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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

2021-001050

The Retreat at Charleston National Country Club Home Owners Association, Inc.,
and The Retreat at Charleston National Country Club Horizontal Property
Regime..... Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.;
Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders
FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building
Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino
Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley
Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC
Construction, Inc.; L&G Construction Group, LLC; Liollo Architecture; JC
Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira
Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle
Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher
Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos,
individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin,
individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin,
individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a
Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De
Caris; and Mario Salgado..... Defendants,

Builders FirstSource-Southeast Group, LLC..... Third-Party Plaintiff, Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and
Renovation; Edward Bruce Witham; and East Coast
Carpentry..... Third-Party Defendants,

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting,
LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman

Quality Exteriors, Inc.; and L&G Construction Group, LLC are the Respondents.

RECORD ON APPEAL
VOLUME VI

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RECORD ON APPEAL
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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2016-CP-10-03783

The Retreat at Charleston National
Country Club Home Owners
Association, Inc. and The Retreat at
Charleston National Country Club
Horizontal Property Regime,

Plaintiffs,

vs.

Winston Carlyle Charleston National,
LLC; Colin R. Campbell Construction,
Inc.; Colin Campbell, individually;
Builders FirstSource-Southeast Group,
LLC; Builders FirstSource, Inc.;
Americo Roofing Concepts, Inc.; DVS,
Inc.; Advanced Building Connection,
LLC; Guy C., Lee Building Materials,
LLC; WS Contractors, LLC; Dino
Schwartz, Individually; Charleston
Exteriors, LLC; ECC Contracting LLC;
Hurley Services, LLC; McDaniel
Construction Co., LLC; AC
Construction Corp.; AC Construction
Inc.; L&G Construction Group, LLC;
Liollo Architecture, JC Construction
d/b/a JC Construction, LLC a/k/a JC
Constructors a/k/a JC Contractors,
LLC; Soto & Vasquez Construction
LLC a/k/a Costa De Oliveria
Contruction, LLC; Solesmar Jesus De
Oliveria; Wilson Lucas Sales d/b/a
Miracle Siding, LLC, Royal Homes of
SC, Inc.; Coleen Batissa; Christopher
Batissa; Norma Ferreira Bruno;
Mendez Construction, LLC; Juan
Garza Ramos, individually; Juan
Garza Ramos d/b/a Juan
Constructors; Jessica Marroquin,
individually; Jessica Marroquin d/b/a

**MOTION FOR RECONSIDERATION OF
ORDER GRANTING PARTIAL SUMMARY
JUDGMENT TO EAST COAST CARPENTRY**

Marroquin Construction; Carlos	)
Marroquin, individually; Carlos and	)
Jessica Marroquin d/b/a Marroquin	)
Construction; Feliciano Cruz Silva;	)
Garcia Roofing, LLC; Givair De Caris;	)
and Mario Salgado,	)
	)
Defendants.	)
Builders FirstSource-Southeast Group,	)
LLC,	)
	)
Third Party Plaintiff,	)
	)
vs.	)
	)
Pohlman Quality Contractors,	)
Pohlman Quality Exteriors, Palmetto	)
Trim and Renovation, Edward Bruce	)
Witham and East Coast Carpentry,	)
	)
Third Party Defendants.	)
	)
	)

TO: ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC ("BFS"), by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Jennifer B. McCoy, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of July 29, 2021, granting East Coast Carpentry ("ECC") partial summary judgment as to the claims of BFS.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina and Rules 52 and 59, South Carolina Rules of Civil Procedure, is premised upon the following considerations:

1. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by *Concord & Cumberland*;
2. The Court inappropriately read the separate provisions of the indemnity section together and improperly found them to be illegal and unenforceable;
3. The Court in *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp.* did not find that the contract was illegal, unenforceable, against public policy or violative of Section 32-2-10;
4. The Court failed to address the contract's severability provision.

ARGUMENT

As represented repeatedly during the course of oral argument, BFS, in this action, has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent. BFS has, by contrast, sought indemnity only against liability for damages resulting from the negligence of its subcontractors, including ECC. Under the circumstances, the indemnity provisions of the relevant BFS/ECC contract should have been interpreted "in accordance with the rules of construction, and of contracts, generally", as opposed to the heightened "clear and unequivocal" standard which (as more fully detailed hereinafter), applies only when a party seeks to be indemnified against liability for damages occasioned by its own negligence, whether sole or concurrent.

Recent rulings from the South Carolina Circuit Courts have determined that the indemnity provisions of BFS subcontractor agreements, similar to those at issue here, were insufficient to support claims for indemnity under South Carolina law. Those prior

rulings were, however, premised upon the Courts' (incorrect) understanding that BFS, in each of those prior actions, was seeking indemnity against liability for damages occasioned by its own negligence. The specific issue before this Court (where BFS seeks indemnity only against liability for damages occasioned by the negligence of its sub-contractor indemnitor), was addressed only recently, in orders denying sub-contractor Motions for Summary Judgement, issued by the Honorable Roger M. Young, Sr., in the matters of Shane v. D.R. Horton, Inc., et al., Civil Action No. 2020CP1002377 and JES Holdings vs. D.R Horton Inc., et al., Civil Action No. 2020CP1001828. Those orders (copies of which are attached hereto as Exhibits A & B respectively), are instructive, and provide appropriate guidance for this court in the resolution of the instant motion for reconsideration.

Judge Young, after entertaining arguments nearly identical to those asserted by ECC in this action, determined, correctly, that the clear and unequivocal standard set forth by the Concord & Cumberland Court applied only in instances where the indemnitee sought indemnification against liability for damages occasioned by its own negligence. Judge Young further determined that where, as here, the indemnitee is not seeking indemnity against damages occasioned by its own negligence (whether sole or concurrent), the rules of construction for contracts generally apply.

Moreover, and completely consistent with the arguments set forth both herein below, Judge Young further determined that the contractual terms at issue, pursuant to which BFS sought indemnity, were specifically authorized by the provisions of South Carolina Code Section 32-2-10, and thus, by definition, not against public policy or unenforceable.

Finally, in a finding of specific relevance to the issues before this Court, Judge Young determined that the Court was compelled by the relevant severability provision of the contract, to sever any contractual provision which was found to be unconscionable or violative of public policy, leaving the remaining indemnity provision intact and enforceable by the indemnitee.

1. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland.

The Court erred in its application of the heightened “clear and convincing” standard, which applies only where a party seeks indemnification against liability for damages occasioned by its own negligence. Such standard is not applicable where, as here, BFS seeks indemnification only against liability for damages occasioned by the negligence of its subcontractor.

The applicable rules for construction of indemnification contracts were succinctly stated by the Concord & Cumberland Court:

“Generally, we will construe an indemnification contract ‘in accordance with the rules for construction of contracts.’ Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, as explained above, when an indemnity clause purports ‘to relieve an indemnitee against the consequences of its own negligence,’ our case law requires strict construction of the clause. Laurens, 855 S.C. at 111, 584 S.E.2d at 378:379.’ Indeed most courts agree with the basic rule that a contract of indemnify will not be construed to indemnify the indemnitee from losses unless such language is expressed in clear and unequivocal terms.’ Fed. Pac. Elec., 298 S.C. at 26, 378 S.E.2d at 57.”

Had the Court conducted the appropriate analysis here, it would have determined that Concord & Cumberland does not apply to this situation, and, thus, the BFS/ECC contract need not satisfy the “clear and unequivocal” standard.

In Concord & Cumberland, the court refused to allow a contractor to recover from its subcontractor for the contractor's own negligence when the purported language on which it sought to recover was not "clear and unequivocal." Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). The unique issue before the Concord & Cumberland Court was whether a general contractor could require its subcontractor to pay for damages caused by the general contractor's own negligence. In that specific factual situation, the court held that the heightened "clear and unequivocal" standard was applicable to the contract language. Id. In reviewing the language at issue in that case, the Concord & Cumberland Court determined that the language did not meet the "clear and unequivocal" standard, and thus that the general contractor could not recover from the subcontractor for the general contractor's own negligence; instead, the Court limited indemnification to damages resulting from negligence in the work performed by the subcontractor.

In this case, BFS is seeking indemnification only against liability for damages occurring as a result of property damage caused by the negligence of its subcontractor, ECC. BFS is not seeking indemnity against liability for damages resulting from its own negligence, whether sole or concurrent. The BFS claims are based upon Section 6(b)(2) of its subcontractor agreement – the only clause that covers indemnification for property damage.

The indemnification clause at issue allows BFS to recover in indemnity only for damages caused by the negligence/gross negligence of ECC, which is exactly the type of recovery provided for by Concord & Cumberland. The indemnification clause provides:

[T]o the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend and hold harmless the Indemnitees for, and to save the

harmless against, any and all Claims (together with reasonable attorneys' fees), **to the extent of liability resulting from Subcontractor's negligence or willful misconduct** incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnatee's failure to supervise Subcontractor's operations.

Subcontract Agreement, Section 6(b)(2) (emphasis added). All indemnification is limited to the extent of ECC's negligence, including indemnification for "property damage," outlined in subsection (i), which is the underlying dispute in the case. This indemnity clause is thus expressly authorized by Section 32-2-10 and Concord & Cumberland. Moreover, indemnity provisions allowing a contractor to recover from its subcontractor for the subcontractor's negligence have been consistently upheld by our courts. See Concord & Cumberland, 424 S.C. 639; One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286, (Ct. App. 2016).

Because BFS is not seeking "to be relieved from the consequences of its own negligence," but is only seeking indemnity against liability for damages caused by its subcontractor, the Concord & Cumberland heightened standard should not have been applied to this contract.

2. The Court inappropriately considered irrelevant clauses of the indemnity provision and improperly found, without any supporting basis, that the indemnity provision is unconscionable, ambiguous, unintelligible, conflicting and unenforceable.

The Court's Order recognized that the indemnity provision in the BFS/ECC contract contains multiple clauses. See Order page 5. Equally importantly, the Court, recognizing that two of those clauses are irrelevant, correctly omitted consideration of such clauses. The Court, in omitting such consideration, noted that,

- a. The first clause, Section 6(a) applies only to workers compensation claims;
- b. The second clause, Section 6(b)(1) applies only to personal injury claims.

See July 29, 2021 Order of Judge McCoy at page 5.

Notwithstanding the Court's clear recognition of the irrelevance of the above cited clauses, it nevertheless appears to have considered those clauses in its determination that the "language is inherently confusing insofar as it calls for ECC to indemnify BFS for BFS's sole negligence, while also claiming to limit indemnity 'to the extent' of ECC's negligence." See Order page 6. The Court appears, in its determination, also to have relied upon an incorrect construction of clause iii of Section 6(b)(2).

Section 6(b)(2), upon which BFS relies in the assertion of its claims, clearly imposes an obligation to indemnify against liability only to the extent that such liability "results from the Subcontractor's negligence or willful misconduct," and then, only to the "extent permitted by law." See BFS/ECC Contract at page 6. Contrary to the Court's determination, nothing within the entirety of Section 6 imposes an obligation upon ECC to indemnify BFS against liability occasioned by either the sole negligence or the concurrent negligence of BFS.

Moreover, as more fully explained in argument 4 below, to the extent that the Court determined that any provision is contrary to South Carolina law, the Court is required to honor the intent of the parties and sever any such provision.

3. The Court in D.R. Horton, Inc. v. Builders FirstSource-Se. Grp. did not find that the contract was illegal, unenforceable, against public policy or violative of Section 32-2-10.

The Court's Order misrepresents the holding in D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., to support its finding that the BFS/ECC contract is illegal, unenforceable, against public policy and violative of Section 32-2-10.

In D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., D.R. Horton successfully compelled a plaintiff homeowner to submit its claims to arbitration to resolve the same. See 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). In the arbitration proceeding, D.R. Horton instructed the arbitrator to issue a single monetary award versus portioning out the award in terms of liability. *Id.* D.R. Horton then filed suit against only BFS to recover in contractual indemnity the entire award and attorney's fees incurred defending against the plaintiff's claims. *Id.* The Court of Appeals determined that D.R. Horton could not ask the arbitrator to conceal its reasons for an award, which may have included damages caused by its own negligence, then ask the circuit court to award it damages that would be barred by statute. *Id.* at 153. The Court of Appeals explained that the record was devoid of any evidence presented to the arbitrator, and any attempt to divine the reasoning for the arbitrator's award would be an exercise in speculation. *Id.* The Court of Appeals held that because it was impossible to determine whether, and to what extent, the arbitrator's award included damages for D.R. Horton's own negligence, indemnification was inappropriate. *Id.*

This Court's Order also failed to recognize that the Court of Appeals specifically found that Section 32-2-10 allowed D.R. Horton and BFS to agree that BFS would indemnify D.R. Horton for damages caused by BFS or its subcontractors. *Id.* at 152. Moreover, the Court of Appeals found that such agreement is not against public policy. *Id.* The court of Appeals found that only the language purporting to require BFS to

indemnity DR Horton for damages caused by DR Horton or its subcontractors' negligence is void as against public policy. *Id.* Thus, D.R. Horton, Inc. v. Builders FirstSource-Se. Grp. expressly authorizes the contractual indemnity claim of BFS against ECC for ECC's negligence.

The language of the BFS/ECC contract does not violate Section 32-2-10. Although Section 32-2-10 prohibits an agreement whereby the indemnitor undertakes to indemnify against liability for damages caused by the sole negligence of the indemnitee, this statute, nonetheless, states specifically that:

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 its employees. (Emphasis added).

The applicable indemnity provisions in Section 6(b)(2) are completely consistent with the indemnity language authorized by Code Section 32-2-10, and thus by definition, are not against public policy. Moreover, indemnity provisions allowing a contractor to recover from its subcontractor for the subcontractor's negligence have been consistently upheld by our courts. See Concord & Cumberland, 424 S.C. 639; One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286, (Ct. App. 2016). As such, the Court improperly found that the indemnity provision is illegal, unenforceable, against public policy and violative of Section 32-2-10 and must reverse its decision to grant partial summary judgment to ECC on this basis

4. The Court failed to address the contract's severability provision.

The Court's Order takes issue with provisions 6(b)(1) and 6(b)(2)(iii) of the BFS/ECC contract and finds that they violate S.C. Code Section 32-2-10 and public

policy. As noted above, despite recognizing that Section 6(b)(1) applies only to personal injury claims, the Court nonetheless ignores this fact and inappropriately applies it to BFS' contractual indemnity claim against ECC for property damage. Moreover, Sections 6(b)(1), upon which BFS does not rely in the assertion of its claims, and 6(b)(2)(iii) clearly impose an obligation to indemnify against liability only to the extent that such liability "results from the Subcontractor's negligence or willful misconduct." See BFS/ECC Contract at page 6. In fact, contrary to the Court's determination, nothing within the entirety of Section 6 imposes an obligation upon ECC to indemnify BFS against liability occasioned by the sole negligence or the concurrent negligence of BFS. Nevertheless, to the extent that the Court believed any provision of the contract to be invalid, the Court had a duty to sever the offending provision and leave the remainder of the contract intact. The Court did not address its duty to sever, and BFS requests that it now do so.

BFS does not concede that any provisions of the contract contain problematic language; nonetheless, to the extent that the Court took issue with any specific language, it should have simply severed such language and left the remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

South Carolina law provides that "[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties'

intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable).

The severability provision of the contract here demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

[BFS/ECC Contract, Section 9, Paragraph (f).] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the contract may be invalid, the Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

While BFS maintains that the provisions of Section 6 are valid, the Court could sever 6(b)(1) and 6(b)(2)(iii), and BFS would still be entitled to pursue its claim for contractual indemnity under Section 6(b)(2)(i) or (ii), which have never been criticized by this or any other court.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court reconsider and deny ECC's motion for summary judgment.

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August 9, 2021

EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2020-CP-10-02377

ANDREA C. SHANE,

Plaintiff,

vs.

D.R. HORTON, INC., FOGEL
SERVICES, INC., 84 LUMBER
COMPANY, BUILDERS
FIRSTSOURCE – SOUTHEAST
GROUP, LLC, ARCHER EXTERIORS,
INC., PROFESSIONAL EXTERIORS
II, LLC F/K/A PROFESSIONAL
EXTERIORS, LLC, AND ALFONSO
RODRIGUEZ VASQUEZ; BUILDERS
FIRSTSOURCE-SOUTHEAST
GROUP, LLC84 LUMBER
COMPANY, ARCHER EXTERIORS,
INC., D.R. HORTON, INC., ECC
CONTRACTING, LLC, FOGEL
SERVICES, INC., PROFESSIONAL
EXTERIORS II, LLC AND
PROFESSIONAL EXTERIORS, LLC,

Defendant.

Builders FirstSource-Southeast Group,
LLC

Third-Party Plaintiff,

vs.

ECC Contracting, LLC

Third-Party Defendant.

ORDER GRANTING IN PART
AND DENYING IN PART ECC
CONTRACTING, LLC'S MOTION
FOR SUMMARY JUDGMENT AS
TO THIRD-PARTY CLAIMS OF
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC.

This matter came before the Court upon the motion of defendant, ECC Contracting, LLC, seeking summary judgement as to the third-party claims as asserted by Builders FirstSource Southeast Group, LLC. Oral arguments were heard on May 26, 2021, with Steve Hughes representing Builders FirstSource and Chandler Rowh and Catherine Chase representing ECC Contracting. Based upon those considerations set forth herein, and for the reasons detailed herein, the motion of ECC Contracting is GRANTED in part and DENIED in part.

FACTUAL AND PROCEDURAL BACKGROUND

The matter arises out of damages allegedly occasioned by deficiencies in construction/development of the subject residence at 1053 Harbortowne Road, Charleston, South Carolina. Plaintiff has brought claims against Builders FirstSource, related to alleged deficiencies in installation of the windows. Builders FirstSource has contended that it did not perform work at or provide materials for the subject property. Rather, ProBuild had undertaken the supply and installation of windows. ProBuild then contracted with its subcontractor, ECC Contracting, LLC, to perform installation of the windows. More than a year after the completion of the project, ProBuild was acquired by Builders FirstSource.

Builders FirstSource, pursuant to the provisions of the referenced acquisition, has now responded to the Plaintiff's allegations, as set forth in the Andrea C. Shane amended complaint. Based upon the Plaintiff's allegations of deficiencies in window installation, Builders FirstSource has asserted third-party claims against ECC Contracting, LLC, setting forth causes of action in (a) negligence/gross negligence, (b) breach of express warranties, (c) breach of

implied warranties, (d) breach of contract, (e) contractual indemnity, and (f) equitable indemnity. By the aforesaid causes of action, Builders FirstSource has sought indemnity, from ECC Contracting, against liability for loss or damage resulting from the negligence or other deficiency in the performance of the work by ECC Contracting. Notwithstanding the assertions of ECC to the contrary, Builders FirstSource has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent, or any such negligence of ProBuild. Its claims are limited to damages occasioned by the negligence of the ProBuild subcontractor, ECC.

ECC has now moved for summary judgement as to the third-party claims of Builders FirstSource. The motion is premised generally upon the ECC contention that Builders FirstSource has sought indemnification against liability for its own negligence, and more specifically upon the provisions of a Master Subcontractor Agreement, executed between ECC and BFS (as opposed to ProBuild), dated February 26, 2008. A virtually identical agreement between ECC and BFS was subsequently executed on September 1, 2015. The Certificate of Occupancy was issued for the subject residence in 2014.

Neither party has yet produced a copy of the relevant contract between ProBuild and ECC, which would have governed their respective rights and responsibilities relating to the work performed. Moreover, prior to the hearing, counsel for BFS specifically advised the Court that discovery on critical issues in this case had barely commenced, much less been completed. Counsel further contended that, under the circumstances, any consideration of the ECC Motion for

Summary Judgement was premature, and should be continued pending completion of discovery. No depositions have yet been taken, and much written discovery is still unanswered.

ORDER

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SC R. Civ. P. 56(c); Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In reviewing a motion for summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). “[S]ummary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009).

1. The BFS Claims for breach of express and implied warranties, breach of contract, and negligence are dismissed pursuant to Stoneledge.

The BFS third party claims for breach of express and implied warranties, breach of contract, and negligence are merely disguised indemnity claims and subject to dismissal under Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015). ECC Contracting's motion is therefore granted as to those claims.

2. Issues of material fact preclude summary judgment.

It has been the consistent practice of this Court to consider motions for summary judgement **only** following completion of necessary discovery. Such a practice is in compliance with instructions from our appellate courts, which have directed that summary judgment is “not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). As noted above, counsel for BFS, prior to the hearing, advised the Court that significant discovery, relating to matters addressed within the ECC motion, remained incomplete. Moreover, arguments of counsel during the hearing clearly confirm that there remain questions of fact concerning issues including the parties to the relevant contract, the provisions of the contract, and the respective negligence of the parties. Premised upon that consideration alone, this Court concludes that the ECC Motion for Summary Judgement is not, at this time, properly before this Court, and must therefore be denied.

A. The governing contract is the one between ECC and ProBuild.

At oral argument, ECC argued that the subcontract agreement between ECC and Builders FirstSource should govern the respective rights and responsibilities between those parties, even though (a) the ECC services were performed pursuant to its contract with Probuild and (b) at the time ECC performed the work at the project, ProBuild and BFS were two completely separate entities. ECC argued further that the indemnity provisions of the ECC/BFS contract have been previously invalidated by rulings from other trial courts, and that those

provisions therefore provide no support for claims in contractual indemnity in this matter.

To support its position that the BFS contract governs, ECC attempts to make much of the following language from the BFS pleading: that ECC “provided materials and/or services . . . pursuant to an agreement with [BFS] *and/or* is predecessor in interest” and that “the subcontract agreement, as executed between [ECC] and [BFS] (*and/or* its predecessor in interest), provided for contractual indemnification in favor of BFS *and/or* its predecessor in interest.” (Emphasis added by ECC). However, the fact that BFS has plead alternatives through the use of “and/or” – before any discovery would have confirmed whether the relationship was with BFS AND/OR its predecessor in interest – does not change the ultimate reality that the contractual relationship at issue was between ECC and ProBuild. To the extent that ECC contests that it had a contractual relationship with ProBuild, its motion is subject to the analysis below regarding insufficient discovery.

The Court notes that, had ECC in fact performed the work for BFS, the ECC/BFS contract in effect at the time would govern the relationship between those parties. However, where, as here, the ECC installation services were provided as a subcontractor to ProBuild (and not to Builders FirstSource), it is the contractual relationship between those parties (ECC and ProBuild), which determines the respective rights and responsibilities of the parties in this matter.

B. Insufficient discovery has been completed.

As the parties are well aware, summary judgment is appropriate only where “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” SC R. Civ. P. 56(c). Notably, there have been no depositions taken and very few interrogatories answered at this early stage of the litigation. Our courts have further instructed that “summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” Doe ex rel. Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). Because discovery has barely begun in this case, and because the parties have not had a “full and fair opportunity to complete discovery,” ECC’s motion is premature and must be denied.

ECC argues that it is entitled to summary judgment because neither party has produced evidence of the contents of any contract, whether oral or written, between ProBuild and ECC. However, rather than supporting its right to summary judgment, the lack of evidence reflects the early stage of this litigation and the Court’s obligation to deny ECC’s motion.

ECC argues further that it is entitled to summary judgement because there is no genuine issue as to any material fact. However, where, as here, Builders FirstSource seeks indemnity against liability for damages occasioned by the negligence of ECC, questions as to the respective negligence of ECC and/or ProBuild are clearly relevant to appropriate disposition of the pending motion. Additionally, material issues of fact abound as to the proper identity of the parties involved in this litigation as well as to the contractual relationship between them. It

is thus impossible for this Court to make the necessary determination that there exists no genuine issue of any material fact. Under the circumstances, any ruling upon the ECC motion for summary judgement would clearly be premature, and the motion, as to the BFS claims in contractual and equitable indemnity, is hereby denied.

3. Even if the ECC/BFS Contract governed, ECC's motion still fails as to the indemnity claims.

This Court has determined that the respective rights and responsibilities of the parties hereto (ECC v BFS) are governed by the contractual relationship between ProBuild and ECC, not by the BFS/ECC contract cited by ECC. However, even accepting ECC's argument that the BFS/ECC Contract governs ECC's relationship with ProBuild, ECC's motion fails.

The BFS/ECC Contract is nearly identical to other iterations that have come under fire before South Carolina Circuit Courts, including this one, which have found that, for various reasons, as a matter of law, the contract does not allow Builders FirstSource to seek indemnification for its own negligence.

This court agrees with previous trial court determinations that the indemnity provisions of the referenced BFS/ECC subcontract agreement are not sufficiently clear and unequivocal to impose an obligation to indemnify against liability for damages occasioned by the negligence of BFS. However, as noted hereinabove, BFS, in this action, has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent. BFS has, by contrast, sought indemnity against liability for damages resulting from the negligence of ECC Contracting. No court has yet considered whether the specific

indemnity provisions of the contract at issue here would allow such recovery. That question is addressed below in light of each of ECC's arguments.

A. The language of the Contract does not violate Section 32-2-10.

The relevant indemnity provision, which is Section Five Paragraph One, provides, in part, that Builders FirstSource may seek indemnification for losses arising out of the subcontractor's performance of the work:

BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

By limiting indemnification only to damages "TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR," Section 5, Paragraph One requires ECC to indemnify BFS only against liability for damages caused by the negligence, whether sole or concurrent, of ECC itself. This arrangement is exactly the type of agreement specifically authorized by the relevant provisions of Section 32-2-10. Although Section 32-2-10 prohibits an agreement whereby the indemnitor undertakes to indemnify against liability for damages caused by the sole negligence of the indemnitee, this statute, nonetheless, states specifically that:

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 its employees. (Emphasis added).

The indemnity provision in Section 5, Paragraph One is completely consistent with the indemnity language authorized by Code Section 32-2-10, and

thus by definition, is not against public policy or unenforceable. Contrary to the assertion of ECC's Counsel, the appellate court in D.R. Horton, Inc. v. Builders FirstSource specifically authorized the general contractor's recovery in indemnity for negligence, whether sole or concurrent, of its subcontractor. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 149, 810 S.E.2d 41, 44 (Ct. App. 2018) (holding that an indemnification clause is void as against public policy to the extent that it requires a subcontractor to indemnify the general contractor for damages caused by the general contractor's negligence, while upholding the portion of an indemnity clause that allows the general contractor to recover from the subcontractor for that subcontractor's negligence, whether sole or concurrent).

Paragraph Two of Section 5 of the Master Subcontractor Agreement, cited by ECC Counsel, relates only to indemnity against liability for damages arising out of personal injury to the subcontractor indemnitor, its agents, employees, or representatives. The provisions of Paragraph Two (which, in any event, impose liability only "to the fullest extent permitted by law") are not relevant to the claims currently asserted by Builders FirstSource, which are limited to indemnity against liability for property damage.

ECC Contracting has also cited the provisions of Section 3 of the Master Subcontractor Agreement, dealing with "Warranty," and claims that the Warranty provision allows BFS to recover from its subcontractors for products that BFS provides. In Section 3, the subcontractor warrants and guarantees "Work", which is a defined term found in Section 1(a) of the contract [Master Subcontractor Agreement, p. 4]. As defined, "Work", encompasses only the materials that the

subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. [Master Subcontractor Agreement, p. 1]. Thus, in Section 3 the subcontractor warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs.

The Warranty provision also provides that the subcontractor will indemnify Builders FirstSource for all non-conforming “Work” - which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the subcontractor. To the extent they are applicable to the claims at issue, the Warranty Provisions of Section 3 are completely consistent with Section 32-2-10 and provide no support for ECC’s motion for summary judgement.

B. The Contract does not violate Concord and Cumberland.

Concord & Cumberland stands for the proposition that when an indemnitee is seeking to recover against an indemnitor for the indemnitee’s own negligence, the contractual language it relies upon must meet a heightened standard of being “clear and unequivocal.” Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Articulated in a manner that applies to our purposes, the Court in Concord & Cumberland held that the “clear and unequivocal” standard only applies when a general contractor seeks to recover from its subcontractor for the general contractor’s own negligence (whether sole or concurrent).

Typically, courts will construe an indemnification contract “in accordance with the rules for construction, and of contracts, generally,” as opposed to using a

heightened “clear and convincing” standard. Id. Because Builders FirstSource is not seeking indemnity against damages caused by its (or ProBuild’s) own alleged negligence, whether sole or concurrent, the heightened standard of “clear and unequivocal” is not applicable to an evaluation of its contractual provisions.

At the crux of Concord & Cumberland was the fact that the general contractor was trying to recover from its subcontractor for the general contractor’s own negligence. As articulated above, BFS cannot recover damages in indemnity against ECC for BFS’s (or ProBuild’s) own negligence. But when evaluating the BFS claim for indemnity against ECC for ECC’s negligence, the heightened standard articulated in Concord & Cumberland does not apply and thus is not relevant here.

C. The Contract is not unconscionable

A contract is considered one of adhesion if it “is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). While the Master Subcontract Agreement does appear to be a form contract, ECC has offered no evidence that the contract was either (1) offered on a take-it-or-leave-it basis, nor that (2) its terms were not negotiable.

Even if the Contract were one of adhesion, that would not end the analysis because “[a]dhesion contracts . . . are not per se unconscionable.” Simpson, 373 S.C. at 27. “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions,

together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Id. at 24–25.

Indemnity provisions allowing a contractor to recover from its subcontractor for the subcontractor’s negligence have been consistently upheld by our courts. See Concord & Cumberland, 424 S.C. 639; One Belle Hall Prop. Owners Ass’n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286, (Ct. App. 2016). Additionally, the evidence here shows that ECC was contented enough with the terms of the contract that it accepted them not only once in 2008, but also chose to renew the same terms again in 2015. It would be inequitable for ECC to be released from terms it repeatedly agreed to simply because it has now become inconvenient for ECC to be bound by them.

D. The Court is required to sever offending provisions.

To the extent that any provision of the Master Subcontractor Agreement may be found to be unconscionable or violative of public policy, Section 32-2-10, or Concord & Cumberland, the Court is compelled to sever such provision pursuant to the specifics of the severance provision of the contract, and as required by relevant South Carolina law. One Belle Hall, 418 S.C. at 64 (holding that allegedly unconscionable language in the contract’s warranty provision ought to be severed, due, in part, to the presence of severability clause; and declining to invalidate the entire contract).

“Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002). The severability provision of the contract at

issue before this Court demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law. (Emphasis added).

[Master Subcontractor Agreement, Section 9(f) at p. 11.] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed. Thus, to the extent that any portion or provision of the contract may be invalid, the Court, as instructed by One Bell Hall and Beach Co., supra, is compelled to honor the intent of the parties and sever any such offending provisions or portion thereof, leaving the remaining provisions – namely, Section Five, Paragraph One – intact.

E. The issue before this Court is not subject to collateral estoppel.

ECC argues that this Court is collaterally estopped from ruling on this issue because prior court rulings have held the BFS Contract unenforceable.

The doctrine of collateral estoppel is available when issues of fact or law are actually litigated and determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994). The issue of law before this Court has not been previously litigated and determined. What other Courts, including this one, have found in prior cases is that under the language of the Contract, BFS cannot “seek[] indemnification for its own negligent acts or omissions.” Amended Order of Judge Newman filed

February 3, 2020 in Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al., Civil Action No. 2018-CP-08-02547; see also this Court’s order in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455; see also Judge Jennifer B. McCoy’s order in Dag Pavic and Stela Susac-Pavic v. Carolina Cottage Homes, LLC et al., Civil Action No. 2019-CP-10-00772.¹ As this Court articulated above, the issue of whether BFS may recover in indemnity for its own negligence is not before this Court. Rather, this Court is considering whether BFS may recover in indemnity for the negligent acts of its subcontractor. Because no Court has yet ruled on that issue, the Court’s holding is not barred by collateral estoppel.

CONCLUSION

Based on the above, the Court holds as follows:

ECC’s motion for summary judgment as to the BFS claims for breach of express and implied warranty, breach of contract, and negligence is GRANTED.

ECC’s motion for summary judgment as to the BFS claims for contractual and equitable indemnity is DENIED.

IT IS SO ORDERED!

ELECTRONIC SIGNATURE PAGE TO FOLLOW

¹ The Court notes that all of these orders are currently on appeal.



Charleston Common Pleas

Case Caption: Andrea C Shane , plaintiff, et al VS Dr Horton Inc , defendant, et al

Case Number: 2020CP1002377

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Electronically signed on 2021-07-29 11:33:30 page 16 of 16

EXHIBIT B

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2020-CP-10-01828

JES Holding, LLC)

Plaintiff,)

vs.)

D.R. Horton, Inc., Fogel Services, Inc.,)
84 Lumber Company, Builders)
FirstSource – Southeast Group, LLC,)
Archer Exteriors, Inc., Professional)
Exteriors II, LLC f/k/a Professional)
Exteriors, LLC, and R D Z Services,)
LLC)

Defendant.)

Builders FirstSource-Southeast Group,)
LLC)

Third-Party Plaintiff,)

vs.)

ECC Contracting, LLC)

Third-Party Defendant.)

ORDER GRANTING IN PART
AND DENYING IN PART ECC
CONTRACTING, LLC'S MOTION
FOR SUMMARY JUDGMENT AS
TO THIRD-PARTY CLAIMS OF
BUILDERS FIRST-SOUTHEAST
GROUP, LLC

This matter came before the Court upon the motion of defendant, ECC Contracting, LLC, seeking summary judgement as to the third-party claims as asserted by Builders FirstSource Southeast Group, LLC. Oral arguments were heard on May 26, 2021, with Steve Hughes representing Builders FirstSource and Chandler Rowh and Catherine Chase representing ECC Contracting. Based upon

those considerations set forth herein, and for the reasons detailed herein, the motion of ECC Contracting is GRANTED in part and DENIED in part.

FACTUAL AND PROCEDURAL BACKGROUND

The matter arises out of damages allegedly occasioned by deficiencies in construction/development of the subject residence at 1033 Harbortowne Road, Charleston, South Carolina. Plaintiff has brought claims against Builders FirstSource, related to alleged deficiencies in installation of the windows. Builders FirstSource has contended that it did not perform work at or provide materials for the subject property. Rather, ProBuild had undertaken the supply and installation of windows. ProBuild then contracted with its subcontractor, ECC Contracting, LLC, to perform installation of the windows. More than a year after the completion of the project, ProBuild was acquired by Builders FirstSource.

Builders FirstSource, pursuant to the provisions of the referenced acquisition, has now responded to the Plaintiff's allegations, as set forth in the JES Holdings, LLC amended complaint. Based upon the Plaintiff's allegations of deficiencies in window installation, Builders FirstSource has asserted third-party claims against ECC Contracting, LLC, setting forth causes of action in (a) negligence/gross negligence, (b) breach of express warranties, (c) breach of implied warranties, (d) breach of contract, (e) contractual indemnity, and (f) equitable indemnity. By the aforesaid causes of action, Builders FirstSource has sought indemnity, from ECC Contracting, against liability for loss or damage resulting from the negligence or other deficiency in the performance of the work by ECC Contracting. Notwithstanding the assertions of ECC to the contrary, Builders

FirstSource has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent, or any such negligence of ProBuild. Its claims are limited to damages occasioned by the negligence of the ProBuild subcontractor, ECC.

ECC has now moved for summary judgement as to the third-party claims of Builders FirstSource. The motion is premised generally upon the ECC contention that Builders FirstSource has sought indemnification against liability for its own negligence, and more specifically upon the provisions of a Master Subcontractor Agreement, executed between ECC and BFS (as opposed to ProBuild), dated February 26, 2008. A virtually identical agreement between ECC and BFS was subsequently executed on September 1, 2015. The Certificate of Occupancy was issued for the subject residence in 2014.

Neither party has yet produced a copy of the relevant contract between ProBuild and ECC, which would have governed their respective rights and responsibilities relating to the work performed. Moreover, prior to the hearing, counsel for BFS specifically advised the Court that discovery on critical issues in this case had barely commenced, much less been completed. Counsel further contended that, under the circumstances, any consideration of the ECC Motion for Summary Judgement was premature, and should be continued pending completion of discovery. No depositions have yet been taken, and much written discovery is still unanswered.

ORDER

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SC R. Civ. P. 56(c); Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In reviewing a motion for summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). “[S]ummary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009).

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It has been the consistent practice of this Court to consider motions for summary judgement **only** following completion of necessary discovery. Such a practice is in compliance with instructions from our appellate courts, which have

directed that summary judgment is “not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). As noted above, counsel for BFS, prior to the hearing, advised the Court that significant discovery, relating to matters addressed within the ECC motion, remained incomplete. Moreover, arguments of counsel during the hearing clearly confirm that there remain questions of fact concerning issues including the parties to the relevant contract, the provisions of the contract, and the respective negligence of the parties. Premised upon that consideration alone, this Court concludes that the ECC Motion for Summary Judgement is not, at this time, properly before this Court, and must therefore be denied.

A. The governing contract is the one between ECC and ProBuild.

At oral argument, ECC argued that the subcontract agreement between ECC and Builders FirstSource should govern the respective rights and responsibilities between those parties, even though (a) the ECC services were performed pursuant to its contract with Probuild and (b) at the time ECC performed the work at the project, ProBuild and BFS were two completely separate entities. ECC argued further that the indemnity provisions of the ECC/BFS contract have been previously invalidated by rulings from other trial courts, and that those provisions therefore provide no support for claims in contractual indemnity in this matter.

To support its position that the BFS contract governs, ECC attempts to make much of the following language from the BFS pleading: that ECC “provided

materials and/or services . . . pursuant to an agreement with [BFS] *and/or* is predecessor in interest” and that “the subcontract agreement, as executed between [ECC] and [BFS] (*and/or* its predecessor in interest), provided for contractual indemnification in favor of BFS *and/or* its predecessor in interest.” (Emphasis added by ECC). However, the fact that BFS has plead alternatives through the use of “and/or” – before any discovery would have confirmed whether the relationship was with BFS AND/OR its predecessor in interest – does not change the ultimate reality that the contractual relationship at issue was between ECC and ProBuild. To the extent that ECC contests that it had a contractual relationship with ProBuild, its motion is subject to the analysis below regarding insufficient discovery.

The Court notes that, had ECC in fact performed the work for BFS, the ECC/BFS contract in effect at the time would govern the relationship between those parties. However, where, as here, the ECC installation services were provided as a subcontractor to ProBuild (and not to Builders FirstSource), it is the contractual relationship between those parties (ECC and ProBuild), which determines the respective rights and responsibilities of the parties in this matter.

B. Insufficient discovery has been completed.

As the parties are well aware, summary judgment is appropriate only where “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” SC R. Civ. P. 56(c). Notably, there have been no depositions taken and very few interrogatories answered at this early stage of the litigation.

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3. Even if the ECC/BFS Contract governed, ECC's motion still fails as to the indemnity claims.

This Court has determined that the respective rights and responsibilities of the parties hereto (ECC v BFS) are governed by the contractual relationship between ProBuild and ECC, not by the BFS/ECC contract cited by ECC. However, even accepting ECC's argument that the BFS/ECC Contract governs ECC's relationship with ProBuild, ECC's motion fails.

The BFS/ECC Contract is nearly identical to other iterations that have come under fire before South Carolina Circuit Courts, including this one, which have found that, for various reasons, as a matter of law, the contract does not allow Builders FirstSource to seek indemnification for its own negligence.

This court agrees with previous trial court determinations that the indemnity provisions of the referenced BFS/ECC subcontract agreement are not sufficiently clear and unequivocal to impose an obligation to indemnify against liability for damages occasioned by the negligence of BFS. However, as noted hereinabove, BFS, in this action, has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent. BFS has, by contrast, sought indemnity against liability for damages resulting from the negligence of ECC Contracting. No court has yet considered whether the specific indemnity provisions of the contract at issue here would allow such recovery. That question is addressed below in light of each of ECC's arguments.

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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 its employees. (Emphasis added).

The indemnity provision in Section 5, Paragraph One is completely consistent with the indemnity language authorized by Code Section 32-2-10, and thus by definition, is not against public policy or unenforceable. Contrary to the assertion of ECC's Counsel, the appellate court in D.R. Horton, Inc. v. Builders FirstSource specifically authorized the general contractor's recovery in indemnity

for negligence, whether sole or concurrent, of its subcontractor. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 149, 810 S.E.2d 41, 44 (Ct. App. 2018) (holding that an indemnification clause is void as against public policy to the extent that it requires a subcontractor to indemnify the general contractor for damages caused by the general contractor's negligence, while upholding the portion of an indemnity clause that allows the general contractor to recover from the subcontractor for that subcontractor's negligence, whether sole or concurrent).

Paragraph Two of Section 5 of the Master Subcontractor Agreement, cited by ECC Counsel, relates only to indemnity against liability for damages arising out of personal injury to the subcontractor indemnitor, its agents, employees, or representatives. The provisions of Paragraph Two (which, in any event, impose liability only "to the fullest extent permitted by law") are not relevant to the claims currently asserted by Builders FirstSource, which are limited to indemnity against liability for property damage.

ECC Contracting has also cited the provisions of Section 3 of the Master Subcontractor Agreement, dealing with "Warranty," and claims that the Warranty provision allows BFS to recover from its subcontractors for products that BFS provides. In Section 3, the subcontractor warrants and guarantees "Work", which is a defined term found in Section 1(a) of the contract [Master Subcontractor Agreement, p. 4]. As defined, "Work", encompasses only the materials that the subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. [Master Subcontractor Agreement, p. 1]. Thus, in Section 3 the

subcontractor warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs.

The Warranty provision also provides that the subcontractor will indemnify Builders FirstSource for all non-conforming “Work” - which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the subcontractor. To the extent they are applicable to the claims at issue, the Warranty Provisions of Section 3 are completely consistent with Section 32-2-10 and provide no support for ECC’s motion for summary judgement.

B. The Contract does not violate Concord and Cumberland.

Concord & Cumberland stands for the proposition that when an indemnitee is seeking to recover against an indemnitor for the indemnitee’s own negligence, the contractual language it relies upon must meet a heightened standard of being “clear and unequivocal.” Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Articulated in a manner that applies to our purposes, the Court in Concord & Cumberland held that the “clear and unequivocal” standard only applies when a general contractor seeks to recover from its subcontractor for the general contractor’s own negligence (whether sole or concurrent).

Typically, courts will construe an indemnification contract “in accordance with the rules for construction, and of contracts, generally,” as opposed to using a heightened “clear and convincing” standard. Id. Because Builders FirstSource is not seeking indemnity against damages caused by its (or ProBuild’s) own alleged

negligence, whether sole or concurrent, the heightened standard of “clear and unequivocal” is not applicable to an evaluation of its contractual provisions.

At the crux of Concord & Cumberland was the fact that the general contractor was trying to recover from its subcontractor for the general contractor’s own negligence. As articulated above, BFS cannot recover damages in indemnity against ECC for BFS’s (or ProBuild’s) own negligence. But when evaluating the BFS claim for indemnity against ECC for ECC’s negligence, the heightened standard articulated in Concord & Cumberland does not apply and thus is not relevant here.

C. The Contract is not unconscionable

A contract is considered one of adhesion if it “is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). While the Master Subcontract Agreement does appear to be a form contract, ECC has offered no evidence that the contract was either (1) offered on a take-it-or-leave-it basis, nor that (2) its terms were not negotiable.

Even if the Contract were one of adhesion, that would not end the analysis because “[a]dhesion contracts . . . are not per se unconscionable.” Simpson, 373 S.C. at 27. “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Id. at 24–25.

Indemnity provisions allowing a contractor to recover from its subcontractor for the subcontractor's negligence have been consistently upheld by our courts. See Concord & Cumberland, 424 S.C. 639; One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286, (Ct. App. 2016). Additionally, the evidence here shows that ECC was contented enough with the terms of the contract that it accepted them not only once in 2008, but also chose to renew the same terms again in 2015. It would be inequitable for ECC to be released from terms it repeatedly agreed to simply because it has now become inconvenient for ECC to be bound by them.

D. The Court is required to sever offending provisions.

To the extent that any provision of the Master Subcontractor Agreement may be found to be unconscionable or violative of public policy, Section 32-2-10, or Concord & Cumberland, the Court is compelled to sever such provision pursuant to the specifics of the severance provision of the contract, and as required by relevant South Carolina law. One Belle Hall, 418 S.C. at 64 (holding that allegedly unconscionable language in the contract's warranty provision ought to be severed, due, in part, to the presence of severability clause; and declining to invalidate the entire contract).

"Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002). The severability provision of the contract at issue before this Court demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law. (Emphasis added).

[Master Subcontractor Agreement, Section 9(f) at p. 11.] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed. Thus, to the extent that any portion or provision of the contract may be invalid, the Court, as instructed by One Bell Hall and Beach Co., supra, is compelled to honor the intent of the parties and sever any such offending provisions or portion thereof, leaving the remaining provisions – namely, Section Five, Paragraph One – intact.

E. The issue before this Court is not subject to collateral estoppel.

ECC argues that this Court is collaterally estopped from ruling on this issue because prior court rulings have held the BFS Contract unenforceable.

The doctrine of collateral estoppel is available when issues of fact or law are actually litigated and determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994). The issue of law before this Court has not been previously litigated and determined. What other Courts, including this one, have found in prior cases is that under the language of the Contract, BFS cannot “seek[] indemnification for its own negligent acts or omissions.” Amended Order of Judge Newman filed February 3, 2020 in Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al., Civil Action No. 2018-CP-08-02547; see also this Court’s order

in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455; see also Judge Jennifer B. McCoy's order in Dag Pavic and Stela Susac-Pavic v. Carolina Cottage Homes, LLC et al., Civil Action No. 2019-CP-10-00772.¹ As this Court articulated above, the issue of whether BFS may recover in indemnity for its own negligence is not before this Court. Rather, this Court is considering whether BFS may recover in indemnity for the negligent acts of its subcontractor. Because no Court has yet ruled on that issue, the Court's holding is not barred by collateral estoppel.

CONCLUSION

Based on the above, the Court holds as follows:

ECC's motion for summary judgment as to the BFS claims for breach of express and implied warranty, breach of contract, and negligence is GRANTED.

ECC's motion for summary judgment as to the BFS claims for contractual and equitable indemnity is DENIED.

IT IS SO ORDERED!

ELECTRONIC SIGNATURE PAGE TO FOLLOW

¹ The Court notes that all of these orders are currently on appeal.



Charleston Common Pleas

Case Caption: Jes Holdings Llc , plaintiff, et al VS Dr Horton Inc , defendant, et al

Case Number: 2020CP1001828

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Electronically signed on 2021-07-29 09:26:17 page 16 of 16

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2016-CP-10-03783

The Retreat at Charleston National
Country Club Home Owners
Association, Inc. and The Retreat at
Charleston National Country Club
Horizontal Property Regime,

Plaintiffs,

vs.

Winston Carlyle Charleston National,
LLC; Colin R. Campbell Construction,
Inc.; Colin Campbell, individually;
Builders FirstSource-Southeast Group,
LLC; Builders FirstSource, Inc.;
Americo Roofing Concepts, Inc.; DVS,
Inc.; Advanced Building Connection,
LLC; Guy C., Lee Building Materials,
LLC; WS Contractors, LLC; Dino
Schwartz, Individually; Charleston
Exteriors, LLC; ECC Contracting LLC;
Hurley Services, LLC; McDaniel
Construction Co., LLC; AC
Construction Corp.; AC Construction
Inc.; L&G Construction Group, LLC;
Liollo Architecture, JC Construction
d/b/a JC Construction, LLC a/k/a JC
Constructors a/k/a JC Contractors,
LLC; Soto & Vasquez Construction
LLC a/k/a Costa De Oliveria
Contruction, LLC; Solesmar Jesus De
Oliveria; Wilson Lucas Sales d/b/a
Miracle Siding, LLC, Royal Homes of
SC, Inc.; Coleen Batissa; Christopher
Batissa; Norma Ferreira Bruno;
Mendez Construction, LLC; Juan
Garza Ramos, individually; Juan
Garza Ramos d/b/a Juan
Constructors; Jessica Marroquin,
individually; Jessica Marroquin d/b/a

**MOTION FOR RECONSIDERATION OF
ORDER GRANTING SUMMARY
JUDGMENT TO WS CONTRACTORS,
LLC**

Marroquin Construction; Carlos	)
Marroquin, individually; Carlos and	)
Jessica Marroquin d/b/a Marroquin	)
Construction; Feliciano Cruz Silva;	)
Garcia Roofing, LLC; Givair De Caris;	)
and Mario Salgado,	)
	)
Defendants.	)
	)
Builders FirstSource-Southeast Group,	)
LLC,	)
	)
Third Party Plaintiff,	)
	)
vs.	)
	)
Pohlman Quality Contractors,	)
Pohlman Quality Exteriors, Palmetto	)
Trim and Renovation, Edward Bruce	)
Witham and East Coast Carpentry,	)
	)
Third Party Defendants.	)
	)
	)

TO: ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC, ("BFS") by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Jennifer B. McCoy, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of July 29, 2021 granting WS Contractors, LLC ("WSC") summary judgment as to the claims of BFS.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina, and Rules 52 and 59, South Carolina Rules of Civil

Procedure, is based upon the following grounds that the Court failed to understand and/or take into account:

1. BFS is not collaterally estopped from arguing against summary judgment because the issues litigated in the earlier cases are different from the issues at bar.
2. The language of the contract does not violate Concord & Cumberland.
3. The contract provisions do not violate either Section 32-2-10 or other requirements of South Carolina law.
4. The Court failed to address the contract's severability provision.
5. The Court inappropriately considered irrelevant clauses of the BFS/WSC contract and improperly found that the clauses are confusing, contradictory, misleading and unenforceable.

ARGUMENT

1. BFS is not collaterally estopped from arguing against summary judgment because the findings in the other cases are different from the issues at bar.

The Court's Order incorrectly found that the BFS cross-claims are barred by collateral estoppel, based upon the Court's erroneous determination that identical issues had previously been determined in Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547; Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455; Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772.

The Court's determination that it was estopped from allowing BFS to proceed on its claims by the cited orders is without merit. Collateral estoppel requires that: (1) the issue in the current case was actually litigated in the prior action; (2) the issue was directly determined in the prior action; and (3) the issue was necessary to support the prior judgment. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d

779, 782 (Ct. App. 2009). The doctrine of collateral estoppel applies only “once a **final judgment** on the merits has been reached in a prior claim.” Carrigg v. Cannon, 347 S.C. 75, 79, 552 S.E.2d 767, 770 (Ct. App. 2001) (emphasis added). “Even where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it.” Id.

The cited orders do not provide a basis for collateral estoppel against the assertion of the BFS claims in the instant action, for two reasons. First, the cited orders are currently on appeal. Collateral estoppel requires that a final, prior judgment exists; however, a judgment, subject to reconsideration upon appeal, cannot be considered “final” until the ultimate appellate court has made its determination. The reasoning of this Court to the contrary would potentially endow the lower courts with authority not contemplated by the judicial system, and, correspondingly, deprive the appellate courts of the authority reserved to those bodies.

The second reason that collateral estoppel is inapplicable to this case is that “the issue . . . actually litigated in the prior case” is different than the issue before the Court in this case. Those orders determined that the indemnity language of the contract was not sufficiently clear or unequivocal to impose the obligation upon the subcontractor to indemnify BFS against liability resulting from its own negligence. In the case before this Court, BFS is not seeking indemnification for its own negligent acts or omissions, but rather is seeking attorney’s fees pursuant to the clear provisions of its agreement with WSC.

The cited orders never even considered the contractual language governing attorneys' fees. Thus, the issues are not the same, collateral estoppel has not been triggered, and the cited orders are not relevant to the analysis required by this case.

2. The language of the contract does not violate Concord & Cumberland.

The Court has inappropriately determined that the ruling in Concord & Cumberland requires that contractual provisions imposing an obligation to defend be clear and unequivocal. The court has further determined that the obligation to defend, as imposed by paragraph three of Section 5, is violative of the provisions of Section 32-2-10.

A. Concord & Cumberland

An understanding of the 2018 Court of Appeals decision in Concord & Cumberland is essential to the issues before this Court. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). In that case, Superior was a general contractor who hired Muhler as its subcontractor. When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to their contract. The contract provided, in relevant part, that:

To the fullest extent permitted by law, **the Subcontractor shall indemnify and hold harmless** the Owner, the Architect, **the Contractor** (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, **arising out of or resulting from the performance of the Subcontractor's Work provided that**

- (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor** or anyone directly or indirectly employed by the

Subcontractor or anyone for whose acts the Subcontractor may be liable, **regardless of whether it is caused in part by a party indemnified hereunder.**

Id. at 643-44 (emphasis added). Superior claimed that these provisions required Muhler to indemnify Superior and that Superior's right to indemnity was not lessened by Superior's concurrent negligence. Id. at 645. Muhler countered that the contract did not require it to indemnify Superior for Superior's wrongdoing. Id.

The Trial Court found, and the Court of Appeals agreed, that in order for Superior to prevail on a claim seeking indemnity *for its own negligence*, it was required to show that the contract language imposing such an indemnity obligation was "clear and unequivocal." Id. at 649. The Court of Appeals noted that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence. Id. Because the Court found that the language did not meet the heightened standard, it held that the contract did not require Muhler to indemnify Superior for Superior's own negligence, and instead "limited indemnification to damages resulting from the work Muhler performed." Id. at 645.

B. Although not required to satisfy the requirements set forth in Concord & Cumberland, the contractual language governing payment of attorneys' fees, nonetheless, meets the heightened "clear and unequivocal" standard articulated therein.

WSC has argued that the BFS claims for attorneys' fees are based upon provisions that violate Concord & Cumberland.

Notably, the Concord & Cumberland case did not explicitly address whether the "clear and unequivocal" standard applied to indemnification claims for attorneys' fees as well as to indemnification claims for liability owed to a third party. Thus, the instant action is distinguishable from Concord & Cumberland in that BFS is not seeking indemnity for

payments made in satisfaction of the plaintiffs' claims, to the extent that such claims may arise out of the negligent acts and omissions of BFS itself. BFS is, in fact, seeking only recovery of attorney's fees and costs, expended in defending against the plaintiffs' claims, arising out of the performance of WSC's work.

Even if the Court were to apply the "clear and unequivocal" standard to contractual language governing attorneys' fees, the contractual provisions at issue here meet that heightened burden. The language of the contract provides that the duty to defend is "...independent and separate from the duty to indemnify, **and the duty to defend exists regardless of any ultimate liability or negligence of the contractor**" [See BFS/WSC contract, Section 5 (emphasis added).] The contractual provision is thus clear in imposing an obligation to defend regardless of the negligence of BFS.

"Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties' intent to absolve the indemnitee of the consequences of its own concurrent negligence." Concord & Cumberland, 424 S.C. at 657. By imposing the duty to defend "regardless of any ultimate liability or negligence of the contractor," the contract "clearly shows the parties' intent to absolve [BFS] of the consequences of its own concurrent negligence." Thus, this language meets the heightened "clear and unequivocal" standard, and summary judgment was not proper.

3. The contract provisions do not violate either Section 32-2-10 or other requirements of South Carolina law.

The Court's holding goes beyond Concord & Cumberland and finds that the language of the contract also violates South Carolina Code § 32-2-10. However, this statute addresses "indemnity" against "liability," and not recovery of attorney's fees.

Specifically, Section 32-2-10 prohibits contracts that “indemnify” the indemnitee against “liability” for damages resulting from the sole negligence of the indemnitee.

Furthermore, the very terms of the statute limit its application to agreements to indemnify for damages. When approaching statutory interpretation, courts must assume that the legislature was 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.” Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Additionally, when, as here, a statute is “in derogation of the common law,” it must be strictly construed. Id.

Section 32-2-10 governs agreements for indemnity. As noted by this Court in Concord & Cumberland, our courts “have consistently defined indemnity as ‘that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.’” Concord & Cumberland, 424 S.C. at 646–47. Attorneys’ fees do not fall within the scope of indemnity because they are not paid by a first party to “a second party for loss or damage the second party incurs to a third party.” Rather, they are consequential damages of an indemnity claim. Because Section 32-2-10 must be strictly construed, and because it uses the term “indemnify,” a term that “has a well-recognized meaning in the law,” it must be read only to apply to agreements governing indemnification; its meaning may not be expanded by the Court to include agreements governing attorneys’ fees.

While Section 32-2-10 addresses agreements governing the duty to indemnify, the statute is silent as to agreements imposing a duty to defend. The duty to defend and the duty to indemnify are two separate and distinct contractual obligations. City of Hartsville

v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009).

“Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the judgment, the duty to defend exists regardless of the [indemnitor’s] ultimate liability to the [indemnatee].” Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977).

In this case, where BFS originally sought indemnity against liability for damages resulting from the WSC’ negligence, those specific indemnity claims have been resolved. The sole remaining claims are those seeking attorney’s fees pursuant to the BFS/WSC contract, claims which are not even addressed, much less prohibited by 32-2-10.

Finally, even if the Court *were* to determine for some reason that the contractual provision regarding attorneys’ fees violated Concord & Cumberland or Section 32-2-10, the Court is required to sever the offending provision, pursuant to the severability clause set forth in Section 9 paragraph (f) of the BFS/WSC contract. BFS’s claim for attorneys’ fees would then instead be fully encompassed by Paragraph One of Section 5 Indemnity.

Paragraph One provides that WSC will indemnify BFS for all losses, “including, but not limited to . . . attorney’s fees” arising out of claims for property damage, “but only to the extent caused, in whole or in part, by any negligent act of the subcontractor” Because recovery under Paragraph One is limited to attorneys’ fees caused by the negligence of the subcontractor, it is not covered by the alleged prohibition of Section 32-2-10; in fact, it is specifically authorized by the statute, because the statute says that it does not affect or void “a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee . . . against liability for damages resulting from the negligence,

in whole or in part, of the promisor” Paragraph One of the Indemnity Provision is the exact type of agreement exempted by the statute.

The obligations imposed on WSC here, to defend the interests of BFS, are clearly and unequivocally set forth within the relevant contract. These obligations do not violate § 32-2-10 or any public policy of the State of South Carolina, and the Court should not have granted summary judgment against these claims.

4. The Court failed to address the contract’s severability provision.

While BFS does not concede that any provisions contain any problematic language, nonetheless, to the extent that the Court took issue with these irrelevant paragraphs, it should have simply severed them and left the provision regarding attorneys’ fees intact. See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002) (explaining that “[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties”). The severability provision of the contract demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

[BFS/WSC contract, Section 9, Paragraph (f).] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the contract may be invalid, the Court should have honored the intent of the parties and severed any offending provision, leaving the remaining provisions intact.

5. The Court inappropriately considered irrelevant clauses of the BFS/WSC contract and improperly found that the clauses are confusing, contradictory, misleading and unenforceable.

The Court's Order recognized that the BFS/WSC contract contains multiple provisions and clauses relating to indemnification. However, the Court's Order failed to recognize that each such provision and clause pertains to a different factual scenario. Specifically, the Court considered the following provisions and clauses:

- a. Section 5 Indemnity paragraph one - which is the only indemnity provision that deals with property damage;
- b. Section 5 Indemnity paragraph two – which is the only indemnity provision that deals with personal injury;
- c. Section 3 Warranty – which is a warranty provision

The contract also includes, at Section 5 paragraph three, a separate paragraph dealing specifically with attorney's fees.

The "Section 5. Indemnity" portion of the contract is comprised of four (4) separate paragraphs. Each paragraph pertains to a specific set of factual circumstances. South Carolina courts have made it clear that there can be multiple provisions, even within one paragraph, that afford separate and distinct rights for the parties. See *Beach Co. V. Twillman, Ltd.*, 351 S.C. 56, 65 (Ct. App. 2002) (finding a single subparagraph was comprised of three discrete provisions because "separate and distinct rights" were implicated in each provision).

The first paragraph of Section 5 is the applicable indemnity language for property damage claims. Therein, the subcontractor agrees to the fullest extent permitted by law to indemnify, defend, and hold harmless BFS from and against any and all claims, suits, losses, causes of action, damages, liabilities, fines penalties, and expenses of any kind including court costs and attorney's fees resulting from property damage arising out of

the subcontractor's performance BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT of the subcontractor.

The second paragraph is similar but deals with bodily injury claims asserted by employees or agents of the subcontractors. The third paragraph deals with the duty to defend and specifically states that it is separate from the duty to indemnify. The fourth paragraph speaks to the defense and indemnification obligations with respect to architects, engineers and claims resulting from defective plans or designs.

Because this is not a case involving either a Section 3 Warranty claim, a Section 5 Paragraph Two bodily injury claim, or a Section 5 Paragraph Three failure to defend claim, these provisions should not be "read together" – or even read at all – for the purposes of this case. The Court has found nothing illegal about the Section 5 Paragraph One property damage provision under which BFS sought indemnification. Indeed, the provision virtually identical to paragraph one of Section 5 was considered by the Court in Concord & Cumberland, where the court found such a provision to be legally adequate to support recovery as sought by BFS here. Thus, the Court should not have considered multiple irrelevant provisions and must reverse its decision to grant WSC summary judgment on such basis.

Moreover, as more fully explained in argument 4 above, to the extent that the Court determined that any provision is contrary to South Carolina law, the Court is required to honor the intent of the parties and sever any such provision.

CONCLUSION

Because the Court's Order did not address or failed to comprehend multiple important points of fact and issues of law, BFS respectfully requests that the Court reconsider its Order dated July 29, 2021 and deny WSC's motion for summary judgment as to BFS' contractual indemnity claim.

HOWELL, GIBSON & HUGHES, P.A.

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Southeast Group, LLC

Beaufort, South Carolina
August 9, 2021

STATE OF SOUTH CAROLINA

COMMON PLEAS

COUNTY OF CHARLESTON

-----x

RETREAT AT CHARLESTON)

)

NATIONAL COUNTRY CLUB HOME)

)

OWNERS ASSOCIATION, et al.,)

)

Plaintiffs,)

)

vs.)

Transcript of Record

2016-CP-10-03783

WINSTON CARLYLE CHARLESTON)

)

NATIONAL, LLC, et al.,)

)

Defendants.)

)

-----x

November 2, 2020

Conducted Virtually by Webex

HEARING ON MOTIONS

B E F O R E:

The Honorable Jennifer McCoy, Presiding Judge

COURT REPORTER: Denise Lauder (retired)

Transcribed by: Bobbi Fisher, RPR

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E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible) (Inaudible)	Indicates word(s) is not known due to audio recording quality/technical issues

P R O C E E D I N G S

(Whereupon, the following proceedings commenced as follows:)

THE COURT: We'll get started. Mr. Grimball indicated he was going to lead us off today. Is that right, Mr. Grimball?

MR. GRIMBALL: Yes, ma'am.

THE COURT: Okay. So what I'm going to ask everybody else -- and I'm going to do the same thing -- is that we are -- while we are not speaking, we just keep ourselves muted. That will cut down greatly on the background noise for the court reporter's benefit. We'll go with that.

Mr. Grimball, I'm happy to hear from you. Just make sure you begin with your full name and who you're here representing today.

MR. GRIMBALL: Yes, ma'am. My name is Heyward Grimball. I'm here on behalf of ECC Contracting, LLC, and East Coast Carpentry, which is also known as East Coast Carpentry Company. Both of my clients have motions for summary judgment against Builders FirstSource.

And this is --

COURT REPORTER: Mr. Grimball, I'm sorry to interrupt you. This is the court reporter. Can you turn your volume up or can you speak a little bit louder? I'm having a hard time hearing you. I'm sorry.

MR. GRIMBALL: Yeah, that's fine. I'll --

COURT REPORTER: That's better already.

1 MR. GRIMBALL: Is this better?

2 COURT REPORTER: Yes.

3 MR. HUGHES: This is Steve Hughes.

4 MR. GRIMBALL: Okay.

5 MR. HUGHES: (Inaudible) but I don't know how the Court
6 planned on proceeding on these. I know that one of the
7 motions are premised upon (indiscernible) realms, with some
8 having two or three more (indiscernible) to that. And I don't
9 know (indiscernible) of the Court to proceed with all of the
10 movants presenting their arguments followed by my global
11 (indiscernible) on those, but I would suggest that might be a
12 more effective use of the Court's time because my arguments
13 would really be substantially similar with regard to each and
14 every motion.

15 THE COURT: Yes, that will be just fine. We will plan on
16 doing that. Thank you, Mr. Hughes.

17 Go ahead, Mr. Grimbball.

18 MR. GRIMBALL: All right. So I think that Your Honor
19 knows this is the I think fourth round of this fight between
20 Builders FirstSource and various of its subcontractors. The
21 first was Judge Newman issued an order granting summary
22 judgment for my client, ECC Contracting, LLC, and another
23 subcontractor that's not involved in this particular motion
24 called Charleston Exteriors. And that was in the Builders
25 FirstSource, the ECC Contracting, et al., case. It's a 2018

1 Berkeley County case. And then, in the 656 Coleman case,
2 Judge Young issued a second order granting the subcontractor's
3 summary judgment, and that's at 2016-CP-10-03455. Based on
4 Judge Newman's order as well as some of the other grounds
5 you're going to hear about today, my understanding is that you
6 have the great pleasure of hearing the same motion yet again
7 in the Pavick case last month or maybe in September. And that
8 case is 2019-CP-10-00772.

9 And just briefly a little bit about this case, this is a
10 case pertaining to the Retreat at Charleston National, the
11 townhome development in the Charleston National Country Club.
12 Litigation was filed on July 22nd, 2016, by the plaintiff HOA.
13 You know, as these things tend to do, the case filled up more
14 and more with amended pleadings. I believe that the final
15 amendment wherein Builders FirstSource brought in a couple of
16 additional subcontractors as third-party defendants was filed
17 in November of 2019.

18 We have mediated this case twice in 2019 and then we
19 attempted to mediate again in 2020 but were hampered by the
20 Coronavirus.

21 With regard to the issues that are before you today, we
22 have conducted significant discovery, including the 30(b)(6)
23 deposition of Builders FirstSource, the 30(b)(6) deposition of
24 my client, ECC Contracting, LLC; the depositions of two of
25 Builders FirstSource's supervisors, Bill Crabtree and Rooster

1 (ph) Cannon, as well as the depositions of the plaintiffs and
2 Builders FirstSource's forensic experts and the plaintiff's
3 cost of repair expert.

4 Mercifully, I don't think that we'll have to get into
5 much into all of that, but I guess before I start going on and
6 on, my understanding from Builders FirstSource's memo in
7 opposition to Hurley's motion for summary judgment is that
8 perhaps Builders FirstSource is agreeing with the Stoneledge
9 argument. It is going to sort of concede that ground and that
10 all we're going to be talking about is contractual and
11 equitable indemnity.

12 Is that right, Mr. Hughes?

13 MR. HUGHES: First status of the law under the Stoneledge
14 opinions is that causes of action -- breach of contract,
15 negligence, and breach of warranty -- under that circumstances
16 and those prevailing here would be a (indiscernible).

17 COURT REPORTER: I can't...

18 MR. HUGHES: -- and has to be relegated to the
19 (indiscernible) of the equitable indemnity, we would not
20 concede with the rationale that the Stoneledge cases applies
21 to our causes of action and contractual indemnity.

22 MR. GRIMBALL: All right. Well, I haven't made that
23 argument, Mr. Hughes, so I'll let somebody else argue that
24 particular point. And if it's all right with you, I'm going
25 to dispense with talking about Stoneledge because I think you

1 and I are in agreement. Is that fair?

2 MR. HUGHES: Yes, sir.

3 MR. GRIMBALL: Perfect. All right.

4 So I think that our -- what I'm going to do, Your Honor,
5 is -- and this is how my memos are structured. I'm going to
6 set forth ECC's arguments first, and then East Coast relies on
7 a lot of the same grounds. And so I will fill in a little bit
8 of the sort of unique issues related to East Coast, but,
9 otherwise, I'm not going to go rehash the same ground twice
10 because I have got two different clients.

11 THE COURT: And, just for the record, everybody's
12 memoranda that have been filed are fully incorporated for the
13 record today. Certainly those will be read; you can count on
14 that. So to the extent, you know, you feel as if you need to
15 sort of go through that in great detail, just take that into
16 consideration, and I will leave these memoranda and we'll hit
17 the high points and see where we are. Thank you so much.

18 MR. GRIMBALL: Perfect. Thank you.

19 And just as a point of clarity, there's a couple of
20 different contracts in issue in -- between the various movants
21 before you, Your Honor. I believe that -- between my two
22 clients, I'm dealing with the two different sets of
23 indemnification language. I think -- and Mr. Hughes, I'm
24 sure, will correct me if I'm wrong, but I think that there are
25 multiple different additions of the contracts but that there's

1 really only two sets of indemnity provisions.

2 So, to start off with, with regard to ECC, I think that
3 the easiest argument for us to make is that Builders
4 FirstSource is collaterally estopped from arguing that these
5 contracts support claims for contractual indemnity.

6 Contractual indemnity merely requires the Court to find
7 that the issue was previously litigated in a prior action,
8 that it was directly determined in the prior action, and that
9 it was necessary to support the prior judgment, and, you know,
10 by review of Judge Newman's order, I believe, that all three
11 of those criteria are met and, you know, sounds a little
12 strange, but I would go on to argue that Judge Young's order
13 finding that BFS is collaterally estopped with regard to the
14 issue of contractual indemnity collaterally estops them from
15 disputing the fact that Judge Newman's order is a final order
16 upon which the finding of collateral estoppel can be made.

17 And then I would go on to say that Judge Young's order
18 finds that BFS's contractual indemnity provisions are, quote,
19 "neither clear nor unequivocal or against public policy and
20 the laws of South Carolina." So I would assert that they are
21 also collaterally estopped from arguing that their contracts
22 violate the anti-indemnity statute.

23 You know, just for the record, the anti-indemnity
24 statute, Section 32-2-10, bars a party from seeking
25 indemnification for damages that arise as a result of its sole

1 negligence. Well, if you look through Builders FirstSource's
2 contract, it does exactly that. It has a section in Section
3 5, indemnification of a contract, which talks about a duty to
4 defend. And the contract explicitly says, Regardless of
5 Builder FirstSource's ultimate liability, the subcontractors
6 had a duty to defend Builders FirstSource. And then, in their
7 pleadings, they seek attorneys costs and fees as damages.
8 Under the statute, you just can't do that.

9 And, you know, Builders FirstSource has attempted to
10 argue that the duty to defend is separate and distinct from
11 the duty to indemnify, but the case law that they have relied
12 upon in making those arguments says that, for an insurer, the
13 duty to defend is separate and distinct from the duty to
14 indemnify.

15 ECC, East Coast, these subcontractors, they're not
16 insurers. The posture of this contract versus a contract of
17 insurance is the -- it's totally different and it's totally
18 different regulations, rules, and law that applies to a
19 subcontractor versus an insurance company.

20 So if you look through Builder FirstSource's contract,
21 it's hard to follow in some regards because there are so many
22 indemnification provisions. Section 5 contains an
23 indemnification provision that is related to claims for bodily
24 injury. That section also violates the anti-indemnity
25 statute.

1 Section 3 of the contract deals with the warranty
2 provisions, and it contains an indemnification provision
3 related to warranties. That indemnification violates the
4 anti-indemnity statute.

5 And in South Carolina, case law is -- it's pretty clear
6 that, if a party has a contract which violates the
7 anti-indemnity statute, the Court is not going to rewrite the
8 contract for them. And, you know, quite frankly, this is an
9 argument that Builders FirstSource has made. There is a Court
10 of Appeals opinion, 422 S.C. 144, it's an appeal from a
11 litigation between D.R. Horton and Builders FirstSource, you
12 know, similar case insofar it's a construction defect case,
13 D.R. Horton resolved the case, and was chasing Builders
14 FirstSource for its attorney's costs and fees.

15 Mr. Hughes's firm prevailed in that appeal and the part
16 that I would like to direct your attention to is the Court
17 states that we agree that the indemnification clause is void
18 as against public policy to the extent it purports to require
19 BFS to indemnify D.R. Horton for damages caused by its
20 negligence or the negligence of its subcontractors.

21 And I think that that's important here because we have
22 eight -- seven, eight subcontractors that are all involved in
23 this project, and Builder FirstSource has sued all of them,
24 and it is demanding in its pleadings indemnification for all
25 of the monies that it must pay to resolve this case as well as

1 attorney's costs and fees --

2 COURT REPORTER: I can't -- I can't --

3 THE COURT: Real quick. Mr. Clarke, I think, got some
4 help. Hey, when you're messing with his volume, it's making
5 us have his feedback in the middle of Mr. Grimbball's argument.
6 So that's us that keep muting you. Are you trying to turn his
7 speaker up or what?

8 UNIDENTIFIED SPEAKER: Yes.

9 THE COURT: Okay. Well, we (indiscernible) otherwise we
10 hear all your papers ruffling. Okay.

11 Thank you, Mr. Grimbball. Go ahead.

12 MR. GRIMBALL: All right. Returning to the *Concord and*
13 *Cumberland* argument, you know, BFS has admitted in open court
14 in its motion to reconsider Judge Newman's order that its
15 indemnification provision, you know, in this contract in all
16 these cases, is substantially the same as the provision that
17 was at issue in that appeal, and, as a result, the contract
18 does not allow them to recover for their -- for damages
19 arising from their concurrent negligence.

20 Now, in -- you know, BFS is attempting to argue that they
21 are able to recover for the sole negligence of their
22 subcontractors. The problem is that all they did was
23 supervise their subcontractors. If a jury finds them liable
24 for something in this case, it will be for something that one
25 of their subcontractors installed. Well, they were obligated

1 to supervise that subcontractor. There is no sole negligence
2 of the subs. It's all concurrent negligence. It's all the
3 subs failing to do something correctly and BFS failing to
4 properly supervise them, failing to catch it.

5 And not only that, you know, one of the issues in this
6 case is the allegation that the windows, which were installed,
7 do not have a proper DP rating. And DP rating is how the
8 construction industry sort of quantifies a window's ability to
9 resist wind loads. And BFS has admitted that some of the
10 windows, if supplied to the project, do not have an adequate
11 DP rating. And this is -- you'll find that information in
12 BFS's expert disclosures and expert reports and cost to repair
13 estimate, which are exhibits to my memo.

14 BFS supplied the windows and so it's impossible for
15 issues with the windows not to be at least partially BFS's
16 fault because they supplied them.

17 And, you know, there and again, just to come back to the
18 collateral estoppel, I believe that Judge Newman found that it
19 is impossible for BFS to not be concurrently negligent -- or
20 it is impossible for them for ECC or one of the other subs to
21 have an indemnification obligation without BFS being currently
22 negligent.

23 So -- and then just briefly, the final issue with
24 indemnification is equitable indemnification, and we believe
25 that BFS's claims for equitable indemnification should fail as

1 well. Number one, we argue that they have unclean hands by
2 virtue of their supervisory role. If that is undisputed, my
3 client testified that, if BFS was not happy with his work,
4 they could not pay him. They would make him change -- make
5 him fix it. BFS testified that they were there to supervise
6 the subs. BFS's superintendent said that he was inspecting
7 subcontractor's work for quality.

8 And not only that, BFS is -- has an unlicensed general
9 contractor's license, and under the contract -- commercial
10 contractor's code, they have a statutory obligation to
11 supervise their unlicensed subcontractors.

12 Now, ECC had its own license but East Coast Carpentry did
13 not and many of the other subcontractors did not.

14 I'd also argue that BFS is a joint tortfeasor and under
15 the Vermeer (ph) case is not entitled to recover in equity.
16 In the Vermeer case, a gentleman was horribly injured by a
17 woodchipper. I believe that it took one of his arms off, and
18 I think that he had already lost an arm before that accident
19 occurred, which is particularly bad.

20 And in that case, the Court held that, because of the
21 claims against the retailer, who had sold the woodchipper to
22 the plaintiff, the retailer could not recover against the
23 manufacturer because the retailer could not be without fault.
24 This case is the same.

25 Builders FirstSource trained my client how to install

1 windows. They gave him instructions on how they wanted these
2 windows to be installed. They supervised him installing the
3 windows, and they supplied the windows, some of which do not
4 have adequate DP ratings by BFS's own admission. It's not
5 possible for Builders FirstSource not to have fault. They are
6 a joint tortfeasor in this case.

7 And then, finally, I would argue that they have unclean
8 hands because their contracts violate South Carolina law and
9 public policy. The doctrine of unclean hands precludes a
10 plaintiff -- here Builders FirstSource -- from recovering the
11 equity if he acted unfairly in a matter that is the subject of
12 the litigation to the prejudice of the defendant. In this
13 case, Builders FirstSource had all of its subcontractors
14 execute contracts with indemnification provisions with
15 multiple indemnification provisions that violated South
16 Carolina law, that expressly violated South Carolina law. And
17 that is fundamentally unfair. They should not be able to
18 recover in equity when they are dolling out illegal contracts
19 to their subcontractors.

20 And then just a ticky-tacky issue that only applies to
21 ECC. Builders FirstSource's contract has a three-year term
22 with a one-year auto renewal. The only work that ECC
23 performed within four years of executing this contract was a
24 punch repair, \$150 of repair work. No one knows what they
25 did. There's no evidence that it is contributing to the

1 plaintiff's damages, and there's just no testimony in the
2 record to support a finding that that work was deficient or is
3 even an issue in this litigation.

4 The other two units that ECC worked on, that work was
5 performed after this contract had expired. So Builders
6 FirstSource should not be able to enforce this indemnification
7 provision when the contract by its expressed terms had
8 expired.

9 And, briefly, moving on to East Coast. East Coast's
10 indemnification provision is quite different from the one that
11 ECC and most of the other subcontractors have. I won't go
12 through the entirety of it, but for our purposes, the
13 important portion of it is the last -- the last section. This
14 is contained on page 6 of the indemnification agreement and
15 indemnification inspection 6. And the last little sub part of
16 the relevant indemnification provision calls for EC -- or East
17 Coast, excuse me, to indemnify Builders FirstSource for,
18 quote, "omissions resulting from indemnities, failure to
19 supervise subcontractor's operations." The contract
20 explicitly calls for East Coast to indemnify BFS for not doing
21 its job. That is nothing but Builders FirstSources's sole
22 negligence. And so this contractual indemnity provision is
23 illegal and it should be struck down.

24 Finally, I think that the only other issue that is unique
25 to East Coast is the statute of repose. Exhibit 2 to East

1 Coast's memo in support of its motion for summary judgment are
2 Gemini Screen Shots. Gemini is a software that Builders
3 FirstSource used to manage its project, issue work orders or
4 purchase orders and keep track of what work had actually been
5 done by the subcontractors. It is the best evidence that we
6 have of what work was done by whom when in the early phases of
7 this project.

8 All of East Coast's work documented in the Gemini Screen
9 Shots was done in 2006 and '07, and this lawsuit wasn't filed
10 until 2016. East Coast wasn't sued until 2019. The statute
11 of repose is long expired, and the statute of repose bars
12 claims for indemnification expressly.

13 In the greater Richland -- a med mal case, it's *Columbia*
14 *Health Care System v. The South Carolina Medical Malpractice*
15 *Liability Joint Underwriting Association*. And in that case,
16 the Court juxtapositions the med mal statute of repose with a
17 construction statute of repose and notes that the construction
18 statute of repose explicitly bars claims for indemnification
19 and contribution.

20 Since Builders FirstSource has conceded the Stoneledge
21 argument and admits that the only claims that it has against
22 East Coast are, in effect, equitable and contractible
23 indemnification, the statute of repose is a complete bar to
24 the claims against East Coast.

25 So, with that being said, I'll let some of my colleagues

1 come in and make brilliant points that I should have brought
2 up.

3 MR. FREEMAN: Good morning, Your Honor. If it pleases
4 the Court, this is Ian Freeman on behalf of WS Contractors,
5 LLC. And I'll be happy to go next unless somebody else wants
6 to jump in. Hearing no one else, I'll go.

7 For sake of expediency and efficiency, if the Court will
8 allow it, what I'd like to start out to do is to say I adopt
9 and incorporate by reference here vis-a-vis a big ditto that
10 everything that Mr. Grimball just said in terms of his oral
11 argument, with the exception that the auto renewal contract
12 term argument and the statute of repose argument that
13 Mr. Grimball made there towards the end, have no application
14 to WS Contractors, I don't believe, in this case. But all of
15 his other arguments do apply equally to WS Contractors. And
16 rather than, you know, boring you with a 15-minute recitation
17 of all of that myself, if it's okay, can we agree that my --
18 that Heywood's other arguments, other than those two are
19 excluded, are adopted for my client?

20 THE COURT: So they will be deemed adopted by the Court,
21 so feel free to add on to those that he argued.

22 MR. FREEMAN: Okay. So I'm just going to add a few
23 other, what I believe, salient points as well as I believe
24 some discrete issues that apply to WS Contractors.

25 First, I'd point out Judge Newman reviewed the exact same

1 Builders FirstSource master agreement in his ruling in favor
2 of ECC and granting summary judgment against Builders
3 FirstSource. He interviewed the exact same versions of the
4 BFS master agreement as are applicable to WS Contractors.

5 And I have got -- exhibits A and B attached to my motion
6 are two BFS master agreements, the notice of motion. I
7 believe really the only contract at issue with respect to WS
8 Contractors is Exhibit B, but out of an abundance of caution,
9 I gave you both of them. But for purposes of the motion, I
10 don't think there's any material difference to the
11 indemnification provisions.

12 But Exhibit B has version of May 17, 2006, at the bottom
13 left corner of each page of the contract, and that is one of
14 the very exact same master agreements that both Judge Newman
15 and Judge Young have deemed, as a matter of law, violates
16 South Carolina law and, as a matter are of law, are
17 unenforceable by BFS.

18 And I would add that Judge Newman, in reviewing the
19 indemnification provisions, most of which are all found in
20 Section 5 of that master agreement, determined, as a matter of
21 law, that the indemnification provisions are confusing at best
22 and deceptive at worst.

23 Now, I think it goes without saying that something that's
24 confusing and deceptive is not clear and unequivocal and that
25 BFS master agreements -- really what they did is they throw a

1 bunch of mud up on the wall, a smorgasbord of indemnification
2 provisions all in Section 5 hoping that one of them is going
3 to stick. And South Carolina law frowns upon that and is
4 determined that that type of approach -- shotgun approach here
5 where BFS is really trying to sneak in and have the subs pay
6 for its negligence, is unenforceable and against public
7 policy.

8 So I think that the right answer and proper approach here
9 to your court, Your Honor, is to determine that the order of
10 Judge Newman, which is attached as Exhibit D to my motion,
11 collaterally estops BFS and the ruling and the findings
12 therein -- have already determined the very issues that are
13 before the Court here today, and BFS cannot now relitigate
14 those issues with you.

15 And Exhibit D is the -- Judge Young's order, and that was
16 actually a motion that I was involved in. I actually
17 represented Hurley Services, LLC, in that case, and I
18 prevailed on that motion, and Judge Young found, indeed, that
19 Judge Newman's order does collaterally estop BFS. And he went
20 on to find as well, agreeing with Judge Newman, that the BFS
21 master agreement is unenforceable and violates South Carolina
22 law. So I think that collateral estoppel clearly is
23 dispositive on the issues before the Court here.

24 I'd like to go on and add that Exhibit C to my motion is
25 an issue release that -- a settlement agreement and issue

1 release that my client negotiated. My client was one of the
2 few parties to have successfully negotiated a settlement with
3 Mr. Lady and the plaintiffs in this case at the 2019
4 mediation. And we paid handsomely, between my client and
5 subcontractors, \$1 million to settle with the plaintiffs and
6 to get a walking issue release in favor of Builders
7 FirstSource and the general contractor and the developer. And
8 that issue release serves to release Builders FirstSource for
9 not only anything, you know, my client did as a subcontractor
10 of Builders FirstSource, but it went on to relieve Builders
11 FirstSource for anything that my client did at the project as
12 a whole, whether it was for Builders FirstSource or not.

13 And stands to reason that the only (inaudible) that
14 Builders FirstSource could possibly be liable for with regard
15 to The Retreat project, we must necessarily be something that
16 has nothing to do with WS Contractors and its work and its
17 subcontractors. Builders FirstSource would be solely
18 liable -- solely negligent if the plaintiff prevailed and gets
19 any verdict against Builders FirstSource, the necessary result
20 of that would be that the verdict would have absolutely
21 nothing to do with WS Contractors, my client, because WS
22 Contractors has got the Builders FirstSource -- a release for
23 anything and everything it did and its subcontractors did at
24 the project.

25 So, therefore, it would -- between BFS and WS

1 Contractors, the necessary logical conclusion is that anything
2 that the plaintiffs hold BFS liable for must be a liability
3 attributable to BFS's negligence and would have nothing to do
4 with my client. And, therefore, it follows that -- any
5 indemnification would be against South Carolina -- contrary to
6 South Carolina law, be it contractual or equitable.

7 And certainly equitable indemnity won't stand because,
8 under the principles of equitable indemnity, even if BFS is
9 just 1 percent at fault or has any unclean hands whatsoever,
10 its equitable indemnity claims fail, and that has to be the
11 necessary result here where my client has brought them an
12 issue release.

13 Now, BFS may come back and say, Well, gee whiz, we thank
14 you for the issue release but we're just after attorney's fees
15 and we think that we're owed attorneys fees. For that -- for
16 one I'd say, Well, we have got you an issue release. It's
17 something you weren't able to get for yourself in your
18 defense.

19 But the attorney's fees are nothing more than another
20 element of damages under contractual indemnity. And I would
21 submit to the Court, if you look at the attorney's fees
22 provision in the master agreement -- and I believe it's,
23 again, in Section 5, it goes on to say -- read it correctly
24 for the Court -- last full paragraph in Section 5 -- and by
25 the way, this is an important feature about the Section 5

1 indemnity provision in the master agreement. There is no
2 subparagraphs or sub parts or little i-1, little i-2, little
3 i-3. It's just all lumped together in one big capitalization,
4 all these indemnities. So there's -- you know, you'd probably
5 hear from Mr. Hughes that, oh, there's impending -- any
6 impending language in these indemnity clauses, the Court can
7 just sever it out. Well, for one, South Carolina is not a
8 blue pencil state. And here where all these indemnities are
9 all lumped in together, all one for all all.

10 And so let me turn back to the attorney's fees. The
11 attorney's fees say the duty to defend under this section is
12 independent and separate. The duty to defend exists
13 regardless of any ultimate liability or negligence of the
14 contractor, the owner or any of their officers, directors,
15 agents and employees.

16 So that defense, regardless of the ultimate liability,
17 BFS can be determined to be ultimately liable but they want us
18 to pay their attorney's fees. That's against public policy
19 under the State of South Carolina. That's based -- your
20 attorney's fees are damages and they're basically asking us to
21 indemnify them for their attorney's fees even if they're
22 solely at fault. That violates the anti-indemnity statute of
23 32-2-10. That violates South Carolina public policy. And
24 that, along with all the other sections and indemnifications
25 in the master agreement, make it confusing, deceptive, not

1 clear and unequivocal and contrary to South Carolina law as
2 found by Judge Newman and Judge Young.

3 Give me just one second; that might be it for me, Your
4 Honor.

5 The Stoneledge issue, I believe, is off the table, but I
6 just want to make clear that especially the issue relieves --
7 serves to defeat both the contractual indemnity claims and the
8 equitable indemnity claims. And, again, I would encourage you
9 to please read my brief that was filed with the court on
10 October the 30th and the exhibits thereto. I don't think you
11 need to even reach the issue of, you know, supervision
12 necessarily because of the issue (inaudible); however, I have
13 got to attach this (inaudible) that makes clear that BFS
14 supervised and directed the work, provided the materials,
15 including the windows. They're a merchant under the terms of
16 Uniform Commercial Code. They're a sophisticated seller.
17 They're deemed to have superior knowledge with regard to the
18 products they sell, and if the products don't meet the DP
19 rating or installed improperly under their supervision, they
20 have got to show some concurrent negligence and share in the
21 fault in that, and, therefore, the equitable indemnity claims
22 fail as well.

23 And with all that, I'll stand down. Thank you, Your
24 Honor.

25 THE COURT: Sure.

1 Who would like to go next?

2 MR. DOUGALL: Your Honor, without objection -- if there's
3 any objection, I'll hold off, but my argument is about two
4 minutes long, and it follows Mr. Freeman's. I represent L and
5 G Construction in this case. We also reached a settlement
6 agreement with the plaintiffs, and it is a full issue release
7 as to any of the work L and G Construction did. So our
8 arguments are exactly like Mr. Freeman's and also piggyback on
9 Mr. Grimball's, and I think that's all I need to say.

10 THE COURT: Okay. And just for the record, I know who
11 you are but could you just state your name for the record
12 court reporter.

13 MR. DOUGALL: Yes, ma'am. It's Tom Dougall.

14 THE COURT: Thank you.

15 All right. Who would like to go next?

16 MR. CLARKE: Your Honor, can you hear me?

17 THE COURT: I can, Mr. Clarke.

18 MR. CLARKE: I'm Finley Clarke. I represent Hurley
19 Services, and I would like to adopt the arguments made by
20 Mr. Grimball and Mr. Freeman, and we'll rely on those
21 arguments as well as the arguments as set forth in my
22 memorandum.

23 THE COURT: All right.

24 MR. CLARKE: Thank you.

25 MR. McNAIR: Your Honor, this is Chase McNair and I

1 represent AC Construction, and I'm going to be a broken record
2 in that I would like to adopt the oral argument of
3 Mr. Grimball and Mr. Freeman.

4 THE COURT: Okay. It's noted for the record. Thank you
5 so much.

6 MR. CLARKE: Thank you, Your Honor.

7 THE COURT: Anyone else?

8 MR. ELLIOTT: Yes, ma'am, if I may. Your Honor, this is
9 Glenn Elliott, Aiken Bridges in Florence, and I represent
10 Pohlman Quality Exteriors.

11 A couple of housekeeping matters if I may, first of all.
12 My motion for summary judgment mentioned a cause of action for
13 contribution. That was an earlier version of one of BFS's
14 pleadings. That's gone. It has not been re-pled so it is
15 out.

16 I am a simple country lawyer from the Pee Dee. This is
17 the hardest thing I will do today will be to ask that Your
18 Honor allow me to adopt and join in the arguments made by
19 Mr. Freeman and Mr. Grimball. I do, however, have one
20 additional substantive item to bring to the Court's attention,
21 and it relates to the subcontract between Pohlman and BFS.

22 In our memorandum, I attached as an exhibit two pages of
23 what is a 17-page contract simply to establish the date of the
24 document. The date shown on that document is -- excuse me;
25 let me scroll back to it -- October 16th, 2007. As shown by

1 the other exhibits attached to Pohlman's memorandum, the two
2 buildings -- the work on the two buildings it accomplished was
3 done several months prior to October of 2007.

4 In the BFS -- excuse me, let me back up and give you a
5 quick fact. Pohlman was originally brought into this case
6 in -- I believe it was 2016 or '17 when BFS was first brought
7 into the case, a long time ago originally. After sending
8 discovery requests and having to press the issue a bit, BFS
9 acknowledged it could not find any documents to prove that
10 Pohlman worked on this project. And so we were dismissed.

11 We then, two years later, got brought back in, in
12 November of last year when Pohlman found the -- excuse me --
13 BFS found the Gemini documents that Mr. Grimbball referred to.
14 And there are two pages that indicate that we were paid to
15 install windows on two buildings, and so we were brought back
16 in.

17 Prior to actually bringing us back in, in November of
18 2017, in July of 20 -- excuse me, '19. In July of 2019, BFS
19 sent a tender letter to carriers for my client, including the
20 October 2007 contract. That's the only contract that's been
21 produced to us.

22 In BFS's memo, in opposition to our motion for summary
23 judgment, the pages of that memo are not numbered, but on the
24 sixth page of the memo, there's a reference to an Exhibit B
25 which is claiming that there was a prior version of this

1 agreement. We don't have that agreement. It's never been
2 produced to us. All I have is the October 2007 start contract
3 between Pohlman and BFS that was originally provided.

4 I, this morning when I realized that argument had been
5 made, asked my paralegal to file the full agreement. Mr. --
6 the letter from Mr. Hughes's office -- it's actually from
7 Mr. Cox -- and that agreement, which, again, shows a date of
8 October of 2007.

9 So it's our position that, at most, BFS has available to
10 it claims for -- excuse me, equitable indemnification because
11 the subcontract that's been produced that we have is -- dates,
12 you know, after the work. And so -- but if, for some reason,
13 the Court allows this relation-back argument, then we get back
14 to the statutory prohibition on contractor indemnity and the
15 Cumberland arguments.

16 So, with that, I'll stand down. Thank you, ma'am.

17 THE COURT: Thank you.

18 Anybody else?

19 MR. HOOVER: Your Honor, this is Payton Hoover on behalf
20 of Palmetto Trim. We will rely on our brief and the motion.
21 I think we had formally filed a motion to adopt the arguments
22 of East Coast Carpentry. I think Mr. Grimbail's laid those
23 out pretty well. From a factual standpoint, the only
24 difference is we worked on three of the units out there. The
25 last certificate of occupancy was issued on July 25th, 2006.

1 So our eight-year statute of repose probably runs around July
2 25th of 2014, and we have no claims against us directly by
3 plaintiff. We purely were brought in in this November 13th,
4 2019, amended answer by Builders FirstSource.

5 And if you look at paragraph 181, which I think are the
6 negligence claims against us, assuming those are still in play
7 and haven't been conceded, there doesn't appear to be any
8 gross negligence allegation that would take us outside of the
9 statute of repose.

10 And other than that, I think Mr. Grimball did a very good
11 job of explaining East Coast Carpentry's position, and we
12 would adopt that position.

13 THE COURT: Okay. Thank you so much. I appreciate it.

14 Anybody else? I'm trying to keep track. See if anybody
15 else would like to join in today. If so, let me know.

16 All right. Hearing none, we will turn it over to
17 Mr. Hughes to respond. I'll have my clerk unmute you,
18 Mr. Hughes.

19 All right, Mr. Hughes. We can hear you now. Do a little
20 test.

21 MR. HUGHES: Thank you, Your Honor.

22 THE COURT: All right. And understand, everybody's doing
23 a great job so far, but let's try to slow down the speech a
24 little bit more than perhaps you would in a courtroom just for
25 the court reporter's benefit and mine as well, and I'm happy

1 to hear from you.

2 MR. HUGHES: Thank you, Your Honor. I'm Steve Hughes of
3 Hall Gibson and Hughes in Beaufort here on behalf of Builders
4 FirstSource.

5 I don't want to be overly wordy, Your Honor, however, I
6 do have a variety of points to make in our position
7 (indiscernible) asserted by the other parties. These claims
8 obviously arise out of initial litigation commenced by the
9 plaintiffs, seeking recovery for damage allegedly occasioned
10 by deficiencies in construction and building materials of the
11 complex known as The Retreat at Charleston National.

12 The claims against Builders FirstSource I'll cover
13 specifically upon my client's supply and installation of
14 windows and doors as well as supply and installation of
15 framing. That installation was actually implemented on behalf
16 of Builders FirstSource by its new (inaudible) most of who are
17 represented here today. That installation by those subs was
18 undertaken specifically pursuant to separate subcontractor
19 agreements executed between Builders FirstSource and the
20 respective subcontractors.

21 Each of those subcontractor agreements contains
22 provisions whereby each of those subcontractors specifically
23 undertook to defend and indemnify Builders FirstSource against
24 liability for damages arising out of the negligence of the
25 performance of the work of that sub.

1 The plaintiffs here rely upon -- excuse me. The movants
2 here rely upon the, or as articulated by the Court of Appeals
3 in Cumberland, they all contend that the Builders FirstSource
4 claims for contractual indemnity are based upon contractual
5 provisions which are neither clear nor unequivocal and thus
6 fail as a matter of law under the requirements purportedly
7 established by the Court in Cumberland.

8 The indemnity claim, as asserted by Builders FirstSource
9 here, however, are factually and legally distinguishable from
10 those that were addressed by the competent Cumberland Court.

11 Here, contrary to the suggestions of some of counsel here
12 today, my client seeks indemnity only -- only -- against
13 liability for damages arising out of or caused by the
14 negligence of the subcontractors. Builders FirstSource is not
15 seeking indemnity for damages occasioned by any negligence
16 which it may be found to have been guilty of.

17 By contrast, general contractor as the indemnitee in
18 *Concord and Cumberland*, sought indemnity from its
19 subcontractors both for the negligence of the subcontractors
20 and for the negligence of the general contractor indemnity
21 itself. The Court of Appeals, in interpreting contractual
22 provisions, which are largely identical to most of those along
23 with (indiscernible) today, determined that those provisions
24 were not specifically clear and unequivocal from posing on
25 obligation for those indemnitors to indemnify the indemnitee

1 against the consequences of the indemnitee's own negligence.

2 The Court further determined that, in order to impose
3 such a liability -- in order for a contract to impose a
4 liability upon a promisor -- in order to -- in order for the
5 indemnitor -- let me back up, Your Honor.

6 The Court specifically determined that, in order for a
7 contract to impose an obligation upon a promisor to indemnify
8 the promisee against the promisee's own negligence, provisions
9 imposing that obligation must be clear and unequivocal. The
10 Court found that the provision at issue in that case, similar
11 to the provision at issue in this case, did not satisfy that
12 clear and unequivocal undertaking.

13 Under those circumstances, the Court found that the
14 indemnitee was not entitled to recovery of the indemnitee as
15 sought; that is, specifically indemnification against damages
16 arising from the indemnitee's own negligence.

17 Again, that -- more importantly and more to the point
18 here, although the Court found that those contractual
19 provisions were not sufficient, at least clear and unequivocal
20 to impose an obligation to indemnify against the indemnitees
21 on negligence, the Court, nonetheless, specifically found that
22 those provisions, again, virtually identical to those at issue
23 here, were, in fact, sufficient -- were, in fact, adequate to
24 impose upon the indemnitor the obligation to indemnify the
25 indemnitee against the consequences of the indemnitor's own

1 negligence.

2 I would submit, Your Honor, that the Court Of Appeals
3 specifically and categorically determined in that case that
4 the contractual provisions at issue in that case were adequate
5 to impose upon the subcontractor the obligation to indemnify
6 my client against indemnity occasioned by the negligence of
7 those subcontractors, whether it be current or
8 (indiscernible).

9 The recognized relief as appropriate in *Concord and*
10 *Cumberland* is exactly what my client is seeking here. My
11 client is not seeking indemnification against the consequences
12 of his own negligence. It is seeking indemnification against
13 damages occasioned by the -- by the negligent conduct of its
14 subcontractors. That is exactly the belief that was
15 authorized as a (indiscernible) under *Concord and Cumberland*.
16 It's exactly what my client is seeking here and it's
17 notwithstanding the provisions of the various movants here
18 today, completely consistent with recognized South Carolina
19 law.

20 THE COURT: Let me stop you right there. So address, for
21 example, Mr. Freeman's client's position where he's already
22 gotten a release from the plaintiffs.

23 MR. HUGHES: Your Honor, he relies upon, I think, upon
24 the case of *Concord and Cumberland* which, again, by its
25 specific terms, normally addressed the validity of an attempt

1 to impose upon an indemnitor the obligation to indemnify the
2 indemnitee against the indemni- -- let me back up.

3 The specific issue --

4 THE COURT: If it's easier to say subcontractor and
5 contractor, I'll impute the legal terms myself.

6 MR. HUGHES: The specific issue before the Court in
7 *Concord and Cumberland* was the validity of a contract
8 provision by which the general contractor sought to impose
9 upon its subcontractor an obligation to indemnify the general
10 contractor against the general contractor's own negligence.
11 The Court in that case specifically determined that any such
12 obligation could be imposed only if the terms purported to
13 impose that obligation were clear and unequivocal. The Court
14 found that the specific contractual provisions in that case
15 were not sufficiently clear and unequivocal and say that,
16 under those circumstances, the general contractor could not
17 recover for its own negligence, (indiscernible) sole or
18 concurrent.

19 However, in so ruling, the Court affirms the finding of
20 the lower court and specifically said that those provisions
21 were, in fact, sufficient and adequate to impose upon the
22 subcontractor the obligation to indemnify the general
23 contractor against the negligence of the subcontractor itself,
24 whether that negligence were sole or concurrent. Obviously,
25 the Court would not allow the general contractor to obtain

1 indemnity against its own concurrent negligence, but those
2 provisions did authorize a general contractor to obtain
3 indemnity against the subcontractor's sole or concurrent
4 negligence.

5 That case simply did not address, per se, attorney's
6 fees. Moreover, Mr. -- Mr. Freeman contends that the
7 provisions of this contract, imposing upon the subcontract of
8 the obligation to indemnify was somehow contrary to the
9 provisions of Section 32-2-10.

10 Section 32-2-10, by its specific terms, applies solely to
11 obligations in indemnity, and as this Court is well aware,
12 indemnity is that form of compensation under which one party
13 is obligated to pay to a second party damages which that
14 second party incurs to a third party. Attorney's fees are
15 simply not within the contemplation of the definition of the
16 term "indemnity."

17 Moreover, Section 32-2-10, in addressing the various
18 considerations which we have been just been discussing,
19 specifically authorizes contracts whereby the promisor agrees
20 to indemnify the promisee against liability occasioned by the
21 negligence of the promisor.

22 Moreover, Section 32-2-10 by its specific terms does not
23 address -- it doesn't prohibit certainly nor does it even
24 address attorney's fees. Attorney's fees are simply outside
25 the realm of anything addressed by Section 32-2-10. I would

1 also note that 32-2-10 is contrary to the common law. It is,
2 thus, subject to strict construction. Again, nothing within
3 32-10 [verbatim] prohibits or even addresses attorney's fees.
4 And reliance upon 32-2-10 to prohibit attorney's fees here is
5 simply incorrect.

6 Moreover, our contract provision seeks recovery of
7 indemnity as well as attorney's fees. I think our courts have
8 been virtually unanimous in recognizing that attorney's fees
9 are a consequence of damages occasioned by a claim of
10 indemnity. Our claim for attorney's fees is for attorney's
11 fees arising out of the negligence that we contend Freeman and
12 the other subcontractors were guilty of, which has redoubted
13 (ph) to our detriment in the form of liability to third
14 parties. There's nothing within the law, whether statutory or
15 common, which precludes the imposition of attorney's fees
16 under the contractual provisions upon which my client relies.

17 Does that answer the Court's question?

18 THE COURT: Yeah, it does. Thank you so much. Go ahead.
19 I didn't mean to interrupt you. Thank you for that.

20 MR. HUGHES: Again, not to belabor the point, Your Honor,
21 but contrary to the assertions of the movants here and my
22 client, it is not seeking indemnity against liability for its
23 own negligence. It is only seeking indemnity against
24 liability for damages occasioned by the negligence, whether
25 sole or contrived, of the subcontractors. That is relief

1 which is not prohibited by Section 32-2-10. As a matter of
2 fact, it is specifically authorized by the specific provisions
3 of 32-2-10 and is also authorized under a correct reading of
4 the case law from *Concord and Cumberland*. I think any intent
5 to the contrary is simply disingenuous and doesn't support the
6 movant's contentions here.

7 THE COURT: All right. And I guess I have one follow-up,
8 Mr. Hughes, I'd like to hear your response on regarding -- you
9 didn't talk about these orders from Judge Newman and Judge
10 Young, obviously, addressing the same portion, that master
11 agreement. So what say you to that argument that they have
12 sort of already struck those down?

13 MR. HUGHES: Your Honor, I think those arguments were
14 improper. As the Court is aware, collateral estoppel is where
15 issues of fact of law have been mitigated and determined by a
16 final judgment. As you and I discussed during the course of
17 previous arguments in Providence (ph), the sine qua non of
18 collateral estoppel is a final judgment. And collateral
19 estoppel applies only in the event of a final judgment and
20 then applies, even in the event of a final judgment, only
21 where the issues have been actually litigated and determined.

22 The specific determination of both Judges Young and
23 Newman was that my client was seeking indemnification from its
24 subcontractors for my client's own negligence. That was the
25 specific factual finding of the court. And the Court went on

1 to say, as a matter of law, that, under those circumstances,
2 the contractual provisions at issue here were not sufficiently
3 clear and unequivocal under the doctrine enunciated by *Concord*
4 *and Cumberland* to impose that obligation upon the clients.
5 Those issues are simply radically different from those before
6 the Court today.

7 As I have said too many times here today, my client is
8 not seeking indemnity against liability for damages occasioned
9 by its own negligence, whether that negligence is sole or
10 concurrent. My client is seeking indemnity solely -- solely
11 for liability occasioned or arising out of the negligent
12 conduct of my subcontractors in the implementation of their
13 work.

14 The rulings of Judge Young and Judge Newman, under the
15 circumstances, are simply not relevant. They do not address
16 the same factual issues. They don't even (indiscernible) to
17 the same legal issues we're relying upon here, and they are
18 simply inadequate to establish a barrier of collateral
19 estoppel.

20 I would also point out that the cases upon which the
21 movants provide to establish a form of judgment here are
22 generally inapposite to the actual decision here. Two of
23 those cases involve applications of state law. The only case
24 that specifically addresses the term "final judgment" in the
25 context of a collateral estoppel is the Walmart case. And, in

1 that case, the Court specifically said that the dispositive
2 case -- the resolution of the case upon appeal as opposed to
3 the resolution of the case at trial was the basis for the
4 collateral estoppel. Those cases simply are not dispositive
5 in determining whether or not any case here is one that would
6 be significant to form a final judgment aside, again, from the
7 fact the more important and relevant fact that the orders of
8 Judges Newman and Young simply addressed different factual and
9 legal issues and are, thus, not dispositive with regard to a
10 collateral estoppel.

11 Aside from the fact that both of those cases are up on
12 appeal and I believe the appropriate (indiscernible) of South
13 Carolina case law would not accord a final judgment status to
14 a case upon appeal inasmuch as, under those circumstances, my
15 client has not had an adequate opportunity to address all
16 issues. For those considerations alone, I believe that a
17 reliance upon collateral estoppel argument here is unfounded.

18 THE COURT: Okay.

19 MR. HUGHES: I would also point out, Your Honor, with
20 regard to the arguments concerning the illegal or
21 unenforceable aspects of my client's contract, as I have
22 stated earlier, Section 5 of my contract, which addresses
23 various provisions of indemnity, is clearly divided into four
24 separate paragraphs. One addresses specifically the matter at
25 issue here. My clients attempt to seek indemnity for damages

1 occasioned by the negligence of its subcontract.

2 The second paragraph of Section 5 addresses indemnity
3 against liability occasioned by the personal injury or death
4 of the subcontractors, employees, or subs themselves, and by
5 its specific terms, is subject to limitations imposed by state
6 law.

7 The third provision of Section 5 which, again, addresses
8 indemnity, relates to attorney's fees and simply points out
9 the duty to defend is separate and independent from the duty
10 to indemnify.

11 And the fourth paragraph of Section 5 simply clarified
12 that the indemnification provisions are not meant to encompass
13 the negligence of an architect.

14 My client has relied in the assertion of its claims here
15 specifically -- specifically upon paragraph 1 of Section 5
16 which incorporates the language that is virtually identical to
17 the language in *Concord and Cumberland* whereby, as I said
18 previously, the Court of Appeals recognized that that
19 language, while not sufficiently clear and unequivocal to
20 impose an obligation to indemnify against the promisee's
21 negligence, was certainly inadequate to impose an obligation
22 to indemnify against the negligence of the subcontractors.
23 Again, exactly what we are claiming here.

24 Mr. Freeman has made much of an argument that because
25 separate paragraphs may conceivably be ultimately determined

1 to be contrary to state law, somehow the entire edifice of our
2 indemnity collapses. He relies upon the corner case for the
3 proposition that our courts will not, quote/unquote, blue line
4 agreements. I am sure Mr. Freeman is well aware that the
5 opinion and (indiscernible) related specifically to noncompete
6 agreements and dealt with limitations upon our judiciary to
7 modify such agreements. That is not the standard case which
8 addresses the ability of the courts to sever contractual
9 provisions.

10 And I would contend, in the first instance, that
11 paragraph one of our indemnification, Section 5, is adequate.
12 I think it's beyond question. I would contend that there's
13 been no judicial determination that any of the remaining
14 provisions within that section are violative of South Carolina
15 law.

16 If they are, it is the law in South Carolina that courts
17 are required to interpret contracts so that the intent of the
18 parties is fulfilled. The Courts are allowed, under the
19 circumstances, to sever contractual provisions which are
20 deemed to be volatile of public policy. The law has been
21 specifically articulated in the case of *Beach Company vs.*
22 *Wilhelm*. That case specifically recognized that a
23 determination of a potential severability of a provision which
24 purportedly violates the law depends upon the intent of the
25 parties. It also depends upon whether the provisions can, in

1 fact, be separated.

2 The contract here contains specific provisions whereby
3 the -- and I'm referring specifically to Article 7-F of our
4 contract, which states specifically -- and I will
5 paraphrase -- that it is the intent of the parties that the
6 provisions of this contract and any sections of those
7 provisions be severed, if necessary, to ensure compliance with
8 state law.

9 Bear with me, Your Honor, if you would.

10 Your Honor, the contract states specifically, at
11 paragraph 7-F, that the provisions of this agreement shall be
12 deemed independent and severable, and the invalidity or
13 partial invalidity of any provision or portion thereof shall
14 not affect the validity or enforceability of any other
15 provision or portion thereof. It is the intent of the parties
16 that any invalid provision hereof be performed to the extent
17 necessary to make it enforceable to the maximum extent of the
18 law.

19 In view of the Court's instructions that contracts should
20 be interpreted to achieve the intent of the parties, in view
21 of the -- that each of the provisions of Section 5 clearly
22 addresses different factual determination and aspects, and we
23 have one that specifically addresses the facts and claims
24 asserted here, and in view of the specific statement of the
25 parties here that it is their intent that any invalid

1 provision be severed, this contract is clearly one, under the
2 rationale articulated in *Beach*, where any offending provision
3 should be severed, leaving the remaining provision, which is
4 clearly consistent with South Carolina law, applicable and
5 available in the enforcement of my client's rights.

6 I don't think any other argument is appropriate. I think
7 that argument is supported by South Carolina law, and I think,
8 in the event that this Court were to determine that any
9 provision of our contract is, in fact, violative of the South
10 Carolina law, that provision can validly be stricken with the
11 remainder of the contract upheld in the interest of enforcing
12 all parties' intentions at the time of the execution of this
13 contract.

14 THE COURT: Okay. So the clause asserted that or states
15 that it's the intent of the parties, and so, by virtue -- your
16 argument is, by virtue of the clause in the contract that your
17 client drafted that says -- discusses the intent of the
18 parties to the contract, that that would absolve me of having
19 to -- or strike all provisions.

20 MR. HUGHES: Well, Your Honor, I think in view of the
21 precedent at the Court of Appeals, I don't know that the Court
22 has any alternative but to strike these opinions. I would
23 remind the Court, as I'm sure you're aware, that even in the
24 matter of *D.R. Horton vs. Builders FirstSource*, the Court of
25 Appeals specifically found that the -- a provision of that

1 contract was inconsistent with South Carolina law. That
2 contract basically said in one portion that the general
3 contractor could recover indemnity against liability
4 occasioned by its own negligence.

5 A separate provision in the same clause or separate
6 clause in the same provision said that it then recovers -- the
7 general contractor could recover against the damages
8 occasioned by the negligence of its subcontractors. One of
9 those was found to be within South Carolina law. The latter
10 was found to be outside of South Carolina law. The Court
11 recognized that, under those circumstances, the general
12 contractor, under appropriate circumstances, could rely upon
13 the provision which authorized, consistently with South
14 Carolina law, recovery of indemnity against the liability
15 occasioned by the negligence of its subcontractors.

16 This case is more consistent with appropriate
17 severability inasmuch as whereas that case involved severing
18 clauses within the same section and within the same paragraph.
19 We have separate paragraphs, each of which addresses a
20 separate factual circumstance, each of which addresses
21 different circumstances under which my client is entitled to
22 indemnity.

23 That case is instructive, at the very least, Your Honor.
24 You may not feel compelled to find that, but that case is
25 instructive in terms of how our courts address these things,

1 and that court clearly severed provisions that were deemed to
2 be hypothetical to South Carolina law, as specifically
3 (indiscernible) in Section 32-2-10, I might add.

4 So I just feel as though that is the argument in
5 opposition to the cases they make. Again, *Porter* is not
6 relevant to the determination here. *Beach* is. *Beach* is
7 consistent with all -- *Beach* is consistent with the history of
8 South Carolina law, encouraging severability where appropriate
9 in the furtherance of the intent of the parties. And I think
10 any arguments to the contrary are simply, at best,
11 disingenuous.

12 Along those same lines, Your Honor -- and, again, not to
13 belabor the point -- again, I think it's instructive that,
14 even when these courts have deemed it appropriate to strike or
15 not to enforce provisions that they determine to be counter to
16 public policy, those courts did not require or even suggest
17 that striking the non-offensive portions appropriate. And,
18 again, I think that's instructive in terms of the Court's
19 determination here.

20 I would also point out, Your Honor -- and again, I'm
21 going to the point about (indiscernible), but even under
22 Section 32-2-10, which specifically prohibits indemnification
23 against the sole negligence -- the sole negligence of the
24 indemnity, that provision by its specific terms only applies
25 to the sole negligence of the indemnity. A strict reading of

1 that statute, which I'm not encouraging here, but a strict
2 reading of that statute would entitle the indemnity under
3 appropriate and (indiscernible) circumstances to recover for
4 its own concurrent negligence. Not for a sole but it could
5 recover for its concurrent negligence. That is not what we're
6 seeking here.

7 My point is, that statute certainly does not preclude
8 recovery by the general contractor for the concurrent
9 negligence of its subcontractor. Even if we're concurrently
10 negligent, that section does not preclude us from recovering
11 for the general -- for the subcontractor's concurrent
12 negligence. And that is totally consistent with *Concord and*
13 *Cumberland* which also, both at the trial level and the
14 appellate level, found that a general contractor, who was
15 entitled to recover against its subcontractor, for the
16 negligence of that subcontractor, even if the general
17 contractor were concurrently negligent. That case simply
18 precluded under those circumstances recovery for the
19 concurrent negligence of the general contractor. It clearly
20 allowed the recovery we were seeking here. Clearly.

21 I need to address briefly Section 3. You and I have
22 addressed this before, Your Honor, on the context of *Pavic*.
23 The parties here agree to contend that Section 3 imposes upon
24 the subcontractor as the obligation to indemnify my client
25 against defects in materials. The work, as encompassed by

1 Section 3, includes materials and labor provided by the
2 subcontractor. That is clearly defined in Section 1 of the
3 subcontract agreement where it specifically addresses work,
4 and work encompasses the material and services provided by the
5 sub.

6 Section 3 simply requires that the sub warrant those
7 materials and services provided by the sub. It requires that
8 they indemnify us against deficiencies in those materials or
9 services. It has nothing to do with any claim by Builders
10 FirstSource for indemnity against the consequences of its own
11 negligence or deficiencies in its products. Section 3 simply
12 does not address those products. And it is not within the
13 indemnification (indiscernible) asserted on my client.

14 I would also take issue with the contention that
15 Mr. Grimball, that my client has, at any point, conceded
16 deficiencies in the DP rating of those windows. We have
17 simply stated that, in the event that the nailing patterns are
18 as asserted by the plaintiff's experts are inadequate, that
19 may give rise to some question concerning the capacity of
20 those windows to satisfy the DP ratings. In that event,
21 however, those -- such -- such a deficiency would clearly be
22 the consequence of the failure of the subcontractors adequate
23 (indiscernible) to install those windows.

24 Briefly addressing the arguments that they made with
25 regard to claimant's inequitable indemnity. Both

1 Mr. (Indiscernible) and Mr. Grimbball have contended that my
2 client has failed to adequately exercise its inspection
3 responsibilities. In the first instance, this work by my
4 client was done pursuant to the license of the general
5 contractor. My client not serve as the general contractor.
6 The general contractor duties were provided by Winston Carlyle
7 and by Temple Construction. My client served as the
8 subcontractor. My client engaged the services of said
9 subcontractors to perform its work. The testimony -- the
10 deposition testimony is clear that my client did, in fact,
11 conduct inspections. The extent to which those inspections
12 may or may not have been adequate are clearly a question for
13 the ultimate fact-finder and are simply not appropriate at
14 this level to warrant dismissal of my cases by summary
15 judgment -- my clients by summary judgment.

16 Same rationale applies to everything my client did. My
17 client may have had some responsibility to supervise and
18 inspect. The evidence establishes that my client did, in
19 fact, engage in supervision and inspection. My client is not,
20 however, required to inspect the installation of every single
21 window. Once it's instructed its subcontractors, it certainly
22 has a right to rely upon what (indiscernible) duties and
23 conscientiousness in pursuing a given entity.

24 To the extent there may be any question as to my client's
25 potential contributory negligence to the damages sustained by

1 the plaintiff, that is an ultimate resolution for the
2 fact-finder and, again, not appropriate at this stage of the
3 litigation.

4 With regard to the arguments made that the contractual
5 terms might have expired, the latter agreements, those
6 involving WS contractors, ECC Construction, et al., call for a
7 three-year term followed by automatic renewal for successive
8 periods of one year in the absence of any cancellation by the
9 parties. There has been no cancellation. The previous
10 agreements also require an initial period followed by
11 successive periods unless terminated by the parties. There
12 has been no termination.

13 So the idea that the claims as asserted by my claims are
14 somehow outside the boundaries established by the judicial
15 terms of this contract is just simply not borne out by the
16 documents themselves.

17 With regard to arguments that the causes of action are
18 somehow defeated by the relevant statute of repose, the
19 plaintiff's primary expert has clearly testified that there
20 are deficiencies in installation of framing and deficiencies
21 in installation of the windows. While my client contests
22 those allegations vigorously, those are, nonetheless, issues
23 before the Court, evidence before the Court, evidence before
24 the ultimate fact-finder, and Mr. Freeman has also, in the
25 context of that testimony, testified that these deficiencies

1 are violative of the code.

2 The Court, I believe, is aware that a violation of the
3 code is evidence of gross negligence sufficient to overcome
4 any contention or any application of the statute of repose, at
5 least at this juncture, and I think would alone preclude any
6 summary judgment (indiscernible) consideration.

7 Your Honor, I believe -- I apologize for the length of my
8 argument. I think that addresses all the conditions I wanted
9 to assert, subject to (indiscernible). Thank you, Your Honor.

10 THE COURT: Sure. All right. Mr. Grimbball, would you
11 like to respond?

12 MR. GRIMBALL: Thank you, Your Honor. As briefly as I
13 possibly can.

14 With regard to Mr. Hughes's arguments about collateral
15 estoppel, I'd like to read for you the first sentence of the
16 first rule of the South Carolina appellate court rules. This
17 is Rule 201: "Appeal may be taken, as provided by law, from
18 any final judgment, appealable order, or decision."

19 Mr. Hughes is presently prosecuting an appeal of Judge
20 Newman's order. The mere fact that he is capable of doing
21 this is because Judge Newman's order is a final order, there
22 is no statute making the order appealable as, for instance, in
23 the case of an order denying motion to compel arbitration.

24 So I think that those arguments are unfounded under our
25 Rules of Civil Procedure. Judge Newman's order and Judge

1 Young's order are final orders. If they're appealable, then
2 they should certainly be capable of being the basis of a
3 finding of collateral estoppel, which is exactly what Judge
4 Young found.

5 With regard to Mr. Hughes's last point about the statute
6 of repose, East Coast Carpentry and East Coast Carpentry
7 Company do not have claims against them from the plaintiffs.
8 The only person who has claims against them is BFS. Because
9 of the Stoneledge holding, BFS only has claims for equitable
10 and contractible indemnity. There will be no jury verdict
11 which could possibly find East Coast or East Coast Carpentry
12 guilty of gross negligence. Therefore, BFS is not entitled to
13 use that exception to the statute of repose against them.

14 With regard to the licensure issue, Mr. Hughes argues
15 that because he -- BFS did not pull the permits in this case,
16 they are not subject to the chapter of the commercial
17 contractor's licensure. That doesn't make any sense. By
18 virtue of obtaining the license, they are required to comply
19 with the provisions of that statute. It doesn't matter
20 whether or not they pulled the permit. The owner of the
21 structure could pull the permit and then have the general
22 contractor come and work under the permit pulled by the owner.
23 That, in no way, obviates the contractor's obligations to
24 follow the law. Builders FirstSource is an unlimited
25 commercial contractor and it is required by the entitlement to

1 that license, the privilege of that license, to follow the
2 rules of that chapter of the law.

3 With regard to Mr. Hughes's assertions that BFS seeks to
4 recover an indemnity only for the sole negligence of its
5 subcontractors, that is a clever argument that is not
6 supported by its contracts or its pleadings. Paragraph 138 of
7 their operative pleading is the request for relief in their
8 claim for indemnity. And, in that paragraph, they say BFS is
9 entitled to full contractual and common law indemnification
10 from the cross-claim defendants for any liability BFS is found
11 to have to the plaintiffs or to others in this action, and BFS
12 is also entitled to damages for any negligence as aforesaid on
13 the part of the cross-claim defendants, entitling BFS to
14 recover from the cross-claim defendant its attorney's fees,
15 costs, and other expenses incurred in defending this action.

16 There's no -- their pleadings -- if you read their
17 pleadings, the plain language of the pleadings is they want
18 the whole hog. They want to be indemnified for every penny
19 that they spend defending this lawsuit. So they can't turn
20 around and run away from the claims they have filed against my
21 clients and every other subcontractor in this case.

22 If you read their contracts, the contracts read the same
23 way. They just are trying to argue that they're only seeking
24 to recover for the sole negligence of the subcontractors
25 because the contracts and pleadings have become inconvenient

1 for them insofar as they violate South Carolina case law and
2 statute.

3 Furthermore, let's talk about the difference in sole
4 negligence and concurrent negligence. Mr. Hughes is
5 attempting to argue that BFS is somehow entitled to recover
6 from eight different subcontractors for their sole -- to the
7 extent that the subcontractors were solely negligent. Well,
8 the only way that the subcontractors can be solely negligent
9 is for BFS to not be negligent at all. If BFS is 1 percent
10 negligent, then there is no sole negligence; it is all
11 concurrent negligence.

12 The mere fact that they have eight subcontractors makes
13 this, I think, procedurally impossible, especially given the
14 fact that some of them are third-party defendants. I mean,
15 there will be no verdict on which BFS is not found to be
16 partially responsible if they are then going to turn around
17 and recover from the third-party defendants. It's just not
18 procedurally possible, and I think that the Court is entitled
19 to consider that in granting this motion.

20 Mr. Hughes contends that attorney's costs and fees are
21 not subject to Section 32-2-10, the anti-indemnity statute. I
22 think that the *Concord and Cumberland* -- or not *Concord and*
23 *Cumberland* -- the *Town of Winsboro* case, the *Addy* case, both
24 make clear that attorney's costs and fees are damages that can
25 be sought in indemnity. Mr. Hughes himself, I think, argued

1 that attorney's costs and fees are, quote, "consequential
2 damages of a claim for indemnification." I don't
3 understand -- the whole -- the anti-indemnity statute is not
4 specific to what kind of damages they are. If attorney's
5 costs and fees are consequential damages, they're covered by
6 that statute.

7 And, finally, I would -- would just ask you to consider
8 what Mr. Hughes is asking the Court to do in separating the
9 duty to defend and the duty to indemnify in the context of a
10 subcontract agreement with subcontractors that were paid as
11 little as \$12 a window to install windows. I mean, insurance
12 companies are billion-dollar operations that span -- they're
13 operating in multiple states and have their own department of
14 the South Carolina government that does nothing but regulate
15 them. Insurance companies have the upper hand in drafting and
16 negotiating contracts for insurance, and contracts for
17 insurance are much more complicated than the subcontract and
18 are much more detailed than when someone will defend the
19 insured and when someone will indemnify the insured.

20 Trying to apply the standard to an insurer that is worth,
21 you know, billions of dollars and has a whole team of
22 attorneys drafting their contracts, as you apply to a
23 subcontractor who you hand the contract you drafted, it
24 just -- it's fundamentally unfair and even, quite frankly, our
25 system, both handling these construction defect claims in

1 allocating risk is going to be worse off if we try to hold
2 these subcontractors to the same standard that we hold the
3 insurance companies.

4 And with that, Your Honor, I am finished. Thank you.

5 THE COURT: Okay. Anybody else that needs to reply?

6 Mr. Hughes? Not covered by Mr. Grimball.

7 MR. FREEMAN: Your Honor, Ian Freeman again. Just real
8 briefly, I'll continue to adopt Mr. Grimball's position in his
9 reply. I would also just add, by the term -- I believe
10 Mr. Hughes said 32-2-10 applies only to third-party claims. I
11 don't think there's anything about the expressed language of
12 the statute that makes it so limited, attorneys' fees are
13 damages, as Mr. Grimball just noted and they're seeking to
14 recover them.

15 Mr. Hughes raised the issue with severability to Judge
16 Young in the 656 Coleman case. Judge Young wasn't persuaded.
17 Judge Young granted summary judgment to Hurley and found the
18 order of Judge Newman of collateral estoppel effect. As
19 Mr. Grimball previously noted, I believe that also Judge
20 Young's finding that it has collateral estoppel effect goes
21 ahead and decides the issue dispositively that indeed Judge
22 Newman's order is a final judgment. Mr. Grimball cited
23 authority to that effect and I have also cited authority in my
24 brief to that effect.

25 And it makes sense, if you think about it, if BFS could

1 now just continue to -- you know, Judge Newman has decided
2 that their contract is unenforceable as a matter of law. If
3 BFS could continue to go out and relitigate this issue, we
4 would wind up with potentially inconsistent decisions from
5 courts that would, you know, again, be on appeal, and we would
6 have inconsistent verdicts, inconsistent rulings. It would be
7 completely inefficient, and collateral estoppel is designed to
8 remove that inefficiency and potential for inconsistency and
9 to protect the integrity of the courts and the decisions made
10 by the courts.

11 So, if you think about it, the policy and rationale for
12 Judge Newman's order being a final judgment for purposes of
13 collateral estoppel, it completely, you know, gives integrity
14 to the courts and should be upheld.

15 I believe that's all I have got, Your Honor. Thank you
16 so much.

17 I would just add, too: I did not hear anything from
18 Mr. Hughes on the issue of the issue release, and, again, I
19 believe the issue release is dispositive for my client. Thank
20 you.

21 MR. LADY: May I speak, Your Honor?

22 THE COURT: I want to make sure that nobody else
23 representing these subcontractors wishes to reply initially.
24 Anybody else have anything they want to add in brief response?
25 No? It's already been said?

1 Okay. All right, Mr. Hughes.

2 MR. LADY: This is Jim Lady. I would just note for the
3 record to Mr. Grimball's argument about statute of repose for
4 East Coast, but the plaintiff has not ceased those. We have
5 served to ECC for gross negligence, and the issue of whether
6 East Coast is an alter ego has not been decided, so the fact
7 that we haven't sued them really is not dispositive of the
8 statute of repose issue. I just wanted to note that.

9 THE COURT: Okay.

10 MR. GRIMBALL: And just for the record, Your Honor -- and
11 please correct me if I'm wrong, Mr. Lady -- but I am unaware
12 of the issue of East Coast being an alter ego of ECC being
13 contained within any of the pleadings that have been filed
14 with the court in the last four years and three months.

15 MR. LADY: I don't know that it has to be but I think
16 that's a factual issue. It could be done as late as at trial.
17 But I think that issue isn't brought and I'd just note that.

18 THE COURT: Okay. I think I have heard everything I need
19 to hear. Mr. Hughes, it's hard to interject many -- I will
20 entertain a very brief reply to their reply. Go ahead.

21 MR. HUGHES: Your Honor, I would simply assert again that
22 the concept of indemnification was specifically defined by the
23 *Concord and Cumberland* court as that form of compensation in
24 which a first party is liable to pay a second party for the
25 loss or damage the second party incurs to a third party.

1 Section 32-2-10 addresses solely negligence and
2 indemnification obligations prohibited against
3 (indiscernible). It simply prohibits an agreement to
4 indemnify a party against liability occasioned by the sole
5 negligence of that party. It is confined to obligations in
6 indemnity, which are obligations to pay third parties. The
7 statute simply does not address attorney's fees.

8 With regard to Mr. Freeman's argument that
9 (indiscernible) somehow precludes him from an obligation to
10 pay attorney's fees, again, attorney's fees are consequential
11 damages attendant upon an obligation to indemnify. They are
12 separate obligations. All Section 32-2-10 does is prohibit
13 indemnification under certain circumstances. It neither
14 addresses nor prohibits attorney's fees. Our contract
15 specifically encompasses it within the obligations imposed on
16 our subcontractors, the obligation both to indemnify and to
17 defend.

18 With regard to our pleadings, our pleadings specifically
19 say that we have been subjected to liability to the plaintiffs
20 because of deficiencies in the performance of our
21 subcontractors, and in the event that those allegations are
22 established, we seek recovery of liability to which we're
23 exposed. Every single one of our causes of action is preceded
24 by a paragraph which premises our claim for recovery upon an
25 establishment of negligence by our subcontractors. Every

1 single one of them.

2 With regard to the two orders issued by Judges Newman and
3 Young, Judge Newman's order specifically says BFS has failed
4 to persuade the Court that its indemnity clauses in either
5 subcontract meet the elevated standard of being a clear and
6 unequivocal statement, which leaves no question as to BFS
7 seeking indemnification for its own negligent acts or
8 omissions. BFS has failed to demonstrate that the contract
9 language can be interpreted only to reach the result of the
10 parties intended to indemnify the indemnity with the
11 indemnity's own negligence. If any other interpretation of
12 the contract language is reasonably possible, they cannot
13 prevail in the contractual indemnity claims.

14 That Court's determination was premised specifically upon
15 a Court determination that we sought recovery against
16 indemnity for our own negligence. Judges Young -- Judge
17 Young's order adopted that language in toto. That is simply
18 not the factual and legal issue before the Court today, and
19 those opinions provide no basis for a finding of collateral
20 estoppel.

21 THE COURT: Okay. Well --

22 MR. HUGHES: Thank you.

23 THE COURT: Sure. I appreciate everybody's attendance
24 today. I look forward to digging a little deeper into these
25 memoranda that you filed and (indiscernible) that I am and

1 it's attached --

2 MR. GRIMBALL: Your Honor?

3 THE COURT: Yes. I'm sorry. Go ahead, Mr. Elliott.
4 What you need to add?

5 MR. ELLIOTT: Forgive me. A small -- a small item,
6 please.

7 Repeatedly, my friend Mr. Hughes has indicated that part
8 of the reason the contractual language should not be stricken
9 is because they're only seeking damages caused by the
10 subcontractors.

11 Respectfully, the elements of damage that he may be
12 seeking under those provisions are irrelevant. We're talking
13 about whether or not the cause of -- the language stands up on
14 its own or not. It's either in or out, and that has both
15 substantive and procedural implications in the case.

16 So the fact that he's only claiming certain elements of
17 damage is irrelevant. If the paragraph is in, it's
18 contractual indemnification. If it's out, then potentially
19 there's equitable indemnification. And as Your Honor
20 understands, that makes a big difference at trial.

21 So the notion that he's only asking for a certain kind of
22 damage is respectfully irrelevant to the analysis of whether
23 or not that paragraph stands up. Thank you.

24 MR. HUGHES: Your Honor, may I briefly respond?

25 THE COURT: I can't see who is speaking. Is that

1 Mr. Hughes?

2 MR. HUGHES: Steve Hughes.

3 THE COURT: Oh, okay.

4 MR. HUGHES: Two things. I meant to suggest earlier that
5 we have provided to the Court -- and I thought to
6 Mr. Elliott -- a contract dated February of 2006 in response
7 to his argument that the contract post-dated limitations for
8 services. But more importantly, I didn't quite under the
9 point that he made a moment ago; however, the relief requested
10 by my client and the contractual provisions upon which we base
11 our claim for relief were specifically recognized as
12 appropriate in the case of *Concord and Cumberland*, both at the
13 trial level and at the appellate level. We seek nothing more
14 than relief that has been specifically authorized by a prior
15 dispositive ruling of our appellate courts.

16 Thank you, Your Honor.

17 MR. GRIMBALL: I'm sorry, Your Honor. I -- I have never
18 understood where in *Concord and Cumberland* Judge Newman ruled
19 that -- I believe it was Superior Construction was entitled to
20 indemnification for the sole negligence of Muhler
21 Construction. There's no judgment filed on the public index,
22 and I don't know where that -- the Court of Appeals found that
23 ruling. Quite frankly, I don't know that that issue was
24 before the Court, but Mr. Cox has said that in front of
25 multiple judges. Mr. Hughes has said that. I just don't know

1 where that is. I have spent hours looking for those orders
2 and opinions, and I don't understand where *Concord and*
3 *Cumberland* ruled that -- I don't even think that issue was in
4 front of the Court. I just don't think the case supports the
5 assertion Mr. Hughes is making.

6 MR. HUGHES: Your Honor, I'll be happy to submit a brief
7 memorandum explaining the two instances in the *Concord and*
8 *Cumberland* opinion whereby the trial court found that the
9 indemnitee was entitled to recover from its subcontractor for
10 damages occasioned by the negligence of the subcontractor
11 itself. That finding was specifically referenced within the
12 appellate opinion and found to be appropriate. We cannot
13 recover, perhaps, under this language for our own negligence.
14 We can certainly recover (indiscernible) occasion of the
15 negligence of the subcontractor even if it (indiscernible)
16 with ours. Thank you.

17 THE COURT: Do you feel the need to -- I tell you, I'm
18 always hesitant to open up to more briefs being filed because
19 then everybody else wants to respond and have a surrebuttal
20 and all of that, and, at some point, all of this must come to
21 a screeching halt, and I think that happens now. So --

22 MR. GRIMBALL: Your Honor, you're absolutely right.
23 Collateral estoppel applies. That's the bottom line. We
24 don't even need to go down that path.

25 THE COURT: Well, I appreciate everybody's arguments

1 today. Once again, I think I have already said it, but
2 everything you have already submitted is in the record. I
3 think I have given everybody ample time to set forth their
4 arguments. So, with that, I will take all this under
5 advisement and issue orders accordingly as soon as possible.
6 And if we need anything else from any of your offices, we will
7 certainly reach out and let you know. But until then, don't
8 call us, we'll call you, and hope everybody has a wonderful
9 weekend and thank you so much for attending today.

10 (The above hearing concluded.)
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1 CERTIFICATE OF TRANSCRIBER

2 CASE/NO.: Retreat at Charleston v Winston Carlyle

3 2016-CP-10-03783

4 DATE OF PROCEEDING: November 6, 2020

5 COURT REPORTER: Denise Lauder (retired)

6
7 I, Bobbi J. Fisher, do hereby certify that the
8 foregoing transcript is a true and correct record of the
9 recorded proceedings; **that said proceedings were transcribed**
10 **to the best of my ability from the audio recording and**
11 **supporting information**, and that I am neither counsel for,
12 related to, nor employed by any of the parties to this case,
13 and I have no interest, financial or otherwise, in its
14 outcome.

15 17 _____
18 Bobbi J. Fisher, RPR

19 NCRA Registered Professional Reporter (RPR)

20 Prepared: November 2, 2021

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BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of OCT 21, 2005, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address:

111 Lumber Lane, Goose Creek, SC, 29445, telephone: 843.553.5252,

fax: 843.572.9567, Contact: Billy F. Crabtree Jr, e-

mail: bill.crabtree @buildersfirstsource.com (“Contractor”), and

EAST COAST CARPENTRY CO, a Sole Proprietorship,

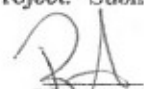
LLC, telephone: (843) 478 8230, fax: (843) 216 2701,

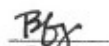
Contact: Rodrigo Assis, e-mail: EASTCOASTCARPENTRYCO@YAHOO.COM.

(“Subcontractor”).

SECTION 1. Introduction.

- a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the “Work”) from time to time for Contractor on any project (“Project”). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (“Contract Documents”) and incorporated into the Agreement by this reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor’s only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.
- b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, “Work Order”) delivered by Contractor to Subcontractor relating to that Project. Such


Subcontractor


Contractor

Work Order(s) are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

- c. **Term.** This Agreement shall continue in full force and effect until terminated as provided herein or until written notice of termination is delivered by one party to the other. Termination of this Agreement shall also terminate all Work Orders. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

SECTION 2. Materials and Workmanship. Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

- a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and omissions.
- b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.
- c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.
- d. **Safety**
 - (1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans and specifications for conformity with all local, state and federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety and health rules and regulations established by or pursuant to the Federal Occupational Safety and Health Act of 1970, and Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges or penalties related to the Work, including, without limitation, fines, charges and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling


Subcontractor


Contractor

of materials or any other function that is in violation of the Law. All workmanship and materials will conform to Law, and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

- (2) The Occupational Safety and Health Administration ("OSHA") has promulgated regulations ("Regulations") which are entitled the OSHA Hazard Communication Standard. Among other things, the Regulations require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractors agrees as follows:

- (A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.
 - (B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.
 - (C) Subcontractor will indemnify, defend and hold Contractor and Owner harmless of and from all Claims, damages, liabilities, and causes of action that arise from the failure of Subcontractor to comply with the Regulations, even if Contractor itself has failed to comply with the Regulations or has been negligent.
 - (D) Subcontractor will assist Contractor in complying with the Regulations.
 - (E) Subcontractor will not use any chemicals in its performance of the Work for Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.
- (3) Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage and other warnings against hazards, and protective barriers. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.


Subcontractor

Contractor

- (4) **Default.** If Subcontractor fails to immediately comply with safety requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$100 per hour until construction at the Project can be safely resumed.

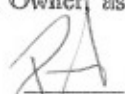
SECTION 3. Warranty and Service. All Work shall be unconditionally guaranteed by Subcontractor for a period of two years, or such longer period as may be required by law or for which Owner requires Contractor to warrant such Work, from the date following Owner's acceptance of the Work. Subcontractor shall correct at its own expense all defects that appear during such period, and all damage (whether to the Work or other components of the Project) arising out of, caused by or in any way related to said defects or repair, within twenty-four (24) hours after written notice or within the time agreed to in writing by Contractor (Saturdays and Sundays excluded). The determination as to what constitutes a defect will be within the sole discretion of Contractor and Owner. If Subcontractor fails to promptly commence and complete the correction of defects, Contractor or Owner may do so. In such event, Subcontractor shall promptly reimburse Contractor for the cost of such work, plus a sum of fifteen percent (15%) thereof (for supervision and overhead). Contractor may, at its option, elect to charge such amounts against the next Partial Payment (defined in Section 8) or the final payment. Subcontractor will maintain a published phone number or an answering service during normal working hours.

SECTION 4. Independent Subcontractor Status. Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of construction of the Work.

SECTION 5. Insurance. At all times while performing the Work, and for a period of two (2) years thereafter, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. **WORKERS' COMPENSATION INSURANCE** - statutory limits in the state where each property is located.
- b. **EMPLOYER'S LIABILITY INSURANCE** - \$500,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. **COMPREHENSIVE GENERAL LIABILITY** - \$1,000,000 per occurrence, \$1,000,000 products, completed operations aggregate, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. **BUSINESS AUTO LIABILITY**, including hired and non-owned auto coverage - \$500,000 Combined Single Limit.

Insurance policies shall be (a) issued by companies with a "Best's Rating" and a "Financial Size Category" acceptable to Contractor, (b) on an "occurrence" form (c) list Contractor and if requested, Owner, as


Subcontractor

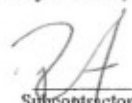
Contractor

additional insureds on the General Liability and Automobile Liability Policies. Such Additional Insured Status shall apply: (i) to all liability arising out of or resulting from bodily injury to or sickness, disease or death of any agent, employee or representative of Subcontractor or any of Subcontractor's subcontractors regardless of whether such claim, damage, loss or expense is caused or is alleged to be caused, in whole or in part by the negligence of any additional insured (it being the expressed intent of Contractor and Subcontractor that in such event Subcontractor is to provide coverage hereunder to insure the additional insured(s) from the consequences of their own negligence, whether it is alleged to be the sole or concurring cause of the bodily injury, sickness, disease or death of Subcontractor's agent, representative, or employee or the employees of any of Subcontractor's subcontractors); (ii) in all cases except (i), to the extent of liability resulting from Subcontractor's negligence or willful misconduct; and (iii) to omissions resulting from the additional insured's failure to supervise Subcontractor's operations.

The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement must be deleted. To the fullest extent permitted by law, any provision on the face of any Certificate of Insurance provided by Subcontractor that states anything to the effect that the Certificate of Insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such Certificate of Insurance. Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section 5 promptly after the date of this Agreement and 30 days before the expiration date of each policy or at any time upon request of Contractor. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor, including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

SECTION 6. Waiver, Release, and Indemnification. Subcontractor agrees that Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend and hold Contractor harmless against any such injuries and claims. Accordingly:

- a. **Waiver.** Subcontractor expressly waives any provision of any applicable workers' compensation act that might prevent its being joined as a defendant or enable it to avoid liability to Contractor or Owner or any other third party for damages, contribution, or indemnity where Subcontractor or any employee, agent, or subcontractor of Subcontractor, or any of their respective employees, officers, agents, or invitees, makes any claim for damages against Contractor or commences any civil action.
- b. **Release and Indemnity.**
 - (1) Subcontractor hereby agrees to release, indemnify, defend, and hold harmless Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees (each an "Indemnitee"), to the fullest extent permitted by law from any costs, expenses, demands, causes of action, claims, damage, liability, loss, or costs ("Claims") (together with attorneys' fees)


Subcontractor

Contractor

arising out of, resulting from, or connected with the death of or any injury to, or any damage to the property of, Subcontractor or its employees, agents, or subcontractors or any of their respective subcontractors, employees, officers, agents, or invitees.

- (2) For all Claims not covered by (1) above and to the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend, and hold harmless the Indemnitees for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), to the extent of liability resulting from Subcontractor's negligence or willful misconduct incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations.

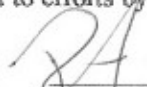
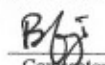
SECTION 7. Default and Damages.

- a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including without limitation this Agreement.

- b. **Damages.**

- (1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement, and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by


Subcontractor

Contractor

Contractor to accelerate the Work, on an account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

- (2) Subcontractor's Liability to Contractor upon Termination. If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to perform under this Agreement or other Contract Documents (including without limitation the amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.
- c. Reimbursement for Fines. Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold Contractor harmless regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including without limitation their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

- a. Payment by Owner is Condition Precedent. Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("Cost of Work") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accept Subcontractor's Work and Contractor receive payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.
- b. Partial Payments. Partial payments ("Partial Payments") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including without limitation materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, Safety Meeting Sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("Employee Time Sheets") for the period of time since the last submission for payment, evidence of payment, waivers (including without limitation lien waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its sub-subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for


Subcontractor

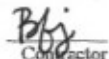

Contractor

the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the Application for Payment by Contractor and receipt of payment by Contractor from Owner.

- c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "Retainage Amount") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payment.
- d. **Grounds for Withholding Payments.** Contractor may withhold any Partial Payment or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.
- e. **Work Covered by Partial Payments.** All the completed Work covered by Partial Payments made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.
- f. **Final Payment.** Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:
 - (1) the Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;
 - (2) Subcontractor has submitted satisfactory evidence of payments to, waivers by and releases from all claims by Subcontractor and any persons, firms or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including without limitation lien waivers) if requested by Contractor;
 - (3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, and warranties and bonds;
 - (4) Subcontractor has provided Safety Meeting Sheets and Employee Time Sheets for the period of time since the last submission for payment;
 - (5) Owner, any general contractor, any lender, any architect and Contractor have accepted the Work; and
 - (6) Contractor has received payment from Owner.
- g. **Release of Retainage.** Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.
- h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or

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Subcontractor


Contractor

other agreement where any interest is retained by or granted to a seller, supplier, or lender. Contractor, where appropriate, may make payments due Subcontractor directly to other parties owed by Subcontractor, unless Subcontractor provides written notification of any dispute between Subcontractor and its creditors. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

- i. **Indemnification.** Subcontractor hereby agrees to indemnify, defend, and save Contractor and Owner harmless from and against any mechanics' and materialmen's liens upon the Project, attorneys' fees and expenses, amounts paid in settlement, and amounts paid to discharge judgments arising out of the services, labor, equipment, or materials furnished by Subcontractor or its employees, suppliers, or subcontractors. If Subcontractor fails to do so, Contractor may deduct from sums then or thereafter due to Subcontractor such amounts as Contractor deems appropriate in its sole discretion to indemnify Contractor and Owner from liens, claims, and encumbrances. Contractor may, in its sole discretion, cure any liens or satisfy any demands, and recover its costs related directly or indirectly thereto from Subcontractor. Subcontractor hereby waives, releases, and forever discharges Contractor and Owner from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that Subcontractor may have against Contractor or Owner that arise directly or indirectly from curing any such liens, claims, encumbrances, or demands.

SECTION 9. Miscellaneous.

- a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor and unless permitted by the Contract Documents. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including without limitation and the pertinent provisions of this Agreement (including without limitation Section 5 hereof) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section 9, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.
- b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.
- c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payment or final payment under this Agreement or any other agreement.
- d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery and surplus materials

no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

- e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.
- f. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

By:

Name: RODRIGO ASSIS
Title: Owner

935-772559

Subcontractor Social Security No. or
Federal I.D. No.

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC

By:

Name: Billy F. Crabtree
Title: Market Installed Mgr.


Subcontractor

Contractor

VENDOR No.: 13515

MASTER SUBCONTRACTOR AGREEMENT SUBMITTAL FORM

Attn: Legal Dept.
2001 Bryan Street, Suite 1600
Dallas, TX 75201
(214) 880-3528 - phone
(214) 880-3577 - fax

Today's Date: 10/21/05Your Name: Rodrigo Assis**BFS LOCATION:**

111 Lumber Lane GOOSE CREEK SC
Street Address City State Zip Code
Phone: (843) 553 5252 Fax: 843.572.9567

SUBCONTRACTOR INFORMATION:

EAST COAST CARPENTRY CO
PO Box 1262 MT PLEASANT SC 29464
Subcontractor Name: Street Address City State Zip Code
Phone: (843) 4788230 Fax: (843) 216 2701

MASTER SUBCONTRACTOR AGREEMENT ENCLOSED? ☒ Yes (required)CERTIFICATE OF INSURANCE ENCLOSED? ☒ Yes (required)DESCRIPTION OF SUBCONTRACTOR WORK: interior trim

For Legal Department Use Only.

Date Logged In: _____

Logged In By: _____

4/20/05

Vendor Add/Modify Form

Please complete form thoroughly.

Location: Goose Creek Requested by: BILL CRABTREE

Approvals: [Signature] General Manager _____ Area Manager _____ Purchasing Manager _____

Vendor Number: _____ Approval Date: _____

Vendor Name: Palmetto Trim & RENOVATIONS

Type of Product or Service: INSTALLER (TRIM/WINDOWS)

Order From Address: Street: 139 WILTON ST

City: GOOSE CREEK

State: SC Zip Code: 29445

Contact Name: RUSTY BAKER

Phone: 843.514.4338 Fax: —

Payment Terms: UPON RECEIPT OF INVOICE (15 DAYS)

Vendor Type: (Circle answer) Merchandise Purchases Operating Expense Employee

Other Specify: SUBCONTRACTOR

1099 Vendor? Yes No

(REQUIRED) Tax ID# 20-2475834

Remit to Name (If Different): SAME

Street: _____

City: _____

State: _____ Zip: _____

Phone: _____ Fax: _____



SUBCONTRACTOR CHECKLIST

**ATTENTION SUBCONTRACTOR: PLEASE COMPLETE AND SUBMIT
THE FOLLOWING CHECKLIST WITH THE MASTER SUBCONTRACTOR
PACKAGE FOR ACCEPTANCE.**

- ✓ Builders FirstSource Master Subcontractor Agreement completely filled out and signed. Changes to the Master Subcontractor Agreement are not acceptable.
- ✓ Certificate of Insurance showing workers' compensation (including employer's liability), general liability and auto liability insurance coverage at required limits and showing BFS as "additional insured" on all policies except workers' compensation. (Please send your insurer a copy of the enclosed Insurance Requirements for Subcontractors and "SAMPLE" certificate of insurance)
- ✓ Direct Deposit Payment Form
- ✓ A "VOIDED" check attached to Direct Deposit Payment Form.
- ✓ Completed W-9

Signed by: R. Baker
(Person responsible for verifying documents)

Date: 5-16-05

Print Name: RUSSELL BAKER



BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of MAY 16, 2005, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 111 Lumber Lane Goose Creek SC 29445, telephone: 843-553-5252, fax: 843-797-1710, Contact: BILL CRABTREE, e-mail: bill.crabtree@buildersfirstsource.com (“Contractor”), and Palmetto Trim & RENOVATIONS, a PARTNERSHIP, telephone: 843-514-4338, fax: —, Contact: RUSTY BAKER, e-mail: — (“Subcontractor”).

SECTION 1. Introduction.

- a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the “Work”) from time to time for Contractor on any project (“Project”). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (“Contract Documents”) and incorporated into the Agreement by this reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor’s only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.
- b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, “Work Order”) delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s) are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.
- c. **Term.** This Agreement shall continue in full force and effect until terminated as provided herein or until written notice of termination is delivered by one party to the other. Termination of this Agreement shall

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Subcontractor

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Contractor

also terminate all Work Orders. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

SECTION 2. Materials and Workmanship. Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

- a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and omissions.
- b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.
- c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.
- d. **Safety**
 - (1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans and specifications for conformity with all local, state and federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety and health rules and regulations established by or pursuant to the Federal Occupational Safety and Health Act of 1970, and Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges or penalties related to the Work, including, without limitation, fines, charges and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials or any other function that is in violation of the Law. All workmanship and materials will conform to Law, and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration

or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

- (2) **The Occupational Safety and Health Administration ("OSHA")** has promulgated regulations ("**Regulations**") which are entitled the OSHA Hazard Communication Standard. Among other things, the Regulations require all contractors and subcontractors to exchange Material Safety Data Sheets ("**MSDS**") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractors agrees as follows:

- (A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.
 - (B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.
 - (C) Subcontractor will indemnify, defend and hold Contractor and Owner harmless of and from all Claims, damages, liabilities, and causes of action that arise from the failure of Subcontractor to comply with the Regulations, even if Contractor itself has failed to comply with the Regulations or has been negligent.
 - (D) Subcontractor will assist Contractor in complying with the Regulations.
 - (E) Subcontractor will not use any chemicals in its performance of the Work for Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.
- (3) Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage and other warnings against hazards, and protective barriers. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.
- (4) **Default.** If Subcontractor fails to immediately comply with safety requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's


Subcontractor

Contractor

Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$100 per hour until construction at the Project can be safely resumed.

SECTION 3. Warranty and Service. All Work shall be unconditionally guaranteed by Subcontractor for a period of two years, or such longer period as may be required by law or for which Owner requires Contractor to warrant such Work, from the date following Owner's acceptance of the Work. Subcontractor shall correct at its own expense all defects that appear during such period, and all damage (whether to the Work or other components of the Project) arising out of, caused by or in any way related to said defects or repair, within twenty-four (24) hours after written notice or within the time agreed to in writing by Contractor (Saturdays and Sundays excluded). The determination as to what constitutes a defect will be within the sole discretion of Contractor and Owner. If Subcontractor fails to promptly commence and complete the correction of defects, Contractor or Owner may do so. In such event, Subcontractor shall promptly reimburse Contractor for the cost of such work, plus a sum of fifteen percent (15%) thereof (for supervision and overhead). Contractor may, at its option, elect to charge such amounts against the next Partial Payment (defined in **Section 8**) or the final payment. Subcontractor will maintain a published phone number or an answering service during normal working hours.

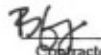
SECTION 4. Independent Subcontractor Status. Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of construction of the Work.

SECTION 5. Insurance. At all times while performing the Work, and for a period of two (2) years thereafter, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. WORKERS' COMPENSATION INSURANCE - statutory limits in the state where each property is located.
- b. EMPLOYER'S LIABILITY INSURANCE - \$1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. COMPREHENSIVE GENERAL LIABILITY - \$1,000,000 per occurrence, \$1,000,000 Products, Completed Operations, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. BUSINESS AUTO LIABILITY, including hired and non-owned auto coverage - \$500,000 Combined Single Limit.

Insurance policies shall be (a) issued by companies with a "Best's Rating" and a "Financial Size Category" acceptable to Contractor, (b) on an "occurrence" form (c) list Contractor and if requested, Owner, as additional insureds on the General Liability and Automobile Liability Policies. Such Additional Insured Status shall apply: (i) to all liability arising out of or resulting from bodily injury to or sickness, disease or death of any agent, employee or representative of Subcontractor or any of Subcontractor's subcontractors regardless of whether such claim, damage, loss or expense is caused or is alleged to be caused, in whole or in part by the negligence of any additional insured (it being the expressed intent of Contractor and Subcontractor that in such event Subcontractor is to provide coverage hereunder to insure the additional insured(s) from the consequences of their own negligence, whether it is alleged to be the sole or concurring cause of the bodily injury, sickness, disease or death of Subcontractor's agent, representative, or employee or the employees of any of Subcontractor's subcontractors); (ii) in all cases except (i), to the extent of liability resulting from Subcontractor's negligence or willful misconduct; and (iii) to omissions resulting from the additional insured's failure to supervise


Subcontractor


Contractor

Subcontractor's operations.

The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement must be deleted. To the fullest extent permitted by law, any provision on the face of any Certificate of Insurance provided by Subcontractor that states anything to the effect that the Certificate of Insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such Certificate of Insurance. Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this **Section 5** promptly after the date of this Agreement and 30 days before the expiration date of each policy or at any time upon request of Contractor. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor, including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

SECTION 6. Waiver, Release, and Indemnification. Subcontractor agrees that Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend and hold Contractor harmless against any such injuries and claims. Accordingly:

- a. **Waiver.** Subcontractor expressly waives any provision of any applicable workers' compensation act that might prevent its being joined as a defendant or enable it to avoid liability to Contractor or Owner or any other third party for damages, contribution, or indemnity where Subcontractor or any employee, agent, or subcontractor of Subcontractor, or any of their respective employees, officers, agents, or invitees, makes any claim for damages against Contractor or commences any civil action.
- b. **Release and Indemnity.**
 - (1) Subcontractor hereby agrees to release, indemnify, defend, and hold harmless Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees (each an "**Indemnitee**"), to the fullest extent permitted by law from any costs, expenses, demands, causes of action, claims, damage, liability, loss, or costs ("**Claims**") (together with attorneys' fees) arising out of, resulting from, or connected with the death of or any injury to, or any damage to the property of, Subcontractor or its employees, agents, or subcontractors or any of their respective subcontractors, employees, officers, agents, or invitees.
 - (2) For all Claims not covered by (1) above and to the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend, and hold harmless the Indemnitees for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), to the extent of liability resulting from Subcontractor's negligence or willful misconduct incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials


Subcontractor


Contractor

provided in connection with the Work; or (iii) omissions resulting from Indemnatee's failure to supervise Subcontractor's operations.

SECTION 7. Default and Damages.

a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including without limitation this Agreement.

b. **Damages.**

- (1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement, and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on an account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.
- (2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to perform under this Agreement or other Contract Documents (including without limitation the amount by which the cost


Subcontractor


Contractor

to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

- c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold Contractor harmless regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including without limitation their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

- a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("Cost of Work") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accept Subcontractor's Work and Contractor receive payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.
- b. **Partial Payments.** Partial payments ("Partial Payments") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including without limitation materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, Safety Meeting Sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("Employee Time Sheets") for the period of time since the last submission for payment, evidence of payment, waivers (including without limitation lien waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its sub-subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the Application for Payment by Contractor and receipt of payment by Contractor from Owner.
- c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "Retainage Amount") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payment.
- d. **Grounds for Withholding Payments.** Contractor may withhold any Partial Payment or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

- e. **Work Covered by Partial Payments.** All the completed Work covered by Partial Payments made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.
- f. **Final Payment.** Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:
- (1) the Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;
 - (2) Subcontractor has submitted satisfactory evidence of payments to, waivers by and releases from all claims by Subcontractor and any persons, firms or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including without limitation lien waivers) if requested by Contractor;
 - (3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, and warranties and bonds;
 - (4) Subcontractor has provided Safety Meeting Sheets and Employee Time Sheets for the period of time since the last submission for payment;
 - (5) Owner, any general contractor, any lender, any architect and Contractor have accepted the Work; and
 - (6) Contractor has received payment from Owner.
- g. **Release of Retainage.** Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.
- h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. Contractor, where appropriate, may make payments due Subcontractor directly to other parties owed by Subcontractor, unless Subcontractor provides written notification of any dispute between Subcontractor and its creditors. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.
- i. **Indemnification.** Subcontractor hereby agrees to indemnify, defend, and save Contractor and Owner harmless from and against any mechanics' and materialmen's liens upon the Project, attorneys' fees and expenses, amounts paid in settlement, and amounts paid to discharge judgments arising out of the services, labor, equipment, or materials furnished by Subcontractor or its employees, suppliers, or subcontractors. If Subcontractor fails to do so, Contractor may deduct from sums then or thereafter due to Subcontractor such amounts as Contractor deems appropriate in its sole discretion to indemnify Contractor and Owner


Subcontractor

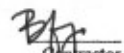
Contractor

from liens, claims, and encumbrances. Contractor may, in its sole discretion, cure any liens or satisfy any demands, and recover its costs related directly or indirectly thereto from Subcontractor. Subcontractor hereby waives, releases, and forever discharges Contractor and Owner from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that Subcontractor may have against Contractor or Owner that arise directly or indirectly from curing any such liens, claims, encumbrances, or demands.

SECTION 9. Miscellaneous.

- a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor and unless permitted by the Contract Documents. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including without limitation and the pertinent provisions of this Agreement (including without limitation Section 5 hereof) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section 9, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.
- b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.
- c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payment or final payment under this Agreement or any other agreement.
- d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.
- e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.
- f. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The prevailing party to any dispute


Subcontractor


Contractor

shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

EXECUTED to be effective as of the date first above written.

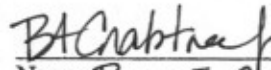
SUBCONTRACTOR:

**BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC**

By:


Name: RUSSELL BAKER
Title: CO/OWNER

By:


Name: Billy F. Crabtree Jr
Title: Charleston Market Installed Manager

20-2475834

Subcontractor Social Security No. or
Federal I.D. No.


Subcontractor


Contractor

Request for Taxpayer Identification Number and Certification

Give form to the
requester. Do not
send to the IRS.

Print or type
See Specific Instructions on page 2.

Name **PALNETTO TRIM & RENOVATIONS**

Business name, if different from above

Check appropriate box: ☐ Individual/
Sole proprietor ☐ Corporation ☒ Partnership ☐ Other ▶

☐ Exempt from backup
withholding

Address (number, street, and apt. or suite no.)

139 WILTON STREET

Requester's name and address (optional)

City, state, and ZIP code

GOOSE CREEK, SC 29445

List account number(s) here (optional)

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see **How to get a TIN** on page 3.

Note: If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Social security number

_____|_____|_____|_____|_____|_____|

or

Employer identification number

20-2475834

Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. person (including a U.S. resident alien).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. (See the instructions on page 4.)

Sign
Here

Signature of
U.S. person ▶

[Signature]

Date ▶

5/16/05

Purpose of Form

A person who is required to file an information return with the IRS, must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

U.S. person. Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
2. Certify that you are not subject to backup withholding, or
3. Claim exemption from backup withholding if you are a U.S. exempt payee.

Note: If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Foreign person. If you are a foreign person, use the appropriate Form W-8 (see Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities).

Nonresident alien who becomes a resident alien.

Generally, only a nonresident alien individual may use the terms of a tax treaty to reduce or eliminate U.S. tax on certain types of income. However, most tax treaties contain a provision known as a "saving clause." Exceptions specified in the saving clause may permit an exemption from tax to continue for certain types of income even after the recipient has otherwise become a U.S. resident alien for tax purposes.

If you are a U.S. resident alien who is relying on an exception contained in the saving clause of a tax treaty to claim an exemption from U.S. tax on certain types of income, you must attach a statement that specifies the following five items:

1. The treaty country. Generally, this must be the same treaty under which you claimed exemption from tax as a nonresident alien.
2. The treaty article addressing the income.
3. The article number (or location) in the tax treaty that contains the saving clause and its exceptions.
4. The type and amount of income that qualifies for the exemption from tax.
5. Sufficient facts to justify the exemption from tax under the terms of the treaty article.



DIRECT DEPOSIT PAYMENT FORM

Direct deposit is a program where your payment will be deposited directly into your account. The initiation of funds takes place on the payment date. Settlement of the funds into your bank account will be completed the second business day following the initiation of payment due to you. If any funds are incorrectly deposited into your bank account, you authorize Builders FirstSource to exercise all means Builders FirstSource in its sole discretion believes necessary to correct the error including but not limited to debiting your account.

Builders FirstSource requires you to sign up for this service to ensure timely posting of your money to your bank account and to eliminate the need to physically mail checks. If you currently do not have a bank account, many banks offer discounts for customers who use the direct deposit feature.

To sign up for direct deposit, please complete the form below. If you are selecting a checking account, please attach a blank "VOIDED" check for that account. To direct your money to a savings account, attach a blank savings deposit slip and include your bank's telephone number.

SELECT ONE:

☒ CHECKING ACCOUNT

☐ SAVINGS ACCOUNT

ACCOUNT NO.:	ABA/ROUTING NO.:	BANK NAME:
20000200 25704	053207766	WACHOVIA

PALMETTO TRIM AND RENOVATIONS, LLC.

139 Wilton St
Goose Creek, SC 29445
Phone. 843-514-4039
Phone. 843-514-4338

1014

67-776/532
BRANCH 67022

Date _____



Pay to the
Order of

VOID

\$

Dollars



Security
Features
Details on
Back



WACHOVIA
Wachovia Bank, N.A.
wachovia.com

For

NP

⑈001014⑈ ⑆053207766⑆ 2000020025704⑈

Print Vendor Name

REB
Authorized Signatory of Vendor

5-16-05
Date Signed

4/20/05

ACORD™ CERTIFICATE OF LIABILITY INSURANCEDATE (MM/DD/YYYY)
11/22/2004

PRODUCER Raymond Roe & Associates Inc.
PO Box 429
Mt. Pleasant, SC 29465

(843) 740-1723

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

NAIC #

INSURED PALMETTO TRIM & RENOVATIONS, LLC

139 WILTON ST.
GOOSE CREEK, SC 29445

INSURER A: American General
INSURER B: NCCI
INSURER C: PROGRESSIVE
INSURER D:
INSURER E:

COVERAGES

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. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR	ADD'L	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS								
LTR	INSRD													
A	X	GENERAL LIABILITY ☒ COMMERCIAL GENERAL LIABILITY ☐ CLAIMS MADE ☒ OCCUR ☒ Contractual Liab GEN'L AGGREGATE LIMIT APPLIES PER: ☐ POLICY ☐ PRO-JECT ☐ LOC	TEMO-CEFL3925411	3/15/2005	3/15/2006	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 50,000 MED EXP (Any one person) \$ 1,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 1,000,000 PRODUCTS - COMPIOP AGG \$ 1,000,000								
C	X	AUTOMOBILE LIABILITY ☒ ANY AUTO ☐ ALL OWNED AUTOS ☐ SCHEDULED AUTOS ☒ HIRED AUTOS ☒ NON-OWNED AUTOS ☒ Comp Ded. \$1,000	08039440 Coll. Ded. \$2,500	5/13/2005	5/13/2006	COMBINED SINGLE LIMIT (Ea accident) \$ 500,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$								
		GARAGE LIABILITY ☐ ANY AUTO				AUTO ONLY - EA ACCIDENT \$ OTHER THAN EA ACC \$ AUTO ONLY: AGG \$								
		EXCESS/UMBRELLA LIABILITY ☐ OCCUR ☐ CLAIMS MADE ☐ DEDUCTIBLE ☐ RETENTION \$				EACH OCCURRENCE \$ AGGREGATE \$ \$ \$ \$								
B		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below	14157880	3/15/2005	3/15/2006	<table border="1"> <tr> <td>WC STATU-TORY LIMITS</td> <td>OTH-ER</td> </tr> <tr> <td>E.L. EACH ACCIDENT</td> <td>\$ 100,000</td> </tr> <tr> <td>E.L. DISEASE - EA EMPLOYEE</td> <td>\$ 500,000</td> </tr> <tr> <td>E.L. DISEASE - POLICY LIMIT</td> <td>\$ 100,000</td> </tr> </table>	WC STATU-TORY LIMITS	OTH-ER	E.L. EACH ACCIDENT	\$ 100,000	E.L. DISEASE - EA EMPLOYEE	\$ 500,000	E.L. DISEASE - POLICY LIMIT	\$ 100,000
WC STATU-TORY LIMITS	OTH-ER													
E.L. EACH ACCIDENT	\$ 100,000													
E.L. DISEASE - EA EMPLOYEE	\$ 500,000													
E.L. DISEASE - POLICY LIMIT	\$ 100,000													
		OTHER												

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

Certificate holder is an additional insured on the General Liability and Automobile Liability policies, as required by written contract. Insurance coverage is primary and non-contributory to any other insurance available to the certificate holder. The Insurance evidenced on this certificate includes a waiver of subrogation in favor of the certificate holder.

CERTIFICATE HOLDER

Builders FirstSource-Southeast Group LLC
c/o Builders FirstSource Service Center
7490 New Technology Way
Frederick, MD 21703 Attn: Annette Yokopenic

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

SILCK

Bill Silck



**BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT**

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of Feb. 26, 2008, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 111 Lumber Lane, GooseCreek, SC 29445, telephone: 843-553-5252, fax: 843-797-1710, Contact: Bill Crabtree, e-mail: bill.crabtree @bldr.com (“Contractor”), and ECC CONTRACTING, address: 2305 AUDUBON DR HAMAM - SC, telephone: (843) 438 8230, fax: 225 5397, Contact: ROD ASSIS, e-mail: ECCCOMT @ YAHOO . COM (“Subcontractor”).

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the “Work”) from time to time for Contractor on any project (the “Project”). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor’s customer (the “Owner”). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the “Contract Documents”) and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor’s only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, “Work Order”) delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s) are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

Subcontractor

 Contractor

c. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of Sections 3, 4, and 5 shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section.

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

d. **Safety and Environmental.**

(1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole


Subcontractor

Contractor

cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety, health, and environmental rules and regulations established by or pursuant to Federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) **The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA").** Regulations have been promulgated by OSHA and EPA ("Regulations") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY WITH THE REGULATIONS.

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.

Subcontractor
Contractor

(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incident third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

SECTION 4. Insurance.

At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.
- b. **Employer's Liability Insurance** - \$1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. **Commercial General Liability** - \$1,000,000 per occurrence, \$1,000,000 products-completed operations aggregate, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. **Business Auto Liability**, including hired and non-owned auto coverage - \$500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's Endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and Alternate Employer's Endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

[Signature]
Subcontractor
Contractor

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION

RJ
Subcontractor
JB
Contractor

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OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDERING OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and

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Subcontractor
Contractor

its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Default and Damages.

a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. **Damages.**

(1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to perform under this Agreement or other Contract Documents (including, without limitation, the

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Subcontractor
Contractor

amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

- c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

- a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("Cost of Work") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.
- b. **Partial Payments.** Partial payments ("Partial Payments") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("Employee Time Sheets") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.
- c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "Retainage Amount") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.

d. Grounds for Withholding Payments. Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

e. Work Covered by Partial Payments. All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. Final Payment. Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

- (1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;
- (2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers) if requested by Contractor;
- (3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, warranties, and bonds;
- (4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;
- (5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and
- (6) Contractor has received payment from Owner.

g. Release of Retainage. Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. Subcontractor's Agreement to Pay. Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

I. INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 9. Miscellaneous.

a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

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Subcontractor
RS
Contractor

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

f. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

ECC CONTRACTING

By:

Name: RODRIGO ASSIS

Title: Owner

26-1548017

Subcontractor Social Security No. or Federal I.D.
No.

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC

By:

Name: Daryl Ward

Title: Associate General Counsel



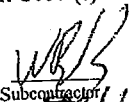
BUILDERS FIRSTSOURCE -- SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into effective as of 9/24, 2012 between Builders FirstSource -- Southeast Group, LLC, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com ("Contractor"), and WS contractors LLC address: 205 Laurel ave, Goose Creek SC 29445, telephone: (843) 480 6262, fax: _____, Contact: Wilson or Willemes, e-mail: WS contractors LLC@hotmail.com ("Subcontractor").

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "Work") from time to time for Contractor on any project (the "Project"). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor's customer (the "Owner"). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the "Contract Documents") and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, "Work Order") delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s)


Subcontractor

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are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

c. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of Sections 3, 4, and 5 shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section.

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

d. **Safety and Environmental.**

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(1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety, health, and environmental rules and regulations established by or pursuant to Federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) **The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA").** Regulations have been promulgated by OSHA and EPA ("Regulations") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

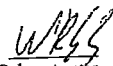
(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY WITH THE REGULATIONS.

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for


Subcontractor

Contractor

Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.

(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be

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intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

SECTION 4. Insurance.

At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.
- b. **Employer's Liability Insurance** - \$1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. **Commercial General Liability** - \$1,000,000 per occurrence, \$1,000,000 products-completed operations aggregate, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. **Business Auto Liability**, including hired and non-owned auto coverage - \$500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's Endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and Alternate Employer's Endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

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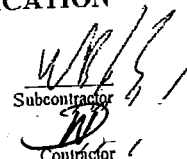
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SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION


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OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of

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construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Default and Damages.

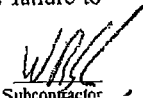
a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. **Damages.**

(1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to


Subcontractor

Contractor

perform under this Agreement or other Contract Documents (including, without limitation, the amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

- c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

- a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("Cost of Work") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

- b. **Partial Payments.** Partial payments ("Partial Payments") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("Employee Time Sheets") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.

- c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "Retainage Amount") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.

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d. **Grounds for Withholding Payments.** Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

e. **Work Covered by Partial Payments.** All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. **Final Payment.** Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

(1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;

(2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers) if requested by Contractor;

(3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, warranties, and bonds;

(4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;

(5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and

(6) Contractor has received payment from Owner.

g. **Release of Retainage.** Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

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i. **INDEMNIFICATION FOR LIENS.** TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 9. Miscellaneous.

a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its

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subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

f. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

WIS Contractors LLC

By:

William R. de Silva

Name: William R. de Silva

Title: Owner

27-1964669

Subcontractor Social Security No. or Federal I.D.
No.

BUILDERS FIRSTSOURCE –
SOUTHEAST GROUP, LLC

By:

Deryl Ward

Name: Deryl Ward

Title: Vice President

WBS
Subcontractor
W
Contractor



BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of May 14, 2012, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com (“Contractor”), and Hurley Services, LLC, address: 201 Sparkleberry Lane, Ladson, SC 29456, telephone: 843-425-5100, fax: 808-992-6563, Contact: Giovanni N. Mendes, e-mail: Hurley Services, LLC@gmail.com (“Subcontractor”).

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the “Work”) from time to time for Contractor on any project (the “Project”). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor’s customer (the “Owner”). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the “Contract Documents”) and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor’s only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, “Work Order”) delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s)

are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

c. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of Sections 3, 4, and 5 shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section.

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

d. **Safety and Environmental.**

(1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety, health, and environmental rules and regulations established by or pursuant to Federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) **The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA").** Regulations have been promulgated by OSHA and EPA ("Regulations") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) **TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY WITH THE REGULATIONS.**

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for

Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.

(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be

intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

SECTION 4. Insurance.

At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.
- b. **Employer's Liability Insurance** - \$1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. **Commercial General Liability** - \$1,000,000 per occurrence, \$1,000,000 products-completed operations aggregate, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. **Business Auto Liability**, including hired and non-owned auto coverage - \$500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's Endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and Alternate Employer's Endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION

OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of


Subcontractor

Contractor

construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Default and Damages.

a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. **Damages.**

(1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to

perform under this Agreement or other Contract Documents (including, without limitation, the amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("**Cost of Work**") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

b. **Partial Payments.** Partial payments ("**Partial Payments**") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("**Employee Time Sheets**") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien-waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.

c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "**Retainage Amount**") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.

d. Grounds for Withholding Payments. Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

e. Work Covered by Partial Payments. All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. Final Payment. Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

- (1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;
- (2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers) if requested by Contractor;
- (3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, warranties, and bonds;
- (4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;
- (5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and
- (6) Contractor has received payment from Owner.

g. Release of Retainage. Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. Subcontractor's Agreement to Pay. Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

i. **INDEMNIFICATION FOR LIENS.** TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 9. Miscellaneous.

a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its

subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

f. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

Hurley Services, LLC

By:

Giovanni N. Mendes

Name: Giovanni N. Mendes

Title: Owner

80-0803713

Subcontractor Social Security No. or Federal I.D.
No.

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC

By:

Deryl Ward

Name:

Deryl Ward

Title:

Vice President

CONTRACT NO.: SE 184-0806-SUB

CONTRACT/LEASE REVIEW FORM

Please read this carefully before completing the form below. In order to process your contract/lease in a timely manner, this form must be filled out completely. If not completely filled out, it will delay the review process of your contract/lease. Please forward this form with a legible copy of the contract/lease by overnight mail, U.S. mail, facsimile, or e-mail to:

Attn: Legal Department
2001 Bryan Street, Suite 1600
Dallas, Texas 75201
(214) 880-3500 - phone
(214) 880-3577 - fax

If immediate attention is needed, please specify reason below.

Today's Date: 8/18/06 Your Name: BILL CRABTREE

Reviewed for business/operational issues by: _____

CONTRACT/LEASE INFORMATION:

BFS is: ☐ Buyer ☐ Seller

Customer/Vendor Name: Pohlman Quality Exteriors

Date Contract/Lease Received by You: 8/18/06 Value: \$ _____

Products/Services: _____

URGENCY: ☐ Normal ☒ Immediate (please specify reason): _____

RETURN INFORMATION:

Return Contract/Lease to: BILL CRABTREE

111 LUMBER LANE GOOSE CREEK SC 29445
Street Address City State Zip Code

Phone: 843-553-5252 Fax: 843-797-1710

SPECIAL INSTRUCTIONS/COMMENTS:

For BFS Corp. Use Only.	Received by Legal: <u>BR</u> <u>8/18/06</u> Initials Date	Approved by Legal: _____ Initials Date
	Forwarded to Finance: _____ Initials Date	Approved by Finance: _____ Initials Date
	Forwarded to Purchasing: _____ Initials Date	Approved by Purchasing: _____ Initials Date

2/01/06



**BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT**

THIS MASTER SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into effective as of August 18, 2006, between Builders FirstSource – Southeast Group, LLC,

a Delaware limited liability company, address: 2001 Bryan St. Suite 1600, Dallas, TX 75201

telephone: (843) 553-5252 fax: (843) 797-1710, Contact: Bill Crabtree

e-mail: bill.crabtree @bldr.com ("Contractor"), and James P. Pohlman Pohlman Quality

address: 106 Glenwood Dr. Goose Creek, SC 29445 Exteriors

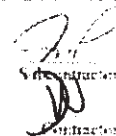
telephone: 514-5496, fax: n/a, Contact: _____

e-mail: j.pohlman@pohlmanquality.com ("Subcontractor").

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "Work") from time to time for Contractor on any project (the "Project"). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor's customer (the "Owner"). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the "Contract Documents") and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, "Work Order") delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s) are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.


Subcontractor

[Version: 5-17-06]

c. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of Sections 3, 4, and 5 shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section.

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

d. **Safety and Environmental.**

(1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole


Subcontractor

Contractor

cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety, health, and environmental rules and regulations established by or pursuant to Federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) **The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA").** Regulations have been promulgated by OSHA and EPA ("**Regulations**") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("**MSDS**") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

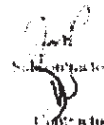
(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY WITH THE REGULATIONS.

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.


Subcontractor
Contractor

(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.


Subcontractor

Contractor

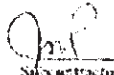
SECTION 4. Insurance.

At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.
- b. **Employer's Liability Insurance** - \$1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. **Commercial General Liability** - \$1,000,000 per occurrence, \$1,000,000 products-completed operations aggregate, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. **Business Auto Liability**, including hired and non-owned auto coverage - \$500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's Endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and Alternate Employer's Endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.


Subcontractor

Contractor

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION

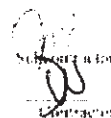
OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDERING OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and


Subcontractor
Contractor

its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Default and Damages.

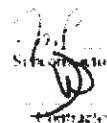
a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. **Damages.**

(1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to perform under this Agreement or other Contract Documents (including, without limitation, the


Subcontractor
Contractor

amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("**Cost of Work**") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

b. **Partial Payments.** Partial payments ("**Partial Payments**") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("**Employee Time Sheets**") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.

c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "**Retainage Amount**") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.


Contractor

d. Grounds for Withholding Payments. Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

e. Work Covered by Partial Payments. All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. Final Payment. Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

- (1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;
- (2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers) if requested by Contractor;
- (3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guarantees, warranties, and bonds;
- (4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;
- (5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and
- (6) Contractor has received payment from Owner.

g. Release of Retainage. Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. Subcontractor's Agreement to Pay. Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

i. **INDEMNIFICATION FOR LIENS.** TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 9. Miscellaneous.

a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

f. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP LLC

By:

Polina Quantity Extenders

Name: Teresa Polina

Title: President

SS 2445962

Subcontractor Social Security No. or Federal I.D.
No.

By:

Deryl Ward

Name: Deryl Ward

Title: Senior Attorney

**HOWELL, GIBSON AND HUGHES, P.A.
ATTORNEYS AT LAW**

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NATHAN E. AKERS
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* Certified Mediator

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twalker@hghpa.com

November 5, 2020

VIA EMAIL ONLY

The Honorable Jennifer McCoy
100 Broad Street, Suite 348
Charleston, South Carolina 29401

Re: The Retreat at Charleston National Country Club Home Owners
Association, Inc., et al vs. Winston Carlyle Charleston National, LLC,
Builders FirstSource-Southeast Group, LLC, etc.
Liberty Mutual Claim No.: P 949-313416-01
Zurich Claim No.: 9260154704
:
Civil Action No.: 2016-CP-10-03783
Our File No: 11981 SPH

Dear Judge McCoy:

Please find enclosed an additional exhibit to be included with Builders
FirstSource-Southeast Group, LLC's memorandum in opposition to Hurley
Services, LLC's amended motion for summary judgment.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON & HUGHES, P.A.

s/ Stephen P. Hughes

Stephen P. Hughes

SPH/sph

Deposition of Gary Freeman

55 (418 - 421)

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1 this Individual Unit directory.
 2 MR. LADY: If I can get them --
 3 THE WITNESS: Okay. I'll do that,
 4 because I don't want to have to come back and do
 5 it later.
 6 MR. IAN FREEMAN: Off the record.
 7 (Discussion off the record.)
 8 Q. (MR. ETHRIDGE) Let's go back to, then,
 9 Exhibit --
 10 A. 189.
 11 Q. 189. All right.
 12 Looking through that as a group, do you
 13 believe that any of the conditions or any of the
 14 damages in those photographs are the result of
 15 any code violation, violation of any regulation
 16 industry standard or manufacturer's
 17 recommendation?
 18 A. Yes. All of them.
 19 Q. All of them are.
 20 A. Yes. The fact that you've got water
 21 intrusion, that's a code violation right there.
 22 And I found in all of my testing
 23 improper installation, either through fastener
 24 spacing or leaks in the windows themselves, which
 25 leads to water intrusion.

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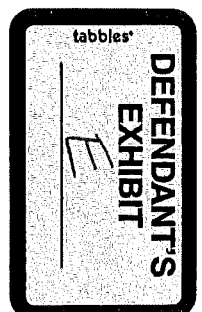
1 and there could be failure to construct it in
 2 compliance with a regulation of some sort.
 3 A. Right.
 4 Q. Same thing with regard to manufacturer's
 5 recommendations -- recommend -- recommendations
 6 in terms of installation. You could have a
 7 design that calls for the building -- or for
 8 components of the building to be installed in
 9 conformity with the manufacturer's
 10 recommendations, and you could have a contractor
 11 fail to install it per the manufacturer's
 12 recommendations, correct?
 13 A. Yes.
 14 Q. Okay. And so my question as to all of
 15 these conditions and photos you have related to
 16 the windows, are all of those conditions that
 17 are, at least in part, attributable to the
 18 contractor failing to comply with either the
 19 building code regulation or manufacturer's
 20 recommendations?
 21 MR. HUGHES: Object to form.
 22 MR. IAN FREEMAN: Same.
 23 A. Maybe. What I would -- let me say this:
 24 Number one, there was -- in the window
 25 specification, there was no window specified; in

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1 Q. Okay. So all of the conditions that
 2 are depicted in -- all of the damage -- all of
 3 the damage and all of the conditions depicted in
 4 Exhibit 189 are the result of, at least in part,
 5 a violation of either the code or some standard
 6 or regulation as it relates to construction; is
 7 that correct?
 8 A. Well, yes, because things -- you
 9 shouldn't have this with proper construction and
 10 design.
 11 Q. Okay.
 12 A. Okay. We're getting into some thin ice
 13 here in terms of trying to draw lines, but I'm
 14 going to follow you if I can.
 15 Q. Well, you would agree you can have
 16 something that -- a design that is proper and
 17 that calls for the construction to comply with
 18 code, and you can have installation that does not
 19 comply with code.
 20 A. That's true.
 21 Q. All right. And same thing with regard
 22 to regulations. You could have a -- there could
 23 be some regulations related to the construction
 24 or installation that control that, and that --
 25 and the design calls for compliance with that,

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1 other words, it was just a very loose description
 2 of have a window, and it listed some various
 3 testing that the windows should comply to.
 4 In the drawings, there were two or three
 5 details that were not even complete in terms
 6 of with regard to addressing flashing and the
 7 lapping of various products.
 8 Of a project this size, I would have
 9 expected to see even three-dimensional details of
 10 the window, because it's so critical in something
 11 like this to show how it should be installed, how
 12 the whole opening should be created. And the
 13 drawings or the design does not address that.
 14 There is no window selected, so you
 15 don't know what window is going to be put in.
 16 And the -- again, the details are very vague in
 17 addressing that.
 18 Q. And we're going to talk about that in a bit
 19 because that's where I was going next.
 20 But let me just ask you this: Would you
 21 generally agree that the perfect product
 22 installed improperly will usually not perform
 23 adequately? You could have a perfect design, and
 24 if it's installed or constructed improperly, it
 25 might fail in its performance.



THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

2021-001050

The Retreat at Charleston National Country Club Home Owners Association, Inc.,
and The Retreat at Charleston National Country Club Horizontal Property
Regime..... Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.;
Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders
FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building
Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino
Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley
Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC
Construction, Inc.; L&G Construction Group, LLC; Liollo Architecture; JC
Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira
Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle
Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher
Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos,
individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin,
individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin,
individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a
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Caris; and Mario Salgado..... Defendants,

Builders FirstSource-Southeast Group, LLC..... Third-Party Plaintiff, Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and
Renovation; Edward Bruce Witham; and East Coast
Carpentry..... Third-Party Defendants,

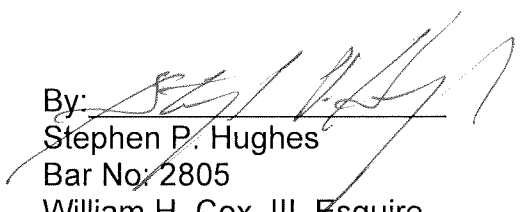
Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting,
LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman

Quality Exteriors, Inc.; and L&G Construction Group, LLC are
the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal contains all material
proposed to be included of any of the parties, and no other material.

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October 24, 2022

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SC Court of Appeals

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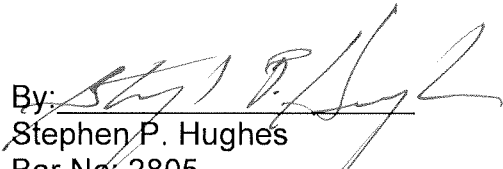
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Record on Appeal has been reviewed
and redacted (where necessary) and complies with the Supreme Court's Order of
August 13, 2007.

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