tell a jury what D.R.
11 Horton believes that East Coast Construction
12 Cleanup did wrong in this particular case?

13 A. Without looking at the documents, I do
14 not know. Can you direct me to those documents?
15 I will be happy to look at them and answer your
16 question.

17 Q. Well, I'm asking about the general
18 pleadings and what -- and what the -- what
19 D.R. Horton -- anyone from D.R. Horton -- is
20 there anyone from D.R. Horton that can testify
21 better than you about anything that East Coast
22 Construction Cleanup would have done wrong with
23 respect to this particular project?

24 A. I am not aware of who that person would
25 be.

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1 Q. And then specific to this neighborhood
2 on Lady's Island, is D.R. Horton going to tell
3 the jury in the trial that there are any defects
4 or deficiencies in the HVAC systems on the
5 plaintiffs' homes?

6 MR. NAIL: Object to the form.

7 A. I'm not aware of any defects in them, so
8 I'm not sure why we would say that.

9 Q. And were there any limitations put on
10 you by D.R. Horton with regard to your ability to
11 prepare for this deposition?

12 A. Limitations?

13 Q. Yes, sir.

14 MR. NAIL: I am going to object to
15 the form of that.

16 A. It's just a matter of having enough
17 time. Not -- nothing put on me by D.R. Horton.

18 Q. Nobody said, you know, you can only take
19 so much time to prepare for this?

20 A. No.

21 Q. And no restrictions on your ability to
22 access any documents that you might need to
23 prepare?

24 A. No restrictions.

25 Q. In preparation for this deposition, did

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1 MR. LEECH: Okay. Those are all
2 the questions I have. Thank you.

3 (A recess was taken.)

4 EXAMINATION

5 BY MR. GRIMBALL:

6 Q. This is Heyward Grimball. I represent
7 Dean Custom Air in this litigation. I assume
8 that you know Charlie?

9 A. I know him very well.

10 Q. You've known Charlie for how long?

11 A. Oh, more than 20 years.

12 Q. I was going to say, I have got a
13 contract from 2001, and it looks like it's your
14 signature on it?

15 A. Yeah, that sounds right.

16 Q. So I assume then you know what Charlie's
17 company did at Tidewater?

18 A. Yes.

19 Q. And do you know if they did the whole
20 neighborhood?

21 A. At that time, their company did every
22 one of our houses in Hilton Head/Savannah.

23 Q. Have you got any criticisms of the work
24 of Dean Custom Air?

25 A. I do not.

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1 you review any contracts with Dean Custom Air?

2 A. I did not review the contracts.

3 Q. But you are here today as the 30(b)(6)
4 witness for D.R. Horton to testify about the
5 contracts, correct?

6 A. I have a general knowledge of the
7 contracts, yes.

8 Q. And you have been part of the
9 negotiation and execution of the contracts for
10 over 20 years?

11 A. Execution, yes. Negotiation of the
12 actual contract, it's very rare that we change
13 the contract or terms of the contract itself.

14 Q. If a subcontractor wishes to change a
15 term of the proposed contract language, it is
16 D.R. Horton's general policy to say no?

17 A. Only by experience of what we have
18 learned from our attorneys in our risk
19 management/legal department at corporate. But I
20 have sent plenty up to be looked at by them
21 and -- but I would not change it without
22 counsel's blessing, and typically they would
23 perform the changes if it was done.

24 Q. So even if D.R. Horton in a rare
25 instance allows a subcontract or accepts a

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1 subcontractor's request to change a term of the
 2 proposed contract, D.R. Horton's attorneys will
 3 draft the proposed change?
 4 MR. NAIL: Object to the form.
 5 A. That would be correct.
 6 Q. Okay. And how often does D.R. Horton
 7 require its subcontractors to re-execute these
 8 infinite contract agreements?
 9 A. It varies. I mean, it could be five
 10 years. It could be six months. We don't
 11 necessarily go back and make existing --
 12 depending on the type of change that was done is
 13 whether or not they would say, we need you to go
 14 back and have an existing -- a contractor under
 15 an existing contract re-sign with a new one.
 16 It's more likely the contractor did
 17 something like changed their name or legal entity
 18 that would require it and drive it. And at that
 19 point, we would put them under the latest and
 20 greatest contract.
 21 Q. Got it. And am I correct -- what do you
 22 do if a subcontractor drags their feet in
 23 executing a subsequent ICA?
 24 A. Well, that rarely happens. I mean,
 25 eventually if -- I may have to just give the work

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1 it. I should question if a contractor has an
 2 issue with signing those, you know, bringing them
 3 up. I would do whatever negotiation I could with
 4 them, but I have yet to have lost a contractor
 5 over that issue.
 6 Q. Got it. If a contractor needs to sign a
 7 new contract for you-all for whatever reason,
 8 will you pay them for the work they have already
 9 performed for you before they execute the new
 10 contract?
 11 A. Will I pay them for the work -- I don't
 12 not pay them during the period. I mean, most of
 13 these contractors are continuously doing work
 14 throughout the time we're trying to get --
 15 they're under contract until they're under a new
 16 contract, and they're still doing work as
 17 revolving payables.
 18 So I don't stop it and say, we're not
 19 going to do anything until you sign this
 20 contract. We don't --
 21 Q. And I assume that's the same case then
 22 for punchwork. You don't hold up payment, you
 23 know, on one project to make sure they do punch
 24 on the other?
 25 A. No. That's not how that works. So we

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1 to somebody else. In other words, it's up to
 2 them whether they want to sign it. It has
 3 nothing to do with me. If they don't want to
 4 sign it, they don't like the scope of work, we
 5 can't come to terms, their price isn't right
 6 because they decided -- because of the contract
 7 or insurance or scope of work, they want to raise
 8 their price, that's their choice 100 percent.
 9 They don't have to work for me at all.
 10 Q. And just to be clear, I'm not asking
 11 about the first time that you partner with a
 12 subcontractor. I'm asking about, you know, when
 13 changes are made and, you know, for instance, if
 14 legal tells you you've got to get a new set of
 15 contracts for your South Carolina trades because
 16 of some change in the law. Do you --
 17 A. I'd get -- sorry. Go ahead. Finish.
 18 I'm sorry.
 19 Q. Oh, no. I just said, do you follow me?
 20 A. Yeah, I follow you. No, that's kind of
 21 what I was talking about. They'll suggest it,
 22 and I will be honest with you, it doesn't happen
 23 that often that they will ask for -- if they find
 24 somebody that's 14 years old on a contract and
 25 we've had three revisions, they may ask me to do

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1 do withholdings for insurance deficiencies,
 2 things like that. But we have the right to
 3 offset their contract, so it doesn't -- we don't
 4 really associate moneys to any individual project
 5 in your day-to-day thinking.
 6 Q. So you could backcharge somebody on
 7 project B for the problems that they created for
 8 you on project A?
 9 A. That's true, yes.
 10 Q. And do you know generally when Dean's
 11 work was performed on this project?
 12 A. 2015 to 2016, I believe.
 13 Q. Okay. And do you know when the contract
 14 that Dean was working on during this project was
 15 executed?
 16 A. I can look it up real quick.
 17 Q. Yeah, that would be great. That would
 18 actually save me some time.
 19 A. I just scanned past it looking for
 20 something else just a little bit ago, so --
 21 Q. And I will tell you while you're
 22 looking, my point in asking this is I've got a
 23 2001 contract, a 2007 contract with no Exhibit A,
 24 and then I've got Exhibit A for a 2010 contract,
 25 and I was trying to figure out what was going on.

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1 A. I am looking at a contract that was
 2 executed on August the 2nd, 2007.
 3 Q. So I am going to share my screen with
 4 you. And is this the same contract that you're
 5 looking at, 2nd August 2007?
 6 A. Yes, same one.
 7 Q. And it's -- the version I have has been
 8 produced during the course of this litigation.
 9 It starts on Bates stamp DRH 006782. And so the
 10 question I've got for you -- and it looks like
 11 you executed this contract; is that correct?
 12 A. That is correct.
 13 Q. And then when I go down through this, we
 14 get to the end of the contract, and South
 15 Carolina revised, July 23rd, 2007, right?
 16 A. Yeah. That looks like it was a fresh
 17 contract, yes.
 18 Q. And then the next document that has been
 19 produced to me, do you have this as Exhibit A as
 20 part of your version of this?
 21 A. I do have that. Mine rolls like yours
 22 does.
 23 Q. And this has got -- are those your
 24 initials in the bottom right-hand corner of the
 25 first page of Exhibit A?

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1 those documents were replaced with these
 2 documents in March of 2010. In other words, the
 3 scopes of work change way more often than the
 4 contract changes.
 5 So we replace the scopes of work with a
 6 newly executed scope of work and, therefore, this
 7 would have been the scope of work -- now I'm not
 8 saying it doesn't exist. I'm saying that during
 9 the time period of the construction -- or the
 10 work done by Dean's in Tidewater Creek, this was
 11 more recent than the -- any prior version. This
 12 would have been the one they were performing
 13 under. Does that make sense?
 14 Q. For the scope.
 15 A. For the scope, right.
 16 Q. And we don't -- so my next question is,
 17 do you remember this meeting, March 17th, 2010,
 18 with Charlie Dean?
 19 A. No.
 20 Q. Do you know -- you know, just absolutely
 21 nothing; don't remember where you met, what you
 22 talked about, what you did?
 23 A. Charlie and I have done so many things
 24 together. There's no way I'd remember a specific
 25 meeting like that.

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1 A. That is me.
 2 Q. So and the date that this was -- there's
 3 a date at the bottom left-hand corner that is
 4 October -- or excuse me, August the 19th, 2008.
 5 Do you see that?
 6 A. I am scrolling -- slowly scrolling down
 7 on mine.
 8 Q. You should be able to see it on my
 9 screen.
 10 A. I will go back to yours. Okay. Wait a
 11 minute now. That is a version date.
 12 Q. Right.
 13 A. This was actually executed in 2010.
 14 Q. Right. And it looks like you executed
 15 this as well.
 16 A. Yes.
 17 Q. And my understanding of how these
 18 documents typically would work is that you and
 19 Charlie would meet, and you-all would execute the
 20 contract, and then you-all would also execute the
 21 scopes of work, which are the exhibits, right?
 22 A. Yes.
 23 Q. So where is the rest of the contract
 24 that you-all executed on March the 17th, 2010?
 25 A. Well, I'm not sure. It could be because

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1 Q. And that's fair enough. So do you
 2 remember if you-all just changed the scope that
 3 day or if you also changed the -- I will call it
 4 the main contract?
 5 A. It looks like we just changed the scope
 6 or we'd have a copy of the contract. In other
 7 words, we would have a newer version of the
 8 contract to provide.
 9 Q. Well, and I guess that -- you know, your
 10 presumption, of course, being that the contract
 11 was not lost; it was -- D.R. Horton retained it
 12 in the usual course of business as they normally
 13 would, right?
 14 A. Right.
 15 Q. And so what is that -- how does that
 16 record retention system/policy, call it what you
 17 want, work?
 18 A. I believe it's typically seven years for
 19 documents.
 20 Q. Well -- and does that differ when you
 21 are talking about the contracts?
 22 A. Yes. I mean, you're not going to get
 23 rid of -- you wouldn't -- actually, I see what
 24 you mean. In the standard real estate part of
 25 it, I think they hold them for seven years, I

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1 believe, is the period. Obviously with this,
2 we're not going to just throw away our one copy
3 of a contract if we haven't replaced it with
4 another one.

5 Q. Right.

6 A. Now, record retention has become better
7 over the last decade than they were in the decade
8 before, simply due to better technology, not
9 relying on paper copies in a file somewhere.

10 Q. So you-all would have basically all of
11 the documents that were generated as part of a
12 project in the post-2011 time frame?

13 A. Say that again.

14 Q. So you-all would have all of the
15 documents, specifications, e-mails, contracts,
16 purchase orders, warranty documents, et cetera,
17 et cetera, for something that had been done in
18 the last 10 years, but you might not have that
19 stuff for something that was done at the
20 beginning half -- the beginning decade of this
21 century?

22 A. Some items we would have. But again,
23 normally most of the stuff, we're only retaining
24 for seven years. Now, these, if we allow some to
25 go that long -- I mean, you saw one back to 2001,

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1 try and figure out the issue. What would you do?

2 A. What would I do? If I had to look at
3 the contract, I'd look at the contract.

4 Q. Right. So where is it?

5 A. Oh, I would go -- if I don't have the
6 actual latest and greatest version readily
7 accessible, I would place a request through --
8 it's actually mostly handled through the
9 accounting department. It's a system that they
10 scan these things into to actually submit them to
11 our corporate office, and they can go and pull
12 things out of that system.

13 Q. And when you say if you don't have it
14 readily accessible, how is it accessible to you?

15 A. How is it accessible for me?

16 Q. Yeah. I mean, do you have paper copies
17 in your desk?

18 A. No, no. It's electronic. I request it.
19 If I don't have it as a scanned document in one
20 of my folders, then I'll request it for a person
21 to get it to me from the system.

22 Q. And so in your folders, is that just
23 documents that you maintain on your computer that
24 are local and, you know, relate to your projects,
25 or do you have the ability to access some builder

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1 but then we have this one from 2007. So we went
2 six years without -- apparently without revising
3 that. And I don't know when the next one was
4 done by Charlie. It may have been -- I assume
5 there has been one since this 2007 one.

6 Q. And that's -- that is a great point.

7 What are you looking at during this deposition
8 that you have been able to pull this contract up
9 in your own system?

10 A. This is documents provided by my
11 attorney.

12 Q. Oh, okay. So this is specific to this
13 litigation?

14 A. Yes. I mean, I have -- I can go look
15 up -- I can get a lot of existing and maybe
16 previous versions that I have access to for a
17 large number of contractors, including scopes of
18 work.

19 But when it gets back to some of this
20 older stuff like this, I've got to go request
21 those documents from others in different
22 locations, even sometimes my corporate office.

23 Q. So let's say that an issue with Charlie
24 came up today about an ongoing project and you
25 needed to look at the terms of his contract to

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1 network within D.R. Horton and pull up a
2 contractor's contract in five different states?

3 A. Oh, no, no, no. Nothing like that.

4 This is -- it might be on like a shared drive
5 that others within our local division can access
6 to look at as well as myself. And either me or
7 one of my employees have scanned those in over
8 the time.

9 A large amount of it is scopes of work
10 because those are the items that we have to
11 reference a lot more than the contract itself.

12 And, you know, but if there's something
13 we're looking for that we don't have, we know --
14 for them to be set up as a vendor or to be
15 maintained as a vendor, the latest and greatest
16 is going to be scanned into a system that sends
17 it to corporate. They can -- and that's ultimate
18 document retention at this time. We can get --
19 go back and have it requested and look at it.

20 Q. Got it.

21 A. And that's how we -- when we get these
22 requests for discovery, that's where it comes
23 from.

24 Q. So you played no role in trying to find,
25 you know, Dean's contract related to this

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1 project?

2 A. I may have. Someone may have -- if
3 someone sent me an e-mail and said, Hey, Ron, can
4 you help me out with this, I might have e-mailed
5 the request to somebody else. But they would
6 have actually gone and gotten the documents.

7 Q. Fair enough. Okay.

8 A. If people don't know where to get stuff,
9 sometimes they come to me.

10 Q. Got it. And, you know, looking at this,
11 do you know if -- well, okay.

12 Have you reviewed the contract with Dean
13 Custom Air for 2007 prior to -- you know, for the
14 purposes of this litigation prior to talking
15 about it with me today?

16 A. No.

17 Q. And can you affirmatively state that
18 there was no additional contract executed between
19 Dean Custom Air and D.R. Horton between 2007 and
20 2015 when this -- Dean's work on this project
21 started?

22 A. I would say, yes, there has not been
23 one. Otherwise, it would have been produced.

24 Q. Well, now, I mean -- okay. And you say
25 that. Do you have any idea -- I mean, have you

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1 Mr. Bunner, the 2007 contract that we're looking
2 at, it does not actually obligate D.R. Horton to
3 hire Dean Custom Air to work on one project or
4 another, correct?

5 A. No. It's a blanket contract.

6 Q. And can I ask you to look at section 6,
7 the performance standards. And, you know, I want
8 you to review whatever you need to to answer my
9 question, but I will tell you that my specific
10 question relates to section 6.4. It's on page 2
11 of the contract.

12 A. I'm getting back to it. I was still on
13 the scope of work. 6.4?

14 Q. Yes, sir.

15 A. Okay. Indemnity?

16 Q. Yes, sir. You ready for me to ask my
17 question?

18 A. Sure.

19 Q. So this section talks about claims,
20 actions, et cetera, arising from the contractor,
21 meaning Dean Custom Air's, failure to comply with
22 or adhere to applicable laws and regulations.
23 And my question is, does that include the
24 building code?

25 A. Does that include what?

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1 reviewed the records for Dean's contracts going
2 back however long you-all might have them to
3 know -- have you spoken with anyone who was part
4 of pulling this contract?

5 A. Can you repeat that? It broke up a
6 little bit. Sorry.

7 Q. Yeah. You know, you say, otherwise, it
8 would be produced. But is that just an
9 assumption on your part, or have you actually
10 made an affirmative effort?

11 A. No. Okay. That's an assumption on my
12 part. For me just to say there is definitely not
13 a contract, I would really like to go dig down
14 and make sure. I don't think there is or, you
15 know, I typically think we're going to produce
16 what we're supposed to produce, but I can't
17 guarantee it because I was not necessarily the
18 person that did it.

19 Q. And the only reason I ask at this
20 granular level is because of the various
21 different dates than what we have gotten
22 produced.

23 (Reporter Interruption)

24 (Discussion off the record.)

25 Q. (MR. GRIMBALL) All right. So,

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1 Q. The building code.

2 A. Can you say that all together again?
3 I'm sorry.

4 Q. Yes. When this provision talks about
5 the contractor, in my case Dean Custom Air's,
6 obligation to indemnify the owner, D.R. Horton,
7 for claims and actions arising out of failure to
8 comply with or adhere to applicable laws and
9 regulations, does that include failure to comply
10 with or adhere to the applicable building code?

11 A. I would say yes.

12 Q. And when -- and in this case, the
13 plaintiffs have alleged that Dean Custom Air has
14 failed to comply with the building code. And if
15 they prove correct in their allegations, it is
16 then D.R. Horton's position under this section
17 6.4 that Dean is to indemnify D.R. Horton for
18 anything relating to Dean's violation of the
19 code; is that correct?

20 A. Yeah, that's correct. Yes.

21 Q. And then I would like to turn to section
22 8. It's on page 3 of the contract. It relates
23 to warranty. And while you're getting there, the
24 questions that I just asked you about section 6
25 in that indemnity thing, that's just D.R.

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1 Horton's position uniformly; that's not limited
 2 just to Dean Custom Air, right? It's a standard
 3 term.
 4 A. It's a standard contract used for
 5 everybody.
 6 Q. Please let me know when you're ready.
 7 A. I'm ready.
 8 Q. Oh, excellent. So my first question is,
 9 when did Dean's warranty on this project expire?
 10 A. Well, it doesn't expire on a project.
 11 It expires on each individual home.
 12 Q. Fair enough. So am I correct that, to
 13 answer this question, we would look at section
 14 8.2, and then there's a section where it says two
 15 years for heating, ventilating, air-conditioning,
 16 ductwork?
 17 A. Yeah, that's your general homeowners
 18 warranty, two years for HVAC.
 19 Q. And am I correct in interpreting this
 20 section to mean that if D.R. Horton has to step
 21 in and fulfill Dean's or any other trade's
 22 warranty obligation, that D.R. Horton will then
 23 seek indemnification from the trade who has
 24 failed to honor their warranty?
 25 A. Yeah, we're going to uphold the

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1 contractor doesn't?
 2 A. Because I -- we signed a contract with
 3 the homeowner to perform according to an RWC, so
 4 we expect our contractors to do -- to hold up
 5 their end of the deal.
 6 Q. The RWC, what is that?
 7 A. Excuse me?
 8 Q. What's the RWC?
 9 A. Residential Warranty Corporation, I
 10 believe is what it is. That's the warranty that
 11 is provided to them by us at closing.
 12 Q. And that warranty includes a warranty
 13 against defects? Is that what I heard you say?
 14 A. I'd have to go back and look at it to
 15 see what it is. But you also have to have a
 16 requirement performed by the South Carolina LLR,
 17 which is the licensing entity in the state.
 18 Q. And D.R. Horton doesn't disclaim any of
 19 its responsibilities as a licensed contractor for
 20 construction, right?
 21 A. We hire contractors to perform the work.
 22 We don't perform any of the work.
 23 Q. Well, you do pull the permits, right?
 24 A. We pull the permit. We don't perform
 25 the work.

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1 warranty. If the contractor decides not to
 2 uphold their end of it, we're going to -- we've
 3 got to find somebody to do the work.
 4 Q. And that's because, as the general
 5 contractor/seller of the home, you-all are
 6 ultimately responsible for all of the work to the
 7 homeowner, right?
 8 MR. NAIL: Object to the form.
 9 A. Yeah, that's not the case. And, I mean,
 10 we perform to the RWC that we -- the warranty
 11 that we provide to our homeowners.
 12 Q. When you say, yeah, that's not the case,
 13 what are you saying is not the case?
 14 A. That we're ultimately responsible.
 15 Q. What are you not responsible for with
 16 regard to the houses that you sell?
 17 A. I'm not responsible for improper
 18 workmanship, improper materials provided. I'm
 19 not responsible for that. The contractors I hire
 20 are responsible for it. I didn't -- we don't
 21 build anything. We don't perform any work on the
 22 homes. It's all done by the contractors. Those
 23 contractors are responsible.
 24 Q. So why then would you step in and
 25 perform the warranty obligation if that

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1 Q. You -- is there anywhere that D.R.
 2 Horton disclaims the liability that is inherent
 3 with the responsibility of pulling a permit?
 4 MR. NAIL: Object to the form.
 5 A. We pull the permit. We get it inspected
 6 by the municipality. They give us -- they sign
 7 off that it's done properly according to the
 8 codes. We hire contractors to perform the work.
 9 Q. You don't ever tell, for instance, City
 10 of Beaufort or whatever the building department
 11 that has jurisdiction of Lady's Island is, that
 12 you're not going to be responsible for the
 13 construction of the project when you pull the
 14 permit in their jurisdiction, right?
 15 A. We don't tell them that, no.
 16 Q. And, in fact, you represent to them that
 17 you will be responsible for the construction of
 18 that project, right?
 19 A. Well, I'm sure that, and I'm sure -- go
 20 ahead with your objection, but I'm sure that when
 21 Dean's pulls his permit for mechanical, he
 22 doesn't tell them the same thing.
 23 Q. Right. So you don't take the position
 24 that somehow D.R. Horton has a lesser
 25 responsibility in pulling the permit than the

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1 other trades involved in the construction of the
 2 house bear when they pull a permit for the same
 3 project?
 4 A. All I take the position is that the
 5 responsibility for the contractor is based on his
 6 contractual agreement with us. That's my only
 7 stance is that, here's a contract, the terms he
 8 agreed to, and that he fulfills his contract.
 9 Q. I would just ask that you answer my
 10 question --
 11 A. I'm sorry.
 12 Q. -- which is, you know, you don't contend
 13 that D.R. Horton somehow has lesser obligations
 14 when it pulls the permit for the construction of
 15 a home than its subcontractors take on when they
 16 pull the permit for the construction of the same
 17 home?
 18 MR. NAIL: Objection.
 19 A. We have different obligations.
 20 Different specific obligations.
 21 Q. Well, of course because the subs are
 22 only performing a portion of the work with their
 23 permits; whereas, yours is for the entire home.
 24 Is that what you mean, or are you talking about
 25 something different?

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1 I believe you're doing a comparison. Maybe I
 2 just completely don't understand this.
 3 Q. Well, my point in asking you this is
 4 that you have indicated that D.R. Horton takes
 5 the position they are not responsible for the
 6 performance of the work that is involved with
 7 constructing homes in South Carolina. And you
 8 have indicated that D.R. Horton does not tell the
 9 government that they are not responsible for the
 10 construction of the homes when they pull the
 11 permits for them.
 12 And you have indicated that the
 13 subcontractors are responsible for the
 14 performance of the work when they pull permits,
 15 right? Do you follow the sort of general
 16 question?
 17 A. They're responsible for their contract
 18 with us. Not all of them have to pull a permit.
 19 Q. That's true. And not all of them have
 20 to be licensed either because they can work under
 21 your license, right?
 22 A. They don't work our under license.
 23 They're just a contractor for us. They don't
 24 have to have a permit to do the work. It's not
 25 required to be inspected. Some of them.

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1 A. Well, keep in mind that we don't just
 2 sell the house. We sell the land that the house
 3 is sitting on.
 4 Q. Any other difference?
 5 A. So I'm saying that -- maybe I just don't
 6 understand the question. I'm saying that we have
 7 some sort of commitment, but the contractor has a
 8 clear commitment as well, so you're telling me if
 9 one is less than the other. I don't know.
 10 Or you're asking me that. I'm sorry.
 11 You're asking me if one has lesser responsibility
 12 or commitment or whatever the term was you used.
 13 That's where I was going with that.
 14 Q. Well, no, I wasn't asking you if one has
 15 a lesser responsibility than the other. I was
 16 asking you if it is your position that one has
 17 got less responsibility for the performance of
 18 the work than the other.
 19 A. My position? I don't really have a
 20 position on that.
 21 Q. Well -- and to be clear, I'm asking you
 22 what D.R. Horton's position is is my question.
 23 MR. NAIL: Object to form.
 24 A. I don't know if we define if one
 25 position is less than another. And so you're --

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1 Q. Anyway, let's move on. Why don't you
 2 turn to page 4, which is another indemnity
 3 provision. It's section 10.
 4 A. Okay.
 5 Q. Am I correct that this section is
 6 non-negotiable?
 7 A. I would say it would rarely be changed.
 8 Q. Are you aware of it ever having been
 9 changed?
 10 A. Not of an instance that this part has
 11 been changed, no.
 12 Q. And have you ever discussed this
 13 provision with Charlie Dean or anyone else from
 14 Dean Custom Air?
 15 A. I'm sure I have discussed it with
 16 Charlie Dean.
 17 Q. Why do you say that?
 18 A. Because I do recall him making some
 19 comment about it.
 20 Q. Do you recall what he said?
 21 A. Saying, yeah, you expect us to do
 22 everything, indemnify you for everything.
 23 Q. Meaning, you know, things he does wrong,
 24 things you do wrong, things that only you do
 25 wrong? Is that what you're saying?

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1 MR. NAIL: Object to the form.
 2 A. I don't know if he specifically said it.
 3 He may have said that. I don't know if he
 4 specifically said it. I remember him complaining
 5 about it or making a comment to me about it.
 6 Q. And what did you say?
 7 A. You don't have to sign it. I'm not
 8 requiring -- I don't require these people to work
 9 for me. I don't have that kind of power, that's
 10 the thing. That's their decision to make.
 11 Q. And was that the full extent of the
 12 conversation?
 13 A. In general, that would be it.
 14 Q. And, you know, given your experience
 15 with being a part of the execution of these
 16 contracts, what is your understanding of this
 17 provision?
 18 A. Bear with me. My screen jumped off of
 19 the provision. I'm waiting for it. My general
 20 knowledge of that provision is that the
 21 contractors are supposed to defend, indemnify,
 22 and hold us harmless for pretty much anything to
 23 do with their work.
 24 Q. Why -- are any -- are there any
 25 exceptions to that?

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1 A. 10.1, sorry.
 2 Q. No worries. It's been a long day.
 3 A. It's having trouble loading. I'm just
 4 having trouble with my PDF.
 5 Q. Would this help? If you look at my
 6 screen --
 7 A. There you go. I can do that. Can you
 8 zoom in a little bit?
 9 Q. And do tell me if you can't read it
 10 obviously. So the word foregoing is right here
 11 where the hand is.
 12 A. Yeah, the intent -- at the end of the
 13 day, the intent of this is for them to defend,
 14 indemnify, hold harmless us for their work.
 15 However it's written, that's the goal of what
 16 this is.
 17 Q. Right. And --
 18 A. And I know what it says about us, but
 19 that's the goal of this.
 20 Q. Well, and, you know, there's this thing
 21 in here that says, notwithstanding the foregoing,
 22 nothing shall require indemnity for losses caused
 23 solely or by fault or negligence of D.R. Horton.
 24 But my question to you is that, with the
 25 understanding that it is D.R. Horton's position

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1 A. As far as how it's written, are there
 2 exceptions to it, or are you saying, am I aware
 3 of any exceptions to that interpretation of it?
 4 Q. I meant as to how it's written. Or is
 5 it just any and everything?
 6 A. I mean, it's pretty much everything to
 7 do with the work, that's related to the work.
 8 Q. Right. Obviously you wouldn't ask the
 9 HVAC guy to indemnify you for an issue with the
 10 roof.
 11 A. That's correct.
 12 Q. There's a portion of this that --
 13 towards the bottom of 10.1, where it says that,
 14 notwithstanding the foregoing, nothing herein
 15 shall require indemnity for losses caused solely
 16 by fault or negligence of the indemnitee, meaning
 17 D.R. Horton, right? Do you see that part of it?
 18 A. I'm trying to get to it.
 19 Q. I'll represent to you that sort of eight
 20 lines from the bottom, the last word of that
 21 section is law, and the word foregoing is
 22 directly above it, if that helps you find it.
 23 A. I was just trying to get on the correct
 24 page. All right. You say you're in 10.4?
 25 Q. 10.1.

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1 that they are not responsible for the
 2 construction of these houses, it's not really
 3 possible for something to be solely the fault of
 4 D.R. Horton, right?
 5 MR. NAIL: Object to the form.
 6 A. Since we -- yeah. It would be very
 7 difficult for it to be solely the fault of D.R.
 8 Horton.
 9 Q. I mean, can you think of anything that
 10 could be wrong with the HVAC which would be
 11 solely the fault of D.R. Horton?
 12 A. No, I really can't.
 13 Q. And that's because, you know, as far as
 14 D.R. Horton is concerned, they are not
 15 responsible for any of the installation of the
 16 HVAC, right?
 17 A. That's correct. And if something got
 18 damaged, it would have been damaged by another
 19 party, who they would be responsible for that
 20 damage based on their contract.
 21 Q. And then section 10.2 says that,
 22 indemnity is not the exclusive remedy, yadda,
 23 yadda. And am I correct that it's -- the whole
 24 contract applies, just -- right?
 25 A. You say the whole contract applied?

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1 Q. Would apply. You're not waiving any
2 rights or anything like that.
3 A. No, we don't waive rights.
4 Q. Who supplies the HVAC systems for these
5 projects?
6 A. This particular one would have been
7 Dean's Custom Air.
8 Q. Do they buy -- they buy the units and
9 ductwork and everything? It's a
10 labor-and-materials-type arrangement?
11 A. Yeah, that's correct. As a matter of
12 fact, the -- I don't even think you can buy the
13 equipment unless you have a mechanical license.
14 Q. And D.R. Horton does not have a
15 mechanical license?
16 A. No.
17 Q. What does D.R. Horton do to make sure
18 that its superintendents are qualified to
19 inspect, supervise the installation of the HVAC,
20 to the extent that they do so?
21 A. Zero.
22 Q. That is --
23 A. They're there to observe HVAC --
24 especially with HVAC is to be inspected by an
25 inspector of the municipality. I do not expect

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1 Confused me.
2 Q. You have to install the HVAC before you
3 install the drywall, right?
4 A. Oh, for the inside part, yes.
5 Q. Yeah. And the drywall hanger or whoever
6 runs the HVAC while it's being installed can
7 damage it, right? Because it sucks up the dust,
8 and the dust can then get in the ductwork and
9 clog up the machinery?
10 A. They're probably -- well, the system is
11 not running while the drywall is being installed.
12 Q. And if they do do that, you would go to
13 whoever ran the system to pay for the repairs,
14 correct?
15 A. Wouldn't have to. You've got to have
16 power to be able to run the HVAC system. You
17 wouldn't have power on the house -- no
18 electricity on the house at that stage of
19 construction. It's impossible.
20 Q. You-all just wouldn't turn it on?
21 A. You can't turn it on without power. The
22 power company won't give you a meter to set on
23 the house to turn on power.
24 Q. Oh, when do they give you a meter?
25 A. You've got to pass your final electrical

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1 my people -- they're not experts on HVAC. That's
2 why you have to have a mechanical license to even
3 install them.
4 Q. So besides having the inspector from the
5 building department come out to the project, does
6 D.R. Horton do anything to ensure that the HVAC
7 is installed in a good and workmanlike manner?
8 A. We're not experts on HVAC. There's no
9 way for us to know that.
10 Q. So the answer to my question is no?
11 A. That's -- yeah, the answer is no, yes.
12 Q. And not only no, but, no, we are not
13 qualified to do that?
14 A. That's correct.
15 Q. And if the HVAC is installed and it is
16 run while they're installing the drywall, that is
17 not the fault of the HVAC installer, correct?
18 A. Explain -- can you repeat that? I
19 didn't catch it.
20 Q. Are you aware that the HVAC -- you
21 cannot run the HVAC during certain phases of
22 subsequent construction?
23 A. You would have to have power to run the
24 HVAC, and I don't think -- you said something
25 about drywall, so I'm not sure what that meant.

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1 inspections, all kinds of things. Way past
2 drywall.
3 Q. Interesting. Just as a general rule of
4 thumb, if I see a warranty request to Dean or any
5 other trade and they got paid for the work that
6 was done as part of that warranty, is that an
7 indication that they were not responsible for
8 whatever problem they were repairing?
9 A. I would say in general. Not always the
10 case. Maybe there was some extenuating
11 circumstance.
12 Q. Yeah. And like I said, I'm looking for
13 a rule of thumb here. I'm not --
14 A. Yeah. As a rule of thumb, I mean, it
15 doesn't make sense for us to pay somebody when
16 they should have been doing it as part of their
17 standard work, so, yeah, that makes sense.
18 MR. GRIMBALL: I don't have any other
19 questions for you. Thank you for your time.
20 THE WITNESS: Thank you.
21 EXAMINATION
22 BY MS. NILAND:
23 Q. Hi, this is Caroline Niland. I'll be
24 extremely brief. I represent Professional
25 Exteriors II. Are you familiar with that

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1 company?
 2 A. I am familiar that they no longer exist,
 3 unfortunately.
 4 Q. All right. And what is your
 5 understanding of the scope of work that
 6 Professional Exteriors II did at the Tidewater
 7 community?
 8 A. Primarily exterior siding, vinyl siding,
 9 turnkey.
 10 Q. Are you familiar with any
 11 representatives or employees of Professional
 12 Exteriors II?
 13 A. Yes, I am.
 14 Q. And who would those people or persons
 15 be?
 16 A. Talking about currently as of today?
 17 Q. At any given time.
 18 A. Well, it used to be Dawn. Then she
 19 passed away, unfortunately, recently. And now
 20 Chris Gordon mainly for that area. I also know
 21 Joey. Joey's name is not popping up right now.
 22 I also know -- oh, Dawn's daughter. I can't
 23 remember what her name is as of right this
 24 second. That's basically it.
 25 Q. As the D.R. Horton representative here

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1 at the bottom?
 2 A. It is.
 3 Q. And do you -- the date here is the 10th
 4 of February, 2016. Is it your understanding that
 5 this contract would be in place during the work
 6 that was done by Professional Exteriors II at the
 7 Tidewater Creek community?
 8 A. I would say for the majority of it. I
 9 would just have to go back and double-check to
 10 make sure that no siding was installed on any
 11 houses prior to that date because I thought some
 12 of them may have actually started in 2015, but I
 13 don't know if they made it to vinyl siding by
 14 that date. Does that make sense?
 15 Q. It does, yes, sir.
 16 A. In general, though, yes.
 17 Q. And this encompasses, I believe -- let
 18 me continue to scroll down here -- the different
 19 exhibits, which include the scope of work for
 20 Professional Exteriors II's work at Tidewater
 21 Creek; is that correct?
 22 A. Yes.
 23 MS. NILAND: Those are all the questions
 24 I have. Thank you.
 25 THE WITNESS: Thank you.

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1 today, do you have any knowledge whether or not
 2 Professional Exteriors' scope of work at the
 3 Tidewater community was not outlined -- or
 4 followed as outlined within the contract and the
 5 scope of work?
 6 A. I'm not aware of them not following the
 7 scope of work.
 8 Q. As the D.R. Horton representative here
 9 today, do you have any criticisms of any of
 10 Professional Exteriors II's work at the Tidewater
 11 community?
 12 MR. NAIL: Object to the form.
 13 A. I do not.
 14 Q. All right. And I'm going to go ahead
 15 and just share my screen with you instead of
 16 asking you to find this, although you are more
 17 than welcome to look at your own copy.
 18 But this is D.R. Horton 06809 through
 19 6825 for the record.
 20 A. Yeah.
 21 Q. Does this appear to be, to you, the
 22 contract with D.R. Horton and Professional
 23 Exteriors II?
 24 A. Yes, it does.
 25 Q. And is this your name and your signature

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1 EXAMINATION
 2 BY MR. DuBOSE:
 3 Q. Hey, Michael, before you go, Clarke
 4 speaking. I have just a couple more triggered by
 5 the testimony, if that works for everyone.
 6 A. Okay.
 7 Q. Hearing no objection, Mr. Bunner, Clarke
 8 DuBose again. You earlier said -- and I think it
 9 was kind of a broad statement -- that D.R. Horton
 10 was not responsible for improper materials
 11 provided. Does that mean that D.R. Horton does
 12 not take responsibility for materials in the
 13 house that it specified, such as countertops or
 14 in my case paint?
 15 A. I see where you're going with that.
 16 Well, yeah, technically, yes, as far as -- I
 17 would say we have some responsibility in the
 18 specification of the material. But it being --
 19 technically by the contract and the way it works,
 20 I don't know if that's really the case. I mean,
 21 it's -- we do specify and -- we specify
 22 Sherwin-Williams and all the way down to it, even
 23 down to the base colors of what colors we want to
 24 offer.
 25 And so -- and I know there's -- there

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1 is -- this is kind of one of those gray areas
 2 because there is, you know, constant back and
 3 forth between the painter and the manufacturer
 4 on -- if there was ever any type of performance
 5 issue on any particular house or whatever,
 6 there's definitely back and forth on it.
 7 We do specify the paint to be used. The
 8 painter does the install of the paint. So that's
 9 where you get that gray area between the painter
 10 and the manufacturer of, well, it was an install
 11 problem, or it was a manufacturer's problem or a
 12 conditions problem.
 13 Maybe the painter shouldn't have
 14 installed it during certain weather conditions or
 15 humidity or temperature conditions. It could
 16 be -- there's so much gray area there.
 17 I'm not saying that -- and of course, if
 18 Horton buys the material, it's nonturnkey, we're
 19 definitely responsible for the material we
 20 provide as well. So I guess really that
 21 statement was really more when it comes to
 22 turnkey contractors.
 23 Q. In this case, does D.R. Horton buy the
 24 paint, or does it just spec the paint and the
 25 painting contractor buys it?

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1 decide on a different paint. Does the
 2 subcontractor, painting subcontractor, have any
 3 ability at all to change the brand or type or
 4 color of paint to be used in the houses he's
 5 painting for you?
 6 A. No, no. And that choice that the
 7 homeowner had is not to choose the paint but the
 8 paint color.
 9 Q. But the paint contractor doesn't even
 10 have that choice; he has to paint what you tell
 11 him to paint, right?
 12 A. That's correct, but certain colors, he
 13 charges more money for.
 14 Q. Just to be clear, the contractor doesn't
 15 get to pick even the color; he just paints what
 16 he's told to paint.
 17 A. That's correct.
 18 Q. Where in the contract does it say that a
 19 contractor is liable for a faulty product that he
 20 did not specify but that was specified by D.R.
 21 Horton?
 22 A. I'm not aware --
 23 Q. I have that paragraph of the indemnity
 24 provision up in front of me.
 25 A. I'm not aware that it specifically says

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1 A. We just spec it. The painting
 2 contractor buys it.
 3 Q. Do you have -- "you" being D.R.
 4 Horton -- have an arrangement with the paint
 5 manufacturer on price and making volumes
 6 available to you?
 7 A. Well, I would -- price is -- no, price
 8 is not done that way. Maybe at some point in the
 9 past. But definitely product availability --
 10 well, it used to be that way. It's not today.
 11 Q. How about back in 2015?
 12 A. Right. But, you know, we would
 13 definitely get priority over making sure that we
 14 had product available for our contractors to
 15 purchase to go to D.R. Horton homes.
 16 Q. Well, for the homes we're here on today,
 17 how was the price of the paint arrived at? Were
 18 you, D.R. Horton, involved in that, or was that
 19 strictly between the contractor and
 20 Sherwin-Williams?
 21 A. That's between the contractor and
 22 Sherwin-Williams.
 23 Q. You told us earlier that if the owner
 24 got in early enough before the house was painted,
 25 I suppose, the painting was completed, he could

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1 that in even those terms or close to those terms
 2 as you just put it.
 3 Q. Does it say it in any terms at all?
 4 A. Well, I guess it does not say that
 5 they're not responsible for the materials
 6 provided.
 7 Q. But if the wrong paint was specified,
 8 that would be different than painting or applying
 9 the paint incorrectly, correct?
 10 A. Well, that's correct. But keep in mind,
 11 these are professional painters. They should
 12 know better than to apply something that is not
 13 in the way the manufacturer intended for that to
 14 be applied.
 15 Q. But if they --
 16 A. So for it to be -- your term of wrong
 17 paint implies that the paint was not meant for
 18 the application that it was used for. Well, the
 19 painter should know better than that if he's a
 20 professional painter, and he does not have to do
 21 that work.
 22 Q. The plaintiffs here are claiming the
 23 paint was defective somehow.
 24 A. I don't know if that's true.
 25 Q. I don't know if it's true either.

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1 A. Yeah.
 2 Q. But my client didn't pick the paint,
 3 couldn't change the paint. That was all D.R.
 4 Horton's decision. We agree on that, don't we?
 5 A. We do agree on that.
 6 Q. And so that decision was entirely within
 7 the control of D.R. Horton?
 8 A. The choice of the paint was in control
 9 of D.R. Horton, that's correct.
 10 MR. DuBOSE: Thank you very much.
 11 THE WITNESS: Okay. Thank you.
 12 MR. NAIL: Anybody else have any other
 13 questions before I ask a few?
 14 EXAMINATION
 15 BY MR. NAIL:
 16 Q. I'll just go ahead.
 17 Good evening. You know who I am,
 18 Mr. Bunner. I just had a couple follow-ups for
 19 you. Has there ever been a circumstance to your
 20 knowledge that a subcontractor, including the
 21 ones that have been involved in the Tidewater
 22 Creek community, have not had the opportunity to
 23 negotiate an independent contractor agreement?
 24 A. There has never been a case.
 25 MR. GRIMBALL: Objection.

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1 leading questions all day. It's a deposition.
 2 Q. All right. You were also asked by
 3 Mr. --
 4 MR. NAIL: Sorry. Did someone say
 5 something?
 6 Q. Mr. Leech who represents East Coast
 7 Construction asked you about whether you believe
 8 that East Coast did anything wrong in this case.
 9 Do you remember that line of questions?
 10 A. I do remember that.
 11 Q. Is it your understanding that the
 12 plaintiffs are making allegations that East Coast
 13 Construction did something wrong?
 14 A. That's what I understand.
 15 Q. And the plaintiffs brought a lawsuit.
 16 They brought claims against East Coast
 17 Construction; is that true?
 18 A. That's what I understand.
 19 Q. And does D.R. Horton rely on its
 20 contractual terms as it relates to the
 21 subcontractors and their responsibility on jobs?
 22 A. Yes.
 23 MR. GRIMBALL: Objection.
 24 Q. I want you to pull up, if you don't
 25 mind, Exhibit 9 that Ms. Gifford-Lucey presented

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1 Q. And even if a term is changed or
 2 proposed by a subcontractor, do they still have
 3 the freedom to negotiate and sign the contract?
 4 A. Yes.
 5 MR. GRIMBALL: Objection.
 6 MR. DuBOSE: Object to the form.
 7 Can we have the objection for one be the
 8 objection of all? No objection to that? Good.
 9 MR. GRIMBALL: And can I just have a
 10 standing objection to this entire line of
 11 questioning, Michael, because I know where you're
 12 going, and I'm going to object to every single
 13 thing. And, you know, unless you're going to
 14 stop leading your own witness, I can tell you I'm
 15 going to object regardless of what your question
 16 pertains to.
 17 MR. NAIL: I'd be really interested to
 18 know the basis for that objection, but I think
 19 I'm done. But he was asked questions about the
 20 negotiation, and I'm simply following up on that.
 21 I'm not really sure what the objection is. But
 22 let's see.
 23 MR. GRIMBALL: You're leading your own
 24 witness.
 25 MR. NAIL: Okay. Well, he's been asked

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1 to you. This is the Dustcom estimate.
 2 A. Let me try to close the documents. I
 3 have so many open.
 4 Q. Let me try to share it real quick. I
 5 just shared it. Can you see that?
 6 A. Yes.
 7 Q. You looked over this with Ms. Lucey
 8 beforehand, earlier in the deposition. And I
 9 believe you testified that it's your
 10 understanding that this was the estimate for
 11 Dustcom to perform work at lot 19. Is that your
 12 understanding?
 13 A. This was an estimate for that work, yes.
 14 Q. And I believe you testified that you
 15 weren't sure of the amount that was paid to
 16 Dustcom, but you thought it was around \$15,000.
 17 Did I hear that correctly?
 18 A. That's what I recall stating.
 19 Q. And if this is the estimate that was
 20 presented by Dustcom, do you have any testimony
 21 to provide today that the amount that was paid to
 22 Dustcom was not \$12,780 to perform that work?
 23 A. I do not.
 24 Q. Let's scroll down here and look at the
 25 GHD report that you also discussed with

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1 Ms. Gifford-Lucey. Do you remember that?
 2 A. Yes.
 3 Q. And we also looked at some photographs
 4 at the end of this report. I'll just go through
 5 them here. Do you remember looking at these?
 6 A. Yes, I do.
 7 Q. And what was your recollection of what
 8 was found on site?
 9 A. A small piece of metal.
 10 Q. And is it your understanding that GHD
 11 documented all of the debris that it found on lot
 12 19?
 13 A. During the investigation?
 14 Q. Yes, sir.
 15 A. Yes.
 16 Q. And would you have expected -- would
 17 D.R. Horton have expected GHD to report any
 18 debris that they found on site?
 19 A. Yes.
 20 MR. NAIL: That's all the questions I
 21 have for you. Thank you.
 22 THE WITNESS: Thank you.
 23 MS. LUCEY: Mr. Bunner, I think you
 24 might be done unless we hear from anyone else.
 25 Very good. Thank you for your time

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1 CERTIFICATE OF REPORTER
 2 STATE OF SOUTH CAROLINA
 3 COUNTY OF CHARLESTON
 4 I, Teri L. Kennelly, Registered
 5 Professional Reporter and Notary Public for the
 6 State of South Carolina at Large, do hereby
 7 certify that the witness in the foregoing
 8 deposition was by me duly sworn to testify to the
 9 truth, the whole truth and nothing but the truth
 10 in the within-entitled cause; that said
 11 deposition was taken at the time and location
 12 therein stated; that the testimony of the witness
 13 and all objections made at the time of the
 14 examination were recorded stenographically by me
 15 and were thereafter transcribed by computer-aided
 16 transcription; that the foregoing is a full,
 17 complete and true record of the testimony of the
 18 witness and of all objections made at the time of
 19 the examination; and that the witness was given
 20 an opportunity to read and correct said
 21 deposition and to subscribe the same.
 22 Should the signature of the witness
 23 not be affixed to the deposition, the witness
 24 shall not have availed himself/herself of the
 25 opportunity to sign or the signature has been
 waived.
 I further certify that I am neither
 related to nor counsel for any party to the cause
 pending or interested in the events thereof.
 Witness my hand, I have hereunto
 affixed my official seal on October 5th, 2021, at
 Charleston, Charleston County, South Carolina.
 Teri L. Kennelly, RPR, CRR
 NCRA REGISTERED REALTIME REPORTER
 My Commission expires
 January 8, 2029

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1 today, Mr. Bunner. We certainly appreciate it.
 2 THE WITNESS: Thank you.
 3 MS. LUCEY: Have a good evening,
 4 everyone.
 5 (The deposition was concluded at
 6 5:43 P.M.)
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1 CERTIFICATE OF REPORTER
 2 STATE OF SOUTH CAROLINA
 3 COUNTY OF CHARLESTON
 4 I, DARAH L. BOLEN, Registered
 5 Professional Reporter and Notary Public for the
 6 State of South Carolina at Large, do hereby
 7 certify that the witness in the foregoing
 8 deposition was by me duly sworn to testify to the
 9 truth, the whole truth and nothing but the truth
 10 in the within-entitled cause; that said
 11 deposition was taken at the time and location
 12 therein stated; that the testimony of the witness
 13 and all objections made at the time of the
 14 examination were recorded stenographically by me
 15 and were thereafter transcribed by computer-aided
 16 transcription; that the foregoing is a full,
 17 complete and true record of the testimony of the
 18 witness and of all objections made at the time of
 19 the examination; and that the witness was given
 20 an opportunity to read and correct said
 21 deposition and to subscribe the same.
 22 Should the signature of the witness
 23 not be affixed to the deposition, the witness
 24 shall not have availed himself/herself of the
 25 opportunity to sign or the signature has been
 waived.
 I further certify that I am neither
 related to nor counsel for any party to the cause
 pending or interested in the events thereof.
 Witness my hand, I have hereunto
 affixed my official seal on October 5, 2021 at
 Charleston, Charleston County, South Carolina.
 DARAH L. BOLEN
 REGISTERED PROFESSIONAL REPORTER
 RPR, CSR(Iowa)
 My Commission expires
 April 25, 2028

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Richard W. and Rebecca A. Drier; Yolanda J. Drier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; Adam F. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Cory M. McDaniel; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Versteegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Armor Building Solutions, LLC; Atlas Surveying BFT, LLC f/k/a Atlas Surveying Holding Company, LLC; Atlas Surveying, Inc.; Builders FirstSource-Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Jenkins Plumbing Company, LC; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Stier Supply Company f/k/a Stier-Holman Supply Co.; Superior Association Services, LLC; and Valim Construction, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2018-CP-07-00911

**HUTTON'S LANDSCAPES, INC.'S
MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT ON THE
CROSS-CLAIMS OF
D.R. HORTON, INC.**

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant Hutton's Landscapes, Inc. ("Hutton's Landscapes") has moved for an order granting summary judgment on the contractual and equitable indemnity cross-claims asserted against it by Defendant D.R. Horton, Inc. ("D.R. Horton"). Hutton's Landscapes hereby submits this Memorandum of Law in support of its Motion for Summary Judgment and shows the Court as follows:

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of alleged construction defects at Tidewater Creek, a neighborhood located in Beaufort County, South Carolina. Twenty-nine (29) named Plaintiffs, who are residents and/or homeowners at Tidewater Creek, initially brought this action on May 1, 2018. A First Amended Complaint and a Second Amended Complaint were subsequently filed on June 21, 2018 and November 20, 2019, respectively.

The action was filed against D.R. Horton, who served as developer and general contractor for the construction of the neighborhood, and multiple subcontractors, including Hutton's Landscapes. The Plaintiffs asserted numerous claims of alleged construction deficiencies, including improper site preparation; improper and inadequate infrastructure installation; inadequate inspections and testing of the site during surveying, platting and subdividing; rusted metal, broken glass, and other hazardous debris strewn throughout the properties; premature erosion; water intrusion; improperly installed siding; and dead and dying trees. [Second Am. Compl., pp. 3-4, ¶ 7.]

Hutton's Landscapes was a subcontractor of D.R. Horton for vertical construction and performed flatwork and landscape installation at Tidewater Creek. On December 4, 2019, D.R. Horton brought a cross-claim against Hutton's Landscapes and the other subcontractors. D.R. Horton alleges that it and Hutton's Landscapes entered into an Independent Contractor Agreement

pursuant to which Hutton's Landscapes agreed to provide labor and materials for "rough grade, final grade, turnkey landscaping, turnkey flatwork, slab backfill, turnkey house slab and related components." [Cross-Claims, ¶ 109.]

D.R. Horton asserts claims for equitable indemnity and contractual indemnity against Hutton's Landscapes. [Id. at ¶¶ 111-117.] Under the equitable indemnity claim, D.R. Horton alleges there was a special relationship between Hutton's Landscapes and D.R. Horton because Hutton's Landscapes provided labor and material as a subcontractor to D.R. Horton and D.R. Horton is entitled to indemnity in equity. [Id. at ¶¶ 111-112.] Under the contractual indemnity claim, D.R. Horton alleges Hutton's Landscapes "agreed to defend, indemnify and hold [D.R. Horton] harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Hutton's performance under the Contract and caused in whole or in part by Hutton's conduct." [Id. at ¶ 115.] Accordingly, D.R. Horton asserts that if the Plaintiffs recover damages against it, D.R. Horton is entitled to equitable and contractual indemnity against Hutton's Landscapes in the same amount. D.R. Horton additionally alleges that it is entitled to be reimbursed and indemnified for the costs of the action, including attorneys' fees. [Id. at ¶¶ 114, 117.]

On May 16, 2014, D.R. Horton and Hutton's Landscapes entered into an Independent Contractor Agreement for Hutton's Landscapes to perform certain work and supply certain materials to D.R. Horton (the "Contract"). The Contract was entered into on a "blanket basis" and intended to govern all current and future work of Hutton's Landscapes performed for D.R. Horton. [See Contract, attached hereto as Exhibit "A," p. 1, § 1.]

The Contract includes an indemnity clause comprised of one long, continuous paragraph (the “Indemnity Clause”) which purports to require Hutton’s Landscapes, as Contractor, to defend and indemnify D.R. Horton, as Owner:

To the fullest extent permitted by law, Contractor shall protect, defend, indemnify, and hold Owner . . . (“Indemnitee”), free and harmless from and against any and all claims, demands, lawsuits or other litigation, actions, causes of action, or other liabilities of every kind and character (including all costs thereof and attorneys’ fees) whether asserted by a purchaser or owner, contractor, or any third party . . . on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property including the loss of use thereof in any way occurring, incident to, arising out of, or in connection with: (1) a breach of any warranties, representations, covenants, or other obligations of Contractor set forth in this Agreement; (2) the Work, as defined in Section I, including but not limited to work performed or to be performed or material supplied by Contractor or Contractor’s agents, or employees; (3) any negligent or intentional act or omission of Contractor regardless of whether caused in part by Indemnitee; or (4) any negligent or intentional act of Indemnitee, related in any way to the Work, excepting only liability or claims arising out of bodily injury to persons, death, or damage to property proximately caused by or resulting from the sole negligence or sole intentional act or omission of Indemnitee. Contractor’s duty to defend is a separate, distinct, and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made against Indemnitee which potentially or arguably is subject to Contractor’s duty to indemnify regardless of Contractor’s ultimate liability for indemnity. Contractor must defend Indemnitee even where the allegations against Indemnitee are ambiguous or incomplete with respect to the issue of Contractor’s duty to indemnify. Once the duty to defend is triggered, Contractor is obligated to defend the entire action, lawsuit, arbitration, or other litigation, including any claims therein not subject to indemnity by Contractor. Notwithstanding the foregoing, nothing herein shall require Contractor to indemnify Indemnitee against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of Indemnitee.

[Id. at p. 4, § 10.1 (all caps removed for readability).]

Hutton’s Landscapes now moves for summary judgment on the contractual indemnity claim asserted by D.R. Horton because the Indemnity Clause is invalid and unenforceable under South Carolina for the reasons set forth herein. Hutton’s Landscapes further moves for summary

judgment on the equitable indemnity claim asserted by D.R. Horton because this claim is not ripe and D.R. Horton has unclean hands for the reasons set forth herein.

LEGAL STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). “In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment.” Id.; Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). Furthermore, the “construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.” Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995).

ARGUMENT

- I. The Indemnity Clause is void and unenforceable under South Carolina’s Anti-Indemnity Statute because the Indemnity Clause requires Hutton’s Landscapes to defend D.R. Horton against all of the Plaintiffs’ claims, including those based on D.R. Horton’s sole negligence.**

The Indemnity Clause in the Contract between D.R. Horton and Hutton’s Landscapes is unenforceable under South Carolina’s Anti-Indemnity Statute because the clause requires Hutton’s

Landscapes to defend and/or pay damages, such as attorneys' fees and costs, for D.R. Horton's sole negligence. Accordingly, the contractual indemnity claim asserted by D.R. Horton against Hutton's Landscapes fails as a matter of law.

South Carolina's Anti-Indemnity Statute, S.C. CODE ANN. § 32-2-10, prohibits any promise or agreement in a construction contract that requires a promisor to indemnify the promisee for the promisee's sole negligence:

Notwithstanding any other provision of law, **a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable.** Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

Id. (emphasis added).

While the Indemnity Clause in the Contract between D.R. Horton and Hutton's Landscapes purports to exclude from indemnity liability for D.R. Horton's sole negligence, contained within the same Indemnity Clause is a broad and expansive duty to defend, which requires Hutton's Landscapes to bear entirely the costs of D.R. Horton's defense regardless of whether Hutton's Landscapes is ultimately required to indemnify D.R. Horton:

Contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made against Indemnitee which potentially or arguably is subject to Contractor's duty to indemnify **regardless of Contractor's ultimate liability for indemnity.** Contractor must defend Indemnitee even where the

allegations against Indemnitee are ambiguous or incomplete with respect to the issue of Contractor's duty to indemnify. Once the duty to defend is triggered, **Contractor is obligated to defend the entire action, lawsuit, arbitration, or other litigation, including any claims therein not subject to indemnity by Contractor.**

[Contract, p. 4, § 10.1 (emphasis added).]

The Indemnity Clause therefore requires Hutton's Landscapes to defend D.R. Horton against all of the Plaintiffs' claims, including those based on D.R. Horton's sole negligence. The Plaintiffs' Second Amended Complaint asserts negligence claims against D.R. Horton and multiple subcontractors, including claims unrelated to Hutton's Landscapes' work and claims which could be attributed to solely D.R. Horton's negligence. In its Cross-Claim for contractual indemnity against Hutton's Landscapes, D.R. Horton seeks to be fully reimbursed for the costs of defending the entire action pursuant to the terms of the Contract. [Cross-Claim, ¶ 117.]

The Indemnity Clause, which permits D.R. Horton to recover its entire costs for defending the Plaintiffs' action, violates the express prohibition under the Anti-Indemnity Statute which bars any promise to indemnify another for its sole negligence. See § 32-2-10. The Indemnity Clause in the Contract between D.R. Horton and Hutton's Landscapes is thus an illegal contract which is unenforceable. See D.R. Horton, Inc. v. Builders FirstSource – Southeast Group, LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) (finding indemnification clause void as against public policy to the extent it purported to require subcontractor to indemnify contractor for its own sole negligence); see also Berkebile v. Outen, 311 S.C. 50, 54 n. 2, 426 S.E.2d 760, 762 n. 2 (1993) (recognizing that an illegal contract is unenforceable and that South Carolina courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the constitution).

While the Anti-Indemnity Statute refers only to promises to “indemnify,” the term “indemnify” in a contractual indemnity context under South Carolina law encompasses a duty to defend as well. Under South Carolina law, the two duties are intimately related under the principles of contract indemnity. The right of indemnity under South Carolina law includes “the right to attorney’s fees and litigation costs incurred in defending the underlying claim.” Fountain v. Fred’s Inc., 429 S.C. 533, 558, 839 S.E.2d 475, 489 (Ct. App. 2020); see also Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971) (holding “in actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract . . . reasonable attorneys’ fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses”).

Hutton’s Landscapes recognizes that in the context of insurance law, the duty to defend and the duty to indemnify are separate and distinct. However, insurance law involves separate concepts than contractual indemnity, and different principles of law apply. Additionally, courts have distinguished the characteristics of liability insurance contracts from private indemnity agreements. On the one hand, “an insurance contract denotes a policy issued by an authorized and licensed insurance company whose primary business it is to assume specific risks of loss of member of the public at large in consideration of the payment of a premium.” Stickovich v. Cleveland, 757 N.E.2d 50, 61 (Ohio Ct. App. 2001) (internal citation omitted).

In contrast, “[t]here are, however, other risk-shifting agreements which are not insurance contracts. These include the customary private indemnity agreement where affording the indemnity is not the primary business of the indemnitor and is not subject to governmental regulation but is merely ancillary to and in furtherance of some other independent transactional relationship between the indemnitor and the indemnitee. The indemnity is, thus, not the essence of the agreement creating the transactional relationship but is only one of its negotiated terms.” Id.

Moreover, “[t]he primary purpose of a liability insurance policy is to provide coverage to a policy holder for the policy holder's own negligence.” Heat & Power Corp. v. Air Prods. & Chems., Inc., 578 A.2d 1202, 1208 (Md. Ct. App. 1990). A liability insurer is not an “unwary or uninformed promisor.” Id. Contrarily, the Legislature has determined as a matter of public policy that no construction contract may contain a promise by one to indemnify a promisee for the promisee’s sole negligence and that each party to a construction contract shall be responsible for its own sole negligence. S.C. CODE ANN. § 32-2-10. The Legislature even exempts insurance contracts from the Anti-Indemnity Statute, recognizing the differing and distinct nature of insurance contracts. Id.

Insurance contracts are also construed differently from construction indemnity contracts. Under insurance law, where an ambiguity is present, it is the court’s policy to construe the ambiguity against the insurer - the one giving the indemnity. Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co., 410 S.C. 175, 763 S.E.2d 598 (Ct. App. 2014) (“The court must construe ambiguous terms in an insurance policy liberally in favor of the insured and strictly against the insurer.”). Indemnity provisions in a construction contract are inversely strictly construed against the indemnitee - the party receiving the indemnity. Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018).

In light of the differing public policies behind contractual indemnity and insurance coverage, any attempt by D.R. Horton to draw from insurance jurisprudence is misplaced. The concepts regarding the duty to defend and the duty to indemnify as applied to insurance do not pertain to construction indemnity contracts. The Supreme Court of South Carolina has long confirmed that common law contractual indemnification includes the duty to defend and that

defense of an action is not separate and distinct from the act of indemnification in the context of contractual indemnity. Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971).

In using the term “indemnify” in the Anti-Indemnity Statute, the Legislature would have understood the meaning of the term as understood at common law, which would include a duty to defend. “The General Assembly is presumed to be aware of the common law, . . . and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.” State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997); see also AM. JUR. *Statutes* § 143 (“It is a familiar rule of construction that when a statute uses words which have a definite and well-known meaning at common law, it will be presumed that the terms are used in the sense in which they were understood at common law.”); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012) (“[W]ords undefined in a statute are to be interpreted and applied according to their common-law meanings.”).

Consequently, the Legislature's use of the term “indemnify” in the Anti-Indemnity Statute does not compel a conclusion that the statute limits only the scope of indemnitor's responsibility to pay damages and not also the scope of their promises to defend claims brought against their indemnitee. Accordingly, the Anti-Indemnity Statute invalidates the Indemnity Clause in the Contract here because the Indemnity Clause requires Hutton's Landscapes to defend D.R. Horton against all of the Plaintiffs' claims, including those based on D.R. Horton's own negligence. See Sunset Presbyterian Church v. Andersen Const. Co., 341 P.3d 192, 197-200 (Or. Ct. App. 2014) (finding Oregon's anti-indemnity statute, which bars “any provision in a construction agreement that requires a person . . . to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the

indemnatee,” applies to a duty to defend); see also Arthur v. State of Hawaii, 377 P.3d 26, 34-38 (Haw. 2016) (determining Hawai’i’s anti-indemnity statute, which bars indemnification for the sole negligence or willful misconduct of the indemnatee, by implication, voids a duty to defend such claims).

Public policy further supports an interpretation of the Anti-Indemnity Statute as prohibiting a promise to defend another party for that party’s sole negligence. The purpose of an anti-indemnity statute is to prevent a general contractor from shifting its exposure for its sole negligence to the subcontractor. See Sunset Presbyterian Church, 341 P.3d at 199. Anti-indemnity statutes are “designed to prevent parties with greater leverage in construction agreements (generally, owners and contractors) from shifting exposure for their own negligence to other parties (generally subcontractors) on a ‘take-it-or-leave-it’ basis.” Id. at 200 (internal citation omitted).

It is illogical that the Legislature would intend to protect subcontractors from agreements requiring them to indemnify general contractors against damages caused by the general contractors’ sole negligence, but yet intend that general contractors still be allowed to require subcontractors to defend them against claims for such damages. An anti-indemnity statute remedies the resulting unfairness when general contractors force subcontractors to accept exposure for the general contractors’ sole negligence as part of the cost of doing business, which includes the cost of defending an action against the contractor for its sole negligence. Id. at 199-200.

An all-encompassing duty to defend provision, requiring the promisor to defend even claims for the promisee’s sole negligence, contravenes public policy because of the unfairness occasioned by the shifting of all attorneys’ fees, costs, and expenses to the promisor. The Indemnity Clause in the Contract contains such a duty to defend and violates South Carolina’s Anti-Indemnity Statute. Therefore, the entire Indemnity Clause, in which the duties to indemnify

and defend are intertwined, is void and unenforceable. D.R. Horton's contractual indemnity claim against Hutton's Landscapes accordingly fails as a matter of law.

II. The Indemnity Clause is void and unenforceable as against public policy because it requires Hutton's Landscapes to indemnify D.R. Horton for its intentional acts.

The Indemnity Clause in the Contract between D.R. Horton and Hutton's Landscapes further violates public policy because it requires Hutton's Landscapes to indemnify D.R. Horton for D.R. Horton's intentional acts. The Indemnity Clause provides:

To the fullest extent permitted by law, **Contractor shall protect, defend, indemnify, and hold Owner . . . ("Indemnitee"), free and harmless from and against any and all claims, demands, lawsuits or other litigation, actions, causes of action, or other liabilities** of every kind and character (including all costs thereof and attorneys' fees) whether asserted by a purchaser or owner, contractor, or any third party . . . on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property including the loss of use thereof **in any way occurring, incident to, arising out of, or in connection with:** (1) a breach of any warranties, representations, covenants, or other obligations of Contractor set forth in this Agreement; (2) the Work, as defined in Section I, including but not limited to work performed or to be performed or material supplied by Contractor or Contractor's agents, or employees; (3) any negligent or intentional act or omission of Contractor . . . regardless whether caused in part by Indemnitee; or (4) **any negligent or intentional act of Indemnitee**, related in any way to the Work, excepting only liability or claims arising out of bodily injury to persons, death, or damage to property proximately caused by or resulting from the sole negligence or sole intentional act or omission of Indemnitee.

[Contract, p. 4, § 10.1 (emphasis added).]

"The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White v. J.M. Brown Amusement Co., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). Our State's Supreme Court has observed as a matter of public policy that contracts of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms. The policy basis behind this rule serves to

deter negligent conduct by the indemnitee, “for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care.” Ashley II of Charleston II, L.L.C. v. PSC Nitrogen, Inc., 409 S.C. 487, 490-91, 763 S.E.2d 19, 20-21 (2014); see also Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 648-49, 819 S.E.2d 166, 171 (Ct. App. 2018).

The public policy concerns are greater with respect to indemnification for intentional acts. Under the Indemnity Clause, D.R. Horton has sought to shift the burden and exposure for defending its intentional acts, for which the Plaintiffs have made claims for and sought punitive damages, under the Second Amended Complaint [Second Am. Compl., ¶¶ 15, 18, 20, 23, 26], to Hutton’s Landscapes. Enforcing such an indemnity provision eliminates any incentive for D.R. Horton to act with any care in the performance of its work. Public policy commands that such a provision, permitting D.R. Horton to require Hutton’s Landscapes to defend D.R. Horton for D.R. Horton’s own intentional acts, be forbidden. See Equitex, Inc. v. Ungar, 60 P.3d 746, 750 (Colo. Ct. App. 2002) (“Public policy prohibits indemnifying a party for damages resulting from intentional or willful wrongful acts.”) (internal citation omitted); cf. S.C. CODE ANN. 15-38-20(C) (“There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury”).

On this additional basis, the Indemnity Clause between D.R. Horton and Hutton’s Landscapes is void and unenforceable. Therefore, D.R. Horton’s contractual indemnity claim against Hutton’s Landscapes must fail.

III. D.R. Horton’s claim for equitable indemnity fails because D.R. Horton is a joint tortfeasor who shares fault for Plaintiffs’ alleged damages and the equitable indemnity claim is not ripe.

D.R. Horton’s claim for equitable indemnity fails because D.R. Horton, as the general

contractor to Hutton's Landscapes, was ultimately responsible for Hutton's Landscapes work at the project, and, thus, cannot be adjudged without fault.

In general, there is no right to indemnity between joint tortfeasors. Atl. Coast Line R.R. Co. v. Whetstone, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963). Equitable indemnity arises in scenarios where "the first party is at fault, but the second party is not." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); see also Fowler v. Hunter, 697 S.E.2d 531, 388 S.C. 355 (S.C. 2010). "If the second party is also at fault, he comes to court without equity and has no right to indemnity." Id. For a party to recover under the theory of equitable indemnity, it must satisfy the following three elements: (1) the party from whom indemnity is sought is liable for causing the plaintiff's damages; (2) the party seeking indemnity is exonerated from any liability for those damages; and (3) the party seeking indemnity incurred damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor. Id. However, under South Carolina law it is clear that "[t]he most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault." Id.

In this case, Plaintiffs allege defects and misrepresentations/concealments of D.R. Horton and its subcontractors related to the "developing, surveying, platting, subdividing, constructing, maintaining, marketing and selling the Tidewater Creek neighborhood." [Second Am. Compl., ¶¶ 7-8]. Plaintiffs specifically allege defects related to "improper site preparation; improper and inadequate infrastructure installation; inadequate inspections and testing of the site during surveying, platting and subdividing; rusted metal, broken glass, and other hazardous debris strewn throughout the properties; premature erosion; water intrusion; improperly installed siding; dead and dying trees; and other deficiencies. . . ." [Second Am. Compl., ¶ 7].

D.R. Horton, by way of its managers and superintendents, bore responsibility, oversight, and coordination as owner, developer, and general contractor at this neighborhood, which included the responsibility to develop, survey, plat, subdivide, construct, maintain, market, and sell to Plaintiffs the homes in the neighborhood. More specifically, D.R. Horton drafted and prepared the project specifications and scopes of work of its contractors for this neighborhood [D.R. Horton's 30(b)(6) Dep. pg. 53-54]; performed daily supervision and oversight of the vertical construction [D.R. Horton's 30(b)(6) Dep. pg. 36, 52, 179]; and walk the yards of each lot in the neighborhood [D.R. Horton's 30(b)(6) Dep. pg. 158].¹ After construction under D.R. Horton's supervision, D.R. Horton determined that the homes were built according to D.R. Horton's plans and specification and in compliance with the applicable building codes and industry standards, and D.R. Horton facilitated the sale of the homes. Accordingly, if it is determined that Hutton's Landscapes' vertical construction scope of work was improper and contributed to Plaintiffs' damages, then, D.R. Horton, as the owner, developer, and general contractor, would share responsibility for those damages. Accordingly, under this scenario, D.R. Horton and Hutton's Landscapes would be considered joint tortfeasors²; and, under South Carolina law, a joint tortfeasor cannot maintain an action for equitable indemnity.

Accordingly, based on D.R. Horton's role as the owner, developer, and general contractor, there is no genuine issue of material fact for a jury to consider with respect to D.R. Horton's equitable indemnity claim against Hutton's Landscapes. If Plaintiffs' claims for which D.R. Horton seeks indemnity are proven, D.R. Horton will be found, at least in part, at fault; thus barring D.R. Horton's equitable indemnification claim as a matter of law.

¹ Excerpts of Testimony from the Rule 30(b)(6) Deposition of D.R. Horton is attached hereto as Exhibit "B".

² Black's Law Dictionary defines joint tortfeasor as "two or more tortfeasors who contributed to the claimant's injury ..." Black's Law Dictionary 765 (4th Ed. 2011).

Additionally, D.R. Horton's pleadings state that their claim for indemnity arises if Plaintiffs are entitled to recover damages against D.R. Horton for the injuries complained of in the Second Amended Complaint. In other words, this Court must find D.R. Horton to be liable or negligent with regards to Plaintiffs' claims before D.R. Horton's claim for indemnity arises. In this scenario, D.R. Horton would be at fault, and, thus, not entitled to indemnity.

Lastly, D.R. Horton's claim for equitable indemnity is not ripe and D.R. Horton has not been "exonerated from any liability for those damages." See Vermeer Carolina's, Inc., supra; Addy, 257 S.C. at 32, 183 S.E.2d at 709 (A party seeking indemnity may be "entitled to recover their costs and attorneys' fees incurred in the *successful* defense of this action under an implied contract . . .) (emphasis added). An indemnity claim "accrues at the time the indemnity claimant suffers loss or damage, that is, at the time of payment of the underlying claim, payment of a judgment thereon, or payment of a settlement thereof by the party seeking indemnity." Maurice T. Brunner, Annotation, When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort, 57 A.L.R.3d 867 (1974). Accordingly, there is no justiciable case or controversy until the conclusion of the underlying tort action, regardless of its outcome.³

Once an indemnity claim accrues, the party wishing to recover attorneys' fees must show: "(1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of defendant's tortious conduct; (2) that the dispute was with a third party—not with the defendant; and (3) that the plaintiff incurred attorneys' fees connected with

³ See, e.g., Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 227–28, 467 S.E.2d 913, 917–18 (1996) ("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. . . . It is not enough that a threat of *possible* injury currently exists; the mere threat of a potential injury is too contingent or remote to support present adjudication." (citations omitted)).

that dispute.” Addy, 257 S.C. at 33, 183 S.E.2d at 709–10. In this case, there have been no findings of fact or award of damages; there has been no determination as to Hutton’s Landscapes alleged tortious or wrongful conduct; and there has been no determination that D.R. Horton is without fault and did not join in causing Plaintiffs’ alleged injuries. Until D.R. Horton establishes a “successful defense” in this action, a claim for equitable indemnity is not ripe and D.R. Horton is not entitled to incurred attorneys’ fees connected with the underlying dispute. For these reasons, D.R. Horton’s claim for equitable indemnity fails.

CONCLUSION

For the reasons set forth herein, Hutton’s Landscapes, Inc. requests this Court to grant its Motion for Summary Judgment and dismiss with prejudice the cross-claims asserted against it by D.R. Horton, Inc. for contractual and equitable indemnity. D.R. Horton’s purported indemnity clause in the Independent Contractor Agreement is void and unenforceable because it requires Hutton’s Landscapes to defend D.R. Horton against all of Plaintiffs’ claims, including those based on D.R. Horton’s sole negligence and intentional acts. Further, D.R. Horton’s claim for equitable indemnity fails because D.R. Horton is a joint tortfeasor who shares in the fault for Plaintiffs’ alleged damages and the equitable indemnity claim is not ripe.

Hutton’s Landscapes also adopts and incorporates by reference as if fully stated herein any and all grounds for dismissal and/or summary judgment asserted at any time by the other Defendants in the above referenced case, to the extent they are consistent with the positions that Hutton’s Landscapes has taken in this case.

Respectfully submitted,

s/ Emily Gifford Lucey

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Megan C. White, S.C. Bar No. 101895

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Counsel for Hutton's Landscapes, Inc.

October 26, 2021
Mt. Pleasant, South Carolina

Exhibit A

Contract

D.R. HORTON
America's Builder

SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR: Matthew's Landscaping, Inc. ("Contractor")
Sole Proprietorship ☐ Partnership ☐ Corporation ☒ Other (ATTACH W-9)
Social Security No. or Tax ID No.: 58-2562189
Name of Owner(s)/Officer(s): Matt Horton
Division Name: Contract Construction Area Name: Charleston Registered Vendor No.: 522977-05
Address for All Notices: 1226 Little Market Rd City: Summerville State: GA Zip Code: 31415
Telephone: (803) 921-1242 Fax: (803) 722-0777 E-Mail Address: Matthew@hortonlandscaping.com
Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THEIRS WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
This agreement (the "Agreement") is entered into on this 16 day of May, 2014, between
DR Horton, Inc. ("Owner") and Contractor.

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

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

3. CONTRACT PRICE.

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

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

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

4. PAYMENT.

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

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. § 29-6-10 AND 29-6-15 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR AGREES THAT OWNER DOES, AND WILL, NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

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

Executed On 16 day of May, 2014

Owner: [Signature] Contractor: [Signature]
By: DR Horton By: Matthew Horton
Name: DR Horton Name: Matthew Horton
Title: President Title: President

INITIALS: OWNER [Initials] CONTRACTOR [Initials]

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

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

5. SCHEDULE OF WORK

5.1 Construction Schedule. Contractor acknowledges that TIME IS OF THE ESSENCE in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timing and priority of the Work without increase in price or liability of any kind to Contractor or Owner. Contractor shall coordinate with Owner all Work scheduled and consistent with the construction schedule.

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

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

6. PERFORMANCE OF THE WORK

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

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

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

6.4 Government Requirements. Contractor shall comply with all applicable federal, state and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1924.39 et seq., and the requirements and posting of all required permits and notices (the "Requirements"). In addition to the obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of the Requirements, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses (including attorney's fees and costs of defense, litigation, settlement of claims, and costs of work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or in the direction of Contractor, regardless of any alleged fault of Owner). In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a home is occupied.

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

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

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

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

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions: (i) establishing a time and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pickup and waste collection at the job location; and (iv) Work site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such

INITIALS: OWNER  CONTRACTOR 

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

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

7. SAFETY.

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

7.2 Safety Laws. Contractor shall fully comply with all laws, codes, ordinances, rules, regulations, standards and statutes governing occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, AND HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorney's fees and court costs, interest, motions, causes of action, judgments or verdicts, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, its any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or Safety Laws regarding any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1910.1201, and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

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

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

B. CONTRACTOR'S WARRANTIES.

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

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

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

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

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

INITIALS: OWNER ME; CONTRACTOR mit

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

9. LIENS AND RETAINAGE.

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

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

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

10. CONTRACTOR'S INDEMNITY.

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

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

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

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

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Basis (the "CGL Policy") with products-completed operations coverage, which contains a per-occurrence limit of no less than \$10 Million Dollars (\$10,000,000), and an aggregate limit of no less than Two Million Dollars (\$2,000,000) protecting against bodily injury, broad form property damage, and personal injury claims arising from the operations of: (i) pre-loss operations; (ii) products-completed operations including materials designed, furnished, sold or

INITIALS: OWNER MM CONTRACTOR MM

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

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

11.3 General Requirements (Applicable to All Required Insurance.) Contractor shall add Owner as a named, Additional Insured, specifically identifying Owner, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to CGL 2010 185 or, if unavailable, both CGL 2010 1001 and CGL 2037 (001). Coverage obtained by Contractor with Owner as an Additional Insured shall be primary, with any insurance of Owner being excess coverage. Insurance coverage required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or rejection of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, except of repair, replacement, or return of money, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation (including this coverage applies in the state where the Work is being performed); and (iv) be with a carrier licensed to do business in the jurisdiction of the Work with minimum financial strength rating of A- and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for its independent determination by Contractor of the amount and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement.

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

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

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

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductibles or self-insured retention limits, independence of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any indemnitor, and against its subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (A) would otherwise have a duty of indemnification, contractual or otherwise, (B) did not pay the insurance premium directly or indirectly, and (C) whether or not such individual or entity has been insured under the policy damaged.

12. REMEDIES.

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

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

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

INITIALS: OWNER *DR* CONTRACTOR *MH*

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

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

13. ALTERNATIVE DISPUTE RESOLUTION.

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

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

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

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

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

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

14. TERMINATION.

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

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

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

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

16. GENERAL CONTRACT PROVISIONS.

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

INITIALS: OWNER CONTRACTOR MH

law, the Master National Independent Contractor Agreement shall control.

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

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

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

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

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

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

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, domestic overnight delivery service, postage delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day 12:00pm by express or overnight delivery service, and upon confirmation if sent by domestic transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All provisions and rules set in this Agreement are intended solely for convenience of reference and shall not change, limit, or otherwise affect that which is set forth in any of the applicable sections of this document.

SOUTH CAROLINA VERSION (REV. 11 APRIL 2013)

INITIALS: OWNER ME CONTRACTOR MT

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Order of the Court



Exhibit "A" Part I-Scope Of Work-General

1. This document defines both Owner and Contractor responsibilities in the stated phase of construction. In the event of any conflict between this scope of work and the Independent Contractor Agreement, the Independent Contract Agreement shall be deemed to control and prevail. It is intended as a checklist that will define the Owner's standard of quality and professionalism. The Contractor's work will not be considered complete until all specifications herein contained are fully met.
2. The work in this bid and agreement shall be installed per plans, specifications and all applicable local, state, and federal codes. All work will be inspected and certified as complete by the Contractor. Payment release does not constitute final acceptance from Owner.
3. The work shall be performed to Owner's standards of quality. If any part of the work is found to be incorrect or causes damage to other work, the Contractor will be responsible for all costs to repair, whether prior to or after payment release.
4. All trash, debris, and scraps shall be removed on a daily basis and deposited in a designated area per job superintendent and the home is to be broom swept *daily*. There is no parking on any lawns, driveways, or sidewalks. Access to the house will be designated by an Owner representative. Violators will be subject to a minimum fine of \$500. Under no circumstances will vehicles be allowed to park/blocking occupied driveways, there will be parking designated on one side of the street. Violators will be fined \$75 and could incur additional fines from local municipalities.
4. All good materials left on the job site shall be maintained in neat order and in a location that does not hamper another Contractor's ability to perform his/her work. The superintendent will designate the location. The home WILL be swept *daily*, and upon completion of work. Also, upon completion of work, a representative of Owner will walk the job. If it is found to be unorganized and dirty, Owner will have the house cleaned and swept and the Contractor will receive a \$75.00 minimum charge.
5. All left over good materials on the job site must be removed within 48 hours of the completion of the work. Failure to remove these materials will result in Owner removing them at the Contractor's expense and will also result in a fine of \$100.00 per day until the materials are removed by either the Contractor or Owner.
6. Owner shall issue authorization (either pursuant to a written purchase order or work order (hereinafter the "Purchase Order")) to commence the work, and Contractor shall not commence the work at a job location until Contractor has received instructions to begin work at a specific job location. Contractor shall commence the work within three (3) days of notice to proceed from Owner, and if such work is interrupted at the direction of Owner, Contractor shall resume such work within two (2) working days from Owner's direction to resume. Notice to proceed will be provided by both Owner's current On-Line Scheduling System and confirmation of the schedule for the work on Owner's current On-Line Scheduling System with the superintendent. It is understood and agreed that the construction start date given in the Contractor by Owner at the beginning of the job is approximate. The dates indicated are only intended to give the Contractor a general idea of the approximate start date. All superintendents will have current schedules. A Owner supervisor will advise Contractor or supplier of schedule changes either by voice or electronic notification. All work must be confirmed with the superintendent prior to start. Failure to commence the work within the time frames listed above will result in a Scope of Work Violation in the amount of \$100.00 per day. In addition, the schedule for the work as provided in Owner's current On-Line Scheduling System must be maintained by the Contractor until the work is completed and approved as completed by the superintendent. A Failure to complete the work in the time frame allowed from commencement to approved completion will result in a Scope of Work Violation in the amount of \$100.00 per day. The Scope of Work Violations will be issued in the form of a back charge to the Contractor. These back charges will be in the form of an offset to any unpaid balances.

Initials: Contractor JH

Owner ML
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Drier et al v. DRH



7. All work shall be performed in a safe and professional manner. It is the Contractor's responsibility to comply with all OSHA requirements. The superintendent will issue a warning to workers on site of violations seen. If after a warning the workers are not in compliance they will be asked to leave the site and no payment will be issued for work completed. All workers must wear hard hats on all job sites at all times. The Owner representative may issue a written warning to workers on site of violations seen. If after a warning the workers are not in compliance, they will be asked to leave the site. Additionally, fines may increase as follows: 1st offense-a written warning and/or a \$100.00 fine, 2nd offense-\$250.00 fine and a mandatory appearance before safety committee, 3rd offense-\$500.00 fine, and 4th offense-termination. Removal of safety rails will result in a \$300.00 fine. In addition, Contractor will be responsible for all costs incurred from missing rail parts. All workers must wear hard hats on all job sites at all times.
8. The Contractor shall respect the work of the other crafts at all times and take necessary precautions in order to avoid damaging such work. If the Contractor damages such work, repairs shall be made at the Contractor's expense.
9. Any and all damages or defective workmanship must be reported to the superintendent. If a Contractor is found to have covered or hidden damages or defective workmanship, then that Contractor will incur all repair cost.
10. It is the responsibility of all Contractors to obtain current product and work specification sheets that are applicable to each and every, all and singular, series, model or plan which Owner builds. This specification sheet will provide the Contractor with special conditions, types, brands, methods, colors and manufacturers that are the express responsibility of each and every Contractor.
11. Owner paperwork hierarchy is as follows: 1. Contractor Selection Sheets 2. Community Specifications 3. Scope of Work 4. Plans. #1 overrides everything. Field Superintendents are not authorized to make changes to any of the above. If you are asked to do something that does not follow the above paperwork hierarchy please contact the Construction Area Manager or the Purchasing Manager immediately. In addition, if you find something within our documents that do not comply with industry standards, is costing you or Owner additional money, or could be done more efficiently, please bring to our attention immediately. If you do not follow the proper paperwork hierarchy or make changes without written approval, Owner will not absorb the additional costs.
12. Contractors are not permitted to eat or smoke in an Owner home. No drinking of alcoholic beverages is allowed on any Owner job site. No uncovered shoes are permitted in a carpeted home.
13. No work should be considered complete until all errors are corrected and all applicable inspections have been passed.
14. All punch out list generated by the Owner superintendent will be complete before payment will be made. The Contractor understands that the deliveries are sometimes delayed and that Owner has little control over material delivery. In the event delivery delays slow down work, the Contractor will not be due payment of the job until the job is complete and punched out.
15. Contractors are responsible for reimbursing Owner the cost of municipal re-inspection fees directly related to their work. Any re-inspections or engineering costs as a result of poor workmanship are to be paid by the Contractor. If Owner pays for these costs, the Contractor will be charged the cost and Owner will offset any unpaid balances to Contractor to recover these costs.
16. In the event a worker is injured on a job site, please follow these steps:
 - A. Verify the injury.
 - B. Contact the office so that we may document the incident.
 - C. The superintendent should fill out an "Accident Report" and return to the office within 48 hours.
17. Owner strictly forbids the subletting of work by any Contractor. Owner will terminate

Initials: Contractor mm

Owner [Signature]
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12/19/2013



any Contractor found to be subletting work and Owner has no responsibility of payment to anyone whom has sublet from the Contractor. This agreement is between Owner and the listed Contractor only.

18. Payment is not due until the Contractor has completed all punch lists to Owner, Inc.'s expectations. Do not turn in purchase orders for a house that is not punched but has verified by an Owner representative.
19. No extras will be paid for without written approval from Owner's superintendent and Owner's Purchasing. All extra work must be submitted to superintendent prior to Owner management's approval for payment. Acceptance will be verified with a PO being issued.
20. Most of Owner's jobs are paid by an auto pay system. The Contractor will be issued a P.O. prior to performing work. Once the work is complete, the job superintendent will progress Owner's current On-Line Scheduling System which will release the Contractor's payment. Do not submit invoices for auto pay work. The Contractor's check will be issued each job task being paid using the P.O. number. It is the Contractor's responsibility to properly keep track of their receivables by cross referencing the P.O. numbers. If for some reason the Contractor feels that payment for a job that is complete has not occurred, the Contractor is to contact the Purchasing Department and provide the needed details. The Purchasing Department will research the situation and provide instruction to the Contractor.
21. Contractor shall comply with all insurance requirements including the Contractor agreement before setting foot on any Owner's site. If insurance lapses, Contractor will be required to leave the site until they are in full compliance. If insurance cannot be reinstated they will be terminated.
22. All materials shall be installed per local, state, and federal codes. Installation of all products shall follow manufacturers' instructions. Any discrepancies between Owner's requirements and code/manufacturers' should be reported to Owner Construction and Purchasing Department in writing.
23. No invoices over 90 days from the date work was completed will be paid.
24. Contractor shall provide qualified supervision on all job sites to monitor work. This person shall be competent and able to make decisions on behalf of the Contractor's company. Each Contractor will have a qualified English speaking job supervisor on the job site. Each Contractor is to furnish a representative for Contractor meetings as scheduled by Owner.
25. Contractors shall not discuss pricing or any agreements w/Owner with any other Contractors. Violation of this policy will result in termination of Contractor.
26. Contractor shall supply an OSHA compliant safety plan to Owner prior to starting work. It is the responsibility of the Contractor to maintain the safety plan and update Owner with all revisions. Upon request, Contractor shall supply Owner with MSDS sheets.
27. Once the doors or windows have been installed it is the responsibility of each Contractor to close them during inclement weather in an effort to minimize damage to the home.
28. The following trades must provide a 24 hr emergency warranty phone number and contact. Any phone number or contact information changes must be reported to the Construction Department and Purchasing Department immediately.
Electrician Plumber Gas HVAC Roofer
29. Contractor is responsible for obtaining and forwarding a working email address to Owner. This account must be monitored at least once each working day. High Speed internet access is not required but is highly recommended.
30. In the event of a violation of any of these General Scopes of Work or in the event of a violation of a Contractor's Specific Scope of Work for their particular trade, a Scope of Work Violation will be issued in the form of a back charge to the Contractor. These back charges will be in the form of an offset to any unpaid balances.

Initials: Contractor [Signature]

Owner [Signature]
Page 3 of 4

12/19/2023



**Exhibit "A" Part II-Scope Of Work Customer Service
Center-(CSC)**

1. Contractor to warrant all work from date of the transfer of the property from Owner to the homeowner for workmanship and materials where applicable. Contractor hereby agrees to repair, replace, or pay the expense of repair / replacement as determined by Owner. The cost of repair/replacement shall include any and all collateral remediation.
2. Contractor will respond within 48 hours to all work order requests from Owner CSC personnel, 24 hours on emergencies. Failure to respond within 48 hours will result in Owner to have corrections made and back charge Contractor for all associated costs. Missed appointments will result in a \$50 back charge per incident. These back charges will be in the form of an offset to any unpaid balances.
3. Contractor must respond to CSC via fax once a work order is received and an appointment is made with the homeowner to correct warranty work within 48 hours of receipt of work order.
4. Contractor must obtain homeowner signatures on all work orders upon completion of warranty work. Homeowner must sign off on all work as being completed and satisfied.
5. Contractor to fax the signed / dated work order from the Homeowner to the CSC. It is the responsibility of the Contractor to inform the CSC of each completed work order. All work orders must be faxed to the CSC as completed. Work orders will be considered "open" if not faxed and received by the CSC.
6. Bi-monthly Vendor reports will be faxed to Contractor. Report will indicate warranty work that is outstanding. Upon receipt Contractor to review all open work orders and note next to each item the work orders that are completed and if not the scheduled appointment date and time. Once reviewed, Contractor to fax report to CSC for updating. Report is to assist Contractors in managing warranty work load. Not maintaining a good standing in completing work orders may result in delay in payments.
7. Contractor's payments for all work will be placed on hold if any warranty work order remains open for 30 days or more. The payments will remain on hold until all of Contractor's open warranty work orders of 30 days or more are closed. Owner may cause the warranty work to be completed at the Contractor's expense.

Contact: Melissa Hurton
Phone#: 912-927-1585

Contractor

Hurton, Landscapes
Company Name

Matt Hurton
Representative Name

[Signature]
Representative Signature

CEO
Title

5/16/14
Date

Initials: Contractor [Signature]

Owner

D. R. Horton, Inc

Ron Bunner
Representative Name

[Signature]
Representative Signature

Assistant Vice President
Title

5/27/14
Date

Owner [Signature]
Page 4 of 4

12/15/2013

DRH-001687

Order of the DRH

D. H. HORTON
Accountant's Building

Exhibit "A" -Scope of Work- Rough Grade

I. Scope Policies

This scope of work outlines specifications as required by Owner. This scope of work is in addition to the General Scope of Work. In the event of any conflict between this scope of work and the Independent Contractor Agreement, the Independent Contractor Agreement shall be deemed to control and prevail. The specifications and standards outlined below may be modified at the discretion of Owner. In the instance that any changes are made to the scope, contractor will be notified and required to resign a scope within 2 business days. This scope of work shall apply to all Owner communities. In addition, this scope of work shall override all previous signed scopes of work for the construction phase listed above.

II. General Requirements

Contractor will supply all material, equipment, and labor necessary to complete the rough grade phase of construction. All work shall conform to all building codes, Owner's standards, plans/details, community specs, and industry standards. Prior to starting any job, contractor shall meet with Field Manager to review all plot plan, landscape plan, options, and pending inspections. All work shall be completed per the schedule set forth by the Field Manager. Vendor shall provide unit pricing to Owner's purchasing for standard, and any unexpected costs.

III. Bids Requirements

Contractor must provide a material and labor breakdown for all bids. All bids must include the wording "all applicable taxes included". All bids shall be returned to the office by the required deadline. All bids must be accompanied with the following paperwork:

- Signed Scope of Work
- Signed Community Specifications
- Signed Copy of Owner bid sheet

IV. Material Specifications

Note: This section outlines general material requirements/manufacturers. This list does not represent all material to be supplied by contractor. Contractor must supply all materials listed throughout the scope of work U.N.O.

V. Scope

A. General

- Daily Log-In to Current Owner's On-Site Scheduling System.
- Remove all excess materials at the end of each day.
- Repair any deficiencies from Inspection/QC/Homeowner/Field manager check within 24 hrs.
- Replace any displaced, silt fence, orange fencing, downed signage and permit box as needed.
- Clean the streets of any dirt, mud, nails, screws, aluminum, etc. generated during material delivery and installation.
- Contractor will be required to meet scheduled start dates with no less than (3) working days of advance notice by the Field Manager.
- Rough grade is defined as a "fine" grade suitable for the final installation of sod, seed and/or all other landscape materials.

Initials: Contractor

[Signature]

Owner

[Signature]

DRH-001688

Drier et al v. DRH



B. Rough Grade

- Slab "fine" grade must be completed within 48 hours of slab pour and form strip;
- Review Plot Plan, Property Pins and drainage pattern with Field Manager prior to starting work. Mark up plot plan outlining all final drainage patterns.
- Call no later prior to starting. Contractor is responsible for any utility damage.
- Inspect foundation and existing flatwork prior to grading. Notify Field Manager of any cracks, chips, etc. Rough grade contractor is responsible for any damage if Field Manager is not notified prior to start of work. Entire lot is to be finished and free of all waste/debris.
- "Fine" grade shall include back of curb to rear lot pins and between pins as disturbed. 10'-0" perimeter of slab and all existing flatwork shall be hand taked to include all utility pedestals, transformers etc. Curb and all existing flatwork to be cut 1 1/2" below grade. All boxes are to be set at grade and backfilled.
- Remove all trash, rocks, dirt mounds and debris from site generated from this phase of construction. Do not pile on paths, driveway, or at the curb. Do not place on any adjacent Owner's community lots. **DO NOT DRAG WASTE TO EDGE OF LOT / LANDSCAPE PARAMETERS AND LEAVE. REMOVE FROM JOB SITE.**
- All swales, front, rear and side, are to be cut and defined with all final dirt movement and removal as needed to establish final positive drainage. Standing water should not exceed 48 hours in swale and 24 hours otherwise. Confirm positive drainage beneath all decks and attached structures.
- Remove/Haul-in dirt as necessary to accomplish proper drainage. Dirt hauled in excess of 1 truckload to be additional. Confirm with Field Manager and receipt of P.O. prior to starting work. The addition or removal of dirt beyond this phase of construction will be at Contractor's cost.
- Fine grade to be a minimum of 8" below top of foundation. There is to be a minimum of 6" of fill in 10' around the foundation. Leave enough soil to create a plant bed a minimum of 3' wide & 8" tall around the front of the home. If the foundation is a monolithic slab, the plant bed shall be located no closer than 18" to the face of the foundation.
- Underbrush all natural material less than 3" inches in diameter and remove debris and dead limbs up to 8' high. Entire lot is to be "finished" as defined by property pin location. Logs in excess of 12" in diameter to be removed at additional cost. Meet with Field Manager to agree upon price in advance.
- Re-work grade as necessary to compensate for disturbances from underground utilities, deck, and flatwork installation.
- Turn in diagram of lot showing drainage patterns to Field Manager.
- Broom sweep all flatwork i.e. drives, walks, patios, porches etc. to include curb and adjacent lots as needed.
- Repair all grading deficiencies as noted by municipal inspectors within 24 hours.
- Verify operation of downspout drain(s) and downspout drain(s). Clean-out and re-stake daylight end(s) if necessary.
- Re-set permit box if necessary. Remove and replace all fence as needed in order to complete job.
- Clean job site.

VI. Payment

All Invoices / P.O.'s shall not be issued in and approved for payment until phase complete and all deficiencies are remedied. Owner reserves the right to make the final decision in determining the correct course of action for any and all repairs. No Extras will be paid unless negotiated prior to performing any work and an approved P.O. is issued.

VII. Warranty

- Contractor shall warrant all work per Owner's contract. All warranty work must be completed within 72 hours of scheduled date and time.

Initials: Contractor

Owner

DRH-001689

Date of sale: DRH



Contractor

Horton's Landscapes
Company Name

[Signature]
By:

Scott Horton
Name:

CEO
Title:

5/27/14
Date:

Owner

D.R. Horton, Inc.

[Signature]
By:

Ron Bonner
Name:

Assistant Vice President
Title:

5/27/14
Date:

Initials: Contractor [Signature]

Owner [Signature]



Exhibit "A"
-Scope of Work-
Final Grade

I. Scope Policies

This scope of work outlines specifications as required by Owner. This scope of work is in addition to the General Scope of Work. In the event of any conflict between this scope of work and the Independent Contractor Agreement, the Independent Contractor Agreement shall be deemed to control and prevail. The specifications and standards outlined below may be modified at the discretion of Owner. In the instance that any changes are made to this scope, contractor will be notified and required to resign a scope within 2 business days. This scope of work shall apply to all Owner communities. In addition, this scope of work shall overlap all previous signed scopes of work for the construction phase listed above.

II. General Requirements

Contractor will supply all material, equipment, and labor necessary to complete the final grade phase of construction. All work shall conform to all building codes, Owner's standards, plans/details, community specs, and industry standards. Prior to starting any job, contractor shall meet with Field Manager to review all plot plans, options, and pending inspections. All work shall be completed per the schedule set forth by the Field Manager. Contractor shall provide unit pricing to Owner's purchasing for standard, and any unexpected costs.

III. Bids Requirements

Contractor must provide a material and labor breakdown for all bids. All bids must include the wording "all applicable taxes included". All bids shall be returned to the office by the required deadline. All bids must be accompanied with the following paperwork:

- * Signed Scope of Work
- * Signed Community Specifications
- * Signed Copy of Owner's bid Sheet

IV. Material Specifications

Note: This section outlines general material requirements/manufacturers. This list does not represent all material to be supplied by contractor. Contractor must supply all materials listed throughout the scope of work U.F.C.

V. Scope

A. General

- Daily Log-In to Current Owner's On-Line Scheduling System;
- Remove all excess materials at the end of each day.
- Repair any deficiencies from inspection/QC/Homeowner/Field manager check within 24 hrs.
- Replace any displaced lift fence, orange fencing, downed signage and permit box as needed.
- Clean the streets of any dirt, mud, nails, screws, aluminum, etc. generated during material delivery and installation.
- Contractor will be required to meet scheduled start dates with no less than (3) working days of advance notice by the Field Manager,

Initials: Contractor

Owner

DRH-001691

Drier et al. v. DBH



B. Final Grade

- Final grade is defined as a line, hand-raked grade suitable for the final installation of sod, seed and/or all other landscape materials to include plants and plant beds.
- Contractor will be required to meet scheduled start dates with no less than (3) working days of advance notice by the Field Manager.
- Review Plot Plan, Property Plus and drainage pattern with Field Manager prior to starting work. Mark-up plot plan outlining all final drainage patterns.
- Call no cuts prior to starting. Contractor is responsible for any utility damage.
- Inspect foundation and existing flatwork prior to grading. Notify Field Manager of any cracks, chips, etc. Final grade contractor is responsible for any damage if Field Manager is not notified prior to start of work. Entire lot is to be HAND RAKED, excluding natural areas, finished and free of all waste/debris.
- Final grade shall include back of curb to rear lot plus and between plus as disturbed to include all utility pedestals, transformers etc. Curb and all existing flatwork to be cut 1 1/2" below grade. All "boxes" to be set at grade and backfilled.
- Remove all trash, rocks, waste, dirt ramps and debris from site generated from this phase of construction. Do not pile on patio, driveway, or at the curb. Do not pile on any adjacent Owner's community lots. DO NOT DRAG WASTE TO EDGE OF LOT / LANDSCAPE PARAMETERS AND LEAVE. REMOVE FROM JOB SITE.
- All swales, front, rear and side, are to be cut and designed with all final dirt movement/removal as needed to establish final/positive drainage. Standing water should not exceed 48 hours in swale and 24 hours otherwise. Confirm positive drainage beneath all decks and attached structures.
- Final grade to be a minimum of 8" below top of foundation. There is to be a minimum of 6" of fill in 10' around the foundation. All plant beds shall be raised to 8" above existing grade. In the case of monolithic slab foundations, the plant beds should be located 18" minimum off the face of the foundation for code regulations on exposure requirements. Many plant beds are created in the yard, contractor will leave 8" of soil to raise those beds as well, as long as there are no native trees that this extra soil will cause harm to the tree root system.
- Underbrush all natural material less than 2" in diameter and remove debris and dead limbs to 8" off the ground. Entire lot is to be "finished" as defined by property pin location. Logs in pieces of 42" in diameter to be removed at additional cost. Meet with Field Manager to agree upon price in advance.
- Re-work grade as necessary to compensate for disturbances from underground utilities, deck, and flatwork installation.
- Turn in diagram of lot showing final drainage patterns to Field Manager.
- Broom sweep all flatwork including decks, walks, patios, porches etc. to include curb and adjacent lots as needed.
- Repair all grading deficiencies as noted by municipal inspectors within 24 hours.
- Verify operation of crawl drain(s) and downspout drain(s). Clear out and re-stake daylight end(s) if necessary.
- Re-set permit box. Remove and replace silt fence as needed in order to accomplish / complete job as defined above.
- Move port-a-john to nearest vacant lot. Clean job site.

VI. Payment

All invoices / P.O.'s shall not be turned in and approved for payment until phase complete and all deficiencies are remedied. Owner reserves the right to make the final decision in determining the correct course of action for any and all repairs. No Extras will be paid unless negotiated prior to performing any work and an approved P.O. is issued.

Initials: Contractor

Owner

DRH-001692

Drier et al v DRH



VII. Warranty

- Contractor shall warrant all work per Owner's contract. All warranty work must be completed within 72 hours of scheduled date and time.

Contractor

Horton's Landscapes Inc
Company Name

[Signature]
By:

Matt Horton
Name:

CEO
Title:

5/27/14
Date:

Owner

D.R. Horton, Inc.

[Signature]
By:

Ron Bunner
Name:

Assistant Vice President
Title:

5/27/14
Date:

Initials: Contractor

[Signature]

Owner

[Signature]



Exhibit "A"

-Scope of Work-

Landscape Turnkey

I. Scope Policies

This scope of work outlines specifications as required by Owner. This scope of work is in addition to the General Scope of Work. In the event of any conflict between this scope of work and the Independent Contractor Agreement, the Independent Contractor Agreement shall be deemed to control and prevail. The specifications and standards outlined herein may be modified at the discretion of Owner. In the instance that any changes are made to this scope, contractor will be notified and required to resubmit a scope within 2 business days. This scope of work shall apply to all Owner communities. In addition, this scope of work shall override all previous signed scopes of work for the construction phases listed above.

II. General Requirements

Contractor will supply all material, equipment, and labor necessary to complete the Landscape Turnkey phase of construction. All work shall conform to all building codes, Owner's standards, plans/details, community specs, and industry standards. Prior to starting any job, subcontractor shall meet with Field Manager to review all plot plan, landscape plan, options, and pending inspections. All work shall be completed per the schedule set forth by the Field Manager. Vendor shall provide unit pricing to Owner's purchasing for standard, and any unexpected costs.

III. Bids Requirements

Contractor must provide a material and labor breakdown for all bids. All bids must include the wording "all applicable taxes included". All bids shall be returned to the office by the required deadline. All bids must be accompanied with the following paperwork:

- Signed Scope of Work
- Signed Community Specifications
- Signed Copy of Owner's bid Sheet

IV. Material Specifications

Notes: This section outlines general material requirements/manufacturers. This list does not represent all material to be supplied by contractor. Contractor must supply all materials listed throughout the scope of work U.N.O.

- Sod per community specs (type and areas to be added)
- All mulch is pine straw U.N.O on community specs
- Plants and Trees per Community specs

V. Scope

A. General

- Daily Log-In to Current Owner's On-Line Scheduling System.
- Remove all excess materials at the end of each day.
- Repair any deficiencies from Inspection/QC/Homeowner/Field manager check within 24 hrs.
- Replace any displaced self fence, orange fencing, downed signage and permit box as needed.
- Clean the streets of any dirt, mud, nails, screws, aluminum, etc. generated during material delivery and installation.
- Contractor will be required to meet scheduled start dates with no less than (3) working days of advance notice by the Field Manager.

Initials: Contractor

[Signature]

Owner

[Signature]



B. Landscaping

- Install quality plant material per specifications
- Plants to be installed per A/LA planting instructions.
- Shrub type, height and diameter are designated by Owner's subdivision specifications. Judgement of non-performance in plant type is at the sole discretion of the Owner's representative.
- Do not plant shrubbery to close to the foundation-min. 3' from foundation
- All plant beds shall maintain proper fall from foundation per local building codes.
- Plant beds to be raised 2" above grade areas. Plant beds on impervious slab finishes shall be located no closer than 18" from the face of the foundation.
- All depressions/settlement to be filled to grade, tamped and compacted to prevent future settlement i.e. sewer and water lines, attachments, clean-outs, shut-offs, meters etc.
- Plant beds shall be trenched and hand raked of all construction debris, rocks, dirt clods etc. prior to and after plant installation. Plant beds created in the yard shall be 3" above the existing grade so long as there are not native trees that the additional soil will harm the tree's root system.
- Water all material on day of installation.
- Contractor responsible for watering/maintaining all Landscape Material, including sod, up to COE in all Communities currently not receiving irrigation. Additional pricing to be agreed upon.
- Ensure positive drainage under decks, Rake and install pine straw under all decks.
- Install pine straw along the natural edge to grassed yard 18" 2' into natural area if one exists.
- Install 1/2" corrugated black pipe I/O splash blocks on all downspouts as required by municipality. Pipe should be connected to downspout with one joint.
- Install concrete sewer clean-out "rings" as required by municipality.
- All flatwork, walks, patios, porches, adjacent curbing to be broom swept and blown free of debris. Hose down if necessary.
- Clean jobsite.
- Clean streets of any mud generated as a result of delivery or installation.
- Remove and re-install permit box and all fence as needed in order to insure proper completion of work as described.

C. Sod/Seed

- NO OVERSEEDED SOD TO BE INSTALLED AT ANY TIME YEAR ROUND; BY REQUEST ONLY, IF DONE SO TO BE REPLACED BY CONTRACTOR AT THEIR EXPENSE.
- All yards are to be plowed, pulverized and hand-rake. "YARD" is defined as all areas disturbed within the property as noted by pin placement to include "right-of-way."
- Hand-raked areas to be free of rocks and debris.
- Ensure proper grading at areas, driveways, patios, and A/C pads. Areas to be cut 1 1/2" to accommodate sod placement.
- Ensure proper drainage away from the home. Landscaping Contractor is responsible for drainage pattern on lot.
- Clearly mark positive drain lines (stake and paint) prior to laying sod/seed. Make sure they are in working condition.
- Ensure all construction debris has been removed from the yard. Rake out all rocks. Cut any exposed roots, bands below grade and fill over. All construction debris to be removed from Community.
- Ensure finished grade (with material on top sod, pine straw, etc.) is a minimum of eight inches from siding to the ground and fall of 6" in 10'.
- Sod material should be green, if not dormant, and of high quality. Sod that does not meet this criteria to be removed/replaced at Contractor's cost.
- Sod should be installed so there is a smooth transition over property lines.
- Ensure sod is installed in a manner that allows water to drain from seeded areas. There shall be a smooth transition from seed to sod areas.
- Do not install Sod / Seed unless water is available on the lot.
- Thoroughly water and roll all sod on day of installation

Initials: Contractor DRH

Owner DRH

DRH-001695

Drier et al v DRH



Contractor

Horton's Landscaping Inc
Company Name

[Signature]
By:

Scott Horton
Name:

CEO
Title:

5/27/14
Date:

Owner

D.R. Horton, Inc.

[Signature]

Ron Burrier
By:
Name:

Assistant Vice-President
Title:

5/27/14
Date:

Initials: Contractor

[Signature]

Owner

[Signature]



Exhibit "A"

-Scope of Work- Flatwork Labor Turnkey

I. Scope Policies

This scope of work outlines specifications as required by Owner. This scope of work is in addition to the General Scope of Work. In the event of any conflict between this scope of work and the Independent Contractor Agreement, the Independent Contractor Agreement shall be deemed to control and prevail. The specifications and standards outlined below may be modified at the discretion of Owner. In the instance that any changes are made to the scope, contractor will be notified and required to resign a scope within 2 business days. This scope of work shall apply to all Owner communities. In addition, this scope of work shall override all previous signed scopes of work for the construction phase listed above.

II. General Requirements

Contractor will supply all material, equipment, and labor necessary to complete the flatwork labor turnkey phase of construction. All work shall conform to all building codes, Owner's standards, plans/details, community specs, and industry standards. Prior to starting any job, Contractor shall meet with Field Manager to review all plot plans, options, and pending inspections. All work shall be completed per the schedule set forth by the Field Manager. Vendor shall provide unit pricing to Owner's purchasing for standard and any unexpected costs.

III. Bids Requirements

Contractor must provide a material and labor breakdown for all bids. All bids must include the wording "all applicable taxes included". All bids shall be returned to the office by the required deadline. All bids must be accompanied with the following paperwork:

- Bid Set of Plans (may not be required for all jobs)
- Signed Scope of Work
- Signed Community Specifications
- Signed Copy of Owner's bid Sheet

IV. Material Specifications

Note: This section outlines general material requirements/manufacturers. This list does not represent all material to be supplied by contractor. Contractor must supply all materials listed throughout the scope of work U.R.O.

Concrete-3000psi, 4" slump; no fiber mesh

V. Scope

A. General

- Daily Log-In to Current Owner's On-Line Scheduling System.
- Remove all excess materials at the end of each day.
- Broom sweep house every day at the end of work.
- Repair any deficiencies from inspection/QC/Homeowner/Field Manager check within 24 hrs.
- Replace any displaced sill fence, orange fencing, downed chains and repair box as needed.
- Clean the streets of any dirt, mud, nails, screws, aluminum, etc. generated during material delivery and installation.
- Contractor will be required to meet scheduled start dates with no less than (3) working days of advance notice by the Field Manager.

Initials: Contractor

Owner

DRH-001698

Draper et al v. DRH

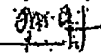


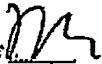
B. Forming

- Prior to forming drive, sidewalk and patio, ensure that sewer inspection has been installed and inspection has passed. Also, ensure electrical and gas undergrounds have been installed. Verify the location and size of driveway and patio with SGS, with utility specs and Superintendent.
- **IT IS THE RESPONSIBILITY OF THE CONTRACTOR TO INSURE THAT VEHICLES WILL NOT SCRATCH ON DRIVE WHEN COMPLETE. CONTRACTOR WILL REMOVE AND REPAIR AT THEIR COST IF THIS REQUIREMENT IS NOT MET.**
- Cut driveway, sidewalk and patio establishing a grade that will allow for proper drainage. All flatwork shall drain away from the house. If you are unsure of any drainage patterns, consult superintendent immediately.
- Supply and install all formwork and "bleeding" for irrigation, etc. as required by Superintendent.
- Install expansion joint at the garage and connection of all sidewalks as necessary.
- All sidewalks (with the exception of city sidewalk, unless required) shall be radii, not square.
- Supply and install 4" corrugated pipe under sidewalk for drainage of downspouts if required.
- Sleeve driveway 18" behind the curb and at any sidewalk where a planting bed is surrounded by concrete or other structure with a 4" sleeve. Concrete supplier to supply material for sleeves.
- Form all city sidewalks, as required by municipality when forming drive.
- All form work to be straight and square (where applicable).
- Install cast iron cleanout for sewer if required. This will be supplied by plumbing contractor.
- Grade Right-of-Way to proper municipality requirements.
- If required, supply and install stone to obtain a suitable driveway base. This service will be provided for an additional charge listed below, and must have prior approval. In the event stone is required, contractor must supply superintendent with all stone tickets. Contractor is responsible for removing any extra material from jobsite.
- Inform Superintendent when job is ready for inspection. Call for inspection. Drive shall be inspected within 24hrs. from the time forms are complete.
- Knock down all dirt piles generated as a result of drive cut. **DO NOT** spread gravel cut from drive over yard. Consult superintendent for location of pile gravel to be hauled off.

C. Pouring

- Ensure all required inspections have passed. This should include stoop inspection on crawl homes.
- Double check all formwork.
- Install 3800 psi concrete minimum of 4" thick. Concrete shall be installed per industry accepted practices. Do not add more than 1.5 gallons of water, or any other additives, per yard without written approval by Owner's representative. Concrete shall not be poured unless the temperature is 40° F and rising.
- Protect all pours from weather. Provide plastic and straw blankets as needed.
- Pour all stoops on crawl homes. Stoops are to be placed with fall 1/8"/ft. and shall not hold water. Stoops are to be broom finished no picture frame.
- Ensure that there are no cold joints.
- Finish to be neat and have a consistent appearance and professional look.
- Ensure there are no humps or low areas which will hold water.
- Clean excess concrete from foundation walls immediately. Clean brick/block as required.
- All control joints to be tooled, not saw cut. Control joints shall be installed per industry standards. All driveways over 12' wide will have a centerline control joint. Subural control joints shall be installed at all sidewalk radius areas.
- Expansion joints or scores every 4' on walks. Expansion joints to be placed in driveways as closely to square as possible, not to exceed every 10'. All flatwork should be arranged with expansion joints in squares. Minimum 1" fall on public walk from the high side to the low side (even across driveway). Expansion joints **MUST** be the black asphalt (bituminous) type expansion joint material and must be installed level with or below concrete level. **NOTE:** If the scoring method is used the scores must be a minimum of 1/4" deep.

Initials: Contractor 

Owner 

DRH-001699

Order of the DRH



- Expansion joints to be placed at inside corner of all steps or scored a minimum of 3/4" deep.
- Expansion joints are required where flatwork is poured against existing concrete. These **MUST** be the black asphalt (bituminous) type expansion joint material. Avoid the temptation to use wood.
- Expansion joints against the home. Nails should be put through the expansion joint to hold it down. Expansion joints **must** be placed where sidewalks intersect or join driveways.
- Patio dropped 3 1/2" and sloped for proper drainage, must have fall away from home 1/4" per foot.
- Use 6 x 6 wire mesh or install rebar on chairs in accordance with structural drawings and local and state building codes. Rebar to be overlapped as per structural drawings and local and state building codes. Floating rebar into footing during pour is not permitted.
- Trowel finish, edge, lightly broom, and picture frame flatwork or as specified per Community.
- Clean excess concrete/splatter as needed. Wash down any blockwork, siding, doors, foundation, splitters and over pour immediately.
- Notify concrete supplier of proper wash-out area. See Superintendent if you are unaware of concrete washout area. Excessive waste in the wash-out area will be backcharged.
Note: Contractor is responsible for cost to set up / establish wash-out area and is responsible for cleaning and maintaining concrete washout area in accordance with Owner and State / Local Environmental Standards.
- Remove any over pours from site immediately.

D: Stripping Forms

- Strip all forms and remove all stakes within 24 hrs. of pour.
- Pick-up and install "No Parking" barricade from construction trailer. "No Parking" barricade to be supplied by Owner.
- Remove all form boards from jobsite.
- Verify slab is level and there are no dips or humps. Any deficiencies need to be corrected within 24 hrs.

VI. Payment

All Invoices / P.O.'s shall not be turned in and approved for payment until phase complete and all deficiencies are remedied. Owner reserves the right to make the final decision in determining the correct course of action for any and all repairs. No Extras will be paid unless negotiated prior to performing any work and an approved P.O. is issued.

1. All Driveway Flatwork
2. Stoop Flatwork on Crawl and Basement Homes, Patio Flatwork on Slab Homes

VII. Warranty

- Contractor shall warrant all work per Owner's contract. All warranty work must be completed within 72 hours of scheduled date and time.

Initials: Contractor

Owner



Contractor

Hortons Landscapes Inc
Company Name

[Signature]
By:

Matt Horton
Name:

CEO
Title:

5/27/14
Date

Owner

D.R. Horton, Inc.

[Signature]
By:

Ron Gannon
Name:

Assistant Vice President
Title:

5/27/14
Date

Initials: Contractor [Signature]

Owner [Signature]



Exhibit "A"

"Scope of Work"

Slab Backfill

I. Scope Policies

This scope of work outlines specifications as required by Owner. This scope of work is in addition to the General Scope of Work. In the event of any conflict between this scope of work and the Independent Contractor Agreement, the Independent Contract Agreement shall be deemed to control and prevail. The specifications and standards outlined below may be modified at the discretion of Owner. In the instance that any changes are made to the scope, Contractor will be notified and required to resign a scope within 2 business days. This scope of work shall apply to all Owner communities. In addition, this scope of work shall override all previous signed scopes of work for this construction phase listed above.

II. General Requirements

Contractor will supply all material, equipment, and labor necessary to complete the slab-backfill phase of construction. All work shall conform to all building codes, Owner's standards, plans/details, community specs, and industry standards. Prior to starting any job, Contractor shall meet with Field Manager to review all plan, options, and pending inspections. All work shall be completed per the schedule set forth by the Field Manager. Vendor shall provide unit pricing to Owner's purchasing for standard, and any unexpected costs.

III. Bids Requirements

Contractor must provide a material and labor breakdown for all bids. All bids must include the wording "all applicable taxes included". All bids shall be returned to the office by the required deadline. All bids must be accompanied with the following paperwork:

- * Bid Set of Plans
- * Signed Scope of Work
- * Signed Community Specifications
- * Signed Copy of Owner's Bid Sheet

IV. Material Specifications

Note: This section outlines general material requirements/manufacturers. This list does not represent all materials to be supplied by Contractor. Contractor must supply all materials listed throughout the scope of work U.N.O.

As Requested Only.....
Sand / Select-Fill Materials

V. Scope

A. General

- * Daily Log-In to Current Owner's On-Line Scheduling System.
- * Remove all excess materials at the end of each day.
- * Broom sweep house every day at the end of work.
- * Repair any deficiencies from inspection/QC/Homeowner/Field manager check within 24 hrs.
- * Replace any displaced all fences, orange fencing, downed signage and permit box as needed.
- * Clear the streets of any dirt, mud, nails, screws, aluminum, etc. generated during material delivery and installation.
- * Contractor will be required to meet scheduled start dates with no less than (3) working days of advance notice by the Field Manager.

Initials: Contractor

[Handwritten Signature]

Owner

[Handwritten Signature]



B. Slab Backfill

- Walk the foundation to check for damage. Report damage immediately to the Superintendent before proceeding with work. You will be responsible for any damage to the foundation found after the slab backfill phase.
- Remove any loose dirt and organic material from slab area, including garage.
- Meet with Superintendent to determine garage slab height.
- Dump backfill material in driveway area only. Do not dump in the front yard. If driveway is inaccessible, consult Superintendent.
- In garage, grade the backfill material to allow for 3" of fall from back to front of garage.
- Fill stoop with backfill material 4" from top of backfill material to top of foundation.
- Sweep debris and backfill material from top of foundation.
- All load supporting fill must be installed in a manner to achieve a 2,500 psi soil bearing capacity.
- All fill must be compacted to achieve a density of 95% of the Standard Proctor Density for the fill used.
- Spread or remove excess backfill material from site.
- In the case of a Raised Monolithic Slab or a Block Stem Wall Slab foundation, there will be 2 parts of fill material. These 2 parts consist of the main house pad (sub-pad) and the fill material which is contained within the foundation walls themselves (backfill). The following additional scopes will be required:

1) Block Stem Wall Slab

- a) Sub-pad area to be excavated and filled per engineering report recommendations.
- b) Sub-pad to be filled in 12" lifts with each lift being compacted to achieve a density of 95% of the Standard Proctor Density for the fill used.
- c) Sub-pad to be filled to a height to be equal to the height of the final finish grade.
- d) Backfill to be filled in 12" lifts and each lift is required to be compacted to achieve a density of 95% of the Standard Proctor Density for the fill used.
- e) Backfill final height should be 4" lower than final slab height. This measure is to take into account the fill excavated from footings and plumbing excavations. Contractor is responsible for balancing this excavated material to where fill will not be required to be hauled away.
- f) Sub-pad requires an engineering compaction density report ordered by the builder.
- g) Backfill requires an engineering compaction density report ordered by the builder.
- h) Footings require an Engineering Penetrometer report ordered by the builder.

2) Raised Monolithic Slab Backfill prior to form boards installation

- a) Sub-pad area to be excavated and filled per engineering report recommendations.
- b) Sub-pad to be filled in 12" lifts with each lift being compacted to achieve a density of 95% of the Standard Proctor Density for the fill used.
- c) Sub-pad to be filled to a height to be equal to the height of the final finish grade.
- d) Backfill to be filled in 12" lifts and each lift is required to be compacted to achieve a density of 95% of the Standard Proctor Density for the fill used.
- e) Backfill final height should be 4" lower than final slab height. This measure is to take into account the fill excavated from footings and plumbing excavations. Contractor is responsible for balancing this excavated material to where fill will not be required to be hauled away.
- f) Backfill to be filled as close to the exterior face of the foundation as to minimize the amount of cut required for dig footings and set form boards.
- g) Sub-pad requires an engineering compaction density report ordered by the builder.
- h) Backfill requires an engineering compaction density report ordered by the builder.
- i) Footings require an Engineering Penetrometer report ordered by the builder.

Initials: Contractor

[Handwritten initials]

Owner

[Handwritten signature]



- 3) Raised Monolithic Slab Backfill after form board installation
- a) Sub-grade to be excavated and filled per engineering report recommendations.
 - b) Sub-grade to be filled in 12" lifts with each lift being compacted to achieve a density of 95% of the Standard Proctor Density for the fill used.
 - c) Sub-grade to be filled to a height to be equal to the height of the final finish grade.
 - d) Backfill to be filled in 12" lifts and each lift is required to be compacted to achieve a density of 95% of the Standard Proctor Density for the fill used.
 - e) Backfill final height should be 4" lower than final slab height. This measure is to take lifts account the fill excavated from footings and plumbing excavations. Contractor is responsible for balancing this excavated material to where fill will not be required to be hauled away.
 - f) Additional care shall be used to ensure that the compaction is consistent across the entire extent of the Backfill and up against form hoards.
 - g) Sub-grade requires an engineering compaction density report ordered by the builder.
 - h) Backfill requires an engineering compaction density report ordered by the builder.
 - i) Footings require an Engineering Penetration report ordered by the builder.

VI. Payment

All invoices / PO's shall not be turned in and approved for payment until phase complete and all deficiencies are remedied. Owner reserves the right to make the final decision in determining the correct course of action for any and all repairs. No Extras will be paid unless negotiated prior to performing any work and an approved P.O. is issued.

VII. Warranty

- Contractor shall warrant all work per Owner's contract. All warranty work must be completed within 72 hours of scheduled days and time.

Contractor

Horton's Landscapes Inc
Company Name

Matt Horton
By:

Matt Horton
Name:

CEO
Title:

5/27/14
Date:

Initials: Contractor MH

Owner

D.R. Horton, Inc.

Ron Bunner
By:

Ron Bunner
Name:

Assistant Vice-President
Title:

5/27/14
Date:

Initials: Owner RB



Exhibit "A"

Scope of Work

House Slab Turnkey (Monolithic)

I. Scope Policies

This scope of work outlines specifications as required by Owner. This scope of work is in addition to the General Scope of Work. In the event of any conflict between this scope of work and the Independent Contractor Agreement, the Independent Contractor Agreement shall be deemed to control and prevail. The specifications and standards outlined below may be modified at the discretion of Owner. In the instance that any changes are made to the scope, contractor will be notified and required to resubmit a scope within 2 business days. This scope of work shall apply to all Owner communities. In addition, this scope of work shall override all previous signed scopes of work for the construction phase listed above.

II. General Requirements

Contractor will supply all material, equipment, and labor necessary to complete the house slab turnkey phase of construction. All work shall conform to all building codes, Owner's standards, plans/details, community specs, and industry standards. Prior to starting any job, subcontractor shall meet with Field Manager to review all plot plans, options, and pending inspections. All work shall be completed per the schedule set forth by the Field Manager. Vendor shall provide unit pricing to Owner's purchasing for standard, and any unexpected costs.

III. Bids Requirements

Contractor must provide a material and labor breakdown for all bids. All bids must include the wording "all applicable taxes included". All bids shall be returned to the office by the required deadline. All bids must be accompanied with the following paperwork:

- Signed Scope of Work
- Signed Community Specifications
- Signed Copy of Owner's bid Sheet

IV. Material Specifications

Note: This section outlines general material requirements/manufacturers. This list does not represent all materials to be supplied by contractor. Contractor must supply all materials listed throughout the scope of work D.N.O.

Concrete-3000psi, 4" slump
 Stone-#67 washed stone
 6 mil visqueen
 1/2" anchor bolts, and/or additional anchoring hardware as required
 6x6 10/10 welded wire mesh
 Insulation (Dow Corning Styrofoam)
 1/4" rebar, and/or additional as required. Specifications shall meet local codes.
 Slab work must be within 1/4" for every 10' finished.

Initials: Contractor

Owner



V. Scope

A. General

- Daily Log-In to Current Owner's On-Line Scheduling System.
- Remove all excess materials at the end of each day.
- Broom sweep house every day at the end of work.
- Repair any deficiencies from inspection/QC/Owner/Field Manager check within 24 hrs.
- Replace any displaced silt fence, orange fencing, downed signage and permit box as needed.
- Clean the streets of any dirt, mud, nails, screws, aluminum, etc. generated during material delivery and installation.
- Contractors will be required to meet scheduled start dates with no less than (3) working days of advance notice by the Field Manager.

B. Forming

- Meet with Superintendent to review plans and options prior to forming.
- Provide all necessary form board (timber, stakes, welded wire mesh vapor barrier (6 mil Visqueen), reinforcement steel chairs for steel and wire mesh, Mud Sill Straps per plan and local code.
- Prior to setting forms, ensure that pad is level. If pad is out of level, stop and inform Superintendent immediately.
- Set all formwork per structural drawings, plans and details.
- Ensure all brick ledges are formed per slab and framing plan.
- Ensure all forms are square. Maximum allowable deviation of foundation from square shall be 1/4" as measured diagonally.
- Leave an accessible path for the plumber.
- Place all debris in trash bin or curb or area designated by superintendent. Remove any unused form material from site.

C. Backfill/Prep

- Prior to backfill, ensure that plumbing inspection, and if applicable, underground electrical inspection have passed.
- See Exhibit "A" Scope of Work-Slab Backfill for additional scopes.
- Dig and clean all footings of any organic material/unavailable soils.
- Be responsible for any damage caused to underground plumbing pipes.
- Garage shall have a minimum of 2" fill in the garage, a maximum of 3".
- Install a 1" weather lip 3" inside the garage wall from inside to inside edge of the exterior wall. Ensure there is proper fill from the weather lip to future drive.
- Contractor is ultimately responsible for ensuring the installation of floor outlet conduit, which is supplied by Electrical Contractor. Electrical Contractor is the primary source of installation.
- Form Ratio as required by plans and specifications.
- Install 6x6 10/10 welded wire mesh over slab area; W.W.M. should be installed on chairs, or pulled into the center of the slab while pouring.
- Install rebar in all footings on chairs, as per structural drawings and state and local building codes.
Note: (2) #4 rebar on rebar chairs have minimum specified by Owner. Engineer's requirements may exceed this—verify with plans.
- Install foam insulation as required.
- Install 6 mil poly over slab area.
- Verify all slab dimensions, brick ledges patios, etc. Ensure all are square.
- Notify Superintendent for inspection.
- Contractor to ensure fine slab so inspector/superintendent can verify depth of concrete.

Initials: Contractor

Owner

DRH-001706

Drlar et al v. DRH



D. Pouring

- Ensure all required inspections have passed.
- Concrete pumping, when required, shall not commence until approved by Owner's representative and a Purchase Order is received.
- Slab work must be within 1/4" for every 10' finished.
- Check all forms for level, plumb, and square.
- Install 3000 psi concrete. Concrete shall be installed per industry accepted practices. Do not add more than 1 gallon of water, or any other additive, per yard without written approval by Owner's representative. Concrete is to be shipped from the Batch Plant with a 4" - 5" slump. Concrete shall not be poured unless the temperature is 40° F and rising.
- Protect all joints from weather. Provide plastic and straw blankets as needed.
- Use grade stakes when pouring.
- W.W.M. should be installed on chairs, or pulled into the center of the slab while pouring.
- Install hold downs (i.e. bolts, strips, etc...) as per structural drawings and state and local building codes. Ensure that no hold downs are installed in door openings. Extra hold downs may be required on short walls and wing walls. Install per requirements.
- Take special care when finishing around plumbing pipes.
- Pour all patios and stoops.
- Ensure that there are no cold joints.
- Ensure slab surface finish is smooth and level and free of crowling marks.
- Ensure all brick ledges are level.
- Concrete slabs should be constructed with control joints having a depth of at least 1/4" the slab thickness.
- Trowel garage control joints. Joints should be trowel. Two equal sections in 2 car, four equal sections on 2 car garage, six sections on 3 car garage.
- Broom Finish and picture frame all patios and entry stoops.
- Notify concrete supplier of proper washout area. See Superintendent if you are unaware of concrete washout area. Excessive waste in the washout area will be back charged.
- Concrete vendor is responsible for cost to establish concrete washout area and is responsible for cost to clean out/maintain concrete washout area in accordance with Owner and State / Local environmental standards.
- Remove any over pours from site immediately.
- Provide the Superintendent with all concrete tickets with the appropriate job lot and address within 24 hrs of pour.

E. Stripping Forms

- Forms shall be stripped on the same day having weather conditions. All forms shall be stripped within 24 hrs of pour.
- Parge all honeycombs and plumbing pipes protruding out of slab as needed.
- Remove all form boards from jobsite.
- Clean job site.
- Verify slab is level and there are no dips or humps. Any deficiencies need to be corrected within 24 hrs.
- Grade out any dirt piles that may have been created during slab installation.

VI. Payment

All Invoices/PO's shall not be issued to and approved for payment until phase complete and all deficiencies are remedied. Owner reserves the right to make the final decision in determining the correct course of action for any and all repairs. No Extras will be paid unless negotiated prior to performing any work and an approved P.O. is issued.

Initials: Contractor

Owner



VII. Warranty

- Contractors shall warrant all work per Owner's contract. All warranty work must be completed within 72 hours of scheduled date and time.

Contractor

Lorton's Landscapes Inc
Company Name

[Signature]
By:

MATT HESTER
Name:

CEO
Title:

5/27/14
Date:

Owner

D.R. Horton, Inc.

[Signature]
By:

Ron Bunker
Name:

Assistant Vice President
Title:

5/27/14
Date:

Initials: Contractor

[Signature]

Owner

[Signature]

DRH-001708

Drier et al v. DRH

Exhibit B

Excerpts From 30(b)(6) Deposition Transcript of D.R. Horton, Inc. (Ronald Bunner)

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1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 BEAUFORT COUNTY
4 DEPOSITION OF RONALD BUNNER
5 30(B)(6) D.R. HORTON, INC.
6 RICHARD W. AND REBECCA A. DREIER; YOLANDA I.
7 DRIER; JACOB R. AND CARLA EMERSON; JOHN B. AND
8 LORI ANNE GECY; AARON M. AND STASHA R.
9 GROOMS; ADAM F. GROOMS; AVARAE HALL;
10 MICHAEL B. AND CHEYENNE M. JOHNSON; KENNY
11 MANUEL LOPEZ AND KELSEY TRUDEL LOPEZ; DYLAN
12 C. AND SAMANTHA DAWN MACHADA; MARVIN K. AND
13 MARYALICE MAMARIL; CORY M. MCDANIEL;
14 THOMAS R. AND MELISSA S. MCFEELY; MICHAEL
15 AND KAREN M. RODRIGUEZ; SARMED AND JESSICA
16 M. SHAFI; JAMES J. SMITH, III, AND ALAYSHIA
17 SMITH; AND NICOLE J. VERSTEGEN,
18 Plaintiffs,
19 vs. CASE NO. 2018-CP-07-00911
20 ADVANCED FLOORING & DESIGN DIVISION OF ISI,
21 LLC *tr/a* ADVANCED FLOORING AND DESIGN, LLC;
22 ARMOR BUILDING SOLUTIONS, LLC; ATLAS
23 SURVEYING BFT, LLC *tr/a* ATLAS SURVEYING
24 HOLDING COMPANY, LLC; ATLAS SURVEYING, INC.;
25 BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC;
CROSSROADS ENTERPRISES, LLC; D.R. HORTON, INC.;
DEAN CUSTOM AIR, LLC; EAST COAST CONSTRUCTION
CLEANUP CORP. *tr/a* CLEANUP CO., INC.; FREEDOM
HOMES, INC. *tr/a* ARMOR BUILDING SOLUTIONS,
INC.; HUTTON'S LANDSCAPES, INC.; JENKINS
PLUMBING COMPANY, LC; LATHER CONSTRUCTION
SC, INC.; LATHER CONSTRUCTION, INC.; MASCO
CABINETRY, LLC; PROBUILD EAST, LLC;
PROFESSIONAL DRYWALL & PAINT SERVICES, LLC;
PROFESSIONAL EXTERIORS II, LLC; QUALITY ELECTRIC
OF THE COASTAL CAROLINAS INCORPORATED; STIER
SUPPLY COMPANY *tr/a* STIER-HOLMAN SUPPLY
CO.; SUPERIOR ASSOCIATION SERVICES, LLC; and
VALIM CONSTRUCTION, LLC,
Defendants.

Page 3

1 APPEARANCES
2 ON BEHALF OF PLAINTIFFS:
3 BEN TRAYWICK LAW FIRM, LLC
4 BY: BENJAMIN A.C. TRAYWICK
5 BY: ALEXANDRA SCOTT WILLIAMS
6 171 Church Street, Suite 340
7 Charleston, SC 29401
8 ON BEHALF OF LATHER CONSTRUCTION, INCORPORATED,
9 AND LATHER CONSTRUCTION, SOUTH CAROLINA,
10 INCORPORATED, and QUALITY ELECTRIC OF THE COASTAL
11 CAROLINAS INCORPORATED:
12 ROSS & CRISTALDI
13 BY: SCOTT WINOGRAD
14 863 Coleman Boulevard
15 Suite B
16 Mount Pleasant, SC 29464
17 ON BEHALF OF D.R. HORTON, INC.:
18 OGLETREE DEAKINS
19 BY: MICHAEL NAIL
20 BY: KIRSTEN PETERSON
21 300 North Main Street
22 Greenville, SC 29601
23 ON BEHALF OF PROFESSIONAL EXTERIORS II, LLC:
24 CARLOCK COPELAND & STAIR, LLP
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Charleston, SC 29401
ON BEHALF OF DEAN CUSTOM AIR, LLC and ARCHER
EXTERIORS, INC.:
RICHARDSON, PLOWDEN & ROBINSON, PA
BY: HEYWARD GRIMBALL
235 Magrath Darby Boulevard
Suite 100
Mount Pleasant, SC 29464

1 DEPONENT: RONALD BUNNER
2 DATE: SEPTEMBER 23, 2021
3 TIME: 10:05 AM
4 LOCATION: VIA REMOTE VIDEOCONFERENCE
5 REPORTED BY: DARAH BOLEN, RPR, CSR(IA)
6 CLARK BOLEN
7 CHARLESTON, SC 29415
8 843-762-6294
9 WWW.CLARK-ASSOCIATES.COM
10 Darah@clark-associates.com
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21
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25

Page 2

1 ON BEHALF OF EAST COAST CONSTRUCTION CLEANUP
2 CORP.:
3 CLAWSON & STAUBES LAW FIRM
4 BY: MICHAEL L. LEECH
5 126 Seven Farms Drive, Suite 200
6 Charleston, SC 29492
7 ON BEHALF OF PROBUILD EAST, LLC, and BUILDERS
8 FIRSTSOURCE SOUTHEAST GROUP, LLC:
9 HOWELL GIBSON & HUGHES, P.A.
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21 SERVICES, LLC:
22 MURPHY & GRANTLAND, P.A.
23 BY: JOHN DOUGLAS ELLIOTT
24 Post Office Box 6648
25 Columbia, SC 29260
- and -
HAYNSWORTH SINKLER BOYD
BY: CLARKE W. DuBOISE
P.O. Box 11889
Columbia, SC 29211-1889
ON BEHALF OF BLUE MESA CONSTRUCTION:
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Page 5

1 ON BEHALF OF ARMOR BUILDING SOLUTIONS, LLC:

2 LUZURIAGA MIMS, LLP
3 BY: TIM DARGAN
4 50 Immigration Street, Suite 200
5 Charleston, SC 29403

6 ON BEHALF OF CROSSROADS ENTERPRISES, LLC:

7 HARVEY & BATTEY
8 BY: AUSTIN BLAKE
9 1001 Craven Street
10 Beaufort, SC 29901

11 ON BEHALF OF VALIM CONSTRUCTION, LLC:

12 TUPPER, GRIMSLEY, DEAN & CANADAY
13 BY: STACEY CANADAY
14 Post Office Box 2055
15 611 Bay Street
16 Beaufort, SC 29901-2055

Page 7

1 Exhibit No. 13 E-mail, 10-20-14, from 184
2 Lather construction to
3 Jared O'Sako, DRH 013338
4 Exhibit No. 14 E-mail exchange, 10-20-14, 184
5 DRH 0013352
6 Exhibit No. 15 Bid analysis, 8-4-14, DRH 185
7 000426

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1 RONALD BUNNER, 30(B)(6) D.R. HORTON
2 having been first duly sworn, was examined and
3 testified as follows:
4 EXAMINATION
5 BY MS. LUCEY:
6 Q. Good morning, Mr. Bunner. How are you
7 this morning?
8 A. I'm well. How are you?
9 Q. I'm well. I don't believe I officially
10 introduced myself this morning. My name is Emily
11 Gifford Lucey, and I represent one of the
12 defendants in this case, Hutton's Landscape, Inc.
13 And we are here today to take the 30(b)(6)
14 deposition of D.R. Horton.
15 Before we begin, I'll cover a few ground
16 rules with you. Have you ever been deposed
17 before, sir?
18 A. Yes.
19 Q. Tell me about your prior depositions.
20 A. I don't remember what they were for.
21 Q. Can you tell me when they occurred?
22 A. It's probably been five or six years ago
23 I think was the last one I've done.
24 Q. Was it in connection with your work at
25 D.R. Horton?

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1 Q. Bottom left-hand corner.
 2 A. Yeah. I see that and that would be a --
 3 the line would be the line separating lots 15,
 4 16, 17, 18, and 19 from the -- Shirley Chaplin
 5 listed property below it.
 6 Q. Okay.
 7 A. And then for lot 20 and the common
 8 area -- and forgive me. It's cut off. I don't
 9 know what this name is to the left, but it's the
 10 vertical line that would be to the left side of
 11 lot 20 and the left side of the common area and
 12 to the right of the -- there's property names
 13 there of who the owners are. I just don't --
 14 it's cut off.
 15 Q. Okay. So that is the outside edge in
 16 that particular corner of the property of the
 17 subdivision; is that correct?
 18 A. That is correct.
 19 Q. Now let's stick with the same bottom
 20 left corner. Within the property, there are
 21 various lot numbers. Does each property owner
 22 own a discrete parcel of property?
 23 A. Yes.
 24 Q. And their property, those limits, are
 25 shown with the boundary lines on the map; is that

Page 35

1 Q. -- as part of the development of the
 2 subdivision?
 3 A. No.
 4 Q. So you -- Horton doesn't pay its
 5 subcontractors to work on property that is
 6 outside of the subdivision?
 7 A. I would say no.
 8 Q. All right. Have you ever been out to
 9 the Tidewater subdivision, Mr. Bunner?
 10 A. Yes. Two or three times I believe.
 11 Q. And when were those visits?
 12 A. They were -- I don't have the exact
 13 date -- years. They were during the actual home
 14 construction. Not during the development. I
 15 believe I -- I can't remember if this was done in
 16 two phases of development. But I went out there
 17 to observe home construction and talked with the
 18 superintendent on-site.
 19 Q. Okay. How often were the
 20 superintendents on-site? I believe you
 21 identified Mr. Federinko, Mr. Yannarella and
 22 Mr. Delgado as superintendents. Was there only
 23 one superintendent assigned to this particular
 24 project for D.R. Horton?
 25 A. No. Okay. The first part of the

Page 34

1 correct?
 2 A. At the time that this was taken, I would
 3 say yes, but I don't know if any properties have
 4 transferred or changed hands to make it a not
 5 accurate representation as of today.
 6 Q. And if we set aside who owns it but just
 7 in terms of the property, each homeowner has a
 8 specific parcel of property that they own; is
 9 that correct?
 10 A. I would say yes.
 11 Q. And it doesn't extend to, for example,
 12 Shirley Chaplin's property?
 13 A. It should not, no.
 14 Q. And it doesn't extend to the property to
 15 the left of lot 20, for example?
 16 A. No, it doesn't extend.
 17 Q. Does any individual homeowner own the
 18 common area or is that owned by the homeowners
 19 association?
 20 A. That would be owned by the homeowners
 21 association.
 22 Q. Okay. Would D.R. Horton expect any of
 23 its subcontractors to work on areas outside of
 24 the Tidewater Creek subdivision --
 25 A. No.

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1 question, how often, typically you're going to
 2 have a site superintendent at least visit the
 3 site at least daily during the week. Weather
 4 dependent on it, vacation, things like that, sick
 5 days, you may not have it. Someone else may fill
 6 in for them if they have time, like their
 7 manager.
 8 The second part of the question over the
 9 period of this that I am aware of, I believe
 10 Peter Delgado was there when we first started the
 11 first few homes out there. Then Nicholas
 12 Yannarella came in and I'm thinking that maybe --
 13 I don't know if they were there together or if
 14 Peter left the company and then Nicholas was by
 15 himself. I think at one point Nicholas did not
 16 have Peter with him.
 17 And then I believe Brad Federinko was
 18 hired and placed out there with Nicholas to train
 19 to be a superintendent under Nicholas's
 20 supervision.
 21 Q. Under ideal circumstances, how many
 22 superintendents would Horton prefer or like to
 23 have on-site that has I think 54 lots?
 24 A. It's not -- it's not really a function
 25 of the number of lots. It has to do with the

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1 A. I believe that was Jay Henderson.
 2 Q. Does D.R. Horton also have a commercial
 3 general contractors license?
 4 A. Yeah. They may be one and the same.
 5 Q. Do you know was Tidewater constructed
 6 under a residential or a commercial license, do
 7 you know?
 8 A. It's residential construction.
 9 Q. Okay. For this particular project, did
 10 D.R. Horton hire subcontractors for work in the
 11 neighborhood?
 12 A. We hired independent contractors.
 13 Q. And tell me why you have distinguished
 14 subcontractors from independent contractors.
 15 A. That's the contract we use. It's titled
 16 Independent Contractor Agreement.
 17 Q. Does D.R. Horton act as the general
 18 contractor for the project?
 19 A. No. We're the owner.
 20 Q. So is it Horton's position that it was
 21 not a general contractor in connection with the
 22 construction of the Tidewater neighborhood?
 23 A. That's correct. We're the owner.
 24 Q. Who pulled the permit -- the building
 25 permits for construction of the various homes in

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1 Q. So what -- who was the general
 2 contractor that Horton hired to develop the
 3 Tidewater subdivision?
 4 A. The actual on-site work I believe was
 5 Lather.
 6 Q. What about with respect to the
 7 individual houses and lots? Is there a general
 8 contractor?
 9 A. I would not say general contractor.
 10 Q. Who was running the ship? Who was
 11 coordinating schedules?
 12 A. Horton was doing that, that's for sure,
 13 on the construction of the homes.
 14 Q. Who was managing and determining scopes
 15 of work?
 16 A. I managed it, but the determination was
 17 typically a group collaboration between
 18 construction management, purchasing manager, and
 19 myself.
 20 Q. But that was all within Horton; is that
 21 accurate?
 22 A. That's correct.
 23 Q. Who oversaw the work of the
 24 subcontractor or the -- what you describe as
 25 independent contractors?

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1 Tidewater?
 2 A. For the building permits -- the main
 3 building permit was pulled by D.R. Horton.
 4 Q. Okay. What do you mean by the main
 5 building permit? You mean a permit --
 6 A. Well, they require different -- like
 7 electricians have to pull their own permits.
 8 Mechanical contractors have to pull their own --
 9 they're like -- certain permits they're required
 10 to pull. It's in addition to the building
 11 permit.
 12 Q. Does an owner have different duties and
 13 obligations than a general contractor would when
 14 constructing -- I'm sorry?
 15 A. Yes. I'm sorry. I didn't let you
 16 finish. Go ahead.
 17 Q. That's okay.
 18 Does an owner have different duties and
 19 obligations than a general contractor when
 20 constructing a home or developing a subdivision?
 21 A. Yes.
 22 Q. Tell me what you believe the differences
 23 are.
 24 A. Well, in developing the subdivision,
 25 we're hiring a general contractor to do so.

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1 A. For the vertical construction on the
 2 homes would have been the superintendent.
 3 Q. Okay. What about for the landscaping
 4 and land clearing, grubbing, grading, et cetera?
 5 Who oversaw that work?
 6 A. Well, now you're crossing over between
 7 land development and vertical construction.
 8 Clearing and grading -- and without me having the
 9 actual development contract for the site
 10 development of Tidewater Creek, I don't know
 11 their scope of work, so it's hard for me to tell
 12 whether how much grading or clearing or grubbing
 13 was done by the site contractor.
 14 Q. Let's just focus on the construction of
 15 the home, completion of the lots, landscaping,
 16 et cetera, for now.
 17 A. Okay.
 18 Q. Who oversaw the work of those -- of the
 19 independent contractors completing that work?
 20 A. The superintendent.
 21 Q. Who was employed by Horton?
 22 A. That's correct.
 23 Q. Did the superintendent have supervisory
 24 obligations regarding the work of the independent
 25 contractors?

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1 A. No. I wouldn't say supervisory. I'd
2 say more of oversight and coordination.

3 Q. Could the superintendent or anyone else
4 from Horton direct the means and methods for
5 construction?

6 A. Means and methods -- I would say no,
7 because it's already part of the scopes of work
8 and contracts.

9 Q. So the scopes of work, who drafted and
10 prepared the scopes of work for this subdivision?

11 A. That would be me.

12 Q. And you would be part of Horton?

13 A. That's correct.

14 Q. So if a particular independent
15 contractor, to use your nomenclature, was not
16 doing something that complied with the project
17 specs, could the superintendent stop that
18 contractor and direct them on how to complete the
19 work in accordance with the scopes of work and
20 related specs?

21 A. I would say not stop, but ask the
22 question, if there's something that they may see
23 that's a question that they're not sure about,
24 but they would want to ask the contractor and
25 then typically ask the contractor's boss and

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1 individual whose name is listed or is it
2 D.R. Horton who is listed?

3 A. I would have to look. I'd have to see
4 one. It may be both.

5 Q. And I think you said the construction
6 manager for this project, the Tidewater project,
7 was Carl Aten?

8 A. Yes.

9 Q. And he's still with D.R. Horton?

10 A. He is.

11 Q. And I feel like I asked you where he
12 was, but I'm afraid I can't remember your answer.

13 A. He's still in the Beaufort/Savannah
14 area.

15 Q. What are the duties and obligations of a
16 construction manager, and specifically Mr. Aten,
17 with regard to Tidewater?

18 A. Mainly it's to make sure that the
19 superintendents are progressing on their
20 schedules on a regular basis.

21 Q. Does the construction manager visit the
22 project site?

23 A. Yes.

24 Q. How often would you typically expect a
25 construction manager to visit the site?

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1 then work their way up if there's something that
2 they may be -- think might be an issue, but keep
3 in mind that the contractor knows more about what
4 they're doing than we do.

5 Q. Yet Horton is the one who prepares the
6 project specifications; is that right?

7 A. Yes. For the vertical construction,
8 yes.

9 Q. And the scopes of work, correct?

10 A. That is correct.

11 Q. Could Horton terminate a contractor for
12 failing to follow the scopes of work and project
13 specifications?

14 A. Horton can terminate a contractor for
15 any reason they want.

16 Q. Did the work of the independent
17 contractors, was that under the residential
18 builders license held by Horton? Except for
19 those who had to pull their own permits, was the
20 other work performed under D.R. Horton's license?

21 A. The name's not actually in D.R. Horton's
22 name, how the licenses are. It's basically in
23 another person's name, but they're the qualifier
24 for D.R. Horton.

25 Q. On the building permits, is it the

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1 A. Probably at least a couple of times a
2 week.

3 Q. Would the construction manager have
4 authority or ability to question a contractor
5 about the kind of work they were performing and
6 whether it complied with the scopes of work and
7 project specs?

8 A. Yes.

9 Q. Was there a specific project manual for
10 Tidewater? I understand there were plans for
11 specific houses; is that correct?

12 A. There are -- yes. There are specific
13 house plans for each lot.

14 Q. Okay. There were civil engineering
15 plans; is that correct?

16 A. Yeah. We refer to them as structural
17 engineering but, yes, it's civil engineering
18 plans for each house.

19 Q. Tell me what you mean by that.

20 A. The structural?

21 Q. Yeah. How would you describe the
22 structural plans?

23 A. They're basically engineering details
24 and drawings to specify what materials and --
25 arrangement of materials and fastening patterns

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1 Q. So my question -- the first one is rough
2 grade. How do you distinguish that from the
3 rough grade what Lather performed on the site?
4 Are they two different types of rough grading?
5 A. Yes. This would be rough grade after
6 the house slab has been installed while Lather is
7 during the development process.
8 Q. Okay. And I think even in the general
9 scope it says, Rough grade is defined as a,
10 quote, Fine grade suitable for the final
11 installation of sod, seed, and all of the
12 landscape materials; is that correct? That's
13 under section 5-A.
14 A. Where it says slab fine grade? Yes.
15 Oh, wait a minute. You said it was under A?
16 Q. Yes. 5-A, the last bullet point on the
17 page.
18 A. Yes.
19 Q. The third bullet point in section 5-A
20 says the contractor, I guess, must repair any
21 deficiencies from inspections/QC/homeowner/field
22 manager check within 24 hours.
23 Does D.R. Horton maintain records of
24 when these inspections or field manager checks
25 occurred?

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1 back?
2 A. They will look at the yards, yes.
3 Q. And if they saw, for example, something
4 that was not in accordance with the plans or the
5 scope of work for Hutton, would the
6 superintendent have contacted Hutton and
7 instructed them to fix it?
8 A. They would -- yes. They would -- and
9 then Hutton's would have fixed it unless it was
10 something that Hutton's determined that shouldn't
11 be fixed and there's nothing wrong with it, in
12 which case it would bring a discussion. So yeah.
13 I mean, there's plenty of times that a discussion
14 has to take place to determine if something needs
15 to be done.
16 Q. Okay. And what if something that the
17 superintendent asked Hutton's to do was outside
18 of Hutton's scope of work, would Hutton's submit
19 change order requests and if it was approved,
20 would an extra purchase order be issued?
21 A. Yes.
22 Q. And with regards to Hutton, do you have
23 any recollection of any discussions you
24 personally had with Matt Hutton regarding
25 Tidewater either before, during, or after

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1 A. No. It would be more of an e-mail
2 record, most likely. I see -- it's -- I don't
3 say that there's a written record of every one of
4 those. Now there would be a written record of
5 the -- that reference to the homeowner -- the
6 homeowner walk?
7 Q. Right.
8 A. And it's basically to say if there's any
9 deficiencies in -- amongst any of these items,
10 during any of these items, it needs to be
11 corrected within 24 hours. But I would still say
12 that's 24 hours of notification.
13 Q. Okay.
14 A. I mean, we would have had to notify
15 them.
16 Q. Right. Would the superintendents as
17 part of their responsibilities on-site walk the
18 front and backyards or would they just walk
19 inside?
20 A. I mean, they would walk the front and
21 backyards, walk around looking at the outside of
22 the house. They're -- my experience with the
23 superintendents, they're looking at that house
24 quite a bit.
25 Q. And what about the yards, both front and

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1 construction of the subdivision?
2 A. Not specific conversations. I'm sure
3 him and I talked about it here and there about
4 certain items. I don't really have any specific
5 memories of any specific conversation with Matt.
6 Q. How about anyone else from Hutton's
7 Landscapes, Kevin Chicharello [phonetic], Lisa
8 Hutton, Melissa Hutton, anyone else?
9 A. Well, I've had plenty of conversations
10 with them. Most of my dealings with Hutton's
11 would have been more pre -- before Tidewater
12 Creek. I dealt with him a lot more often in
13 earlier years. Directly.
14 Q. Why were you dealing with them less
15 during Tidewater Creek and subsequent to that?
16 A. Well, my title changed from city manager
17 back to VP of ops. So as city manager, I was
18 involved with all -- plenty of items in the
19 Hilton Head/Savannah area, but during Tidewater
20 Creek, I was back to VP of operations for -- at
21 the time, Hilton Head/Savannah all the way to --
22 I believe Wilmington, North Carolina.
23 So I guess I would speak with Matt. I
24 would have e-mails -- possible e-mails with Matt
25 and Melissa. Not as much with Kevin. But I had

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1 the South Carolina entity worked on the project.
 2 But we can leave it there for now.
 3 A. I didn't even know there were two
 4 different entities.
 5 Q. As far as kind of getting back to the
 6 overall project, was D.R. Horton the one who
 7 chose this site for this development?
 8 A. D.R. Horton chose the land, yes.
 9 Q. Okay. And they're the ones who hired
 10 the contractors for the project, correct?
 11 A. Yes.
 12 Q. And they're also the ones that sold the
 13 properties?
 14 A. Yes.
 15 Q. And did they also oversee the work of
 16 the -- the work at the properties?
 17 A. They provided -- yeah. They performed
 18 oversight, yes.
 19 Q. Okay. And do they have an overall
 20 responsibility for the construction process?
 21 MR. NAIL: Objection.
 22 A. I'd say not overall responsibility. We
 23 do rely on our engineers for the development
 24 process now. We do rely on our engineers to
 25 confirm that the contract documents have been

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1 equipment is on-site.
 2 You can sort of see -- that's just a
 3 drive-by, look out there and see that the
 4 equipment is on-site, they're doing something,
 5 whatever the heck they're supposed to be doing,
 6 whether they're putting in stormwater or sewer or
 7 whatever or moving dirt. They're out there doing
 8 something. Whether it's actually done correctly
 9 is determined by the engineer.
 10 Q. Okay. And as we discussed earlier, the
 11 actual person for D.R. Horton that's on-site
 12 providing, as you said, kind of daily supervision
 13 is a superintendent; is that right?
 14 A. For the home vertical construction, that
 15 is correct.
 16 Q. Okay. But it's -- okay. Let's kind of
 17 parse that out a little bit, and maybe I wasn't
 18 listening closely -- I should have been -- to
 19 what you just said. So it's different for the
 20 land development part.
 21 A. That's correct. And with land
 22 development, you'd have a land development
 23 manager and/or land development project managers
 24 that may be assigned to one or two or more
 25 projects, depending on how many projects you have

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1 performed for each pay app.
 2 Q. Okay.
 3 A. In other words, the progress that the
 4 contractor is claiming has been made, it has been
 5 made and to the document specifications required.
 6 We rely -- that's why we have an observing
 7 engineer -- I believe it was a separate one than
 8 the design engineer that we determined today --
 9 that comes out and puts a professional eye on it
 10 for us.
 11 Q. And I believe we saw one of those
 12 documents that looked like it was Carolina
 13 Engineering Consultants. Does that sound right?
 14 A. Yeah. That sounds right, yes.
 15 Q. And so their role on this project might
 16 have been to provide some sort of project
 17 supervision type thing -- oversight as well?
 18 A. Well, that would be our only
 19 professional checking; in other words, that's why
 20 we have them to make sure because we need a
 21 professional just to check the professional -- or
 22 the contractor's work.
 23 So other than us really -- we do oversee
 24 it as far as like scheduling, you know, going out
 25 there and making sure contractors are there or

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1 going at any one time, and they do not
 2 necessarily visit the site on a daily basis.
 3 Q. So when we're doing the grading, who
 4 would be the person overseeing that for
 5 D.R. Horton?
 6 A. I mean, overall that would have been
 7 Jared, Jared O'Sako.
 8 Q. And that's the land development manager.
 9 That's the title of the position?
 10 A. I don't know if he had that title -- I'm
 11 thinking he did have the manager title at that
 12 point in time. Yeah, that's what I'm thinking.
 13 Q. And you mentioned earlier how you were
 14 on-site a couple of times. I am just trying to
 15 understand what was your actual role in the
 16 project or connection with it? Did you have some
 17 kind of --
 18 A. Well, the purchasing departments
 19 reported to me, and purchasing will periodically
 20 make field visits, whether it's to make sure that
 21 the right materials are being -- like
 22 manufacturer's usage is being done. We select
 23 certain manufacturers. Sometimes it's out there
 24 just to count material. Like we can count studs
 25 in the house for a framing package, that kind of

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP0700911

Richard W Dreier et al
PLAINTIFF(S)

Huttons Landscapes Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Hutton Landscapes Inc. Motion for Summary Judgement on the Claims of Plaintiffs is denied as the Court finds genuine issues of material facts exist, except for those claims withdrawn by Plaintiff's against Hutton that include Negligent Misrepresentation, Rescission, South Carolina Unfair Trade Practices, and Fraud.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/12/2021 .

Armor Building Solutions Inc
Garcia Reza Rodiles
Graciela Reza
Americo Roofing Concepts Inc
Classy Maintenance Services
Diaz Handyman
Camargo Plumbing, Llc
Salvador Diaz
Construction Pros, Llc
Jorge Pilar Ramirez
Cayetano Cordova

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Beaufort Common Pleas

Case Caption: Richard W Dreier , plaintiff, et al VS Atlas Surveying Inc , defendant,
et al
Case Number: 2018CP0700911
Type: Order/Electronic Form 4

H. Steven DeBerry, IV

Circuit Court Judge 2771

Electronically signed on 2021-11-12 13:40:04 page 3 of 3

ELECTRONICALLY FILED - 2021 Nov 12 2:14 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2018-CP-07-00911
	)	
Richard W. and Rebecca A. Drier; <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
Americo Roofing, Inc. <i>et al.</i> ;	)	
	)	
Defendants,	)	
	)	
Builders FirstSource-Southeast Group, LLC	)	
and ProBuild Company, LLC,	)	
	)	
Third Party Plaintiff,	)	
	)	
v.	)	
	)	
Blue Mesa Construction, Inc.,	)	
	)	
Third Party Defendant)	)	

**D.R. HORTON'S MEMORANDUM IN OPPOSITION TO LATHER
CONSTRUCTION, INC'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendant, D.R. Horton, Inc. ("Crossclaimant" or "DRH"), pursuant to South Carolina Rule of Civil Procedure 56, and files this Memorandum in Opposition to Defendant, Lather Construction S.C., Inc. and Lather Construction, Inc.'s (hereafter collectively "Lather" or "Defendant") Motion for Summary Judgment.

DRH will show that Lather's Motion for Summary Judgment should be denied because there exists at least a scintilla of evidence that: (1) there is an issue of material fact as to which contract applies; (2) DRH's claims for Contractual Indemnity are not barred by the Anti-Indemnity Statute, S.C. Code Ann. 32-2-10; (3) the contract provisions at issue between DRH and Lather are valid, legal, and enforceable; and (4) the unhand cleans defense is without merit.

I. BACKGROUND

a. The Contracts

This case concerns alleged defects in the site development and construction of homes in Tidewater Creek, a neighborhood in Beaufort County, South Carolina (hereafter "Tidewater"). D.R. Horton at all times prior to the sale of the properties was the Owner of Tidewater after purchasing the land in 2014. Before the site development process commenced, D.R. Horton hired Lather to serve as the general contractor for, among other things, the following tasks: land clearing and demolition work, drainage, grading, asphalt paving, utilities, and sanitary sewer. As consistent with D.R. Horton's corporate policies, D.R. Horton and Lather entered into an "Independent Contractor Agreement" ("ICA") on December 2nd, 2013, which governed the relationship between D.R. Horton and Lather at the time Lather commenced its work at Tidewater. Given the comprehensive scope of Lather's work as the general contractor, and the engineer's specifications required to perform the work, Lather and D.R. Horton also entered into a contract prepared by the site development engineer, which provides specific details and information surrounding each parties' duties, responsibilities, and scope of work at Tidewater (hereafter "Site Development Contract"). Importantly, both the ICA and the Site Development Contract contain indemnity provisions.

b. DRH's Cross-Claims Against Lather

Having been sued under tort and warranty theories by the Plaintiffs, as the owner, for alleged deficiencies in the work performed by Lather, DRH has properly alleged a cross-claim for contractual indemnity against Lather. Therein, DRH expressly alleges that:

105. Lather entered into the Contract with DRH pursuant to which Lather agreed to defend, indemnify, and hold DRH harmless against any and all claims, losses, costs, and damages including but not limited to claims for property damage,

pertaining to Lather's performance under the Contract and caused in whole or in part by Lather's conduct.

106. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which are denied, DRH alleges that any damages were in fact sustained by the Plaintiffs in this action arose out of the conduct of Lather or its agents in connection with Lather's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Lather or its agents and not a result of any actions or omissions on the part of DRH.

107. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied. DRH is entitled to contractual indemnity against Lather in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys' fees and costs.

(DRH Ans. to 2nd Amnd Comp & Cross-claims at ¶¶ 105-07.)

D.R. Horton's contractual indemnity claim is based on the indemnity provision of the ICA, copied below.

18. CONTRACTOR'S INDEMNITY.

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

The Site Development Contract also has indemnity provisions. Section 4.06 of the Site Development Contract documents and specifications has an indemnification provision for "Hazardous Environmental Conditions." Section 6.11 (Titled Use of Site and Other Area) also contains the following language:

3. To the fullest extent permitted by Laws and Regulations, CONTRACTOR shall indemnify and hold harmless OWNER, ENGINEER, ENGINEER's Consultant, and the officers, directors, partners, employees, agents, and other consultants of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to any claim or action, legal or equitable, brought by any such owner or occupant against OWNER, ENGINEER, or any other party indemnified hereunder to the extent caused by or based upon CONTRACTOR's performance of the Work.

Finally, Section 6.20 Contains an Indemnification Provision, which applies to all work performed by Lather:

6.20 Indemnification

A. To the fullest extent permitted by Laws and Regulations, CONTRACTOR shall indemnify and hold harmless OWNER, ENGINEER, ENGINEER's Consultants, and the officers, directors, partners, employees, agents, and other consultants and subcontractors of each and any of them from

and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage;

1. is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom; and

2. is caused in whole or in part by any negligent act or omission of CONTRACTOR, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable, regardless of whether or not caused in part by any negligence or omission of an individual or entity indemnified hereunder or whether liability is imposed upon such indemnified party by Laws and Regulations regardless of the negligence of any such individual or entity.

B. In any and all claims against OWNER or ENGINEER or any of their respective consultants, agents, officers, directors, partners, or employees by any employee (or the survivor or personal representative of such employee) of CONTRACTOR, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, the indemnification obligation under paragraph 6.20.A shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for CONTRACTOR or any such Subcontractor, Supplier, or other individual or entity under workers' compensation acts, disability benefit acts, or other employee benefit acts.

C. The indemnification obligations of CONTRACTOR under paragraph 6.20.A shall not extend to the liability of ENGINEER and ENGINEER's Consultants or to the officers, directors, partners, employees, agents, and other consultants and subcontractors of each and any of them arising out of:

- 1. the preparation or approval of, or the failure to prepare or approve, maps, Drawings, opinions, reports, surveys, Change Orders, designs, or Specifications; or**
- 2. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.**

c. Lather's Motion For Summary Judgment Against DRH

Lather filed this motion, alleging that summary judgment is proper because: (1) D.R. Horton's contract with Lather for the Project does not contain an indemnification provision; (2) If there is a contractual indemnity provision, D.R. Horton's claims for Contractual indemnity are barred by the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10 et seq, and *D.R. Horton, Inc. v. Builders FirstSource Se. Grp, LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018); (3) D.R. Horton's Contract is illegal and unenforceable; (4) D.R. Horton's Contractual Indemnity Provision violates the requirements set forth in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018); (5) D.R. Horton's claim for

equitable indemnity is not ripe, and (6) D.R. Horton has unclean hands and thus its claim in equity fails as a matter of law. *See* Lather's Mot. For Sum. J. For the reasons and authority set forth below, the Court should find that Lather has failed to show that summary judgment is appropriate as to each of Crossclaimant's claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Turner v. Milliman*, 392 S.C. 116, 122 (2011) (citing *Fleming v. Rose*, 350 S.C. 488, 493). Summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). Unless the case requires a heightened burden of proof, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C.1975)) (internal quotations omitted).

III. LEGAL ARGUMENT

a. DRH is entitled to contractual indemnity.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990). A party's right to indemnity may arise by contract or in equity based on the relationship between a first and a second party. *Id.*; see also *Stuck v. Pioneer Logging Machinery, Inc.* 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). In *Town of Winnsboro*, the court used the following analogy to describe the principles of contractual indemnity:

A familiar example of contractual indemnity is the third party liability insurance policy. Under such a policy, the insurer (the first party) agrees to pay the insured (the second party) the amount of any damages the insured may become legally liable to pay a third party. In this situation the insured's liability to the third party is often (though not necessarily) based on the insured's own fault (*e.g.*, negligent operation of an automobile, failure to maintain premises in safe condition). That is, the second party may be an at fault party.

Town of Winnsboro, 303 S.C. at 56, 398 S.E.2d at 502.

The indemnity provision of the ICA applies to this case. See Ex.1, Affidavit of Ron Bunner, hereto attached. While Lather cites to Mr. Bunner's Deposition in support of its argument that the Site Development Contract was the exclusive contract governing Lather's work at Tidewater, its citation to the record is misconstrued and incomplete. First, deposing counsel never presented Mr. Bunner with the ICA and asked whether it applied to Tidewater during the deposition. Second, Mr. Bunner testified that the Site Development Contract is a contract that applied to the work. See Ex. 2, Bunner Dep. Tran pg. 105, hereto attached. Not once did Mr. Bunner testify that it was the exclusive contract. Given that Lather never presented both contracts to him, deposing counsel's failure to ask about the applicability of each to contract to Tidewater renders the testimony

incomplete. Moreover, as the following deposition excerpts illustrate, Lather's owner testified that the ICA governed the work at Tidewater, rendering Lather's motion for summary judgment inappropriate based on its own fact witness's testimony.

17 (Defendant's Exhibit 1, Contract
18 Documents and Specifications
19 [DRH-459-468], was marked for
20 identification.)
21 BY MR. NAIL:
22 Q So I've just handed you Defendant's
23 Exhibit 1. This is DRH-459 through 468. Do you
24 recognize this document?
25 A No.

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1 Q If you'll turn to Page -- the very last
2 page, 468, for me. Is that your signature at the
3 top right-hand corner?
4 A Yes.
5 Q So what is this document?
6 A I'm not sure, signing the contract to do
7 the work.
8 Q And would you agree that DR Horton was
9 the owner of the project?
10 A Yes.
11 Q And Lather Construction was the general
12 contractor for the development phase?
13 A Yes.

18 BY MR. NAIL:
19 Q This is DRH-948 through 956. Do you
20 recognize this document?
21 A I guess the same thing, contract.
22 Q If you'll go to the last page for me,
23 Page 956. At the right-hand bottom corner, is that
24 also your signature at the bottom?
25 A Yes, it is.
5 Q Was this the agreement that was in place
6 at the time you commenced work at Tidewater Creek?
7 A Looks like it, yes.

By raising the issue of the applicability of the Site Development Contract in its brief – Lather conflicts its own testimony and D.R. Horton’s position. Indeed, Lather itself has created an issue of material fact as to which contract applies. Finally, Lather’s insistence that the Site Development Contract and not the ICA applies fails to provide a basis for Summary Judgment because the Site Development Contract *also contains an indemnification provision*. Lather’s failure to recognize the indemnification provision contained in the Site Development Contract is fatal to its Motion for Summary Judgment, which rests its case on the Site Development Contract lacking an indemnification clause.

b. The indemnity provision at issue is valid and enforceable under S.C. Code § 32-2-10.

Lather argues, in the alternative, that if an indemnification provision exists and applies, then it is unenforceable under S.C. Code § 32-2-10 and applicable South Carolina case law. However, Lather’s reliance on the South Carolina Anti-Indemnity Statute is misplaced. The statute exclusively addresses claims for indemnity arising solely from the negligence of the indemnitee (here, DRH), and in which there is no possibility of a finding of liability on the part of the indemnitor (here, Lather). Such is not the claim pled or presented by DRH against Lather. The statute states, in part:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents,

employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

S.C. Code Ann. § 32-2-10. (emphasis added).

Defendant gives only a conclusory assertion that the contract is unenforceable under the statute in its motion, and its memorandum is void of any reference to the statutory language at all. However, D.R. Horton anticipates that Defendant will attempt to argue that the indemnity clause contained in the ICA violates § 32-2-10 and is unenforceable. More specifically, Crossclaimant expects Defendant to rely on the statute's language that an indemnification provision within a construction contract that attempts to indemnify a harm "resulting from the sole negligence of the promisee" is unenforceable. S.C. Code § 32-2-10 (emphasis added). Further, Lather will likely argue that the provision in the ICA, providing that contractor shall defend and indemnify for "any negligent or intentional act or omission of the indemnitee [DRH] related in any way to the work, excepting only liability or claims arising out of bodily injury to persons, death, or damage to property proximately caused by or resulting from the sole negligence or sole intentional act or omission of indemnitee" is impermissible under the statute. Ex. 1 at ¶ 10.1. However, the ICA complies with the statute because it explicitly excepts DRH's sole negligence from Lather's indemnity obligation. *See* Ex. 1 at ¶ 10.1

Moreover, even if one were to concede, for the sake of discussion, that the aforementioned clause contained in the indemnity provision of the ICA might be impermissible under § 32-2-10, such a fact would not bar Crossclaimant from seeking indemnity under the ICA. Defendant has overlooked the remaining portion of the statute. The statute goes on to provide that separate promises to indemnify the indemnitee for acts arising out of the indemnitee's partial negligence or

unrelated to the indemnitee's negligence are not invalidated by the statute. S.C. Code § 32-2-10. This means that the State Legislature expressly contemplated, in the plain language of the statute, that while an indemnification promise related to the indemnitee's sole negligence is unenforceable, other promises in an indemnification section are still valid.

The provision at issue here contains such separate promises. Lather promised to defend and to indemnify DRH for liability arising out of Lather's work, and that is the provision of the ICA at issue in this case. ¶ 10.1. Thus, even if § 32-2-10 invalidates any promise by Lather to indemnify DRH for its own sole negligence (DRH is unaware of any such promise), the separate promise to defend and to indemnify DRH for amounts related to or arising out of Lather's work, either in whole or in part, is valid and enforceable. S.C. Code § 32-2-10. Again, nothing in the statute removes Lather's obligation to indemnify DRH for liability arising out of Lather's own work, which is the remedy that has been asserted by DRH.¹ *Id.* Defendant's promise to defend and indemnify Crossclaimant is valid under the statute.

c. The indemnity provision at issue is valid and enforceable under South Carolina Common Law.

In South Carolina, courts enforce the valid provisions of a contract in accordance with the parties' intent at the time the contract was executed. *See Beach Co. v. Twillman, Ltd.*, 566 S.E.2d 863, 866-67 (S.C. Ct. App. 2002). Should a court determine that an unenforceable provision exists in a contract, "the next question becomes whether, under any appropriate circumstances, the ... agreement[] can be reformed, or the identified illegal provisions ... severed, thus preserving ... [the]

¹ DRH has asserted that, "To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by or other acts and/or omissions of Lather, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Lather or its agents and not a result of any actions or omissions on the part of DRH." See DRH Second Amnd. Ans. to Plaintiff's Second Amnd. Comp. ¶ 106.

agreement between the parties." *Hooters of Am., Inc. v. Phillips*, 39 F. Supp.2d 582, 624 (D.S.C. 1998), *aff'd* 173 F.3d 933 (4th Cir. 1999). It is not proper to sever a provision where it is part of several interdependent provisions in the contract. *Beach Co.*, 566 S.E.2d at 867. However, a provision may be severed when it is susceptible to division, has two or more parts, is not dependent on other parts of the contract, and is not intended by the parties to be an interdependent clause. *Id.*; *see also Columbia Architectural Grp., Inc. v. Barker*, 266 S.E.2d 428, 429 (S.C. 1980).

Where the parties intend to make separate and not interdependent promises, the Court should consider the enforceability of the provision at issue separately. *See Columbia Architectural Group*, 266 S.E.2d at 429. The parties' listing or denoting of promises separately is evidence of their intent that promises be separate and independent. *Id.* Further, where separate provisions, even in the same section of a contract, contain rights wholly independent of each other, one provision may be severed while the other is enforced. *Beach Co.*, 566 S.E.2d at 867 (severing an unenforceable provision and enforcing another provision in the same section of the contract). In contrast, courts have found that unenforceable provisions could not be severed, such that an entire section or contract was unenforceable, where multiple provisions were interrelated and pervasive. *Simpson.*, 644 S.E.2d 674 n.9 (comparing the strike to an entire arbitration section with several unenforceable, interrelated provisions to the severability of "one offending provision"). Finally, the Court of Appeals, in a case cited by Lather to support their position, selectively enforced provisions of D.R. Horton's indemnity language in a contract similar to one at issue here. *See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45.

This is not a case where the parties' contract cannot be enforced as written in the absence of several interdependent, allegedly unenforceable, provisions. Here, the one allegedly unenforceable provision is not at issue and is clearly susceptible to division such that the parties'

agreement on point may still be enforced. Indeed, Defendant's indemnification promises are divided on purpose by the parties, themselves, and thus separately numbered. (Ex. 1 at ¶ 10.)

Indemnification for liability arising out of the "work performed or to be performed or supplied by contractor or by the contractor or contractor's agents or employees" is numbered (2), while indemnification for liability arising out of DRH's negligence is numbered (4). *Id.* The fourth indemnification provision follows an "or" in this list, not an "and." *Id.* Defendant agreed it would indemnify Crossclaimant for amounts, including reasonable attorneys' fees and defense costs arising out of Lather's work *or* DRH's negligence. *Id.* It is clear the parties intended these to be separate promises. The separate promises show that the parties intended that Lather indemnify DRH for defense costs and attorneys' fees related to or arising from Lather's work. Defendant's contention that Lather may avoid his entire promise to indemnify on the basis that Lather promised to indemnify DRH for amounts related to DRH's negligence (of which DRH contends there was none) is meritless. Thus, Defendant's promise to defend and indemnify is valid under common law.

Nonetheless, Lather relies upon *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp, LLC*. to conclude that the ICA is illegal and unenforceable. 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). This conclusion misconstrues the holding of *Builders FirstSource*. That case held, based on the unique facts of that case, that the single provision of the contract purporting to require the subcontractor to indemnify the contractor for liability to which it did not contribute was unenforceable. *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). That case was superficially similar to the present case only in that it involved DRH seeking indemnity from its contractor based on a contract between the parties. *Id.* at 43. However, there, the facts diverge. In that case, the claim for indemnity was asserted after

the conclusion of an arbitration to which the indemnitor was not a party. Therein, the arbitrator had issued a simple award stating only the amount awarded to the plaintiff, with no findings as to the allocation of liability between DRH and any subcontractor. *Id.* at 44.

Because of this, the trial court held that it had no basis for determining whether the award was based in whole or in part on any act or omission attributable to the subcontractor, or in what amount. *Id.* The court held that it would be against public policy for the subcontractor to indemnify a party for liability not shown or alleged by the plaintiff in the underlying lawsuit to be caused by the subcontractor, and accordingly found the claim for indemnification was foreclosed for want of any evidentiary basis to discern whether any of the liability imposed upon DRH was the result of anything but its own conduct. *Id.* at 45. In this regard, the issue of indemnity against the negligence of the indemnitor was relevant only because, in the absence of any evidence to allow it to find otherwise, the court was constrained to either allow DRH to proceed on a claim for indemnity for damages that could not under any circumstance be separated from its own conduct (since the only finding by the arbitrator was that DRH was liable), or dismiss DRH's claim. Such is not the case here, where DRH and Lather are both being sued, and the claims against them will be tried together, with the jury having the opportunity to allocate fault. Accordingly, the *Builders FirstSource* opinion is simply not contrary to DRH's position in this matter.

To that end, perhaps the most important takeaway of *Builders FirstSource*, as it applies here, is what the Court of Appeals did not say. The Court of Appeals did not find that because the contract contained an unenforceable provision (concerning indemnification of D.R. Horton from its own sole negligence) that renders the entire indemnity clause invalid. In contrast, the Court of Appeals addressed another provision of the contract at issue in that case, and this case, and found it enforceable. The court specifically noted that S.C. Code Ann. § 32-2-10, "allows D.R. Horton

and BFS to agree that BFS will indemnify D.R. Horton for damages caused by BFS or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree.” *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45. Indeed, if the Court of Appeals had intended to invalidate the entire indemnity clause on a wholesale basis, it would have been explicit in stating that it was doing so. Without such a statement, Lather cannot properly infer such a drastic conclusion in an attempt to avoid their duty to indemnify D.R. Horton.

- d. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) is wholly irrelevant to the instant procedural and substantive facts.

In its Motion, Lather improperly cites to *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) (“*Concord*”), broadly stating that D.R. Hortons “[c]ontractual Indemnity Provision violates the requirements set forth in *Concord*” and therefore should be dismissed, without providing any further explanation to support its position. Nevertheless, D.R. Horton anticipates that Defendant will also trumpet *Concord* in support of their motion. However, the facts of *Concord* are distinguishable and do not support a finding that summary judgment should be granted in favor of Lather.

In *Concord*, following a settlement of the underlying lawsuit, the general contractor, Superior Construction Corporation, brought a claim for contractual indemnity against its subcontractor, Muhler. *Id.* Specifically, the General Contractor filed a motion for partial summary judgment against Muhler, claiming it was entitled to contractual indemnity from Muhler for Superior’s own negligence in the amount of the settlement amount along with attorneys’ fees and expenses. *Id.* In response, Muhler moved for partial summary judgment arguing that the subcontractor agreement did not obligate it to indemnify Superior for Superior’s “own wrong-

doing.” *Id.* Muhler claimed such an indemnity clause must be clear and unequivocal in the contract, and the contracts at issue failed to meet that burden. *Id.* The circuit court denied Superior's motion for partial summary judgment and granted Muhler's motion to the extent Muhler sought a declaration the language of the subcontractor agreements as written did not require Muhler to indemnify Superior for Superior's own negligence. *Id.* The Court of Appeals affirmed.

Superior cited several other cases where contractual indemnity provisions where the indemnitor agreed to indemnify the indemnitee had been upheld and argued that theirs should, as well. *Id.* at 174-175. The Court noted that a contract of indemnity will be construed to indemnify the indemnitee against losses resulting from its own negligent acts so long as the intention is expressed in clear and unequivocal terms. *Id.* at 172. The Court found that the Superior-Muhler contract was not.

At the outset, it is important to note that, in *Concord*, it was undisputed Superior had no claim for equitable indemnity, as it acknowledged it was partially negligent. *Id.* at 645 (“... It is also undisputed Superior has no claim for equitable indemnity, as it acknowledges it was partially negligent.”). Here, D.R. Horton expressly denies any negligent conduct on its part. This distinction, alone, is fatal to Lather's argument, because the court's holding in *Concord* was expressly predicated upon the predetermination of Superior's own negligence. Additionally, it should be noted that, in the same vein, DRH's claims for equitable indemnity remain viable as it is not (nor does it in any way acknowledge it is) at any fault. Thus, DRH's claims for equitable indemnity survive Lather's motions, regardless of the Court's application of *Concord*.

Further, the sustainability of DRH's claims in this case does not depend upon its ability to successfully frame the relief it seeks as indemnity for its "concurrent negligence,"² as was the circumstance attendant to Superior's claims in *Concord*. While the Court in *Concord* strictly construed the contract between Superior and Muhler, strict construction is not applicable here because D.R. Horton has properly pled claims for indemnity for losses arising from liability derivative from the liabilities of Lather, and has not pled for indemnity for losses arising from D.R. Horton's liability. The pleadings are clear that DRH has alleged that, to the extent DRH is found liable for damages sustained by the Plaintiff, which are denied, and to the extent that the fact finder determines they were the result of the materials supplied by, work performed by or other acts and/or omissions of Lather then DRH alleges Lather is required to indemnify DRH for liability arising out of Lather's work. See DRH's Second Amnd. Ans. to Plaintiff's Second Amnd. Comp.

Lather's invocation of *Concord* is both procedurally premature and substantively incorrect. Pursuant to the Contract, Lather agreed to indemnify DRH against claims arising out of the work they performed on the subject properties. Therefore, because Lather obligated themselves to indemnify DRH against any claim arising out of their work, the Plaintiffs ultimate success on their claims against Lather's work, which is what *Concord* concerns, is immaterial to Lather's liability to DRH.

In total, insofar as Lather's arguments require construction of the contract (e.g., parsing out whose negligence Lather is responsible for and in what respect), summary judgment is improper because contract construction is an issue of fact. If there is an ambiguity in a contract that could lead to more than one reasonable construction, it is appropriate for the court to take extrinsic

² Indeed, it is premature to deem that any party was or was not "negligent" at this stage of litigation, as no finding has been rendered on that subject and, in fact, the question is not even presented by the pending dispositive motions.

evidence as to the intent of the parties, and therefore summary judgment is wholly inappropriate. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007) (internal citations omitted).

e. The Unclean Hands Argument is Meritless.

As an initial matter, the unclean hands defense is inapplicable to D.R Horton's cause of action for contractual indemnity, since it is an equitable defense. With respect to the claim for equitable indemnity, proof of this affirmative defense requires a showing that the party seeking equity has acted inequitably toward the party against which equity is sought. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010). Moreover, Lather bears the burden of proof in seeking summary judgment on an affirmative defense. Yet Lather has failed to come forward with any evidence that D.R. Horton has unclean hands as a matter of law. In order to succeed on this Motion, Lather must show that evidence in the record requires that any reasonable jury must find that D.R. Horton has engaged in inequitable conduct toward the plaintiffs such that D.R. Horton may not seek equity for itself. This is a nearly insurmountable burden for Lather to meet at this stage of the litigation, and Lather has presented no evidence in support of its contention.

In asserting unclean hands (without evidence) as a grounds for summary judgment, Lather is seeking to turn the doctrine of equitable indemnity on its head. 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 South Carolina Electric & Gas Co. v. Utilities Const. Co.*, 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964) (holding that even though indemnitee was found to be at fault, it was entitled to seek equitable indemnity because there was no breach of a legal duty); *Town of Winnsboro v.*

Wiedeman-Singleton, Inc., 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990). The fact that a general contractor remains liable to its customer in warranty, despite the express recognition that it is not liable in negligence for a subcontractor's conduct necessarily requires that implied warranty claims must constitute "no fault liability." See *Fields vs. J. Haynes Waters Builders*, 658 S.E.2d 80 (S.C. 2008). In stark contrast to Defendant's arguments, a case such as this one is the textbook definition of the circumstance in which equitable indemnity applies. Indeed, the seller of a new home's "[l]iability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 503, 229 S.E.2d 728, 730–31 (1976).

The *Town of Winnsboro* case, cited above, is particularly instructive. There, a municipality brought causes of action for negligence, breach of contract, and fraud against a general contractor and a subcontractor in relation to the construction of a facility (all fault-based claims). *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990). The general contractor asserted crossclaims against the subcontractor for indemnity for the extent of its attorneys' fees and liability incurred. *Id.* After a trial, the jury returned a verdict finding only the two subcontractors negligent. *Id.* The prime contractor was exonerated of all claims. *Id.* After the jury's verdict, the trial court granted a directed verdict in favor of the general contractor on its crossclaims for indemnity. *Id.* The trial court's decision that the prime contractor was entitled to equitable indemnity was affirmed by both the Circuit Court of Appeals and the Supreme Court of South Carolina. Both appellate courts reasoned that the prime contractor was entitled to equitable indemnity on the basis that it was placed in the position of defending

against a lawsuit because of the subcontractor's tortious conduct. The prime contractor was entitled to indemnity for its attorneys' fees and defense costs.

The facts of this case are similar to *Town of Winnsboro*. DRH has been placed in the position of defending a lawsuit related to the alleged defective work of its contractor, Lather. D.R. Horton maintains that it was not in any way negligent. Moreover, DRH's liability, if found, under the implied warranty will result as an operation of law, not fault. As previously discussed, being liable for an implied warranty does not require a finding of fault. The alleged fault for the defective condition of the Plaintiffs' properties arose, in part, from the work of Lather. As the above authority indicates, it is fault—not liability—that determines a party's right to equitable indemnity. Defendants cannot avoid their obligation to indemnify D.R. Horton on the basis that D.R. Horton may be found liable for breach of warranty.

However, this is precisely what Lather appears to be attempting by way of its Motion. It has no evidence of negligence or other wrongful conduct by D.R. Horton, and certainly not evidence sufficient to foreclose D.R. Horton's defense to the same as a matter of law. Lather concludes without evidence that "at the end of the day...[DRH's] responsibility for their involvement in the project...means they bear some liability in this action..." Lather Mem. Supp. Of Sum. J at 6. Thus, Lather appears to argue that because D.R. Horton *might* be held liable to Plaintiffs, it must be presupposed to have unclean hands and therefore be precluded from equitable indemnity against Lather. This statement cannot be reconciled with *Town of Winnsboro* wherein the prime contractor was exonerated of liability while its subcontractors were not. Thus, a reasonable jury could find Lather liable and exonerate D.R. Horton. Moreover, the very gravamen of equitable indemnity is recovery against another for liability without fault. Therefore, the apparent rationale underlying Lather's Motion falls completely flat.

IV. CONCLUSION

Because DRH has put forth at least a scintilla of evidence that there exists genuine issues of material fact based on the aforementioned evidence, DRH respectfully requests that Defendant's Motion for Summary Judgment be denied.

Dated this 27th day of October 2021.

Respectfully submitted,

By: s/ Kirsten M. Peterson
S. Michael Nail (S.C. Bar #101818)
Kirsten M. Peterson (S.C. Bar # 104226)
Attorneys for Defendant,
D.R. Horton, Inc.

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kirsten.peterson@ogletreedeakins.com

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Case No-2018 CP 07-00911
DR Horton Memo Opp to Lather MTSJ
EX 1

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Richard W. and Rebecca A. Drier; *et al.*,)

Plaintiffs,)

v.)

Americo Roofing, Inc. *et al.*;)

Defendants,)

Builders FirstSource-Southeast Group, LLC)
and ProBuild Company, LLC,)

Third Party Plaintiff,)

v.)

Blue Mesa Construction, Inc.,)

Third Party Defendant)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. No.: 2018-CP-07-00911

AFFIDAVIT OF RONALD K. BUNNER

I, Ron Bunner, having been duly sworn, hereby depose and state the following:

1. I am over the age of 18 and competent to give this Affidavit. All information contained herein is based upon my personal knowledge.

2. I am employed by D.R. Horton, Inc. ("DRH") as a Vice-President of Operations in the Charleston Division, and I have been employed in this capacity at all times relevant to the subject matter of this affidavit.

3. On September 23, 2021, I was deposed in the above-referenced matter as DRH's 30(b)(6) company witness.

4. In the deposition, I was presented with the "Contract and Specifications for Tidewater Creek," ("the Contract") but it was an incomplete copy which did not contain the specifications. The full version of the Contract is attached hereto as **Exhibit A**.

5. Regarding the Contract, I testified that it is a contract with Lather Construction ("Lather") and DRH for the site development of Tidewater Creek ("the Project"), which specifically governs the scope of work and pricing for the Project.

6. My testimony remains accurate. The Contract was prepared by the site development engineer, Carolina Engineering Consultants, Inc. ("Carolina Engineering") and provides detail and information surrounding each parties' scope of work and responsibility for the site development of this particular Project.

7. However, at the deposition, I was not presented with the Independent Contractor Agreement ("ICA") between Lather and DRH (**Exhibit B**).

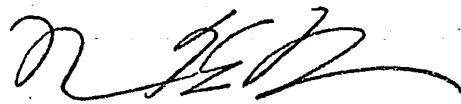
8. The ICA governed the relationship between Lather and DRH at the time Lather commenced its work as the general contractor for the site development work at the Project, whereas the Contract prepared by Carolina Engineering provided more framework concerning Lather's scope of work specific to the Project. Both contracts are valid and govern the relationship between Lather and DRH related to the Project in certain respects.

9. Prior to signing this Affidavit, I was provided with a full opportunity to review it and make corrections.

10. The statements made herein are based on my personal knowledge and/or my review of DRH's business records, which are kept in the ordinary course of business.

[Signature lines appearing on the following page]

Executed on October 25th 2021.



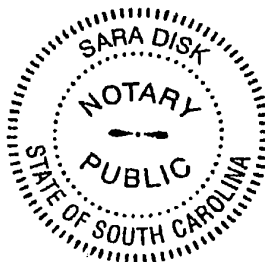
RONALD K. BUNNER

SWORN TO and subscribed before me
this 25th day of January, 2021.

Sara Disk

Notary Public for South Carolina

My Commission Expires: 12-19-2024



49021118.1

Affidavit
Ronald K Bunner
Exhibit B



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR igthe Construction ("Contractor")
 Sole Proprietorship ☐ Partnership ☒ Corporation ☐ LLC ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 46-4003042
 Name of Owner(s)/Officer(s): Shawna Lather
 Division Name: Capital Construction Area Name: Hilton Head/SEA Assigned Vendor No.: 1100967
 Address for All Notices: 1 East River Dr
 City: Beaufort State: SC Zip Code: 299107
 Telephone: 813 241-3687 Fax: () E-Mail Address: Shawna.Lather@igtheconstruction.com
 Insurance Carrier: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 2nd day of December, 2013, between
DR Horton, Inc ("Owner") and Contractor.

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

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

3. CONTRACT PRICE.

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

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

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

4. PAYMENT.

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

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 29-6-39 AND 29-6-50 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR AGREES THAT OWNER DOES, AND WILL, NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

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

Executed this 2nd day of December, 2013.

Owner: [Signature]
 By: RON BUNNEL
 Title: Assistant Vice-President

Contractor: [Signature]
 By: Shawna Lather
 Title: Owner

INITIALS: OWNER [Initials] CONTRACTOR [Initials]



DRH-000948
 Drier et al v. DRH

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

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

5. SCHEDULE OF WORK

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

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

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

6. PERFORMANCE OF THE WORK

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

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

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

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

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

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

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

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

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

INITIALS: OWNER WV CONTRACTOR [Signature]

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

9. LIENS AND RETAINAGE.

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

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

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

10. CONTRACTOR'S INDEMNITY.

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

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

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

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

11. INSURANCE.

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

INITIALS: OWNER WJ CONTRACTOR [Signature]

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

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

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

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

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

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

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

12. REMEDIES.

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

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

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

INITIALS: OWNER DM CONTRACTOR DM

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

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

13. ALTERNATIVE DISPUTE RESOLUTION.

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

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

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

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

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

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

14. TERMINATION.

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

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

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

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

16. GENERAL CONTRACT PROVISIONS.

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

INITIALS: OWNER DM CONTRACTOR [Signature]

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

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

7. SAFETY.

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

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

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

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

8. CONTRACTOR'S WARRANTIES.

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

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

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

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

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

INITIALS: OWNER WJH CONTRACTOR [Signature]

law, the Master National Independent Contractor Agreement shall control.

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

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

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

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

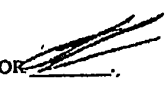
16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

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

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

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

SOUTH CAROLINA VERSION (REV. 12 APRIL 2013)

INITIALS: OWNER  CONTRACTOR 

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Exhibit "A" Part I-General Scope Of Work

General & Miscellaneous

- Mobilization
- Layout and staking
- Build construction entrance
- Asbuilts
- Installation of stop and street signs
- Installation of conduit

Clearing and Demolition

- Clear and grub site

Drainage

- Installation of RCP
- Insulation of HDPE
- Install catch basins, curb inlets, and junction boxes

Erosion Control

- Tree protection
- Temporary gravel
- Silt fence
- Seeding and sod
- Rip-rap sediment basin

Earthwork

- Strip/respreads topsoil
- Off-site fill
- Demucking and backfill
- Rough grade

Initials: Owner: 

Contractor: 

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Grading

- Fine grade for curb and base
- Fine grade shoulders and easements

Asphalt Paving & Pavement Marking

- Asphalt surface and binder

Concrete

- Concrete curb
- Installation of handicap ramps

Utilities

- Utility layout and record drawings

Sanitary Sewer

- Installation of sewer
- Pump stations

Water Distribution

- Installation of water

Owner:

By:

Name:

Title:

Date:

Ren Bunner
Ren Bunner
Assistant Vice-President
12/2/13

Initials: Owner:

RB

Contractor:

By:

Name:

Title:

Date:

Shawn Lecher
Shawn Lecher
Owner
11-26-13

Contractor:

SL

DRH-000956
Drier et al v. DRH

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
Richard W. and Rebecca A. Drier; *et al.*,)
Plaintiffs,)
v.)
Americo Roofing, Inc. *et al.*;)
Defendants,)
Builders FirstSource-Southeast Group, LLC)
and ProBuild Company, LLC,)
Third Party Plaintiff,)
v.)
Blue Mesa Construction, Inc.,)
Third Party Defendant)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. No.: 2018-CP-07-00911

D.R. HORTON'S MEMORANDUM IN OPPOSITION TO HUTTON'S LANDSCAPES, INC. MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant/Crossclaimant, D.R. Horton, Inc. ("Crossclaimant" or "DRH"), pursuant to South Carolina Rule of Civil Procedure 56, and files this Memorandum in Opposition to Defendant, Hutton Landscapes, Inc. ("Hutton" or "Defendant") Motion For Summary Judgment.

DRH will show that Hutton's Motion for Summary Judgment should be denied because there exists at least a scintilla of evidence that: (1) there is an issue of material fact as to whether DRH is solely negligent; (2) DRH's claims for Contractual Indemnity are not barred by the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10; (3) the contract provisions at issue between DRH

and Hutton are valid, legal, and enforceable; and (4) the unclean hands and ripeness defenses are without merit.

I. BACKGROUND

a. The Contracts

This case concerns alleged defects in the site development and construction of homes in Tidewater Creek, a neighborhood in Beaufort County, South Carolina (hereafter "Tidewater"). Specifically, Plaintiffs allege that they are finding varying degrees of trash and debris in their yards. DRH at all times prior to the sale of the properties was the Owner of the land on which Tidewater now sits, after purchasing the land in 2014, and served as the general contractor during vertical construction. DRH and Hutton entered into an "Independent Contractor Agreement" ("ICA"), which governed the relationship between DRH and Hutton at the time Hutton commenced its work at Tidewater. Pursuant to the ICA, Hutton agreed to provide, among other things, labor and materials for rough grade, final grade, turnkey landscaping, turnkey flatwork, slab work, turnkey house slab and related components.

b. DRH's Cross-Claims Against Hutton

Having been sued under tort and warranty theories by the Plaintiffs, as the owner, for alleged deficiencies in the work performed by Hutton, DRH has properly alleged a cross-claim for contractual indemnity against Hutton. Therein, DRH expressly alleges that:

94. Hutton entered into the Contract with DRH pursuant to which Hutton agreed to defend, indemnify, and hold DRH harmless against any and all claims, losses, costs, and damages including but not limited to claims for property damage, pertaining to Hutton's performance under the Contract and caused in whole or in part by Hutton's conduct.

95. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which are denied, DRH alleges that any damages were

in fact sustained by the Plaintiffs in this action arose out of the conduct of Hutton or its agents in connection with Hutton's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Hutton or its agents and not a result of any actions or omissions on the part of DRH.

96. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied. DRH is entitled to contractual indemnity against Hutton in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys' fees and costs.

(DRH Ans. to 2nd Amnd Comp & Cross-claims at ¶¶ 94-96.)

DRH's contractual indemnity claim is based on the indemnity provision of the ICA, copied below:

To the fullest extent permitted by law, Contractor shall protect, defend, indemnify, and hold Owner . . . ("Indemnitee"), free and harmless from and against any and all claims, demands, lawsuits or other litigation, actions, causes of action, or other liabilities of every kind and character (including all costs thereof and attorneys' fees) whether asserted by a purchaser or owner, contractor, or any third party . . . on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property including the loss of use thereof in any way occurring, incident to, arising out of, or in connection with: (1) a breach of any warranties, representations, covenants, or other obligations of Contractor set forth in this Agreement; (2) the Work, as defined in Section I, including but not limited to work performed or to be performed or material supplied by Contractor or Contractor's agents, or employees; (3) any negligent or intentional act or omission of Contractor regardless of whether caused in part by Indemnitee; or (4) any negligent or intentional act of Indemnitee, related in any way to the Work, excepting only liability or claims arising out of bodily injury to persons, death, or damage to property proximately caused by or resulting from the sole negligence or sole intentional act or omission of Indemnitee. Contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made against Indemnitee which potentially or arguably is subject to Contractor's duty to indemnify regardless of Contractor's ultimate liability for indemnity. Contractor must defend Indemnitee even where the allegations against Indemnitee are ambiguous or incomplete with respect to the issue of Contractor's duty to indemnify. Once the duty to defend is triggered, Contractor is obligated to defend the entire action, lawsuit, arbitration, or other litigation, including any claims therein not subject to indemnity by Contractor. Notwithstanding the foregoing, nothing herein shall require

Contractor to indemnify Indemnatee against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of Indemnatee.

The indemnitee provision was in all-caps and in bold text.

c. Hutton's Motion For Summary Judgment Against DRH

Hutton filed this motion, alleging that summary judgment is proper because: (1) DRH's claims for a Duty to Defend are barred by the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, *et seq.*, and *D.R. Horton, Inc. v. Builders FirstSource Se. Grp, LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) because it seeks reimbursement for DRH's sole negligence; (2) The Indemnity Clause is void and unenforceable as against public policy; (3) DRH's claim for equitable indemnity fails because DRH is a joint tortfeasor who shares fault for Plaintiffs' alleged damages, and the equitable indemnity claim is not ripe.

For the reasons and authority set forth below, the Court should find that Hutton has failed to show that summary judgment is appropriate as to each of Crossclaimant's claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCF. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Turner v. Milliman*, 392 S.C. 116, 122 (2011) (citing *Fleming v. Rose*, 350 S.C. 488, 493).

Summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). Unless the case requires a heightened burden of proof, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C.1975)) (internal quotations omitted).

III. ANALYSIS

a. The indemnity provision at issue is valid and enforceable under S.C. Code § 32-2-10.

Defendant's assertion that the indemnity provision requires Hutton to indemnify DRH for DRH's sole negligence is false. The indemnity provision explicitly and expressly excludes from indemnity liability for DRH's sole negligence in compliance with S.C. Code § 32-2-10. Nonetheless, Hutton contends that the exclusion, and indeed the whole indemnity provision, is worthless because of a "broad and expansive duty to defend", which requires Hutton's Landscapes to bear the costs of DRH's defense, regardless of whether Hutton's Landscapes is ultimately required to indemnify DRH. Hutton Mot. Sum. J at 6. Hutton overlooks the established principle that the duty to defend *is* broader than the duty to indemnify. Instead, Hutton contends that S.C. Code § 32-2-10 applies to the duty to defend, despite acknowledging that nowhere does the statute mention the duty to defend, and refers only to promises to "indemnify." Hutton Mot. Sum. J at 8. South Carolina insurance case law makes clear that the Duty to Defend the promisee is separate

and distinct from the obligation to pay a judgment rendered against the indemnitee. Hutton seeks to ignore the numerous cases delineating the differences between the duty to defend and duty to indemnify by unilaterally declaring that “the concepts regarding the duty to defend and the duty to indemnify as applied to insurance do not pertain to construction indemnity contracts.” Hutton Mot. Sum. J at 6. Hutton takes this position for the sole purpose of forcing the duty to defend provision to fit under the umbrella of South Carolina’s anti-indemnity statute just to reach the legally unfounded conclusion that the Indemnity Provision of the ICA pertaining to both the duty to defend and the duty to indemnify for any amount or for any reason is illegal and wholesale void. Hutton Mot. Sum. J at 8.

Hutton’s position is unfounded, as illustrated by the fact that Hutton cites to no case authority to support the notion that the duty to defend and duty to indemnify are one in the same in a non-insurance contract. Moreover, D.R. Horton is aware of no case that would support Hutton’s self-serving conclusion. While Defendant cites to a non-binding Ohio case for the proposition that different principles of law apply to insurance contracts versus contractual indemnity, that case does not explicitly address the issue in the duty to defend context. Moreover, *Stickovich* did conclude that the duty to defend is broader than the duty to indemnify by stating that: “the duty to defend a claim is distinct from the duty to pay that claim and does not mean that the insurer has a duty to pay if the facts subsequently show there is no coverage or liability of its insured. *Stickovich v. City of Cleveland*, 2001-Ohio-4117, 143 Ohio App.3d 13, 40, 757 N.E.2d 50, 71. Hutton cites to *Stickovich* for the proposition that an insurance contract denotes a policy issued by an authorized and licensed insurance company whose primary business it is to assume specific risks of loss, but fails to mention that pursuant to the contractual indemnity provision of the ICA, Hutton took out liability insurance policies, listing DRH as an additional insured, thereby

shifting any potential risk of loss pertaining to the duty to defend and indemnify DRH arising from the ICA to a licensed insurance company in the business of assuming risks of loss. See Ex. 1, Certificate of Insurance, hereto attached. That DRH is an additional insured on Hutton's own insurance policies pursuant to the ICA, presents at least a scintilla of evidence that a reasonable juror could find the Indemnity Provision valid. Presumably Hutton did so when it executed and undertook to perform under the ICA.

Additionally, Hutton cites to *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) in support of its contention that the duty to defend is somehow subsumed under the duty to indemnify. However, *Addy* says no such thing, and the duty to defend was not at issue or once mentioned in *Addy*.

Addy concluded that: "[I]t is generally held that where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the *legal consequences* of the original wrongful act and may be recovered as damages. *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) (internal citations omitted). *Addy* did not hold that because damages for indemnity may include attorneys' fees, among other things, the duty to defend is somehow conflated with the duty to indemnify. If Defendant's position were taken as true, there would be no contracts pertaining to the duty to defend. But Hutton is asking this Court to declare just that: that as a matter of law, the duty to defend is equivalent to the duty to indemnify in all contracts other than insurance contracts, and is accordingly unenforceable pursuant to S.C. Code § 32-2-10. To the contrary, the duty to defend must be construed as a present duty, triggered upon *allegations* of the promisor's wrong doing, or else any promise purporting to include a duty to defend would be illusory. It would be illusory

because the promise to defend would only be enforceable upon a verdict of liability for the indemnitee, which would, of course, at that point, just be a claim for indemnity.

i. South Carolina Courts have long differentiated between the duty to defend and the duty to indemnify in the insurance contract.

While DRH is unaware of South Carolina case law addressing the contractual duty to defend outside the insurance context, case law pertaining to insurance principles support DRH's position that the duty to defend is separate from the duty to indemnify and is bound by a different set of standards triggering its applicability. South Carolina Courts have long differentiated between the duty to defend and the duty to indemnify in the insurance contract.

In South Carolina, an insurer has a duty to provide a defense, "even if any of the allegations of the suit are groundless, false or fraudulent," and "the duty to defend exists regardless of the insurer's ultimate liability to the insured." *Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 186-87, 236 S.E.2d 818, 820 (1977)). The South Carolina Supreme Court has further held that a duty to defend arises where the "underlying complaint creates a *possibility* of coverage under an insurance policy" *City of Hartsville v. South Carolina Municipal Insurance and Risk Financing Fund* 382 S.C. 534, 535, 677 S.E.2d 574, 575 (2009) (citing *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980) (emphasis added)). Similarly here, Hutton's duty to defend DRH is a present one that was triggered by the Plaintiff's allegations pertaining to Hutton's work, as laid out in the contract:

Contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made against Indemnitee, which potentially or arguably is subject to Contractor's duty to indemnify regardless of Contractor's ultimate liability for indemnity. See Ex. 2, South Carolina Independent Contractor Agreement at p. 4, § 10.1 (hereto attached).

This contract language between DRH and Hutton is consistent with the duty to defend case law cited above: the agreement that the duty to defend is triggered when any claim of liability is made against the indemnitee which potentially is subject to the subcontractor's duty to indemnify is consistent with *City of Hartsville v. South Carolina Municipal Insurance and Risk Financing Fund*, where the mere *possibility* of property damage caused by the work of the indemnitor was enough to trigger the duty to defend.

In contrast to the duty to defend, indemnity is "that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." *Concord and Cumberland Horiz. Prop. Regime v. Concord and Cumberland, LLC*, 424 S.C. 639, 646-47, 819 S.E.2d 166, 170 (Ct. App. 2018) (quoting *Campbell v. Beacon Mfg. Co.*, 313 S.C. 313, S.C. 451, 454, 438 S.E.2d 271, 272 (Ct. App. 1993)). "A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Id.* (quoting *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999)).

b. Even if S.C. Code § 32-2-10 does apply to the duty to defend, the indemnity provision at issue is valid and enforceable under it.

S.C. Code § 32-2-10 exclusively addresses claims for indemnity arising solely from the negligence of the indemnitee (here, DRH), and in which there is no possibility of a finding of liability on the part of the indemnitor (here, Hutton). Such is not the claim pled or presented by DRH against Hutton. The statute states, in part:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage

proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

S.C. Code Ann. § 32-2-10. (emphasis added).

Hutton argues that the duty to defend provision in the ICA violates § 32-2-10 and is unenforceable. Assuming, for the sake of discussion, that § 32-2-10 applies to the duty to defend, Hutton's argument still fails. Hutton relies exclusively on the statute's language that an indemnification provision within a construction contract that attempts to indemnify a harm "resulting from the sole negligence of the promisee" is unenforceable. S.C. Code § 32-2-10 (emphasis added). Hutton states, "[t]he Plaintiffs' Second Amended Complaint asserts negligence claims against D.R. Horton and multiple subcontractors, including claims unrelated to Hutton's Landscapes' work and claims which could be attributed to solely D.R. Horton's negligence." In other words, with the words "could be" Defendant expressly concedes that DRH has not yet been found solely negligent as a matter of law, but concludes that simply because the posited scenario *could* happen, to contract to which Hutton entered with DRH is void ab initio.

A reasonable jury may also exonerate DRH of all liability, given that DRH self performs no work. For example, Hutton's 30(b)(6) witness admitted in his deposition that there exist work orders where Hutton was paid to clean up debris off certain Plaintiffs' lots. Matthew Hutton Dep. pg. 89, lines 21-23, see Ex. 3, hereto attached. Additionally, DRH's expert has opined that "if the material was visible, then they [Hutton] had a responsibility to pick it up." Steve Moore Dep. pg.

127, lines 4, 5, see Ex. 4, hereto attached. Given that this lawsuit pertains to allegations of debris in Plaintiffs' yards, to the extent Plaintiffs are successful on proving their claim (which DRH denies), there is at least a scintilla of evidence that Hutton will face some culpability.

In contrast, DRH's expert has opined in his deposition and will opine at trial that "DRH did all that they should have done... I think D.R. Horton did what they were supposed to do...there was nothing they would have done differently." Steve Moore Dep. pg. 98, lines 24, 25, see Ex. 4, hereto attached. Additionally, the Expert Witness for Lather Construction, Inc., another co-defendant, also testified that to a reasonable degree of engineering certainty, he cannot identify any standard of care that DRH violated in the development of this project. Jim Kahle Dep. pg. 35, lines 10-13, see Ex. 5, hereto attached. He further testified, that there was no additional due diligence that DRH should have performed as the owner and developer of this site. Jim Kahle Dep. pg. 41, lines 16-22, see Ex. 5, hereto attached. A reasonable jury could believe this testimony. Thus, viewing the evidence in light of the non-moving party, there is at least a scintilla of evidence that DRH will not be found liable, at all, let alone solely liable, rendering Defendant's basis for its motion moot.

Hutton states that "[I]n its Cross-Claim for contractual indemnity against Hutton's Landscapes, D.R. Horton seeks to be fully reimbursed for the costs of defending the entire action pursuant to the terms of the Contract." [Cross-Claim, ¶ 117.] Hutton misstates DRH's position. DRH tendered its defense to Hutton on July 16, 2018, pursuant to the ICA. Hutton, at no point in time, raised the issue that they have no duty to defend because DRH may also be liable. Hutton did not respond at all. Instead, Hutton sat on their hands and refused to defend DRH in clear violation of the plain terms of the contract. Hutton owed DRH a present obligation to defend them in this suit, which it failed to do. As such, DRH now seeks to recover those defense costs, which

should have been paid by Hutton all along. If a jury finds that DRH is solely negligent, then DRH will likely not be successful on its indemnity claims. But Hutton has put forth no evidence that, as a matter of law, the jury will find DRH solely negligent, and Hutton not negligent at all. Hutton's argument that DRH's claims should be dismissed because DRH *may* be found solely negligent is not enough to prevail on summary judgment.

i. Defendant Overlooks the Separation of Promises Provision of § 32-2-10.

The statute also provides that separate promises to indemnify the indemnitee for acts arising out of the indemnitee's partial negligence or unrelated to the indemnitee's negligence are not invalidated by the statute. S.C. Code § 32-2-10. This means that the State Legislature expressly contemplated, in the plain language of the statute, that while an indemnification promise related to the indemnitee's sole negligence is unenforceable, other promises in an indemnification section are still valid.

The provision at issue here contains such separate promises. Hutton promised to defend and to indemnify DRH for liability arising out of Hutton's work, and that is the provision of the ICA at issue in this case. ¶ 10.1. Thus, even if § 32-2-10 invalidates any promise by Hutton to defend or indemnify DRH for its own sole negligence, the separate promise to defend and to indemnify DRH for amounts related to or arising out of Hutton's work, either in whole or in part, is valid and enforceable. *See* S.C. Code § 32-2-10. Again, nothing in the statute removes Hutton's obligation to indemnify DRH for liability arising out of Hutton's own work, which is the remedy that has been asserted by DRH.¹ *Id.* Defendant's promise to defend and indemnify Crossclaimant is valid under the statute.

¹ DRH has asserted that, "To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by or other acts and/or omissions of Hutton, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action

c. The indemnity provision at issue is valid and enforceable under South Carolina Common Law.

In South Carolina, courts enforce the valid provisions of a contract in accordance with the parties' intent at the time the contract was executed. *See Beach Co. v. Twillman, Ltd.*, 566 S.E.2d 863, 866-67 (S.C. Ct. App. 2002). Should a court determine that an unenforceable provision exists in a contract, "the next question becomes whether, under any appropriate circumstances, the ... agreement can be reformed, or the identified illegal provisions ... severed, thus preserving ... [the] agreement between the parties." *Hooters of Am., Inc. v. Phillips*, 39 F. Supp.2d 582, 624 (D.S.C. 1998), *aff'd* 173 F.3d 933 (4th Cir. 1999). It is not proper to sever a provision where it is part of several interdependent provisions in the contract. *Beach Co.*, 566 S.E.2d at 867. However, a provision may be severed when it is susceptible to division, has two or more parts, is not dependent on other parts of the contract, and is not intended by the parties to be an interdependent clause. *Id.*; *see also Columbia Architectural Grp., Inc. v. Barker*, 266 S.E.2d 428, 429 (S.C. 1980).

Where the parties intend to make separate and not interdependent promises, the Court should consider the enforceability of the provision at issue separately. *See Columbia Architectural Group*, 266 S.E.2d at 429. The parties' listing or denoting of promises separately is evidence of their intent that promises be separate and independent. *Id.* Further, where separate provisions, even in the same section of a contract, contain rights wholly independent of each other, one provision may be severed, while the other is enforced. *Beach Co.*, 566 S.E.2d at 867 (severing an unenforceable provision and enforcing another provision in the same section of the contract). In contrast, courts have found that unenforceable provisions could not be severed, such that an entire section or contract was unenforceable, where multiple provisions were interrelated and pervasive.

were a direct and proximate result of the wrongful acts and omissions of Hutton or its agents and not a result of any actions or omissions on the part of DRH." *See* DRH Second Amnd. Ans. to Plaintiff's Second Amnd. Comp. ¶ 106.

Simpson, 644 S.E.2d 674 n.9 (comparing the strike to an entire arbitration section with several unenforceable, interrelated provisions to the severability of "one offending provision"). Finally, the Court of Appeals, in a case cited by Hutton to support its position that DRH's indemnity provision is wholesale illegal, selectively enforced provisions of DRH's indemnity language in a contract similar to one at issue here. *See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45.

This is not a case where the parties' contract cannot be enforced, as written, in the absence of several interdependent, allegedly unenforceable, provisions. Here, the one allegedly unenforceable provision is not at issue and is clearly susceptible to division, such that the parties' agreement on point may still be enforced. Indeed, Defendant's indemnification promises are divided on purpose by the parties, themselves, and thus separately numbered. (See Ex. 2, at ¶ 10., hereto attached)

Indemnification for liability arising out of the "work performed or to be performed or material supplied by contractor or by the contractor or contractor's agents or employees" is numbered (2), while indemnification for liability arising out of DRH's negligence or intentional act is numbered (4). *Id.* The fourth indemnification provision follows an "or" in this list, not an "and." *Id.* Hutton agreed it would indemnify Crossclaimant for amounts, including reasonable attorneys' fees and defense costs arising out of Hutton's work *or* DRH's negligence/intentional act. *Id.* The duty to defend provision is explicitly stated as being "separate, distinct, and independent" from the duty to indemnify. *Id.* Thus, it is clear the parties intended these to be separate promises. The separate promises show that the parties intended that Hutton indemnify DRH for defense costs and attorneys' fees related to or arising from Hutton's work. Hutton's contention that it may avoid his entire promise to indemnify on the basis that Hutton promised to indemnify DRH for amounts

related to DRH's negligence or intentional acts (of which DRH contends there were none) is meritless. Thus, Defendant's promise to defend and indemnify is valid under common law.

Nonetheless, Hutton relies upon *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp, LLC*, to conclude that the ICA is illegal and unenforceable. 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). This conclusion misconstrues the holding of *Builders FirstSource*. That case held, based on the unique facts of that case, that the single provision of the contract purporting to require the subcontractor to indemnify the contractor for liability to which it did not contribute was unenforceable. *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). That case was superficially similar to the present case, only in that it involved DRH seeking indemnity from its subcontractor based on a contract between the parties. *Id.* at 43. However, there, the facts diverge. In that case, the claim for indemnity was asserted after the conclusion of an arbitration to which the indemnitor was not a party. Therein, the arbitrator had issued a simple award stating only the amount awarded to the plaintiff, with no findings as to the allocation of liability between DRH and any subcontractor. *Id.* at 44. Moreover, DRH had specifically requested that the arbitrator not allocate liability.

Because of this, the trial court held that it had no basis for determining whether the award was based, in whole or in part, on any act or omission attributable to the subcontractor, or in what amount. *Id.* The court held that it would be against public policy for the subcontractor to indemnify a party for liability not shown or alleged by the plaintiff in the underlying lawsuit to be caused by the subcontractor, and accordingly found the claim for indemnification was foreclosed for want of any evidentiary basis to discern whether any of the liability imposed upon DRH was the result of anything but its own conduct. *Id.* at 45. In this regard, the issue of indemnity against the negligence of the indemnitor was relevant only because, in the absence of any evidence to allow it to find

otherwise, the court was constrained to either allow DRH to proceed on a claim for indemnity for damages that could not, under any circumstance, be separated from its own conduct (since the only finding by the arbitrator was that DRH was liable), or dismiss DRH's claim. Such is not the case here, where DRH and Hutton are both being sued, and the claims against them will be tried together, with the jury having the opportunity to allocate fault. Accordingly, the *Builders FirstSource* opinion is simply not contrary to DRH's position in this matter.

To that end, perhaps the most important takeaway of *Builders FirstSource*, as it applies here, is what the Court of Appeals did not say. The Court of Appeals did not find that because the contract contained an unenforceable provision (concerning indemnification of DRH from its own sole negligence) that renders the entire indemnity clause invalid. In contrast, the Court of Appeals addressed another provision of the contract at issue in that case, and this case, and found it enforceable. The court specifically noted that S.C. Code Ann. § 32-2-10, "allows D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton for damages caused by BFS or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree." *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45. Indeed, if the Court of Appeals had intended to invalidate the entire indemnity clause on a wholesale basis, it would have been explicit in stating that it was doing so. Without such a statement, Hutton cannot properly infer such a drastic conclusion in an attempt to avoid their duty to indemnify DRH.

In total, insofar as Hutton's arguments require construction of the contract (*e.g.*, parsing out whose negligence Hutton is responsible for and in what respect), summary judgment is improper because contract construction is an issue of fact. If there is an ambiguity in a contract that could lead to more than one reasonable construction, it is appropriate for the court to take

extrinsic evidence as to the intent of the parties, and therefore summary judgment is wholly inappropriate. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007) (internal citations omitted).

d. The Unclean Hands Argument is Meritless.

As an initial matter, the unclean hands defense is inapplicable to DRH's cause of action for contractual indemnity, since it is an equitable defense. With respect to the claim for equitable indemnity, proof of this affirmative defense requires a showing that the party seeking equity has acted inequitably toward the party against which equity is sought. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010). Moreover, Hutton bears the burden of proof in seeking summary judgment on an affirmative defense. Yet Hutton has failed to come forward with any evidence that DRH has unclean hands as a matter of law. In order to succeed on this Motion, Hutton must show that evidence in the record requires that any reasonable jury must find that DRH has engaged in inequitable conduct toward the plaintiffs, such that DRH may not seek equity for itself. This is a nearly insurmountable burden for Hutton to meet at this stage of the litigation, and Hutton has presented no evidence in support of its contention.

In asserting unclean hands (without evidence) as grounds for summary judgment, Hutton is seeking to turn the doctrine of equitable indemnity on its head. 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 South Carolina Electric & Gas Co. v. Utilities Const. Co.*, 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964) (holding that even though indemnitee was found to be at fault, it was entitled to seek equitable indemnity because there was no breach of a legal duty); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990). The fact that a general contractor

remains liable to its customer in warranty, despite the express recognition that it is not liable in negligence for a subcontractor's conduct necessarily requires that implied warranty claims must constitute "no fault liability." *See Fields v. J. Haynes Waters Builders*, 658 S.E.2d 80 (S.C. 2008). In stark contrast to Defendant's arguments, a case, such as this one, is the textbook definition of the circumstance in which equitable indemnity applies. Indeed, the seller of a new home's "[l]iability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 503, 229 S.E.2d 728, 730-31 (1976).

The *Town of Winnsboro* case, cited above, is particularly instructive. There, a municipality brought causes of action for negligence, breach of contract, and fraud against a general contractor and a subcontractor in relation to the construction of a facility (all fault-based claims). *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990). The general contractor asserted crossclaims against the subcontractor for indemnity for the extent of its attorneys' fees and liability incurred. *Id.* After a trial, the jury returned a verdict finding only the two subcontractors negligent. *Id.* The prime contractor was exonerated of all claims. *Id.* After the jury's verdict, the trial court granted a directed verdict in favor of the general contractor on its crossclaims for indemnity. *Id.* The trial court's decision that the prime contractor was entitled to equitable indemnity was affirmed by both the Circuit Court of Appeals and the Supreme Court of South Carolina. Both appellate courts reasoned that the prime contractor was entitled to equitable indemnity on the basis that it was placed in the position of defending against a lawsuit because of the subcontractor's tortious conduct. The prime contractor was entitled to indemnity for its attorneys' fees and defense costs.

The facts of this case are similar to *Town of Winnsboro*. DRH has been placed in the position of defending a lawsuit related to the alleged defective work of its contractor, Hutton. DRH maintains that it was not, in any way, negligent. Moreover, DRH's liability, if found, under the implied warranty will result as an operation of law, not fault. As previously discussed, being liable for an implied warranty does not require a finding of fault. The alleged fault for the defective condition of the Plaintiffs' properties arose, in part, from the work of Hutton. As the above authority indicates, it is fault—not liability—that determines a party's right to equitable indemnity. Defendants cannot avoid their obligation to indemnify DRH on the basis that DRH may be found liable for breach of warranty.

However, this is precisely what Hutton appears to be attempting by way of its Motion. It has no evidence of negligence or other wrongful conduct by DRH, and certainly not evidence sufficient to foreclose DRH's defense to the same as a matter of law. Instead, Hutton appears to argue that because DRH *might* be held liable to Plaintiffs, it must be pre-supposed to have unclean hands and therefore be precluded from equitable indemnity against Hutton. This statement cannot be reconciled with *Town of Winnsboro*, wherein the prime contractor was exonerated of liability, while its subcontractors were not. Thus, a reasonable jury could find Hutton liable and exonerate DRH. Moreover, the very gravamen of equitable indemnity is recovery against another for liability without fault. Therefore, the apparent rationale underlying Hutton's Motion falls completely flat. DRH's Claims Are Ripe.

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 General Contractor's equitable indemnity cross-claim because the General Contractor presented a question of fact as to whether it was at fault for the alleged construction defect. Thus, Defendant's argument is specious.² Like the General Contractor in *Stoneledge*, DRH has presented a question of fact as to its claims. Summary Judgment should be denied.

[DATE & SIGNATURE BLOCK ON NEXT PAGE]

² Defendant overlooks the fact that accrual for purposes of the Statute of Limitations and ripeness are not the same thing. Accrual is a question of notice to the claimant. A case can be ripe for years and not accrue under the discovery rule. Moreover, the policy behind accrual at the time liability attaches is to prevent a potential claimant in equitable indemnity from being foreclosed from relief because it did not yet realize the extent or nature of its liability. But it isn't designed to protect indemnitors by forcing indemnitees to suffer the time and expense of litigating one action to conclusion, suffer a loss and the financial consequences, and then have to bring an entirely separate lawsuit in order to obtain that to which they are entitled in equity. Public policy dictates that one who is (especially) equitably entitled to relief should be able to try their claim concurrently with the claim against them. Judicial economy demands the same result. As a practical matter, since it is a claim in equity, it is being tried before the trial judge concurrently with the legal claims being tried before the jury. Defendant's suggestion would lead to the preposterous outcome that a trial judge will hear the entire case, and rather than taking the jury's findings of fact and rendering a decision on the equitable claims consistent with the same, DRH must then file another lawsuit, and try the same issues in front of the same or a different judge. Thus the only product of the procedure that Hutton's theory would require is unnecessary expense and delay.

Dated this 28^h day of October 2021.

Respectfully submitted,

By: s/ Kirsten M. Peterson
S. Michael Nail (S.C. Bar #101818)
Kirsten M. Peterson (S.C. Bar # 104226)
Attorneys for Defendant,
D.R. Horton, Inc.

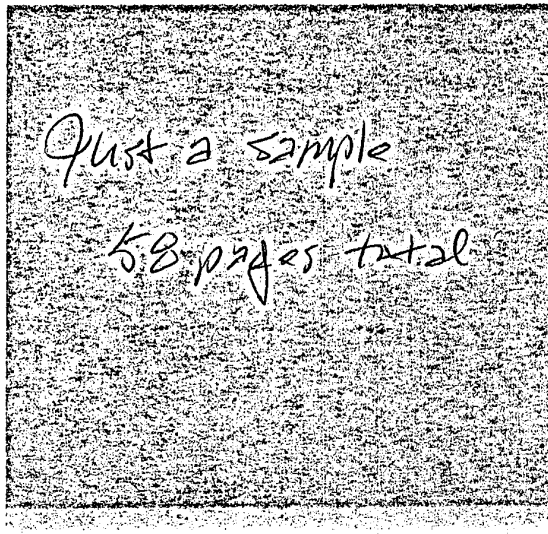
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49094992.1

Case No 2018-CP-07-00911

DR Horton Memo Opposition to Hutton MTSJ

EX 1



524 248

Client#: 203010

HUYT04

ACORD

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
2/14/2018

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

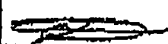
IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer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

PRODUCER Regions Insurance - Savannah 7391 Hodgson Memorial Drive Savannah, GA 31408 912 644-5050	CONTACT PHONE Toll Free 912 644-8080 FAX ADDRESS
INSURED Hutton's Landscapes, Inc. 5509 Ogechee Rd Savannah, GA 31408	INSURANCE AFFORDING COVERAGE INSURER A: Centennial National Insurance Company NAIC # 19640 INSURER B: Technology Insurance Company 42376 INSURER C: INSURER D: INSURER E: INSURER F:

COVERAGES		CERTIFICATE NUMBER:		REVISION NUMBER:	
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.					
POLICY LINE	TYPE OF INSURANCE	ADDITIONAL INSURED	POLICY NUMBER	POLICY PERIOD (MM/DD/YYYY) (MM/DD/YYYY)	LIMITS
A	☒ COMMERCIAL GENERAL LIABILITY ☐ CLAIMS-MADE ☒ OCCUR ☐ FUTURE ☐ POLICY ☒ PRO-JECT ☐ LOC ☐ OTHER	X	CMPGA0000030986	02/15/2018 02/15/2019	EACH OCCURRENCE \$1,000,000 DAMAGE TO RENTED PREMISES (per occurrence) \$100,000 MED EXP (any one person) \$5,000 PERSONAL & ADV INJURY \$1,000,000 GENERAL AGGREGATE \$2,000,000 PRODUCTS & COMPOUND AGG \$2,000,000
A	☒ AUTOMOBILE LIABILITY ☒ ANY AUTO ☐ OWNED AUTOS ONLY ☒ NON-OWNED AUTOS ONLY ☐ SCHEDULED AUTOS ONLY	X	GAPGA0000030985	02/15/2018 02/15/2019	COMBINED SINGLE LIMIT (per accident) \$1,000,000 BODILY INJURY (per person) \$ BODILY INJURY (per accident) \$ PROPERTY DAMAGE (per accident) \$
A	☒ UMBRELLA LIAB ☐ EXCESS LIAB ☐ DEO ☐ RETENTION \$	X	CUPGA0000030985	02/15/2018 02/15/2019	EACH OCCURRENCE \$2,000,000 AGGREGATE \$2,000,000
B	☒ WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ☐ ANY EMPLOYEE OR CONTRACTOR ☐ OFFICER/DIRECTOR EXCLUSION (Mandatory to ME) ☐ If yes, describe order DESCRIPTION OF OPERATIONS below	X	TWC3696954	02/15/2018 02/15/2019	☒ PER STATUTE EL EACH ACCIDENT \$1,000,000 EL DISEASE - EA EMPLOYEE \$1,000,000 EL DISEASE - POLICY LIMIT \$1,000,000
A	Herbicide Pesticide		CMPGA0000030986	02/15/2018 02/15/2018	Included

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

See Notes
The certificate holder is named as an additional insured as respects operations performed by or on behalf of the Named Insured when required (See Attached Descriptions)

CERTIFICATE HOLDER	CANCELLATION
DR HORTON, Inc, its Affiliates and Subsidiaries Insurance Compliance P O Box 100085-DR Duluth, GA 30095	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS. AUTHORIZED REPRESENTATIVE 

ACORD 25 (2018/03) 1 of 2 The ACORD name and logo are registered marks of ACORD
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JJAME

DRH-000835
Drier et al v. DRH



CERTIFICATE OF LIABILITY INSURANCE

HUTTO-1

DP ID: 41

DATE 6/24/80

03/09/2017

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

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

PRODUCER Regions Insurance, Inc. P.O. Box 13527 Savannah, GA 31418 Dana Stevens		CONTACT PHONE FAX INC. No. Dist: 912-544-5050 FILE ADDRESS:		FILE INC. No.: 912-852-8782
INSURED		INSURED(S) AFFORDING COVERAGE		NAIC #
HUTTON S LANDSCAPES, INC. H INDUSTRIES, LLC FORMATION CONCRETE, LLC 5509 Oglethorpe Road Savannah, GA 31419		INSURER A - COMERICA NATIONAL INSURANCE CO		19840
		INSURER B - Technology Insurance Company		42378
		INSURER C:		
		INSURER D:		
		INSURER E:		
		INSURER F:		

COVERAGES

CERTIFICATE NUMBER:

REVISION NUMBER

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

Row	TYPE OF INSURANCE	AGGREGATE LIMIT (USD)	POLICY NUMBER	POLICY EFF. DATE (YYYY / MM/DD)	POLICY EXPIRATION DATE (YYYY / MM/DD)	UNITS	AMOUNT
A	☒ COMMERCIAL GENERAL LIABILITY ☒ CLAIMMADE ☒ OCCUR GENERAL AGGREGATE LIMIT APPLIES PER: ☐ POLICY ☒ PER ACCIDENT ☐ LOC ☐ OTHER:	X X	CMFPGA0000030466	02/15/2017	02/15/2018	EACH OCCURRENCE DAMAGE TO RENTED PREMISES (Each occurrence) MED EXP (Any one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCTS - COMPROP AGG OTHER:	\$ 1,000,000 \$ 100,000 \$ 5,000 \$ 1,000,000 \$ 2,000,000 \$ 2,000,000 \$
A	AUTOMOBILE LIABILITY ☒ ANY AUTO ☒ ALL OWNED AUTOS ☒ Hired AUTOS ☒ \$500 CRED ☒ SCHEDULED AUTOS ☒ NON-OWNED AUTOS ☒ \$5000 CRED		CAFPGA000000	02/15/2017	02/15/2018	COMBINED SINGLE LIMIT (Each accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident) OTHER:	\$ 1,000,000 \$ \$ \$ \$
A	☒ UMBRELLA LIABILITY ☒ EXCESS LIAB ☒ CLAIMMADE ☒ RETENTION \$		CUFGA0000030261	02/15/2017	02/15/2018	EACH OCCURRENCE AGGREGATE OTHER:	\$ 2,000,000 \$ 2,000,000 \$
B	WORKER'S COMPENSATION AND EMPLOYERS LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/ MEMBER EXCLUDED? (Mandatory in HI) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N Y	TWC3525462	02/15/2017	02/15/2018	☒ PER ACCIDENT ☐ OTHER EL EACH ACCIDENT EL DISEASE - EA EMPLOYEE EL DISEASE - POLICY LIMIT	\$ 1,000,000 \$ 1,000,000 \$ 1,000,000
A	Health & Life Insurance		CMFPGA0000030466	02/15/2017	02/15/2018	Included	
C	Contractors Equip		CMFPGA0000030466	02/15/2017	02/15/2018	Included	

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACCORD TO, ADDITIONAL REMARKS SCHEDULE MAY BE ATTACHED IF MORE SPACE IS REQUIRED)

CERTIFICATE HOLDER

CANCELLATION

DR HORTON, Inc. Its Affiliates and Subsidiaries Insurance Compliance P O Box 100085-DR Duluth, GA 30086	DR HORT	DATE RECEIVED
	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.	
	AUTHORIZED REPRESENTATIVE 	

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ACORD 25 (2014/01)

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DRH-000851
Drier et al v. DRH

NOTEPAD:	HOLDER CODE DRH0RT	HUTTO-1	PAGE 2
	INSURED'S NAME HUTTON S LANDSCAPES, INC.	OP ID: JJ	DATE 03/09/2017

The certificate holder is named as an additional insured as respects operations performed by or on behalf of the Named Insured when required by written contract and subject to the terms, conditions and exclusions of the policy. Waiver of subrogation is granted to the holder. 30 days notice of cancellation is granted to the Holder.

Actual endorsements are attached for review

DRH-000852
Drier et al v. DRH



CERTIFICATE OF LIABILITY INSURANCE

HUTTO-1

OP ID: JJ

DATE (MM/DD/YYYY)

03/21/2016

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PRODUCER
Stevens Hale & Associates
P.O. Box 13627
Savannah, GA 31416
Dana Stevens

CONTACT

PHONE (A/C, H, Ext.) 912-981-4300

FAX (A/C, H, Ext.) 912-981-4303

ADDRESS:

INSURER(S) AFFORDING COVERAGE

NAIC#

INSURED HUTTON'S LANDSCAPES, INC.
H INDUSTRIES, LLC
FORMATION CONCRETE, LLC
5509 Ogeechee Road
Savannah, GA 31419

INSURER A: Selective Insurance of the SE

39926

INSURER B: Technology Insurance Company

INSURER C: The Travelers Ins Co

28858

INSURER D:

INSURER E:

INSURER F:

COVERAGES

CERTIFICATE NUMBER:

REVISION NUMBER:

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

TYPE OF INSURANCE	ADDL. SUMS (IND. ROW)	POLICY NUMBER	POLICY TERM (MM/DD/YYYY) (MM/DD/YYYY)	LIMITS
A ☒ COMMERCIAL GENERAL LIABILITY ☒ CLAIMS MADE ☒ OCCUR ☒ Contractual GEN'L AGGREGATE LIMIT APPLIES PER: ☒ POLICY ☐ PRO-JECT ☐ LOG OTHER:	X X	S2022306	02/15/2016 02/15/2017	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PROPERTY (EL. EXCL.) \$ 100,000 MED EXP (Any one person) \$ 5,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 3,000,000 PRODUCTS - COMMOD AGG \$ 3,000,000
A ☒ AUTOMOBILE LIABILITY ☒ ANY AUTO ☒ ALL OWNED AUTOS ☒ RENTED AUTOS ☒ \$500 Comp ☒ \$1000 Coll ☒ SCHEDULED AUTOS ☒ \$1000 Coll		S2022306	02/15/2016 02/15/2017	COMBINED SINGLE LIMIT (EL. EXCL.) \$ 1,900,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
A ☒ UMBRELLA LIAB ☒ EXCESS LIAB ☒ RETENTION \$ 0 ☒ CLAIMS MADE	X	S2022308	02/15/2016 02/15/2017	EACH OCCURRENCE \$ 1,000,000 AGGREGATE \$ 1,000,000
B WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE/OFFICER/MEMBER EXCLUDED? (mandatory in RI) YES, describe under DESCRIPTION OF OPERATIONS below VIN Y N/A		TWCS626462	02/15/2016 02/15/2017	☒ PER STATUTE ☒ EL. EACH ACCIDENT \$ 1,000,000 ☒ EL. DISEASE - EA EMPLOYEE \$ 1,000,000 ☒ EL. DISEASE - POLICY LIMIT \$ 1,000,000
A Herbicide/Pesticide C Contractors Equip		S2022308 101	02/15/2016 02/15/2017 02/15/2016 02/15/2017	Included Ded 500

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

CERTIFICATE HOLDER

OR HORT

CANCELLATION

DR HORTON, Inc. Its Affiliates
and Subsidiaries
Insurance Compliance
P.O. BOX 12810-DR
HEMET, CA 92348

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

ACORD 25 (2014/01)

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DRH-000854

Drier et al v. DRH

NOTEPAD:	HOLDER CODE	DR HORT	HUTTO-1	PAGE 2
	INSURED'S NAME	HUTTON'S LANDSCAPES, INC.	OP ID: JJ	Date 03/21/2016

The certificate holder is named as an additional insured as respects operations performed by or on behalf of the Named Insured when required by written contract and subject to the terms, conditions and exclusions of the policies. Waiver of subrogation is granted to the holder. 30 days notice of cancellation is granted to the Holder.

CG 7202-12/11
CG 7921-01/10
CA 7735-02/10
BH 0005-01/96
WC000313

DRH-000855
Drier et al v. DRH

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier, Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Verstegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource – Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; Valim Construction, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-07-00911

**STIPULATION OF DISMISSAL OF
SOME (BUT NOT ALL) CLAIMS
BROUGHT BY PLAINTIFFS AS TO
LATHER CONSTRUCTION, INC.**

(DOES NOT END CASE)

**(DOES NOT DISMISS LATHER
CONSTRUCTION, INC.)**

Now, Therefore, Plaintiffs, by and through their undersigned counsel, hereby stipulate to the dismissal of the following claims ONLY that were brought against Lather Construction, Inc.

from this matter with prejudice, pursuant to Rule 41(a)(1)(b) of the South Carolina Rules of Civil Procedure: Negligent Misrepresentation/Rescission, Unfair Trade Practices Act, Fraud in the Inducement/Rescission, and Breach Implied Warranty of Habitability. Plaintiffs are NOT dismissing any other claims against Lather Construction, Inc. that are not mentioned specifically by name herein.

The parties shall bear their own attorneys' fees, costs, and expenses as to these claims. The parties specifically reserve all rights and causes of action against all parties not dismissed herein.

WE SO MOVE:

s/Jeffrey A. Ross
Jeffrey A. Ross, Bar No.: 74254
Philip P. Cristaldi, Bar No.: 102219
Scott H. Winograd, Bar No.: 103483
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Phone: (843) 329-4040
Email: jross@rcaawsc.com
pcristaldi@rclawsc.com
swinograd@rclawsc.com
Attorneys for Lather Construction, Inc.

WE CONSENT:

s/ Alexandra Scott Williams
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Alexandra Scott Williams, Esq.
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Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Richard W. and Rebecca A. Drier; Yolanda J. Drier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. And Stasha R. Grooms; Adam F. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Cory M. McDaniel; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III and Alayshia Smith; and Nicole J. Verstegen,

Plaintiffs,

vs.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Armor Building Solutions, LLC; Atlas Surveying BFT, LLC f/k/a Atlas Surveying Holding Company, LLC; Atlas Surveying, Inc.; Builders FirstSource - Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Jenkins Plumbing Company, LC; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Stier Supply Company f/k/a Stier-Holman Supply Co.; Superior Association Services, LLC; Valim Construction, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL
CIRCUIT

CASE NO.: 2018-CP-07-00911

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT AS TO
THE CROSSCLAIMS OF DR HORTON**

PLEASE TAKE NOTICE that the Defendant, East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc. ("East Coast"), through its undersigned attorneys, will move before the presiding Judge for the Court of Common Pleas for Beaufort County, in the Beaufort County Courthouse, at 10:00 a.m. on the tenth (10th) day after service hereof, or at such other time and place as is convenient to the Court and counsel, as follows:

That East Coast be granted Summary Judgment against Defendant D.R. Horton, Inc.'s crossclaims for contractual and equitable indemnity, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, as to the within action, for the reason that there exists no genuine issue as to any material fact and that East Coast is entitled to Judgment against D.R. Horton as a matter of law. Additionally, East Coast asserts the following:

1. D.R. Horton has failed to produce a contractual indemnification provision applicable to the project at issue;
2. The indemnification provision D.R. Horton seeks to rely on is void and unenforceable under South Carolina law;
3. D.R. Horton's claim for equitable indemnity fails as it is not ripe and D.R. Horton has unclean hands.

Defendant's Motion for Summary Judgment is further based upon the pleadings, exhibits, discovery responses, and affidavits filed in this proceeding. Additionally, this Motion is based on the forthcoming Memorandum in Support and such other arguments submitted in support thereof.

[Signature on the following page]

CLAWSON and STAUBES, LLC

s/ Tyler E. Cloud

Tyler E. Cloud

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Corp.

Charleston, South Carolina
November 10, 2021