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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge  
Civil Action No. 2016-CP-10-03783

Appellate Case No. 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.; CollenBatissa; 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; 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.

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**SUPPLEMENTAL RECORD ON APPEAL**

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Stephen P. Hughes (Bar # 002805)  
William H. Cox, III (Bar # 101991)  
Howell, Gibson & Hughes, P.A.  
Post Office Box 40  
Beaufort, SC 29901-0040  
(843) 522-2400  
*Attorneys for Appellant  
Builders FirstSource - Southeast Group, LLC*

Payton D. Hoover (Bar # No: 75967)  
Richardson Plowden & Robinson, PA  
235 Magrath Darby Blvd, Suite 100  
Mt. Pleasant, SC 29464  
(843) 805-6550  
*Attorney for Respondent Palmetto Trim and  
Renovations*

James H. Elliott, Jr (Bar # 13620 )  
F. Heyward Grimball (Bar # 101743)  
Richardson Plowden & Robinson, PA  
235 Magrath Darby Blvd, Suite 100 Mt.  
Pleasant, SC 29464  
(843) 805-6550  
*Attorneys for Respondent East Coast Carpentry*

Thomas F. Dougall (Bar # 1729)  
Michal Kalwajtys (Bar # 100950)  
Dougall & Collins  
1700 Woodcreek Farms Road  
Elgin, SC 29045  
(803) 865-8858  
*Attorneys for Respondent L&G Construction  
Group, LLC*

Kevin W. Mims (Bar # 69418)  
W. Chase McNair (Bar # 100695)  
J. Barnwell Fishburne, Jr. (Bar #102026)  
Luzuriaga Mims, LLP  
50 Immigration Street, Suite 200  
Charleston, SC 29403  
*Attorneys for Respondent AC Construction, Inc.*

James H. Elliott, Jr (Bar # 13620)  
F. Heyward Grimball (Bar # 101743)  
Richardson Plowden & Robinson, PA  
235 Magrath Darby Blvd, Suite 100  
Mt. Pleasant, SC 29464  
(843) 805-6550  
AND  
L. Dean Best (Bar # 11952)  
M. Shanter Chaparro (Bar # 102419)  
Best Law, PA  
PO Box 2374  
Mt. Pleasant, SC 29465  
(843) 793-4744  
*Attorneys for Respondent ECC Contracting,  
LLC*

E. Glenn Elliott (Bar # 7838)  
Aiken Bridges Elliott Tyler & Saleeby  
PO Box 1931  
Florence, SC 29503  
(843) 669-8787  
*Attorneys for Respondent Pohlman Quality  
Exteriors, Inc.*

Finley B. Clarke (Bar # 1252)  
Clarke Johnson Peterson & McLean, PA  
PO Box 1865  
Florence, SC 29503  
(843) 669-2401  
*Attorney for Respondent Hurley Services, LLC*

John P. Linton (Bar # 79130)  
Jennifer S. Ivey (Bar # 102533)  
Walker Gressette & Linton, LLC  
PO Box 22167  
Charleston, SC 29413  
(843) 727-2200  
*Attorneys for Respondent WS Contractors, LLC*

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| STATE OF SOUTH CAROLINA )<br>)<br>)<br>COUNTY OF CHARLESTON )<br>)<br>)<br>The Retreat at Charleston National County Club )<br>Home Owners Association, Inc., etal )<br>)<br>Plaintiffs, )<br>)<br>vs. )<br>)<br>)<br>Winston Carlyle Charleston National, etal )<br>)<br>Defendants. ) | IN THE COURT OF COMMON PLEAS<br>FOR THE NINTH JUDICIAL CIRCUIT<br><br>CASE NO.: 2016-CP-10-03783<br><br><b>MOTION AND ORDER INFORMATION</b><br><br><b>FORM AND COVERSHEET</b> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                 |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Plaintiff's Attorney: James Lady, Esq.,<br>Bar No. _____<br>Address: Mullen Wylie, LLC<br>171 Church St Ste 370<br>Charleston, SC 29401-3200<br>Phone: (843) 853-6200 Fax (843) 853-8994<br>E-mail: jlady@mullenwylie.com Other: _____ | Defendant's Attorney: Michael L. Leech<br>Bar No. 100516<br>Address: CLAWSON and STAUBES, LLC<br>126 Seven Farms Drive, Suite 200<br>Charleston, South Carolina 29492-8144<br>Phone: (843) 577-2026 Fax: (843) 722-2867<br>E-mail: mleech@clawsonandstaubes.com |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

- ☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**  
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**  
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: Summary Judgment  
 Estimated Time Needed: 15 minutes Court Reporter Needed: ☐ YES / ☐ NO

**SECTION II: Motion/Order Type**

- ☐ Written motion attached  
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant \_\_\_\_\_ Date submitted \_\_\_\_\_

**SECTION III: Motion Fee**

- ☐ PAID – AMOUNT: \$ \_\_\_\_\_  
☐ EXEMPT: (check reason)
 

|                                                                                                                                                           |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support                                                                                   |
| <input type="checkbox"/> Domestic Abuse or Abuse and Neglect                                                                                              |
| <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party                                                          |
| <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief                                                    |
| <input type="checkbox"/> Motion for Stay in Bankruptcy                                                                                                    |
| <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)                                            |
| <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions |
| Name of Court Reporter: _____                                                                                                                             |
| <input type="checkbox"/> Other: _____                                                                                                                     |

**JUDGE'S SECTION**

- ☐ Motion Fee to be paid upon filing of the attached order.  
☐ Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

- Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_  
☐ MOTION FEE COLLECTED: \$ \_\_\_\_\_  
☐ CONTESTED – AMOUNT DUE: \$ \_\_\_\_\_

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Retreat at Charleston National County  
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; Pohlman  
Quality Contractors; Pohlman Quality  
Exteriors, Inc., Liollio Architecture, JC  
Contractors, LLC, Soto & Vazquez  
Construction, LLC, Costa de Oliveira  
Construccion, LLC a/k/a Costa de Oliveira  
Construction, LLC and Solesmar Jesus de  
Oliveira,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-03783

**NOTICE OF MOTION AND MOTION  
FOR SUMMARY JUDGMENT ON  
DEFENDANT BUILDERS  
FIRSTSOURCE – SOUTHEAST  
GROUP, LLC'S CROSSCLAIMS**

2019 SEP 13 AM 10:59  
JULE J. ARNSTADT  
CLERK OF COURT

TO: All Counsel of Record

YOU WILL PLEASE TAKE NOTICE that the McDaniel Construction, Co., LLC, (hereinafter "McDaniel") through its undersigned attorney and in accordance with Rule 56 of the South Carolina Rules of Civil Procedure, hereby moves this Court for a summary judgment on all crossclaims asserted against McDaniel by the Defendant

Builders FirstSource – Southeast Group, LLC (hereinafter “BFS”), in its Answer to Plaintiffs’ Fourth Amended Complaint.

This Motion is based upon the pleadings filed in this action, the evidence produced by the parties and the deposition testimonies of fact witnesses and Plaintiffs’ own expert. The above evidence establishes beyond dispute that:

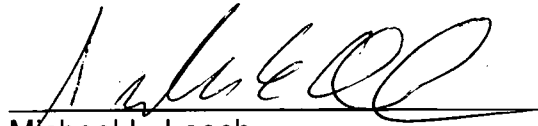
1. None of the damages alleged and documented by Plaintiffs’ expert are in any way related to McDaniel/s scope of work on the project at issue in this action;
2. Plaintiffs lack evidence of McDaniel’s negligence in performing the scope of work that could have cause any of the damages alleged by the Plaintiffs;
3. BFS’s crossclaims against McDaniel are not independent causes of action and are wholly contingent on the outcome of Plaintiffs’ case against BFS and McDaniel; and
4. Because Plaintiffs cannot prove their case against McDaniel, BFS’s crossclaims must fail as a matter of law.

The above will be expanded upon in a memorandum of law to be submitted prior to the hearing on this matter.

**WHEREFORE**, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, McDaniel asks this Court to grant a summary judgment dismissing with prejudice all claims asserted by the Plaintiffs in this action.

[Signature on the following page]

CLAWSON and STAUBES, LLC

A handwritten signature in black ink, appearing to read 'M. Leech', written over a horizontal line.

Michael L. Leech

Bar No.: 100516

Tyler E. Cloud

Bar No.: 103155

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Email: mleech@clawsonandstaubes.com

Email: tcloud@clawsonandstaubes.com

Attorney for McDaniel Construction, Co., LLC

Charleston, South Carolina

September 6, 2019

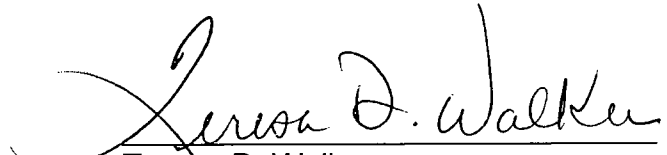
## CERTIFICATE OF SERVICE

**2016-CP-10-03783**

The undersigned hereby certifies that a true copy of the foregoing Notice of Motion and Motion for Summary Judgment on Defendant Builders FirstSource – Southeast Group, LLC's Crossclaims was served upon all parties of record on this the 11 day of September, 2019, via:

|                                     |                              |
|-------------------------------------|------------------------------|
| <input checked="" type="checkbox"/> | United States Postal Service |
| <input type="checkbox"/>            | Facsimile                    |
| <input checked="" type="checkbox"/> | Electronic Email             |
| <input type="checkbox"/>            | Via Hand Delivery            |

2019 SEP 13 AM 10:59  
JULIE J. ARISTIDE  
CLERK OF COURT

  
Teresa D. Walker



Michael L. Leech  
Licensed in SC  
mleech@clawsonandstaubes.com

September 6, 2019

File No.: 20172215.000

The Honorable Julie J. Armstrong  
Charleston County Clerk of Court  
100 Broad St Ste 106  
Charleston, SC 29401-2210

Re: McDaniel Construction Co., LLC adv The Retreat at Charleston National Country  
Club HOA, Inc. et al  
Case No.: 2016-CP-10-03783

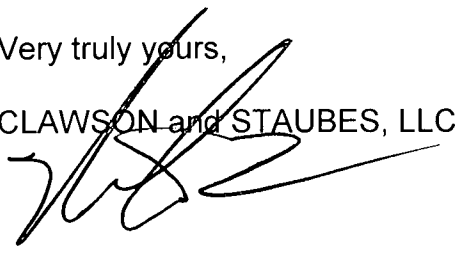
Dear Ms. Armstrong:

Enclosed please find the original and one (1) copy of Defendant McDaniel Construction's Motion for Summary Judgment on Defendant Builders FirstSource - Southeast Group, LLC's Crossclaims to be filed in the above-referenced case. Please file the original and return a filed-stamped copy of the Motion in the self-addressed, stamped envelope provided for your convenience. Also enclosed is our check in the amount of Twenty-five (\$25.00) Dollars representing the administrative fee for this request as well as the docketing form required by your office.

By copy of this letter, I am serving a copy of Defendant McDaniel Construction's Motion for Summary Judgment on Defendant Builders FirstSource - Southeast Group, LLC's Crossclaims upon counsel of record, along with a Certificate of Service.

Very truly yours,

CLAWSON and STAUBES, LLC



Michael L. Leech

MLL/tdw

Enclosure

cc: All Counsel of Record (*via email*)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

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Winston Carlyle Charleston National, LLC;  
Colin R. Campbell Construction, Inc.; Colin  
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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; Pohlman  
Quality Contractors; Pohlman Quality  
Exteriors, Inc., Liollo Architecture, JC  
Contractors, LLC, Soto & Vazquez  
Construction, LLC, Costa de Oliveira  
Construccion, LLC a/k/a Costa de Oliveira  
Construction, LLC and Solesmar Jesus de  
Oliveira,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-03783

**DEFENDANT MCDANIEL  
CONSTRUCTION CO., LLC'S  
SUPPLEMENTAL MEMORANDUM IN  
SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT AS TO  
DEFENDANT BUILDERS  
FIRSTSOURCE'S CROSS-CLAIMS**

Defendant McDaniel Construction Co., LLC ("McDaniel") submits this Supplemental Memorandum in Support of its Motion for Summary Judgment against Defendant Builders FirstSource's ("BFS") cross-claims asserted in its Answer to Plaintiffs' Complaint. McDaniel is entitled to summary judgment as a matter of law because there is no genuine issue of material fact regarding McDaniel's liability for work perform at The

Retreat at Charleston National Country Club (the “Project”). Additionally, BFS’ claims are barred by the doctrine of collateral estoppel and the contractual language for indemnity upon which BFS relies is neither clear nor unequivocal and is in violation for S.C. Code § 32-2-10. Therefore, McDaniel is entitled to Summary Judgment as a matter of law. The undersigned has previously presented this Court with a memorandum and intends for this document to supplement that with additional information and provide the Court with an update on changes since that filing.<sup>1</sup>

### **SUPPLEMENTAL FACTS**

The Court will recall that the project in question consists of numerous buildings and McDaniel only performed work on a single building, Building 27. McDaniel’s scope of work was limited to framing, and for the purposes of this argument and assuming facts in the most favorable light for BFS, we will also assume that McDaniel also installed the house wrap.

On January 6, 2020, this Court heard McDaniel’s Motion for Summary Judgment as to Plaintiffs’ claims. See Ex. 1, Trans. of Record, Jan. 6, 2020. At that hearing, counsel for Plaintiffs conceded their expert had not inspected Building 27. Id. at 30:8-11. This Court noted, “[McDaniel] performed some work; they were hired to do it; they did a good job; there's no deficiencies; they shouldn't be in this thing.” Id. at 31:21-24. And, “I don't think that your boys need to be in this if, in fact, they actually did a good job.” Id. at 34:4-5. The Court learned that Plaintiffs intended to perform an additional inspection with

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<sup>1</sup> The Court will note that portions of this memorandum are identical or nearly identical to those filed in other cases discussing the same issues. The undersigned has been granted permission to use those memoranda by the attorneys in an effort to not “recreate the wheel.”

their experts and permitted them additional time to bring up any issues with Building 27. If none were found, the Court instructed that counsel to, “come back and I’m letting your guys out.” Id. at 35:10-11.

Concurrently, this Court heard argument from various other parties on Motions for Summary Judgment. Arguing on behalf of L&G Construction on a Motion for Summary Judgment as to the BFS cross-claims, Mr. Michal Kalwajtys argued the claims are contingent on the Motion for Summary Judgment as to Plaintiffs claims. (“[W]hether or not my motion for summary judgment against BFS survives depends on your decision regarding the motion against the plaintiff.” Id. at 60:7-10). In response, BFS agreed, “depending upon the Court’s ruling with regard to the L&G motion on the plaintiff’s claims, I think that would be dispositive and I would have no further argument.” Id. at 60:20-23.

The inspection went forward and no issues were identified as to McDaniel’s work. To his ultimate credit, counsel for Plaintiffs concedes there are no issues with McDaniel’s work and agreed to dismiss McDaniel. To that end, Plaintiffs’ have consented to the filing of the attached stipulation. See Ex. 2. In spite of this stipulation, which specifically identifies McDaniel’s scope in broad terms and concedes there are no defects, BFS refuses to dismiss its now baseless cross-claims. Thus, McDaniel is forced to continue to expend money and defend this suit.

### **SUPPLEMENTAL ARGUMENT**

McDaniel incorporates its previously filed memorandum and provides the following additional information for the Court. Please see **Sections I-III** filed previously.

#### **IV. MCDANIEL’S LIABILITY IS NOT IN QUESTION**

There is no question of fact, based on the stipulations by Plaintiffs and based on the prior discussion by this Court, that McDaniel's liability is not in question. McDaniel's work is as a matter of law, and by way of stipulation, NOT defective. Thus, McDaniel should be dismissed wholly from the suit for any cross-claims.

#### **V. BFS' CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL**

BFS' claims on identical issues have already been ruled upon in Builders First Source v. MI Window & Door, et al., 2018-CP-08-02547 ("MI Window") by Judge Clifton Newman and are currently pending before Judge Roger Young in Six Fifty Six Owners Association, Inc., et al. v. Winsor South, LLC; et al., 2016-CP-10-03455 ("Six Fifty Six").

Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was "actually litigated and determined by a valid and final judgment" in a prior suit. Zurcher v. Bilton, 379 S.C. 132, 135 (2008). Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same. Id. It applies only if "the precluded party has had a full and fair opportunity to litigate the issue in the first action." Id.

In both MI Window and Six Fifty Six, BFS contends it is entitled to indemnity from various parties under the identical contractual provisions, which will be discussed more fully below. See Ex. 3, Amended Order Granting Charleston Exteriors, LLC's and ECC Contracting, LLC's Motion For Summary Judgment, 2018-CP-08-02547. In MI Window, BFS had the opportunity to be heard, and Summary Judgement was granted against it. Thus, BFS should be barred from re-litigating the same issue repeatedly on the exact same contract.

What is distinguishable from the above-referenced cases and is perhaps more compelling in this case is that both of those cases involve BFS seeking reimbursement for funds after both groups have settled and paid money to the underlying Plaintiffs. In this case, McDaniel has not paid money, nor should it, because everyone agrees its work is not defective. Therefore, the cross-claims against McDaniel should be dismissed.

**VI. BFS' CLAIMS FOR CONTRACTUAL INDEMNITY ARE BASED ON CONTRACTUAL PROVISIONS THAT ARE NEITHER CLEAR NOR UNEQUIVOCAL AND VIOLATE S.C. CODE ANN. § 32-2-10 THUS THEY FAIL AS A MATTER OF LAW.**

**a. LAW**

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee's concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 172 (S.C. App. 2018), reh'g denied (Oct. 18, 2018) (affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity cross-claims of contractor based on application of the clear and unequivocal standard). Section 32-2-10 provides: "Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately **caused by or resulting from the sole**

**negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable.”** S.C. Code Ann. § 32-2-10 (Emphasis added).

#### **b. Discussion**

According to BFS, McDaniel executed the “Master Subcontractor Agreement” dated June 11, 2007 (hereafter “Master Agreement”). See Ex. 4. McDaniel does not concede that this agreement is valid or that it applies to this project, but for the purposes of this discussion and viewing the facts most favorably to BFS, we will assume it is applicable. The Master Agreement at issue here is a BFS contract form bearing “Version – 5/17/06.” This version of the master agreement is the same as that which was analyzed by Judge Newman and is currently under review by Judge Young. BFS seeks to recover from McDaniel under the terms of the Master Agreement. As such, the Master Agreement is at issue in this matter.

Section 5 of the Master Agreement contains multiple indemnity clauses. The first such indemnity provision states:

**TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFENDANT 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 FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS 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 SUBCONTRACTORS, 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.

See Ex. 4, emphasis added in bold.

In one instance, BFS seeks to have its subcontractors indemnify it only to the extent caused "IN WHOLE OR-IN PART" by the subcontractor but later seeks indemnity "REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF [BFS]." Reading the contract as a whole, this is confusing, misleading, and violates the anti-indemnity statute. In essence, BFS is attempting to turn its subcontractors into insurers, which is the precise fear of the Court in Concord & Cumberland and the basis for the legislature's enactment of the anti-indemnity statute, S.C. Code § 32-2-10. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647 (Ct. App. 2018).

Further, the "defend and hold harmless" section upon which BFS will rely to seek attorneys fees clearly violates S.C. Code § 32-2-10 in that it seeks to be held harmless "REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF [BFS]." South Carolina courts have held that a hold harmless provision is a form of indemnity.

Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56 (Ct. App. 1990) (“A second example of contractual indemnity is a ‘hold harmless’ clause in a subcontract.”). Thus, BFS should never be permitted to recover its attorneys fees because this section violates the anti-indemnity statute on its face.

BFS will contend that there is “saving” language within these provisions that allow these provisions to be re-written or removed by the court. This is not permissible under South Carolina law. See Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 588 (2010) (recognizing that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy). Therefore, the indemnity provisions should be struck as a whole and McDaniel should be granted Summary Judgment on the BFS cross-claims.

Finally, in this instance, BFS could NEVER be liable for the negligence of McDaniel because everyone agrees McDaniel’s work is NOT defective. Thus, McDaniel owes nothing to BFS. BFS should have been dismissed months ago.

### **Conclusion**

The Court should grant McDaniel’s Motion for Summary Judgment because there are clear, plain, and undisputable facts that show McDaniel is not responsible for any of the construction defects at the Retreat. McDaniel worked on the only building at the Project that contains no defects and has caused no damages to the Plaintiff or BFS. Accordingly, the Court should grant McDaniel’s Motion for Summary Judgment.

CLAWSON and STAUBES, LLC

s/ Michael L. Leech

Michael L. Leech

Bar No.: 100516

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Attorney for McDaniel Construction Co., LLC.

Charleston, South Carolina

April 21, 2020

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;  
Liollio 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  
Contruccion, 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

**BUILDERS FIRSTSOURCE-  
SOUTHEAST GROUP, LLC'S  
MEMORANDUM IN OPPOSITION TO  
MCDANIEL CONSTRUCTION CO.'S  
MOTION FOR SUMMARY JUDGMENT**

|                                       |   |
|---------------------------------------|---|
| 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.                           | ) |
| <hr/>                                 | ) |
| 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.               | ) |
|                                       | ) |
| <hr/>                                 | ) |

This Memorandum is submitted in opposition to the motion of McDaniel Construction Co. (hereinafter "McDaniel") by which McDaniel has sought summary judgment as to the crossclaims asserted by Builders FirstSource-Southeast Group, LLC (hereinafter "BFS"). Based upon those considerations set forth hereinafter, it is respectfully submitted that the McDaniel motion should be denied.

### **FACTUAL ALLEGATIONS**

The captioned action is one by which the plaintiffs, The Retreat at Charleston National Country Club Home Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime, have sought recovery of damages allegedly occasioned by deficiencies in original construction of the subject project, a multi-family development, located in Mount Pleasant, South Carolina.

The plaintiffs' claims, as asserted against BFS and its subcontractor, McDaniel, are premised upon alleged deficiencies in installation of house wrap and framing during original construction. McDaniel installed house wrap and framing for BFS at Building 27. McDaniel installed the materials for BFS pursuant to a Master Subcontractor Agreement executed between the parties on June 11, 2007. (The BFS-McDaniel Master Subcontract Agreement is attached hereto as Exhibit A). The Master Subcontractor Agreement includes specific provisions by which McDaniel undertook to defend and indemnify BFS against liability, loss, or damage arising out of the negligent acts or omissions of McDaniel in the performance of its work.

The plaintiffs have alleged that the weather resistive barrier and framing were improperly installed, resulting in water infiltration and associated damages. In support of those contentions, the plaintiffs have offered testimony of their primary forensic expert, professional engineer Gary Freeman. Mr. Freeman, premised upon alleged findings during visual and destructive investigation, claimed, within his relevant reports, and upon deposition testimony, to have identified deficiencies in the installation of the weather resistive barrier and framing resulting in damages and necessary repairs.

### **BFS ARGUMENT IN OPPOSITION**

- 1. The evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to BFS, present genuine issues of material fact, which preclude summary judgment in favor of McDaniel.**

Summary judgment is proper if "...there is no genuine issue as to any material fact", and the moving party is "entitled to judgment as a matter of law." Rule 56(c) SCRCP. To determine whether summary judgment is appropriate, the court must view "the evidence and all inferences which can be reasonably drawn from the evidence in

the light most favorable to the non-moving party”. *Hancock v. Mid Management Company*, 381 S.C. 326, 329, 673 S.E. 2<sup>nd</sup> 801, 802 (2009). To survive a motion for summary judgment, the non-moving party need only show a mere scintilla of evidence. *Id.* (holding that “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand the motion for summary judgment”).

As demonstrated hereinafter, the testimony, offered on behalf of the plaintiffs by their retained expert, Gary D. Freeman, PE, is sufficient to establish a genuine issue of material fact, precluding summary judgment in favor of McDaniel.

McDaniel installed the building wrap and framing at Building 27, pursuant to obligations undertaken by McDaniel under the Master Subcontractor Agreement executed with BFS.

Plaintiffs’ expert Freeman testified that he identified deficiencies in the installation of the building wrap and associated flashings at every building he investigated. Specifically, Mr. Freeman determined that in all instances where Tyvek had been installed, it was reverse lapped with any intersecting flashings. See Exhibit B deposition transcript of Gary Freeman, May 8, 2019, at page 208 line 25 through page 209 line 7 and page 210 lines 15-19.

Mr. Freeman testified that with regard to knee wall construction, he observed a lack of house wrap in violation of the code. See Exhibit C deposition transcript of Gary Freeman, November 9, 2018, at page 115 lines 1-4. Mr. Freeman also observed reverse lapped house wrap and in many instances wood completely void of any kind of barrier protection. See Exhibit C page 115 lines 10-16. Mr. Freeman found that the

weather-resistive barrier was cut at the corner creating a weakness in the wall system and not pursuant to the manufacturers' instructions of wrapping the corner with 2 to 3 feet of material. See Exhibit C page 122 lines 8-25.

Plaintiffs allege that the weather resistive barrier is improperly installed and that they have sustained damages resulting from the improper installation of the weather resistive barrier. Plaintiffs have imputed fault associated with the improper weather resistive barrier installation, implemented by McDaniel, to BFS. Thus, the evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to BFS, clearly suggest negligent acts or omissions by McDaniel in its installation of the weather resistive barrier causing the water intrusion and resulting damages at the subject project. At the very least, the testimony of Mr. Freeman establishes a scintilla of evidence adequate to preclude summary judgment in favor of McDaniel.

**2. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group*, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015) is valid law.**

BFS acknowledges that *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group*, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015) is valid law and therefore concedes that its cross-claims for breach of express and implied warranties, breach of contract, and negligence are subject to dismissal. However, pursuant *Stoneledge v. BFS*, and for the reasons articulated hereinafter, the BFS cross-claims for contractual and common law indemnity are not subject to dismissal and the Court must deny summary judgment in favor of McDaniel on these claims.

### **3. *McDaniel's liability is still in question.***

McDaniel argues that because Plaintiffs have filed a stipulation of dismissal, dismissing their claims against McDaniel, that McDaniel's work as a matter of law is not defective. This is simply not correct. While Plaintiffs stipulated that their claims against McDaniel are dismissed, Plaintiffs are free to pursue claims against BFS regarding McDaniel's defective work. In fact, the stipulation expressly states that "all other claims remain active." See Exhibit D Plaintiffs' Stipulation of Dismissal of McDaniel. The Plaintiffs further stipulated that there are no defects *at this time* in the work performed by McDaniel. Thus, Plaintiffs have not stipulated that there are no defects in McDaniel's work. Therefore, BFS still faces liability for damages caused by the acts or omissions of McDaniel.

The stipulation was filed by the Plaintiffs on April 17, 2020. Since the filing of the stipulation, which only notes there are no defects in the work of McDaniel as of the date of the filing, the Plaintiffs have performed multiple rounds of destructive testing at the project to collect additional evidence to support their claims of improper installation of framing by BFS and its subcontractors. There is no Court Order that prevents Plaintiffs from taking such actions and as such, BFS will continue to incur defense costs and expenses defending against the claims arising out of or relating to the acts or omissions of its framing subcontractors, including McDaniel Construction.

Because Plaintiffs have not released their claims relating to alleged improper framing installation implemented by McDaniel or stipulated that there are no defects in the work performed by McDaniel, summary judgment is not proper at this time. The evidence and all inferences which can be reasonably drawn therefrom, viewed in the

light most favorable to BFS, clearly suggest negligent acts or omissions by McDaniel in its installations of the weather resistive barrier and framing causing the water intrusion and associated damages at the subject project. At the very least, reports and the testimony of Mr. Freeman establish more than a scintilla of evidence adequate to preclude summary judgment in favor of McDaniel.

Even if McDaniel secured an issue release or Plaintiffs' stipulated that there are no defects in McDaniel's scope, BFS still has a viable claim for contractual indemnity that obligates McDaniel to pay the defense costs incurred by BFS in defending against Plaintiffs' claims regarding McDaniel's alleged improper scope of work. Until such a release or stipulation is executed, BFS will continue to incur defense costs arising out of or relating to the acts or omissions of McDaniel's scope of work.

#### **4. The BFS cross-claims are not barred by the doctrine of collateral estoppel.**

McDaniel argues that the BFS cross-claims on identical issues have already been ruled upon in *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al.* as Civil Action No. 2018-CP-08-2547 and therefore collateral estoppel operates to bar BFS from re-litigating the same issues. **McDaniel's argument is without merit, and is based upon a misconstruction of the referenced orders.**

In *BFS v. MI*, the Honorable Clifton Newman filed an Order dated February 3, 2020 granting BFS' subcontractors' motions for summary judgment on BFS' claims for negligence, breach of contract, breach of warranties, and contractual indemnity. See Exhibit E Judge Newman's *BFS v. MI* Order. Judge Newman's Order denied the subcontractors' motions for summary judgment on BFS' claim for equitable indemnity.

Judge Newman's Order simultaneously granted BFS' motion to consolidate, and further ruled that the case would be stayed until the related D'Amico litigation was remanded from appeal.

In Section B of his Order, Judge Newman granted summary judgment in favor of the subcontractors on the BFS claims for negligence, breach of contract, and breach of warranties, respectively, pursuant to the holding in *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015) that such claims were merely disguised claims for equitable indemnity.

In Section C of his order, Judge Newman granted summary judgment in favor of the subcontractors on what the Court determined was the BFS claim for contractual indemnity for BFS' own negligence. Judge Newman, in granting summary judgment against BFS, relied upon the holding in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 819 S.E. 2d 166, 170-171 (S.C. Ct. App. 2018), wherein the Court of Appeals required that, in order to relieve an indemnitee from the consequences of its own negligence, the relevant contract provision must express such intention in clear and unequivocal terms. Judge Newman found that South Carolina precedent requires that the party seeking to be indemnified for its own negligence bears the burden of proving that the indemnity language meets the elevated standard of being clear and unequivocal. Judge Newman further determined that BFS failed to meet this elevated standard, and that BFS could not, therefore, be indemnified against liability for damages caused by its own negligence.

Judge Newman's Order in *BFS v. MI*, upon which McDaniel's collateral estoppel argument relies, is based solely upon:

- (a) The Court's determination that BFS was seeking to be indemnified for its own negligence, and
- (b) The Court's finding that the relevant contract provision was not sufficiently clear and unequivocal to impose such an obligation upon the subcontractor/indemnitee.

The order of Judge Newman specifically did not address or resolve the particular issue before this Court, ie,

Whether the relevant indemnitee provision is adequate, under general principles of contract construction, to require indemnity against liability for loss occasioned by the negligence, whether sole or concurrent, of the indemnitor.

The specific issue, therefore, was neither "actually litigated" nor "determined" by Judge Newman, and his order fails to provide any basis for collateral estoppel.

Moreover, the specific indemnity provision relied upon by BFS in the instant litigation is virtually identical to the indemnity provision considered by the *Concord & Cumberland* Court, which specifically confirmed the right of a party to be indemnified against loss caused solely or in part by the negligence of the indemnitor.

Here, because BFS is not seeking to be indemnified against BFS's own negligence, but only against liability for damages caused by the negligence of its

subcontractor, Judge Newman's Order in *BFS v. MI* cannot, as a matter of law, operate to estop BFS from seeking indemnification for McDaniel's negligence in this action.

The motion of McDaniel, seeking summary judgment on the basis of collateral estoppel, is thus without merit, and should be denied.

**5. The BFS cross-claim for contractual indemnity is based on a contractual provision that complies with South Carolina law.**

McDaniel argues that the BFS cross-claim for contractual indemnity is based on contractual provisions that are neither clear nor unequivocal, and thus fail as a matter of law under *Concord & Cumberland* and S.C. Code Ann. Section 32-2-10.

It bears repeated emphasis, however, that BFS is seeking indemnity from McDaniel, not against liability for loss or damage arising out of any negligence of BFS, but only against liability for damage or loss arising out of the sole or concurrent negligent acts or omissions of McDaniel in the performance of McDaniel's work. Under the circumstances, the clear and unequivocal standard, as articulated by the Court of Appeals in *Concord & Cumberland*, does not apply and such indemnity is specifically provided for by S.C. Code Ann. Section 32-2-10.

**a. *Concord & Cumberland* specifically authorizes BFS' claim for contractual indemnity.**

BFS seeks indemnification pursuant to the relevant provision of the Master Subcontractor Agreement as executed between BFS and McDaniel. The relevant indemnity provision is the first paragraph of Section 5 Indemnity and states as follows:

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, LIABILITY, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEYS FEES (SUCH LEGAL COSTS 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 THE SUBJECT AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

(Emphasis Supplied)

Exhibit A Section 5, first paragraph.

By the specific provision of paragraph one of Section 5 Indemnity, McDaniel as a subcontractor has undertaken to indemnify BFS against losses arising out of negligent acts or omissions of McDaniel in the performance of its work for BFS.

BFS, by its cross-claim, has sought indemnity only against liability for loss or damage caused by the negligent acts and/or omissions of McDaniel in the performance of its work for BFS. BFS is not seeking indemnification against liability for loss or damage arising from BFS' own negligence, whether sole or concurrent.

In *Concord & Cumberland*, the Court of Appeals considered indemnification provisions which were virtually identical to those at issue in the instant litigation. In that case, the general contractor, Superior Construction, sought indemnification from its window installation subcontractor, Muhler, against damages arising from both (a) the negligence of the subcontractor Muhler and (b) the concurrent negligence of itself the general contractor, Superior. The Circuit Court found that the indemnification provisions of the subcontract agreement were not sufficiently “clear and unequivocal” as to require Muhler to indemnify Superior for Superior’s own negligence. However, the Circuit Court specifically determined that those indemnity provisions did in fact obligate the subcontractor, Muhler, to indemnify the general contractor, Superior, against claims and damages caused by Muhler’s negligence. The Court of Appeals affirmed the determination of the Circuit Court, noting, repeatedly within its opinion, that, although the indemnification provision of the relevant subcontract agreement was not sufficiently clear and unequivocal to require indemnification against the general contractor’s own negligence, such indemnification provision nonetheless obligated the subcontractor to indemnify the general contractor against loss or damage caused by the subcontractor’s negligence.

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. **That is not the case here.** BFS is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from McDaniel’s negligence. When, as here, a contractor does not

seek indemnity for its own negligence, the clear and unequivocal standard does not apply, and the indemnity provision is not invalid.

Appropriate application of the *Concord & Cumberland* ruling to the contractual provision at issue in the instant proceeding clearly authorizes pursuit of contractual indemnity for damages caused by McDaniel's negligence, whether sole or concurrent, (as opposed to damages occasioned by the sole or concurrent negligence of BFS), and, equally clearly, precludes summary judgment in favor of McDaniel. The *Concord & Cumberland* opinion, in specifically authorizing indemnity in favor of a contractor, against losses occasioned by the negligent acts of its subcontractor, is controlling here, and requires denial of McDaniel's motion for summary judgment as to the BFS cross-claim for contractual indemnity.

McDaniel argues that when "[r]eading the contract as a whole, [the indemnity provision] is confusing, misleading, and violates the anti-indemnity statute. Notwithstanding the argument of McDaniel, the contract, when appropriately considered, clearly demonstrates separate indemnity provisions, premised upon different factual considerations. As more specifically detailed hereinafter, the specific provision relied upon by Builders FirstSource in the instant action is consistent with rights recognized by the Concord and Cumberland Court, and provides no basis for the relief sought by McDaniel.

The Section 5 Indemnity portion of the Master Subcontractor Agreement is comprised of four (4) separate paragraphs. Each paragraph pertains to a specific set of factual circumstances. Each of the four paragraphs addresses separate and distinct rights and obligations of the parties.

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). Thus, there is nothing illegal about Section 5 setting forth separate and distinct rights for the parties in separate and distinct paragraphs when South Carolina courts would allow such separate and distinct rights to be set forth in one paragraph.

The first paragraph of Section 5 is the applicable indemnity language for this case as it is the only indemnity provision in the entire contract that speaks to property damage claims caused by the subcontractor’s negligence. By the specific provisions of the first paragraph, the subcontractor has undertaken to defend and indemnify (“to the fullest extent permitted by law”) BFS against liability or loss arising out of negligent acts or omissions of the subcontractor in the performance of its work for BFS.

By contrast, the indemnification provisions of the second paragraph of Section 5 relate solely to claims

“...arising out of or resulting from bodily injury to, or sickness, disease, or death of, the subcontractor, any agent, employee, or representatives of the subcontractor, or any of its subcontractors...”

The provisions of the second paragraph (which impose indemnity obligations “to the fullest extent permitted by law”) of Section 5 address potential claims entirely distinct

from those involved in the instant action, and are irrelevant to this Court's consideration of the propriety of the BFS claims.

The third paragraph of Section 5 deals with the duty to defend and specifically states that it is separate from the duty to indemnify.

The fourth paragraph of Section 5 makes clear that the defense and indemnification obligations are not intended to and shall not impose any requirement upon the subcontractor to indemnify anyone for claims resulting from defects in plan or design.

The specific provision of paragraph one of Section 5, pursuant to which BFS seeks indemnity, authorizes such indemnity ("to the fullest extent permitted by law") against liability for loss occasioned by the negligent acts or omissions of the BFS subcontractor, McDaniel. Such indemnity provision is not subject to the clear and unequivocal standard imposed by the *Concord & Cumberland* Court, and the provision clearly authorizes the relief sought by BFS in the instant litigation.

Moreover, to the extent that any of the remaining provisions of Section 5 might be deemed to be inconsistent with South Carolina law, those provisions are clearly subject to severing, under relevant South Carolina precedent.

The relevant Master Subcontractor Agreement contains specific provisions, at Section 9(f), for severability:

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 supplied).

Exhibit A Section 9(f).

South Carolina courts are required to enforce the contract in accordance with the intent of the parties at the time the contract was executed. *Beach Co. v. Twillman, Ltd.*, 566 S.E.2d 863, 866, 867 (S.C. Ct. App. 2002). Where separate provisions, even in the same paragraph of the contract, contain rights wholly independent of each other, one provision may be severed while the other is enforced. See *Id.* and *D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC*, 810 S.E.2d 41. In the *DR Horton v. BFS* case, the Court of Appeals found it appropriate to sever what it determined to be an invalid indemnity provision set forth in one clause of the applicable indemnification provision, while simultaneously recognizing the validity of the two remaining clauses therein as valid separate and distinct rights.

The allegedly unenforceable provisions of the contract are not at issue here. To the extent necessary, those provisions are clearly susceptible to division and severance without affecting the valid indemnity provision, and the intent of the parties requiring such severability is clearly set forth within the relevant contract.

McDaniel cites the *Poynter* opinion to support its contention that severability is not permissible under South Carolina law. *Poynter* dealt with limitations on the authority of the courts to modify restrictions in non-competition clauses. The ruling was specific to such non-compete agreements, and provides no authority for the wholesale invalidation of the indemnity obligations as urged by McDaniel.

**b. S.C. Code Ann. Section 32-2-10 specifically authorizes BFS' claim for contractual indemnity.**

McDaniel is also in error in its contention that the indemnity provision at issue here is contrary to prohibitions allegedly imposed by S.C. Code Ann Section 32-2-10.

S.C. Code Ann. § 32-2-10 provides:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. (Emphasis added).

Section 32-2-10, by its specific language, states simply that an agreement to indemnify a party against liability for damages arising out of party's sole negligence is against public policy, and thus unenforceable.

Despite its prohibition against indemnity against the sole negligence of the indemnitee, Section 32-2-10 also notes specifically that nothing therein shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promise against liability for damages resulting from the negligence, in whole or in part, of the promisor. The indemnity provision, relied upon by BFS in support of its claims in

the instant action, is, therefore, specifically authorized by Section 32-2-10 and provides no basis for an award of summary judgment in favor of McDaniel.

McDaniel's final argument appears to be that the indemnity provision violates S.C. Code Ann. Section 32-2-10 because BFS will seek reimbursement of attorney's fees regardless of any ultimate liability or negligence of BFS.

The propriety of claims in indemnity, as asserted by BFS in the instant action, are specifically recognized by S.C. Code Ann. Section 32-2-10. Moreover, the relevant provisions of the Master Subcontractor Agreement, pursuant to which BFS seeks indemnity from McDaniel, are equally consistent with the provisions of S.C. Code Ann. § 32-2-10. BFS is not seeking indemnity against liability for damages arising out of its own negligence, whether sole or concurrent. BFS is only seeking indemnity solely against liability for damages occasioned by the negligent acts or omissions of its subcontractor McDaniel. The first paragraph on Section 5 Indemnity notes that the "damages" include court costs and attorney's fees including costs incurred in establishing the indemnification and other rights agreed to in this paragraph. Nothing in Section 32-2-10 or *Concord & Cumberland* precludes or prohibits the recovery of attorney's fees as damages of a contractual indemnity claim.

### CONCLUSION

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

HOWELL, GIBSON & HUGHES, P.A.

By: s/ Stephen P. Hughes  
Stephen P. Hughes  
William H. Cox, III  
Post Office Box 40  
Beaufort, SC 29901-0040  
(843) 522-2400  
Attorneys for Builders FirstSource-  
Southeast Group, LLC

Beaufort, South Carolina  
December 11, 2020

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Retreat at Charleston National County  
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; Pohlman  
Quality Contractors; Pohlman Quality  
Exteriors, Inc., Liollio Architecture, JC  
Contractors, LLC, Soto & Vazquez  
Construction, LLC, Costa de Oliveira  
Construccion, LLC a/k/a Costa de Oliveira  
Construction, LLC and Solesmar Jesus de  
Oliveira,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-03783

**DEFENDANT MCDANIEL  
CONSTRUCTION CO., LLC'S  
SUPPLEMENTAL MEMORANDUM IN  
SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT AS TO  
DEFENDANT BUILDERS  
FIRSTSOURCE'S CROSS-CLAIMS**

Defendant McDaniel Construction Co., LLC ("McDaniel") submits this Supplemental Memorandum in Support of its Motion for Summary Judgment against Defendant Builders FirstSource's ("BFS") cross-claims asserted in its Answer to Plaintiffs' Complaint. McDaniel is entitled to summary judgment as a matter of law because there is no genuine issue of material fact regarding McDaniel's liability for work perform at The

Retreat at Charleston National Country Club (the “Project”). Additionally, BFS’ claims are barred by the doctrine of collateral estoppel and the contractual language for indemnity upon which BFS relies is neither clear nor unequivocal and is in violation for S.C. Code § 32-2-10. Therefore, McDaniel is entitled to Summary Judgment as a matter of law. The undersigned has previously presented this Court with a memorandum and intends for this document to supplement that with additional information and provide the Court with an update on changes since that filing.<sup>1</sup>

### **SUPPLEMENTAL FACTS**

The Court will recall that the project in question consists of numerous buildings and McDaniel only performed work on a single building, Building 27. McDaniel’s scope of work was limited to framing, and for the purposes of this argument and assuming facts in the most favorable light for BFS, we will also assume that McDaniel also installed the house wrap.

On January 6, 2020, this Court heard McDaniel’s Motion for Summary Judgment as to Plaintiffs’ claims. See Ex. 1, Trans. of Record, Jan. 6, 2020. At that hearing, counsel for Plaintiffs conceded their expert had not inspected Building 27. Id. at 30:8-11. This Court noted, “[McDaniel] performed some work; they were hired to do it; they did a good job; there's no deficiencies; they shouldn't be in this thing.” Id. at 31:21-24. And, “I don't think that your boys need to be in this if, in fact, they actually did a good job.” Id. at 34:4-5. The Court learned that Plaintiffs intended to perform an additional inspection with

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<sup>1</sup> The Court will note that portions of this memorandum are identical or nearly identical to those filed in other cases discussing the same issues. The undersigned has been granted permission to use those memoranda by the attorneys in an effort to not “recreate the wheel.”

their experts and permitted them additional time to bring up any issues with Building 27. If none were found, the Court instructed that counsel to, “come back and I’m letting your guys out.” Id. at 35:10-11.

Concurrently, this Court heard argument from various other parties on Motions for Summary Judgment. Arguing on behalf of L&G Construction on a Motion for Summary Judgment as to the BFS cross-claims, Mr. Michal Kalwajtys argued the claims are contingent on the Motion for Summary Judgment as to Plaintiffs claims. (“[W]hether or not my motion for summary judgment against BFS survives depends on your decision regarding the motion against the plaintiff.” Id. at 60:7-10). In response, BFS agreed, “depending upon the Court’s ruling with regard to the L&G motion on the plaintiff’s claims, I think that would be dispositive and I would have no further argument.” Id. at 60:20-23.

The inspection went forward and no issues were identified as to McDaniel’s work. To his ultimate credit, counsel for Plaintiffs concedes there are no issues with McDaniel’s work and agreed to dismiss McDaniel. To that end, Plaintiffs’ have consented to the filing of the attached stipulation. See Ex. 2. In spite of this stipulation, which specifically identifies McDaniel’s scope in broad terms and concedes there are no defects, BFS refuses to dismiss its now baseless cross-claims. Thus, McDaniel is forced to continue to expend money and defend this suit.

### **SUPPLEMENTAL ARGUMENT**

McDaniel incorporates its previously filed memorandum and provides the following additional information for the Court. Please see **Sections I-III** filed previously.

#### **IV. MCDANIEL’S LIABILITY IS NOT IN QUESTION**

There is no question of fact, based on the stipulations by Plaintiffs and based on the prior discussion by this Court, that McDaniel's liability is not in question. McDaniel's work is as a matter of law, and by way of stipulation, NOT defective. Thus, McDaniel should be dismissed wholly from the suit for any cross-claims.

#### **V. BFS' CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL**

BFS' claims on identical issues have already been ruled upon in Builders First Source v. MI Window & Door, et al., 2018-CP-08-02547 ("MI Window") by Judge Clifton Newman and are currently pending before Judge Roger Young in Six Fifty Six Owners Association, Inc., et al. v. Winsor South, LLC; et al., 2016-CP-10-03455 ("Six Fifty Six").

Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was "actually litigated and determined by a valid and final judgment" in a prior suit. Zurcher v. Bilton, 379 S.C. 132, 135 (2008). Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same. Id. It applies only if "the precluded party has had a full and fair opportunity to litigate the issue in the first action." Id.

In both MI Window and Six Fifty Six, BFS contends it is entitled to indemnity from various parties under the identical contractual provisions, which will be discussed more fully below. See Ex. 3, Amended Order Granting Charleston Exteriors, LLC's and ECC Contracting, LLC's Motion For Summary Judgment, 2018-CP-08-02547. In MI Window, BFS had the opportunity to be heard, and Summary Judgement was granted against it. Thus, BFS should be barred from re-litigating the same issue repeatedly on the exact same contract.

What is distinguishable from the above-referenced cases and is perhaps more compelling in this case is that both of those cases involve BFS seeking reimbursement for funds after both groups have settled and paid money to the underlying Plaintiffs. In this case, McDaniel has not paid money, nor should it, because everyone agrees its work is not defective. Therefore, the cross-claims against McDaniel should be dismissed.

**VI. BFS' CLAIMS FOR CONTRACTUAL INDEMNITY ARE BASED ON CONTRACTUAL PROVISIONS THAT ARE NEITHER CLEAR NOR UNEQUIVOCAL AND VIOLATE S.C. CODE ANN. § 32-2-10 THUS THEY FAIL AS A MATTER OF LAW.**

**a. LAW**

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee's concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 172 (S.C. App. 2018), reh'g denied (Oct. 18, 2018) (affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity cross-claims of contractor based on application of the clear and unequivocal standard). Section 32-2-10 provides: "Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately **caused by or resulting from the sole**

**negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable.”** S.C. Code Ann. § 32-2-10 (Emphasis added).

#### **b. Discussion**

According to BFS, McDaniel executed the “Master Subcontractor Agreement” dated June 11, 2007 (hereafter “Master Agreement”). See Ex. 4. McDaniel does not concede that this agreement is valid or that it applies to this project, but for the purposes of this discussion and viewing the facts most favorably to BFS, we will assume it is applicable. The Master Agreement at issue here is a BFS contract form bearing “Version – 5/17/06.” This version of the master agreement is the same as that which was analyzed by Judge Newman and is currently under review by Judge Young. BFS seeks to recover from McDaniel under the terms of the Master Agreement. As such, the Master Agreement is at issue in this matter.

Section 5 of the Master Agreement contains multiple indemnity clauses. The first such indemnity provision states:

**TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFENDANT 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 FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS 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 SUBCONTRACTORS, 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.

See Ex. 4, emphasis added in bold.

In one instance, BFS seeks to have its subcontractors indemnify it only to the extent caused "IN WHOLE OR-IN PART" by the subcontractor but later seeks indemnity "REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF [BFS]." Reading the contract as a whole, this is confusing, misleading, and violates the anti-indemnity statute. In essence, BFS is attempting to turn its subcontractors into insurers, which is the precise fear of the Court in Concord & Cumberland and the basis for the legislature's enactment of the anti-indemnity statute, S.C. Code § 32-2-10. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647 (Ct. App. 2018).

Further, the "defend and hold harmless" section upon which BFS will rely to seek attorneys fees clearly violates S.C. Code § 32-2-10 in that it seeks to be held harmless "REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF [BFS]." South Carolina courts have held that a hold harmless provision is a form of indemnity.

Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56 (Ct. App. 1990) (“A second example of contractual indemnity is a ‘hold harmless’ clause in a subcontract.”). Thus, BFS should never be permitted to recover its attorneys fees because this section violates the anti-indemnity statute on its face.

BFS will contend that there is “saving” language within these provisions that allow these provisions to be re-written or removed by the court. This is not permissible under South Carolina law. See Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 588 (2010) (recognizing that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy). Therefore, the indemnity provisions should be struck as a whole and McDaniel should be granted Summary Judgment on the BFS cross-claims.

Finally, in this instance, BFS could NEVER be liable for the negligence of McDaniel because everyone agrees McDaniel’s work is NOT defective. Thus, McDaniel owes nothing to BFS. BFS should have been dismissed months ago.

### **Conclusion**

The Court should grant McDaniel’s Motion for Summary Judgment because there are clear, plain, and undisputable facts that show McDaniel is not responsible for any of the construction defects at the Retreat. McDaniel worked on the only building at the Project that contains no defects and has caused no damages to the Plaintiff or BFS. Accordingly, the Court should grant McDaniel’s Motion for Summary Judgment.

CLAWSON and STAUBES, LLC

s/ Michael L. Leech

Michael L. Leech

Bar No.: 100516

126 Seven Farms Drive, Suite 200

Charleston, South Carolina 29492-8144

Phone: (843) 577-2026

Fax: (843) 722-2867

Attorney for McDaniel Construction Co., LLC.

Charleston, South Carolina

April 21, 2020

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

**THIS MASTER SUBCONTRACTOR AGREEMENT** (this “**Agreement**”) is entered into effective as of \_\_\_\_\_, 200\_\_, between **Builders FirstSource – Southeast Group, LLC**, a Delaware limited liability company, address: 2001 Bryan St., Suite 1100, Dallas, TX, telephone: 214 0003000, fax: \_\_\_\_\_, Contact: \_\_\_\_\_, e-mail: \_\_\_\_\_@bldr.com (“**Contractor**”), and McDaniel Const Co. LLC, address: 329 Sports Ln. Cross, SC. 29436, telephone: 753-2647, fax: same, Contact: Mike McDaniel, e-mail: MMcDaniel@HomeSC.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.

3

            
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.

  
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

  
Subcontractor  
  
Contractor

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 construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and

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Subcontractor  
  
Contractor

[Version -- 5/17/06]

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.

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Subcontractor  
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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 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.

  
Subcontractor  
  
Contractor

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  
            
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: McDaniel Const Co. LLC

Name: Mike McDaniel

Title: Owner

26-0109019

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

By: [Signature]

Name: Deryl Ward

Title: Associate General Counsel

JUL 12 2007



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

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of July 11, 2007, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 111 Lumber Lane Fox Creek, SC 29445, telephone: 8435535252, fax: 8435729507, Contact: Bill Crabtree, e-mail: bill.crabtree@bldr.com (“Contractor”), and McDaniel Const. Co. LLC, address: 2088 Briar Bend Rd. Ridgville, S.C. 29472, telephone: 296-8921, fax: —, Contact: Michael McDaniel, e-mail: Evolution1@Bellouth.net (“Subcontractor”).

**SECTION I. 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

JUL 12 2007

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

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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

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(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

JUL 12 2007

**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

JUL 12 2007

**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

  
Subcontractor  
  
Contractor

JUL 12 2007

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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*RAM*  
Subcontractor  
*[Signature]*  
Contractor

[Version - 5/17/06]

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.

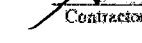
a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (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.

*[Signature]*  
Subcontractor  
*[Signature]*  
Contractor

JUL 12 2007

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.

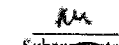
e. **Work Covered by Partial Payments.** All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon 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.

  
Subcontractor  
  
Contractor

JUL 12 2007

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.

  
Subcontractor  
  
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: McDaniel Construction Co. LLC By:

Name: Michael McDaniel

Title: OWNER

Name: Deryl Ward  
Title: Senior Attorney

26-0109019  
Subcontractor Social Security No. or Federal I.D.  
No.

mm  
Subcontractor  
JS  
Contractor

## FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al  
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al  
DEFENDANT(S)

## DISPOSITION TYPE (CHECK ONE)

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

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

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

Defendant McDaniel Construction, Co., LLC's Motion for Summary Judgment is Granted. Defendants Wilson Lucas Sales D/B/A Miracle Siding, LLC and Miracle Siding, LLC's Motion for Leave to Amend Answer is Granted.

## ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

## For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/17/2020 .

ECC Contracting LLC  
East Coast Carpentry Company  
Rodrigo Assis  
Edward Bruce Witham  
Pohlman Quality Exteriors Inc  
Yessenia Alvarez Penaloza  
Sixto Melchor Ayala  
Mario Salgado  
Givair De Caris  
Dino Schwartz  
Advanced Building Connection LLC  
Garcia Roofing LLC  
Feliciano Cruz Silva  
Carlos Marroquin  
Marroquin Construction  
Jessica Marroquin  
Juan Constructors  
Juan Garza Ramos

## NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

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

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Charleston Common Pleas

**Case Caption:** Retreat at Charleston National Country Club Home Owners Asso ,  
plaintiff, et al VS Winston Carlyle Charleston National LLC ,  
defendant, et al  
**Case Number:** 2016CP1003783  
**Type:** Order/Electronic Form 4

IT IS SO ORDERED!

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

Electronically signed on 2020-12-17 11:55:50 page 3 of 3

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge  
Civil Action No. 2016-CP-10-03783

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Appellate Case No. 2021-001050

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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.; CollenBatissa; 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; 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.

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**CERTIFICATE OF COUNSEL**

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I certify that the Supplemental Record on Appeal contains no matter which is irrelevant to this appeal.

Respectfully submitted,

s/ Jennifer S. Ivey

John P. Linton, Jr. (SC Bar # 79130)

Jennifer S. Ivey (SC Bar # 102533)

Walker Gressette & Linton, LLC

P.O. Box 22167

Charleston, SC 29413

(843) 727-2200

*Attorneys for Respondent WS Contractors, LLC*

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge  
Civil Action No. 2016-CP-10-03758

Appellate Case No. 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.; CollenBatissa; 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; 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.

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**CERTIFICATE OF COMPLIANCE**

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The undersigned hereby certifies that this Supplemental Record on Appeal has been reviewed and redacted where necessary and complies with the Supreme Court's Order of August 13, 2007.

Respectfully submitted,

s/ Jennifer S. Ivey

John P. Linton, Jr. (SC Bar # 79130)

Jennifer S. Ivey (SC Bar # 102533)

Walker Gressette & Linton, LLC

P.O. Box 22167

Charleston, SC 29413

(843) 727-2200

*Attorneys for Respondent WS Contractors, LLC*