

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2004-CP-26-0084

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SC Court of Appeals

Crossmann Communities of North Carolina, Inc.
and Beazer Homes Investment Corp.,..... *Appellants,*

vs.

Harleysville Mutual Insurance Company and
Cincinnati Insurance Company,

Of Whom Cincinnati Insurance Company is.....*Respondent.*

RECORD ON APPEAL - VOLUME I

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No. 2004-CP-26-84

Crossmann Communities of North
Carolina, Inc., Beazer Homes
Investment Corp., and Daniel Rogers,

Plaintiffs,

v.

Harleysville Mutual Insurance
Company, Cincinnati Insurance
Company, and Associated Insurors,
Inc., of Myrtle Beach,

Defendants.

FINAL ORDER

Trial Date - January 29, 2007.

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PROCEDURAL HISTORY

Plaintiffs, Crossmann Communities of North Carolina, Inc., Beazer Homes Corp., and Daniel Rogers ("Plaintiffs"), filed this action in January 2004 seeking a declaratory judgment, breach of contract damages, and other relief from Defendants Harleysville Mutual Insurance Company ("Harleysville"), Massachusetts Bay Insurance Company ("Massachusetts Bay"), Regent Insurance Company ("Regent"), Indiana Insurance Company ("Indiana"), Cincinnati Insurance Company ("Cincinnati") (collectively, the "Insurer-Defendants") and Associated Insurors of Myrtle Beach, Inc. ("Associated Insurors").

Plaintiffs' Second Amended Complaint sought, among other things, breach of contract damages and entry of a judgment declaring that all Insurer-Defendants' insurance policies provided coverage for defense costs and indemnity costs incurred by or on behalf

of Plaintiffs as a result of underlying property damage lawsuits filed against Plaintiffs or their predecessors in South Carolina state court (the "Underlying Lawsuits").

Defendants Harleysville, Massachusetts Bay, Regent, and Indiana together paid attorneys' fees and other costs incurred to defend Plaintiffs in the South Carolina Underlying Lawsuits. All Defendants, however, initially denied any obligation to indemnify Plaintiffs for any settlements or judgments that may be entered against Plaintiffs in the South Carolina Underlying Lawsuits.

During the course of this case, Plaintiffs reached settlements with Defendants Regent, Indiana, and Massachusetts Bay, pursuant to which those insurers made payments to Plaintiffs under their respective insurance policies. As such, those insurers were dismissed from this action pursuant to Partial Stipulation of Dismissal filed June 3, 2005 as to Defendant Regent and Partial Orders of Dismissal and Order Revising Caption filed May 10, 2006 as to Defendants Indiana and Massachusetts Bay.

The three Defendants at trial in January 2007 were Harleysville, Cincinnati, and Associated Insurors. After jury selection, Plaintiffs and Defendant Associated Insurors reached a settlement pursuant to which, among other things, their respective claims against one another were dismissed, without prejudice, pursuant to Consent Order of Dismissal without Prejudice of Defendant Associated Insurors, Inc. of Myrtle Beach filed herein February 9, 2007.

During the first day of trial, Plaintiffs and Defendants Harleysville and Cincinnati entered into a Stipulated Agreement which was entered into the record as Court's Exhibit

1. The Stipulated Agreement consists of stipulations of certain facts and further identifies specific issues to be resolved by this Court in resolution of this action without submission of the case to the jury. As such, the jury panel was dismissed and all parties submitted Post-Trial Briefs setting forth their respective positions on the issues specified in Court's Exhibit 1.

Pursuant to Court's Exhibit 1, the parties entered into a Consent Order of Dismissal with Prejudice of Certain Claims against Defendants Harleysville and Cincinnati filed herein March 26, 2007. Pursuant to the Consent Order, Daniel Rogers dismissed his claims against the Defendants Harleysville and Cincinnati with prejudice and all Plaintiffs dismissed their claims against Defendants Harleysville and Cincinnati related to the alleged acts and omissions of Associated Insurors, Inc. of Myrtle Beach, specifically counts 3, 4, 5, and 6 as set forth in Plaintiffs' Second Amended Complaint. The parties then submitted the case for the Court's determination in accordance with Court's Exhibit 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has jurisdiction over this action and venue is proper in this Court. The Court concludes that, because the parties argued their various positions with respect to South Carolina law, and for other applicable "choice of law" factors, the substantive law of South Carolina applies to this case.

Harleysville issued commercial general liability insurance covering Plaintiffs having the following policy periods and limits of liability:

Harleysville Primary Policy Number	Policy Period	Limits
CB 9A 5801	7/29/93-7/29/94	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"
	7/29/94-7/29/95	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"
	7/29/95-7/29/96	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"
	7/29/96-7/29/97	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"
	7/29/97-7/29/98	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"
	7/29/98-8/29/98	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"

The Harleysville primary policies define the term "occurrence" to mean "an accident, including repeated exposure to the same general harmful conditions."

The Harleysville policies define "property damage" as "physical injury to tangible property, including all loss of use thereof."

Harleysville also issued excess, or umbrella, insurance covering Plaintiffs that sits directly above the Harleysville primary coverage for five policy periods beginning July 29, 1994 and ending August 29, 1998. Harleysville's umbrella policies have the following policy periods and limits:

**Harleysville
Excess Policy
Number**

Policy Period

Limits

BEC 9A 5801	7/29/94-7/29/95	\$10,000,000 "each occurrence limit" and "products-completed operations aggregate limit"
	7/29/95-7/29/96	\$10,000,000 "each occurrence limit" and "products-completed operations aggregate limit"
	7/29/96-7/29/97	\$10,000,000 "each occurrence limit" and "products-completed operations aggregate limit"
	7/29/97-7/29/98	\$10,000,000 "each occurrence limit" and "products-completed operations aggregate limit"
	7/29/98-8/29/98	\$10,000,000 "each occurrence limit" and "products-completed operations aggregate limit"

The Harleysville umbrella policies define the terms "occurrence" and "property damage" in the exact same manner as do the Harleysville primary policies.

Cincinnati issued umbrella liability policies covering Plaintiffs having the following policy periods and annual limits of liability:

**Cincinnati Excess
Policy Numbers**

Policy Period

Limits

CCC 4382766	7/1/95-7/2/98	\$10,000,000 each occurrence annual limit and annual aggregate limit
CCC 4445840	7/1/98-7/1/01	\$10,000,000 each occurrence annual limit and annual aggregate limit
	7/1/01-7/1/02	\$10,000,000 each occurrence annual limit and annual aggregate limit

The Cincinnati excess policies define the term "occurrence" to mean "an accident, including repeated exposure to the same general harmful conditions."

The Cincinnati policies define "property damage" as "physical injury to tangible property, including all loss of use thereof."

The South Carolina Underlying Lawsuits were filed against Plaintiffs or their predecessors in South Carolina State Court. These cases were:

- *River Oaks Horizontal Property Regime, et al. v. Pinehurst Builders, Inc., et al., Case No. 00-CP-26-5193 ("River Oaks I")*
- *River Oaks II Horizontal Property Regime, et al., v. River Oaks Development Corp., et al., Case No. 01-CP-26-5932 ("River Oaks II")*
- *Waterway Village at River Oaks, et al., v. River Oaks Golf Development Corp., et al., Case No. 01-CP-26-535 ("Waterway Village")*
- *Buck Creek Golf Villas Horizontal Property Regime et al. v. Buck Creek Development Inc., Case No. 2002-CP-26-4200 ("Buck Creek")*
- *Lightkeepers Village Homeowners Ass'n. v. Lightkeepers Village, et al., Case No. 2000-CP-26-43 ("Lightkeepers Village")*
- *Rose, et al. v. Lightkeepers Village, et al., Case No. 2000-CP-26-5363 ("Rose")*

Plaintiffs eventually settled all of the South Carolina Underlying Lawsuits by making payments to the homeowner-plaintiffs in those cases in the amounts set forth below:

UNDERLYING LAWSUIT	NET SETTLEMENT AMOUNTS PAID TO HOMEOWNER- PLAINTIFFS
River Oaks I	\$ 7,425,000
River Oaks II	\$ 2,826,500
Waterway Village	\$ 3,925,000
Buck Creek	\$ 2,194,250
Lightkeepers Village/Rose	\$ 400,000
TOTAL	\$16,770,750

As set forth in the parties' detailed Post-Trial Statements, the parties developed substantial documentary evidence and testimony during discovery regarding the following topics:

- the manner in which the condominium projects at issue in each of the South Carolina Underlying Lawsuits was constructed;
- the nature of the construction defects and property damage complained of by the homeowner-plaintiffs in each of the South Carolina Underlying Lawsuits; and
- the costs to repair each of the condominium projects at issue in the South Carolina Underlying Lawsuits.

The Stipulation entered as Court's Exhibit 1 provides, in part, as follows:

- (1) If there is an "occurrence" or are "occurrences" under the Harleysville and Cincinnati policies ("the Policies"), then the damages at the underlying projects that resulted from water intrusion and that meet the definition of "property damage" in the Policies are \$7.2 million. If the trial Court finds that there has been an occurrence or occurrences, then the Court shall find that Plaintiffs' insured loss is \$7.2 million, subject to the Court's rulings on the issues set forth in paragraphs 8b, 8c, and 8d below:

- (2) The parties agree that the damage referred to in paragraph 1 above began within 30 days after the Certificate of Occupancy was issued for each building and that such damage, and new damage, progressed until repaired or until Beazer Homes paid to settle the underlying cases, whichever came first.
- (4) The parties stipulate to the following facts:
 - a. The insureds under the Harleysville and Cincinnati Policies served as the architect, general contractor and the developer at River Oaks I, River Oaks II, Buck Creek, and Waterway Village.
 - b. The insureds under the Policies served as the general contractor for buildings 20 and 28 at Lightkeeper's Village.
 - c. All of the construction work at all of the underlying projects was performed entirely by subcontractors.
- (7) The parties agree that the record in this case shall consist of all settlement documents, pleadings, discovery, and depositions, in both the coverage case and the underlying cases which have been produced and exchanged in discovery in this case.
- (13) Cincinnati's applicable policies are excess policies with a "follow form" endorsement applicable to completed operations.

The Stipulation entered as Court's Exhibit 1 further identifies the following matters as the only issues of law to be addressed by this Court:

- (8.a.) Did the property damage giving rise to Plaintiffs' claims for coverage arise from an "occurrence";
- (8.b.) In the event the Court finds that there was an occurrence or occurrences, how shall the \$7.2 million in insured damages referred to in paragraph 1 above be allocated, whether by "joint and several" or by "time on the risk";
- (8.c.) In the event judgment is entered for Plaintiffs, and that the Court determines that "time on the risk" is the proper allocation method, what is

the proper period over which the "time on the risk" should be calculated. All parties reserve their right to argue, from the applicable facts and law, the appropriate start date and end date for any pro rata time on the risk allocation period. Alternatively, in the event that judgment is entered for the Plaintiffs and the Court determines that "joint and several" is the proper allocation method, whether Harleysville or Cincinnati is entitled to any set-off under South Carolina law in light of Plaintiffs' settlement with other insurers and, if set-off is appropriate, the amount of any such set-off.

- (8.d.) In the event the Court finds that there has been an occurrence or occurrences, whether Plaintiffs are entitled to prejudgment interest with respect to the award of insured damages, with each party preserving their rights with respect to that issue.

The Stipulation entered as Court's Exhibit 1 further provides that Harleysville and Cincinnati will not raise the applicability of any policy exclusion. The parties also agreed that Cincinnati could argue to the Court that the underlying insurance has not been exhausted and that Cincinnati has no obligation to "drop down" and cover Plaintiffs for losses.

Whether The Property Damage Arose From An "Occurrence"

It is undisputed under South Carolina law that terms in insurance policies that are susceptible to more than one reasonable meaning must be construed by the Court strictly against the insurer and in a manner that favors coverage. "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." Diamond State Insurance Co. v. Homestead Ind., Inc., 318 S.C. 231, 236, 456 S.E. 2d 912, 915 (1995). Accord South Carolina Farm Bureau Mutual Ins. Co. v. Courtney, 349 S.C. 366, 563 S.E. 2d 648 (2002).

In this case, several key terms in the Harleysville and Cincinnati policies, such as “occurrence,” “accident,” and “repeated exposure to the same general harmful conditions,” are susceptible to more than one reasonable meaning. (See, e.g., Makimoto Depo., at 66-67, relevant pages attached as Tab 6 in Plaintiffs’ Appendix of Deposition Evidence.) In ruling upon the issues in Court’s Exhibit 1, these and other terms in the policies must be construed strictly against Harleysville and Cincinnati and in favor of coverage.

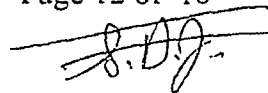
The Harleysville and Cincinnati policies define “occurrence” as “an accident, including repeated exposure to the same general harmful conditions.” As shown in the record evidence and in Court’s Exhibit 1, the facts surrounding the construction of the five condominium projects, as well as the nature of the homeowner-plaintiffs’ property damage claims, fall within this definition as well as applicable case law.

- (a) Pinehurst’s business model was to purchase and develop the land and then help coordinate the activities of the various subcontractors on the condominium projects (Skelley Depo., at 72-73, pages attached as Tab 7 in the Appendix of Deposition Evidence.);
- (b) All construction work at each of the condominium projects was performed by subcontractors and not by Plaintiffs or their predecessors (Court’s Ex. 1, ¶ 4(c).);
- (c) Both Plaintiffs’ expert, Mr. Lewis, and Defendants’ expert, Mr. McCandless, agree that the property damage at each of the underlying projects is a result of repeated exposure to the same general harmful conditions, i.e., water intrusion (Lewis Depo., at 91; McCandless Depo., at 77-78, pages attached as Tabs 1 and 2 in the Appendix of Deposition Evidence);

- (d) The faulty work of certain subcontractors, e.g., the window and siding installers, resulted in damage to the work of subcontractors that was not faulty but instead was properly performed, e.g., the work of the framing subcontractors (Lewis Depo., at 80-81);
- (e) For purposes of this proceeding against Harleysville and Cincinnati, \$7.2 million in property damage resulted from water intrusion (Court's Ex. 1, ¶ 1); and
- (f) The property damage complained of by the homeowner-plaintiffs did not begin until after the buildings were completed; therefore, there was damage only to the property of others, i.e., the property owned by the homeowner-plaintiffs.

Given these facts, the Court finds that the damages complained of by the homeowner-plaintiffs as alleged in each of the South Carolina Underlying Lawsuits were caused by "occurrences," i.e., an "accident, including repeated exposure to the same general harmful conditions."

In addition to the plain language in the Harleysville and Cincinnati policies, a claim based upon allegations that negligent construction caused and resulted in property damage to components of a building that were not previously damaged is an occurrence under a general liability policy like those issued by Harleysville. E.g., L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 123 n.4 (recognizing that a CGL policy may . . . provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property.") The South Carolina Supreme Court in its decision on rehearing in L-J cited with approval to High Country Associates v. New Hampshire Ins. Co., 139 N.H. 9, 648 A. 2d 474 (1974), which, like this case, involved coverage for a general contractor under a general liability policy for claims of property

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damage caused by negligent construction. In High Country Associates, the Court stated as follows:

Because reasonable disagreement about interpretation of "accident" in the definition of "occurrence" is possible, as shown by the different interpretations used by the parties, the term "accident" is ambiguous as it is used in the policy . . . Having found the term ambiguous, we construe 'accident' in favor of coverage. . . . The damage alleged by the [underlying homeowner-plaintiffs] was unexpected from the standpoint of [policyholder] High Country Associates and was caused by continuing exposure to moisture seeping through the walls of the units. The allegations of damage fit within an interpretation of "accident" and the definition of "occurrence" in the policy.

High Country Assocs., *supra*, 139 N.H. at 44, 648 A.2d at 478. The South Carolina Supreme Court's approval of the ruling in High Country shows that the South Carolina Underlying Lawsuits seek damages against Plaintiffs as a result of "property damage" at each of the condominium projects caused by an "occurrence."

Judge Duffy reached a similar conclusion as the High Country court. Okatie Hotel Group, LLC v. Amerisure Ins. Co., No. Civ. A. 2:04-2212-23, 2006 WL 91577 (D.S.C. Jan. 13, 2006). In that case, Judge Duffy held that

the property damage to [the policyholder's] hotel -- caused by exposure to the harmful conditions of leaks and moisture -- constituted an occurrence under the CGL [general liability] policies issued by Defendant.

See also Boggs v. Aetna Cos. & Sur. Co. 272 S.C. 460, 463 (1979) (holding that "the allegedly negligent location of [a] house on [a] lot which created the exposure to a [drainage problem] which resulted in property damage constituted an "occurrence"

within the meaning of a general liability policy). The policyholder in Okatie Hotel was the general contractor for the hotel construction project.

The parties stipulated that substantial property damage resulted from water intrusion at each of the condominium projects at issue in the South Carolina Underlying Lawsuits, and that such property damage was progressive in nature. This property damage resulted from the negligent construction by Plaintiffs' subcontractors. As a result, it is undisputed that at each of the condominium projects, there is property damage to parts of the buildings that resulted from, and was in addition to, the subcontractors' negligent work itself, and that such property damage was caused by the negligence of Plaintiffs' subcontractors. The Court thus finds that for each of the condominium projects at issue in the South Carolina Underlying Lawsuits, the property damage was caused by an occurrence as defined in the Harleysville and Cincinnati policies.

The parties further stipulated that, in the event the Court concluded that the property damage at each of the condominium projects was caused by an occurrence – which the Court has so held – then the insured loss sustained by Plaintiffs is \$7.2 million. (Court Ex. 1, ¶ 1.) The Court therefore finds, based on the parties' stipulation embodied in Court's Exhibit 1, that Plaintiffs' insured loss is \$7.2 million.

Whether Damages Are Allocated By “Joint and Several” Or By “Time on The Risk”

In their post-trial submissions, Plaintiffs and Defendant Cincinnati Insurance Company contended that Century Indemnity Company v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 357 (2002), provides that, in situations such as this case, when the property damage occurs over multiple policy periods, each triggered policy is jointly and severally liable, up to the policy limits, for the entirety of the policyholder’s insured loss, which in this case is \$7.2 million. (Plaintiffs’ Post-Trial Brief at 42–48; Cincinnati Insurance Company Post-Trial Brief, at 9–10.)

The record evidence shows that the condominium projects at issue in the South Carolina Underlying Lawsuits sustained property damage, or “injury-in-fact,” during the policy periods of Harleysville and Cincinnati. The triggered policies thus “provide[] coverage for property damage that occurred during the policy period and for any continuing damage.” Century Indemnity, supra, 348 S.C. 564, 561 S.E. 2d at 355 (emphasis added).

There is no language in any of the policies limiting Harleysville’s responsibility for indemnification to any share of Plaintiffs’ losses other than “those sums” which Plaintiffs have paid the South Carolina homeowner-plaintiffs to settle the Underlying Lawsuits. The South Carolina Supreme Court has in its most recent pronouncement provided for a joint and several approach to an insurer’s obligation to indemnify its policyholder. Because the Court has ruled that Plaintiffs’ insured losses are to be allocated in accordance with the joint and several methodology, and because the combined limits of

the Harleysville policies covering Plaintiffs exceed the \$7.2 million in stipulated insured losses as found by the Court, the Court need not rule upon whether the excess/umbrella insurance policies covering Plaintiffs and issued by Cincinnati are presently triggered by Plaintiffs' insured losses in the South Carolina Underlying Lawsuits.

Whether Harleysville Or Cincinnati Is Entitled To Set-Off

In South Carolina, set-off is an equitable remedy that may be available in appropriate circumstance for non-settling defendants against which a judgment is entered after trial. Welch v. Epstein, 342 S.C. 279 (S.C. Ct. App. 2000). The general rule is that the non-settling defendants at trial have the burden of proving entitlement to a set-off, and also must prove the appropriate amount of any such set-off. See, e.g., Gager v. Carlson, 146 Conn. 288, 150 A.2d 302 (1959). It is also well-settled in South Carolina that a defendant that is found liable to the plaintiff at trial is not entitled to set-off simply because the plaintiff also received some compensation for its losses from an independent source. Ratteni v. Grainger, 298 S.C. 276, 379 S.E. 2d 890 (1989). This rule has been applied liberally in South Carolina to preclude any reduction in damages in many cases for a non-settling defendant at trial. Otis Elevator v. Hardin Const. Co., 316 S.C. 292, 450 S.E. 2d 41 (1994).

The insurance policies issued by Regent, Massachusetts Bay, and Indiana covering Plaintiffs are separate and independent contracts from the policies of insurance covering Plaintiffs and issued by Harleysville and Cincinnati. In Atkinson v. Orkin Exterminating Co., 361 S.C. 157, 604 S.E.2d 385 (S.C. 2004), the South Carolina Supreme Court

reversed the set-off granted by the trial court on the grounds that the pre-trial settlement were "collateral sources" of recovery, and stated as follows:

The duties that Orkin and Terminix owed the [plaintiffs] were based upon independent, unrelated contracts, not a common duty of care. Moreover, we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's negligent inspection of the home. Accordingly, we hold that the proceeds from the Terminix settlement was a collateral source, and therefore the trial court erred in off-setting the judgment by the amount the [plaintiffs] received in settlement.

Id., 361 S.C. at 172, 604 S.E.2d at 394.

In this case, the duties under the insurance policies of the Settling Insurers -- Regent, Massachusetts Bay, and Indiana -- were "based upon independent, unrelated contracts, not a common duty of care." Atkinson, supra. Therefore, Harleysville is not entitled to any judgment reduction or other set-off in the event the Court enters judgment for Plaintiffs.

The Court also finds that there is no equitable basis for an award of set-off because Plaintiffs will have substantial uninsured losses arising from the South Carolina Underlying Lawsuits even with the \$7.2 million judgment added to the pre-trial settlement amounts.

Prejudgment Interest

The Court concludes that Plaintiffs are not entitled to an award of prejudgment interest under South Carolina law because, in the Court's opinion, such an award would provide a windfall for Plaintiffs.

It Is Therefore Ordered, Adjudged And Decreed As Follows:

1. For the reasons set forth above and based upon the record herein, judgment is entered on Count I of Plaintiffs' Second Amended Complaint in favor of Plaintiffs and against Defendant Harleysville in the amount of \$7.2 million.

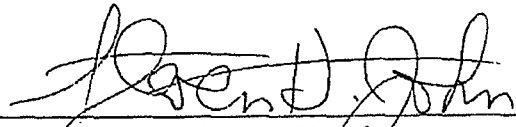
2. For the reasons set forth above and based upon the record herein, judgment is entered on Count II of Plaintiffs' Second Amended Complaint in favor of Plaintiffs and against Defendants Harleysville and Cincinnati, and the parties' rights and obligations under the respective policies are as set forth in this Order.

IT IS SO ORDERED.

Dated:

5/3/07

Conway, South Carolina


The Honorable Steven H. John
Presiding Judge, Fifteenth Judicial Circuit

I
PROCEDURAL HISTORY

Plaintiffs, Crossmann Communities of North Carolina, Inc. and Beazer Homes Corp., ("Plaintiffs" or "Beazer"), filed this action in January 2004 seeking a declaratory judgment, breach of contract damages, and other relief from Defendants Harleysville Mutual Insurance Company ("Harleysville"), Massachusetts Bay Insurance Company ("Massachusetts Bay"), Regent Insurance Company ("Regent"), Indiana Insurance Company ("Indiana"), Cincinnati Insurance Company ("Cincinnati") (collectively, the "Insurer-Defendants") and Associated Insurors of Myrtle Beach, Inc. ("Associated Insurors").¹

Plaintiffs' Second Amended Complaint sought, among other things, breach of contract damages and entry of a judgment declaring that all Insurer-Defendants' insurance policies provided coverage for defense costs and indemnity costs incurred by or on behalf of Plaintiffs. Plaintiffs' claims arise from underlying property damage lawsuits filed by homeowners' associations against Plaintiffs or their predecessors in South Carolina state court.

¹ Pinehurst Builders, Inc. was at all times insured by the Defendant, Harleysville. On May 25, 1998, Pinehurst Builders, Inc. was acquired by Crossmann Communities, Inc. On January 20, 2002, Beazer Homes Corp. acquired Crossmann.

During the course of this case, Plaintiffs reached settlements with Defendants Regent, Indiana, and Massachusetts Bay, pursuant to which those insurers made payments to Plaintiffs under their respective insurance policies. As such, those insurers were dismissed from this action pursuant to Partial Orders of Dismissal and Order Revising Caption, filed May 10, 2006, as to Defendants Indiana and Massachusetts Bay, and Partial Stipulation of Dismissal filed June 3, 2005, as to Defendant Regent.

The three Defendants at trial in January 2007 were Harleysville, Cincinnati, and Associated Insurors. On the morning of trial, the Plaintiffs and Defendants Harleysville and Cincinnati entered into a Stipulation which was marked in the record as Court's Ex. 1. In the Stipulation, the Parties stipulated to certain facts and further identified specific issues to be resolved by this Court in resolution of this action without submission of the case to the jury. The jury panel was dismissed and all parties submitted Post-Trial Briefs addressing their respective positions on the issues specified in the Stipulation. Associated Insurors was later dismissed as a party Defendant.

Harleysville issued commercial general liability insurance covering Plaintiffs having the following policy periods and limits of liability:

Harleysville Primary Policy Number	Policy Period	Limits
CB 9A 5801	7/29/93-7/29/94	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"

**Harleysville
Primary Policy
Number**

Policy Period

Limits

CB 9A 5801	7/29/94-7/29/95	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"
	7/29/95-7/29/96	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"
	7/29/96-7/29/97	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"
	7/29/97-7/29/98	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"
	7/29/98-8/29/98	\$1,000,000 "each occurrence limit" and \$2,000,000 "products-completed operations aggregate limit"

The Harleysville primary policies define the term "occurrence" to mean "an accident, including repeated exposure to the same general harmful conditions," and define "property damage" as "physical injury to tangible property, including all loss of use thereof." (Harleysville Policy, at HV 47).

The South Carolina Underlying Lawsuits were filed against Plaintiffs or their predecessors in South Carolina State Court. Those cases were:

- River Oaks Horizontal Property Regime, et al. v. Pinehurst Builders, Inc., et al., Case No. 00-CP-26-5193 ("River Oaks I")

- River Oaks II Horizontal Property Regime, et al. v. River Oaks Development Corp., et al., Case No. 01-CP-26-5932 ("River Oaks II")
- Waterway Village at River Oaks, et al. v. River Oaks Golf Development Corp., et al., Case No. 01-CP-26-535 ("Waterway Village")
- Buck Creek Golf Villas Horizontal Property Regime, et al. v. Buck Creek Development, Inc., Case No. 02-CP-26-4200 ("Buck Creek")
- Lightkeepers Village Homeowners Assoc. v. Lightkeepers Village, et al., Case No. 00-CP-26-43 ("Lightkeepers Village")
- Rose, et al. v. Lightkeepers Village, et al., Case No. 00-CP-26-5363 ("Rose")

Plaintiffs eventually settled all of the South Carolina Underlying Lawsuits by making payments to the homeowner-plaintiffs in those cases in the amounts set forth below:

UNDERLYING LAWSUITS	NET SETTLEMENT AMOUNTS PAID TO HOMEOWNERS
River Oaks I	\$ 7,425,000
River Oaks II/Lorenzi	\$ 2,826,500
Waterway Village	\$ 3,925,000
Buck Creek	\$ 2,194,250
Lightkeepers Village/Rose	\$ 400,000
TOTAL	\$16,770,750

As set forth in the Parties' detailed Post-Trial Briefs filed in early 2007, the Parties developed substantial documentary evidence and testimony during discovery regarding the following topics:

- the manner in which the condominium projects at issue in each of the South Carolina Underlying Lawsuits was constructed;
- the nature of the construction defects and property damage complained of by the homeowner-plaintiffs in each of the South Carolina Underlying Lawsuits;
- the costs to repair each of the condominium projects at issue in the South Carolina Underlying Lawsuits; and
- the substantial costs incurred by Beazer to pay for constructed-related property damage claims asserted against Beazer by homeowners in South Carolina.

The Stipulation entered as Court's Ex. 1 provides, in part, as follows:

- (1) If there is an "occurrence" or are "occurrences" under the Harleysville and Cincinnati policies ("the Policies"), then the damages at the underlying projects that resulted from water intrusion and that meet the definition of "property damage" in the Policies are \$7.2 million. If the Court finds that there has been an occurrence or occurrences, then the Court shall find that Plaintiffs' insured loss is \$7.2 million, subject to the Court's rulings on the issues set forth in paragraphs 8b, 8c, and 8d below;
- (2) The parties agree that the damage referred to in paragraph 1 above began within 30 days after the Certificate of Occupancy was issued for each building and that such damage, and new damage, progressed until repaired or until Beazer Homes paid to settle the underlying cases, whichever came first.
- (4) The parties stipulate to the following facts:
 - a. The insureds under the Harleysville and Cincinnati Policies served as the architect, general contractor, and the developer

at River Oaks I, River Oaks II, Buck Creek, and Waterway Village.

- b. The insureds under the Policies served as the general contractor for buildings 20 and 28 at Lightkeeper's Village.
 - c. All of the construction work at all of the underlying projects was performed entirely by subcontractors.
- (7) The parties agree that the record in this case shall consist of all settlement documents, pleadings, discovery, and depositions, in both the coverage case and the underlying cases which have been produced and exchanged in discovery in this case.

The Stipulation entered as Court's Ex. 1 further identifies the following matters as the only issues of law to be addressed by this Court:

- (8.a.) Did the property damage giving rise to Plaintiffs' claims for coverage arise from an "occurrence";
- (8.b.) In the event the Court finds that there was an occurrence or occurrences, how shall the \$7.2 million in insured damages referred to in paragraph 1 above be allocated, whether by "joint and several" or by "time on the risk";
- (8.c.) In the event judgment is entered for Plaintiffs, and that the Court determines that "time on the risk" is the proper allocation method, what is the proper period over which the "time on the risk" should be calculated. All Parties reserve their right to argue, from the applicable facts and law, the appropriate start date and end date for any *pro rata* time on the risk allocation period. Alternatively, in the event that judgment is entered for the Plaintiffs and the Court determines that "joint and several" is the proper allocation method, whether Harleysville or Cincinnati is entitled to any set-off under South Carolina law in light of Plaintiffs' settlement with other insurers and, if set-off is appropriate, the amount of any such set-off.
- (8.d.) In the event the Court finds that there has been an occurrence or occurrences, whether Plaintiffs are entitled to prejudgment interest with

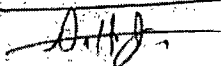
respect to the award of insured damages, with each Party reserving their rights with respect to that issue.

It was further stipulated that Harleysville and Cincinnati would not for purposes of the disposition of this matter at the trial Court level, raise the applicability of policy exclusions with respect to the Court's consideration of the issues identified in the Stipulation.

All Parties agree the Stipulation remains in effect for purposes of this Court's determination of the issues presented on remand from the South Carolina Supreme Court.

II **THE COURT'S 2007 FINAL JUDGMENT**

On May 3, 2007, the Court issued its Final Judgment. On Count I of the Second Amended Complaint, which sought damages from the insurers for breach of contract, the Court entered judgment in favor of Beazer and against Harleysville in the amount of \$7.2 million. On Count II of the Second Amended Complaint, which sought a declaratory judgment as to Harleysville's and Cincinnati's rights and obligations under their respective insurance policies covering Plaintiffs, the Court entered judgment in favor of Plaintiffs and against both Harleysville and Cincinnati. (May 3, 2007 Final Judgment, at 18.) The Court ruled that the property damage at the various condominium projects that was the subject of the Underlying Lawsuits was caused by an "occurrence," as that term is defined in the Harleysville and Cincinnati policies. (May 2007 Final Judgment, at 14.)



Another issue addressed by the Court raised by Count II of the Second Amended Complaint - - the Declaratory Judgment Count - - was the allocation of Beazer's losses across the various insurance policies. Specifically, the Court decided whether the damages were to be allocated on a *pro rata*, time-on-risk basis, or whether each triggered insurance policy was jointly and severally liable for all of Plaintiffs' losses. In its May 2007 Final Judgment, the Court agreed with Beazer and Cincinnati and entered the declaratory judgment "in favor of [Plaintiffs]" and "against Defendants Harleysville and Cincinnati" and stated that Beazer's losses "are to be allocated in accordance with the joint and several methodology." (May 3, 2007 Final Judgment, at 15, 18, Ex. A.)

The Court also ruled that the insurers were not entitled to any set-off with respect to settlement payments made to Beazer in 2005 and 2006 by insurers Indiana Insurance Company, Massachusetts Bay Insurance Company, and Regent Insurance Company. The Court found that South Carolina's "collateral source" rule has been liberally applied to preclude any reduction in damages in many cases for a non-settling defendant at trial, holding "there is no equitable basis for an award of set-off because Plaintiffs will have substantial uninsured losses arising from the South Carolina Underlying Lawsuits even with the \$7.2 million judgment added to the pre-trial settlement amounts." (May 2007 Final Judgment, at 17.) Finally, the Court ruled in favor of Plaintiffs and held that post-judgment interest accrued from the date of entry of the judgment until paid by Harleysville.

III HARLEYSVILLE'S APPEAL

After entry of final judgment in May 2007 and the Court's disposition of post-judgment motions, Harleysville filed a timely Notice of Appeal to pursue a direct appeal to the South Carolina Supreme Court, in accordance with the Stipulation. The Supreme Court in August 2011 affirmed this Court's ruling that the property damage at the projects that were the subject of the South Carolina Underlying Lawsuits was caused by an "occurrence" under the Harleysville (and Cincinnati) policies. *Crossmann, et al. v. Harleysville, et al.*, 395 S.C. 40, 717 S.E.2d, 594 (2011). The Supreme Court also held that Harleysville's liability to Beazer was to be calculated in accordance with a *pro rata*, time-on-risk analysis. *Id.* 395 S.C. at 63-64, 717 S.E.2d at 601-602.

In *Crossmann*, the Court remanded this matter for further consideration of the time-on-risk allocation. In doing so, the Court provided guidance and a default framework toward the accomplishment of the time-on-risk calculation. In particular, the Court provided:

Using our "time-on-risk" framework, the allocation of the damage award against Crossmann must conform to the actual distribution of property damage across the progressive damage period. Where proof of the actual property damage distribution is not available, the allocation formula adopted herein will serve as an appropriate default method for dividing the loss among Crossmann's insurers. We remand to the trial court for further consideration of the "time-on-risk" allocation. *Id.* at 591.

In cases where it is impossible to know the exact measure of damage attributable to the injury that triggered each policy, Courts have looked at the total loss incurred as a result of all of the property damage and then



devised a formula to divide that loss in a manner that reasonably approximates the loss attributable to each policy period. The basic formula consists of a numerator representing the number of years and insurer provided coverage and a denominator representing the total number of years during which the damage progressed. This fraction is multiplied by the total amount the policy holder has become liable to pay as damages for the entire progressive injury. In this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk. *Id.* at 602.

This formula is not a perfect estimate of the loss attributable to each insurer's time on the risk. Rather, it is a default rule that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof. *Id.* at 602.

We leave it to the sound discretion of the trial court to determine whether it is necessary to apply the "time-on-risk" formula separately to each individual building or whether, instead, it would be prudent to modify the default formula to arrive at a reasonable methodology for this case. *Id.* at 602.

In sum, we construe the standard CGL Policy to require that each insurer cover only that portion of a loss attributable to property damage that occurred during its policy period. In light of the difficulty in proving the exact amount of damage incurred during each policy period, we adopt the formula above as the default method for allocating shares of the loss. Trial courts may vary from this default formula where appropriate to the circumstances of a particular case, but they must remain faithful to the premise that each insurer is responsible only for a *pro rata* portion of the total loss, and each *pro rata* portion must be defined by the insurer's time-on-the-risk. *Id.* at 603.

Based upon the foregoing, this Court makes the following Findings of Fact and Conclusions of Law.

IV
PROCEEDINGS ON REMAND

After the Supreme Court's August 22, 2011 Opinion in *Crossmann*, this Court scheduled a hearing for January 5, 2012 and directed Beazer, Harleysville, and Cincinnati to submit briefs for the Court's determination on remand. All Parties appeared before the Court on January 5, 2012 for hearing. The Court scheduled a second day of hearing for March 1, 2012. Beazer, Harleysville, and Cincinnati submitted additional briefs in advance of the March 1 hearing and all Parties appeared and argument was conducted on March 1.

In their respective Briefs, the Parties have raised three issues for determination by this Court. These are:

- A) The establishment of Harleysville's indemnity obligation pursuant to the time on risk methodology;
- B) Whether Harleysville is obligated to pay post-judgment interest and, if so, from what date; and
- C) The establishment of Cincinnati Insurance Company's excess coverage obligation. (Note: This issue is addressed in a separate Order of this Court.)

The issues among Beazer and Harleysville are addressed below:



A) THE ESTABLISHMENT OF HARLEYSVILLE'S INDEMNITY OBLIGATION PURSUANT TO THE TIME ON RISK METHODOLOGY

The basic formula for calculation of *pro rata* time on risk indemnity (hereinafter the "Basic Formula") as set forth in *Crossmann* is as follows:

$$\text{Harleysville's Liability} = \frac{\text{Harleysville's Days on the Risk}}{\text{Total Days of Progressive Damage}} \times \text{Total Covered Damages}$$

In keeping with *Crossmann* and pursuant to agreement of all Parties, the record contains sufficient evidence supporting application of the Basic Formula on a building by building basis. The Underlying Lawsuits encompass property damage and repair costs at 122 buildings.

Attached hereto and incorporated herein as Exhibit 1 is a Time on the Risk Damages Calculations Chart (hereinafter the "Damages Calculations Chart"). The Damages Calculations Chart applies the Basic Formula to each of the 122 buildings in arriving upon Harleysville's ultimate indemnity obligation. The following discussion of each component of the Basic Formula references the various categories within the attached Damages Calculations Chart as applicable.

1) Total Days of Progressive Damage:

The starting point for calculating the total days of progressive damage is the Stipulation entered as Court's Exhibit 1. In pertinent part, the Stipulation provides for a

progressive damage start date as being 30 days after the issuance of the Certificate of Occupancy for each building. For those buildings where the Certificate of Occupancy date could not be established, the Parties have stipulated to an estimated Certificate of Occupancy date. As such, the attached Damages Calculations Chart itemizes the undisputed "CO Date" for each building and the undisputed "CO Date Plus 30 Days" for each building. This is the start date of the progressive damage for each building.

The Stipulation further provides for the ending date of the progressive damage. In particular, the Stipulation provides that the damage progressed until repaired or until Beazer Homes paid to settle the Underlying Lawsuits, whichever came first. The Damages Calculations Chart sets forth the end date of the progressive damage for each building in the column captioned "Settlement Date". The Parties have agreed upon the accuracy of the end dates as set forth in the Damages Calculations Chart.

In order to calculate the total days of progressive damage, it is only necessary to count the days for each building beginning with the start date and ending on the end date. The Damages Calculations Chart sets forth the total days of progressive damage in the column captioned "Total Days of Progressive Damage". This is the denominator for the Basic Formula.

2) Harleysville's Days on the Risk:

Harleysville issued successive policies to Pinehurst Builders, Inc. beginning July 29, 1993 and provided coverage for Pinehurst Builders' successors in interest, including

[Handwritten signature]

Crossmann and Beazer. The Harleysville coverage was cancelled by Crossmann on August 29, 1998. Ordinarily, it is only necessary to count the days within the insurer's anniversary dates which coincide with the days during which damages progressed. Here, however, Harleysville has raised an issue on remand concerning a brief period of overlapping coverage with another insurer, Indiana Insurance Company. In particular, Harleysville asserts that the "other insurance" clauses in its and Indiana's policies render Harleysville's coverage obligations as excess during a small portion of Harleysville's time on the risk. This issue of "other insurance" requires separate analysis.

a) Indiana's "Other Insurance" Analysis:

Harleysville's coverage began July 29, 1993 and continued until cancelled on August 29, 1998. The named insured under the Harleysville policies was at all times Pinehurst Builders, Inc. Crossmann Communities, Inc. acquired Pinehurst Builders, Inc. on May 25, 1998.

Crossmann Communities, Inc. purchased liability coverage through Indiana Insurance Company beginning July 1, 1997. That coverage continued in place until cancelled on August 29, 1998. Because Crossman Communities, Inc. acquired Pinehurst Builders, Inc. on May 25, 1998, there are 96 days of concurrent coverage until the Harleysville and Indiana policies were simultaenously cancelled by Crossmann Communities, Inc. on August 29, 1998.

Harleysville urges this Court to (1) deem Pinehurst an additional named insured to the Crossmann/Indiana policy; (2) construe the "other insurance" clauses of the Harleysville and Indiana policies such that Harleysville is deemed excess over the Indiana coverage; and (3) apply the Indiana coverage retroactively and find coverage for Pinehurst back to the July 1, 1997 inception date of the Indiana Policy, even though Crossmann did not acquire Pinehurst until May 1998.

In response, Beazer first notes that the "other insurance" issue is being raised for the first time on Remand. Beazer also disputes that Pinehurst became an additional named insured pursuant to the Indiana policy language, that Harleysville's coverage is excess, and that Harleysville can somehow apply the Indiana coverage retroactively prior to the date Crossmann Communities, Inc. acquired Pinehurst Builders, Inc.

i) Timeliness of Harleysville's Argument on Remand

Following the initial January 2007 trial of this matter, the Parties were required to submit post-trial briefs as to the issues raised in the Stipulation. Harleysville timely filed its Post-Trial Brief dated February 13, 2007. In that brief, Harleysville attached "time on risk" loss calculations similar to the attached Damages Calculations Chart. In doing so, Harleysville adopted the position that its time on risk continued through the coverage cancellation date of August 29, 1998. Harleysville maintained that position through the appeal of this case to the South Carolina Supreme

Court. Harleysville's newly adopted position regarding the end date of its coverage obligations first appeared in Harleysville's Brief on Remand Issues filed herein November 2, 2011.

Beazer contends that Harleysville's newly adopted position comes too late and further notes that the "other insurance" issue is not properly within Harleysville's pleadings. Beazer has demonstrated prejudice resulting from Harleysville's change in position in that it has settled with and dismissed Indiana Insurance Company, has conducted various other settlement negotiations, conducted trial preparations, and negotiated the Stipulation without notice of an "other insurance" issue.

Harleysville first argues that its pleadings encompass the "other insurance" issue as part of its Third, Sixteenth, and Seventeenth Defenses. As an initial matter, this Court notes that Rule 8(c), SCRCP requires certain defenses to be pled affirmatively. These include various affirmative defenses itemized within the Rule, together with "any other matter constituting an avoidance or affirmative defense." Failure to do so constitutes a waiver of the defense. Plyler v. Burns 373 SC 673, 647 S.E. 2d 188 (2007).

Although the defense of "other insurance" is not specifically enumerated within Rule 8(c), it does constitute an "avoidance or affirmative defense." In Oyler v. Oyler 273 SC 4, 358 S.E. 2d 170, the Court provides guidance in determining whether a matter constitutes an avoidance for purposes of affirmative pleading. The

Court there states “an avoidance is a defense which goes beyond the basic elements of the opposing party’s cause and depends upon additional facts to defeat the claim.” *Id.* at 172. I find that the “other insurance” issue constitutes an avoidance for purposes of Rule 8(c) analysis in that resolution of the issue requires incorporation of other provisions of the Harleysville Insurance Policy, as well as the Indiana Insurance Policy. As such, I find that Harleysville has failed to properly plead the “other insurance” affirmative defense.

Harleysville next argues that the Stipulation, when read together with *Crossmann*, requires that this Court consider the “other insurance” issue. In particular, the Stipulation at paragraph 8(c) specifically provides that “all parties reserve their right to argue, from the applicable facts and law, the appropriate start date and end date for any *pro rata* time on the risk allocation.” As previously noted, *Crossmann* remands this matter to this Court for “further consideration of the “time on risk” allocation.” I find that the Stipulation is sufficiently specific in this regard and allows this Court to consider Harleysville’s “other insurance” issue.

ii) Indiana Named Insured Clauses

Indiana Insurance Company issued its initial policy to Crossmann Communities, Inc. on July 1, 1997. Crossmann had not yet acquired Pinehurst and therefore Pinehurst is not an insured in the Indiana policy. The Indiana policy does,

however, include language concerning after-acquired entities. The Indiana policies provide:

"NAMED INSURED IS COMPLETED TO READ AS FOLLOWS: ... Crossmann Communities, Inc. and all of its subsidiaries; financially controlled organizations; and joint-ventures related to home building or land development; now existing, previously existing, or hereafter acquired or created, and for which coverage is not otherwise more specifically provided in which the named insured has an ownership interest."

The Indiana policies further provide:

"Section II-Who Is An Insured

Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to the organization. ...

Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization."

In construing these provisions, I find that it is reasonable to conclude that the Harleysville and Indiana policies overlapped and provided concurrent coverage upon Crossmann's acquisition of Pinehurst on May 25, 1998. I further find that the concurrent coverage may be applied prospectively only from May 25, 1998 until both policies were simultaneously cancelled on August 29, 1998, being a period of 96 days.

iii) Harleysville and Indiana "Other Insurance" Clauses

Harleysville contends the language of its policies, when read together with the language of the Indiana policies, requires that this Court deem

Harleysville's coverage excess and Indiana's coverage primary during the period of overlap. This Court is thus required to review the pertinent language of both policies.

The policies provide, in pertinent part, as follows:

Harleysville Policy: If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

Indiana Policy: If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This Insurance is primary except when b. below applies. If this Insurance is primary, our obligations are not affected unless any of the other Insurance is also primary. Then, we will share with all that other Insurance by the method described in c. below.

b. Excess Insurance

This Insurance is excess over any of the other Insurance, whether primary, excess, contingent or any other basis:

- (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
- (2) That is Fire Insurance for premises rented to you or temporarily occupied by you with permission of the owner; or
- (3) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject

to Exclusion g. of Coverage A (Section 1) (emphasis added)

In reviewing competing “other insurance” clauses, Courts are required to determine the “total policy insuring intent” embodied within the policies. South Carolina Insurance Company v. Fidelity and Guarantee Insurance Underwriters, Inc. 327 SC 207, 489 S.E. 2d. 200 (1997). In doing so, Courts should consider the wording of the “other insurance” clauses and may also consider other factors such as the stated coverage provided in the policies, the premiums paid, requirements for underlying insurance, and other relevant factors. *Id.* at 204.

In construing the “other insurance” clauses of the Harleysville and Indiana policies, this Court first notes that both purport to be excess over certain other insurance. The Harleysville policy simply states that if there is other insurance covering the same loss or damage, the Harleysville coverage is to be deemed excess. The Indiana policy states that it is primary subject to certain exceptions. The exceptions include the scenario presented here; that is that fire, extended coverage, builder’s risk, installation risk or similar coverage for “your work” as provided in the Harleysville policy. Therefore the Indiana policy, by its terms, deems itself excess.

Under South Carolina law, when the “other insurance” clauses are mutually repugnant, both policies are deemed to provide *pro rata* primary coverage. *Id.* at 206. Because the policy limits of the Harleysville and Indiana policies are the same, each is obligated for 50 percent of the insured loss during the 96-day period of overlapping

coverage. As noted above, the period of overlapping coverage is from May 25, 1998 to August 29, 1998, being a period of 96 days.

The above findings provide the basis for computation of Harleystown's days on the risk. Because 96 days of Harleystown's time on the risk are concurrent with Indiana, the attached Damages Calculations Chart identifies Harleystown's Days on the Risk (Primary) and Harleystown's Days on the Risk (Concurrent) for each building. This then becomes the numerator for purposes of completing the Basic Formula.

3) Total Coverage Damages:

The final component of the Basic Formula is to calculate the total covered damages. The Stipulation provides that "the damages at the Underlying Projects that resulted from water intrusion and that meet the definition of "property damage" in the Harleystown and Cincinnati Policies are \$7.2 Million". Because the Parties have agreed to application of the Basic Formula on a building-by-building basis, this Court is required to allocate the \$7.2 Million in damages applicable to Harleystown and Cincinnati among the five Underlying Projects consisting of 122 total buildings.

In *Crossmann*, the Court recognized that the Basic Formula is a default rule that assumes equal allocation of progressive damage over time. The Court further recognized that application of the Basic Formula to the particulars of any given case may require prudent modification to the default formula in allocating time on risk indemnity

obligations among multiple insurers. As such, this Court notes it is provided discretion in determining the best and most accurate allocation of the stipulated total covered damage among the 122 buildings. In doing so, this Court notes that the Stipulation provides that the record in this case shall consist of all settlement documents, pleadings, discovery, and depositions, in both the coverage case and the Underlying Lawsuits which have been produced and exchanged in discovery in this case. As such, this Court is free to review applicable record evidence in choosing the best and most accurate methodology for allocating the stipulated total covered loss.

There exist various methodologies for allocation of the total covered loss among the various buildings. For example, one method is to simply divide the stipulated \$7.2 Million total covered loss by the total number of buildings. This is the method presently advanced by Harleysville. Another method is to allocate the \$7.2 Million stipulated damages in proportion to the amounts paid by Beazer to settle the Underlying Lawsuits. This is the method previously advanced by Harleysville. The more precise method, however, is the method advanced by Beazer, and is discussed below.

Both Beazer and Harleysville retained experts who, among other things, undertook to allocate the various damages claimed by the Plaintiffs in the five Underlying Lawsuits. Beazer's expert is Mr. H.G. (Skip) Lewis (hereinafter "Lewis") and Harleysville's expert is Mr. David McCandless (hereinafter "McCandless"). Each expert prepared reports allocating the various damage components from each Underlying Lawsuit among

“resultant loss” (i.e., rot resulting from water infiltration) and “faulty work standing alone” (i.e., improperly fastened shingles).

The \$7.2 Million damages stipulated to by Harleysville and Cincinnati is defined to be “damages at the Underlying Projects that resulted from water intrusion and that meet the definition of “property damage”. This definition is in keeping with the dictates of *Crossmann* regarding covered loss. As such, the expert allocations prepared by Messrs. Lewis and McCandless provide this Court the factual record evidence required to fairly allocate the stipulated \$7.2 Million of property damage among the various building types at the various Underlying Projects.

Both Lewis and McCandless prepared reports which are properly in the record before this Court. These reports detail the allocation of resultant loss as alleged by the various Plaintiffs in the Underlying Lawsuits among each building. Because the Parties to this action have stipulated to a resulting loss figure of \$7.2 Million applicable to the Harleysville and Cincinnati Policies, it is necessary to apportion the \$7.2 Million consistent with a proration derived from the expert reports of Messrs. Lewis and McCandless. I find this method best allocates the resulting loss in keeping with *Crossmann* and the Stipulation. I further find that because Messrs. Lewis and McCandless apportion the resulting loss differently, the average of the two is a reasonable approach in the allocating the \$7.2 Million among the buildings.

Attached hereto and incorporated herein as Exhibit 2 is a summary of the Expert Damage Calculations. The "Averaged Calculations" as set forth in Exhibit 2 are then applied to the \$7.2 Million stipulated resulting loss for the Harleysville and Cincinnati Policies and divided by the number of buildings/building types within each Underlying Project. The result is the Stipulated Damages Per Building as shown on the attached Damages Calculations Chart.

4) **Harleysville's Pro Rata Share of Stipulated Damages**

This Court is now able to calculate Harleysville's *pro rata* share of Stipulated Damages per the Basic Formula. The attached Damage Calculations Chart begins with Building 01 of the Underlying Buck Creek Project (BC01). Utilizing BC01 as an example, application of the Basic Formula is as follows:

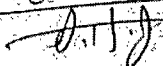
Harleysville's Days on the Risk (Primary) - 1436 x Stipulated Damages per Bldg. - 48,663 = \$14,885.44
Total Days of Progressive Damage - 4399

+

Harleysville's Days on the Risk (Concurrent) - 96 x Stipulated Damages per Bldg. - 48,663/2 = \$530.98
Total Days of Progress Damage - 4399

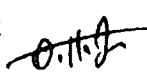
Harleysville's *pro rata* share of Stipulated Damages = \$16,417

This application of the Basic Formula is then repeated for each of the 122 buildings, as is fully set forth on the attached Damages Calculations Chart. I therefore find Harleysville's *pro rata* share of Stipulated Damages to be \$1,580,146.00.

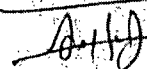


**B) WHETHER HARLEYSVILLE IS OBLIGATED TO PAY
POST-JUDGMENT INTEREST AND, IF SO, FROM WHAT DATE**

This Court issued its 2007 Final Order filed herein May 3, 2007. That Order is silent as to the issue of post-judgment interest. As previously noted, Harleystville appealed this Court's Final Order. During the pendency of that appeal, Harleystville sought leave from the South Carolina Supreme Court to return to this Court to argue whether post-judgment interest is appropriate. The Supreme Court issued its Order dated January 7, 2009 allowing Harleystville's requested leave.

The Parties briefed the post-judgment interest issues and appeared before this Court February 6, 2009. Having reviewed the briefs and heard argument of counsel, this Court issued its Order on the post-judgment interest issue filed herein February 19, 2009. That Order finds that post-judgment interest is mandatory pursuant to S.C. Code Ann. Section 34-31-20(B), further relying upon Calhoun v. Calhoun, 339 S.C. 96, 529 S.E. 2d. 14 (2000). 

Harleystville appealed this Court's February 19, 2009 Order and that appeal was consolidated with the primary appeal herein per Order of the South Carolina Supreme Court dated March 27, 2009. Despite Harleystville's appeal and consolidation, *Crossmann* makes no determination as to the post-judgment interest issue. Harleystville did not seek clarification from the Supreme Court in that regard. Instead, Harleystville has included the post-judgment interest issue in its briefing on remand and requests that this Court re-visit its February 19, 2009 Order.



Setting the procedural/preservation issues aside², this Court adheres to its prior ruling. S.C. Code Ann. Section 34-31-20(B) provides that "A money decree or judgment of a Court enrolled or entered must draw interest according to law." That statutory mandate led to a myriad of confusing case law scenarios arising from post-judgment interest modification of awards by the trial and appellate courts. Our Supreme Court thereafter resolved the confusion in the case of Calhoun v. Calhoun, 339 SC 96, 529 S.E. 2d. 14 (2000).

In Calhoun, the Court recognized many of the confusing scenarios which had arisen both in South Carolina and other jurisdictions. The Calhoun Court noted:

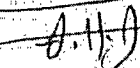
This Court has held that interest does not accrue during the pendency of an appeal when the appeal is made by the judgment creditor on the basis of a claim of inadequacy and the appeal is unsuccessful.

The Court has never ruled on whether interest accrues during the pendency of an appeal when the appeal is made by the judgment creditor on the basis of a claim of inadequacy and the appeal is successful.

Some jurisdictions have held that when both the judgment debtor and judgment creditor appeal, the judgment creditor is entitled to interest from the date of the judgment regardless of whether the judgment creditor's appeal is successful.

Other jurisdictions allow interest to accrue despite an unsuccessful appeal if the judgment debtor's appeal was filed before that of the judgment creditor.

²Beazer contends the post-judgment interest issue is not properly before this Court and that because *Crossmann* is silent as to the issue, that this Court's Order of February 19, 2009 is the law of the case. I find Harleysville is entitled to proceed with this argument on Remand.



Still another line of cases holds that where a money award has been modified on appeal, whether upward or downward, and the only action necessary in the trial court is compliance with the mandate of the appellate court, the view has been taken that interest on the award as modified should run from the same date as if no appeal had been taken. *Id.* at 103.

The cases reviewed by the Court in Calhoun include a variety of claims and causes of action such as domestic, personal injury, breach of contract, and many others.

In resolving the post-judgment interest issue, the Calhoun Court recognized that “a bright line rule for the accrual of interest needs to be established.” *Id.* at 104. Further, the Calhoun Court ruled that:

The simplest way to resolve it is by adopting a rule that when a money judgment is finalized, whether in a lower court or in an appellate court, the interest on that amount, whether it has been modified upward or downward or remains the same, runs from the date of the original judgment. To the extent this new rule is inconsistent with prior case law, that case law is overruled.

Calhoun remains controlling of the issue now presented to this Court. To the extent Harleysville relies upon the prior case of Babb v. Rothrock, 310 SC 350, 426 S.E. 2d. 789 (1993), that reliance is misplaced.

Having considered the various filings of the Parties in these regards and argument of counsel, I find that Beazer is entitled to post-judgment interest upon this Court’s award of

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\$1,580,146.00, such interest to accrue from the date of this Court's original Final Order of May 3, 2007.³

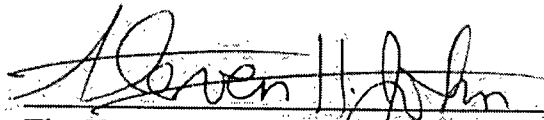
THEREFORE, the Clerk of Court for Horry County is directed to enter Judgment in favor of Crossmann Communities of North Carolina, Inc. and Beazer Homes Investment Corp. against Harleysville Mutual Insurance Company in the amount of \$1,580,146.00, with post judgment interest to accrue upon such judgment beginning May 3, 2007.

IT IS SO ORDERED.

Dated:

5/23/12

Conway, South Carolina


The Honorable Steven H. John
Fifteenth Judicial Circuit
Resident Judge

³During the Hearings on Remand, counsel for Beazer presented calculations of post judgment interest pursuant to applicable South Carolina Statutes and post judgment interest rates as annually advanced by the South Carolina Supreme Court. Applying these calculations to this Court's award of \$1,580,146.00 for the period beginning May 3, 2007 and ending March 23, 2012 yields post judgment interest accrued in the amount of \$802,370.00, together with per diem accrual thereafter.

Exhibit 1

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Exhibit 1

HARLEYSVILLE MUT. INS. CO. "TIME ON THE RISK" DAMAGES CALCULATIONS

						Harleysville Policy Dates		
	Harleysville's Total Pro Rata Share of Stipulated Damages = \$1,580,146					Effective Date	End Date	Harleysville's Share
					Primary	7/29/1993	5/25/1998	100%
					Concurrent	5/25/1998	8/29/1998	50%

Building	CO Date¹	CO Date Plus 30 Days	Settlement Date²	Total Days of Progressive Damage	Harleysville's Days on the Risk (Primary)	Harleysville's Days on the Risk (Concurrent)	Stipulated Damages Per Building	Harleysville's Pro Rata Share of Stipulated Damages
BC01	5/20/1994	6/19/1994	7/5/2006	4399	1436	96	\$48,663	\$16,417
BC02	3/14/1994	4/13/1994	7/5/2006	4466	1503	96	\$48,663	\$16,900
BC03	12/29/1993	1/28/1994	7/5/2006	4541	1578	96	\$48,663	\$17,425
BC04	10/17/1994	11/16/1994	7/5/2006	4249	1286	96	\$48,663	\$15,278
BC05	2/23/1995	3/25/1995	7/5/2006	4120	1157	96	\$48,663	\$14,233
BC06	11/2/1995	12/2/1995	7/5/2006	3868	905	96	\$48,663	\$11,990
BC07	7/26/1996	8/25/1996	7/5/2006	3601	638	96	\$48,663	\$9,270
BC08	9/13/1996	10/13/1996	7/5/2006	3552	589	96	\$48,663	\$8,727
BC09	12/15/1997	1/14/1998	7/5/2006	3094	131	96	\$48,663	\$2,815
BC11	4/6/1998	5/6/1998	7/5/2006	2982	19	96	\$48,663	\$1,093
BC12	9/3/1997	10/3/1997	7/5/2006	3197	234	96	\$48,663	\$4,292
BC13	6/4/1996	7/4/1996	7/5/2006	3653	689.5	96	\$48,663	\$9,826

¹ Unknown CO Dates have been bolded and approximated by averaging the COs before and after the building.
² Known repair dates are used for Waterway Village Bldgs. 3, 14, and 16.

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Building	CO Date ¹	CO Date Plus 30 Days	Settlement Date ²	Total Days of Progressive Damage	Harleysville's Days on the Risk (Primary)	Harleysville's Days on the Risk (Concurrent)	Stipulated Damages Per Building	Harleysville's Pro Rata Share of Stipulated Damages
BC14	3/7/1995	4/6/1995	7/5/2006	4108	1145	96	\$48,663	\$14,132
BC15	6/22/1995	7/22/1995	7/5/2006	4001	1038	96	\$48,663	\$13,209
BC16	11/22/1995	12/22/1995	7/5/2006	3848	885	96	\$48,663	\$11,799
BC17	12/28/1995	1/27/1996	7/5/2006	3812	849	96	\$48,663	\$11,451
BC18	2/2/1996	3/3/1996	7/5/2006	3776	813	96	\$48,663	\$11,096
BC19	10/23/1996	11/22/1996	7/5/2006	3512	549	96	\$48,663	\$8,272
BC20	9/30/1996	10/30/1996	7/5/2006	3535	572	96	\$48,663	\$8,535
BC21	12/13/1996	1/12/1997	7/5/2006	3461	498	96	\$48,663	\$7,677
BC22	1/22/1997	2/21/1997	7/5/2006	3421	458	96	\$48,663	\$7,198
BC23	3/12/1997	4/11/1997	7/5/2006	3372	409	96	\$48,663	\$6,595
BC24	8/7/1997	9/6/1997	7/5/2006	3224	261	96	\$48,663	\$4,664
LK20	7/9/1993	8/8/1993	11/21/2006	4853	1751	96	\$129,549	\$48,024
LK28	4/28/1994	5/28/1994	11/21/2006	4560	1458	96	\$74,788	\$24,700
RO02	12/20/1995	1/19/1996	10/24/2005	3566	857	96	\$100,138	\$25,414
RO03	12/20/1995	1/19/1996	10/24/2005	3566	857	96	\$100,138	\$25,414
RO04	12/18/1995	1/17/1996	10/24/2005	3568	859	96	\$100,138	\$25,455
RO05	12/14/1995	1/13/1996	10/24/2005	3572	863	96	\$100,138	\$25,539
RO06	12/11/1995	1/10/1996	10/24/2005	3575	866	96	\$100,138	\$25,602
RO07	12/5/1995	1/4/1996	5/7/2004	3046	872	96	\$100,138	\$30,245
RO08	11/30/1995	12/30/1995	10/24/2005	3586	877	96	\$100,138	\$25,830
RO09	11/30/1995	12/30/1995	10/24/2005	3586	877	96	\$100,138	\$25,830
RO10	10/18/1995	11/17/1995	10/24/2005	3629	920	96	\$101,683	\$27,123
RO11	10/18/1995	11/17/1995	10/24/2005	3629	920	96	\$101,683	\$27,123
RO12	10/18/1995	11/17/1995	10/24/2005	3629	920	96	\$101,683	\$27,123

Building	CO Date ¹	CO Date Plus 30 Days	Settlement Date ²	Total Days of Progressive Damage	Harleysville's Days on the Risk (Primary)	Harleysville's Days on the Risk (Concurrent)	Stipulated Damages Per Building	Harleysville's Pro Rata Share of Stipulated Damages
RO13	10/30/1995	11/29/1995	10/24/2005	3617	908	96	\$101,683	\$26,876
RO14	1/24/1995	2/23/1995	10/24/2005	3896	1187	96	\$100,138	\$31,743
RO15	3/4/1994	4/3/1994	10/24/2005	4222	1513	96	\$100,138	\$37,024
RO16	4/20/1994	5/20/1994	10/24/2005	4175	1466	96	\$100,138	\$36,314
RO17	4/29/1994	5/29/1994	10/24/2005	4166	1457	96	\$100,138	\$36,176
RO18	7/28/1994	8/27/1994	10/24/2005	4076	1367	96	\$100,138	\$34,763
RO19	10/26/1994	11/25/1994	10/24/2005	3986	1277	96	\$100,138	\$33,287
RO20	11/1/1994	12/1/1994	10/24/2005	3980	1271	96	\$100,138	\$33,186
RO21	11/23/1994	12/23/1994	10/24/2005	3958	1249	96	\$100,138	\$32,814
RO22	12/2/1994	1/1/1995	10/24/2005	3949	1240	96	\$100,138	\$32,661
RO23	2/28/1997	3/30/1997	10/24/2005	3130	421	96	\$100,138	\$15,005
RO24	2/28/1997	3/30/1997	10/24/2005	3130	421	96	\$101,683	\$15,236
RO25	12/22/1994	1/21/1995	10/24/2005	3929	1220	96	\$100,138	\$32,317
RO26	12/27/1994	1/26/1995	10/24/2005	3924	1215	96	\$100,138	\$32,231
RO27	3/24/1995	4/23/1995	10/24/2005	3837	1128	96	\$100,138	\$30,691
RO28	3/24/1995	4/23/1995	10/24/2005	3837	1128	96	\$101,683	\$31,165
RO29	3/28/1995	4/27/1995	10/24/2005	3833	1124	96	\$101,683	\$31,091
RO30	4/6/1995	5/6/1995	10/24/2005	3824	1115	96	\$101,683	\$30,925
RO31	4/19/1995	5/19/1995	10/24/2005	3811	1102	96	\$100,138	\$30,217
RO32	5/4/1995	6/3/1995	10/24/2005	3796	1087	96	\$100,138	\$29,941
RO33	6/23/1995	7/23/1995	10/24/2005	3746	1037	96	\$100,138	\$29,004
RO34	5/26/1995	6/25/1995	10/24/2005	3774	1065	96	\$100,138	\$29,532
RO35	6/14/1995	7/14/1995	10/24/2005	3755	1046	96	\$101,683	\$29,625
RO36	8/11/1995	9/10/1995	10/24/2005	3697	988	96	\$101,683	\$28,494

Building	CO Date ¹	CO Date Plus 30 Days	Settlement Date ²	Total Days of Progressive Damage	Harleysville's Days on the Risk (Primary)	Harleysville's Days on the Risk (Concurrent)	Stipulated Damages Per Building	Harleysville's Pro Rata Share of Stipulated Damages
RO37	8/17/1995	9/16/1995	10/24/2005	3691	982	96	\$101,683	\$28,375
RO38	8/25/1995	9/24/1995	10/24/2005	3683	974	96	\$101,683	\$28,216
RO39	2/2/1996	3/3/1996	10/24/2005	3522	813	96	\$100,138	\$24,480
RO40	3/20/1996	4/19/1996	10/24/2005	3475	766	96	\$101,683	\$23,819
RO41	3/14/1996	4/13/1996	10/24/2005	3481	772	96	\$101,683	\$23,953
RO42	12/31/1997	1/30/1998	10/24/2005	2824	115	96	\$100,138	\$5,780
RO43	12/31/1997	1/30/1998	10/24/2005	2824	115	96	\$100,138	\$5,780
RO44	12/31/1997	1/30/1998	10/24/2005	2824	115	96	\$100,138	\$5,780
ROI45	6/17/1999	7/17/1999	3/14/2006	2432	0	0	\$38,887	\$0
ROI46	5/7/1999	6/6/1999	3/14/2006	2473	0	0	\$38,887	\$0
ROI47	12/3/1998	1/2/1999	3/14/2006	2628	0	0	\$38,887	\$0
ROI48	11/2/1998	12/2/1998	3/14/2006	2659	0	0	\$38,887	\$0
ROI49	10/26/1998	11/25/1998	3/14/2006	2666	0	0	\$38,887	\$0
ROI50	10/5/1998	11/4/1998	3/14/2006	2687	0	0	\$38,887	\$0
ROI51	9/14/1998	10/14/1998	3/14/2006	2708	0	0	\$38,887	\$0
ROI52	8/25/1998	9/24/1998	3/14/2006	2728	0	0	\$38,887	\$0
ROI53	7/17/1998	8/16/1998	3/14/2006	2767	0	13	\$38,887	\$91
ROI54	7/2/1998	8/1/1998	3/14/2006	2782	0	28	\$38,887	\$196
ROI55	6/25/1998	7/25/1998	3/14/2006	2789	0	35	\$38,887	\$244
ROI56	6/19/1998	7/19/1998	3/14/2006	2795	0	41	\$38,887	\$285
ROI57	11/20/1998	12/20/1998	3/14/2006	2641	0	0	\$35,344	\$0
ROI58	11/20/1998	12/20/1998	3/14/2006	2641	0	0	\$35,344	\$0
ROI59	11/30/1998	12/30/1998	3/14/2006	2631	0	0	\$35,344	\$0
ROI60	12/11/1998	1/10/1999	3/14/2006	2620	0	0	\$35,344	\$0

Building	CO Date ¹	CO Date Plus 30 Days	Settlement Date ²	Total Days of Progressive Damage	Harleysville's Days on the Risk (Primary)	Harleysville's Days on the Risk (Concurrent)	Stipulated Damages Per Building	Harleysville's Pro Rata Share of Stipulated Damages
ROI61	12/22/1998	1/21/1999	3/14/2006	2609	0	0	\$35,344	\$0
ROI62	2/1/1999	3/3/1999	3/14/2006	2568	0	0	\$35,344	\$0
ROI63	6/2/1999	7/2/1999	3/14/2006	2447	0	0	\$35,344	\$0
ROI64	6/11/1999	7/11/1999	3/14/2006	2438	0	0	\$35,344	\$0
ROI65	9/8/1999	10/8/1999	3/14/2006	2349	0	0	\$35,344	\$0
ROI66	9/30/1999	10/30/1999	3/14/2006	2327	0	0	\$35,344	\$0
ROI67	12/29/1999	1/28/2000	3/14/2006	2237	0	0	\$32,770	\$0
WW01	7/9/1996	8/8/1996	7/5/2006	3618	655	96	\$22,451	\$4,362
WW02	7/9/1996	8/8/1996	7/5/2006	3618	655	96	\$22,451	\$4,362
WW03	7/9/1996	8/8/1996	4/1/2003	2427	655	96	\$22,451	\$6,503
WW04	9/20/1996	10/20/1996	7/5/2006	3545	582	96	\$22,451	\$3,990
WW05	9/27/1996	10/27/1996	7/5/2006	3538	575	96	\$22,451	\$3,953
WW06	10/14/1996	11/13/1996	7/5/2006	3521	558	96	\$22,451	\$3,864
WW07	11/1/1996	12/1/1996	7/5/2006	3503	540	96	\$22,451	\$3,769
WW08	11/8/1996	12/8/1996	7/5/2006	3496	533	96	\$22,451	\$3,731
WW09	12/5/1996	1/4/1997	7/5/2006	3469	506	96	\$22,451	\$3,585
WW10	11/26/1996	12/26/1996	7/5/2006	3478	515	96	\$22,451	\$3,634
WW11	1/17/1997	2/16/1997	7/5/2006	3426	463	96	\$22,451	\$3,349
WW12	3/26/1997	4/25/1997	7/5/2006	3358	395	96	\$22,451	\$2,962
WW13	7/16/1997	8/15/1997	7/5/2006	3246	283	96	\$22,451	\$2,289
WW14	8/21/1997	9/20/1997	4/1/2003	2019	247	96	\$22,451	\$3,280
WW15	8/15/1997	9/14/1997	7/5/2006	3216	253	96	\$22,451	\$2,101
WW16	4/23/1997	5/23/1997	4/1/2003	2139	367	96	\$22,451	\$4,356
WW17	1/28/1997	2/27/1997	7/5/2006	3415	452	96	\$22,451	\$3,287

Building	CO Date ¹	CO Date Plus 30 Days	Settlement Date ²	Total Days of Progressive Damage	Harleysville's Days on the Risk (Primary)	Harleysville's Days on the Risk (Concurrent)	Stipulated Damages Per Building	Harleysville's Pro Rata Share of Stipulated Damages
WW18	12/5/1996	1/4/1997	7/5/2006	3469	506	96	\$22,451	\$3,585
WW19	12/20/1996	1/19/1997	7/5/2006	3454	491	96	\$22,451	\$3,504
WW20	1/6/1997	2/5/1997	7/5/2006	3437	474	96	\$22,451	\$3,410
WW21	11/8/1996	12/8/1996	7/5/2006	3496	533	96	\$22,451	\$3,731
WW22	10/22/1996	11/21/1996	7/5/2006	3513	550	96	\$22,451	\$3,822
WW23	2/28/1997	3/30/1997	7/5/2006	3384	421	96	\$22,451	\$3,112
WW24	2/28/1997	3/30/1997	7/5/2006	3384	421	96	\$22,451	\$3,112
WW25	8/22/1996	9/21/1996	7/5/2006	3574	611	96	\$22,451	\$4,140
WW26	8/9/1996	9/8/1996	7/5/2006	3587	624	96	\$22,451	\$4,206
WW27	7/25/1996	8/24/1996	7/5/2006	3602	639	96	\$22,451	\$4,282
WW28	12/23/1997	1/22/1998	7/5/2006	3086	123	96	\$22,451	\$1,244
WW29	10/9/1997	11/8/1997	7/5/2006	3161	198	96	\$22,451	\$1,747
WW30	10/21/1997	11/20/1997	7/5/2006	3149	186	96	\$22,451	\$1,668
WW31	11/5/1997	12/5/1997	7/5/2006	3134	171	96	\$22,451	\$1,569
						Total =	\$7,200,000	\$1,580,146

Exhibit 2

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Exhibit 2

EXPERT DAMAGE CALCULATIONS

Lewis Calculations

* Based on revised damages calculations of L.G. (Skip) Lewis, Jr., P.E., that were filed following his deposition and attached as Exhibit J to the remand brief filed on November 2, 2011.

Project	Damage to Work Product of Others With or Without Damage to Subs Work Product (per building)	# of Buildings	Total	Percentage of Total Damages
Buck Creek	\$ 24,710	23	\$ 568,337	11.29%
Lightkeepers Village Building 20	\$ 83,738	1	\$ 83,738	1.66%
Lightkeepers Village Building 28	\$ 61,551	1	\$ 61,551	1.22%
River Oaks I Building Type 1	\$ 78,996	14	\$ 1,105,939	21.98%
River Oaks I Building Type 2	\$ 77,393	29	\$ 2,244,406	44.60%
River Oaks II (Buildings 45-56)	\$ 11,044	12	\$ 132,528	2.63%
River Oaks II (Buildings 57-66)	\$ 6,531	10	\$ 65,306	1.30%
River Oaks II (Building 67)	\$ 4,801	1	\$ 4,801	0.10%
Waterway Village	\$ 24,710	31	\$ 766,019	15.22%
Total		122	\$ 5,032,624	100.00%

McCandless Calculations

* Based on Damages Calculations provided in report prepared by David C. McCandless, P.E., dated October 5, 2006 (Exhibit 5 to Deposition of McCandless)

Project	Physical Damage to Tangible Property (per building)	# of Buildings	Total	Percentage of Total Damages
Buck Creek	\$ 17,803	23	\$ 409,469	19.80%
Lightkeepers Village Building 20	\$ 40,015	1	\$ 40,015	1.93%
Lightkeepers Village Building 28	\$ 17,672	1	\$ 17,672	0.85%
River Oaks I Building Type 1	\$ 25,954	14	\$ 363,356	17.57%
River Oaks I Building Type 2	\$ 25,725	29	\$ 746,025	36.07%
River Oaks II (Buildings 45-56)	\$ 17,803	12	\$ 213,636	10.33%
River Oaks II (Buildings 57-66)	\$ 17,622	10	\$ 176,220	8.52%
River Oaks II (Building 67)	\$ 16,854	1	\$ 16,854	0.81%
Waterway Village	\$ 2,743	31	\$ 85,048	4.11%
Total		122	\$ 2,068,295	100.00%

Averaged Calculations

Project	Average
Buck Creek	15.55%
Lightkeepers Village Building 20	1.80%
Lightkeepers Village Building 28	1.04%
River Oaks I Building Type 1	19.77%
River Oaks I Building Type 2	40.33%
River Oaks II (Buildings 45-56)	6.48%
River Oaks II (Buildings 57-66)	4.91%
River Oaks II (Building 67)	0.46%
Waterway Village	9.67%
Total	100.00%

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

C/A No. 04-CP-26-0084

Crossmann Communities of North Carolina,)
Inc., and Beazer Homes Investment Corp.,)

Plaintiffs,)

v.)

Harleysville Mutual Insurance Company,)
Cincinnati Insurance Company,)

Defendants.)

ORDER

(Cincinnati Insurance)

Hearing Dates - January 5, 2012 and
March 1, 2012.

FILED
HORRY COUNTY
12 MAY 23 PM 1:59
KELLY E. THOMPSON
CLERK OF COURT

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PROCEDURAL HISTORY

Plaintiffs, Crossmann Communities of North Carolina, Inc. (hereinafter "Crossmann"), Beazer Homes Corp., and Daniel Rogers (hereinafter "Plaintiffs"), filed this action in January 2004 seeking a declaratory judgment, breach of contract damages, and other relief from Defendants Harleysville Mutual Insurance Company (hereinafter "Harleysville"), Massachusetts Bay Insurance Company (hereinafter "Massachusetts Bay"), Regent Insurance Company (hereinafter "Regent"), Indiana Insurance Company (hereinafter "Indiana"), Cincinnati Insurance Company (hereinafter "Cincinnati") (collectively the "Insurer-Defendants") and Associated Insurors of Myrtle Beach, Inc. (hereinafter "Associated Insurors").

Plaintiffs' Second Amended Complaint sought, among other things, breach of contract damages and entry of a judgment declaring that all Insurer-Defendants' insurance policies provided coverage for defense costs and indemnity costs incurred by or on behalf of Plaintiffs as a result of underlying property damage lawsuits filed against Plaintiffs or their predecessors in South Carolina state court (hereinafter "Underlying Lawsuits").

Defendants Harleysville, Massachusetts Bay, Regent, and Indiana together paid attorneys' fees and other costs incurred to defend Plaintiffs in the South Carolina Underlying Lawsuits. All Defendants, however, initially denied any obligation to indemnify Plaintiffs for any settlements or judgments that may be entered against Plaintiffs in the South Carolina Underlying Lawsuits.

During the course of this case, Plaintiffs reached settlements with Defendants Regent, Indiana, and Massachusetts Bay pursuant to which those insurers made payments to Plaintiffs under their respective insurance policies. As such, those insurers were dismissed from this action pursuant to a Partial Stipulation of Dismissal filed June 3, 2005 as to Defendant Regent and

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Partial Orders of Dismissal and Order Revising Caption filed May 10, 2006 as to Defendants Indiana and Massachusetts Bay.

The three Defendants at trial in January 2007 were Harleysville, Cincinnati, and Associated Insurors. After jury selection, Plaintiffs and Defendant Associated Insurors reached a settlement pursuant to which, among other things, their respective claims against each other were dismissed, without prejudice, pursuant to a Consent Order of Dismissal without Prejudice of Defendant Associated Insurors, Inc. of Myrtle Beach, which was filed February 9, 2007.

During the first day of trial, Plaintiffs and Defendants Harleysville and Cincinnati entered into a Stipulated Agreement which was entered into the record as Court's Exhibit One (1) (hereinafter "Stipulations"). The Stipulated Agreement consists of stipulations of certain facts and further identifies specific issues to be resolved by this Court in resolution of this action without submission of the case to the jury. As such, the jury panel was dismissed and all Parties submitted Post-Trial Briefs setting forth their respective positions on the issues specified in the Stipulations.

Pursuant to the Stipulations, the Parties entered into a Consent Order of Dismissal with Prejudice of Certain Claims against Defendants Harleysville and Cincinnati as filed March 26, 2007. Pursuant to the Consent Order, Plaintiff Daniel Rogers dismissed his claims against Defendants Harleysville and Cincinnati with Prejudice and all Plaintiffs dismissed their claims against Defendants Harleysville and Cincinnati related to the alleged acts and omissions of Associated Insurors, specifically counts 3, 4, 5 and 6, as set forth in Plaintiffs' Second Amended Complaint. The Parties then submitted the case for the Court's determination in accordance with the Stipulations.

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The Court entered its Final Order on May 3, 2007. This Order was appealed to the South Carolina Supreme Court pursuant to the stipulations entered into by the Parties. The Supreme Court issued its decision in Crossmann Communities of North Carolina, Inc., v. Harleysville Mutual Insurance Co., 395 S.C. 40, 717 S.E.2d 589 (2011) ("Crossmann II"). The Supreme Court affirmed this Court's earlier judgment in part and vacated it in part. The case was remanded to this Court for an assessment of the two non-settling insurers' (Harleysville and Cincinnati) liability under the *pro-rata* "time on risk" approach set forth in its opinion.

All Parties submitted briefs on the issues set forth in Crossman II upon its remand to this Court. Hearings on the issues on remand were held before this Court on January 5, 2012 and March 1, 2012.

This Order addresses the issues relating to Cincinnati Insurance Company. A separate Order will be entered as to the issues relating to Harleysville Mutual Insurance Company. The issues as to the two carriers are distinct because Harleysville is a primary carrier and Cincinnati is an excess carrier. There are also differences in the applicable periods of coverage.

For the reasons set forth below, I find that the Cincinnati excess coverage has not been triggered for the claims that fall within its policy periods.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has jurisdiction over this action and venue is proper in this Court. The Court concludes that, based upon the Parties' arguments with respect to South Carolina law, and for other applicable "choice of law" factors, the substantive law of South Carolina applies to this case.

Cincinnati issued umbrella liability policies (hereinafter the "Excess Policies") for the period of May 29, 1998 to September 1, 2002 with limits of liability of Ten Million Dollars per occurrence, annual limit and annual aggregate limit.

The Excess Policies define the term "occurrence" to mean "an accident, including repeated exposure to the same general harmful conditions."

The Excess Policies define "property damage" as "physical injury to tangible property, including all loss of use thereof."

The Underlying Lawsuits were filed against Plaintiffs or their predecessors in South Carolina State Court. These cases were:

- River Oaks Horizontal Property Regime, et al. v. Pinehurst Builders, Inc., et al., Case No. 00-CP-26-5193 ("River Oaks I")
- River Oaks II Horizontal Property Regime, et al. v. River Oaks Development Corp., et al., Case No. 01-CP-26-5932 ("River Oaks II")
- Waterway Village at River Oaks, et al. v. River Oaks Golf Development Corp., et al., Case No. 01-CP-26-535 ("Waterway Village")
- Buck Creek Golf Villas Horizontal Property Regime et al. v. Buck Creek Development Inc., Case No. 02-CP-26-4200 ("Buck Creek")
- Lightkeepers Village Homeowners Ass'n. v. Lightkeepers Village, et al., Case No. 00-CP-26-43 ("Lightkeepers Village")
- Rose et al. v. Lightkeepers Village, et al., Case No. 00-CP-26-5363 ("Rose")

The Plaintiffs in this matter eventually settled all of the South Carolina Underlying Lawsuits by making payments to the homeowner-plaintiffs in those cases in the amounts set forth below:

UNDERLYING LAWSUIT	NET SETTLEMENT AMOUNTS PAID TO HOMEOWNER-PLAINTIFFS
River Oaks I	\$7,425,000.00
River Oaks II	\$2,826,500.00
Waterway Village	\$3,925,000.00
Buck Creek	\$2,194,250.00
Lightkeepers Village / Rose	\$400,000.00
TOTAL	\$16,770,750.00

As set forth in the Parties' detailed Post-Trial Statements in this matter, the Parties developed substantial documentary evidence and testimony during discovery regarding the following topics:

- the manner in which the condominium projects at issue in each of the Underlying Lawsuits was constructed;
- the nature of the construction defects and property damage complained of by the homeowner-plaintiffs in each of the Underlying Lawsuits; and
- the costs to repair each of the condominium projects at issue in the Underlying Lawsuits.

The Stipulations provide, in part, as follows:

- (1) If there is an "occurrence" or are "occurrences" under the Harleysville and Cincinnati policies (hereinafter "the Policies"), then the damages at the underlying projects that resulted from water intrusion and that meet the definition of "property damages" in the Policies are \$7.2 million. If the trial Court finds that there has been an occurrence or occurrences, then the Court shall find that Plaintiffs' insured loss is

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\$7.2 million, subject to the Court's rulings on the issues set forth in Paragraphs 8b, 8c, and 8d below.

(2) The Parties agree that the damage referred to in Paragraph One (1) above began within Thirty (30) days after the Certificate of Occupancy was issued for each building and that such damage, and new damage, progressed until repaired or until Beazer Homes paid to settle the underlying cases, whichever came first.

(4) The Parties stipulate to the following facts:

a. The Insureds under the Harleysville and Cincinnati Policies served as the architect, general contractor and the developer at River Oaks I, River Oaks II, Buck Creek, and Waterway Village.

b. The Insureds under the Policies served as the general contractor for Buildings Twenty (20) and Twenty-Eight (28) at Lightkeeper's Village.

c. All of the construction work at all of the underlying projects was performed entirely by subcontractors.

(7) The Parties agree that the record in this case shall consist of all settlement documents, pleadings, discovery, and depositions, in both the coverage cases and the underlying cases which have been produced and exchanged in discovery in this case.

(8) The parties agree that the following matters are the only issues of law to be addressed ^{by} Judge John. . .

(8)(b) In the event the Court finds that there was an occurrence or occurrences, how shall the \$7.2 million in insured damages referred to in Paragraph 1 above be allocated, whether by "joint and several" or by "time on the risk."

(13) Cincinnati's applicable policies are excess policies with a "follow form" endorsement applicable to completed operations.

Prior to the scheduled trial in January 2007, Crossmann entered into a Settlement Agreement with three (3) of the primary carriers. The carriers, their policy periods and limits are:

Indiana	May 29, 1998 – Aug. 29, 1998	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate
Massachusetts Bay	Aug. 29, 1998 – Aug. 29, 2000	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate
Regent	Aug. 29, 2000 – Jan. 1, 2002	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate

Crossmann settled with these carriers for the following amounts:

Indiana	\$2.7 Million
Massachusetts Bay	\$2.9 Million
Regent	\$3 Million

Indiana, Massachusetts Bay and Regent are the three (3) underlying carriers for which Cincinnati provided excess coverage.

THE PARTIES STIPULATED TO \$7.2 MILLION IN POTENTIALLY COVERED DAMAGES

The Supreme Court held in *Crossman II* that:

[N]egligent or defective construction resulting in damages to otherwise non-defective components may constitute "property damage", but the defective construction would not. We find the expanded definition of "occurrence" is ambiguous and must be construed in favor of the insured, and the facts of the instant case trigger the insuring language of Harleysville's policies. We note, however, that various exclusions may preclude coverage in some instances. Because the parties in the present case stipulate not to raise the issue, we do not address any policy exclusions and exceptions.

Crossmann II, 395 S.C. at 50, 717 S.E.2d at 594.

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The language in the settling carriers' policies is similar to the relevant language in the Harleysville policy. As agreed to in the Stipulations, Cincinnati's policy is a "follow form" policy. Accordingly, the potentially covered damages in the settling carriers' and the excess policies would be similar because the Cincinnati policy follows the form of the settling carriers' policies.

Crossmann paid a total of Sixteen Million, Seven Hundred Seventy Thousand, Seven Hundred Fifty and no/100 (\$16,770,750.00) Dollars to settle the claims in the Underlying Lawsuits. Of this amount, the Parties stipulated that \$7.2 Million resulted from water intrusion and met the definition of "property damages" in the Policies. See Stipulation One (1). The balance of the amounts paid, Nine Million, Five Hundred Seventy Thousand, Seven Hundred Fifty and no/100 (\$9,570,750.00) Dollars, represents the cost to repair "defective construction" as referenced in *Crossmann II*. *Crossman II*, 395 S.C. at 50, S.E.2d at 594. While Crossmann argues that the measure of Cincinnati's potential liability should be Sixteen Million, Seven Hundred Seventy Thousand, Seven Hundred Fifty and no/100 (\$16,770,750.00) Dollars, the Court is bound by the parties' Stipulation that the potentially covered damages are \$7.2 Million.

Accordingly, Cincinnati's liability, if any, would be determined utilizing the stipulated amount of \$7.2 Million for the Harleysville and Cincinnati coverage periods.

Harleysville's coverage period is August 8, 1993 to August 29, 1998. Cincinnati's period for excess coverage is May 29, 1998 to September 1, 2002. There were various primary carriers during Cincinnati's period of excess coverage.

**CINCINNATI'S POTENTIAL LIABILITY IS DETERMINED BY THE USE OF THE
"TIME ON RISK" ANALYSIS**

The Supreme Court held in *Crossman II* that "time on risk" is the appropriate methodology to use when there are multiple carriers with varying policy periods. Crossmann, however, contends that Cincinnati did not join in Harleysville's appeal and that "joint and

several" liability as set forth in this Court's May 3, 2007 Order is now the law of the case as to Cincinnati.

Plaintiffs argued that Cincinnati's liability is joint and several because it did not appeal this Court's May 3, 2007 ruling that a joint and several allocation approach is appropriate. Plaintiffs claim that Cincinnati's joint and several share is \$5,533,872. Their theory is based upon the faulty premise that because Cincinnati did not challenge the Court's ruling regarding the joint and several approach, it is now the law of the case as to Cincinnati.

This argument lacks merit because the law of the case doctrine is not applicable. The Supreme Court has held that a ruling becomes the law of the case "if the **offended** party does not challenge that ruling." See *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 587 (Ct. App. 1997) (emphasis added). Here, Cincinnati was not offended, aggrieved or otherwise directly affected by the Court's ruling inasmuch as the Court expressly declined to rule whether Cincinnati's policies provided coverage. In its May 3, 2007 Order, this Court stated in relevant part:

because the combined limits of the Harleysville policies covering Plaintiffs exceed the \$7.2 million in stipulated insured losses as found by the Court, the Court need not rule upon whether the excess/umbrella insurance policies covering Plaintiffs and issued by Cincinnati are presently triggered by Plaintiffs' insured losses in the South Carolina Underlying Lawsuits.

May 3, 2007 Order at 16. Likewise, the Supreme Court's *Crossman II* opinion notes that the Circuit Court did not rule whether Cincinnati's policies provided coverage. *Crossman II*. FN1 395 S.C. at 44, 717 S.E.2d at 591. The Supreme Court stated, "Because the trial court found Harleysville's policies were sufficient to indemnify the entire \$7.2 million in stipulated damages, it did not rule on whether Cincinnati's policies provided coverage ..." *Id.* In sum, there was no adverse ruling as to Cincinnati on the issue of joint and several liability from which to appeal because the Court specifically declined to rule on whether Cincinnati's policies provided

coverage at all. Cincinnati was not aggrieved by the Court's order. Thus, the law of the case doctrine has no application here.

Moreover, in arguing that joint and several liability should be applied, the Plaintiffs are surprisingly asking this Court to apply a legal concept that was explicitly and decisively rejected by our State's highest court in *Crossman II*. In *Crossman II*, the Supreme Court stated:

In this case, Crossmann argues in favor of a "joint and several" approach to the allocation of damages, while Harleysville advocates a pro rata/"time on the risk" approach. We adopt the pro rata/"time on the risk" approach.

Id. S.C. at 59, S.E.2d at 599. The Supreme Court also noted that the joint and several approach has been criticized as "inefficient and wasteful of judicial resources." *Id.* S.C. at 60, S.E.2d at 599. Further, the Court concluded that the pro rata approach is more consistent with meeting public policy goals than the joint and several approach. *Id.* S.C. at 63, S.E.2d at 601. The Supreme Court then remanded this matter and specifically instructed this Court that it was to hold further proceedings consistent with the pro rata/"time on the risk" approach. *Id.* at S.C. at 67, S.E.2d at 603. If this Court were to instead now apply a joint and several approach to allocating damages among insurers, as the Plaintiffs request, this would be in direct contravention of the Supreme Court's directive to this Court.

Crossmann further contends that Cincinnati is jointly and severally liable based upon this Court's May 3, 2007 Order, in which judgment was entered on Count II of the Second Amended Complaint. Crossmann contends that Cincinnati is bound by the judgment entered on Count II since it didn't join in Harleysville's appeal.

This argument has no merit. The May 3, 2007 Order entered judgment on Count II (Declaratory Judgment) and stated "the parties' rights and obligations under the respective

policies are as set forth in this Order" (emphasis added). The May 3, 2007 Order specifically stated that the Court did not rule upon whether the Cincinnati policies were triggered.

**THE LIMITS OF THE "UNDERLYING INSURANCE" MAY BE
EXHAUSTED BY PAYMENT OF CLAIMS BY THE CARRIERS OR CROSSMANN
FUNDING THE GAP BETWEEN CARRIERS' PAYMENTS
AND THE POLICY LIMITS**

Cincinnati issued excess insurance policies, which are not triggered until the policy limits of all underlying and all available coverages have been exhausted. In determining an insurer's duty to provide coverage to a claim, the parties' intent is to be measured solely by the language of the policies unless the language is ambiguous. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). It is undisputed under South Carolina law that terms in insurance policies that are susceptible to more than one reasonable meaning must be construed by the Court strictly against the insurer and in a manner that favors coverage. "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Insurance Co., v. Homestead Ind., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). *Accord South Carolina Farm Bureau Mutual Ins. Co. v. Courtney*, 349 S.C. 366, 563 S.E.2d 648 (2002). Accordingly, whether an excess insurer's coverage has been triggered depends on the language of the excess insurance contract. *National Union Fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273 (11th Cir. 2000) (whether an excess insurer's coverage has been triggered depends solely on the terms of the excess insurance contract).

An insurance policy is to be read like any contract, and the words that it contains are to be given their plain and ordinary meaning. The express language of all of the relevant Cincinnati Excess Policies plainly states that the coverage is excess to any available insurance and all underlying policies. The Cincinnati policy issued to Plaintiff provides:

A. Insuring Agreement

We will pay on behalf of the insured the "ultimate net loss" which the insured is legally obligated to pay as damages in excess of the "underlying insurance" or for an "occurrence" covered by this policy which is either excluded or not covered by "underlying insurance" because of:

1. "Bodily injury" or "property damage" covered by this policy occurring during the policy period and caused by an "occurrence"; or

2. "Personal injury" ... covered by this policy committed during the policy period and caused by an "occurrence"

Cincinnati Commercial Umbrella Liability Policy No. CCC 444 58 40, ("Cincinnati Excess Policy") Section I, A.

"Underlying insurance" is defined to mean:

the policies of insurance listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the "occurrence." "Underlying insurance" also includes any type of self-insurance or alternative method by which the insured arranged for funding of legal liabilities that affords coverage that this policy covers.

Id. Section V, 16.

Other provisions in Cincinnati's Excess Policies also emphasize the excess nature of the coverage provided. A provision entitled "Other Insurance" states "[t]he insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory." *See* Cincinnati Excess Policy, Section IV, 11.

The Excess Policies also include a Limits of Insurance clause that further explains that the excess coverage provided by Cincinnati is triggered only if the limits of all underlying insurance have been exhausted "by payment of claims." This clause states that the coverage provided by Cincinnati continues as excess coverage if the limits of underlying insurance are reduced by the payment of claims but not exhausted. The Limits of Insurance clause provides:

a. If the limits of "underlying insurance" have been reduced by payment of claims, this policy will continue in force as excess of the reduced "underlying insurance"; or

b. If the limits of "underlying insurance" have been exhausted by payment of claims, this policy will continue in force as "underlying insurance."

Id. Section III, 4(a), (b).

Under the language of the Cincinnati Excess Policies, the "underlying insurance" can be exhausted either by the underlying carriers paying the full limits available or by Crossmann funding the difference between a settlement for less than the full limits and the limits of the relevant policies.

Accordingly, Cincinnati's Excess Policies will be triggered if the amount of damages paid in settlement of the underlying cases, as calculated on the "time on risk" method set forth by the Supreme Court, exceeds the limits of the "underlying insurance" for each policy period.

**CINCINNATI'S EXCESS POLICIES HAVE NOT BEEN TRIGGERED FOR
THE VARIOUS PERIODS AT ISSUE**

Cincinnati had coverage for the period May 29, 1998 to September 1, 2002. The underlying insurance policy periods and limits are:

Indiana	May 29, 1998 – Aug. 29, 1998	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate
Massachusetts Bay	Aug. 29, 1998 – Aug. 29, 2000	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate
Regent	Aug. 29, 2000 – Jan. 1, 2002	\$1 Million/Per Occurrence, Per Year \$2 Million/Annual Aggregate

There is an issue as to whether there has been a single occurrence or multiple occurrences. It is not necessary, however, for the Court to resolve this issue. Based on the stipulated damages of \$7.2 Million, Cincinnati's Excess Policies are not triggered, regardless of whether the \$1 Million per occurrence or \$2 Million annual aggregate limits are used.

The Supreme Court provides a default rule for determining damages that occur during a particular period:

[I]t is a default rule that assumes the damage occurred in equal portions during each year that it progressed. If proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof.

However, absent such proof, assuming an even progression is a logical default.

Crossmann II, 395 S.C. at 65, 717 S.E.2d at 602.

The parties' experts provided methods of allocating damages pursuant to *Crossman II* and the Stipulations. In general, the damages are allocated evenly over the period from thirty (30) days after the Certificate of Occupancy was issued until repairs were completed or the underlying lawsuits were settled.

The Court must determine the appropriate methodology to use in comparing the limits of the underlying policies to the damages that have been allocated for the various policy periods. While this could be done based on policy years, Crossman contends that the most appropriate method is to use a daily calculation.

The Court finds that the daily method of calculation would be appropriate since Indiana had coverage for less than a full year and Regent had coverage for less than two full years.

Crossmann set forth a methodology for calculating the per day loss on each project in its Brief. The Court finds that, while the methodology is reasonable, the stipulated amount of covered damages must be utilized, rather than the total settlement paid by Crossmann.

The first step is to allocate the stipulated damages among the five underlying lawsuits. This is done by comparing the amount of the settlement in each case to the total settlement amount of \$16,770,750.00. The percentage thus calculated is then applied to the stipulated damages of \$7.2 Million to determine a pro-rata allocation for each settlement. This calculation is shown in Exhibit A.

The next step is to prorate the stipulated loss amount per project over the number of days of progressive loss. The number of days is based upon a commencement date of 30 days after

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the Certificate of Occupancy was issued until repairs were completed or the underlying case was settled (Stipulation No. 2). This calculation is set forth in Exhibit B.

This results in a Daily Loss Amount of \$2,136.00.

The final step is to compare the Daily Loss Amount to the Daily Underlying Policy Limit. If the policy limits of \$1 Million per occurrence, per year is applied, the Daily Underlying Policy Limit is \$2,740.00.

Accordingly, Cincinnati's Excess Policy is not triggered since the underlying limit is greater than the stipulated amount of daily loss. This is reflected in Exhibit C.

It is not necessary for the Court to address the issue of whether the \$2 Million annual aggregate limit for multiple occurrences would apply, since the result would be the same as for the lower limits.

**SETTLEMENTS PAID BY THE UNDERLYING INSURERS ARE IRRELEVANT TO
CINCINNATI'S LIABILITY**

The Parties presented information and various arguments relating to the relevance of the settlement amounts paid by the settling Insurers (Indiana, Massachusetts Bay and Regent).

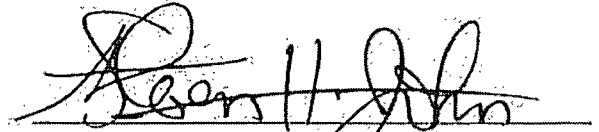
There are issues raised by Crossman's internal allocation of these proceeds.

Crossman unilaterally determined the allocation among policy periods, projects and underlying lawsuits. There also may be inconsistencies between Crossman's position on single occurrence or multiple occurrences for some of the settling Insurers.

These issues and arguments need not be considered because the Cincinnati Excess Policies define "Underlying Insurance" to include any type of self insurance or alternative methods of funding of Crossmann's liabilities. The relevant comparison, as set forth above, is to compare the stipulated damages allocated during the various periods of underlying insurance to the limits of the primary coverage.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that

For the reasons set forth above and based upon the record herein, the damages allocated to the various policy periods of the underlying primary carriers using the "time on risk" analysis are less than the limits of the underlying insurance. Accordingly, Cincinnati's Excess Policies have not been triggered for any of these periods.



The Honorable Steven H. John
Presiding Judge, Fifteenth Judicial Circuit

Resident

This 3rd day of May, 2012
Conway, South Carolina

CLERK OF COURT
12 MAY 23 PM 2:00
CLOCK IN TIME CANCELLED
FILED
COUNTY

EXHIBIT A

SUMMARY OF SETTLEMENTS AND ALLOCATION OF STIPULATED DAMAGES

LAWSUIT	SETTLEMENT AMOUNT	PERCENT OF SETTLEMENT	ALLOCATION OF STIPULATED DAMAGES
River Oaks I	\$7,425,000	44.27%	\$3,187,440
River Oaks II/Lorenzi	\$2,826,500	16.85%	\$1,213,200
Waterway Village	\$3,925,000	23.40%	\$1,684,800
Buck Creek	\$2,194,250	13.08%	\$941,760
Lightkeepers Village/Rose	\$400,000	2.40%	\$172,800
TOTALS:	\$16,770,750	100%	\$7,200,000

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EXHIBIT B

CALCULATION OF DAILY LOSS AMOUNTS BY PROJECT

PROJECT	STIPULATED LOSS AMOUNTS		AVERAGE DAYS OF PROGRESSIVE LOSS		PER DAY LOSS
River Oaks I	\$3,187,440	÷	3,659	=	\$871
River Oaks II/Lorenzi	\$1,213,200	÷	2,592	=	\$468
Waterway Village	\$1,684,800	÷	3,316	=	\$508
Buck Creek	\$941,760	÷	3,730	=	\$252
Lightkeepers Village/Rose	\$172,800	÷	4,707	=	\$37
TOTAL:					\$2,136 Loss/Day

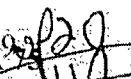
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EXHIBIT C

CINCINNATI'S TIME-ON-RISK LIABILITY TO BEAZER

UNDERLYING INSURER	DAILY LOSS AMOUNT	DAILY ¹ UNDERLYING POLICY LIMIT	=	CIN. SHARE/DAY	×	DAYS	=	CIN. SHARE
Indiana	\$2,136	\$2,740	=	0	=	92	=	\$0
Massachusetts	\$2,136	\$2,740	=	0	=	730	=	\$0
Bay Regent	\$2,136	\$2,740	=	0	=	459	=	\$0
TOTAL:							=	\$0

¹Policy limits of \$1 Million per occurrence, per year.

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

C/A No. 04-CP-26-0084

Crossmann Communities of North Carolina,)
Inc., and Beazer Homes Investment Corp.,)

Plaintiffs,)

v.)

Harleysville Mutual Insurance Company,)
Cincinnati Insurance Company,)

Defendants.)

ORDER

(Cincinnati Insurance)

Hearing Date – August 27, 2012

COUNSEL

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1685
ROA 774

This matter is before the Court pursuant to Crossmann Communities of North Carolina, Inc. and Beazer Homes Investment Corporation's (collectively "Beazer") Motion to Alter, Amend or Reconsider pursuant to Rule 59(e), South Carolina Rules of Civil Procedure. A hearing on this motion was held on August 27, 2012. The motion is directed to and in response to this Court's Order as to Cincinnati Insurance Company ("Cincinnati") dated May 23, 2012. The factual background and procedural history of the case are set forth in the Court's May 23, 2012 Order.

For the reasons set forth below, Beazer's Motion to Alter, Amend or Reconsider is denied.

As set forth in its motion, Crossmann requests the Court to reconsider its May 23, 2012 Order by arguing the following:

1. Payments by Beazer or by insurers to resolve third-party claims against Beazer in states other than South Carolina must apply to establish exhaustion.
2. Even if the Court focuses on South Carolina claims against Beazer, the limits of the policies underlying in the Cincinnati policies are exhausted.
3. Because Cincinnati did not appeal from the Court's May 2007 Final Judgment and Order, Cincinnati is bound by that judgment which held, in part, that any triggered insurance policy is jointly and severally liable for all of Beazer's loss.

In addition, in its brief, Beazer requested limited discovery as to the intent of the parties in entering into the stipulations dated January 29, 2007 and indicated that it would submit a supplemental brief regarding the issue. Beazer did not submit a supplemental brief and did not argue this at the August 27, 2012 hearing. Accordingly, it is deemed abandoned and denied.

While it is undisputed that Beazer paid substantial sums to settle claims in other jurisdictions, Beazer failed to demonstrate what portion of the monies paid, if any, were for covered claims as set forth in *Crossmann Communities of North Carolina, Inc., v. Harleysville*

Mutual Insurance Co., 395 S.C. 40, 717 S.E.2d 589 (2011) ("*Crossmann II*"). Further, Beazer has failed to identify what part of any alleged covered claims would be allocated to the Cincinnati policy periods utilizing the pro rata/time on risk methodology as set forth in *Crossmann II*. Only "property damages" caused by an "occurrence" that occurred during Cincinnati's policy period would act to exhaust the underlying CGL limits.

In an effort to show that the amounts paid to settle cases in other states should be considered in this litigation, Beazer relies on statements contained in its Answers to Interrogatories in this matter dated July 24, 2006. (Plaintiff's Exhibit 2 at the August 27, 2012 hearing). The response Beazer relies upon is set forth on page 3 of Plaintiff's Exhibit 2. The discovery response states that in the Indiana and Kentucky cases, Beazer faced "losses arising from third-party claims for property damage caused by acts or omissions of subcontractors." Beazer did not state in its discovery response that any property damage was caused by an "occurrence" as defined in *Crossmann II* or that it occurred during Cincinnati's policy period. Further, during the August 27, 2012 hearing, Beazer did not present any evidence to the Court that any property damage in the Indiana and Kentucky cases was caused by an "occurrence" as defined in *Crossmann II* or that it occurred during Cincinnati's policy period.

The Court has examined the January 29, 2007 stipulations of the parties, the evidence presented during the course of this litigation and the memoranda submitted by the parties. The Court's Order of May 23, 2012 represents the exercise of "sound discretion . . . to arrive at a reasonable methodology" to determine the underlying damages. *Crossmann II* at 395 SC at 65, 717 S.E.2d at 602.

Beazer has not presented any new or different information that requires modification of the Court's May 23, 2012 order as to the application of payments in other states by Beazer.

As to the second argument presented by Beazer, Beazer previously stipulated that the covered damages were \$7.2 million. While the settlements paid by Indiana, Massachusetts Bay and Regent may have been for covered damages, the Court's May 23, 2012 Order did not allocate these settlements to particular claims. Instead the Court examined the underlying damages using the pro rata/time on risk methodology set forth in *Crossmann II*. Since the damages occurring during Cincinnati's policy periods did not exceed the limits (not amounts actually paid) of the underlying insurance, Cincinnati's excess policies were not triggered.

The third issue is whether Cincinnati's exposure should be determined using the pro rata/time on risk methodology set forth in *Crossmann II*, or whether the Court should use a joint and several approach.

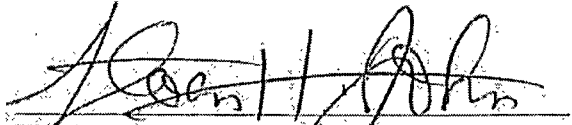
As set forth in Footnote 1 of *Crossmann II*, this Court "did not rule on whether Cincinnati policies provided coverage" in its May 3, 2007 Order. Accordingly, this Court must now follow the methodology established in *Crossmann II*, ie., pro rata/time on risk.

Beazer has not presented any new or different information that requires modification of the Court's May 23, 2012 order on this issue.

The Court has carefully considered the entirety of the January 29, 2007 stipulations, how the stipulations affected the parties' rights, and the record before it. While this Court appreciates the argument of counsel for Beazer, it declines to change its previous ruling and reaffirms the May 23, 2012 Order as to Cincinnati Insurance *in toto*.

Accordingly, the Beazer's Motion to Alter, Amend or Reconsider is denied.

AND IT IS SO ORDERED.


The Honorable Steven W. John
Resident Judge, Fifteenth Judicial Circuit

This 12th day of September, 2012
Conway, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Crossmann Communities of North Carolina,
Inc., Beazer Homes Investment Corp., et al.
Plaintiffs,

vs.

Harleysville Mutual Insurance Company, et al,
Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.

2004-CP-26-84

**COVER SHEET FOR
CIVIL ACTIONS**

The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this Cover Sheet must be served on the defendant(s) along with the Summons and Complaint.

NATURE OF ACTION: (check one category for the main cause of action)

☐ TORT - Motor Vehicle	☐ CONTRACT - Debt Collection
☐ TORT - Professional Malpractice	☐ CONTRACT - Employment
☐ TORT - Unfair Trade Practices, and Other Economic or Business-Related Wrongs	☐ CONTRACT - Construction
☐ TORT - Products Liability	☒ CONTRACT - Wrongful Breach
☐ TORT - General or Other	☐ CONTRACT - General or Other
☐ PCR	☐ REAL PROPERTY
☐ GOV/ADM - Property Seizure	☐ MINOR SETTLEMENTS
☐ GOV/ADM - General or Other	☐ DOMESTIC FOREIGN JUDGMENT
	☐ OTHER (Please Describe)

JURY DEMAND

☒ YES

☐ NO

Note: Information requested on this form is preliminary in nature, and for administrative purposes only. The response to this request for information on jury demand merely indicates a likelihood that a jury trial will or will not be requested and does NOT constitute a demand for or a waiver of trial by jury pursuant to applicable rules or statutes.

DOCKETING INFORMATION (Check one box)

- ☐ This case is subject to arbitration (all cases with monetary damages less than \$25,000 are subject to arbitration, unless otherwise exempt).
- ☒ This case is subject to mediation (all cases not subject to arbitration must be mediated, unless otherwise exempt).
- ☐ This case is exempt from ADR, and certificate is attached.

David B. Miller

Name of Plaintiff/Plaintiff's Attorney (please type or print clearly)

David B. Miller

Signature of Plaintiff/Plaintiff's Attorney

Post Office Box 357

Mailing Address

Myrtle Beach, South Carolina 29578-0357

City, State, Zip Code

Date: January 8, 2004

843-448-2400

Telephone Number

MED. (11/95) SEE REVERSE SIDE FOR FURTHER IMPORTANT INFORMATION

ROA 82

FILED
HORRY COUNTY
CLERK OF COURT
JAN - 8 PM 1:09

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Crossmann Communities of North
Carolina, Inc., Beazer Homes
Investment Corp., and Daniel Rogers,

Plaintiffs,

v.

Harleysville Mutual Insurance
Company, Indiana Insurance Company,
Massachusetts Bay Insurance Company,
Regent Insurance Company,
Cincinnati Insurance Company, and
BB&T Insurance Services, Inc., as
successor in interest to ASURA Corp.,

Defendants.

FILED
HORRY COUNTY
04 JAN - 8 PM 1:10
NEANNE J. ROBERTS
CLERK OF COURT

SUMMONS FOR RELIEF

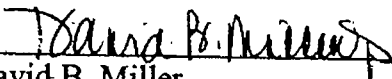
(Complaint Served)

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their office at 1000 29th Avenue North, Myrtle Beach, South Carolina 29577, and to file your answer with the Clerk of Court for Horry, all within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will

apply to the Court for judgment by default for the relief demanded in the Complaint and a judgment will be rendered against you.

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
Post Office Box 357
Myrtle Beach, SC 29578-0357
843-448-2400
Attorneys for the Plaintiff



David B. Miller

Myrtle Beach, South Carolina

January 8, 2004

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CROSSMANN COMMUNITIES)
OF NORTH CAROLINA, INC.,)
BEAZER HOMES INVESTMENT)
CORP., and DANIEL ROGERS,)

CASE NO. 2004-CP-_____

Plaintiffs,

COMPLAINT

v.

HARLEYSVILLE MUTUAL)
INSURANCE COMPANY,)
INDIANA INSURANCE)
COMPANY, MASSACHUSETTS)
BAY INSURANCE COMPANY,)
REGENT INSURANCE)
COMPANY, CINCINNATI)
INSURANCE COMPANY, and)
BB&T INSURANCE SERVICES,)
INC., as successor-in-interest)
to ASURA CORP.,)

JURY TRIAL DEMANDED

Defendants.

FILED
HORRY COUNTY
04 JAN - 8 PM 1:10
JEANNE J. ROGERS
CLERK OF COURT

COMPLAINT

NOW COME Plaintiffs, Crossmann Communities of North Carolina, Inc. ("Crossmann"), Beazer Homes Investment Corp. ("Beazer"), and Daniel Rogers ("Mr. Rogers") (collectively, "Plaintiffs"), and for their Complaint against Defendants Harleysville Mutual Insurance Company ("Harleysville"), Indiana Insurance Company ("Indiana"), Massachusetts Bay Insurance Company

("Massachusetts Bay"), Regent Insurance Company ("Regent"), Cincinnati Insurance Company ("Cincinnati"), (collectively, the "Insurer Defendants"), and BB&T Insurance Services, Inc. ("BB&T Insurance") as successor-in-interest to Asura Corporation ("Asura") (collectively "BB&T-Asura") (all defendants collectively referred to as "Defendants"), allege and aver as follows:

I. NATURE OF ACTION

1. Plaintiffs and certain predecessors-in-interest, including Pinehurst Builders, Inc. ("Pinehurst"), River Oaks Golf Development Corp. ("River Oaks"), and Buck Creek Development, Inc. ("Buck Creek") (Plaintiffs, Crossmann and Beazer, and their predecessors-in-interest, Pinehurst, River Oaks, and Buck Creek, are referred to collectively hereinafter as "Policyholders"), have been sued in six cases pending in the state courts of South Carolina (the "Underlying Complaints"). The suits generally allege property damage in South Carolina caused by occurrences resulting from the actions or inactions of the Policyholders and/or their subcontractors taking place in South Carolina.

2. Pinehurst, Crossmann, River Oaks, and Buck Creek are named insureds under various insurance policies sold by the Insurer Defendants. As named insured and successor-in-interest to Pinehurst, River Oaks, and Buck Creek, Crossmann is insured by comprehensive general liability ("CGL") policies and excess policies issued by the Insurer Defendants; and as successor-in-interest to

Crossmann, Beazer is also insured by CGL and excess policies issued by the Insurer Defendants, which contain, among other things, duties on the part of the Insurer Defendants to defend and indemnify the Policyholders with respect to the Underlying Complaints. The Insurer Defendants have reserved their rights under the policies and have advised the Policyholders of various reasons why the Insurer Defendants believe there is no coverage for the Underlying Complaints.

3. Asura (at the time known as Associated Insurers, Inc.) was an independent insurance agency that was engaged to obtain insurance coverage for the Policyholders, including River Oaks. At least one of the Insurer Defendants declined to defend and indemnify River Oaks against one of the Underlying Complaints on the ground that the insurer did not provide coverage for the time period for which Asura was engaged to obtain coverage for River Oaks. Asura was acquired by BB&T Insurance in approximately September 2000.

4. This is a civil action arising out of the Insurer Defendants' breach of their obligations to the Policyholders under the CGL and excess coverage policies. This action seeks compensatory damages and a declaratory judgment to enforce the terms of the policies and to make the Policyholders whole. The Policyholders also seek compensatory damages from Asura to the extent Asura breached its duty to obtain insurance coverage for the time periods requested by River Oaks. Plaintiffs

in this action seek full and final resolution of all coverage disputes with all of their insurers covering the six Underlying Complaints.

II. PARTIES, JURISDICTION, AND VENUE

5. Crossmann is a North Carolina corporation with its principal operations in Myrtle Beach, South Carolina. Crossmann is in the business of residential real estate development and construction.

6. Beazer is a Delaware corporation with its principal place of business in Atlanta, Georgia. Beazer is in the business of residential real estate development and construction.

7. Mr. Rogers is a citizen and resident of Brunswick County, North Carolina. Mr. Rogers is an architect who was employed by Pinehurst and Crossman at the time of the events giving rise to this Complaint.

8. Harleysville is a corporation organized and existing under the laws of Pennsylvania with its principal place of business in Harleysville, Pennsylvania. At all times material hereto, Harleysville was in the business of selling contracts of insurance to commercial entities such as Plaintiffs and has sold insurance policies covering risks located within the state of South Carolina.

9. Indiana is a corporation organized and existing under the laws of Indiana with its principal place of business in Keene, New Hampshire. At all times

material hereto, Indiana was in the business of selling contracts of insurance to commercial entities such as Plaintiffs and has sold insurance policies covering risks located within the state of South Carolina.

10. Massachusetts Bay is a corporation organized and existing under the laws of Massachusetts with its principal place of business in Worcester, Massachusetts. At all times material hereto, Massachusetts Bay was in the business of selling contracts of insurance to commercial entities such as Plaintiffs and has sold insurance policies covering risks located within the state of South Carolina.

11. Regent is a corporation organized and existing under the laws of Wisconsin with its principal place of business in Sun Prairie, Wisconsin. At all times material hereto, Regent was in the business of selling contracts of insurance to commercial entities such as Plaintiffs and has sold insurance policies covering risks located within the state of South Carolina.

12. Cincinnati is a corporation organized and existing under the laws of Ohio with its principal place of business in Fairfield, Ohio. At all times material hereto, Cincinnati was in the business of selling contracts of insurance to commercial entities such as the Policyholders and has sold insurance policies covering risks located within the state of South Carolina.

13. BB&T Insurance is a corporation organized and existing under the laws of North Carolina with its principal place of business in Raleigh, North Carolina. BB&T Insurance is an insurance agency. BB&T Insurance acquired Asura in approximately September 2000, and Asura was merged into BB&T Insurance.

14. This Court has jurisdiction over the parties to this action and the subject matter thereof pursuant to Art. V, § 11 of the Constitution of the State of South Carolina and S.C. Code Ann. §§ 15-53-10 through 15-53-140.

15. All suits brought against insurance companies doing business in South Carolina may be brought in the county where the loss occurs. A substantial portion of the alleged property damage and events giving rise to this action occurred in this jurisdiction. Therefore, venue is proper in this Court pursuant to S.C. Code Ann. § 15-7-70.

16. This Court has personal jurisdiction over the Insurer Defendants with respect to the claims set forth in this Complaint pursuant to S.C. Code Ann. § 36-2-803(1)(f); a court may exercise personal jurisdiction over those who contract directly or by an agent to insure any person, property, or risk located in South Carolina at the time of contracting.

17. The Court has personal jurisdiction over BB&T Insurance because BB&T Insurance is a corporation authorized to do business in South Carolina and doing business in South Carolina, and is the successor-in-interest by merger to Asura, a corporation that was authorized to do business in South Carolina and conducted business in South Carolina.

18. As a result of the foregoing allegations, the Defendants are subject to the jurisdiction of this Court, and venue is proper in this Court.

III. FACTUAL ALLEGATIONS

A. The Plaintiff Corporate Entities

19. Crossmann was incorporated on or about May 11, 1998, as a wholly owned subsidiary of Crossmann Communities, Inc. ("CCI").

20. River Oaks was incorporated on or about June 25, 1993, and merged into Crossmann on or about June 1, 1998. Crossmann is a successor-in-interest by merger to all of River Oaks's rights under applicable insurance policies.

21. Buck Creek was incorporated on or about June 25, 1993, and merged into Crossmann on or about June 1, 1998. Crossmann is a successor-in-interest by merger to all of Buck Creek's rights under applicable insurance policies.

22. Pinehurst was incorporated on or about December 31, 1979, and merged into Crossmann on or about August 3, 1998. Crossmann is a successor-in-interest by merger to all of Pinehurst's rights under applicable insurance policies.

23. CCI merged into Beazer on or about April 17, 2002, and Beazer is a successor-in-interest to all rights of Crossmann and CCI under applicable insurance policies.

B. The Insurance Policies

24. Harleysville, Indiana, Massachusetts Bay, and Regent provided insurance coverage to Pinehurst, Crossmann, Beazer, River Oaks, Buck Creek, and/or Mr. Rogers as outlined in the Schedule of Insurance attached as **Exhibit A** and incorporated by reference herein.

i. Harleysville Policies

25. Harleysville sold a CGL policy, Policy No. CB9A5801, to Pinehurst that was in effect from January 29, 1993 through August 29, 1998.

26. On or about June 26, 1998, the name of the insured on Harleysville Policy No. CB9A5801 was changed to Crossmann Communities of North Carolina, Inc. d/b/a Pinehurst Builders.

27. Harleysville sold a comprehensive general liability policy, Policy No. GL705673, to River Oaks that was in effect from July 1993 through October 4, 1998.

28. Pinehurst was named as an additional insured under Harleysville Policy No. GL705673.

29. Harleysville sold an excess coverage policy, Policy No. BEC9A5801, to Pinehurst that was in effect from July 29, 1994 through August 29, 1998. Harleysville Policy No. BEC9A5801 was issued to Pinehurst, Crossmann, and River Oaks.

30. On or about June 26, 1998 the named insured on Harleysville Policy No. BEC9A5801 was changed from Pinehurst to Crossmann Communities of North Carolina d/b/a Pinehurst Builders.

31. On September 8, 1994, River Oaks was added to Harleysville Policy No. BEC9A5801 as an additional insured.

32. Harleysville sold an excess coverage policy, Policy No. GL706803, to Pinehurst that was in effect from July 29, 1997 to July 29, 1998. Harleysville Policy No. GL706803 was issued to Pinehurst, River Oaks, and Buck Creek.

33. These policies issued to River Oaks and Pinehurst by Harleysville (the "Harleysville Policies") contain no deductibles or self-insured retentions.

34. Daniel Rogers is insured under the Harleysville Policies as an employee of a named insured.

35. The Harleysville Policies were delivered to River Oaks and Pinehurst in Myrtle Beach, South Carolina.

36. The Insuring Agreements in the CGL policies issued by Harleysville provide, in pertinent part, as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" [or] "property damage" . . . to which this insurance applies. . . . We will have the right and duty to defend any "suit" seeking those damages.

(Harleysville CGL Policies § II.A.1., "Business Liability.")

37. The Harleysville CGL policies provide that Harleysville has the duty to defend the insured against any suit seeking damages for "property damage" caused by an "occurrence." (Id. §§ II.A.1.a. and b., "Business Liability.") An "occurrence" is defined to include an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Id. § II.F.9, "Liability and Medical Expenses Definitions.")

38. The Harleysville CGL policies define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," and includes "[l]oss of use of tangible property that is not physically injured." (Id. § II.F.12., "Liability and Medical Expenses Definitions.")

ii. Indiana Policies

39. From July 1, 1993 through August 29, 1998, CCI was insured by CGL policies issued by Indiana. From July 1, 1996 through August 29, 1998, CCI was insured by Indiana CGL policies (the "Indiana Policies") numbered 42-153-374, 42-153-375, 42-168-444, 42-168-750, 42-178-801, and 42-179-108.

40. The Indiana Policies cover any and all of CCI's subsidiaries, financially controlled organizations, and joint ventures.

41. Pinehurst, Crossmann, River Oaks, and Buck Creek qualify as additional insureds under the Indiana Policies.

42. Daniel Rogers is insured under the Indiana Policies as an employee of a named insured.

43. The Insuring Agreements in the Indiana Policies provide, in pertinent part, as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.

(Indiana Policies § I.A.1.a, "Bodily Injury and Property Damage Liability.")

44. The Indiana Policies provide that Indiana has the duty to defend the insured against any suit seeking damages for "bodily injury" or "property damage" caused by an "occurrence." (*Id.* §§ I.A.1.a. and b., "Bodily Injury and Property

Damage Liability.”) An “occurrence” is defined to include an “accident, including continuous or repeated exposure to substantially the same general harmful conditions.” (Id. § V.12, “Definitions.”)

45. The Indiana Policies define “property damage” as “[p]hysical injury to tangible property, including all resulting loss of use of that property,” and includes “[l]oss of use of tangible property that is not physically injured.” (Id. § V.15.a. and b., “Definitions.”)

iii. Massachusetts Bay Policy

46. Massachusetts Bay sold a general liability policy, Massachusetts Bay Policy No. ZDI 5260801 (the “Massachusetts Bay Policy”), to CCI that was in effect from August 29, 1998 through August 29, 2000.

47. The Massachusetts Bay Policy covers any and all of CCI’s subsidiaries, financially controlled organizations, and joint ventures.

48. Pinehurst, Crossmann, River Oaks, and Buck Creek qualify as additional insureds under the Massachusetts Bay Policy.

49. Daniel Rogers is insured under the Massachusetts Bay Policy as an employee of a named insured.

50. The Insuring Agreement in the Massachusetts Bay Policy provides, in pertinent part, as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. (Massachusetts Bay Policy § I.A.1.a., "Bodily Injury and Property Damage Liability.")

51. The Massachusetts Bay Policy provides that Massachusetts Bay has the duty to defend the insured against any suit seeking damages for "bodily injury" or "property damage" caused by an "occurrence." (Id. §§ I.A.1.a. and b., "Bodily Injury and Property Damage Liability.") An "occurrence" is defined to include an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Id. § V.12, "Definitions.")

52. The Massachusetts Bay Policy defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," and includes "[l]oss of use of tangible property that is not physically injured." (Id. § V.15.a. and b., "Definitions.")

iv. Regent Policy

53. Regent sold a general liability policy, Regent Policy No. CCI 0320615 (the "Regent Policy"), to CCI that was in effect from August 29, 2000 through January 1, 2002.

54. The Regent Policy covers any and all of CCI's subsidiaries, financially controlled organizations, and joint ventures.

55. Pinehurst, Crossmann, River Oaks, and Buck Creek qualify as additional insureds under the Regent Policy.

56. Daniel Rogers is insured under the Regent Policy as an employee of a named insured.

57. The Insuring Agreement in the Regent Policy provides, in pertinent part, as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.

(Regent Policy § I.A.1.a, "Bodily Injury and Property Damage Liability.")

58. The Regent Policy provides that Regent has the duty to defend the insured against any suit seeking damages for "bodily injury" or "property damage" caused by an "occurrence." (Id. §§ I.A.1.a. and b., "Bodily Injury and Property Damage Liability.") An "occurrence" is defined to include an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Id. § V.13, "Definitions.")

59. The Regent Policy defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," and includes "[l]oss of use of tangible property that is not physically injured." (Id. § V.17.a. and b., "Definitions.")

v. Cincinnati Policies

60. Cincinnati sold excess liability policies to CCI. Policy No. CCC4382766 was in effect from July 1, 1995 to July 1, 1998, and Policy No. CCC4445840 was in effect from July 1, 1998 to July 1, 2002 (the "Cincinnati Policies").

61. The Cincinnati Policies cover any and all of CCI's subsidiaries, financially controlled organizations, and joint ventures.

62. Pinehurst, Crossmann, River Oaks, and Buck Creek qualify as additional insureds under the Cincinnati Policies.

63. Daniel Rogers is insured under the Cincinnati Policies as an employee of a named insured.

64. The Insuring Agreements in the Cincinnati Policies provide, in pertinent part, as follows:

We will pay on behalf of the insured the "ultimate net loss" which the insured is legally obligated to pay as damages in excess of the "underlying insurance" or for an "occurrence" covered by this policy which is either excluded or not covered by "underlying insurance" because of... "[b]odily injury" or "property damage" covered by this policy occurring during the policy period and caused by an "occurrence."

(Cincinnati Policies § I.A., "Coverages.")

65. The Cincinnati Policies provide that Cincinnati has the duty to defend the insured against any claim or suit seeking damages for "bodily injury" or

“property damage” not covered by “underlying insurance” or other insurance. (Id. § I.C.1, “Defense and Supplementary Payments.”) An “occurrence” is defined to include an “accident, including continuous or repeated exposure to substantially the same general harmful conditions.” (Id. § V.9, “Definitions.”)

66. The Cincinnati Policies define “property damage” as “[p]hysical injury to or destruction of tangible property including all resulting loss of use,” and includes “[l]oss of use of tangible property that is not physically injured.” (Id. § V.12.a. and b., “Definitions.”)

67. The insurance policies issued by Harleysville, Indiana, Massachusetts Bay, Regent, and Cincinnati to the Policyholders will hereinafter be collectively referred to as the “Policies.”

C. Events Giving Rise to the Insurer Defendants’ Duties Under the Policies

68. The six Underlying Complaints seek substantial damages from the Policyholders based on property damage allegedly occurring in South Carolina. The Policyholders purchased insurance from the Insurer Defendants for such claims, and the Insurer Defendants’ failure to acknowledge their unqualified obligations has caused Plaintiffs substantial harm. The Underlying Complaints are summarized below.

- i. Robert L. Rose, and Kathleen A. Rose, individually and representing as a class all unit owners of Buildings 20 and 28 of the Lightkeepers Horizontal Property Regime, v. Lightkeepers Village, a South Carolina Partnership; Crossmann Communities of North Carolina, Inc. as Successor in Interest to Pinehurst Builders and Properties, Inc. and Pinehurst Builders and Properties, Inc.; John Stirewalt, AIA Architect, Inc.; Dryvit Systems, Inc.; Chris Homey d/b/a Coastal Stucco; Strand Chemical Company, Inc.; The Coastal Window and Door Center, Inc.; and Norco Windows & Patio Doors, a JELD-WEN Company; and Apache Products, Inc. d/b/a Circle Supply, Inc., Case No. 2000-CP-26-5363, Court of Common Pleas, Horry County, South Carolina

69. In Rose, et al. v. Lightkeepers Village, et al., Case No. 2002-CP-26-5363, the plaintiffs (the "Rose Plaintiffs") filed an action against Crossmann, Pinehurst, and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

70. The Rose Plaintiff's Complaint (the "Rose Complaint") (attached hereto as **Exhibit B**), alleges a cause of action for damages arising from property damage caused by an occurrence.

71. The Rose Complaint alleges, among other things, that "water has penetrated the exterior walls of the Buildings; . . . termites have entered and destroyed parts of the Buildings; and numerous construction defects exist in many of the Buildings." (Rose Compl. ¶ 12.) The Rose Complaint further alleges that "the Buildings have sustained substantial water intrusion, mold, mildew, rot and deterioration." (Id.)

72. The Rose Complaint alleges that the Rose Plaintiffs will lose the use of their residences for a substantial period of time and that “there may be damage to the individual units” as a result of the repair, restoration, and remediation of the Buildings. (Id.)

73. As a result of the alleged negligence, the Rose Complaint seeks compensatory and other damages for the alleged property damage and loss of use of their apartment units.

74. The Rose Plaintiffs’ claims are allegations of “property damage” caused by an “occurrence” under the Policies, which trigger the Insurer Defendants’ duty to defend and indemnify Crossmann and Pinehurst.

75. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the Rose Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

76. No exclusions of the Policies apply to the Rose Plaintiffs’ claims.

- ii. Buck Creek Golf Villas Horizontal Property Regime and Buck Creek Golf Villas Homeowners' Association, Inc. v. Buck Creek Development, Inc. and Crossmann Communities of North Carolina, Inc., as successor to Buck Creek Development, Inc., Pinehurst Builders, Inc. and Crossmann Communities of North Carolina, Inc. as successor to Pinehurst Builders, Inc. and Daniel Rogers, Case No. 2002-CP-26-4200, Court of Common Pleas, Horry County, South Carolina.

77. In Buck Creek Golf Villas Horizontal Property Regime, et al. v. Buck Creek Development Inc., et al., Case No. 2002-CP-26-4200, the plaintiffs (the "Buck Creek Plaintiffs") filed an action against Buck Creek, Pinehurst, Crossmann and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

78. In the Buck Creek Plaintiffs' Complaint (the "Buck Creek Complaint") (attached hereto as **Exhibit C**), the Buck Creek Plaintiffs allege a cause of action for damages arising from property damage caused by an occurrence. (Buck Creek Compl. ¶ 8.)

79. The Buck Creek Complaint alleges, among other things, "improper and inadequate construction of buildings such that major water intrusion has occurred and extensive mold growth has resulted," (*id.*), that Buck Creek, Pinehurst, Crossmann and others were negligent in "failing to properly protect all exterior wall openings against water and moisture penetration," (*id.* ¶ 8.tt), and that the negligence of Buck Creek, Pinehurst, Crossmann and others resulted in

“improper and incomplete protection of wall openings, allowing water intrusion and associated damages.” (Id. ¶ 8.z)

80. As a result of the alleged negligence, the Buck Creek Plaintiffs seek compensatory damages to remedy the property damage and also seek damages from loss of use and diminution in value of the property. (Id. ¶¶ 13, 17, 22, 26, 29, 33, 38.)

81. The Buck Creek Plaintiffs’ claims are allegations of “property damage” caused by an “occurrence” under the Policies, which trigger the Insurer Defendants’ duty to defend and indemnify Buck Creek, Pinehurst, Crossmann, and Mr. Rogers.

82. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the Buck Creek Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

83. No exclusions of the Policies apply to the Buck Creek Plaintiffs’ claims.

- iii. Lightkeepers Village Homeowners Association, Inc. v. Lightkeepers Village, a South Carolina Partnership, Woodland, Inc., formerly known as Landmark Homes, Inc., Successor to Landmark Homes, Inc., and Landmark Homes, Inc., John Stirewalt, AIA Architect, Inc., Crossmann Communities of N.C., Inc. as Successor in Interest to Pinehurst Builders and Properties, Inc. and Pinehurst Builders and Properties, Inc., Thompson, Barnhill & Stone, Inc., Chris Horney d/b/a Coastal Stucco, Leroy Faircloth d/b/a Carolina Stucco, Dryvit Systems, Inc., Sea Coast Pest Control, Inc., Strand Chemical Company, Inc., Resort Pest Control, Inc., Orkin Exterminating Co., Inc., Troy Hardee Construction Co., Inc. The Coastal Window and Door Center, Inc., The Peachtree Companies, Inc., Lincoln Wood Products, Inc., Timeline Vinyl Products, Inc., ULM Bros., Inc., and Calabash Roofing Co., Case No. 2000-CP-26-43, Court of Common Pleas, Horry County, South Carolina.

84. In Lightkeepers Village Homeowners Association, Inc. v. Lightkeepers Village, et al., Case No. 2000-CP-26-43, the plaintiff (the “Lightkeepers Plaintiff”) filed an action against Pinehurst, Crossmann, and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

85. The Lightkeepers Plaintiff’s Complaint (the “Lightkeepers Complaint”) (attached hereto as **Exhibit D**), alleges a cause of action for damages arising from property damage caused by an occurrence. (Lightkeepers 3rd Am. Compl. ¶¶ 23, 26.m, 26.p.)

86. The Lightkeepers Plaintiff alleges, among other things, that Crossmann and Pinehurst negligently constructed the Plaintiff’s buildings, resulting in the buildings having the propensity to “leak and trap water.” (Id. ¶ 26.)

The Lightkeepers Complaint further alleges that the improper construction of the buildings allowed termites to enter the building, causing "termite damage." (Id. ¶ 27.) The Lightkeepers Plaintiff also alleges "loss of use" of the buildings. (Id.)

87. The claims in the Lightkeepers Complaint are allegations of "property damage" caused by an "occurrence," which trigger the Insurer Defendants' duty to defend and indemnify Pinehurst and Crossmann under the Policies.

88. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the Lightkeepers Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

89. No exclusions of the Policies apply to the Lightkeepers Plaintiff's claims.

iv. **River Oaks Horizontal Property Regime and River Oaks Homeowners Association, Inc. v. Pinehurst Builders, Inc., Crossmann Communities of N.C., Inc. as successor to Pinehurst Builders, Inc., River Oaks Golf Development Corp., Crossmann Communities of N.C., as successor to River Oaks Golf Development Corp., River Oaks Estates Development Corp., Dan Rogers, Castles Consulting Engineers, Inc., R.B. Pond, Inc. as successor to Coastal Grading, Inc., Right Way Construction, Inc., Glen Cornett, Calvin Wrenn and Better Build Windows, Inc., Case No. 00-CP-26-5193, Court of Common Pleas, Horry County, South Carolina.**

90. In River Oaks Horizontal Property Regime, et al. v. Pinehurst Builders, et al., Case No. 00-CP-5193, plaintiffs (the "River Oaks Plaintiffs") filed

an action against Pinehurst, Crossmann, River Oaks and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

91. The River Oaks Plaintiffs' Complaint (the "River Oaks Complaint") (attached hereto as **Exhibit E**), alleges a cause of action for damages arising from property damage caused by an occurrence.

92. The River Oaks Complaint alleges, among other things, "water infiltration," (id. ¶ 15), "deterioration of structural components due to failure of the waterproofing/flashing system at the balconies," (id. ¶ 16(h)), and "[d]eterioration of structural columns due to the use of non-pressure treated wood in an exterior application," (id. ¶ 16(i)), "flooding of the units," (id. ¶ 16(k)), and "termite infestation and destruction due to improper construction methods," (id. ¶ 16(p)).

93. As a result of the alleged negligence, the River Oaks Plaintiffs seek compensatory damages to remedy the property damage and also seek damages for loss of use and diminution in value of the property. (Id. ¶¶ 17, 21, 30.)

94. The claims in the River Oaks Complaint are allegations of "property damage" caused by an "occurrence," which trigger the Insurer Defendants' duty to defend and indemnify Pinehurst, Crossmann, and River Oaks under the Policies.

95. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the River Oaks

Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

96. No exclusions of the Policies apply to the River Oaks Plaintiffs' claims.

v. River Oaks II Horizontal Property Regime and River Oaks Homeowners Association, Inc. v. River Oaks Development Corp., Crossmann Communities of N.C., Inc., As Successor To River Oaks Golf Development Corp., Pinehurst Builders, Inc., Crossmann Communities of N.C., As Successor To Pinehurst Builders, Inc., and Daniel Rogers, Case No. 01-CP-26-5932, Court of Common Pleas, Horry County, South Carolina.

97. In River Oaks II Horizontal Property Regime, et al. v. River Oaks Development Corp., et al., Case No. 01-CP-26-5932, plaintiffs (the "River Oaks II Plaintiffs") filed an action against Pinehurst, Crossmann, and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

98. The River Oaks II Plaintiffs' Complaint (the "River Oaks II Complaint") (attached hereto as **Exhibit F**), alleges a cause of action for damages arising from property damages caused by an occurrence.

99. The River Oaks II Complaint includes, among others, allegations of "improper waterproofing details" (id. ¶ 46.v), and failure of the waterproofing system to prevent water infiltration into the interior portions of the building, (id. ¶ 88(a)), "defective storm water management drainage system," (id. ¶ 46.11), "lack of flashing or weepholes in the brick veneer," (id. ¶ 46.w), and "improper moisture

protection behind the brick veneer,” (id. ¶ 46.x), as well as “defective electrical wiring, breakers, and bussing,” (id. ¶ 46.oo).

100. As a result of the alleged negligence, the River Oaks II Plaintiffs seek compensatory damages to remedy the property damage and also seek damages for loss of use and diminution of value of the property. (Id. ¶¶ 53, 54, 66, 84.)

101. The claims in the River Oaks II Complaint are allegations of “property damage” caused by an “occurrence,” which trigger the Insurer Defendants’ duty to defend and indemnify Pinehurst, Crossmann, and River Oaks under the Policies.

102. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the River Oaks II Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

103. No exclusions of the Policies apply to the River Oaks II Plaintiffs’ claims.

- vi. Waterway Village at River Oaks Horizontal Property Regime and Waterway Village at River Oaks Homeowners Association, Inc. v. River Oaks Golf Development Corp., Pinehurst Builders, Inc., Crossmann Communities of N.C., Inc. as successor to Pinehurst Builders, Inc., Daniel Rogers, Right Way Construction, Inc., Donovan Bros. Roofing & Restoration, Inc., Tri-City Insulation, Sam's Drywall, Hardee Electric Service, Sealey Concrete, Inc., and B&W Landscaping, Case No. 2001-CP-26-535, Court of Common Pleas, Horry County, South Carolina.

104. In Waterway Village at River Oaks Horizontal Property Regime, et al.

v. Waterway Village at River Oaks Homeowners Association, Inc., et al., Case No. 2001-CP-26-535, plaintiffs (the "Waterway Village Plaintiffs") filed an action against Pinehurst, Crossmann, River Oaks and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

105. The Waterway Village Plaintiffs' Complaint (the "Waterway Village Complaint") (attached hereto as **Exhibit G**), alleges a cause of action for damages arising from property damage caused by an occurrence.

106. The Waterway Village Plaintiffs allege, inter alia, inappropriate waterproofing and exterior wrap of the buildings, (Waterway Village Am. Compl. ¶ 38(a)), "improper application of the building wrap, leading to, among other things, inadequate protection of the OSB substrate," (id. ¶ 14.h), "improper or absence of proper moisture protection at wall openings," (id. ¶ 14.i), "improper and incomplete attachment and sealing of vinyl siding and vinyl siding accessories," (id. ¶ 14.k), "improper and incomplete framing of gable end walls, causing

deterioration to the interior,” (id. ¶ 14.p), and “failing to properly protect all exterior wall openings against water and moisture penetration.” (Id. ¶ 14.aa.)

107. As a result of the alleged negligence, the Waterway Village Plaintiffs seek compensatory damages to remedy the property damage and also seek damages for loss of use and diminution in value of the property. (Id. ¶¶ 15, 19, 28.)

108. The claims in the Waterway Village Complaint are allegations of “property damage” caused by an “occurrence,” which triggers the Insurer Defendants’ duty to defend and indemnify Pinehurst and Crossmann under the Policies.

109. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the Waterway Village Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.*

* On or about November 14, 2003, Defendant Harleysville filed a declaratory judgment complaint in the United States District Court for the Eastern District of North Carolina against Pinehurst, Crossmann, River Oaks, and Mr. Rogers, seeking a declaration that it has no obligation to defend and indemnify Pinehurst, Crossmann, River Oaks, and Mr. Rogers against the Waterway Village Complaint. The relief sought by Plaintiffs in this action is far broader and more comprehensive than any relief that could be granted by the North Carolina federal court, and South Carolina substantive law will govern in either forum because the insured property and interests are located here, and the Policies were delivered here.

110. No exclusions of the Policies apply to the Waterway Village Plaintiffs' claims.

D. Events Giving Rise to BB&T-Asura's Liability to Plaintiffs

111. Following the incorporation of River Oaks in June 1993, River Oaks engaged Asura (then known as Associated Insurers, Inc.) to obtain CGL insurance coverage for River Oaks to be effective as of July 1993.

112. River Oaks repeatedly informed Asura that River Oaks was to be included as a named insured on the Harleysville Policies as of July 1993, and at various times, Asura notified River Oaks that it had coverage for the period July 1993, through October 4, 1998.

113. Following the filing of the Waterway Village and River Oaks Complaints, Harleysville refused to defend and indemnify River Oaks on the purported basis that River Oaks was not a named insured for the period during which the underlying damages arose.

114. Plaintiffs suffered damages in having to defend themselves against the the Waterway Village and River Oaks Complaints and to the extent that Harleysville refuses to indemnify Plaintiffs for any damages arising from the Underlying Complaints.

COUNT ONE: INSURER DEFENDANTS --
BREACH OF CONTRACT

115. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 114 above.

116. Plaintiffs are insured under the Insurer Defendants' Policies that were in effect during the alleged events giving rise to the Underlying Complaints and under which the Insurer Defendants' defense obligations were triggered by the allegations in the Underlying Complaints.

117. Plaintiffs sent timely notice of the Underlying Complaints to the Insurer Defendants and have otherwise complied with all provisions of the Policies.

118. The Policies require the Insurer Defendants to defend the Policyholders for all suits seeking damages covered by the Policies.

119. The allegations in the Underlying Complaints are covered under the Policies.

120. No exclusions of the Policies apply to the claims in the Underlying Complaints.

121. The Insurer Defendants have an immediate and indivisible duty to defend and indemnify the Policyholders against the Underlying Complaints.

122. While the Insurer Defendants have defended the Policyholders in the Underlying Complaints, they have done so under a complete reservation of rights, setting forth alleged defenses to coverage that are without merit. The Insurer Defendants refusal to defend the Policyholders against the Underlying Complaints without reservation is a breach of the insurance contracts.

123. The Insurer Defendants have advised Plaintiffs that they believe they have no duty to indemnify the Policyholders under the Policies for any settlement or judgments in the Underlying Complaints. The Insurer Defendants' breaches of their duties to indemnify the Policyholders are breaches of the insurance contracts.

124. As a result of the Insurer Defendants' breaches of the insurance contracts, Plaintiffs have been deprived of the benefits of the Policies, for which substantial premiums were paid, and have sustained damages in an amount to be established at trial.

COUNT TWO: INSURER DEFENDANTS --
DECLARATORY JUDGMENT

125. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 124 above.

126. The Underlying Complaints seek damages that are covered by the Policies and have triggered duties owed by the Insurer Defendants to Plaintiffs

under the Policies, including the Insurer Defendants' duty to defend and duty to indemnify.

127. The coverage grants in the Policies obligate the Insurer Defendants to defend and indemnify the Policyholders against the claims and events described in Paragraphs 68 through 110 above.

128. No exclusions of the Policies apply to the claims of the Underlying Complaints.

129. The Insurer Defendants have wrongfully denied their duty to defend and indemnify the Policyholders without reservation.

130. Plaintiffs seek entry of a Declaratory Judgment declaring the rights and obligations of the Insurer Defendants under the Policies with respect to the Underlying Complaints as follows:

(a) each of the Underlying Complaints sets forth claims that are covered under each of the Policies sold by the Insurer Defendants covering the Policyholders;

(b) no exclusion in any of the Policies bars coverage for any of the Underlying Complaints;

(c) each of the Policies sold by the Insurer Defendants to the Policyholders has an immediate duty to defend and to indemnify the Policyholders with respect to the Underlying Complaints.

131. The issuance of declaratory relief by this Court will fully and finally resolve the existing controversy between Plaintiffs and the Insurer Defendants.

COUNT THREE: BB&T-ASURA – BREACH OF CONTRACT

132. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 131 above.

133. Following the incorporation of River Oaks in June 1993, River Oaks contracted with Asura to obtain insurance coverage for the period July 1993 through October 1998.

134. River Oaks repeatedly informed Asura that River Oaks was to be included as a named insured on the Harleysville Policies as of July 1993, and at various times, Asura notified River Oaks that it had coverage for the period July 1993 through October 4, 1998.

135. Following the filing of the Waterway Village and River Oaks Complaints, Harleysville refused to defend and indemnify River Oaks on the purported basis that River Oaks was not a named insured for the time period during which the underlying damages arose.

136. To the extent that River Oaks is not a named insured on the Harleysville Policies for the time period July 1993 to October 4, 1998, Asura breached its contract with River Oaks to provide insurance coverage.

137. As a result of Asura's breach, Plaintiffs were deprived of the benefits of the insurance coverage for which they bargained and upon which they relied.

138. Plaintiffs are entitled to damages resulting from Asura's breach of contract, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks, in an amount to be determined at trial.

COUNT FOUR: BB&T-ASURA - NEGLIGENCE

139. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 138 above.

140. Following the incorporation of River Oaks in June 1993, River Oaks engaged Defendant Asura to obtain insurance coverage for the period July 1993 through October 1998.

141. Asura owed a duty to River Oaks to use its best efforts to obtain such coverage for River Oaks.

142. River Oaks repeatedly informed Asura that River Oaks was to be included as a named insured on the Harleysville Policies as of July 1993, and at

various times, Asura notified River Oaks that it had coverage for the period July 1993 through October 4, 1998.

143. River Oaks relied in good faith upon Asura's assurances that it had obtained the coverage requested by River Oaks.

144. Following the filing of the Waterway Village and River Oaks Complaints, Harleysville refused to defend and indemnify River Oaks on the purported basis that River Oaks was not a named insured for the time period during which the underlying damages arose.

145. To the extent that River Oaks is not a named insured on the Harleysville Policies for the time period July 1993 to October 4, 1998, Asura was negligent in failing to obtain the insurance coverage requested by River Oaks.

146. As a result of Asura's negligence, Plaintiffs were deprived of the benefits of the insurance coverage that they requested.

147. Plaintiffs are entitled to damages resulting from Asura's negligence, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks, in an amount to be determined at trial.

COUNT FIVE: BB&T-ASURA – BREACH OF FIDUCIARY DUTY

148. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 147 above.

149. Following the incorporation of River Oaks in June 1993, River Oaks engaged Defendant Asura to obtain insurance coverage for the period July 1993 through October 1998.

150. As an insurance agent, Asura owed a fiduciary duty to River Oaks and had a duty to use its best efforts to obtain insurance coverage for River Oaks.

151. Asura was bound to act in good faith and with due regard to the interests of River Oaks.

152. Asura had a duty to provide complete and truthful information regarding any insurance coverage obtained on behalf of River Oaks.

153. River Oaks repeatedly informed Asura that River Oaks was to be included as a named insured on the Harleysville Policies as of July 1993, and at various times, Asura notified River Oaks that it had coverage for the period July 1993 through October 4, 1998.

154. Following the filing of the Waterway Village and River Oaks Complaints, Harleysville refused to defend and indemnify River Oaks on the purported basis that River Oaks was not a named insured for the time period during which the underlying damages arose.

155. To the extent that River Oaks is not a named insured on the Harleysville Policies for the time period June 1993 to October 4, 1998, Asura breached its fiduciary duty to River Oaks.

156. Plaintiffs are entitled to damages resulting from Asura's breach of fiduciary duty, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks, in an amount to be determined at trial.

JURY TRIAL DEMAND

157. Plaintiffs demand trial by jury as to all issues and counts in this Complaint triable by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- (a) enter judgment on Count One in favor of Plaintiffs and against the Insurer Defendants;
- (b) enter judgment on Count One in favor of Plaintiffs and against the Insurer Defendants in an amount sufficient to compensate Plaintiffs for all damages resulting from the Insurer Defendants' breach of their obligations under the Policies;
- (c) award in favor of Plaintiffs and against the Insurer Defendants pre-judgment interest on all amounts awarded as compensatory and

incidental damages, in an amount to be calculated in accordance with law;

- (d) enter declaratory judgment on Count Two in favor of Plaintiffs and against the Insurer Defendants that declares the rights and obligations of the Insurer Defendants under the Policies with respect to the Underlying Complaints as follows:
 - (i) each of the Underlying Complaints sets forth claims that are covered under each of the Policies sold by the Insurer Defendants covering the Policyholders;
 - (ii) no exclusion in any of the insurance policies bars coverage for any of the Underlying Complaints;
 - (iii) each of the Policies sold by the Insurer Defendants to the Policyholders has an immediate duty to defend and to indemnify the Policyholders with respect to the Underlying Complaints.
- (e) enter judgment on Count Three in favor of Plaintiffs and against BB&T Insurance;
- (f) enter judgment on Count Three in favor of Plaintiffs and against BB&T Insurance in an amount sufficient to compensate Plaintiffs for

all damages resulting from Asura's breach of its contract with River Oak;

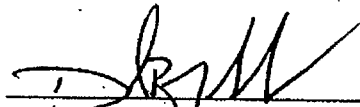
- (g) enter judgment on Count Four in favor of Plaintiffs and against BB&T Insurance;
- (h) enter judgment on Count Four in favor of Plaintiffs and against BB&T Insurance in an amount sufficient to compensate Plaintiffs for all damages resulting from Asura's negligence;
- (i) enter judgment on Count Five in favor of Plaintiffs and against BB&T Insurance;
- (j) enter judgment on Count Five in favor of Plaintiffs and against BB&T Insurance in an amount sufficient to compensate Plaintiffs for all damages resulting from Asura's breach of fiduciary duty;
- (k) award in favor of Plaintiffs and against BB&T Insurance pre-judgment interest on all amounts awarded as compensatory and incidental damages, in an amount to be calculated in accordance with law;
- (l) award Plaintiffs their attorneys' fees in an amount sufficient to reimburse Plaintiffs for costs resulting from Defendants' breach of contract and/or negligence;

- (m) award Plaintiffs their costs associated with this action; and
- (n) award to Plaintiffs and against Defendants such other, further, and additional relief as the Court deems just and proper.

Dated: January 8, 2004

Respectfully submitted,

BELLAMY, RUTENBERG,
COPELAND, EPPS, GRAVELY &
BOWERS PA



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P.O. Box 357
Myrtle Beach, SC 29578
(843) 448-2400

Attorney for Plaintiffs

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Crossmann Communities of North)
Carolina, Inc., Beazer Homes)
Investment Corp., and Daniel Rogers,)

Plaintiffs,)

v.)

Harleysville Mutual Insurance)
Company, Indiana Insurance)
Company, Massachusetts Bay)
Insurance Company, Regent)
Insurance Company, Cincinnati)
Insurance Company, and Associated)
Insurers, Inc. of Myrtle Beach,)

Defendants.)

Regent Insurance Co.,)

Third-Party Plaintiff,)

v.)

Waterway Village River Oaks)
Horizontal Property Regime, Water-)
way Village at River Oaks Homeowners)
Association, Inc., River Oaks)
Horizontal Property Regime, River)
Oaks Homeowners Association, Inc.)
Lightkeepers Village Homeowners)
Association, Inc., Robert L. Rose and)
Kathleen A. Rose, individually and re-)
presenting as a class all unit owners of)
Buildings 20 and 28 of the Light-)
keepers Horizontal Property Regime,)
River Oaks II Horizontal Property)
Regime, River Oaks Homeowners)
Association, Inc., Buck Creek Golf)
Villas Horizontal Property Regime, and)
Buck Creek Golf Villas Homeowners)
Association, Inc.,)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No. 2004-CP-26-84

SECOND AMENDED COMPLAINT

JURY TRIAL DEMANDED

HORRY COUNTY
05 JUN -2 PM 4: 06
MICHAEL J. JENNINGS
CLERK OF COURT

PLAINTIFFS' SECOND AMENDED COMPLAINT

NOW COME Plaintiffs, Crossmann Communities of North Carolina, Inc. ("Crossmann"), Beazer Homes Investment Corp. ("Beazer"), and Daniel Rogers ("Mr. Rogers") (collectively, "Plaintiffs"), and for their Second Amended Complaint against Defendants Harleysville Mutual Insurance Company ("Harleysville"), Indiana Insurance Company ("Indiana"), Massachusetts Bay Insurance Company ("Massachusetts Bay"), Cincinnati Insurance Company ("Cincinnati") (collectively, the "Insurer Defendants"), and Associated Insurors, Inc. of Myrtle Beach ("Associated Insurors") (all defendants collectively referred to as "Defendants"), allege and aver as follows:

I. BACKGROUND FACTS

1. This action was commenced on or about January 8, 2004 by Plaintiffs. Plaintiffs and certain predecessors-in-interest, including Pinehurst Builders, Inc. ("Pinehurst"), River Oaks Golf Development Corp. ("River Oaks"), Buck Creek Development, Inc. ("Buck Creek"), and Crossmann have been sued in six cases pending in the state courts of South Carolina (the "Underlying Complaints"). The suits generally allege property damage in South Carolina caused by occurrences resulting from the actions or inactions of the Plaintiffs and/or their subcontractors taking place in South Carolina.

2. Plaintiffs sought declaratory and other relief against the Insurer Defendants. Plaintiffs filed an Amended Complaint on or about February 17, 2004, to assert claims against Associated Insurors, Inc. of Myrtle Beach. Plaintiffs sought relief against Defendant Associated Insurors for Associated Insurors' breach of contract, negligence, and breach of fiduciary duty for Associated Insurors' failure to obtain insurance coverage for all of Plaintiffs' entities beginning in 1993.

3. The Defendants in this action were Harleysville, Indiana, Massachusetts Bay, Cincinnati, and Regent Insurance Company ("Regent"). Effective May, 2005, Plaintiffs and Regent entered into a Confidential Settlement and Release that requires Regent to make certain payments for the Underlying Lawsuits and releases Regent from any further obligations related to such claims. As a result, Plaintiffs continue herein to seek declaratory and other relief against the remaining Defendants, but there is no longer a dispute between Plaintiffs and Regent and Plaintiffs have agreed to dismiss their claims against Regent.

4. Pinehurst, Crossmann, River Oaks, and Buck Creek are named insureds under various insurance policies sold by the Insurer Defendants. As named insured and successor-in-interest to Pinehurst, River Oaks, and Buck Creek, Crossmann is insured by comprehensive general liability ("CGL") policies and excess policies issued by the Insurer Defendants; and as successor-in-interest to Crossmann, Beazer is also insured by CGL and excess policies issued by the Insurer Defendants, which contain, among other things, duties on the part of the Insurer Defendants to defend and indemnify the Plaintiffs with respect to the Underlying Complaints. The Insurer Defendants have reserved their rights under the policies and have advised the Plaintiffs of various reasons why the Insurer Defendants believe there is no coverage for the Underlying Complaints.

5. Associated Insurors, Harleysville's agent, was an insurance agency that obtained obtain insurance coverage for the Plaintiffs. Associated Insurors represented to Plaintiffs that the Harleysville policies would provide coverage for, among other things, claims for property damage arising from acts or omissions of subcontractors. Harleysville has denied coverage to the Plaintiffs for each of the Underlying Complaints on the basis that claims for property damage arising from acts or omissions of subcontractors are not covered under their Policies. As a result,

Associated Insurers misrepresented the nature of coverage the policies afforded, and is liable to Plaintiffs for the indemnity payment, if any, for the Underlying Lawsuits. Associated Insurers, as agent for Harleysville, and Harleysville are liable for all defense and indemnity costs that Plaintiffs have incurred or may incur with respect to all of the Underlying Lawsuits.

6. This is a civil action arising out of the Insurer Defendants' breach of their obligations to the Plaintiffs under the CGL and excess coverage policies. This action seeks compensatory damages and a declaratory judgment to enforce the terms of the policies and to make the Plaintiffs whole. The Plaintiffs also seek compensatory damages from Associated Insurers to the extent Associated Insurers breached its duty to obtain insurance coverage for the time periods requested by River Oaks and fraudulently misrepresented that the Harleysville Policies would cover Plaintiffs' claims. Plaintiffs in this action seek full and final resolution of all coverage disputes with all of their insurers covering the six Underlying Complaints.

II. PARTIES, JURISDICTION, AND VENUE

7. Crossmann was a North Carolina corporation with its principal operations in Myrtle Beach, South Carolina. Crossmann was in the business of residential real estate development and construction.

8. Beazer is a Delaware corporation with its principal place of business in Atlanta, Georgia. Beazer is in the business of residential real estate development and construction.

9. Mr. Rogers is a citizen and resident of Brunswick County, North Carolina. Mr. Rogers is an architect who was employed by Pinehurst and Crossman at the time of the events giving rise to this Complaint.

10. Harleysville is a corporation organized and existing under the laws of Pennsylvania with its principal place of business in Harleysville, Pennsylvania. At all times material hereto, Harleysville was in the business of selling contracts of insurance to commercial

entities such as Plaintiffs and has sold insurance policies covering risks located within the state of South Carolina.

11. Indiana is a corporation organized and existing under the laws of Indiana with its principal place of business in Keene, New Hampshire. At all times material hereto, Indiana was in the business of selling contracts of insurance to commercial entities such as Plaintiffs and has sold insurance policies covering risks located within the state of South Carolina.

12. Massachusetts Bay is a corporation organized and existing under the laws of Massachusetts with its principal place of business in Worcester, Massachusetts. At all times material hereto, Massachusetts Bay was in the business of selling contracts of insurance to commercial entities such as Plaintiffs and has sold insurance policies covering risks located within the state of South Carolina.

13. Cincinnati is a corporation organized and existing under the laws of Ohio with its principal place of business in Fairfield, Ohio. At all times material hereto, Cincinnati was in the business of selling contracts of insurance to commercial entities such as the Plaintiffs and has sold insurance policies covering risks located within the state of South Carolina.

14. Associated Insurors is a corporation organized and existing under the laws of South Carolina with its principal place of business in Myrtle Beach, South Carolina.

15. This Court has jurisdiction over the parties to this action and the subject matter thereof pursuant to Art. V, § 11 of the Constitution of the State of South Carolina and S.C. Code Ann. §§ 15-53-10 through 15-53-140.

16. All suits brought against insurance companies doing business in South Carolina may be brought in the county where the loss occurs. A substantial portion of the alleged

property damage and events giving rise to this action occurred in this jurisdiction. Therefore, venue is proper in this Court pursuant to S.C. Code Ann. § 15-7-70.

17. This Court has personal jurisdiction over the Insurer Defendants with respect to the claims set forth in this Complaint pursuant to S.C. Code Ann. § 36-2-803(1)(f); a court may exercise personal jurisdiction over those who contract directly or by an agent to insure any person, property, or risk located in South Carolina at the time of contracting.

18. As a result of the foregoing allegations, the Defendants are subject to the jurisdiction of this Court, and venue is proper in this Court.

III. FACTUAL ALLEGATIONS

a. The Plaintiff Corporate Entities

19. Crossmann was incorporated on or about May 11, 1998, as a wholly owned subsidiary of Crossmann Communities, Inc. ("CCI").

20. River Oaks was incorporated on or about June 25, 1993, and merged into Crossmann in May, 1998. Crossmann is a successor-in-interest by merger to all of River Oaks's rights under applicable insurance policies.

21. Buck Creek was incorporated on or about June 25, 1993, and merged into Crossmann in May, 1998. Crossmann is a successor-in-interest by merger to all of Buck Creek's rights under applicable insurance policies.

22. Pinehurst was incorporated on or about December 31, 1979, and merged into Crossmann in May 1998. Crossmann is a successor-in-interest by merger to all of Pinehurst's rights under applicable insurance policies.

23. CCI and Crossmann merged into Beazer on or about April 17, 2002. Beazer is the successor-in-interest by merger to all of Crossmann's rights under applicable insurance policies.

b. The Insurance Policies

24. Harleysville, Indiana, and Massachusetts Bay provided insurance coverage to Pinehurst, Crossmann, Beazer, River Oaks, Buck Creek, and/or Mr. Rogers as outlined in the Schedule of Insurance attached as **Exhibit A** and incorporated by reference herein.

i. Harleysville Policies

25. Harleysville sold a CGL policy, Policy No. CB9A5801, to Pinehurst that was in effect from January 29, 1993 through August 29, 1998.

26. On or about June 26, 1998, the name of the insured on Harleysville Policy No. CB9A5801 was changed to Crossmann Communities of North Carolina, Inc. d/b/a Pinehurst Builders.

27. Harleysville sold a comprehensive general liability policy, Policy No. GL705673, to River Oaks that was in effect from July 1993 through October 4, 1998.

28. Pinehurst was named as an additional insured under Harleysville Policy No. GL705673.

29. Harleysville sold an excess coverage policy, Policy No. BEC9A5801, to Pinehurst that was in effect from July 29, 1993 through August 29, 1998. Harleysville Policy No. BEC9A5801 was issued to Pinehurst, Crossmann, and River Oaks.

30. On or about June 26, 1998 the named insured on Harleysville Policy No. BEC9A5801 was changed from Pinehurst to Crossmann Communities of North Carolina d/b/a Pinehurst Builders.

31. On September 8, 1994, River Oaks was added to Harleysville Policy No. BEC9A5801 as an additional insured.

32. Harleysville sold Pinehurst, River Oaks, and Buck Creek other general liability and excess coverage policies that were in effect at various times from 1993 to 1998 and may be applicable to the claims alleged in the Underlying Complaints.

33. These policies issued to River Oaks and Pinehurst by Harleysville (the "Harleysville Policies") contain no deductibles or self-insured retentions.

34. Daniel Rogers is insured under the Harleysville Policies as an employee of a named insured.

35. The Harleysville Policies were delivered to River Oaks and Pinehurst in Myrtle Beach, South Carolina.

36. The Insuring Agreements in the CGL policies issued by Harleysville provide, in pertinent part, as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" [or] "property damage" . . . to which this insurance applies. . . . We will have the right and duty to defend any "suit" seeking those damages.

(Harleysville CGL Policies § II.A.1., "Business Liability.")

37. The Harleysville CGL policies provide that Harleysville has the duty to defend the insured against any suit seeking damages for "property damage" caused by an "occurrence."

(*Id.* §§ II.A.1.a. and b., "Business Liability.") An "occurrence" is defined to include an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.* § II.F.9, "Liability and Medical Expenses Definitions.")

38. The Harleysville CGL policies define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," and includes "[l]oss of use of tangible property that is not physically injured." (*Id.* § II.F.12., "Liability and Medical Expenses Definitions.")

ii. Indiana Policies

39. From July 1, 1993 through August 29, 1998, CCI was insured by CGL policies issued by Indiana. From July 1, 1997 through August 29, 1998, CCI was insured by Indiana CGL policies (the "Indiana Policies") numbered 42-168-444 and 42-178-801.

40. The Indiana Policies cover any and all of CCI's subsidiaries, financially controlled organizations, and joint ventures.

41. Pinhurst, Crossmann, River Oaks, and Buck Creek qualify as additional insureds under the Indiana Policies.

42. Daniel Rogers is insured under the Indiana Policies as an employee of a named insured.

43. The Insuring Agreements in the Indiana Policies provide, in pertinent part, as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.

(Indiana Policies § I.A.1.a, "Bodily Injury and Property Damage Liability.")

44. The Indiana Policies provide that Indiana has the duty to defend the insured against any suit seeking damages for "bodily injury" or "property damage" caused by an "occurrence." (*Id.* §§ I.A.1.a. and b., "Bodily Injury and Property Damage Liability.") An "occurrence" is defined to include an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.* § V.12, "Definitions.")

45. The Indiana Policies define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," and includes "[l]oss of use of tangible property that is not physically injured." (*Id.* § V.15.a. and b., "Definitions.")

iii. Massachusetts Bay Policy

46. Massachusetts Bay sold a general liability policy, Massachusetts Bay Policy No. ZDI 5260801 (the "Massachusetts Bay Policy"), to CCI that was in effect from August 29, 1998 through August 29, 2000.

47. The Massachusetts Bay Policy covers any and all of CCI's subsidiaries, financially controlled organizations, and joint ventures.

48. Pinchurst, Crossmann, River Oaks, and Buck Creek qualify as additional insureds under the Massachusetts Bay Policy.

49. Daniel Rogers is insured under the Massachusetts Bay Policy as an employee of a named insured.

50. The Insuring Agreement in the Massachusetts Bay Policy provides, in pertinent part, as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.

(Massachusetts Bay Policy § I.A.1.a., "Bodily Injury and Property Damage Liability.")

51. The Massachusetts Bay Policy provides that Massachusetts Bay has the duty to defend the insured against any suit seeking damages for "bodily injury" or "property damage" caused by an "occurrence." (*Id.* §§ I.A.1.a. and b., "Bodily Injury and Property Damage Liability.") An "occurrence" is defined to include an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.* § V.12, "Definitions.")

52. The Massachusetts Bay Policy defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property," and includes "[l]oss of use of tangible property that is not physically injured." (*Id.* § V.15.a. and b., "Definitions.")

iv. Cincinnati Policies

53. Cincinnati sold excess liability policies to CCI. Policy No. CCC 4382766 was in effect from July 1, 1995 to July 1, 1998, and Policy No. CCC 4445840 was in effect from July 1, 1998 to July 1, 2002 (the "Cincinnati Policies").

54. The Cincinnati Policies cover any and all of CCI's subsidiaries, financially controlled organizations, and joint ventures.

55. Pinehurst, Crossmann, River Oaks, and Buck Creek qualify as additional insureds under the Cincinnati Policies.

56. Daniel Rogers is insured under the Cincinnati Policies as an employee of a named insured.

57. The Insuring Agreements in the Cincinnati Policies provide, in pertinent part, as follows:

We will pay on behalf of the insured the "ultimate net loss" which the insured is legally obligated to pay as damages in excess of the "underlying insurance" or for an "occurrence" covered by this policy which is either excluded or not covered by "underlying insurance" because of... "[b]odily injury" or "property damage" covered by this policy occurring during the policy period and caused by an "occurrence."

(Cincinnati Policies § I.A., "Coverages.")

58. The Cincinnati Policies provide that Cincinnati has the duty to defend the insured against any claim or suit seeking damages for "bodily injury" or "property damage" not covered by "underlying insurance" or other insurance. (Id. § I.C.1, "Defense and Supplementary Payments.") An "occurrence" is defined to include an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Id. § V.9, "Definitions.")

59. The Cincinnati Policies define "property damage" as "[p]hysical injury to or destruction of tangible property including all resulting loss of use," and includes "[l]oss of use of tangible property that is not physically injured." (*Id.* § V.12.a. and b., "Definitions.")

60. The insurance policies issued by Harleysville, Indiana, Massachusetts Bay, and Cincinnati to the Plaintiffs will hereinafter be collectively referred to as the "Policies."

c. Events Giving Rise to the Insurer Defendants' Duties Under the Policies

61. The six Underlying Complaints seek substantial damages from the Plaintiffs based on property damage allegedly occurring in South Carolina. The Plaintiffs purchased insurance from the Insurer Defendants for such claims, and the Insurer Defendants' failure to acknowledge their unqualified obligations has caused Plaintiffs substantial harm. The Underlying Complaints are summarized below.

i. Robert L. Rose, and Kathleen A. Rose, individually and representing as a class all unit owners of Buildings 20 and 28 of the Lightkeepers Horizontal Property Regime, v. Lightkeepers Village, a South Carolina Partnership; Crossmann Communities of North Carolina, Inc. as Successor in Interest to Pinehurst Builders and Properties, Inc. and Pinehurst Builders and Properties, Inc.; John Stirewalt, AIA Architect, Inc.; Dryvit Systems, Inc.; Chris Homev d/b/a Coastal Stucco; Strand Chemical Company, Inc.; The Coastal Window and Door Center, Inc.; and Noreco Windows & Patio Doors, a JELD-WEN Company; and Apache Products, Inc. d/b/a Circle Supply, Inc., Case No. 2000-CP-26-5363, Court of Common Pleas, Horry County, South Carolina

62. In Rose, et al. v. Lightkeepers Village, et al., Case No. 2002-CP-26-5363, the plaintiffs (the "Rose Plaintiffs") filed an action against Crossmann, Pinehurst, and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

63. The Rose Plaintiff's Complaint (the "Rose Complaint") (attached hereto as **Exhibit B**), alleges a cause of action for damages arising from property damage caused by an occurrence.

64. The Rose Complaint alleges, among other things, that “water has penetrated the exterior walls of the Buildings; . . . termites have entered and destroyed parts of the Buildings; and numerous construction defects exist in many of the Buildings.” (Rose Compl. ¶ 12.) The Rose Complaint further alleges that “the Buildings have sustained substantial water intrusion, mold, mildew, rot and deterioration.” (Id.)

65. The Rose Complaint alleges that the Rose Plaintiffs will lose the use of their residences for a substantial period of time and that “there may be damage to the individual units” as a result of the repair, restoration, and remediation of the Buildings. (Id.)

66. As a result of the alleged negligence, the Rose Complaint seeks compensatory and other damages for the alleged property damage and loss of use of their apartment units.

67. The Rose Plaintiffs’ claims are allegations of “property damage” caused by an “occurrence” under the Policies, which trigger the Insurer Defendants’ duty to defend and indemnify Crossmann and Pinehurst.

68. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the Rose Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

69. No exclusions of the Policies apply to the Rose Plaintiffs’ claims.

i. Buck Creek Golf Villas Horizontal Property Regime and Buck Creek Golf Villas Homeowners’ Association, Inc. v. Buck Creek Development, Inc. and Crossmann Communities of North Carolina, Inc., as successor to Buck Creek Development, Inc., Pinehurst Builders, Inc. and Crossmann Communities of North Carolina, Inc. as successor to Pinehurst Builders, Inc. and Daniel Rogers, Case No. 2002-CP-26-4200, Court of Common Pleas, Horry County, South Carolina.

70. In Buck Creek Golf Villas Horizontal Property Regime, et al. v. Buck Creek Development Inc., et al., Case No. 2002-CP-26-4200, the plaintiffs (the “Buck Creek Plaintiffs”)

filed an action against Buck Creek, Pinehurst, Crossmann and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

71. In the Buck Creek Plaintiffs' Complaint (the "Buck Creek Complaint") (attached hereto as Exhibit C), the Buck Creek Plaintiffs allege a cause of action for damages arising from property damage caused by an occurrence. (Buck Creek Compl. ¶ 8.)

72. The Buck Creek Complaint alleges, among other things, "improper and inadequate construction of buildings such that major water intrusion has occurred and extensive mold growth has resulted," (id.), that Buck Creek, Pinehurst, Crossmann and others were negligent in "failing to properly protect all exterior wall openings against water and moisture penetration," (id. ¶ 8.tt), and that the negligence of Buck Creek, Pinehurst, Crossmann and others resulted in "improper and incomplete protection of wall openings, allowing water intrusion and associated damages." (Id. ¶ 8.z)

73. As a result of the alleged negligence, the Buck Creek Plaintiffs seek compensatory damages to remedy the property damage and also seek damages from loss of use and diminution in value of the property. (Id. ¶¶ 13, 17, 22, 26, 29, 33, 38.)

74. The Buck Creek Plaintiffs' claims are allegations of "property damage" caused by an "occurrence" under the Policies, which trigger the Insurer Defendants' duty to defend and indemnify Buck Creek, Pinehurst, Crossmann, and Mr. Rogers.

75. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the Buck Creek Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

76. No exclusions of the Policies apply to the Buck Creek Plaintiffs' claims.

- ii. Lightkeepers Village Homeowners Association, Inc. v. Lightkeepers Village, a South Carolina Partnership, Woodland, Inc., formerly known as Landmark Homes, Inc., Successor to Landmark Homes, Inc., and Landmark Homes, Inc., John Stirewalt, AIA Architect, Inc., Crossmann Communities of N.C., Inc. as Successor in Interest to Pinehurst Builders and Properties, Inc. and Pinehurst Builders and Properties, Inc., Thompson, Barnhill & Stone, Inc., Chris Horney d/b/a Coastal Stucco, Leroy Faircloth d/b/a Carolina Stucco, Dryvit Systems, Inc., Sea Coast Pest Control, Inc., Strand Chemical Company, Inc., Resort Pest Control, Inc., Orkin Exterminating Co., Inc., Troy Hardee Construction Co., Inc. The Coastal Window and Door Center, Inc., The Peachtree Companies, Inc., Lincoln Wood Products, Inc., Timeline Vinyl Products, Inc., ULM Bros., Inc., and Calabash Roofing Co., Case No. 2000-CP-26-43, Court of Common Pleas, Horry County, South Carolina.

77. In Lightkeepers Village Homeowners Association, Inc. v. Lightkeepers Village, et al., Case No. 2000-CP-26-43, the plaintiff (the "Lightkeepers Plaintiff") filed an action against Pinehurst, Crossmann, and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

78. The Lightkeepers Plaintiff's Complaint (the "Lightkeepers Complaint") (attached hereto as Exhibit D), alleges a cause of action for damages arising from property damage caused by an occurrence. (Lightkeepers 3rd Am. Compl. ¶¶ 23, 26.m, 26.p.)

79. The Lightkeepers Plaintiff alleges, among other things, that Crossmann and Pinehurst negligently constructed the Plaintiff's buildings, resulting in the buildings having the propensity to "leak and trap water." (Id. ¶ 26.) The Lightkeepers Complaint further alleges that the improper construction of the buildings allowed termites to enter the building, causing "termite damage." (Id. ¶ 27.) The Lightkeepers Plaintiff also alleges "loss of use" of the buildings. (Id.)

80. The claims in the Lightkeepers Complaint are allegations of "property damage" caused by an "occurrence," which trigger the Insurer Defendants' duty to defend and indemnify Pinehurst and Crossmann under the Policies.

81. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the Lightkeepers Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

82. No exclusions of the Policies apply to the Lightkeepers Plaintiff's claims.

iii. River Oaks Horizontal Property Regime and River Oaks Homeowners Association, Inc. v. Pinchurst Builders, Inc., Crossmann Communities of N.C., Inc. as successor to Pinchurst Builders, Inc., River Oaks Golf Development Corp., Crossmann Communities of N.C., as successor to River Oaks Golf Development Corp., River Oaks Estates Development Corp., Dan Rogers, Castles Consulting Engineers, Inc., R.B. Pond, Inc. as successor to Coastal Grading, Inc., Right Way Construction, Inc., Glen Cornett, Calvin Wrenn and Better Build Windows, Inc., Case No. 00-CP-26-5193, Court of Common Pleas, Horry County, South Carolina.

83. In River Oaks Horizontal Property Regime, et al. v. Pinchurst Builders, et al., Case No. 00-CP-5193, plaintiffs (the "River Oaks Plaintiffs") filed an action against Pinchurst, Crossmann, River Oaks and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

84. The River Oaks Plaintiffs' Complaint (the "River Oaks Complaint") (attached hereto as Exhibit E), alleges a cause of action for damages arising from property damage caused by an occurrence.

85. The River Oaks Complaint alleges, among other things, "water infiltration," (id. ¶ 15), "deterioration of structural components due to failure of the waterproofing/flashing system at the balconies," (id. ¶ 16(h)), and "[d]eterioration of structural columns due to the use of non-pressure treated wood in an exterior application," (id. ¶ 16(i)), "flooding of the units," (id. ¶ 16(k)), and "termite infestation and destruction due to improper construction methods," (id. ¶ 16(p)).

86. As a result of the alleged negligence, the River Oaks Plaintiffs seek compensatory damages to remedy the property damage and also seek damages for loss of use and diminution in value of the property. (Id. ¶ 17, 21, 30.)

87. The claims in the River Oaks Complaint are allegations of "property damage" caused by an "occurrence," which trigger the Insurer Defendants' duty to defend and indemnify Pinehurst, Crossmann, and River Oaks under the Policies.

88. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the River Oaks Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

89. No exclusions of the Policies apply to the River Oaks Plaintiffs' claims.

iv. River Oaks II Horizontal Property Regime and River Oaks Homeowners Association, Inc. v. River Oaks Development Corp., Crossmann Communities of N.C., Inc., As Successor To River Oaks Golf Development Corp., Pinehurst Builders, Inc., Crossmann Communities of N.C., As Successor To Pinehurst Builders, Inc., and Daniel Rogers, Case No. 01-CP-26-5932, Court of Common Pleas, Horry County, South Carolina.

90. In River Oaks II Horizontal Property Regime, et al. v. River Oaks Development Corp., et al., Case No. 01-CP-26-5932, plaintiffs (the "River Oaks II Plaintiffs") filed an action against Pinehurst, Crossmann, and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

91. The River Oaks II Plaintiffs' Complaint (the "River Oaks II Complaint") (attached hereto as Exhibit F), alleges a cause of action for damages arising from property damages caused by an occurrence.

92. The River Oaks II Complaint includes, among others, allegations of "improper waterproofing details" (id. ¶ 46.v), and failure of the waterproofing system to prevent water

infiltration into the interior portions of the building, (id. ¶ 88(a)), "defective storm water management drainage system," (id. ¶ 46.11), "lack of flashing or weepholes in the brick veneer," (id. ¶ 46.w), and "improper moisture protection behind the brick veneer," (id. ¶ 46.x), as well as "defective electrical wiring, breakers, and bussing," (id. ¶ 46.oo).

93. As a result of the alleged negligence, the River Oaks II Plaintiffs seek compensatory damages to remedy the property damage and also seek damages for loss of use and diminution of value of the property. (Id. ¶¶ 53, 54, 66, 84.)

94. The claims in the River Oaks II Complaint are allegations of "property damage" caused by an "occurrence," which trigger the Insurer Defendants' duty to defend and indemnify Pinehurst, Crossmann, and River Oaks under the Policies.

95. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the River Oaks II Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

96. No exclusions of the Policies apply to the River Oaks II Plaintiffs' claims.

v. Waterway Village at River Oaks Horizontal Property Regime and Waterway Village at River Oaks Homeowners Association, Inc. v. River Oaks Golf Development Corp., Pinehurst Builders, Inc., Crossmann Communities of N.C., Inc. as successor to Pinehurst Builders, Inc., Daniel Rogers, Right Way Construction, Inc., Donovan Bros. Roofing & Restoration, Inc., Tri-City Insulation, Sam's Drywall, Hardee Electric Service, Sealey Concrete, Inc., and B&W Landscaping, Case No. 2001-CP-26-535, Court of Common Pleas, Horry County, South Carolina.

97. In Waterway Village at River Oaks Horizontal Property Regime, et al. v. Waterway Village at River Oaks Homeowners Association, Inc., et al., Case No. 2001-CP-26-535, plaintiffs (the "Waterway Village Plaintiffs") filed an action against Pinehurst, Crossmann,

River Oaks and others that is now pending in the Court of Common Pleas, Horry County, South Carolina.

98. The Waterway Village Plaintiffs' Complaint (the "Waterway Village Complaint") (attached hereto as **Exhibit G**), alleges a cause of action for damages arising from property damage caused by an occurrence.

99. The Waterway Village Plaintiffs allege, inter alia, inappropriate waterproofing and exterior wrap of the buildings, (Waterway Village Am. Compl. ¶ 38(a)), "improper application of the building wrap, leading to, among other things, inadequate protection of the OSB substrate," (id. ¶ 14.h), "improper or absence of proper moisture protection at wall openings," (id. ¶ 14.i), "improper and incomplete attachment and sealing of vinyl siding and vinyl siding accessories," (id. ¶ 14.k), "improper and incomplete framing of gable end walls, causing deterioration to the interior," (id. ¶ 14.p), and "failing to properly protect all exterior wall openings against water and moisture penetration." (Id. ¶ 14.aa.)

100. As a result of the alleged negligence, the Waterway Village Plaintiffs seek compensatory damages to remedy the property damage and also seek damages for loss of use and diminution in value of the property. (Id. ¶¶ 15, 19, 28.)

101. The claims in the Waterway Village Complaint are allegations of "property damage" caused by an "occurrence," which triggers the Insurer Defendants' duty to defend and indemnify Pinchurst and Crossmann under the Policies.

102. Plaintiffs complied with their obligations under the Policies by providing timely and proper notice of the various claims raised in the Waterway Village Complaint to the Insurer Defendants and demanding that the Insurer Defendants honor their duty to defend under the Policies.

103. No exclusions of the Policies apply to the Waterway Village Plaintiffs' claims.

d. Events Giving Rise to Associated Insurors's Liability to Plaintiffs

104. Associated Insurors was the agent of Harleysville in the early 1990s.

105. Following the incorporation of River Oaks in June 1993, River Oaks engaged in discussions with Associated Insurors to discuss the possibility of purchasing CGL insurance coverage for River Oaks to be effective as of July 1993. At the same time, Pinehurst discussed the possibility of purchasing CGL coverage for Pinehurst through Associated Insurors.

106. Associated Insurors represented to Pinehurst and River Oaks that the Harleysville policies would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors. Pinehurst and River Oaks relied upon the representations of Associated Insurors that such third-party claims for property damage would be covered and purchased the policies recommended by Associated Insurors. After the policies were effective, Harleysville paid a number of such claims on behalf of Pinehurst and River Oaks. To the extent that Harleysville has denied responsive coverage to Pinehurst and River Oaks on the basis that the Underlying Lawsuits are not covered under their policies, Associated Insurors misrepresented the nature of coverage the policies afforded in an attempt to induce Pinehurst and River Oaks to purchase such policies.

107. River Oaks also repeatedly informed Associated Insurors that River Oaks was to be included as a named insured on the Harleysville Policies as of July 1993, and at various times, Associated Insurors notified River Oaks that it had coverage for the period July 1993, through October 4, 1998.

108. Following the filing of the Waterway Village and River Oaks Complaints, Harleysville refused to defend and indemnify River Oaks on the purported basis that River Oaks was not a named insured for the period during which the underlying damages arose. Plaintiffs suffered damages in having to defend themselves against the Waterway Village and River Oaks Complaints and to the extent that Harleysville refuses to indemnify Plaintiffs for any damages arising from the Underlying Complaints.

COUNT ONE: INSURER DEFENDANTS -
BREACH OF CONTRACT

109. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 108 above.

110. Plaintiffs are insured under the Insurer Defendants' Policies that were in effect during the alleged events giving rise to the Underlying Complaints and under which the Insurer Defendants' defense obligations were triggered by the allegations in the Underlying Complaints. Plaintiffs sent timely notice of the Underlying Complaints to the Insurer Defendants and have otherwise complied with all provisions of the Policies.

111. The Policies require the Insurer Defendants to defend the Plaintiffs for all suits seeking damages covered by the Policies.

112. The allegations in the Underlying Complaints are covered under the Policies.

113. No exclusions of the Policies apply to the claims in the Underlying Complaints.

114. The Insurer Defendants have an immediate and indivisible duty to defend and indemnify the Plaintiffs against the Underlying Complaints.

115. While the Insurer Defendants have defended the Plaintiffs in the Underlying Complaints, they have done so under a complete reservation of rights, setting forth alleged defenses to coverage that are without merit. The Insurer Defendants refusal to defend the

Plaintiffs against the Underlying Complaints without reservation is a breach of the insurance contracts.

116. The Insurer Defendants have advised Plaintiffs that they believe they have no duty to indemnify the Plaintiffs under the Policies for any settlement or judgments in the Underlying Complaints. The Insurer Defendants' breaches of their duties to indemnify the Plaintiffs are breaches of the insurance contracts.

117. As a result of the Insurer Defendants' breaches of the insurance contracts, Plaintiffs have been deprived of the benefits of the Policies, for which substantial premiums were paid, and have sustained damages in an amount to be established at trial.

**COUNT TWO: INSURER DEFENDANTS -
DECLARATORY JUDGMENT**

118. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 117 above.

119. The Underlying Complaints seek damages that are covered by the Policies and have triggered duties owed by the Insurer Defendants to Plaintiffs under the Policies, including the Insurer Defendants' duty to defend and duty to indemnify.

120. The coverage grants in the Policies obligate the Insurer Defendants to defend and indemnify the Plaintiffs against the claims and events described in Paragraphs 59 through 101 above.

121. No exclusions of the Policies apply to the claims of the Underlying Complaints. The Insurer Defendants have wrongfully denied their duty to defend and indemnify the Plaintiffs without reservation.

122. Plaintiffs seek entry of a Declaratory Judgment declaring the rights and obligations of the Insurer Defendants under the Policies with respect to the Underlying Complaints as follows:

(a) each of the Underlying Complaints sets forth claims that are covered under each of the Policies sold by the Insurer Defendants covering the Plaintiffs;

(b) no exclusion in any of the Policies bars coverage for any of the Underlying Complaints;

(c) each of the Policies sold by the Insurer Defendants to the Plaintiffs has an immediate duty to defend and to indemnify the Plaintiffs with respect to the Underlying Complaints.

123. The issuance of declaratory relief by this Court will fully and finally resolve the existing controversy between Plaintiffs and the Insurer Defendants.

COUNT THREE: HARLEYSVILLE - ESTOPPEL

124. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 123 above.

125. Harleysville, through its agent, Associated Insurors, represented to Pinehurst and River Oaks that, under the Policies that Harleysville and Associated Insurors would issue to Pinehurst and River Oaks, Harleysville would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

126. Pinehurst and River Oaks, in making their determination to purchase their insurance policies from Harleysville, reasonably relied on the representations made by

Harleysville's agent, Associated Insurors, that the policies would provide coverage for, among other things, claims for property damage arising from acts or omissions of subcontractors. Plaintiffs believed that the Harleysville policies would, in fact, provide coverage for, among other things, claims for property damage arising from acts or omissions of subcontractors.

127. Plaintiffs reasonably and detrimentally relied on these representations in purchasing Harleysville's policies.

128. Harleysville now denies coverage to Plaintiffs on the basis that the Underlying Lawsuits are not covered under their policies.

129. As a result of these misrepresentations, Harleysville is estopped from denying coverage for the Underlying Lawsuits under the policies.

COUNT FOUR: HARLEYSVILLE - NEGLIGENCE

130. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 129 above.

131. Following the incorporation of River Oaks in June 1993, River Oaks engaged in discussions with Associated Insurors, Harleysville's agent, to discuss the possibility of purchasing CGL insurance coverage for River Oaks to be effective as of July 1993. At the same time, Pinehurst discussed the possibility of purchasing CGL coverage for Pinehurst through Associated Insurors.

132. Associated Insurors represented to Pinehurst and River Oaks that, under the Policies that Harleysville and Associated Insurors would issue to Pinehurst and River Oaks, Harleysville would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinehurst

and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

133. Pinchurst relied in good faith upon Associated Insurors's assurances that it had obtained the coverage requested by Pinchurst.

134. Harleysville now denies coverage on the basis that claims for property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies.

135. As a result of Harleysville's agent's negligence, and as a result of Harleysville's denial that its Policies provide coverage to Plaintiffs for third-party claims for property damage arising from acts or omissions of subcontractors, Plaintiffs were deprived of the benefits of the insurance coverage for which they bargained and upon which they relied. Plaintiffs are entitled to damages resulting from Harleysville's fraud, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks and Pinchurst, in an amount to be determined at trial.

COUNT FIVE: HARLEYSVILLE - FRAUD

136. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 135 above.

137. Following the incorporation of River Oaks in June 1993, River Oaks engaged in discussions with Associated Insurors, Harleysville's agent, to discuss the possibility of purchasing CGL insurance coverage for River Oaks to be effective as of July 1993. At the same time, Pinchurst discussed the possibility of purchasing CGL coverage for Pinchurst through Associated Insurors.

138. Associated Insurors represented to Pinchurst and River Oaks that, under the Policies that Harleysville and Associated Insurors would issue to Pinchurst and River Oaks,

Harleysville would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

139. Those representations were false because Harleysville now denies that its Policies cover claims for property damage arising from acts or omissions in the construction projects undertaken by Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

140. Harleysville's agent's misrepresentations were material to Plaintiffs' decision to contract with Harleysville for insurance coverage.

141. Harleysville's agent and/or Harleysville either knew of the falsity of these representations or recklessly disregarded the falsity of the representations.

142. Harleysville's agent intended that Plaintiffs rely upon its representations when deciding to purchase the Harleysville Policies.

143. Plaintiffs were unaware that the representations were false and that Harleysville would deny coverage on the basis that claims for property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies, particularly because Harleysville has paid such claims in the past.

144. Pinehurst and River Oaks reasonably relied upon the representations of Associated Insurers that such third-party claims for property damage would be covered and purchased the policies recommended by Associated Insurers.

145. To the extent that Harleysville now denies coverage on the basis that claims for property damage arising from acts or omissions in the construction projects undertaken by

Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors, are not covered under the Harleysville Policies, Harleysville, through its agent, defrauded Pinehurst of the insurance coverage it believed it was contracting for.

146. As a result of Harleysville's fraud, and as a result of Harleysville's denial that its Policies provide coverage to Plaintiffs for third-party claims for property damage arising from acts or omissions of subcontractors, Plaintiffs were deprived of the benefits of the insurance coverage for which they bargained and upon which they relied. Plaintiffs are entitled to damages resulting from Harleysville's fraud, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks and Pinehurst, in an amount to be determined at trial.

COUNT SIX: HARLEYSVILLE - NEGLIGENT MISREPRESENTATION

147. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 146 above.

148. Harleysville's agent, Associated Insurors, falsely represented to Pinehurst and River Oaks that, under the Policies that Harleysville and Associated Insurors would issue to Pinehurst and River Oaks, Harleysville would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

149. Harleysville now denies coverage on the basis that claims for property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies.

150. Harleysville had a pecuniary interest in its agents' representations since the representations resulted in Plaintiffs contracting with Harleysville for insurance coverage.

151. Harleysville had a duty of care to see that it and its agent transmitted truthful information to Plaintiffs.

152. Harleysville breached its duty of care to see that it and its agent transmitted truthful information to Plaintiffs.

153. Plaintiffs reasonably and justifiably relied upon Harleysville's agent's representations that the Harleysville Policies would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions of subcontractors.

154. As a result of Harleysville's negligent misrepresentations, and as a result of Harleysville's denial that its Policies provide coverage to Plaintiffs for third-party claims for property damage arising from acts or omissions of subcontractors, Plaintiffs were deprived of the benefits of the insurance coverage for which they bargained and upon which they relied. Plaintiffs are entitled to damages resulting from Harleysville's negligent misrepresentations, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks and Pinehurst, in an amount to be determined at trial.

COUNT SEVEN: ASSOCIATED INSURORS - BREACH OF CONTRACT

155. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 154 above.

156. Following the incorporation of River Oaks in June 1993, River Oaks contracted with Associated Insurors to obtain insurance coverage for the period July 1993 through October 1998.

157. River Oaks repeatedly informed Associated Insurors that River Oaks was to be included as a named insured on the Harleysville Policies as of July 1993, and at various times, Associated Insurors notified River Oaks that it had coverage for the period July 1993 through October 4, 1998.

158. Following the filing of the Waterway Village and River Oaks Complaints, Harleysville refused to defend and indemnify River Oaks on the purported basis that River Oaks was not a named insured for the time period during which the underlying damages arose.

159. To the extent that River Oaks is not a named insured on the Harleysville Policies for the time period July 1993 to October 4, 1998, Associated Insurors breached its contract with River Oaks to provide insurance coverage.

160. Pinehurst also contracted with Associated Insurors to obtain insurance coverage for the period July 1993 through October 1998.

161. Pinehurst instructed Associated Insurors to obtain adequate insurance so that it would be completely covered for, among other things, third-party claims for property damage arising from acts or omissions of subcontractors.

162. Associated Insurors represented to Pinehurst and River Oaks that, under the Policies that Harleysville and Associated Insurors would issue to Pinehurst and River Oaks, Harleysville would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

163. To the extent that Harleysville now denies coverage on the basis that claims for third-party property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies, Associated Insurors breached its contract with Pinehurst to provide such insurance coverage.

164. As a result of Associated Insurors's breach, and as a result of Harleysville's denial that its Policies provide coverage to Plaintiffs for third-party claims for property damage arising

from acts or omissions of subcontractors, Plaintiffs were deprived of the benefits of the insurance coverage for which they bargained and upon which they relied. Plaintiffs are entitled to damages resulting from Harleysville's fraud, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks and Pinehurst, in an amount to be determined at trial.

COUNT EIGHT: ASSOCIATED INSURORS - NEGLIGENCE

165. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 164 above.

166. Following the incorporation of River Oaks in June 1993, River Oaks engaged Defendant Associated Insurors to obtain insurance coverage for the period July 1993 through October 1998.

167. Associated Insurors owed a duty to River Oaks to use its best efforts to obtain such coverage for River Oaks.

168. River Oaks repeatedly informed Associated Insurors that River Oaks was to be included as a named insured on the Harleysville Policies as of July 1993, and at various times, Associated Insurors notified River Oaks that it had coverage for the period July 1993 through October 4, 1998.

169. River Oaks relied in good faith upon Associated Insurors's assurances that it had obtained the coverage requested by River Oaks.

170. Following the filing of the Waterway Village and River Oaks Complaints, Harleysville refused to defend and indemnify River Oaks on the purported basis that River Oaks was not a named insured for the time period during which the underlying damages arose.

171. To the extent that River Oaks is not a named insured on the Harleysville Policies for the time period July 1993 to October 4, 1998, Associated Insurors was negligent in failing to obtain the insurance coverage requested by River Oaks.

172. Pinehurst also engaged Defendant Associated Insurors to obtain insurance coverage for the period July 1993 through October 1998.

173. Pinehurst instructed Associated Insurors to obtain adequate insurance so that it would be completely covered for, among other things, third-party claims for property damage arising from acts or omissions of subcontractors.

174. Associated Insurors represented to Pinehurst and River Oaks that, under the Policies that Harleysville and Associated Insurors would issue to Pinehurst and River Oaks, Harleysville would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

175. Pinehurst relied in good faith upon Associated Insurors's assurances that it had obtained the coverage requested by Pinehurst.

176. Harleysville now denies coverage on the basis that third-party claims for property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies.

177. As a result of Associated Insurors's negligence, and as a result of Harleysville's denial that its Policies provide coverage to Plaintiffs for third-party claims for property damage arising from acts or omissions of subcontractors, Plaintiffs were deprived of the benefits of the insurance coverage for which they bargained and upon which they relied. Plaintiffs are entitled to damages resulting from Harleysville's fraud, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks and Pinehurst, in an amount to be determined at trial.

COUNT NINE: ASSOCIATED INSURORS – BREACH OF FIDUCIARY DUTY

178. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 177 above.

179. Following the incorporation of River Oaks in June 1993, River Oaks engaged Defendant Associated Insurors to obtain insurance coverage for the period July 1993 through October 1998.

180. As an insurance agent, Associated Insurors owed a fiduciary duty to River Oaks and had a duty to use its best efforts to obtain insurance coverage for River Oaks. Associated Insurors was bound to act in good faith and with due regard to the interests of River Oaks.

181. Associated Insurors had a duty to provide complete and truthful information regarding any insurance coverage obtained on behalf of River Oaks.

182. River Oaks repeatedly informed Associated Insurors that River Oaks was to be included as a named insured on the Harleystville Policies as of July 1993, and at various times, Associated Insurors notified River Oaks that it had coverage for the period July 1993 through October 4, 1998.

183. Following the filing of the Waterway Village and River Oaks Complaints, Harleystville refused to defend and indemnify River Oaks on the purported basis that River Oaks was not a named insured for the time period during which the underlying damages arose.

184. To the extent that River Oaks is not a named insured on the Harleystville Policies for the time period June 1993 to October 4, 1998, Associated Insurors breached its fiduciary duty to River Oaks.

185. Pinehurst also engaged Defendant Associated Insurors to obtain insurance coverage for the period July 1993 through October 1998.

186. Pinchurst instructed Associated Insurors to obtain adequate insurance so that it would be completely covered for, among other things, third-party claims for property damage arising from acts or omissions of subcontractors.

187. Associated Insurors represented to Pinchurst and River Oaks that, under the Policies that Harleysville and Associated Insurors would issue to Pinchurst and River Oaks, Harleysville would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinchurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

188. As an insurance agent, Associated Insurors owed a fiduciary duty to Pinchurst and had a duty to use its best efforts to obtain insurance coverage for Pinchurst.

189. Associated Insurors was bound to act in good faith and with due regard to the interests of Pinchurst.

190. Associated Insurors had a duty to provide complete and truthful information regarding any insurance coverage obtained on behalf of Pinchurst.

191. Pinchurst relied in good faith upon Associated Insurors's assurances that it had obtained the coverage requested by Pinchurst.

192. To the extent that Harleysville now denies coverage on the basis that claims for third-party property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies, Associated Insurors breached its fiduciary duty to Pinchurst to provide such insurance coverage.

193. As a result of Associated Insurors's breach, and as a result of Harleysville's denial that its Policies provide coverage to Plaintiffs for third-party claims for property damage arising

from acts or omissions of subcontractors, Plaintiffs were deprived of the benefits of the insurance coverage for which they bargained and upon which they relied. Plaintiffs are entitled to damages resulting from Harleysville's fraud, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks and Pinehurst, in an amount to be determined at trial.

COUNT TEN: ASSOCIATED INSURORS - FRAUD

194. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 193 above.

195. Following the incorporation of River Oaks in June 1993, River Oaks engaged in discussions with Associated Insurors, Harleysville's agent, to discuss the possibility of purchasing CGL coverage for River Oaks to be effective as of July 1993. At the same time, Pinehurst discussed the possibility of purchasing CGL coverage for Pinehurst through Associated Insurors.

196. Associated Insurors represented to Pinehurst and River Oaks that, under the Policies that Harleysville and Associated Insurors would issue to Pinehurst and River Oaks, Harleysville would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

197. These representations were false because Harleysville now denies coverage on the basis that claims for property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies.

198. Associated Insurors's misrepresentations were material to Plaintiffs' decision to contract with Harleysville for insurance coverage.

199. Associated Insurers either knew of the falsity of these representations or recklessly disregarded the falsity of the representations.

200. Associated Insurers intended that Plaintiffs rely upon its representations when purchasing the Harleysville Policies.

201. Plaintiffs were unaware that the representations were false and that Harleysville would deny coverage on the basis that claims for property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies, particularly because Harleysville has paid such claims in the past.

202. Plaintiffs reasonably relied upon Associated Insurers's misrepresentations that the Harleysville Policies would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions of subcontractors.

203. To the extent that Harleysville now denies coverage on the basis that claims for property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies, Associated Insurers defrauded Pinehurst of the insurance coverage it believed it was contracting for.

204. As a result of Associated Insurers's fraud, and as a result of Harleysville's denial that its Policies provide coverage to Plaintiffs for third-party claims for property damage arising from acts or omissions of subcontractors, Plaintiffs were deprived of the benefits of the insurance coverage for which they bargained and upon which they relied. Plaintiffs are entitled to damages resulting from Harleysville's fraud, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks and Pinehurst, in an amount to be determined at trial.

COUNT ELEVEN: ASSOCIATED INSURORS - NEGLIGENT MISREPRESENTATION

205. Plaintiffs incorporate by reference, as if fully set forth herein, the statements in numbered Paragraphs 1 through 204 above.

206. Associated Insurors, as Harleysville's agent, falsely represented to Pinehurst and River Oaks that, under the Policies that Harleysville and Associated Insurors would issue to Pinehurst and River Oaks, Harleysville would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions in the construction projects to be undertaken by Pinehurst and River Oaks, including claims for property damage arising from acts or omissions of subcontractors.

207. Harleysville now denies coverage on the basis that claims for property damage arising from acts or omissions of subcontractors are not covered under the Harleysville Policies.

208. Associated Insurors had a pecuniary interest in Plaintiffs contracting with Harleysville to obtain insurance coverage since doing so would result in monetary fees for Associated Insurors.

209. Associated Insurors had a duty of care to see that it transmitted truthful information to Plaintiffs.

210. Associated Insurors breached its duty of care to see that it transmitted truthful information to Plaintiffs.

211. Plaintiffs reasonably and justifiably relied upon Associated Insurors's representations that the Harleysville Policies would provide coverage for, among other things, third-party claims for property damage arising from acts or omissions of subcontractors.

212. As a result of Associated Insurors's negligent misrepresentations, and as a result of Harleysville's denial that its Policies provide coverage to Plaintiffs for third-party claims for

property damage arising from acts or omissions of subcontractors, Plaintiffs were deprived of the benefits of the insurance coverage for which they bargained and upon which they relied. Plaintiffs are entitled to damages resulting from Harleysville's fraud, including any damages resulting from Harleysville's refusal to defend and indemnify River Oaks and Pinehurst, in an amount to be determined at trial.

JURY TRIAL DEMAND

213. Plaintiffs demand trial by jury as to all issues and counts in this Complaint triable by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

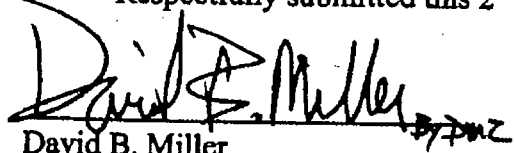
- (a) enter judgment on Count One in favor of Plaintiffs and against the Insurer Defendants;
- (b) enter judgment on Count One in favor of Plaintiffs and against the Insurer Defendants in an amount sufficient to compensate Plaintiffs for all damages resulting from the Insurer Defendants' breach of their obligations under the Policies;
- (c) award in favor of Plaintiffs and against the Insurer Defendants pre-judgment interest on all amounts awarded as compensatory and incidental damages, in an amount to be calculated in accordance with law;
- (d) enter declaratory judgment on Count Two in favor of Plaintiffs and against the Insurer Defendants that declares the rights and obligations of the Insurer Defendants under the Policies with respect to the Underlying Complaints as follows:

- (i) each of the Underlying Complaints sets forth claims that are covered under each of the Policies sold by the Insurer Defendants covering the Plaintiffs;
 - (ii) no exclusion in any of the insurance policies bars coverage for any of the Underlying Complaints;
 - (iii) each of the Policies sold by the Insurer Defendants to the Plaintiffs has an immediate duty to defend and to indemnify the Plaintiffs with respect to the Underlying Complaints.
- (e) enter judgment on Count Three in favor of Plaintiffs and against Harleysville;
 - (f) enter judgment on Count Three in favor of Plaintiffs and against Harleysville and declare that Harleysville is estopped from asserting any defenses to its coverage obligations;
 - (g) enter judgment on Count Four in favor Plaintiffs and against Harleysville;
 - (h) enter judgment on Count Four in favor of Plaintiffs and against Associated Harleysville in an amount sufficient to compensate Plaintiffs for all damages resulting from Harleysville's negligence;
 - (i) enter judgment on Count Five in favor of Plaintiffs and against Harleysville;
 - (j) enter judgment on Count Five in favor of Plaintiffs and against Harleysville in an amount sufficient to compensate Plaintiffs for all damages resulting from Harleysville's fraud;
 - (k) enter judgment on Count Six in favor of Plaintiffs and against Harleysville;

- (l) enter judgment on Count Six in favor of Plaintiffs and against Associated Insurors in an amount sufficient to compensate Plaintiffs for all damages resulting from Harleysville's negligent misrepresentations;
- (m) enter judgment on Count Seven in favor of Plaintiffs and against Associated Insurors;
- (n) enter judgment on Count Seven in favor of Plaintiffs and against Associated Insurors in an amount sufficient to compensate Plaintiffs for all damages resulting from Associated Insurors's breach of contract;
- (o) enter judgment on Count Eight in favor of Plaintiffs and against Associated Insurors;
- (p) enter judgment on Count Eight in favor of Plaintiffs and against Associated Insurors in an amount sufficient to compensate Plaintiffs for Associated Insurors's negligence;
- (q) enter judgment on Count Nine in favor of Plaintiffs and against Associated Insurors;
- (r) enter judgment on Count Nine in favor of Plaintiffs and against Associated Insurors in an amount sufficient to compensate Plaintiffs for Associated Insurors's breach of fiduciary duty;
- (s) enter judgment on Count Ten in favor of Plaintiffs and against Associated Insurors;
- (t) enter judgment on Count Ten in favor of Plaintiffs and against Associated Insurors in an amount sufficient to compensate Plaintiffs for Associated Insurors's fraud;

- (u) enter judgment on Count Eleven in favor of Plaintiffs and against Associated Insurors;
- (v) enter judgment on Count Eleven in favor of Plaintiffs and against Associated Insurors in an amount sufficient to compensate Plaintiffs for Associated Insurors's negligent misrepresentations;
- (w) award in favor of Plaintiffs and against Associated Insurors pre-judgment interest on all amounts awarded as compensatory and incidental damages, in an amount to be calculated in accordance with law;
- (x) award Plaintiffs their attorneys' fees in an amount sufficient to reimburse Plaintiffs for costs resulting from Defendants' breach of contract and/or negligence;
- (y) award Plaintiffs their costs associated with this action; and
- (z) award to Plaintiffs and against Defendants such other, further, and additional relief as the Court deems just and proper.

Respectfully submitted this 2nd day of June, 2005.


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EXHIBIT A

EXHIBIT A

Schedule of Insurance

Carrier	Insured	Policy Number	Policy Period	Type
Harleysville Mutual Insurance Company	Pinehurst Builders, Inc.; Crossmann Communities of NC, Inc. d/b/a Pinehurst Builders	CB 9A 5801	7/29/93-7/29/94 7/29/94-7/29/95 7/29/95-7/29/96 7/29/96-7/29/97 7/29/97-7/29/98 7/29/98-8/29/98	CGL
Harleysville Mutual Insurance Company	River Oaks Golf Development Corp.; Pinehurst Builders, Inc.	GL 705673	10/4/95-10/4/96 10/4/96-10/4/97	CGL
Harleysville Mutual Insurance Company	Pinehurst Builders, Inc.; Crossmann Communities of NC, Inc. d/b/a Pinehurst Builders; River Oaks Golf Development Corp.; Buck Creek Development, Inc.	BEC 9A 5801	7/29/94-7/29/95 7/29/95-7/29/96 7/29/96-7/29/97 7/29/97-7/29/98 7/29/98-8/29/98	Excess
Indiana Insurance Co.	Crossmann Communities, Inc. and all subsidiaries, etc.	42-168-444	7/1/97-7/1/98	CGL
Indiana Insurance Co.	Crossmann Communities, Inc. and all subsidiaries, etc.	42-178-801	7/1/98-8/29/98	CGL
Massachusetts Bay Insurance Co.	Crossmann Communities, Inc. and all subsidiaries, etc.	ZDI 5260801	8/29/98-8/29/99 8/29/99-8/29/00	CGL
Regent Insurance Co.	Crossmann Communities, Inc.	CCI 0320615	8/29/00-8/29/01 1/1/01-1/1/02	CGL
Cincinnati Insurance Co.	Crossmann Communities, Inc. and all subsidiaries, etc.	CCC 438 27 66	7/1/95-7/1/98	Excess
Cincinnati Insurance Co.	Crossmann Communities, Inc. and all subsidiaries, etc.	CCC 444 58 40	7/1/98-7/1/01 7/1/01-7/1/02	Excess

ROA 165

EXHIBIT B

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2002-CP-26-5363

Paul Beach and Renee Beach,
individually and representing
as a class all unit owners of
Buildings 20 and 28 of the
Lightkeepers Horizontal Property
Regime,

Plaintiffs,

vs.

Lightkeepers Village, a South
Carolina Partnership; Crossman
Communities of North Carolina, Inc.)
as Successor in Interest to
Pinehurst Builders and Properties,
Inc. and Pinehurst Builders and
Properties, Inc.; John Stirewalt,
AIA Architect, Inc.;
Dryvit Systems, Inc.;
Chris Horney d/b/a Coastal Stucco;
Strand Chemical Company, Inc.;
The Coastal Window and Door Center,
Inc.; and Norco Windows & Patio
Doors, a JELD-WEN Company;
and Apache Products, Inc. d/b/a
Circle Supply, Inc.;

Defendants.

AMENDED SUMMONS
(Jury Trial Requested)

FILED
HORRY COUNTY
03 DEC 17 PM 1:48
JEANNE J. ROBERTS
CLERK OF COURT

TO: THE DEFENDANTS ABOVE NAMED:

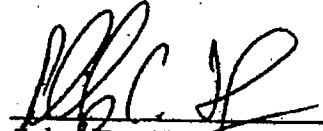
YOU ARE HEREBY SUMMONED and required to answer the
Amended Complaint in this action, of which a copy is herewith
served upon you, and to serve a copy of your answer to the Amended
Complaint on the subscribers at their office at Thompson Henry
P.A., 1318 Third Avenue, Conway, South Carolina, within thirty
days after the service hereof; exclusive of the day of such

service; and if you fail to answer the Amended Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for the relief demanded in the Amended Complaint.

Conway, South Carolina

June 10, 2003

THOMPSON & HENRY, P.A.



John P. Henry
Philip C. Thompson
P. O. Box 1533
1318 Third Avenue
Conway, South Carolina 29526
(843) 248-5741

ATTORNEYS FOR THE PLAINTIFFS

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2002-CP-26-5363

Paul Beach and Renee Beach,
individually and representing
as a class all unit owners of
Buildings 20 and 28 of the
Lightkeepers Horizontal Property
Regime,

Plaintiffs,

vs.

AMENDED COMPLAINT
(Jury Trial Requested)

Lightkeepers Village, a South
Carolina Partnership; Crossman
Communities of North Carolina, Inc.)
as Successor in Interest to
Pinehurst Builders and Properties,
Inc. and Pinehurst Builders and
Properties, Inc.; John Stirewalt,
AIA Architect, Inc.;
Dryvit Systems, Inc.;
Chris Horney d/b/a Coastal Stucco;
Strand Chemical Company, Inc.;
The Coastal Window and Door Center,
Inc.; and Norco Windows & Patio
Doors, a JELD-WEN Company;
and Apache Products, Inc. d/b/a
Circle Supply, Inc.;

Defendants.

FILED
HORRY COUNTY
03 DEC 17 PM 1:48
JEANNE J. ROBERTS
CLERK OF COURT

Plaintiffs, complaining of Defendants, would respectfully
show unto this Honorable Court:

STATEMENT OF FACTS

1. The Plaintiffs are the owners of Condominium Unit
Number 20-D of the Lightkeepers Horizontal Property Regime and
bring this action in their individual names and pursuant to Rule 23
of the South Carolina Rules of Civil Procedure as representing a

class composed of each and every homeowner in Buildings 20 and 28 (hereinafter "the Buildings"). There are fourteen (14) condominium units comprising the Buildings. The Plaintiffs would further allege and show:

- (i) The class is so numerous that joinder of all members is impracticable;
- (ii) There are questions of law and fact common to the class;
- (iii) The claims of the Plaintiffs are typical of the claims of the class;
- (iv) The Plaintiffs will fairly and adequately protect the interest of the class; and
- (v) The amount in controversy exceeds One Hundred Dollars (\$100.00) for each member of the class.

2. The Buildings, the subject of this action, are multi-story buildings all having multiple units in the Buildings.

3. The Defendant Lightkeepers Village (hereinafter "Lightkeepers Village"), a South Carolina Partnership, is, on information and belief, a partnership organized and existing under the laws of the State of South Carolina and is doing business in Horry County, South Carolina. Lightkeepers Village was the developer of the Lightkeepers Village Condominium Project and conveyed the individual units.

4. The Defendant Crossman Communities of North Carolina, Inc. as successor in interest to Pinehurst Builders and Properties, Inc. (hereinafter "Crossman Communities") is, on information and belief, a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. Pinehurst Builders and Properties, Inc. is a North Carolina corporation and on information and belief, was acquired by Crossman Communities which is successor in interest to Pinehurst Builders and Properties, Inc. On information and belief, Pinehurst Builders and Properties, Inc. and/or Crossman Communities constructed the Buildings.

5. John Stirewalt, AIA Architect, Inc. (hereinafter "Stirewalt"), is a corporation organized under the laws of the State of North Carolina. Stirewalt designed the Buildings.

6. The Defendant Dryvit Systems, Inc. (hereinafter "Dryvit Systems"), on information and belief, is a corporation organized and existing under the laws of the State of Georgia and is doing business in Horry County, South Carolina. Dryvit Systems manufactured the synthetic stucco applied to the Buildings and certified the applicator, Chris Horney. On information and belief, agents and employees of Dryvit Systems were on site during the construction of the Buildings. These agents or employees of Dryvit Systems supervised and oversaw the application of the Dryvit System on the Buildings.

7. The Defendant Chris Horney, d/b/a Coastal Stucco (hereinafter "Coastal Stucco"), on information and belief, is a sole proprietorship with its principal place of business in the State of North Carolina and is doing business in Horry County, South Carolina. On information and belief, Coastal Stucco applied the exterior siding including the EIFS and other components of the Buildings. Coastal Stucco also did major repairs to the Buildings' envelope. On information and belief, Coastal Stucco is a certified applicator of the Dryvit system.

8. The Defendant Strand Chemical Company, Inc. (hereinafter "Strand Chemical"), upon information and belief, is a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. On information and belief, Strand Chemical contracted with the Homeowners Association to inspect and treat the Buildings for subterranean termites.

9. The Coastal Window and Door Center, Inc. (hereinafter "Coastal Window") is, on information and belief, a corporation organized and existing under the laws of the State of North Carolina and is doing business in Horry County, South Carolina. On information and belief, Coastal Window supplied the windows for the Buildings. On information and belief, Coastal Window supplied windows including, but not limited to, Norco windows.

10. Norco Windows & Patio Doors, a JELD-WEN Company (hereinafter "Norco") is, on information and belief, a corporation organized and existing under the laws of the State of Wisconsin and is doing business in Horry County, South Carolina. On information and belief, Norco manufactured the windows for the Buildings.

11. Apache Products, Inc. d/b/a Circle Supply, Inc. (hereinafter collectively "Circle Supply"), on information and belief, are corporations organized and existing under the laws of the State of North Carolina and are in the business of selling Dryvit synthetic stucco. On information and belief, Circle Supply sold the Dryvit that was applied to the Buildings.

12. The exterior walls of the Buildings listed above are constructed mainly of synthetic stucco manufactured by Dryvit Systems. The Plaintiffs have recently discovered that water has penetrated the exterior walls of the Buildings; decks and balconies are improperly installed and flashed; flashing and sealants were not installed or were inappropriately installed; termites have entered and destroyed parts of the Buildings; and numerous construction deficiencies exist in many of the Buildings. As a result, the Buildings have sustained substantial water intrusion, mold, mildew, rot and deterioration. The Plaintiffs have recently learned that the Buildings will require closing for a substantial period of time because of the repair, restoration and remediation that will be required and Plaintiffs have further learned that

there may be damage to the individual units as a result of said repair, restoration and remediation.

FOR A FIRST CAUSE OF ACTION

13. The allegations of the Statement of Facts are incorporated herein and made a part and parcel hereof.

14. In the design and construction of the Buildings and in the treatment for termites, the Defendants had a duty to the Plaintiffs to exercise due care and to design, construct and treat the Buildings in accordance with applicable codes, industry standards, manufacturer's requirements and good construction practices.

15. In the construction of the Buildings as well as the pest control treatment of the Buildings as above listed, the Defendants, on information and belief, violated the applicable Standard Building Code adopted by ordinance by Horry County; failed to use good construction practices; failed to follow manufacturer's requirements and recommendations; failed to follow industry standards; used or sold materials which were inappropriate and defective; failed to properly inspect or treat the Buildings for subterranean termites; failed to otherwise comply with the appropriate standard of care; and failed to follow the plans and specifications.

16. The Defendants, on information and belief, were negligent, reckless, willful and wanton and grossly negligent in

numerous particulars, including, but not limited to the following:

- a. In reference to John Stirewalt in specifying synthetic stucco when he knew or should have known that synthetic stucco was an inappropriately designed building component;
- b. In failing to properly construct the exterior walls of the Buildings;
- c. In failing to properly attach and construct the decks and balconies on the Buildings;
- d. In failing to use proper windows and doors and in failing to properly install appropriate and code compliant windows and doors;
- e. In placing defectively designed and constructed materials and buildings in the stream of commerce;
- f. In failing to properly construct firewalls, roofs and other parts of the Buildings;
- g. In manufacturing, specifying, distributing and installing defective windows;
- h. In failing to apply the Dryvit EIFS stucco system and construct the exterior walls of the Buildings in a manner commensurate with industry standards; applicable building codes; and in deviation from manufacturer's requirements and recommendations;
- i. In failing to properly repair areas of defective stucco;
- j. In failing to properly oversee the installation of the Dryvit synthetic stucco system on the Buildings;
- k. In applying a defectively designed synthetic stucco system to the Buildings;
- l. In placing defectively designed synthetic stucco system into the stream of commerce;

- m. In failing to warn the Plaintiffs of the defective nature of its EIFS system and its potential to leak and trap water;
- n. In failing to treat or negligently treating and inspecting the Buildings for subterranean termites;
- o. In manufacturing and distributing a defective synthetic stucco system and placing the same in the stream of commerce;
- p. In failing to warn the Plaintiffs of the defective nature of the synthetic stucco and its tendency to trap water and deteriorate the substrate;
- q. In designing, constructing, and placing in the stream of commerce defective material and buildings as set forth herein and in the report by R. V. Buric dated June 28, 2000, reference to which is craved as forming a part hereof; and
- r. In failing to properly train and supervise its certified applicators of the stucco.

17. The Defendants breached their duty to the Plaintiffs as hereinabove set forth.

18. As a direct and proximate result of the combined and concurring negligence, carelessness, recklessness, willfulness and wantonness of the Defendants as hereinabove set forth, the Plaintiffs have been damaged in that the class members will suffer damage to their units and will lose substantial use of their Buildings as a result of the repair, restoration and remediation of their Buildings.

19. Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in a sum sufficient to

correct any damage to their units and a sum sufficient to compensate them for loss of use and rental of their units, replacement costs of windows and doors, loss of reputation of the Buildings and consequential and punitive damages.

FOR A SECOND CAUSE OF ACTION

20. The allegations of the Statement of Facts and First Cause of Action are incorporated herein and made a part and parcel hereof.

21. In the sale of the condominium units, Lightkeepers Village made express and implied warranties including, but not limited to, the warranty of habitability and fitness. Lightkeepers Village has breached its express and implied warranties as set forth hereinabove and as a result, has placed in the stream of commerce defective construction all to the damage of the Plaintiffs as herein set forth.

22. The Plaintiffs are informed and believe that they are entitled to judgment against the Defendants for damages as set forth above.

FOR A THIRD CAUSE OF ACTION

23. The allegations of the Statement of Facts and First and Second Causes of Action are incorporated herein and made a part and parcel hereof.

24. In the construction of the Buildings listed above, the Defendant contractors made implied warranties of good

workmanship.

25. The Defendants breached their implied warranty of good workmanship as set forth above.

26. That as a direct and proximate result of the breach by the Defendants of their warranty of good workmanship, the Plaintiffs have been damaged as set forth above and are entitled to judgment for actual and consequential damages.

FOR A FOURTH CAUSE OF ACTION

27. The Statement of Facts and the First, Second and Third Causes of Action are incorporated herein and made a part and parcel hereof.

28. In the sale of the synthetic stucco system, Dryvit Systems made express and implied warranties including, but not limited to, the warranties of merchantability and fitness. Dryvit Systems has breached its express and implied warranties as set forth hereinabove and as a result, has placed in the stream of commerce a defective synthetic stucco system resulting in defective construction of the Buildings all to the damage of the Plaintiffs as set forth above.

29. That as a direct and proximate result of the breach by Dryvit Systems of their warranties of merchantability and fitness, the Plaintiffs have been damaged as set forth above and are entitled to judgment for actual and consequential damages.

FOR A FIFTH CAUSE OF ACTION

30. The Statement of Facts and the First, Second, Third and Fourth Causes of Action are incorporated herein and made a part and parcel hereof.

31. Strand Chemical entered into service contracts with the Association for the treatment of subterranean termites, reference to said contracts being craved as forming a part and parcel hereof.

32. That Strand has breached its service contracts with the Homeowners Association by failing to treat or inadequately treating the Buildings for subterranean termites as evidenced by the fact that termites have damaged the Buildings and active termites have been discovered in some of the Buildings.

33. As a direct and proximate result of the breach of the service contracts in providing pest control services to the Plaintiffs' Buildings, the Plaintiffs have been damaged in that the class will suffer loss of use and damage to their individual units and the reputation of the condominiums has been severely impaired.

34. Plaintiffs are informed and believe that they are entitled to judgment against the Defendants as set forth hereinabove.

FOR A SIXTH CAUSE OF ACTION

35. The Statement of Facts and the First, Second, Third, Fourth and Fifth Causes of Action are incorporated herein and made

a part and parcel hereof.

36. The Defendant window manufacturers and distributor made implied and express warranties in the sale and distribution of its windows, including, but not limited to, the warranties of fitness and merchantability.

37. The Defendants breached their warranties as set forth above and the Plaintiffs have been damaged as set forth above and are entitled to judgment for actual and consequential damages.

FOR A SEVENTH CAUSE OF ACTION

38. The Statement of Facts and the First, Second, Third, Fourth, Fifth and Sixth Causes of Action are incorporated herein and made a part and parcel hereof.

39. The Dryvit EIFS system(s) manufactured by Dryvit and sold by Circle Supply was expected to and did reach the Plaintiffs without substantial change in the condition in which it was purchased.

40. The Dryvit EIFS system was in a defective condition, unreasonably dangerous to the Plaintiffs and to the Plaintiffs' property when it left the Defendants' possession or control in that under normal conditions, usage and application, it caused water to accumulate behind the system resulting in deterioration of the substrate; corrosion, mold, mildew, fungi and insects to invade the Buildings.

41. The Defendants were in the chain of distribution of the defective Dryvit system when it purchased said system and subsequently applied it to the Buildings. Plaintiffs' use of the Dryvit system was in a manner in which was intended for use and it was foreseeable to be used in such manner by the Defendants.

42. The Dryvit EIFS system was inherently defective and is incapable, no matter how meticulously applied, of being applied so as not to entrap water behind the system.

43. The Defendants failed to provide notice to the Plaintiffs either directly or indirectly, through sufficient warnings, of the deficiencies in the system and the risk and dangers inherent in the use of the product.

44. As a direct and proximate result of the defective Dryvit EIFS system, the Plaintiffs have and will suffer numerous injuries as hereinabove set forth which will include but not be limited to, complete removal and replacing of the Buildings with a nondefective product and substantial repair of the substrate and structural members of the Buildings which will cause closure of the units.

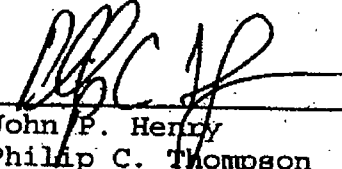
45. Plaintiffs are informed and believe that they are entitled to judgment against the Defendants for actual and punitive damages to compensate them for damages to their units together with loss of use and consequential damages.

WHEREFORE, Plaintiffs pray for judgment against the
Defendants as hereinabove set forth.

Conway, South Carolina

June 10, 2003

THOMPSON & HENRY, P.A.



John P. Henry
Philip C. Thompson
P. O. Box 1533
1318 Third Avenue
Conway, South Carolina 29526
(843) 248-5741

ATTORNEYS FOR THE PLAINTIFFS

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Robert A. Rose and Kathleen A.
Rose, et al.

Plaintiffs,

v.

Lightkeepers Village, et al.,

Defendants.

COVER SHEET FOR CIVIL ACTIONS

DOCKET NO. 2002-CP-26-536

FILED
HORRY COUNTY
02 SEP 18 PM 2:35
JEANNE J. ROBERTS
CLERK OF COURT

The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this Cover Sheet must be served on the Defendant along with the Summons and Complaint.

NATURE OF ACTION: (check one category for the main cause of action)

☐ TORT - Motor Vehicle	☐ CONTRACT - Debt Collection
☐ TORT - Professional Malpractice	☐ CONTRACT - Employment
☐ TORT - Unfair Trade Practices, and Other Economic or Business-Related Wrongs	☒ CONTRACT - Construction
☐ TORT - Products Liability	☐ CONTRACT - Wrongful Breach
☐ TORT - General or Other	☐ CONTRACT - General or Other
☐ PCR	☐ REAL PROPERTY
☐ GOV/ADM - Workers Comp.	☐ MINOR SETTLEMENTS
☐ GOV/ADM - General or Other	☐ DOMESTIC/FOREIGN JUDGMENT
	☐ OTHER (Please Describe)

JURY DEMAND (X) Yes () No

Note: Information requested on this form is preliminary in nature, and for administrative purposes only. The response to this request for information on jury demand merely indicates a likelihood that a jury will or will not be requested and does NOT constitute a demand for or a waiver of trial by jury pursuant to applicable rules or statutes.

DOCKETING INFORMATION (Check One Box.)

- ☐ This case is subject to arbitration (all cases with monetary damages less than \$25,000.00 are subject to arbitration, unless otherwise exempt).
- ☐ This case is subject to mediation (all cases not subject to arbitration must be mediated, unless otherwise exempt).
- ☒ This case is exempt from ADR, and certificate is attached.

Signature of Plaintiff/Plaintiff's Attorney

John P. Henry

Post Office Box 1533

Conway, South Carolina 29528

(843) 248-5741

Date: September 16, 2002.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
DOCKET NO. 2002-CP-26- 5363

Robert L. Rose and Kathleen A.
Rose, et al.)

Plaintiffs,)

v.)

Lightkeepers Village, et al.,)

Defendants.)

**CERTIFICATE OF
EXEMPTION/WITHDRAWAL
FROM ARBITRATION**

FILED
HORRY COUNTY
02 SEP 18 PM 2:35
JEANNE J. ROBERTS
CLERK OF COURT

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE:

___ monetary relief requested in this case exceeds \$25,000;

___ this is a class action;

___ there is a substantial claim for injunction or declaratory relief requested in this case;

___ this case involves (check one or more of the following)

___ title to real estate;
___ wills, trusts and decedents' estates;
___ mortgage foreclosure;
___ partition;

___ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

X monetary relief requested in this case is unspecified but exceeds \$25,000;

___ this case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;

___ this action is appellate in nature;

___ this is a post-conviction relief matter;

___ this is a forfeiture proceeding brought by the State; or

___ this is a contempt of court proceeding.

Date: September 16, 2002.

[Signature]
Attorney for Plaintiff

NOTE: Motion must be presented to the court, a hearing held, and a finding made, for exemption or withdrawal from arbitration for "strong and compelling reason" sought pursuant to Rule 1(d), Rules of Circuit Court Arbitration.

ARB (11/95)

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Robert L. Rose and Kathleen A.)
Rose, individually and representing)
as a class all unit owners of)
Buildings 20 and 28 of the Light-)
keepers Horizontal Property)
Regime,)

Plaintiffs,)

vs.)

Lightkeepers Village, a South)
Carolina Partnership; Crossman)
Communities of North Carolina, Inc.)
as Successor in Interest to Pinehurst)
Builders and Properties, Inc. and)
Pinehurst Builders and Properties,)
Inc.; John Stirewalt, AIA Architect,)
Inc.; Dryvit Systems, Inc.; Chris)
Horney d/b/a Coastal Stucco; Strand)
Chemical Company, Inc.; The)
Coastal Window and Door Center,)
Inc.; and Norco Windows & Patio)
Doors, a JELD-WEN Company;)
and Apache Products, Inc. d/b/a)
Circle Supply, Inc.;)

Defendants.)

COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2002-CP-26- 5363

SUMMONS
(Jury Trial Requested)

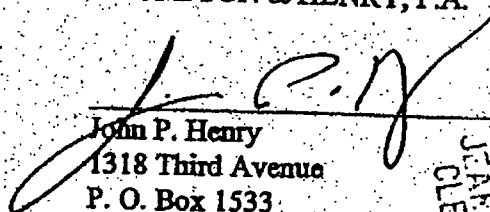
FILED
HORRY COUNTY
02 SEP 18 PM 2:35
CLARENCE J. ROBERTS
CLERK OF COURT

TO: THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscriber at his office at Thompson & Henry, P.A., 1318 Third Avenue, Conway, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply

to the Court for the relief demanded in the Complaint.

THOMPSON & HENRY, P.A.


John P. Henry
1318 Third Avenue
P. O. Box 1533
Conway, South Carolina 29524
(803) 248-5741
Attorneys for the Plaintiff

Conway, South Carolina

September 16, 2002.

FILED
HENRY COUNTY
02 SEP 18 PM 2:35
JEANNE J. ROBERTS
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2002-CP-26- 5363

Robert L. Rose and Kathleen A.)
Rose, individually and representing)
as a class all unit owners of)
Buildings 20 and 28 of the Light-)
keepers Horizontal Property)
Regime,)

Plaintiffs,)

vs.)

Lightkeepers Village, a South)
Carolina Partnership; Crossman)
Communities of North Carolina, Inc.)
as Successor in Interest to Pinchurst)
Builders and Properties, Inc. and)
Pinchurst Builders and Properties,)
Inc.; John Stirewalt, AIA Architect,)
Inc.; Dryvit Systems, Inc.; Chris)
Horney d/b/a Coastal Stucco; Strand)
Chemical Company, Inc.; The)
Coastal Window and Door Center,)
Inc.; and Norco Windows & Patio)
Doors, a JELD-WEN Company;)
and Apache Products, Inc. d/b/a)
Circle Supply, Inc.;)

Defendants.)

COMPLAINT
(Jury Trial Requested)

FILED
HORRY COUNTY
02 SEP 18 PM 2:35
JEANNE J. ROBERTS
CLERK OF COURT

Plaintiffs, complaining of Defendants, would respectfully show unto this Honorable Court:

STATEMENT OF FACTS

1. The Plaintiffs are the owners of condominium unit number 20-B of the Lightkeepers Horizontal Property Regime and bring this action in their individual names and pursuant to Rule 23 of the *South Carolina Rules of Civil Procedure* as representing a class composed of each and every homeowner in Buildings 20 and 28 (hereinafter "the Buildings"). There are fourteen (14)

condominium units comprising the Buildings. The Plaintiffs would further allege and show:

- (i) The class is so numerous that joinder of all members is impracticable;
- (ii) There are questions of law and fact common to the class;
- (iii) The claims of the Plaintiffs are typical of the claims of the class;
- (iv) The Plaintiffs will fairly and adequately protect the interest of the class; and
- (v) The amount in controversy exceeds One Hundred Dollars (\$100.00) for each member of the class.

2. The Buildings, the subject of this action, are multi-story buildings all having multiple units in the Buildings.

3. The Defendant, Lightkeepers Village (hereinafter "Lightkeepers Village"), a South Carolina Partnership, is, on information and belief, a partnership organized and existing under the laws of the State of South Carolina and is doing business in Horry County, South Carolina. Lightkeepers Village was the developer of the Lightkeepers Village condominium project and conveyed the individual units.

4. The Defendant, Crossman Communities of North Carolina, Inc. as successor in interest to Pinehurst Builders and Properties, Inc. (hereinafter "Crossman Communities") is, on information and belief, a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. Pinehurst Builders and Properties, Inc. is a North Carolina corporation and on information and belief, was acquired by Crossman Communities which is successor in interest to Pinehurst Builders and Properties, Inc. On information and belief, Pinehurst Builders and Properties, Inc. and/or Crossman Communities constructed the Buildings.

5. John Stirewalt, AIA Architect, Inc. (hereinafter "Stirewalt"), is a corporation organized under the laws of the State of North Carolina. Stirewalt designed the Buildings.

6. The Defendant, Dryvit Systems, Inc. (hereinafter "Dryvit Systems"), on information and belief, is a corporation organized and existing under the laws of the State of Georgia and is doing business in Horry County, South Carolina. Dryvit Systems manufactured the synthetic stucco applied to the Buildings and certified the applicator, Chris Horney. On information and belief, agents and employees of Dryvit Systems were on site during the construction of the Buildings. These agents or employees of Dryvit Systems supervised and oversaw the application of the Dryvit System on the Buildings.

7. The Defendant, Chris Horney, d/b/a Coastal Stucco (hereinafter "Coastal Stucco"), on information and belief, is a sole proprietorship with its principal place of business in the State of North Carolina and is doing business in Horry County, South Carolina. On information and belief, Coastal Stucco applied the exterior siding including the EIFS and other components of the Buildings. Coastal Stucco also did major repairs to the Buildings' envelope. On information and belief, Coastal Stucco is a certified applicator of the Dryvit system.

8. The Defendant, Strand Chemical Company, Inc. (hereinafter "Strand Chemical"), upon information and belief, is a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. On information and belief, Strand Chemical contracted with the Homeowners Association to inspect and treat the Buildings for subterranean termites.

9. The Coastal Window and Door Center, Inc. (hereinafter "Coastal Window") is, on information and belief, a corporation organized and existing under the laws of the State of North

Carolina and is doing business in Horry County, South Carolina. On information and belief, Coastal Window supplied the windows for the Buildings. On information and belief, Coastal Window supplied windows including, but not limited to, Norco windows.

10. Norco Windows & Patio Doors, a JELD-WEN Company (hereinafter "Norco") is, on information and belief, a corporation organized and existing under the laws of the State of Wisconsin and is doing business in Horry County, South Carolina. On information and belief, Norco manufactured the windows for the Buildings.

11. Apache Products, Inc. d/b/a Circle Supply, Inc. (hereinafter collectively "Circle Supply"), on information and belief, are corporations organized and existing under the laws of the State of North Carolina and are in the business of selling Dryvit synthetic stucco. On information and belief, Circle Supply sold the Dryvit that was applied to the Buildings.

12. The exterior walls of the Buildings listed above are constructed mainly of synthetic stucco manufactured by Dryvit Systems. The Plaintiffs have recently discovered that water has penetrated the exterior walls of the Buildings; decks and balconies are improperly installed and flashed; flashing and sealants were not installed or were inappropriately installed; termites have entered and destroyed parts of the Buildings; and numerous construction deficiencies exist in many of the Buildings. As a result, the Buildings have sustained substantial water intrusion, mold, mildew, rot and deterioration. The Plaintiffs have recently learned that the Buildings will require closing for a substantial period of time because of the repair, restoration and remediation that will be required and Plaintiffs have further learned that there may be damage to the individual units as a result of said repair, restoration and remediation.

FOR A FIRST CAUSE OF ACTION

13. The allegations of the Statement of Facts are incorporated herein and made a part and parcel hereof.

14. In the design and construction of the Buildings and in the treatment for termites, the Defendants had a duty to the Plaintiffs to exercise due care and to design, construct and treat the Buildings in accordance with applicable codes, industry standards, manufacturer's requirements and good construction practices.

15. In the construction of the Buildings as well as the pest control treatment of the Buildings as above listed, the Defendants, on information and belief, violated the applicable Standard Building Code adopted by ordinance by Horry County; failed to use good construction practices; failed to follow manufacturer's requirements and recommendations; failed to follow industry standards; used or sold materials which were inappropriate and defective; failed to properly inspect or treat the Buildings for subterranean termites; failed to otherwise comply with the appropriate standard of care; and failed to follow the plans and specifications.

16. The Defendants, on information and belief, were negligent, reckless, willful and wanton and grossly negligent in numerous particulars, including, but not limited to the following:

- a. In reference to John Stirewalt in specifying synthetic stucco when he knew or should have known that synthetic stucco was in an inappropriately designed building component;
- b. In failing to properly construct the exterior walls of the Buildings;
- c. In failing to properly attach and construct the decks and balconies on the Buildings;
- d. In failing to use proper windows and doors and in failing to properly install appropriate and code compliant windows and doors;

- e. In placing defectively designed and constructed materials and buildings in the stream of commerce;
 - f. In failing to properly construct firewalls, roofs and other parts of the Buildings;
 - g. In manufacturing, specifying, distributing and installing defective windows;
 - h. In failing to apply the Dryvit EIFS stucco system and construct the exterior walls of the Buildings in a manner commensurate with industry standards; applicable building codes; and in deviation from manufacturer's requirements and recommendations;
 - i. In failing to properly repair areas of defective stucco;
 - j. In failing to properly oversee the installation of the Dryvit synthetic stucco system on the Buildings;
 - k. In applying a defectively designed synthetic stucco system to the Buildings;
 - l. In placing defectively designed synthetic stucco system into the stream of commerce;
 - m. In failing to warn the Plaintiffs of the defective nature of its EIFS system and its potential to leak and trap water;
 - n. In failing to treat or negligently treating and inspecting the Buildings for subterranean termites;
 - o. In manufacturing and distributing a defective synthetic stucco system and placing the same in the stream of commerce;
 - p. In failing to warn the Plaintiffs of the defective nature of the synthetic stucco and its tendency to trap water and deteriorate the substrate;
 - q. In designing, constructing, and placing in the stream of commerce defective material and buildings as set forth herein and in the report by R. V. Buric dated June 28, 2000, reference to which is craved as forming a part hereof; and
 - r. In failing to properly train and supervise its certified applicators of the stucco.
17. The Defendants breached their duty to the Plaintiffs as hereinabove set forth.
18. As a direct and proximate result of the combined and concurring negligence, carelessness, recklessness, willfulness and wantonness of the Defendants as hereinabove set forth,

the Plaintiffs have been damaged in that the class members will suffer damage to their units and will lose substantial use of their Buildings as a result of the repair, restoration and remediation of their Buildings.

19. Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in a sum sufficient to correct any damage to their units and a sum sufficient to compensate them for loss of use and rental of their units, replacement costs of windows and doors, loss of reputation of the Buildings and consequential and punitive damages.

FOR A SECOND CAUSE OF ACTION

20. The allegations of the Statement of Facts and First Cause of Action are incorporated herein and made a part and parcel hereof.

21. In the sale of the condominium units, Lightkeepers Village made express and implied warranties including, but not limited to, the warranty of habitability and fitness. Lightkeepers Village has breached its express and implied warranties as set forth hereinabove and as a result, has placed in the stream of commerce defective construction all to the damage of the Plaintiffs as herein set forth.

22. The Plaintiffs are informed and believe that they are entitled to judgment against the Defendants for damages as set forth above.

FOR A THIRD CAUSE OF ACTION

23. The allegations of the Statement of Facts and First and Second Causes of Action are incorporated herein and made a part and parcel hereof.

24. In the construction of the Buildings listed above, the Defendant contractors made implied warranties of good workmanship.

25. The Defendants breached their implied warranty of good workmanship as set forth above.

26. That as a direct and proximate result of the breach by the Defendants of their warranty of good workmanship, the Plaintiffs have been damaged as set forth above and are entitled to judgment for actual and consequential damages.

FOR A FOURTH CAUSE OF ACTION

27. The Statement of Facts and the First, Second and Third Causes of Action are incorporated herein and made a part and parcel hereof.

28. In the sale of the synthetic stucco system, Dryvit Systems made express and implied warranties including, but not limited to, the warranties of merchantability and fitness. Dryvit Systems has breached its express and implied warranties as set forth hereinabove and as a result, has placed in the stream of commerce a defective synthetic stucco system resulting in defective construction of the Buildings all to the damage of the Plaintiffs as set forth above.

29. That as a direct and proximate result of the breach by Dryvit Systems of their warranties of merchantability and fitness, the Plaintiffs have been damaged as set forth above and are entitled to judgment for actual and consequential damages.

FOR A FIFTH CAUSE OF ACTION

30. The Statement of Facts and the First, Second, Third and Fourth Causes of Action are incorporated herein and made a part and parcel hereof.

31. Strand Chemical entered into service contracts with the Association for the treatment of subterranean termites, reference to said contracts being craved as forming a part and parcel hereof.

32. That Strand has breached its service contracts with the Homeowners Association by failing to treat or inadequately treating the Buildings for subterranean termites as evidenced by the fact that termites have damaged the Buildings and active termites have been discovered in some of the Buildings.

33. As a direct and proximate result of the breach of the service contracts in providing pest control services to the Plaintiffs' Buildings, the Plaintiffs have been damaged in that the class will suffer loss of use and damage to their individual units and the reputation of the condominiums has been severely impaired.

34. Plaintiffs are informed and believe that they are entitled to judgment against the Defendants as set forth hereinabove.

FOR A SIXTH CAUSE OF ACTION

35. The Statement of Facts and the First, Second, Third, Fourth and Fifth Causes of Action are incorporated herein and made a part and parcel hereof.

36. The Defendant window manufacturers and distributor made implied and express warranties in the sale and distribution of its windows, including, but not limited to, the warranties of fitness and merchantability.

37. The Defendants breached their warranties as set forth above and the Plaintiffs have been damaged as set forth above and are entitled to judgment for actual and consequential damages.

FOR A SEVENTH CAUSE OF ACTION

38. The Statement of Facts and the First, Second, Third, Fourth, Fifth and Sixth Causes of Action are incorporated herein and made a part and parcel hereof.

39. The Dryvit EIFS system(s) manufactured by Dryvit and sold by Circle Supply was expected to and did reach the Plaintiffs without substantial change in the condition in which it was purchased.

40. The Dryvit EIFS system was in a defective condition, unreasonably dangerous to the Plaintiffs and to the Plaintiffs' property when it left the Defendants' possession or control in that under normal conditions, usage and application, it caused water to accumulate behind the system resulting in deterioration of the substrate; corrosion, mold, mildew, fungi and insects to invade the Buildings.

41. The Defendants were in the chain of distribution of the defective Dryvit system when it purchased said system and subsequently applied it to the Buildings. Plaintiffs' use of the Dryvit system was in a manner in which was intended for use and it was foreseeable to be used in such manner by the Defendants.

42. The Dryvit EIFS system was inherently defective and is incapable, no matter how meticulously applied, of being applied so as not to entrap water behind the system.

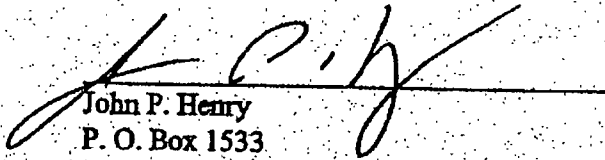
43. The Defendants failed to provide notice to the Plaintiffs either directly or indirectly, through sufficient warnings, of the deficiencies in the system and the risk and dangers inherent in the use of the product.

44. As a direct and proximate result of the defective Dryvit EIFS system, the Plaintiffs have and will suffer numerous injuries as hereinabove set forth which will include but not be limited to, complete removal and replacing of the Buildings with a nondefective product and substantial repair of the substrate and structural members of the Buildings which will cause closure of the units.

45. Plaintiffs are informed and believe that they are entitled to judgment against the Defendants for actual and punitive damages to compensate them for damages to their units together with loss of use and consequential damages.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as hereinabove set forth.

THOMPSON & HENRY, P.A.



John P. Henry

P. O. Box 1533

1318 Third Avenue

Conway, South Carolina 29526

(843) 248-5741

ATTORNEYS FOR THE PLAINTIFFS

September 16, 2002

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Buck Creek Golf Villas HOA,

Plaintiff

vs.

Buck Creek Golf Development Corp.,

Defendants

IN THE CIRCUIT COURT FOR THE

FIFTEENTH JUDICIAL CIRCUIT

COVER SHEET FOR
CIVIL ACTIONS

FILED
HORRY COUNTY
02 JUL 26 PM 4:32
JEANNE J ROBERTS
CLERK OF COURT

2002 - 9 - 26 - 4200

The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed and dated. A copy of this Cover sheet must be served on the defendant(s) along with the Summons and Complaint.

NATURE OF ACTION: (check one category for the main cause of action)

☐ TORT - Motor Vehicle	☐ CONTRACT - Debt Collection
☐ TORT - Professional Malpractice	☐ CONTRACT - Employment
☐ TORT - Unfair Trade Practices, and Other Economic or Business-Related Wrongs	☐ CONTRACT - Construction
☐ TORT - Products Liability	☐ CONTRACT - Wrongful Breach
☒ TORT - General or Other	☐ CONTRACT - General or Other
☐ PCR	☐ REAL PROPERTY
☐ GOV/ADM - Workers Comp.	☐ MINOR SETTLEMENTS
☐ GOV/ADM - General or Other	☐ DOMESTIC FOREIGN JUDGMENT
	☐ OTHER (Please Describe)

JURY DEMAND ☒ YES ☐ NO

Note: Information requested on this form is preliminary in nature, and for administrative purposes only. The response to this request for information on jury demand merely indicates a likelihood that a jury trial will or will not be requested and does NOT constitute a demand for or a waiver of trial by jury pursuant to applicable rules or statutes.

DOCKETING INFORMATION (Check One Box)

- ☐ This case is subject to arbitration (all cases with monetary damages less than \$25,000 are subject to arbitration, unless otherwise exempt).
- ☒ This case is subject to mediation (all cases not subject to arbitration must be mediated, unless otherwise exempt).
- ☐ This case is exempt from ADR, and certificate is attached.

Date:

7/26/02

McCUTCHEN, MUMFORD, VAUGHT & O'DEA, P.A.
4610 Oleander Drive, Suite 203
Myrtle Beach, SC 29577 (843) 449-3411

SEE REVERSE SIDE FOR FURTHER IMPORTANT INFORMATION
SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of this filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.

2. The initial ADR conference must be held within 300 days after the filing of this action.

3. Cases are exempt from ADR only upon the following grounds:

(a) Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

(b) Cases which are appellate in nature such as appeals or writs of certiorari;

(c) Post conviction relief matters;

(d) Contempt of court proceedings;

(e) Forfeiture proceedings brought by the State;

(f) Cases involving mortgage foreclosures; and

(g) Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.

4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2002-CP-26- 4200

Buck Creek Golf Villas Horizontal
Property Regime and Buck Creek Golf
Villas Homeowners' Association, Inc.

Plaintiffs,

vs.

SUMMONS

Buck Creek Development, Inc. and
Crossman Communities of North Carolina,
Inc., as successor to Buck Creek
Development, Inc., Pinehurst Builders, Inc.
and Crossman Communities of North
Carolina, Inc., as successor to Pinehurst
Builders, Inc., and Daniel Rogers,

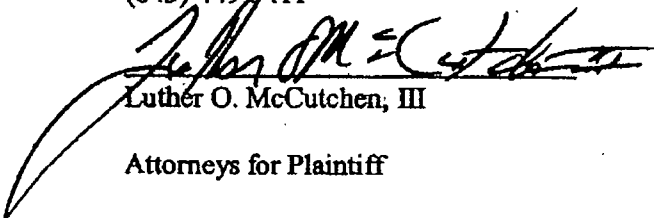
Defendants.

FILED
HORRY COUNTY
02 JUL 26 PM 4:03
JEANNE J. ROBERTS
CLERK OF COURT

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the Plaintiffs' attorneys, McCutchen, Mumford, Vaught & O'Dea, P.A., at 4610 Oleander Drive, Suite 203, Oleander Center, Myrtle Beach, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgement by default will be rendered against you for the relief demanded in the Complaint. Your Answer must be in writing and signed by you or by your attorney and you must state your address or the address of your attorney, if signed by your attorney.

MCCUTCHEM, MUMFORD, VAUGHT & O'DEA, PA
4610 Oleander Drive, Suite 203
Myrtle Beach, SC 29577
(843) 449-2411


Luther O. McCutchen, III

Attorneys for Plaintiff

July 26, 2001
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2002-CP-26-

95

Buck Creek Golf Villas Horizontal
Property Regime and Buck Creek Golf
Villas Homeowners' Association, Inc.

Plaintiffs,

vs.

Buck Creek Development, Inc. and
Crossman Communities of North Carolina,
Inc., as successor to Buck Creek
Development, Inc., Pinehurst Builders, Inc.
and Crossman Communities of North
Carolina, Inc., as successor to Pinehurst
Builders, Inc., and Daniel Rogers,

Defendants.

COMPLAINT
(Jury Trial Demanded)

FILED
HORRY COUNTY
02 JUL 26 PM 4:03
JEANNE J. ROBERTS
CLERK OF COURT

The Plaintiffs, complaining of Defendants above named, would respectfully allege and show unto this Honorable Court as follows:

1. The Plaintiff, Buck Creek Golf Villas Horizontal Property Regime, is a horizontal property regime located in Horry County, South Carolina and is organized and existing pursuant to the laws of the State of South Carolina as provided for in the Horizontal Property Act found in §27-31-10 et. seq., Code of Laws of South Carolina 1976, as amended. This Regime was established by that Master Deed recorded in the office of the Clerk of Court for Horry County in Deed Book 1696

at Page 606, et. seq.

2. The Plaintiff, Buck Creek Golf Villas Homeowners' Association, Inc. is a nonprofit, eleemosynary corporation organized and existing pursuant to the laws of the State of South Carolina with its only office and principal place of business being in Horry County, South Carolina. The Association was formed to manage and administer the affairs of the Regime to include, but not limited to, maintenance and repair of the property of the Regime. The Regime and the Association shall hereinafter collectively be referred to as "The Plaintiffs or Plaintiffs".
3. The Defendant, Buck Creek Golf Development, Inc., is, upon information and belief, a corporation organized and existing under the laws of one of the States of The United States; is or was duly domesticated to do business in the State of South Carolina and does, or did, business in Horry County, South Carolina by, among other things, the development of Buck Creek Golf Villas Horizontal Property Regime, same being more fully referenced above. The Defendant Crossmann Communities of North Carolina, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of one of the States of the United States and is the successor in interest to Buck Creek Golf Development, Inc. These Defendants, Buck Creek Golf Development, Inc. and Crossmann Communities of North Carolina, Inc., shall hereinafter collectively be referred to as the "Developer". Developer did hold title to certain real estate in Horry County, South Carolina which was developed into the Buck Creek Golf

Villas Horizontal Property Regime condominium project. The Developer did develop, sell and market individual condominium units in the Buck Creek project.

4. The Defendant, Pinehurst Builders, Inc., is, upon information and belief, a corporation organized and existing pursuant to the laws of one of the States of the United States; is or was duly domesticated to do business in the State of South Carolina and does, or did, business in Horry County, South Carolina by, at all times relevant herein, being the General Contractor for all aspects of the building and construction of the Buck Creek project. The Defendant Crossmann Communities of North Carolina, Inc. is, upon information and belief, a corporation duly organized and existing under the laws of a State other than the State of South Carolina and is the successor in interest to the Defendant, Pinehurst Builders, Inc. The Defendants Pinehurst Builders, Inc. and Crossmann Communities of North Carolina, Inc. shall hereinafter be collectively referred to as the "General Contractor".
5. The Defendant, Daniel Rogers, (hereinafter referred to as "Rogers" or "Architect"), is, upon information and belief, a citizen and resident of the State of North Carolina who, at all relevant times herein, did business in Horry County, South Carolina, as an architect. Rogers worked either for, or in conjunction with, Pinehurst Builders, Inc., in the preparation of plans and specifications for the Buck Creek project. As the project Architect, Rogers was responsible for architectural, schematic and design development, supervision, construction documents, bidding, negotiation, and approval and acceptance of work performed

and completed at the Buck Creek project.

6. As a result of the foregoing allegations, all of the above Defendants are subject to the jurisdiction of this Court. Further, the actions, conduct and agreements of the above named defendants at all times contemplated the construction and the sale of condominium units and condominium property to individual purchasers and the formation of a regime with the Plaintiffs being charged with the responsibility for maintenance and repair of the general and limited common elements.
7. These Defendants knew, or should have known, that the Plaintiffs would be charged with the responsibility for the care, maintenance, upkeep and supervision of the property after the full transfer of the control of power passed by the Developer to the Association.
8. These Defendants owed duties to the Plaintiffs in the completion and performance of their work in reference to the development, construction, design, oversight, supervision and placement in the stream of commerce the Buck Creek units and the Association has recently discerned certain construction, structural and safety defects in the buildings and the properties of the Regime. Upon information and belief, the problems and defects in the project are as a result of defective design and/or construction, including oversight and supervision, and include, but are not limited to, the following:
 - a) improper, incomplete and inadequate fastening and attachment of the composition shingles to the underlying roof base;
 - b) improper and inadequate application of the composition shingles to the roof including misalignment, improper overlap, improper attachment and

improper exposure;

- c) improper and incomplete installation of the roof underlayment;
- d) improper and inadequate attachment of roof flashings and metal trim, including fascia, grate closure strips, et al;
- e) improper installation of white PVC vent pipes through the roofs;
- f) improper installation of black rubber flashing boots around the PVC vent pipes;
- g) improper, incomplete and inadequate flashing installation on roofs, including at gable attic vent areas;
- h) incomplete and inadequate installation of the wood roof deck;
- i) improper and inadequate installation of roof ridge vents;
- j) improper and inadequate roof coverage by shingles;
- k) improper installation of roof shingles at roof eaves, including absence of starter strips;
- l) improper and incomplete flashing and flashing detail throughout the roof installation;
- m) improper installation of unsupported shingles at roof ridge areas;
- n) improper and inadequate installation of draftstopping separations in attics;
- o) improper, incomplete and inadequate attachment between roof trusses and wall framing;
- p) incomplete and inadequate bracing of the roof framing, including truss bracing requirements, spacing of trusses, span of roof rafters and thickness of the roof deck;
- q) improper and inadequate roof framing;
- r) improper use of damaged roof framing members;
- s) improper termination of exhaust vents directly in attic;

- t) improper window installation, including flashing details and attachments to exterior walls;
- u) improper and inadequate fastening of the windows in the rough wall opening of the construction;
- v) improper construction of storage closets and installation of thresholds of the storage closet doors;
- w) improper construction of walkway areas adjacent to storage closet doors, including improper sloping;
- x) improper and incomplete installation of waterproofing details at the intersections and ends of breezeways and walls;
- y) improper and incomplete installation of the building wrap;
- z) improper and incomplete protection of wall openings, allowing water intrusion and associated damages;
- aa) improper installation and attachment of vinyl siding;
- bb) improper wrapping of window openings;
- cc) failure to caulk and seal behind the nailing flanges of the windows;
- dd) improper, inadequate and insufficient waterproofing details at the building corners;
- ee) improper, inadequate and insufficient waterproofing details at the columns;
- ff) improper, inadequate and insufficient waterproofing details at wall terminations, including screen enclosed porches, bases of the walls, and breezeway wall intersection;
- gg) improper and inadequate foundation to wall framing connection;
- hh) improper and inadequate wall framing on the first floors of the buildings;
- ii) inadequate and improper installation and attachment of hurricane straps;

- jj) improper and incomplete framing of gable end walls;
- kk) improper, inadequate and deficient attachment of OSB sheathing to the wall framing;
- ll) improper alteration of the 2 x 8 inch bank joists that support the second and third floor walkways;
- mm) improper construction and sizing of attic access openings;
- nn) improper installation of white PVC plumbing cleanouts;
- oo) improper and insufficient construction of fire-rated wall assemblies for fire resistance in stairwells;
- pp) improper and inadequate construction of fire-rated ceiling assemblies and floor framing under the elevated walkways;
- qq) improper construction of the walkways while providing for the lack of slope away from the buildings;
- rr) improper and inadequate grading and earth moving to effectively provide for proper site drainage and storm water management;
- ss) installing and using improper hardware not designed for exterior use;
- tt) failing to properly protect all exterior wall openings against water and moisture penetration;
- uu) in designing and constructing the properties such that there is standing water and negative drainage;
- vv) improper and inadequate installation of electrical components and wiring;
- ww) improper and inadequate construction of buildings such that major water intrusion has occurred and extensive mold growth has resulted;

9. As a direct and proximate result and consequence of the numerous design and/or construction defects, deficiencies and problems at the Buck Creek project resulting in substantial damage, decay and deterioration, the Plaintiffs will have to, and shall be required to, expend substantial sums of money for the

extraordinary repairs and reconstruction costs for the common elements and limited common elements of Buck Creek for the expected life of the structure.

FIRST CAUSE OF ACTION
(Negligence/General Contractor)

10. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
11. The General Contractor owed a duty to the Plaintiffs to exercise that degree of skill necessary to construct, supervise, inspect and review the design and otherwise deliver the buildings of Buck Creek free of the construction defects to ensure that said buildings were designed and built in conformity with the customary and ordinary standards of the building and construction industry.
12. The defects and deficiencies set forth herein which exist at the Buck Creek project were the direct and proximate result of the acts and omissions of the General Contractor which constitute negligence and/or gross negligence in one or more of the following particulars to wit:
 - a) In failing to properly construct, or provide for the proper construction of the project, by deviating from the plans and specifications as designed and/or in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
 - b) In using and/or supplying substandard materials and products;
 - c) By allowing the installation of, or installing, materials and products not in accordance with the project's plans and specifications;
 - d) By allowing the installation of, or installing, materials and products in violations of instructions and directions provided by product and material manufacturers;

- e) By allowing, accepting, or in performing, the work in violation of the applicable building codes, including the Standard Building Code;
 - f) In failing to properly supervise, or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements and customary and ordinary standards of the construction industry;
 - g) In accepting and allowing the installation of defective, substandard and/or non-conforming materials and labor; and
 - h) In accepting and performing deficient, substandard and/or defective workmanship and/or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, the project plans and specifications, Standard Building Code requirements and customary and ordinary construction practices.
 - i) In failing to inform the Architect and/or the Developer of the defects in the plans and specifications.
13. As a direct and proximate result and consequence of the negligence and/or gross negligence by the General Contractor, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use, diminution in value and such punitive damages as may be appropriate.

FOR A SECOND CAUSE OF ACTION
(Breach of Express and Implied Warranties/General Contractor)

14. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
15. The General Contractor for the construction of Buck Creek Golf Villas, upon

information and belief, made and asserted express warranties in the construction of the project that the building would be free of construction defects and deficiencies and, further, also impliedly warranted that the project would be constructed in a careful, diligent and workman-like manner, in accordance with accepted industry and construction standards, and to be free of construction defects.

16. The defects and deficiencies set forth herein which exist at the Buck Creek project were the direct and proximate result of the acts and omissions of the General Contractor which constitute negligence and/or gross negligence in one or more of the following particulars to wit:

- a) In failing to properly construct, or provide for the proper construction of the project, by deviating from the plans and specifications as designed and/or in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
- b) In using and/or supplying substandard materials and products;
- c) By allowing the installation of, or installing, materials and products not in accordance with the project's plans and specifications;
- d) By allowing the installation of, or installing, materials and products in violations of instructions and directions provided by product and material manufacturers;
- e) By allowing, accepting, or in performing, the work in violation of the applicable building codes, including the Standard Building Code;
- f) In failing to properly supervise, or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements and customary and ordinary standards of the construction industry;

- g) In accepting and allowing the installation of defective, substandard and/or non-conforming materials and labor; and
 - h) In accepting and performing deficient, substandard and/or defective workmanship and/or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, the project plans and specifications, Standard Building Code requirements and customary and ordinary construction practices.
 - i) In failing to inform the Architect and/or Developer of the defects in the plans and specifications.
17. As a direct and proximate result and consequence of the General Contractor's breach of its express and implied warranties, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use and diminution in value.

THIRD CAUSE OF ACTION
(Negligence/Developer)

18. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
19. The Developer owed duties to the Plaintiffs to develop, design, construct, supervise and inspect the Buck Creek buildings to insure they were free of construction and design defects, and that they were developed, designed and built in conformity with the customary and ordinary standards for like construction in the building and construction industry.
20. In the design, development, construction, supervision and inspection of the Buck Creek project, the Developer owed a duty to the Plaintiff to ensure that the

Architect and Contractor hired to oversee the project and construct the buildings did so with the buildings being free of construction defects and deficiencies and built and designed in conformity with customary and ordinary standards found in the building and construction industry.

21. The Developer was negligent and/or grossly negligent with regards to the development of the Buck Creek project and the deficiencies and defects which exist at the project are the direct and proximate result of one or more of the following particulars in addition to those referenced above:
- a) In failing to properly construct, or provide for the proper construction of the project, by deviating or allowing the deviation from the plans and specifications as designed and/or in failing to require the General Contractors to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
 - b) In using and/or in allowing the use of substandard materials and products;
 - c) By allowing the installation of materials and products not in accordance with the project's plans and specifications;
 - d) By allowing and/or accepting the installation of materials and products in violations of instructions and directions provided by product and material manufacturers;
 - e) By allowing and/or accepting the work to be performed in violation of the applicable building codes, including the Standard Building Code;
 - f) In failing to properly provide for and/or require proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements and customary and ordinary standards of the construction industry;
 - g) In accepting and/or allowing defective, substandard and/or non-conforming labor; and

- h) In accepting and/or allowing the performance of deficient, substandard and/or defective workmanship and/or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, the project plans and specifications, Standard Building Code requirements and customary and ordinary construction practices.
 - i) In failing to inform the Architect and/or the General Contractor of the defects in the plans and specifications.
22. As a direct and proximate result and consequence of the negligence and/or gross negligence by the Developer, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use, diminution in value and such punitive damages as may be appropriate.

FOR A FOURTH CAUSE OF ACTION
(Breach of Implied Warranties and Habitability
and Fitness for Particular Purpose/Developer)

23. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
24. The Developer developed the Buck Creek project and sold the condominium units contained therein, along with their proportionate share of the common elements. In the sale of the condominium units, along with their proportionate share of the common elements, Developer made implied warranties of habitability and fitness for a particular purpose.
25. These Plaintiffs would allege and show that the Developer breached its implied warranties of habitability and fitness for a particular purpose by selling the

condominium units along with their proportionate share of the common elements in an inferior and rapidly deteriorating condition with the buildings and common elements containing the defects and deficiencies set forth above.

26. As a direct and proximate result and consequence of the Developer's breach of its implied warranties, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use and diminution in value.

FOR A FIFTH CAUSE OF ACTION
(Breach of Express Warranty/Developer)

27. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
28. Developer, in its sale and marketing of the property of Buck Creek represented and warranted that the condominium project, including the individual units and common elements, was of the highest quality and said Developer breached its express warranty by marketing and selling the individual units to members of the Association with condominium buildings having the defects and deficiencies set forth above.
29. As a direct and proximate result and consequence of the Developer's breach of its express warranties, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the

structure, loss of use and diminution in value.

FOR A SIXTH CAUSE OF ACTION
(Negligence/Architect)

30. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
31. The Architect owed duties to the Plaintiffs to properly design, supervise and oversee the development and construction of the buildings at Buck Creek and to ensure that they were developed, designed and built in conformity with industry standards in normal construction practices and in accordance with the project plans and specifications.
32. The acts and omissions of the Architect constitute negligence and/or gross negligence with regards to his duties at Buck Creek in certain particulars, including, but not limited to, the following:
 - a) In failing to properly design the buildings so as to provide for appropriate waterproofing and exterior wrap of the buildings;
 - b) In failing to properly design all exterior wall openings to provide for the necessary wrapping, caulking and flashing;
 - c) In failing to properly design and require the necessary flashing for all areas of the project including the roofs, exterior walls and exterior openings;
 - d) In failing to provide proper specifications so that the building could be built in compliance with standards in customary industry practices and in accordance with existing building codes;
 - e) In failing to design and provide for appropriate fire protection for the exterior areas of the building;
 - f) In failing to properly supervise, oversee and inspect the project and construction to ensure its construction was in compliance with all plans

and specifications, industry standards, manufacturer's requirements, all applicable building codes and all other code requirements and customary and standard building and construction practices;

- g) In allowing and/or accepting defective and substandard work and materials;
- h) In failing to inform the Developer and General Contractor of the defects and deficiencies as referenced above.

33. As a direct and proximate result and consequence of the negligence and/or gross negligence by the Architect, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended and to be required and expended, over the expected life of the structure, loss of use, diminution in value and such punitive damages as may be appropriate.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Express and Implied Warranties/Architect)

34. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
35. The Architect, by and through his involvement with the construction and completion of the Buck Creek project, both expressly and implied warranted that the design of the project, inclusive of all plans and specifications, was to the highest and best quality and in conformity with the generally accepted standards of the design, architectural and construction industry. Therefore, by sealing the final plans and certifying that the project was built in conformity with the presented plans and specifications, said Architect did further both expressly and

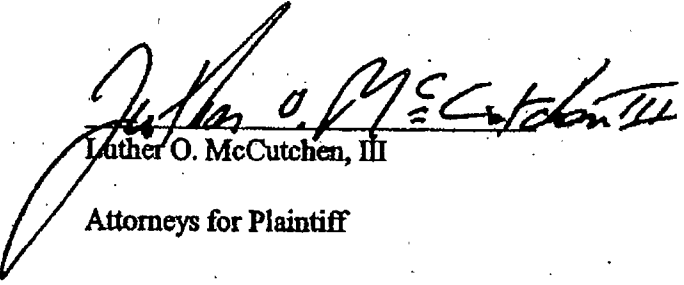
impliedly warrant that the construction of the project was built in accordance with the general principles in the industry and the materials used and labor expended were also in conformity.

36. Further, the Architect has also expressly and impliedly warranted that the buildings and improvements of the project were built in accordance with, and pursuant to the plans and specifications prepared by him and/or by the General Contractor, and which carried his seal and certification.
37. The plans and specifications were not suitable for their intended purposes and as a result of the Architect's breach of the aforementioned express and implied warranties in favor of the Plaintiff, Plaintiff is damaged with extreme and severe structural and construction defects and deficiencies.
38. As a direct and proximate result and consequence of the Architect's breach of the express and implied warranties referenced above, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use and diminution in value.

WHEREFORE, Plaintiffs pray for judgment against these Defendants, as herein above set forth, in an amount equal to all its actual, consequential, incidental and special damages, together with punitive damages, as this Court may deem appropriate, and for such other and further relief as is deemed just and proper.

Respectfully submitted,

McCUTCHEN, MUMFORD, VAUGHT & O'DEA, PA
4610 Oleander Drive, Suite 203
Myrtle Beach, SC 29577
(843) 449-3411



Luther O. McCutchen, III

Attorneys for Plaintiff

July 26, 2001
Myrtle Beach, South Carolina

EXHIBIT D

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Lightkeepers Village Homeowners)
Association, Inc.,)
Plaintiff,)

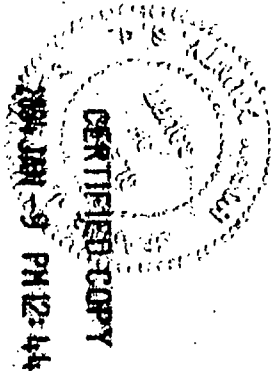
v.)

Lightkeepers Village, a South)
Carolina Partnership, Woodland,)
Inc., formerly known as Landmark)
Homes, Inc., Successor to Landmark)
Homes, Inc., and Landmark Homes,)
Inc., John Stirewalt, AIA Architect,)
Inc., Crossman Communities of)
North Carolina, Inc. as Successor)
in Interest to Pinehurst Builders)
and Properties, Inc. and Pinehurst)
Builders and Properties, Inc.,)
Thompson, Barnhill & Stone, Inc.,)
Chris Horney d/b/a Coastal Stucco,)
Leroy Faircloth d/b/a Carolina)
Stucco, Dryvit Systems, Inc., Sea)
Coast Pest Control, Inc., Strand)
Chemical Company, Inc., Resort)
Pest Control, Inc., Orkin)
Exterminating Company, Inc.,)
Troy Hardee Construction Co., Inc.,)
The Coastal Window and Door)
Center, Inc., The Peachtree)
Companies, Inc., Lincoln Wood)
Products, Inc., Timeline Vinyl)
Products, Inc., ULM Brothers, Inc.,)
and Calabash Roofing Company,)
Defendants.)

IN THE COURT OF COMMON PLEAS
CASE NO. 2000-CP-26-43

THIRD AMENDED SUMMONS
(Jury Trial Demanded)

CLERK OF COURT
HORRY COUNTY



JEANNE J. ROBERTS
CLERK OF COURT

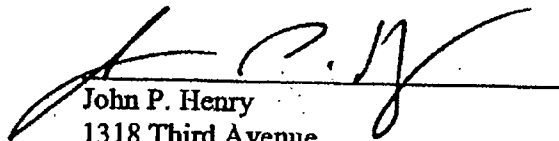
FILED
HORRY COUNTY
JAN 30 AM 10:59

TO: THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Third Amended Complaint

in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Third Amended Complaint on the subscriber at his office at The Thompson Law Firm, P.A., 1318 Third Avenue, Conway, South Carolina, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Third Amended Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Third Amended Complaint.

THE THOMPSON LAW FIRM, P.A.



John P. Henry
1318 Third Avenue
P. O. Box 1533
Conway, South Carolina 29526
(803) 248-5741
Attorneys for the Plaintiff

Conway, South Carolina

January 30, 2002.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Lightkeepers Village Homeowners)
Association, Inc.,)
Plaintiff,)

v.)

Lightkeepers Village, a South)
Carolina Partnership, Woodland,)
Inc., formerly known as Landmark)
Homes, Inc., Successor to Landmark)
Homes, Inc., and Landmark Homes,)
Inc., John Stirewalt, AIA Architect,)
Inc., Crossman Communities of)
North Carolina, Inc. as Successor)
in Interest to Pinchurst Builders)
and Properties, Inc. and Pinchurst)
Builders and Properties, Inc.,)
Thompson, Barnhill & Stone, Inc.,)
Chris Horney d/b/a Coastal Stucco,)
Leroy Faircloth d/b/a Carolina)
Stucco, Dryvit Systems, Inc., Sea)
Coast Pest Control, Inc., Strand)
Chemical Company, Inc., Resort)
Pest Control, Inc., Orkin)
Exterminating Company, Inc.,)
Troy Hardee Construction Co., Inc.,)
The Coastal Window and Door)
Center, Inc., The Peachtree)
Companies, Inc., Lincoln Wood)
Products, Inc., Timeline Vinyl)
Products, Inc., ULM Brothers, Inc.,)
and Calabash Roofing Company,)
Defendants.)

IN THE COURT OF COMMON PLEAS
CASE NO. 2000-CP-26-43

THIRD AMENDED COMPLAINT
(Jury Trial Demanded)

FILED
HORRY COUNTY
02 JAN 30 AM 10:59
JEANNE J. ROBERTS
CLERK OF COURT

Plaintiff, complaining of Defendants, would respectfully show unto this Honorable Court:

STATEMENT OF FACTS

1. The Plaintiff is a not-for-profit corporation organized and existing under the laws of the State of South Carolina and pursuant to the South Carolina Horizontal Property Act, is charged with the upkeep and maintenance of the common elements of the Lightkeepers Village condominiums. The Lightkeepers Village Master Deed was recorded on September 28, 1990 in Deed Book 1424 at page 773. Numerous amendments adding phases to the Lightkeepers Horizontal Property Regime have been filed of record subsequent to the filing of the Master Deed.

2. The Defendant, Lightkeepers Village, a South Carolina Partnership, is, on information and belief, a partnership organized and existing under the laws of the State of South Carolina and is doing business in Horry County, South Carolina. Lightkeepers Village, a South Carolina Partnership, was the developer of the Lightkeepers Village condominium project and conveyed the individual units.

3. On information and belief, Woodland, Inc., formerly known as Landmark Homes, Inc. (hereinafter referred to as "Landmark I") is a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. Woodland, Inc., on information and belief, is successor in interest to Landmark Homes, Inc. Landmark Homes, Inc. and/or Woodland, Inc., on information and belief constructed some of the buildings located at the Lightkeepers Village condominium development.

4. John Stirewalt, AIA Architect, Inc., on information and belief, designed some or all of the buildings located in the Lightkeepers Village condominium project.

5. On information and belief, on or about August 28, 1996, Fortis Group, Inc., acquired the assets of Woodland, Inc. and thereafter formed a corporation known as Landmark Homes, Inc. ("Landmark II"). On information and belief, Fortis Group, Inc. and/or Landmark (II) constructed

some of the buildings located at the Lightkeepers Village condominium project.

6. Crossman Communities of North Carolina, Inc. as successor in interest to Pinehurst Builders and Properties, Inc. is, on information and belief, a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. Pinehurst Builders and Properties, Inc. is a North Carolina corporation and on information and belief, was acquired by Crossman Communities of North Carolina, Inc. which is successor in interest to Pinehurst Builders and Properties, Inc. On information and belief, Pinehurst Builders and Properties, Inc. and/or Crossman Communities of North Carolina, Inc. constructed some of the buildings located in the Lightkeepers Village Condominium project.

7. The Defendant, Chris Horney, d/b/a Coastal Stucco, on information and belief, is a sole proprietorship with its principal place of business in the State of North Carolina and is doing business in Horry County, South Carolina. On information and belief, Chris Horney, d/b/a Coastal Stucco, applied the exterior siding including the EIFS and other components of the building. On information and belief, Chris Horney is a certified applicator of the Dryvit system.

8. On information and belief, Leroy Faircloth is a resident of either South Carolina or North Carolina and is doing business as Carolina Stucco. On information and belief, Leroy Faircloth constructed the exterior envelop and other components of some of the building including, but not limited to, the stucco system. On information and belief, Leroy Faircloth is a certified applicator of the Dryvit system.

9. On information and belief, Thompson, Barnhill and Stone, Inc. is a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. On information and belief, Thompson, Barnhill and Stone, Inc.

constructed some of the buildings located in the Lightkeepers Village Condominium project.

10. On information and belief, Troy Hardee Construction Company, Inc. is a corporation organized and existing under the laws of the State of South Carolina. Troy Hardee Construction Company, Inc. constructed some of the buildings located in the Lightkeepers Village Condominium project.

11. The Defendant, Dryvit Systems, Inc., on information and belief, is a corporation organized and existing under the laws of the State of Georgia and is doing business in Horry County, South Carolina. Dryvit Systems, Inc. manufactured most of the synthetic stucco applied to the Lightkeepers Village buildings listed in Paragraph 16 below and certified the applicators. On information and belief, agents and employees of Dryvit Systems, Inc. were on site during the construction of some or all of the buildings located in the Lightkeepers Village Condominium project. These agents or employees of Dryvit Systems, Inc. supervised and oversaw the application of the Dryvit System on some of the buildings located in the Lightkeepers Village Condominium project.

12. The Defendant, Sea Coast Pest Control, Inc. on information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is doing business in Horry County, South Carolina. Sea Coast Pest Control, Inc. (hereinafter referred to as "Sea Coast") entered into various contracts with the Plaintiff in which Sea Coast agreed to provide pest control services for some of the buildings, the subject of this action, including, but not limited to, the following buildings: 14, 15, 21, 22, 26, 27, and 33 as well as the clubhouse and lighthouse. Upon information and belief, Sea Coast has continued to treat the above-listed buildings of the

Plaintiff.

13. The Defendant Strand Chemical Company, Inc., upon information and belief, is a corporation organized and existing under the laws of one of the States of the United States and is doing business in Horry County, South Carolina. Strand Chemical Company, Inc. (hereinafter referred to as "Strand") entered into various contracts with the Plaintiff in which Strand agreed to provide pest control services for buildings 16, 17, 18, 20, and 28. Strand has continued to treat the above-listed buildings for subterranean termites.

14. The Defendant Resort Pest Control, Inc., upon information and belief, is a corporation organized and existing under the laws of one of the States of the United States and is doing business in Horry County, South Carolina. Resort Pest Control, Inc. (hereinafter referred to as "Resort") entered into various contracts with the Plaintiff in which Resort agreed to provide pest control services for the clubhouse. Resort has continued to treat some of the buildings for subterranean termites.

15. The Defendant Orkin Exterminating Company, Inc. (hereinafter referred to as "Orkin"), upon information and belief, is a corporation organized and existing under the laws of one of the States of the United States and is doing business in Horry County, South Carolina. In 1995, Resort merged with Orkin. Thereafter, Orkin continued to treat the clubhouse at the Lightkeepers Village condominium project until 1996.

16. The buildings located in Lightkeepers Village are multi-story, multi-unit buildings and the following are the subject of this action: Buildings 19, 18, 23, 17, 24, 16, 20, 28, 15, 21, 27, 26, 14, 22, 33 and the club house and lighthouse.

17. The Coastal Window and Door Center, Inc. is, on information and belief, a corporation organized and existing under the laws of the State of North Carolina and is doing business in Horry County, South Carolina. On information and belief, The Coastal Window and Door Center, Inc. supplied the windows for the buildings comprising the Lightkeepers Condominium project. On information and belief, The Coastal Window and Door Center supplied windows including, but not limited to, Crestline windows, Lincoln windows and Pennco windows.

18. That The Peachtree Companies, Inc. is, on information and belief, a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. On information and belief, The Peachtree Companies, Inc. manufactured the Crestline windows and doors in the buildings at the Lightkeepers Village Condominium project.

19. That Lincoln Wood Products, Inc. is, on information and belief, a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. On information and belief, Lincoln Wood Products, Inc. manufactured the Lincoln windows and doors in the buildings at the Lightkeepers Village Condominium project.

20. That Timeline Vinyl Products, Inc. ("Timeline") is, on information and belief, a corporation organized and existing under the laws of one of the states of the United States and is doing business in Horry County, South Carolina. On information and belief, Timeline manufactured the Pennco windows and doors in the buildings at the Lightkeepers Village Condominium project.

21. On information and belief, ULM Brothers, Inc. is a corporation organized and existing under the laws of the State of North Carolina and is doing business in Horry County, South

Carolina. On information and belief, ULM Brothers, Inc. applied the exterior stucco system and/or other components of the building to at least building 19 and maybe other buildings in the Lightkeepers Village Condominium project.

22. On information and belief, Calabash Roofing Company ("Calabash") is a proprietorship organized and existing under the laws of the State of North Carolina. Calabash installed the roofing for some or all of the buildings located at Lightkeepers Village.

23. The exterior walls of the condominium buildings listed above are constructed mainly of stucco, either hardcoat stucco or synthetic stucco and other types of siding. The Plaintiff has recently discovered that water has penetrated the exterior skin of the buildings; termites have entered and destroyed parts of the buildings; and that numerous construction deficiencies exist in many of the buildings. Moreover, the Plaintiff recently observed substantial termite damage and live termites in the buildings comprising the Lightkeepers Village condominium project.

FOR A FIRST CAUSE OF ACTION

24. The allegations of the Statement of Facts are incorporated herein and made a part and parcel hereof.

25. In the construction of the Lightkeepers Village buildings as well as the pest control treatment of the buildings as above listed, the Defendants, on information and belief, violated the applicable Standard Building Code adopted by ordinance by Horry County; failed to use good construction practices; failed to follow manufacturer's requirements and recommendations; failed to follow industry standards; used materials which were inappropriate and defective; failed to properly inspect or treat the buildings for subterranean termites; failed to otherwise comply with the appropriate standard of care; and failed to follow the plans and specifications.

26. The Defendants, on information and belief, were negligent, reckless, willful and wanton and grossly negligent in numerous particulars, including, but not limited to the following:

- a. In failing to properly design, observe and inspect the construction and in specifying materials for the exterior walls including, but not limited to stucco, windows and doors which were defective or did not meet code requirements;
- b. In failing to properly construct the exterior walls of the condominium buildings;
- c. In failing to properly attach and construct the decks on the condominium buildings;
- d. In failing to use proper windows and doors and in failing to properly install appropriate and code compliant windows and doors;
- e. In placing defectively designed and constructed building in the stream of commerce;
- f. In failing to properly construct firewalls, roofs and other parts of the buildings;
- g. In manufacturing, specifying, distributing and installing defective windows;
- h. In failing to apply the EIFS and hardcoat stucco systems and construct the entire walls of the Lightkeepers Village buildings in a manner commensurate with industry standards; in violation of applicable building codes; and, in deviation from manufacturer's requirements and recommendations;
- i. In failing to properly repair areas of defective stucco;
- j. In failing to properly oversee the installation of the hardcoat synthetic stucco system at the Lightkeepers Village buildings;
- k. In applying a defectively designed synthetic stucco system to the Lightkeepers Village buildings;
- l. In placing defectively designed synthetic stucco system into the stream of commerce;
- m. In failing to warn the Plaintiff of the defective nature of its EIFS system and its potential to leak and trap water;
- n. In failing to treat and inspect the buildings comprising Lightkeepers Village condominium project;
- o. In manufacturing and distributing a defective synthetic stucco system and placing the

same in the stream of commerce;

- p. In failing to warn the Plaintiff of the defective nature of the synthetic stucco and its tendency to trap water and deteriorate the substrate;
- q. In designing, constructing, and placing in the stream of commerce defective material and buildings as set forth herein and in the report by R. V. Buric dated June 28, 2000, reference to which is craved as forming a part hereof; and
- r. In failing to properly train and supervise its certified applicators of the stucco.

27. As a direct and proximate result of the combined and concurring negligence, carelessness, recklessness, willfulness and wantonness of the Defendants as herein above set forth, the Plaintiff has been damaged in that it will be required to expend substantial sums to correct the deficiencies and termite damage and bring the buildings into compliance with the Standard Building Code, the reputation of the condominium has been severely impaired and Plaintiff will lose substantial use of the buildings.

28. Plaintiff is informed and believes that it is entitled to judgment against the Defendants in a sum sufficient to correct the construction and design deficiencies as well as the termite damage and to bring the buildings into compliance with the current applicable Standard Building Code together with a sum sufficient to reimburse the Plaintiff for loss of use and damage to the reputation of its buildings and punitive damages.

FOR A SECOND CAUSE OF ACTION

29. The allegations of the Statement of Facts and First Cause of Action are incorporated herein and made a part and parcel hereof.

30. In the sale of the condominium units, Lightkeepers Village, a South Carolina Partnership, made express and implied warranties including, but not limited to, the warranty of habitability and fitness. Lightkeepers Village, a South Carolina Partnership, has breached its express

and implied warranties as set forth herein above and as a result, has placed in the stream of commerce defective construction all to the damage to the Plaintiff as herein set forth.

31. The Plaintiff is informed and believes that it is entitled to judgment against the Defendants in a sum sufficient to correct the construction deficiencies and termite damage and bring the buildings into compliance with the current applicable Standard Building Code together with a sum sufficient to reimburse the Plaintiff for damage to the reputation of the buildings and loss of use of the buildings.

FOR A THIRD CAUSE OF ACTION

32. The allegations of the Statement of Facts and First and Second Causes of Action are incorporated herein and made a part and parcel hereof.

33. In the construction of the Lightkeepers Village buildings listed above, the Defendant contractors made implied warranties of good workmanship.

34. The Defendants breached their implied warranty of good workmanship as set forth above.

35. That as a direct and proximate result of the breach by the Defendants of their warranty of good workmanship, the Plaintiff has been damaged as set forth above.

FOR A FOURTH CAUSE OF ACTION

36. The Statement of Facts and the First, Second and Third Causes of Action are incorporated herein and made a part and parcel hereof.

37. In the sale of the synthetic stucco system, Dryvit Systems Incorporated, a Georgia corporation, made express and implied warranties including, but not limited to, the warranties of merchantability and fitness. Dryvit Systems Incorporated has breached its express and implied

warranties as set forth herein above and as a result, has placed in the stream of commerce a defective synthetic stucco system resulting in defective construction of the Lightkeepers Village buildings all to the damage to the Plaintiff as herein set forth.

38. That as a direct and proximate result of the breach by the Defendant Dryvit Systems, Incorporated of their warranties of merchantability and fitness, the Plaintiff has been damaged as set forth above.

FOR A FIFTH CAUSE OF ACTION

39. The Statement of Facts and the First, Second, Third and Fourth Causes of Action are incorporated herein and made a part and parcel hereof.

40. Defendants, Sea Coast, Strand, and Orkin entered into service contracts for the treatment of subterranean termites, reference to said contracts being craved as forming a part and parcel hereof.

41. That the Defendants herein above listed have breached their service contracts with the Plaintiff by failing to or inadequately treat the buildings comprising the Lightkeepers condominium project for subterranean termites as evidenced by the fact that termites have damaged the buildings and active termites have been discovered in the various buildings of the Lightkeepers project.

42. As a direct and proximate result of the breach of the service contracts in providing pest control services to the Plaintiff's buildings, the Plaintiff has been damaged in that it will be required to expend substantial sums to repair damage inflicted by subterranean termites, the reputation of the condominiums have been severely impaired and the Plaintiff will lose substantial use of the buildings.

43. Plaintiff is informed and believes that it is entitled to judgment against the Defendants in a sum sufficient to correct the termite damage together with a sum sufficient to reimburse the Plaintiff for loss of use and damage to the reputation of the buildings.

FOR A SIXTH CAUSE OF ACTION

44. The Statement of Facts and the First, Second, Third, Fourth and Fifth Causes of Action are incorporated herein and made a part and parcel hereof.

45. The Defendant window manufacturers and distributor made implied and express warranties in the sale and distribution of its windows, including, but not limited to, the warranties of fitness and merchantability.

46. The Defendants breached their warranties as set forth above and the Plaintiff has been damaged as set forth above.

FOR A SEVENTH CAUSE OF ACTION

47. The Statement of Facts and the First, Second, Third, Fourth, Fifth and Sixth Causes of Action are incorporated herein and made a part and parcel hereof.

48. Dryvit Systems, Inc. ("Dryvit") has marketed its synthetic stucco system in the State of South Carolina and many of the buildings, the subject of this action, are clad with the Dryvit synthetic stucco system. Dryvit marketed its synthetic stucco system in the State of South Carolina when it knew, or in the exercise of reasonable care should have known, that its synthetic stucco system allowed moisture to become trapped behind the system with no means of escape thereby causing degradation of the substraights of the buildings. Dryvit also certified its applicators with little or no training and represented to the public that its product was appropriate and that its applicators were trained and certified in the proper application of its synthetic stucco system. Dryvit further

represented to the public and in particular to the developer of the Lightkeepers Village development that it would send technical experts to assure compliance with its application procedures. These representations to the public were an effort by Dryvit to sell its defective and deficient product when it knew or in the exercise of reasonable care should have known that its product would be detrimental to buildings to which it was applied.

49. As a result of Dryvit's deceptive acts and practices, Dryvit sold its product in the State of South Carolina and in particular to the developer of the Lightkeepers Village Condominium project and said product has caused extensive damages by allowing water to intrude through its synthetic stucco system and damage other parts of the buildings at Lightkeepers Village.

50. That Dryvit's marketing of its synthetic stucco system was a deceptive act or practice which has and will have an impact upon the public interest.

51. That Dryvit continues to market its defective synthetic stucco system and its acts and practices of marketing these systems have the potential for repetition. Dryvit's marketing of its FRP stucco system is and was a willful violation of the South Carolina Unfair Trade Practices Act found in South Carolina Code, annotated, 39-5-10, et. seq.

52. That as a direct and proximate result of the unfair and deceptive acts and practices of Dryvit as herein above set forth, the Plaintiff has been damaged in that the Dryvit synthetic stucco system applied to the buildings at the Lightkeepers Village is defective and has not been installed correctly and has allowed water to intrude into the substraigh of the exterior and interior walls and has allowed termites to enter the building all causing extensive damages.

53. The Plaintiff is informed and believes that it is entitled to judgment against Dryvit in an amount sufficient to correct any construction deficiencies and to bring the building into

compliance with current applicable standard building codes along with triple damages, costs and attorneys fees as provided under the South Carolina Unfair Trade Practices Act, South Carolina Code, annotated, 39-5-10, et. seq.

FOR AN EIGHTH CAUSE OF ACTION

54. The Statement of Facts and the First, Second, Third, Fourth, Fifth, Sixth and Seventh Causes of Action are incorporated herein and made a part and parcel hereof.

55. The Defendants, Sea Coast Pest Control, Inc., Strand Chemical Company, Inc., Resort Pest Control, Inc., and Orkin Exterminating Company, Inc. (hereinafter collectively referred to as "the termite companies") market their products and services in the State of South Carolina and, in particular, have marketed their products and services to the Plaintiff, Lightkeepers Village Homeowners Association, Inc.

56. The termite companies have represented to the Plaintiff that they would adequately inspect and treat for termites at the Lightkeepers Village buildings. The termite companies represented to the Plaintiff that they had in fact adequately inspected and treated for termites when the termite companies knew or in the exercise of reasonable care, should have known, that the buildings were susceptible to and conducive of termite infestation and the termite companies failed to adequately inspect and treat for termites while representing to the Plaintiff that this had been done.

57. The termite companies' marketing of their services and products was a deceptive act or practice which has and will have an impact upon the public interest.

58. That the termite companies continue to market their services and products and their acts and practices of marketing their services and products have the potential for repetition. The termite companies marketing of its services and products is a willful violation of the South Carolina

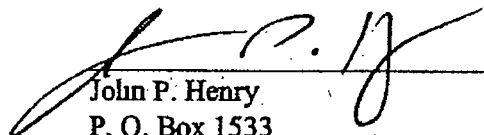
Unfair Trade Practices Act found in South Carolina Code, annotated, 39-5-10, et. seq.

59. That as a direct and proximate result of the unfair and deceptive acts and practices of the termite companies as herein above set forth, the Plaintiff has been damaged in that its buildings have been infested with termites which have caused extensive deterioration of portions of the buildings located in Lightkeepers Village.

60. The Plaintiff is informed and believes that it is entitled to judgment against the termite companies in an amount sufficient to correct any termite damages along with triple damages, costs and attorneys fees as provided under the South Carolina Unfair Trade Practices Act, South Carolina Code, annotated, 39-5-10, et. seq.

WHEREFORE, Plaintiff prays for judgment against the Defendants as herein above set forth.

THE THOMPSON LAW FIRM, P.A.


John P. Henry
P. O. Box 1533
1318 Third Avenue
Conway, South Carolina 29526
(843) 248-5741
Attorneys for the Plaintiff

Conway, South Carolina

January 30, 2002

2. That regular communication by mail exists throughout the State of South Carolina and the United States and that this is a proper circumstance for service by mail;

3. That the Consent Order to Amend Complaint; Third Amended Summons; and Third Amended Complaint was served upon the hereinafter addressees by depositing same in the U.S. Post Office, at Conway, South Carolina, on the 30th day of January, 2002 with the proper addresses thereon and first-class postage prepaid in full.

ADDRESSEES: Daniel J. MacDonald, Esq.
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950 48th Avenue North, Suite 200
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Kathryn M. Cook, Esq.
Cook & Roy
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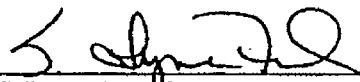
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R. Wade Marionneaux, Esq.
Powell, Goldstein, Frazer & Murphy, LLP
191 Peachtree Street, NE
Atlanta, Georgia 30303


S. Lynne French

SWORN to before me this
30th day of January, 2002

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2-11-2005

EXHIBIT E

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

RIVER OAKS HORIZONTAL)
PROPERTY REGIME and RIVER OAKS)
HOMEOWNERS ASSOCIATION, INC.,)
Plaintiffs,)

vs.)

PINEHURST BUILDERS, INC.;)
CROSSMAN COMMUNITIES OF NORTH)
CAROLINA, INC. as successor to)
PINEHURST BUILDERS, INC., RIVER OAKS)
GOLF DEVELOPMENT CORP., CROSSMAN)
COMMUNITIES OF NORTH CAROLINA,)
INC., as successor to RIVER OAKS GOLF)
DEVELOPMENT CORP., RIVER OAKS)
ESTATES DEVELOPMENT CORP., DAN)
ROGERS, CASTLES CONSULTING)
ENGINEERS, INC., COASTAL GRADING,)
INC., RIGHT WAY CONSTRUCTION, INC.,)
GLEN CORNETT, CALVIN WRENN,)
BETTER BUILT WINDOWS, INC. and)
STRAND TERMITE & PEST CONTROL CO.,)
a division of Strand Chemical Co., Inc.,)
Defendants,)

RIGHT WAY CONSTRUCTION, INC.,)
Third Party Plaintiff,)

vs.)

RONIALDO VILARINO d/b/a RAV)
CARPENTRY and LAVOON)
CONSTRUCTION, INC.,)
Third Party Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 00-CP-26-5193

SECOND AMENDED SUMMONS
(Jury Trial Demanded)

JEANNE J. ROBERTS
CLERK OF COURT

02 JAN 28 AM 11:56

FILED
HORRY COUNTY

CLERK OF COURT
HORRY COUNTY

2001 JAN -9 PM 12:44

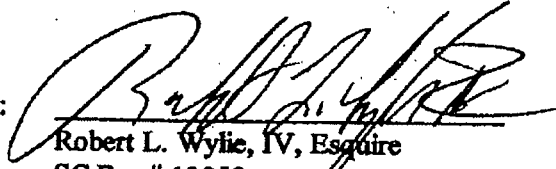
CERTIFIED COPY

TO: THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Second Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Second Amended Complaint on subscriber at his office at Post Office Box 1980, Myrtle Beach, South Carolina 29578, within thirty (30) days after the service hereof, exclusive of the day of such service, AND IF YOU FAIL TO APPEAR AND DEFEND THE ACTION AS REQUIRED BY LAW,

JUDGMENT BY DEFAULT WILL BE RENDERED AGAINST YOU FOR THE RELIEF DEMANDED IN THE
SECOND AMENDED COMPLAINT.

MULLEN, WYLIE & SEEKINGS, L.L.C.

By: 

Robert L. Wylie, IV, Esquire
SC Bar # 13052
Post Office Box 1980
Myrtle Beach, SC 29578
(843) 449-4800
attorney for Plaintiffs

LEITER & SNOOK, P.A.

By: 

John M. Leiter, Esquire
SC Bar # 003157
1205 48th Avenue North, Suite 109
Myrtle Beach, SC 29577
(843) 449-1451
attorney for Plaintiffs

Myrtle Beach, South Carolina
January 24, 2002

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

RIVER OAKS HORIZONTAL)
PROPERTY REGIME and RIVER OAKS)
HOMEOWNERS ASSOCIATION, INC.,)
Plaintiffs,)

vs.)

PINEHURST BUILDERS, INC.,)
CROSSMAN COMMUNITIES OF)
NORTH CAROLINA, INC. as successor)
to PINEHURST BUILDERS, INC., RIVER)
OAKS GOLF DEVELOPMENT CORP.,)
CROSSMAN COMMUNITIES OF)
NORTH CAROLINA, INC., as successor)
to RIVER OAKS GOLF DEVELOPMENT)
CORP., RIVER OAKS ESTATES)
DEVELOPMENT CORP., DAN ROGERS,)
CASTLES CONSULTING ENGINEERS,)
INC., COASTAL GRADING, INC.,)
RIGHT WAY CONSTRUCTION, INC.,)
GLEN CORNETT, CALVIN WRENN,)
BETTER BUILT WINDOWS, INC. and)
STRAND TERMITE & PEST CONTROL)
CO., a division of Strand Chemical Co., Inc.,)
Defendants,)

RIGHT WAY CONSTRUCTION, INC.,)
Third Party Plaintiff,)

vs.)

RONIALDO VILARINO d/b/a RAV)
CARPENTRY and LAVOON)
CONSTRUCTION, INC.,)
Third Party Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 00-CP-26-5193

SECOND AMENDED COMPLAINT
(Jury Trial Demanded)

FILED
HORRY COUNTY
02 JAN 28 AM 11:56
JEANNE J. ROBERTS
CLERK OF COURT

Plaintiffs, complaining of the Defendants above named, would respectfully allege and show
unto this Honorable Court as follows:

1. Plaintiff River Oaks Horizontal Property Regime is a horizontal property regime organized and existing pursuant to the laws of the State of South Carolina as provided in the Horizontal Property Act, §27-31-10 et. seq., S.C. Code Annotated 1976, as amended, and located in Myrtle Beach, South Carolina.

2. Plaintiff River Oaks Homeowners Association, Inc. (hereinafter "HOA") is a non-profit corporation organized and existing pursuant to the laws of the State of South Carolina, with its principle place of business in Horry County, South Carolina. The River Oaks Homeowners Association, Inc. was formed pursuant to the Master Deed for the River Oaks Horizontal Property Regime to carry out the responsibilities of the Horizontal Property Regime including, but not limited to, maintenance and repair of the property.

3. Defendant Pinehurst Builders, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of a state other than the State of South Carolina which was, at all times relevant hereto, conducting business in Horry County, South Carolina. Pinehurst Builders, Inc. was the general contractor which contracted to build, and built, the River Oaks project. Defendant Crossman Communities of North Carolina, Inc. is, upon information and belief, the successor in interest to Defendant Pinehurst Builders, Inc. Defendants Pinehurst Builders, Inc. and Crossman Communities of North Carolina, Inc. shall hereinafter be referred to collectively as "General Contractor".

4. Defendant River Oaks Golf Development Corp. is, upon information and belief, a corporation organized and existing pursuant to the laws of a state other than the State of South Carolina which was, at all times relevant hereto, conducting business in Horry County, South Carolina. Defendant Crossman Communities of North Carolina, Inc. is, upon information and belief,

the successor in interest to River Oaks Golf Development Corp.

5. Defendant River Oaks Estates Development Corp. is, upon information and belief, a corporation organized and existing pursuant to the laws of a state other than the State of South Carolina which was, at all times relevant hereto, conducting business in Horry County, South Carolina.

6. Defendants River Oaks Golf Development Corp., Defendant Crossman Communities, Inc. and Defendant River Oaks Estates Development Corp. shall be collectively referred to hereinafter as "Developer". Said Defendants were to hold title to certain real estate in Horry County, South Carolina, to develop and construct a condominium project on that real estate and to market the units constructed.

7. Defendant Dan Rogers (hereinafter "Architect") is, upon information and belief, a citizen and resident of the State of North Carolina who was, at all times relevant hereto, conducting business as an architect in Horry County, South Carolina. Architect was responsible for schematic design, design development, construction documents, bidding and negotiation, construction, supervision and acceptance of work performed on the River Oaks project.

8. Defendant Castles Consulting Engineers, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina which was, at all times relevant hereto, conducting business within Horry County, South Carolina. Upon information and belief, Defendant Castles Consulting Engineers, Inc. was responsible for the design of the infrastructure and drainage at the River Oaks project.

9. Defendant Coastal Grading, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina which was, at all times

relevant hereto, conducting business within Horry County, South Carolina . Upon information and belief, Defendant Coastal Grading, Inc. was responsible for performing site work at the River Oaks project.

10. Defendant Right Way Construction, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina which was, at all times relevant hereto, conducting business within Horry County, South Carolina. Upon information and belief, Defendant Right Way Construction, Inc. was responsible for performing all, or a portion, of the framing, flashing, waterproofing, window installation, carpentry work and vinyl siding installation at the River Oaks project.

11. Defendants Glen Cornett and Calvin Wrenn are, upon information and belief, citizens and residents of the State of South Carolina. Defendants Cornett and Wrenn were, upon information and belief, responsible for all, or a portion, of the framing, flashing, waterproofing, window installation, carpentry work and vinyl siding installation at the River Oaks project.

12. Defendant Better Built Windows, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of a state other than the State of South Carolina which was, at all times relevant hereto, performing business within Horry County, South Carolina. Upon information and belief, Defendant Better Built Windows, Inc. manufactured the windows which were utilized at the River Oaks project.

13. Defendant Strand Termite & Pest Control, Co., a division of Strand Chemical Co., Inc. (hereinafter "Strand Termite") is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina which was, at all times relevant hereto, conducting business within Horry County, South Carolina.

14. The actions, conduct and agreements of the above named Defendants at all times contemplated the sale of the condominium units to individual purchasers and the formation of regimes to be charged with the responsibility for maintenance and repairs of the general and limited common elements.

15. The Defendants did design, develop, construct and sell the condominium project known as River Oaks (hereinafter the "Project"). Developer, as grantor of the Project, caused to be prepared and filed in the RMC Office for Horry County, South Carolina, the Master Deed and By-laws for the River Oaks Horizontal Property Regime, thereby committing the real estate with improvements thereon to the condominium form of ownership.

16. Since completion of the Project, problems with water infiltration into the interior of the buildings has occurred. An inspection of the buildings has resulted in the discovery of structural and safety defects. Upon information and belief, the problems or defects in the Project are a result of defective design and/or construction.

17. The defects in construction and design complained of include, but are not limited to, the following:

- (a) defective storm water management drainage system;
- (b) lack of a means of discharge for portions of the storm water management system;
- (c) improper installation of the gable louvers causing deterioration of interior materials;
- (d) improper installation of the wind resistant tie down straps in the buildings;
- (e) improper installation of the siding;
- (f) lack of proper flashing at the windows;
- (g) improper installation of the windows;

- (h) deterioration of structural components due to failure of the waterproofing/flashing system at the balconies;
- (i) deterioration of structural columns due to the use of non-pressure treated wood in an exterior application;
- (j) failure to completely install the building wrap;
- (k) flooding of units due to buildings being built below the adjacent side walk elevations;
- (l) failure of the walkway waterproofing/flashing system causing water to infiltrate the buildings and damage interior materials;
- (m) failure to properly install walkway floor sheathing;
- (n) failure to properly attach emergency egress stair handrails;
- (o) failure to properly construct some emergency egress stairs;
- (p) termite infestation and destruction; and
- (q) improper installation of the building wrap causing the laps to be backwards.

18. As a direct and proximate result and consequence of the numerous construction and/or design defects and problems at the Project, the Project has experienced substantial decay and deterioration and Plaintiffs have and will continue to be required to spend substantial sums of money for the extraordinary repairs and reconstruction of major portions of the common elements.

19. Additionally, an inspection of the Project has revealed the existence of active termites and termite damage. As a result and consequence of the existence of termites and termite damage at the Project, Plaintiffs have been and will continue to be required to expend substantial sums of money to re-treat and repair major portions of the common elements of the Project.

FOR A FIRST CAUSE OF ACTION
(Negligence/General Contractor)

20. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-19 above as fully as if repeated verbatim herein.

21. General Contractor owed a duty to the Plaintiffs to exercise that degree of skill necessary to construct, supervise and review the design and otherwise deliver the buildings free of construction defects and designed and built in conformity with the customary and ordinary standards of the building and construction industry.

22. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of General Contractor in one or more of the following particulars:

- (a) in failing to properly construct the Project by deviating from the plans and specifications and by failing to employ practices and methods of construction conforming with accepted industry standards; and/or using defective materials; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;
- (b) in failing to properly supervise the sub-contractors and/or other trades in order to ensure that all work proceeded in accordance with the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry;
- (c) in accepting non-conforming or defective materials;
- (d) in accepting and performing deficient and/or defective workmanship and/or materials;

without proper inspection to ensure the work was correct and in conformity with industry standards and in accordance with the plans and specifications and the manufacturer's instructions;

- (e) in constructing the Project in violation of applicable building codes; and
- (f) in failing to inform the architect and/or developer of the defects in the plans and specifications.

23. As a direct and proximate result and consequence of the negligence and gross negligence of General Contractor, Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use, diminution in value and for such punitive damages as may be appropriate.

FOR A SECOND CAUSE OF ACTION

(Breach of Express and Implied Warranties/General Contractor)

24. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-23 above as fully as if repeated verbatim herein.

25. Upon information and belief, General Contractor of the Project made express warranties in connection with contracting to build the Project to the effect that the buildings would be free of construction defects.

26. General Contractor also implied warranted that the Project would be constructed in a careful, diligent and workmanlike manner, free of construction defects.

27. General Contractor breached its express and implied warranties including, but not limited to, the following particulars:

- (a) in failing to properly construct the Project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
- (b) in using and supplying defective materials;
- (c) in installing materials not in accordance with the plans and specifications;
- (d) in installing materials in violation of manufacturer's instructions;
- (e) in performing work which violated applicable building codes;
- (f) in failing to properly supervise employees, agents and sub-contractors to ensure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
- (g) in accepting defective and/or non-conforming materials and labor;
- (h) in providing deficient and/or defective workmanship and/or materials, without proper inspections to ensure the work was correct and in conformity with customary industry standards and in accordance with the plans and specifications and the manufacturer's instructions; and
- (i) in failing to adequately construct a waterproofing system on the exterior of the building such as to allow water to infiltrate the interior of the building.

28. As a direct and proximate result and consequence of General Contractors' breach of their implied warranties, Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use and diminution in value.

FOR THIRD CAUSE OF ACTION
(Negligence/Developer)

29. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-28 above as fully as if repeated verbatim herein.

30. Developer owed a duty to the Plaintiffs to exercise that degree of skill necessary to select an architect and contractor and to oversee the Project and otherwise deliver the buildings free of construction defects and which designed and built in conformity with the customary and ordinary standards of the building and construction industry.

31. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of Developer in one or more of the following particulars:

- (a) in failing to properly select an architect and contractor so that the Project would be designed and built by methods of construction and design conforming with accepted industry standards;
- (b) in allowing and/or accepting non-conforming or defective work;
- (c) in failing to properly oversee the Project in order to ensure that all work proceeded in accordance with the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry; and
- (d) in failing to inform the architect and contractor of any defects found in the Project.

32. As a direct and proximate result and consequence of the negligence and/or gross negligence of Developer, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the

expected life of the structures, loss of use, depreciation in value and such punitive damages as may be appropriate.

FOR A FOURTH CAUSE OF ACTION
(Breach of Express Warranty/Developer)

33. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-32 above as fully as if repeated verbatim herein.

34. Developer represented and warranted that the Project, including the condominium units and the general common elements, was of the highest quality. Those representations and warranties were made in connection with the sale of the units and formation of the River Oaks Horizontal Property Regime.

35. Developer breached their express warranty by producing, selling and turning over to the Plaintiffs inferior and rapidly deteriorating condominium buildings plagued with extensive and severe construction defects and problems.

36. As a direct and proximate result and consequence of Developer's breach of their express warranty, the Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use and depreciation in value.

FOR A FIFTH CAUSE OF ACTION
(Breach of Implied Warranty/Developer)

37. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-36 above as fully as if repeated verbatim herein.

38. Developer, as developer, seller and grantor, made implied warranties of habitability and fitness for intended use. Developer further impliedly warranted the fitness of the plans and

specifications provided for the Project.

39. Developer has breached their implied warranties by producing, selling and turning over to the Plaintiffs inferior and rapidly deteriorating condominium buildings plagued with extensive and severe construction defects and problems.

40. As a direct and proximate result and consequence of Developer's breach of the implied warranties, the Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use and depreciation in value.

FOR A SIXTH CAUSE OF ACTION
(Negligence/Architect)

41. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-40 above as fully as if repeated verbatim herein.

42. Architect was negligent, willful and wanton in his design and inspection of the Project including, but not limited to, the following particulars:

- (a) in failing to adequately design a waterproofing system so as to prevent water infiltration into the interior portions of the building;
- (b) improper design of waterproofing of the exterior of the building and non-existent or improper design of flashing;
- (c) improper design or specifications for doors and windows;
- (d) inadequate inspection and acceptance of defective or non-conforming construction work;
- (e) failure to design and insure construction in compliance with applicable building codes

and acceptable building practices; and

- (f) failure to properly specify appropriate materials to be used in the construction of the Project.

43. As a direct and proximate result and consequence of the negligence and gross negligence of the Architect, Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use, depreciation in value and such punitive damages as may be appropriate.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Express and Implied Warranty/Architect)

44. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-43 above as fully as if repeated verbatim herein.

45. Architect expressly and impliedly warranted that his design of the Project would be of the highest quality and in conformance with the generally accepted standards of the architectural and construction industry, and further, that the specifications of materials and procedures would comply with the generally accepted principals in the industry.

46. Architect further expressly and impliedly warranty that the plans and specifications prepared for the Project were suitable and fit for use in constructing the Project, and that such buildings, when complete, would be free of design defects.

47. The plans and specifications as provided by the Architect were not suitable or appropriate for their intended purpose, and as a result of the Architect's breach of warranties by designing the Project with severe structural and water intrusion problems, Plaintiffs are entitled to

such actual damages as this Court may deem appropriate.

FOR A EIGHTH CAUSE OF ACTION
(Negligence/Castles Consulting Engineers, Inc.)

48. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-47 above as fully as if repeated verbatim herein.

49. Defendant Castles Consulting Engineers, Inc. was negligent, willful and wanton in its design and inspection of the Project including, but not limited to, the following particulars:

- (a) in failing to adequately design a storm water management drainage system so as to prevent water infiltration into the interior portions of the building;
- (b) in failing to provide for a proper means of discharge for portions of the storm water management system;
- (c) inadequate inspection and acceptance of defective or nonconforming construction work; and
- (d) failure to design and insure construction in compliance with acceptable site drainage practices.

50. As a direct and proximate result of the consequence of the negligence and gross negligence of Defendant Castles Consulting Engineers, Inc., Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required of the expected life of the Project, loss of use, depreciation in value, and such punitive damages as may be appropriate.

FOR A NINTH CAUSE OF ACTION
(Breach of Express and Implied Warranty/Castles Consulting Engineers, Inc.)

51. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-50 above

as fully as if repeated verbatim herein.

52. Defendant Castles Consulting Engineers, Inc. expressly and impliedly warranted that its design of the Project would be of the highest quality and in conformance with the generally accepted standards of the engineering and construction industry, and further, that the specifications and procedures provided by Defendant Castles Consulting Engineers, Inc. would comply with the generally accepted principles of the industry.

53. Defendant Castles Consulting Engineers, Inc. further expressly and impliedly warranted that the plans and specifications prepared for the Project were suitable and fit for use in constructing the Project and that the Project, when complete, would be free of design defects.

54. The plans and specifications as provided by Defendant Castles Consulting Engineers, Inc. were not suitable or appropriate for their intended purpose, and as a result of Defendant Castles Consulting Engineers, Inc.'s breach of warranties by designing the Project with severe drainage problems, Plaintiffs are entitled to such actual damages as this Court may deem appropriate.

FOR A TENTH CAUSE OF ACTION
(Negligence/Coastal Grading, Inc.)

55. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-54 above as fully as if repeated verbatim herein.

56. Defendant Coastal Grading, Inc. owed a duty to the Plaintiffs to exercise that degree of skill necessary to construct, supervise and review the design and otherwise deliver the Project free of construction defects and designed and constructed in conformance with the customary and ordinary standards of the building and construction industry.

57. The deficiencies and defects which exist at the Project are the proximate and direct

result of the negligence and/or gross negligence of Defendant Coastal Grading, Inc. in one or more of the following particulars:

- (a) in failing to properly construct the Project by deviating from the plans and specifications and by failing to employ practices and methods of construction conforming with accepted industry standards and/or installing materials not in accordance with the plans and specifications; and
- (b) in performing deficient and/or defective workmanship without proper inspection to insure the work was correct and in conformity with industry standards and in accordance with the plans and specifications.

58. As a direct and proximate result and consequence of the negligence and/or gross negligence of Defendant Coastal Grading, Inc., Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use, diminution in value and for such punitive damages as may be appropriate.

FOR AN ELEVENTH CAUSE OF ACTION
(Breach of Express and Implied Warranty/Coastal Grading, Inc.)

59. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-58 above as fully as if repeated verbatim herein.

60. Upon information and belief, Defendant Coastal Grading, Inc. made express warranties in connection with contracting to build the Project to the affect that the Project would be free of construction defects.

61. Defendant Coastal Grading, Inc. further impliedly warranted that the Project would

be constructed in a careful, diligent and workmanlike manner, free of construction defects.

62. Defendant Coastal Grading, Inc. breached its expressed and implied warranties including, but not limited to, the following particulars:

- (a) in failing to properly construct the Project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
- (b) in installing materials not in accordance with the plans and specifications;
- (c) in failing to properly supervise employees, agents and subcontractors to insure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
- (d) in providing deficient and/or defective workmanship and/or materials, without proper inspections to insure the work was correct and in conformity with customary industry standards and in accordance with the plans and specifications; and
- (e) in failing to adequately construct a drainage/storm water management system at the Project such as to allow water to infiltrate the interior of the buildings.

63. As a direct and proximate result and consequence of Defendant Coastal Grading, Inc.'s breach of its express and implied warranties, Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use and diminution in value.

FOR A TWELFTH CAUSE OF ACTION

(Negligence/Right Way Construction, Inc., Glen Cornett and Calvin Wrenn)

64. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-63 above

as fully as if repeated verbatim herein.

65. Defendants Right Way Construction, Inc., Glen Cornett, and Calvin Wrenn (hereinafter "Defendants Right Way, Cornett, and Wrenn") owed a duty to the Plaintiffs to exercise that degree of skill necessary to construct, supervise and review the design and otherwise to deliver the buildings free of construction defects and design and built in conformity with the customary and ordinary standards of the buildings and construction industry.

66. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of Defendants Right Way, Cornett and Wrenn in one or more of the following particulars:

- (a) in failing to properly construct the Project by deviating from the plans and specifications and by failing to employ practices and methods of construction conforming with accepted industry standards; and/or using defective materials; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;
- (b) in failing to properly insure that all work proceeded in accordance with the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry;
- (c) in accepting non-conforming or defective materials;
- (d) in accepting and performing deficient and/or defective workmanship and/or materials, without proper inspection to ensure the work was correct and in conformity with industry standards and in accordance with the plans and specifications and the manufacturer's instructions;

- (e) in constructing the Project in violation of applicable building codes; and
- (f) in failing to inform the architect, developer and/or general contractor of the defects in the plans and specifications.

67. As a direct and proximate result and consequence of the negligence and/or gross negligence of Defendants Right Way, Cornett and Wrenn, Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use, diminution in value and for such punitive damages as may be appropriate.

FOR A THIRTEENTH CAUSE OF ACTION
(Breach of Implied Warranties/Defendants Right Way
Construction, Inc., Glen Cornett, and Calvin Wrenn)

68. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-67 above as fully as if repeated verbatim herein.

69. Upon information and belief, Defendants Right Way, Cornett and Wrenn impliedly warranted that the Project would be constructed in a careful, diligent and workmanlike manner, free of construction defects.

70. Defendants Right Way, Cornell and Wrenn breached their implied warranties including, but not limited to, the following particulars:

- (a) in failing to properly construct the Project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
- (b) in using and supplying defective materials;
- (c) in installing materials not in accordance with the plans and specifications;

- (d) in installing materials in violation of manufacturer's instructions;
- (e) in performing work which violated applicable building codes;
- (f) in failing to properly supervise employees, agents and sub-contractors to ensure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
- (g) in accepting defective and/or non-conforming materials and labor;
- (h) in providing deficient and/or defective workmanship and/or materials, without proper inspections to ensure the work was correct and in conformity with customary industry standards and in accordance with the plans and specifications and the manufacturer's instructions; and
- (i) in failing to adequately construct a waterproofing system on the exterior of the building such as to allow water to infiltrate the interior of the building.

71. As a direct and proximate result and consequence of Defendants Right Way, Cornett and Wrenn's breach of their implied warranties, Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use and diminution in value.

FOR A FOURTEENTH CAUSE OF ACTION
(Breach of Warranty/Better Bilt Windows)

72. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-71 above as fully as if repeated verbatim herein.

73. Defendant Better Bilt Windows expressly or impliedly warranted to Plaintiffs that any material designed, supplied or sold by them for use on the Project would be merchantable and fit for

its intended or specific purpose. Defendant Better Bilt Windows breached its express and/or implied warranties of merchantability and/or fitness for a particular or intended purpose in that the windows designed, manufactured and supplied or sold by Defendant Better Bilt Windows have deteriorated to the extent they no longer serve their intended purpose and are allowing water to enter into the Project.

74. As a result of the above referenced breaches of warranties, Plaintiffs have incurred damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, diminution in value and loss of use.

FOR A FIFTEENTH CAUSE OF ACTION
(Strict Liability/Better Bilt Windows)

75. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-74 above as fully as if repeated verbatim herein.

76. Defendant Better Bilt Windows was the manufacturer, supplier, seller or distributor of the windows installed at the Project and intended and expected that such windows would reach and be used at the Project in the same or substantially same condition as sold by Defendant Better Bilt Windows and such products were in a defective condition unreasonably dangerous to the user/consumer or its property.

77. As a result of the defective products of Defendant Better Bilt Windows, Plaintiffs have sustained actual damages as outlined above and are informed and believe they are entitled to judgment against Defendant Better Bilt Windows.

FOR A SIXTEENTH CAUSE OF ACTION
(Negligence/Better Bilt Windows)

78. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-77 above

as fully as if repeated verbatim herein.

79. Defendant Better Bilt Windows had a duty to design and manufacture the windows that it supplied to the Plaintiffs free of any and all defects which prevent the windows from properly performing and satisfying their ordinary, intended and foreseeable uses. Defendant Better Bilt Windows owed Plaintiffs a duty of reasonable care and knew, or should have known, that Plaintiffs could be injured if Defendant Better Bilt Windows acted negligently.

80. Defendant Better Bilt Windows breached the above referenced duties in that the windows supplied to Plaintiffs were not properly designed or manufactured and, as a result of said negligent design and manufacture, have deteriorated to the point they no longer perform as intended and are allowing water to infiltrate the walls of the Project.

81. Defendant Better Bilt Windows's breach of its duty respecting the design, manufacture, marketing and sale of the windows supplied to Plaintiffs constitutes gross negligence, entitling Plaintiffs to recover punitive damages.

82. As a direct, foreseeable and proximate result of Defendant Better Bilt Windows's negligence, Plaintiffs have suffered damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, diminution of value and loss of use.

83. Plaintiffs are informed and believe they are entitled to judgment against Defendant Better Bilt Windows for such actual and punitive damages as shall be determined by the trier of fact.

FOR A SEVENTEENTH CAUSE OF ACTION

(Breach of Guaranty/Strand Termite)

84. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-83 above

as fully as if repeated verbatim herein.

85. Beginning in 1993, Defendant Strand Termite issued guarantees to Plaintiffs to, among other things, treat, inspect and repair termite damage to the various buildings with the Project.

86. Since issuance of the guarantees, Defendant Strand Termite has made regular visits to the Project for purposes of termite inspections and treatment.

87. As set forth above, Plaintiffs had an inspection performed on the Project resulting in the discovery of termite damage, as well as design and construction deficiencies.

88. Defendant Strand Termite is in breach of the guarantees by failing to effectively treat, discover and repair existing termite damage.

89. As a direct, foreseeable and proximate result of Defendant Strand Termite's breach of its guarantees, Plaintiffs have suffered, and continue to suffer, injuries and are entitled to recovery in an amount equal to the cost to repair the defects and damages, any consequential costs associated with such repair, loss of use of the Project, diminution in value of the Project and interest and costs.

FOR AN EIGHTEENTH CAUSE OF ACTION
(Negligence/Gross Negligence/Strand Termite)

90. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-89 above as fully as if repeated verbatim herein.

91. Upon information and belief, Defendant Strand Termite owed a duty to Plaintiffs to fully investigate, discover, treat and/or repair any termites or termite damage existing at the Project.

92. Defendant Strand Termite has breached its duty by failing to effectively inspect, discover, treat and/or repair the existence of termite damage at the Project and has performed such duties in a negligent and/or grossly negligent manner, with reckless disregard to the rights of

Plaintiffs.

93. As a direct, foreseeable and proximate result of Defendant Strand Termite's negligence and/or gross negligence, Plaintiffs have suffered, and continue to suffer, injuries and are entitled to recovery in an amount equal to the cost to repair the defects and damages, any consequential costs associated with such repair, loss of use of the Project, diminution in value of the Project, punitive damages as may be appropriate and interest and costs.

FOR A NINETEENTH CAUSE OF ACTION
(Breach of Implied Warranty/Strand Termite)

94. Plaintiffs incorporate into this cause of action the allegations in paragraphs 1-93 above as fully as if repeated verbatim herein.

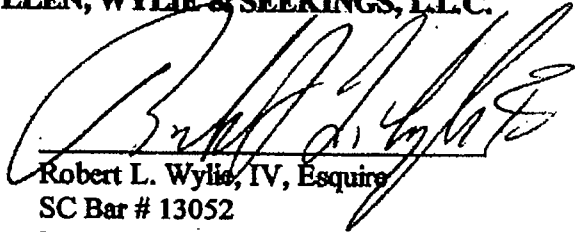
95. Defendant Strand Termite impliedly warranted that the termite inspections and treatments that it performed would be performed in a workmanlike, professional manner and in accordance with industry standards.

96. Defendant Strand Termite breached its implied warranty by failing to properly inspect for and treat for termites at the Project.

97. As a direct and proximate result of Defendant Strand Termite's breach of implied warranty, Plaintiffs have been damaged in the amount required and to be required to perform the extraordinary repairs at the Project.

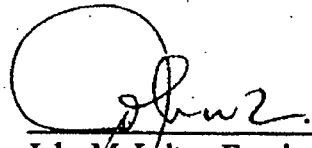
WHEREFORE, Plaintiffs pray for a judgment against the Defendants for such actual and punitive damages as this Court deems appropriate and for such other and further relief as is just and proper.

MULLEN, WYLIE & SEEKINGS, L.L.C.

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Myrtle Beach, South Carolina
January 24, 2002

EXHIBIT F

26
STATE OF SOUTH CAROLINA)
HORRY COUNTY)
River Oaks II Horizontal)
Property Regime, et al.)
PLAINTIFF)
V.)
River Oaks Development)
Corp., et al.)
DEFENDANT.)

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT

2001-CP-26-5932

COVER SHEET FOR
CIVIL ACTIONS

FILED
HORRY COUNTY
01 NOV 27 AM 8:30
JEANNE J. ROBERTS
CLERK OF COURT
2001 JAN -9 PM 12:44
CERTIFIED COPY

The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of closing. It must be filled out completely, signed, and dated. A copy of this Cover Sheet must be served on the defendant(s) along with the Summons and Complaint.

NATURE OF ACTION: (check one category for the main cause of action)

☐ TORT - Motor Vehicles	☐ CONTRACT - Debt Collection
☐ TORT - Professional Malpractice	☐ CONTRACT - Employment
☐ TORT - Unfair Trade Practices, & Other Economic or Business-Related Wrongs	☐ CONTRACT - Construction
☐ TORT - Products Liability	☐ CONTRACT - Wrongful Breach
☒ TORT - Negligence	☐ CONTRACT - General Other
☐ PCR	☐ REAL PROPERTY
☐ GOV/ADM - Property Seizure	☐ MINOR SETTLEMENTS
☐ GOV/ADM - General or Other	☐ DOMESTIC FOREIGN JUDGMENT
	☐ OTHER (please describe)

JURY DEMAND: (☒) YES () NO

Note: Information requested on this form is preliminary in nature, and for administrative purposes only. The response to this request for information on jury demand merely indicates a likelihood that a jury trial will or will not be requested and does not constitute a demand for or a waiver of trial by jury pursuant to applicable rules or statutes.

DOCKETING INFORMATION (check on box)

- ☐ This case is subject to arbitration (all cases with monetary damages less than \$25,000 are subject to arbitration, unless otherwise exempt)
- ☒ This case is subject to mediation (all cases not subject to arbitration must be mediated, unless otherwise exempt)
- ☐ This case is exempt from ADR, and certificate is attached.

November 26, 2001

Stacy L. Stanley
Stacy L. Stanley, Plaintiff's Attorney
P.O. Box 475
Loris, SC 29569
(843) 756-9111

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY) CIVIL ACTION NO. 01-CP-26-5932

RIVER OAKS II HORIZONTAL PROPERTY)
REGIME AND RIVER OAKS HOMEOWNERS)
ASSOCIATION, INC.,)

PLAINTIFFS,)

vs.)

RIVER OAKS DEVELOPMENT CORP.,)
CROSSMANN COMMUNITIES OF NORTH)
CAROLINA, INC., As Successor To)
RIVER OAKS GOLF DEVELOPMENT CORP.,)
PINEHURST BUILDERS, INC., CROSSMANN)
COMMUNITIES OF NORTH CAROLINA,)
As Successor To PINEHURST BUILDERS,)
INC., and DANIEL ROGERS,)

DEFENDANTS.)

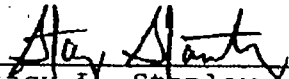
SUMMONS

(NEGLIGENCE)
(BREACH OF WARRANTY)
(UTPA))
(JURY TRIAL DEMAND)

FILED
HORRY COUNTY
01 NOV 27 AM 9:30
JEANNE J. ROBERTS
CLERK OF COURT

TO: THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscriber at his office at Post Office Box 475, Loris, South Carolina 29569, within THIRTY (30) DAYS after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.


Stacy L. Stanley
Stanley Law Firm, LLC
Attorney for the Plaintiff
Post Office Box 475
Loris, South Carolina 29569

November 26, 2001

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 01-CP-26-5932

RIVER OAKS II HORIZONTAL PROPERTY)
REGIME AND RIVER OAKS HOMEOWNERS)
ASSOCIATION, INC.,)

PLAINTIFFS,)

vs.)

RIVER OAKS DEVELOPMENT CORP.,)
CROSSMANN COMMUNITIES OF NORTH)
CAROLINA, INC., As Successor To)
RIVER OAKS GOLF DEVELOPMENT CORP.,)
PINEHURST BUILDERS, INC., CROSSMANN)
COMMUNITIES OF NORTH CAROLINA,)
As Successor To PINEHURST BUILDERS,)
INC., and DANIEL ROGERS,)

DEFENDANTS.)

COMPLAINT

(NEGLIGENCE)
(BREACH OF WARRANTY)
(UTPA)
(JURY TRIAL DEMANDED)

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CLERK OF COURT

The Plaintiffs above named, complaining of the
Defendants herein, respectfully alleges as follows:

FACTS COMMON TO ALL CAUSES OF ACTION

1. Plaintiff River Oaks II Property Regime is a
horizontal property regime organized and existing under the
laws of the State of South Carolina as provided in the
Horizontal Property Act, Section 27-31-10 et.seq., S.C.
Code Annotated, as amended, and located in Myrtle Beach,
South Carolina.

2. Plaintiff River Oaks II Homeowners Association, Inc. (hereinafter HOA) is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principle place of business in Horry County, South Carolina. The River Oaks II Homeowners Association, Inc. was formed pursuant to the Master Deed for the River Oaks II Horizontal Property Regime including, but not limited to, maintenance and repair of the property.

3. Upon information and belief, Defendant River Oaks Development Corporation (hereinafter River Oaks) is a corporation organized and existing pursuant to the laws of a state other than the State of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

4. Defendant River Oaks held certain real estate in Horry County, South Carolina that was developed into the River Oaks II Horizontal Property Regime condominium project (hereinafter River Oaks II project).

5. Defendant River Oaks developed the River Oaks II project.

6. Defendant River Oaks built individual condominium units in the River Oaks project.

7. Defendant River Oaks sold individual condominium units in the River Oaks II project.

8. Defendant River Oaks marketed individual condominium units in the River Oaks II project.

9. Upon information and belief, Defendant Crossmann Communities of North Carolina, Inc. (hereinafter Crossmann) is a corporation organized and existing pursuant to the laws of a state other than the State of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

10. Defendant Crossmann held certain real estate in Horry County, South Carolina that was developed into the River Oaks II project.

11. Defendant Crossmann developed the River Oaks II project.

12. Defendant Crossmann built individual condominium units in the River Oaks project.

13. Defendant Crossmann sold individual condominium units in the River Oaks II project.

14. Defendant Crossmann marketed individual condominium units in the River Oaks II project.

15. Defendant Crossmann used in-house construction managers for the construction of the River Oaks II project.

16. Defendant Crossmann used in-house architects for the construction of the River Oaks II project.

17. Defendant Crossmann used in-house purchasing

agents for the construction of the River Oaks II project.

18. Defendant Crossmann used in-house, on-site construction superintendents for the construction of the River Oaks II project.

19. Defendant Crossmann is the successor in interest to the Defendant Pinehurst Builders, Inc.

20. Defendant Crossmann is the successor in interest to the Defendant River Oaks.

21. Upon information and belief, Defendant Pinehurst Builders, Inc. (hereinafter Pinehurst) is a corporation organized and existing pursuant to the laws of a state other than the State of South Carolina and conducts business by and through its officers, agents, servants, and employees in Horry County, South Carolina.

22. Defendant Pinehurst held certain real estate in Horry County, South Carolina that was developed into River Oaks II Horizontal Property Regime condominium project.

23. Defendant Pinehurst developed the River Oaks II project.

24. Defendant Pinehurst was the General Contractor of the River Oaks II project.

25. Defendant Pinehurst built the River Oaks II project.

26. Defendant Pinehurst sold individual condominium

units in the River Oaks II project.

27. Defendant Pinehurst marketed individual condominium units in the River Oaks II project.

28. Defendant Pinehurst used in-house construction managers for the construction of the River Oaks II project.

29. Defendant Pinehurst used in-house architects for the construction of the River Oaks II project.

30. Defendant Pinehurst used in-house purchasing agents for the construction of the River Oaks II project.

31. Defendant Pinehurst used in-house, on-site construction superintendents for the construction of the River Oaks II project.

32. Upon information and belief, Defendant Daniel Rogers (hereinafter Rogers) is a citizen and resident of the State of North Carolina.

33. Defendant Rogers worked as an architect in Horry County, South Carolina.

34. Defendant Rogers prepared plans and specifications for Pinehurst for the River Oaks II project.

35. Defendant Rogers prepared plans and specifications for Crossmann for the River Oaks II project.

36. Defendant Rogers was responsible for design of work performed on the River Oaks II project.

37. Defendant Rogers was responsible for

construction on the River Oaks II project.

38. Defendant Rogers was responsible for design development on the River Oaks II project.

39. Defendant Rogers was responsible for the construction documents on the River Oaks II project.

40. Defendant Rogers was responsible for the bidding and negotiation on the River Oaks II project.

41. Defendant Rogers was responsible for the supervision on the River Oaks II project.

42. Defendant Rogers was responsible for the acceptance of work on the River Oaks II project.

43. Since the completion of construction, the HOA has discovered structural and safety defects.

44. The structural and safety defects are the result of defective design.

45. The structural and safety defects are the result of defective construction.

46. The structural and safety defects include, but are not limited to, the following:

- a. improper exposure of shingle tabs;
- b. improper and inadequate fastening of the composition shingles;
- c. incomplete installation of the roof underlayment;

- d. inadequate attachment of metal fascia;
- e. improper exposure of white PVC roof vents;
- f. inadequate attachment of vent flashing boots;
- g. improper and incomplete flashing details;
- h. incomplete roof deck installation;
- i. incomplete installation of vinyl soffit;
- j. improper application of composition shingles;
- k. improper fire protection provided at tenant separation;
- l. unattached vents;
- m. marginal framing including excessive spans and inadequate bracing;
- n. inadequate protection of the OSB substrate;
- o. improper application of the building wrap;
- p. improper or absence of protection at wall openings;
- q. improper installation or absence of flashing;
- r. improper installation of storage closet doors;
- s. marginal attachment of vinyl siding and vinyl siding accessories;
- t. improper vinyl siding installation details;
- u. improper window installation;
- v. improper waterproofing details;

- w. lack of flashing or weepholes in the brick veneer;
- x. improper moisture protection behind the brick veneer;
- y. improper or absence of attachment between the wall framing and foundation;
- z. inadequate wall framing on the first floor at the front of the buildings;
 - aa. inadequate attachment of hurricane straps;
 - bb. marginal framing of the gable end walls;
 - cc. inadequate and deficient attachment of the OSB sheathing to the wall framing;
 - dd. inadequate or absence of attachment between the floor trusses and wall framing;
 - ee. improper placement of anchor bolts in the concrete foundation;
 - ff. undersized attic access openings;
 - gg. exposed white PVC plumbing cleanouts;
 - hh. incomplete fire-rated wall assemblies;
 - ii. improper construction of sidewalks and asphalt parking lot;
 - jj. improper walkway slopes;
 - kk. improper hardware for storage doors;

- ll. defective storm water management drainage system;
- mm. improper construction of stairways;
- nn. improper landscaping;
- oo. defective electrical wiring, breakers, and bussing; and
- pp. improper attachment of trusses.

FIRST CAUSE OF ACTION
(Negligence: Pinehurst)

47. Plaintiffs reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

48. Pinehurst owed a duty to Plaintiffs to exercise the degree of skill necessary to construct, supervise, inspect, and review the design and construction of the River Oaks II project.

49. Pinehurst owed a duty to Plaintiffs to ensure that the River Oaks II project was built and designed in conformity with the customary and ordinary standards of the building and construction industry.

50. Pinehurst owed a duty to Plaintiffs to ensure that the River Oaks II project was built and designed in conformity with manufacturer's specifications.

51. Pinehurst owed a duty to Plaintiffs to ensure that the River Oaks II project was built and designed in conformity with applicable building codes including, but not limited to, the Standard Building Code.

52. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Pinehurst that constitute negligence and/or gross negligence in one or more of the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications;
- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction industry;
- c. in failing to properly install standard materials and products;
- d. in failing to properly install materials and products that are in accordance with the project's plans and specifications;
- e. in failing to properly install material and products in accordance with the instructions of product and material manufacturers;

- f. in failing to perform work in accordance with applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide supervision and oversight for employees, agents, and subcontractors to ensure that all work proceeded in accordance with the plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- h. in failing to accept conforming materials and labor;
- i. in failing to provide sufficient workmanship and/or materials in the project with proper supervision and inspections in accordance with plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;
- j. in failing to inform Rogers and Crossmann of the defects in plans and specifications.

53. As a direct and proximate result of the negligence and/or gross negligence by Pinehurst, Plaintiffs have suffered injuries and damages in the amount equal to the repair, maintenance, and reconstruction costs required

and to be expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, and such punitive damages as may be appropriate.

SECOND CAUSE OF ACTION

(Breach of Express and Implied Warranties: Pinehurst)

54. Plaintiffs reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

55. Pinehurst asserted express warranties in the construction of the project that the building would be free of construction defects and deficiencies.

56. Pinehurst impliedly warranted that the project would be constructed in a careful, diligent and workman-like manner in accordance with accepted industry and construction standards.

57. Pinehurst impliedly warranted that the project would be free of construction defects.

58. The defects and deficiencies set forth herein were the direct and proximate result of the acts and omissions of Pinehurst and constitute negligence and/or gross negligence including, but not limited to, the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications as designed;
- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
- c. in using and/or supplying substandard materials and products;
- d. in installing or allowing the installation of materials and products not in accordance with the project's plans and specifications;
- e. in installing or allowing the installation of materials and products in violation of instructions and directions provided by the material and product manufacturers;
- f. in allowing, accepting, or performing the project work in violation of the applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide for proper supervision and oversight of employees,

agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;

- h. in accepting and allowing the installation of defective, substandard, or non-conforming materials and labor;
- i. in accepting and performing deficient, substandard, or defective workmanship or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, plans and specifications, Standard Building Code requirements, and customary and ordinary construction practices; and
- j. in failing to inform the Rogers or Crossmann of the defects in the plans and specifications.

59. As a direct and proximate result of Pinehurst's breach of its express and implied warranties, River Oaks II suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended and to be required and expended in

the future over the expect life of the structure, loss of use, and diminution in value.

THIRD CAUSE OF ACTION
(Negligence: River Oaks and Crossmann)

60. Plaintiffs reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

61. Crossmann owed a duty to Plaintiffs to exercise the degree of skill necessary to construct, supervise, inspect, and review the design and construction of the River Oaks II project.

62. Crossmann owed a duty to Plaintiffs to ensure that the River Oaks II project was built and designed in conformity with the customary and ordinary standards of the building and construction industry.

63. Crossmann owed a duty to Plaintiffs to ensure that the River Oaks II project was built and designed in conformity with manufacturer's specifications.

64. Crossmann owed a duty to Plaintiffs to ensure that the River Oaks II project was built and designed in conformity with applicable building codes including, but not limited to, the Standard Building Code.

65. The defects and deficiencies set forth herein

were the direct and proximate result of the acts and omissions of Crossmann that constitute negligence and/or gross negligence in one or more of the following:

- a. in failing to properly construct or provide for the proper construction of the project by deviating from the plans and specifications;
- b. in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction industry;
- c. in failing to properly install standard materials and products;
- d. in failing to properly install materials and products that are in accordance with the project's plans and specifications;
- e. in failing to properly install material and products in accordance with the instructions of product and material manufacturers;
- f. in failing to perform work in accordance with applicable building codes including, but not limited to, the Standard Building Code;
- g. in failing to properly supervise or provide supervision and oversight for employees,

agents, and subcontractors to ensure that all work proceeded in accordance with the plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;

h. in failing to accept conforming materials and labor;

i. in failing to provide sufficient workmanship and/or materials in the project with proper supervision and inspections in accordance with plans and specifications, industry standards, code requirements, and customary and ordinary standards of the construction industry;

j. in failing to inform Rogers and Crossmann of the defects in plans and specifications.

66. As a direct and proximate result of the negligence and/or gross negligence by Crossmann, Plaintiffs have suffered injuries and damages in the amount equal to the repair, maintenance, and reconstruction costs required and to be expended and to be required and expended in the future over the expected life of the structure, loss of use, diminution in value, and such punitive damages as may be appropriate.

FOURTH CAUSE OF ACTION
**(Breach of Implied Warranties of Habitability and Fitness
for a Particular Purpose: River Oaks, Crossmann, and
Pinehurst)**

67. Plaintiffs reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

68. River Oaks sold condominium units along with their proportionate share of the common elements.

69. River Oaks made implied warranties of habitability and fitness for a particular purpose.

70. Crossmann sold condominium units along with their proportionate share of the common elements.

71. Crossmann made implied warranties of habitability and fitness for a particular purpose.

72. Pinehurst sold condominium units along with their proportionate share of the common elements.

73. Pinehurst made implied warranties of habitability and fitness for a particular purpose.

74. River Oaks, Crossmann, and Pinehurst breached their implied warranties of habitability and fitness for a particular purpose by selling the condominium units along with their proportionate share of the common elements in an inferior and rapidly deteriorating condition with the

buildings and common elements containing the defects and deficiencies as set forth above.

75. As a direct and proximate result of River Oaks and Crossmann's breach of its implied warranties, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be required and expended in the future over the expected life of the structure, loss of use, and diminution in value.

FIFTH CAUSE OF ACTION

(Breach of Express Warranty: River Oaks, Crossmann, and Pinehurst)

76. Plaintiffs reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

77. River Oaks marketed the property at the River Oaks II project.

78. River Oaks warranted that the River Oaks II project was of the highest quality.

79. Crossmann marketed the property at the River Oaks II project.

80. Crossmann warranted that the River Oaks II project was of the highest quality.

81. Pinehurst marketed the property at the River Oaks II project.

82. Pinehurst warranted that the River Oaks II project was of the highest quality.

83. River Oaks, Crossmann, and Pinehurst breached their express warranties by marketing and selling the individual units to the members of the Association with the condominium buildings containing defects and deficiencies set forth above.

84. As a direct and proximate result of River Oaks and Crossmann's breach of its express warranties, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value.

SIXTH CAUSE OF ACTION
(Negligence: Rogers)

85. Plaintiffs reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

86. Rogers owed a duty to the Plaintiffs to properly design, supervise, and oversee the development and construction of the River Oaks II project.

87. Rogers owed a duty to the Plaintiffs to ensure

that the River Oaks II project was developed, designed, and built in conformity with industry standards, normal construction practices, and in accordance with the project plans and specifications.

88. The acts and omissions of Rogers constitute negligence and/or gross negligence with regards to his duties at River Oaks II including, but not limited to, the following:

- a. in failing to adequately design a waterproofing system that would prevent water infiltration into the interior portions of the building;
- b. improper design of the exterior of the building;
- c. improper design or non-existent design of proper flashing;
- d. improper design or specifications for doors and windows;
- e. improper design or specifications for the exterior of the building;
- f. inadequate inspection of construction material or products;
- g. inadequate inspection of construction work;
- h. in failing to design the project in accordance with applicable building codes;

- i. in failing to design the project in accordance with acceptable building practices;
- j. in failing to design and provide for appropriate fire protection for the exterior areas of the building;
- k. in allowing and/or accepting defective and substandard work and materials;
- l. in failing to inform Pinehurst, River Oaks, and Crossmann of the defects and deficiencies as set forth above.

89. As a direct and proximate result of Rogers' negligence and/or gross negligence, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value.

SEVENTH CAUSE OF ACTION

(Breach of Express and Implied Warranties: Rogers)

90. Plaintiffs reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

91. Rogers certified the final plans of the River

Oaks II project.

92. Rogers used his architect seal for the final plans of the River Oaks II project.

93. Rogers expressly and impliedly warranted that the design of the project was of the highest and best quality by certifying and sealing the final plans.

94. Rogers expressly and impliedly warranted that the plans and specifications of the project were of the highest and best quality by certifying and sealing the final plans.

95. Rogers expressly and impliedly warranted that the construction of the project was built in accordance with the general principles of the industry by certifying and sealing the final plans.

96. Rogers expressly and impliedly warranted that the materials and labor of the project were in accordance with general principles of the industry and applicable building codes by certifying and sealing the final plans.

97. Rogers expressly and impliedly warranted that the plans and specifications were suitable and fit for the project and that the project would be free of design and construction defects.

98. The plans and specifications were not suitable for the project and their intended purpose.

99. As a direct and proximate result of Rogers'

negligence and/or gross negligence, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value.

FOR A EIGHTH CAUSE OF ACTION

(Unfair Trade Practices Act: River Oaks, Crossmann, Pinehurst, and Rogers)

100. Plaintiffs reference and incorporate every allegation set forth above as if fully repeated verbatim herein.

101. River Oaks, Crossmann, Pinehurst, and Rogers design, develop, and construct condominium buildings that are defective and deficient.

102. Defendants have been aware of these defects and deficiencies, but continue to build the condominium buildings without any concern for the public interest.

103. Defendants' actions impact the public interest.

104. Defendants' actions have been repeated or have the potential for repetition in the future.

105. As a direct result and proximate cause of Defendants' actions, Plaintiffs incurred actual damages including, but not limited to, the amount equal to the extraordinary repair, maintenance, and reconstruction costs

required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value.

106. Defendants' actions were willful or Defendants could have ascertained that the above mentioned conduct violated the Unfair Trade Practices Act and, therefore, Plaintiffs are also entitled to treble damages.

WHEREFORE, the Plaintiff prays as follows:

A. For the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value of the River Oaks II project;

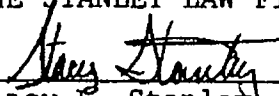
B. For punitive damages;

C. For treble damages;

D. For the costs and disbursements of this action; and

E. For such other and further relief as this Court may deem just and proper.

THE STANLEY LAW FIRM


Stacy L. Stanley
Post Office Box 475
Loris, S.C. 29569
(843) 756-9111
Attorney for the Plaintiff

November 26, 2001.

EXHIBIT G

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2001-CP-26-535

WATERWAY VILLAGE AT RIVER OAKS
HORIZONTAL PROPERTY REGIME and
WATERWAY VILLAGE at RIVER OAKS
HOMEOWNERS ASSOCIATION, INC.,

Plaintiffs,

vs.

RIVER OAKS GOLF DEVELOPMENT CORP.,
CROSSMANN COMMUNITIES OF NORTH
CAROLINA, INC. as successor to RIVER OAKS
GOLF DEVELOPMENT CORP., PINEHURST
BUILDERS, INC., CROSSMANN COMMUNITIES
OF NORTH CAROLINA, INC. as successor to
PINEHURST BUILDERS, INC., DANIEL
ROGERS, RIGHT WAY CONSTRUCTION, INC.,
DONOVAN BROTHERS ROOFING &
RESTORATION, INC., TRI-CITY INSULATION,
SAM'S DRYWALL, HARDEE ELECTRIC
SERVICE, SEALEY CONCRETE, INC., and
B & W LANDSCAPING,

Defendants.

AMENDED SUMMONS
(Jury Trial Demanded)

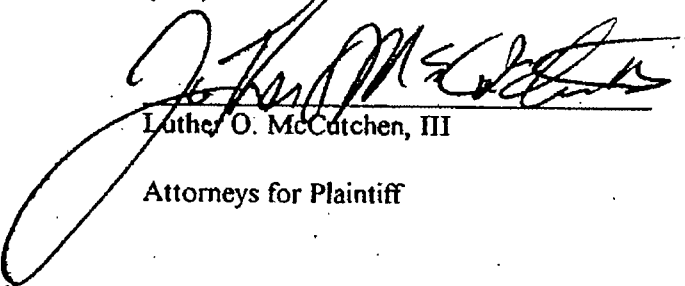
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J. ROBERTS
CLERK OF COURT
HORRY COUNTY

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2004 JUN -9 PM 2:44
J. ROBERTS
CLERK OF COURT
HORRY COUNTY

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Amended Complaint on the Plaintiff's attorneys, McCutchen, Mumford, Vaught & O'Dea, P.A., at 4610 Oleander Drive, Suite 203, Oleander Center, Myrtle Beach, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Amended Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Amended Complaint and judgment by default will be rendered against you for the relief demanded in the Amended Complaint. Your Answer must be in writing and signed by you or by your attorney and you must state your address or the address of your attorney, if signed by your attorney.

McCUTCHEN, MUMFORD, VAUGHT & O'DEA, P. A.
4610 Oleander Dr., Suite 203
Myrtle Beach, SC 29577
(843) 449-3411



Luther O. McCutchen, III

Attorneys for Plaintiff

July 26, 2001
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2001-CP-26-535

WATERWAY VILLAGE AT RIVER OAKS)
HORIZONTAL PROPERTY REGIME and)
WATERWAY VILLAGE at RIVER OAKS)
HOMEOWNERS ASSOCIATION, INC.,)

Plaintiffs,)

vs.)

RIVER OAKS GOLF DEVELOPMENT CORP.,)
CROSSMANN COMMUNITIES OF NORTH)
CAROLINA, INC. as successor to RIVER OAKS)
GOLF DEVELOPMENT CORP., PINEHURST)
BUILDERS, INC., CROSSMANN COMMUNITIES)
OF NORTH CAROLINA, INC. as successor to)
PINEHURST BUILDERS, INC., DANIEL)
ROGERS, RIGHT WAY CONSTRUCTION, INC.,)
DONOVAN BROTHERS ROOFING &)
RESTORATION, INC., TRI-CITY INSULATION,)
SAM'S DRYWALL, HARDEE ELECTRIC)
SERVICE, SEALEY CONCRETE, INC., and)
B & W LANDSCAPING,)

Defendants.)

AMENDED COMPLAINT
(Jury Trial Demanded)

FILED
Horry County
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J. ROBERTS
CLERK OF COURT

The Plaintiffs, complaining of Defendants above named, would respectfully allege and show unto this Honorable Court as follows:

1. The Plaintiff, Waterway Village at River Oaks Horizontal Property Regime is a horizontal property regime located in Horry County, South Carolina and is organized and existing pursuant to the laws of the State of South Carolina as provided for in the Horizontal Property Act found in §27-31-10 et. seq., Code of Laws of South Carolina 1976, as amended. This Regime was established by that

Master Deed recorded in the office of the Clerk of Court for Horry County in Deed Book 1879 at Page 485, et. seq.

2. The Plaintiff, Waterway Village at River Oaks Homeowners' Association, Inc. is a nonprofit, eleemosynary corporation organized and existing pursuant to the laws of the State of South Carolina with its only office and principal place of business being in Horry County, South Carolina. The Association was formed to manage and administer the affairs of the Regime to include, but not limited to, maintenance and repair of the property of the Regime. The Regime and the Association shall hereinafter collectively be referred to as "The Plaintiffs or Plaintiffs".
3. The Defendant, River Oaks Golf Development Corp., is, upon information and belief, a corporation organized and existing under the laws of one of the States of The United States; is or was duly domesticated to do business in the State of South Carolina and does, or did, business in Horry County, South Carolina by, among other things, the development of Waterway Village at River Oaks Horizontal Property Regime, same being more fully referenced above. The Defendant Crossmann Communities of North Carolina, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of one of the States of the United States and is the successor in interest to River Oaks Golf Development Corp. These Defendants, River Oaks Golf Development Corp. and Crossmann Communities of North Carolina, Inc., shall hereinafter collectively be referred to as the "Developer". Developer did hold title to certain real estate in Horry County, South Carolina which was developed into the Waterway Village at

River Oaks Horizontal Property Regime condominium project. The Developer did develop, sell and market individual condominium units in the Waterway Village project.

4. The Defendant, Pinehurst Builders, Inc., is, upon information and belief, a corporation organized and existing pursuant to the laws of one of the States of the United States; is or was duly domesticated to do business in the State of South Carolina and does, or did, business in Horry County, South Carolina by, at all times relevant herein, being the General Contractor for all aspects of the building and construction of the Waterway Village at River Oaks project. The Defendant Crossmann Communities of North Carolina, Inc. is, upon information and belief, a corporation duly organized and existing under the laws of a State other than the State of South Carolina and is the successor in interest to the Defendant, Pinehurst Builders, Inc. The Defendants Pinehurst Builders, Inc. and Crossmann Communities of North Carolina, Inc. shall hereinafter be collectively referred to as the "General Contractor".
5. The Defendant, Daniel Rogers, (hereinafter referred to as "Rogers" or "Architect"), is, upon information and belief, a citizen and resident of the State of North Carolina who, at all relevant times herein, did business in Horry County, South Carolina, as an architect. Rogers worked either for, or in conjunction with, Pinehurst Builders, Inc., in the preparation of plans and specifications for the Waterway Village at River Oaks project. As the project Architect, Rogers was responsible for architectural, schematic and design development, supervision,

construction documents, bidding, negotiation, and approval and acceptance of work performed and completed at the Waterway Village at River Oaks project.

6. The Defendant, Right Way Construction, Inc., is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina and, at all times relevant herein, conducted business in Horry County, South Carolina. Upon information and belief, Defendant Right Way Construction, Inc. had responsibilities at the subject project including, but not limited to, the construction and installation of framing, flashing, waterproofing, window installation, carpentry work and vinyl siding as found in the particulars set forth below.
7. Upon information and belief, the Defendant, Donovan Brothers Roofing & Restoration, Inc., is a corporation organized and existing pursuant to the laws of the State of South Carolina and, at all times relevant herein, conducted business in Horry County, South Carolina. Upon information and belief, Donovan Brothers Roofing and Restoration, had responsibilities at the subject project including, but not limited to, the construction and installation of the roof, roof underlayment, flashing, waterproofing, and all matters relevant to the roof and shingle installation as found in the particulars set forth below.
8. Upon information and belief, the Defendant, Tri-City Insulation, is a business operating and doing business in Horry County, South Carolina at all times relevant hereto. Upon information and belief, this Defendant had responsibilities at the subject project including, but not limited to, the installation of insulation and

waterproofing as found in the particulars set forth hereinafter.

9. Upon information and belief, the Defendant, Sam's Drywall, is a business located in Lumberton, North Carolina, which at all times herein performed services at the Waterway Village project, had responsibilities at the subject project including, but not limited to, the framing, flashing, carpentry work and vinyl siding installation, as well as drywall installation and completion as found in the particulars set forth below.
10. Upon information and belief, the Defendant, Hardee Electric Service, is a business located in Conway, South Carolina, which has and continues to do, business in Horry County, South Carolina. Upon information and belief, Hardee Electric Service was responsible for performing part or all of the electrical wiring, installation and related work at the subject project as found in the particulars set forth below.
11. Upon information and belief, the Defendant, Sealey Concrete, Inc., is a corporation organized and existing pursuant to the laws of the State of South Carolina, and all times herein did business in Horry County, South Carolina. The Defendant Sealey Concrete, Inc. was responsible for, among other things, the design and construction of the sidewalks of the project as found in the particulars set forth below.
12. As a result of the foregoing allegations, all of the above Defendants are subject to the jurisdiction of this Court. Further, the actions, conduct and agreements of the above named defendants at all times contemplated the construction and the sale of

condominium units and condominium property to individual purchasers and the formation of a regime with the Plaintiffs being charged with the responsibility for maintenance and repair of the general and limited common elements.

13. These Defendants knew, or should have known, that the Plaintiffs would be charged with the responsibility for the care, maintenance, upkeep and supervision of the property after the full transfer of the control of power passed by the Developer to the Association.
14. These Defendants owed duties to the Plaintiffs in the completion and performance of their work in reference to the development, construction, design, oversight, supervision and placement in the stream of commerce the Waterway Village at River Oaks units and the Association has recently discerned certain construction, structural and safety defects in the buildings and the properties of the Regime. Upon information and belief, the problems and defects in the project are as a result of defective design and/or construction, including oversight and supervision, and include, but are not limited to, the following:
 - a) improper, incomplete and inadequate fastening and attachment of the composition shingles to the underlying roof base;
 - b) improper application of the composition shingles to the roof including misalignment, improper overlap and improper attachment;
 - c) improper installation of the roof underlayment;
 - d) improper gutter and down-spout sizing;
 - e) incomplete roof/deck installations, to include the base of the gable end walls;

- f) improper, incomplete and insufficient flashing and flashing details throughout the roof installation;
- g) improper installation of unsupported shingles at roof ridges;
- h) improper application of the building wrap, leading to, among other things, inadequate protection of the OSB substrate;
- i) improper or absence of proper moisture protection at wall openings;
- j) improper installation and/or absence of flashing at windows and exterior openings;
- k) improper and incomplete attachment and sealing of vinyl siding and vinyl siding accessories;
- l) improper window installation;
- m) improper or absence of attachment between wall framing and the foundation;
- n) improper and inadequate wall framing on the first floor on the front of the buildings;
- o) inadequate and improper installation and attachment of hurricane straps;
- p) improper and incomplete framing of gable end walls, causing deterioration to the interior;
- q) improper, inadequate and deficient attachment of the OSB sheathing to the wall framing;
- r) inadequate attachment between the floor trusses and wall framing;
- s) improper cutting of truss ends, thereby impacting their structural integrity;
- t) inadequate or lack of, proper attachment between the roof trusses and the wall framing;
- u) inadequate protection of fire resistance to the stairs giving access to the second and third floors;
- v) inadequate, or absence of, fire protection for the breeze ways, providing

the only means of ingress and egress for the second and third floors;

- w) inadequate and inconsistent protection of the structural elements that support the breeze ways on building fronts and the screen porches on the rear buildings;
 - x) failure to properly install adequate and complete wiring in the buildings;
 - y) failure to properly use pressure treated wood in all exterior applications;
 - z) installing and using hardware in exterior places with hardware not specifically designed to be used for exterior exposure;
 - aa) failing to properly protect all exterior wall openings against water and moisture penetration;
 - bb) improperly designing and constructing the sidewalks;
 - cc) designing and constructing property such that there is standing water and negative drainage;
15. As a direct and proximate result and consequence of the numerous design and/or construction defects, deficiencies and problems at the Waterway Village project resulting in substantial damage, decay and deterioration, the Plaintiffs will have to, and shall be required to, expend substantial sums of money for the extraordinary repairs and reconstruction costs for the common elements and limited common elements of Waterway Village for the expected life of the structure.

FIRST CAUSE OF ACTION
(Negligence/General Contractor)

16. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
17. The General Contractor owed a duty to the Plaintiffs to exercise that degree of skill necessary to construct, supervise, inspect and review the design and otherwise

deliver the buildings of Waterway Village free of the construction defects to ensure that said buildings were designed and built in conformity with the customary and ordinary standards of the building and construction industry.

18. The defects and deficiencies set forth herein which exist at the Waterway Village project were the direct and proximate result of the acts and omissions of the General Contractor which constitute negligence and/or gross negligence in one or more of the following particulars to wit:

- a) In failing to properly construct, or provide for the proper construction of the project, by deviating from the plans and specifications as designed and/or in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
- b) In using and/or supplying substandard materials and products;
- c) By allowing the installation of, or installing, materials and products not in accordance with the project's plans and specifications;
- d) By allowing the installation of, or installing, materials and products in violations of instructions and directions provided by product and material manufacturers;
- e) By allowing, accepting, or in performing, the work in violation of the applicable building codes, including the Standard Building Code;
- f) In failing to properly supervise, or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements and customary and ordinary standards of the construction industry;
- g) In accepting and allowing the installation of defective, substandard and/or non-conforming materials and labor; and
- h) In accepting and performing deficient, substandard and/or defective workmanship and/or materials in the project without proper inspections to

ensure that the work completed was correct and in conformity with industry standards, the project plans and specifications, Standard Building Code requirements and customary and ordinary construction practices.

- i) In failing to inform the Architect and/or the Developer of the defects in the plans and specifications.
19. As a direct and proximate result and consequence of the negligence and/or gross negligence by the General Contractor, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use, diminution in value and such punitive damages as may be appropriate.

FOR A SECOND CAUSE OF ACTION
(Breach of Express and Implied Warranties/General Contractor)

20. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
21. The General Contractor for the construction of Waterway Village at River Oaks, upon information and belief, made and asserted express warranties in the construction of the project that the building would be free of construction defects and deficiencies and, further, also impliedly warranted that the project would be constructed in a careful, diligent and workman-like manner, in accordance with accepted industry and construction standards, and to be free of construction defects.
22. The defects and deficiencies set forth herein which exist at the Waterway Village project were the direct and proximate result of the acts and omissions of the

General Contractor which constitute negligence and/or gross negligence in one or more of the following particulars to wit:

- a) In failing to properly construct, or provide for the proper construction of the project, by deviating from the plans and specifications as designed and/or in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
- b) In using and/or supplying substandard materials and products;
- c) By allowing the installation of, or installing, materials and products not in accordance with the project's plans and specifications;
- d) By allowing the installation of, or installing, materials and products in violations of instructions and directions provided by product and material manufacturers;
- e) By allowing, accepting, or in performing, the work in violation of the applicable building codes, including the Standard Building Code;
- f) In failing to properly supervise, or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements and customary and ordinary standards of the construction industry;
- g) In accepting and allowing the installation of defective, substandard and/or non-conforming materials and labor; and
- h) In accepting and performing deficient, substandard and/or defective workmanship and/or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, the project plans and specifications, Standard Building Code requirements and customary and ordinary construction practices.
- i) In failing to inform the Architect and/or Developer of the defects in the plans and specifications.

23. As a direct and proximate result and consequence of the General Contractor's breach of its express and implied warranties, Plaintiffs have suffered injuries and

damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use and diminution in value.

THIRD CAUSE OF ACTION
(Negligence/Developer)

24. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
25. The Developer owed a duties to the Plaintiffs to develop, design, construct, supervise and inspect the Waterway Village at River Oaks buildings to insure they were free of construction and design defects, and ensure that the buildings were developed, designed and built in conformity with the customary and ordinary standards for like construction in the building and construction industry.
26. In the design, development, construction, supervision and inspection of the Waterway Village at River Oaks project, the Developer owed a duty to the Plaintiff to ensure that the Architect and Contractor hired to oversee the project and construct the buildings did so with the buildings being free of construction defects and deficiencies and built and designed in conformity with customary and ordinary standards found in the building and construction industry.
27. The Developer was negligent and/or grossly negligent with regards to the development of the Waterway Village project and the deficiencies and defects which exist at the project are the direct and proximate result of one or more of the following particulars in addition to those referenced above:

- a) In failing to properly construct, or provide for the proper construction of the project, by deviating or allowing the deviation from the plans and specifications as designed and/or in failing to require the General Contractors to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
- b) In using and/or in allowing the use of substandard materials and products;
- c) By allowing the installation of materials and products not in accordance with the project's plans and specifications;
- d) By allowing and/or accepting the installation of materials and products in violations of instructions and directions provided by product and material manufacturers;
- e) By allowing and/or accepting the work to be performed in violation of the applicable building codes, including the Standard Building Code;
- f) In failing to properly provide for and/or require proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements and customary and ordinary standards of the construction industry;
- g) In accepting and/or allowing defective, substandard and/or non-conforming labor; and
- h) In accepting and/or allowing the performance of deficient, substandard and/or defective workmanship and/or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, the project plans and specifications, Standard Building Code requirements and customary and ordinary construction practices.
- i) In failing to inform the Architect and/or the General Contractor of the defects in the plans and specifications.

28. As a direct and proximate result and consequence of the negligence and/or gross negligence by the Developer, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs

required and expended, and to be required and expended, over the expected life of the structure, loss of use, diminution in value and such punitive damages as may be appropriate.

FOR A FOURTH CAUSE OF ACTION
(Breach of Implied Warranties and Habitability
and Fitness for Particular Purpose/Developer)

29. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
30. The Developer developed the Waterway Village project and sold the condominium units contained therein, along with their proportionate share of the common elements. In the sale of the condominium units, along with their proportionate share of the common elements, Developer made implied warranties of habitability and fitness for a particular purpose.
31. These Plaintiffs would allege and show that the Developer breached its implied warranties of habitability and fitness for a particular purpose by selling the condominium units along with their proportionate share of the common elements in an inferior and rapidly deteriorating condition with the buildings and common elements containing the defects and deficiencies set forth above.
32. As a direct and proximate result and consequence of the Developer's breach of its implied warranties, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use and diminution in value.

FOR A FIFTH CAUSE OF ACTION
(Breach of Express Warranty/Developer)

33. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
34. Developer, River Oaks, in its sale and marketing of the property of Waterway Village represented and warranted that the condominium project, including the individual units and common elements, was of the highest quality and said Developer breached its express warranty by marketing and selling the individual units to members of the Association with condominium buildings having the defects and deficiencies set forth above.
35. As a direct and proximate result and consequence of the Developer's breach of its express warranties, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use and diminution in value.

FOR A SIXTH CAUSE OF ACTION
(Negligence/Architect)

36. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
37. The Architect owed duties to the Plaintiffs to properly design, supervise and oversee the development and construction of the buildings at Waterway Village and to ensure that they were developed, designed and built in conformity with industry standards in normal construction practices and in accordance with the

project plans and specifications.

38. The acts and omissions of the Architect constitute negligence and/or gross negligence with regards to his duties at Waterway Village in certain particulars, including, but not limited to, the following:

- a) In failing to properly design the buildings so as to provide for appropriate waterproofing and exterior wrap of the buildings;
- b) In failing to properly design all exterior wall openings to provide for the necessary wrapping, caulking and flashing;
- c) In failing to properly design and require the necessary flashing for all areas of the project including the roofs, exterior walls and exterior openings;
- d) In failing to provide proper specifications so that the building could be built in compliance with standards in customary industry practices and in accordance with existing building codes;
- e) In failing to design and provide for appropriate fire protection for the exterior areas of the building;
- f) In failing to properly supervise, oversee and inspect the project and construction to ensure its construction was in compliance with all plans and specifications, industry standards, manufacturer's requirements, all applicable building codes and all other code requirements and customary and standard building and construction practices;
- g) In allowing and/or accepting defective and substandard work and materials;
- h) In failing to inform the Developer and General Contractor of the defects and deficiencies as referenced above.

39. As a direct and proximate result and consequence of the negligence and/or gross negligence by the Architect, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended and to be required and expended, over the expected life of

the structure, loss of use, diminution in value and such punitive damages as may be appropriate.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Express and Implied Warranties/Architect)

40. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
41. The Architect, by and through his involvement with the construction and completion of the Waterway Village project, both expressly and implied warranted that the design of the project, inclusive of all plans and specifications, was to the highest and best quality and in conformity with the generally accepted standards of the design, architectural and construction industry. Therefore, by sealing the final plans and certifying that the project was built in conformity with the presented plans and specifications, said Architect did further both expressly and impliedly warrant that the construction of the project was built in accordance with the general principles in the industry and the materials used and labor expended were also in conformity.
42. Further, the Architect has also expressly and impliedly warranted that the buildings and improvements of the project were built in accordance with, and pursuant to the plans and specifications prepared by him and/or by the General Contractor, and which carried his seal and certification.
43. The plans and specifications were not suitable for their intended purposes and as a result of the Architect's breach of the aforementioned express and implied

warranties in favor of the Plaintiff, Plaintiff is damaged with extreme and severe structural and construction defects and deficiencies.

44. As a direct and proximate result and consequence of the Architect's breach of the express and implied warranties referenced above, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use and diminution in value.

FOR AN EIGHTH CAUSE OF ACTION

(Negligence/Right Way Construction, Inc., Donovan Brothers Roofing & Restoration, Inc., Tri-City Insulation, Sam's Drywall, Hardee Electric Service Sealey Concrete, Inc. and B & W Landscaping)

45. Each and every allegation set forth above is incorporated herein by reference as if fully repeated verbatim.
46. The Defendants, Right Way Construction, Inc., Donovan Brothers Roofing & Restoration, Inc., Tri-City Insulation, Sam's Drywall, Hardee Electric Service Sealey Concrete, Inc. and B & W Landscaping (hereinafter "Defendant Subcontractors") owed duties to the Plaintiffs to exercise that degree of skill necessary to construct, supervise and review the design and otherwise to deliver the buildings free of construction defects and design and built in conformity with the customary and ordinary standards of the buildings and construction industry.
47. The deficiencies and defects which exist at the River Oaks project are the proximate and direct result of the negligence and/or gross negligence of Defendant Subcontractors in one or more of the following particulars:

- a) In failing to properly construct the project by deviating from the plans and specifications and by failing to employ practices and methods of constructions conforming with customary and accepted industry standards; and/or using defective materials; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;
 - b) In failing to properly insure that all work proceeded in accordance with the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry;
 - c) In accepting non-conforming or defective materials;
 - d) In accepting and performing deficient and/or defective workmanship and/or materials, without proper inspection to ensure the work was correct and in conformity with industry standards and in accordance with the plans and specifications and th manufacturer's instructions;
 - e) In constructing the condominium project in violation of applicable building codes; and
 - f) In failing to inform the Architect, Developer and/or General Contractor of the defects in the plans and specifications.
48. As a direct and proximate result and consequence of the negligence and/or gross negligence by these Subcontractors, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use, diminution in value and such punitive damages as may be appropriate.

FOR A NINTH CAUSE OF ACTION

(Breach of Implied Warranties/Defendants Right Way Construction, Inc.,
Donovan Brothers Roofing & Restoration, Inc., Tri-City Insulation,
Sam's Drywall, Hardee Electric Service Sealey Concrete, Inc.
and B & W Landscaping)

49. Each and every allegation set forth above is incorporated herein by reference as if

fully repeated verbatim.

50. Upon information and belief, Defendant Subcontractors implied warranted that the project would be constructed in a careful, diligent and workmanlike manner, free of construction defects.
51. Defendant Subcontractors breached their implied warranties including, but not limited to, the following particulars:
- a) In failing to properly construct, or provide for the proper construction of the project, by deviating from the plans and specifications as designed and/or in failing to employ practices and methods of construction and construction oversight conforming to the normal, customary, and ordinary standards of the construction and oversight industry;
 - b) In using and/or supplying substandard materials and products;
 - c) By allowing the installation of, or installing, materials and products not in accordance with the project's plans and specifications;
 - d) By allowing the installation of, or installing, materials and products in violations of instructions and directions provided by product and material manufacturers;
 - e) By allowing, accepting, or in performing, the work in violation of the applicable building codes, including the Standard Building Code;
 - f) In failing to properly supervise, or provide for proper supervision and oversight of employees, agents, and subcontractors to ensure that all work proceeded and was completed in accordance with the project plans and specifications, industry standards, code requirements and customary and ordinary standards of the construction industry;
 - g) In accepting and allowing the installation of defective, substandard and/or non-conforming materials and labor; and
 - h) In accepting and performing deficient, substandard and/or defective workmanship and/or materials in the project without proper inspections to ensure that the work completed was correct and in conformity with industry standards, the project plans and specifications, Standard Building

Code requirements and customary and ordinary construction practices.

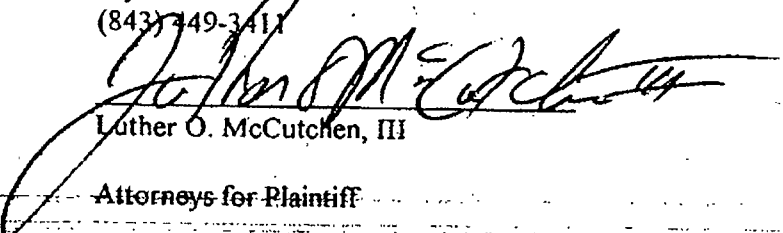
- i) In failing to inform the Architect, Developer and/or the General Contractor of the defects in the plans and specifications.

52. As a direct and proximate result and consequence of the Subcontractors' breaches of their implied warranties, Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the structure, loss of use and diminution in value.

WHEREFORE, Plaintiffs pray for judgment against these Defendants, as herein above set forth, in an amount equal to all its actual, consequential, incidental and special damages, together with punitive damages, as this Court may deem appropriate, and for such other and further relief as is deemed just and proper.

Respectfully submitted,

McCUTCHEN, MUMFORD, VAUGHT & O'DEA, PA
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Myrtle Beach, SC 29577
(843) 449-3411



Luther O. McCutchen, III

Attorneys for Plaintiff

July 26, 2001
Myrtle Beach, South Carolina

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

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entities as named insured under the policies provided, however, that the named insured endorsement contained in the policies provides named insured status for various entities which bear a relationship to Crossman Communities, Inc. and the Plaintiffs may fall within this endorsement based upon their relationship to Crossman Communities, Inc. and as to the remainder it craves reference to the policies that it issued and denies any allegations of Paragraph Four (4) that differ from or are inconsistent with the policy language;

5. That it lacks sufficient information to form a belief as to the allegations of Paragraph Five (5) and therefore denies same and demands strict proof thereof;

6. That Paragraph Six (6) sets forth a characterization of the allegations of this lawsuit and no response is required of this Defendant;

7. That it lacks sufficient information to form a belief as to the allegations of Paragraphs Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), and Twelve (12) and therefore denies same and demands strict proof thereof;

8. That it admits Paragraph Thirteen (13);

9. That it lacks sufficient information to form a belief as to the allegations of Paragraph Fourteen (14) and therefore denies the same and demands strict proof thereof;

10. That Paragraphs Fifteen (15), Sixteen (16), Seventeen (17) and Eighteen (18) set forth various jurisdictional issues to which no response is required of this Defendant and this Defendant reserves all rights to contest venue or jurisdiction in this matter;

11. That it lacks sufficient information to form a belief as to the allegations of Paragraphs Nineteen (19), Twenty (20), Twenty One (21), Twenty Two (22) and Twenty Three (23) and therefore denies same and demands strict proof thereof;

12. That Paragraphs Twenty Four (24) through Fifty Two (52) do not purport to state a claim as to this Defendant and therefore no response is required, however, to the extent that said Paragraph may be construed to allege such a claim, they are denied;

13. That it admits Paragraph Fifty Three (53);

14. That it admits so much of Paragraph Fifty Four (54) as alleges that there is an endorsement to the Cincinnati policies which provides for coverage for a number of entities related to Crossman Communities, Inc. and craves reference to the documents for their terms and conditions and further craves reference to the organizational documents of the various subsidiaries to determine whether or not the various entities fall within the definitions provided in the policies;

15. That it lacks sufficient information to form a belief as to the allegations of Paragraphs Sixty Five (55) and Fifty Six (56) and therefore denies same and demands strict proof thereof;

16. That it admits Paragraph Fifty Seven (57) to the extent that it represents a quotation from the policy, however, the insuring agreement is modified by an endorsement which limits the coverage provided and which states:

this policy does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" unless such coverage is provided by valid and collectable "underlying insurance" as listed in the schedule of underlying policies, and then only for such hazards for which coverage is afforded by such "underlying insurance";

17. That it admits so much of Paragraph Fifty Eight (58) as alleges that it has a duty to defend under certain circumstances for damages which may be covered under the policy and craves reference to the complete policy, including all endorsements, for the terms and conditions and denies any allegations of Paragraphs Fifty Eight (58) and Fifty Nine (59) that differ from or are inconsistent with the terms and conditions of the policies;

18. That Paragraph Sixty (60) is a definitional statement to which no response is required of this Defendant;

19. That it admits so much of Paragraph Sixty One (61) and alleges that the underlying complaints attached as exhibits seek damages from the named Defendants, that it lacks sufficient information to form a belief as to whether the claims fall within the coverage of the Cincinnati policies and further denies that it has failed to acknowledge claims in that there are a variety of policy provisions in the Cincinnati policies and the underlying policies which affect coverage;

20. That Paragraphs Sixty Two (62), Sixty Three (63), Sixty Four (64), Sixty Five (65) and Sixty Six (66) set forth a summary of the Plaintiff's interpretation of the underlying complaint and this Defendant craves reference to the complaint for the allegations set forth therein;

21. That it denies so much of Paragraph Sixty Seven (67) as alleges that Cincinnati has a duty to defend and indemnify the Plaintiffs until such time as the underlying policies have been exhausted and further craves reference to the terms and conditions of the Cincinnati policy to determine any duty to defend and/or indemnify the Plaintiffs for claims asserted;

22. That it lacks sufficient information to form a belief as to the allegations of Paragraphs Sixty Eight (68) and Sixty Nine (69) and therefore denies same and demands strict proof thereof;

23. That Paragraphs Seventy (70), Seventy One (71), Seventy Two (72) and Seventy Three (73) set forth a summary of the Plaintiff's interpretation of the underlying complaint and this Defendant craves reference to the complaints for the allegations set forth therein;

24. That it denies so much of Paragraph Seventy Four (74) as alleges that Cincinnati has a duty to defend and indemnify the Plaintiffs until such time as the underlying policies have been

exhausted and further crave reference to the terms and conditions of the Cincinnati policy to determine any duty to defend and/or indemnify the Plaintiffs for claims asserted;

25. That it lacks sufficient information to form a belief as to the allegations of Paragraphs Seventy Five (75) and Seventy Six (76) and therefore denies same and demands strict proof thereof;

26. That Paragraphs Seventy Seven (77), Seventy Eight (78), and Seventy Nine (79) set forth a summary of the Plaintiff's interpretation of the underlying complaint and this Defendant craves reference to the complaints for the allegations set forth therein;

27. That it denies so much of Paragraph Eighty (80) as alleges that Cincinnati has a duty to defend and indemnify the Plaintiffs until such time as the underlying policies have been exhausted and further crave reference to the terms and conditions of the Cincinnati policy to determine any duty to defend and/or indemnify the Plaintiffs for claims asserted;

28. That it lacks sufficient information to form a belief as to the allegations of Paragraphs Eighty One (81) and Eighty Two (82) and therefore denies same and demands strict proof thereof;

29. That Paragraphs Eighty Three (83), Eighty Four (84), Eighty Five (85) and Eighty Six (86) set forth a summary of the Plaintiff's interpretation of the underlying complaint and this Defendant craves reference to the complaints for the allegations set forth therein;

30. That it denies so much of Paragraph Eighty Seven (87) as alleges that Cincinnati has a duty to defend and indemnify the Plaintiffs until such time as the underlying policies have been exhausted and further crave reference to the terms and conditions of the Cincinnati policy to determine any duty to defend and/or indemnify the Plaintiffs for claims asserted;

31. That it lacks sufficient information to form a belief as to the allegations of Paragraphs Eighty Eight (88) and Eighty Nine (89) and therefore denies same and demands strict proof thereof;

32. That Paragraphs Ninety (90), Ninety One (91), Ninety Two (92) and Ninety Three (93) set forth a summary of the Plaintiff's interpretation of the underlying complaint and this Defendant craves reference to the complaints for the allegations set forth therein;

33. That it denies so much of Paragraph Ninety Four (94) as alleges that Cincinnati has a duty to defend and indemnify the Plaintiffs until such time as the underlying policies have been exhausted and further crave reference to the terms and conditions of the Cincinnati policy to determine any duty to defend and/or indemnify the Plaintiffs for claims asserted;

34. That it lacks sufficient information to form a belief as to the allegations of Paragraphs Ninety Five (95) and Ninety Six (96) and therefore denies same and demands strict proof thereof;

35. That Paragraphs Ninety Seven (97), Ninety Eight (98), Ninety Nine (99) and One Hundred (100) set forth a summary of the Plaintiff's interpretation of the underlying complaint and this Defendant craves reference to the complaints for the allegations set forth therein;

36. That it denies so much of Paragraph One Hundred One (101) as alleges that Cincinnati has a duty to defend and indemnify the Plaintiffs until such time as the underlying policies have been exhausted and further crave reference to the terms and conditions of the Cincinnati policy to determine any duty to defend and/or indemnify the Plaintiffs for claims asserted;

37. That it lacks sufficient information to form a belief as to the allegations of Paragraphs One Hundred Two (102) and One Hundred Three (103) and therefore denies same and demands strict proof thereof;

38. That Paragraphs One Hundred Four (104) through One Hundred Eight (108) do not purport to state a claim as to this Defendant and therefore no response is required, however, to the extent that said Paragraphs may be construed to allege such a claim, they are denied;

39. That Defendant reincorporates by reference, as if fully set forth herein, the responses to Paragraphs One (1) through One Hundred Eight (108) of the Second Amended Complaint by way of response to Paragraph One Hundred Nine (109);

40. That it admits Paragraph One Hundred Ten (110) to the extent that Plaintiffs establish a sufficient relationship to fall within the scope of the definition of named insured as set forth in the policies and any endorsements thereto and further craves reference to the policies including all endorsements, as to the determination of any duty to defend that may have arisen under the policies and any coverage that may exist;

41. That it denies Paragraph One Hundred Eleven (111) as to this Defendant;

42. That it lacks sufficient information to form a belief as to the allegations of Paragraphs One Hundred Twelve (112) and One Hundred Thirteen (113) and therefore denies same and demands strict proof thereof;

43. That it denies Paragraphs One Hundred Fourteen (114), One Hundred Fifteen (115), One Hundred Sixteen (116) and One Hundred Seventeen (117) as to this Defendant;

44. That Defendant reincorporates by reference, as if fully set forth herein, the responses to Paragraphs One (1) through One Hundred Seventeen (117) of the Second Amended Complaint in response to Paragraph One Hundred Eighteen (118);

45. That it lacks sufficient information to form a belief as to the allegations of Paragraph One Hundred Nineteen (119) of the Second Amended Complaint and therefore denies same and demands strict proof thereof;

46. That it denies Paragraphs One Hundred Twenty (120), and One Hundred Twenty One (121) as to this Defendant;

47. That Paragraphs One Hundred Twenty Two (122) and One Hundred Twenty Three (123) are a prayer for relief seeking declaratory judgment and no response is required of this Defendant, however, to the extent that said paragraph may require a response, they are denied;

48. That Paragraphs One Hundred Twenty Four (124) through Two Hundred Twelve (212) do not purport to state a claim as to this Defendant and therefore no response is required, however, to the extent that said paragraphs may be construed to allege such a claim, they are denied;

49. That Paragraph Two Hundred Thirteen (213) is a demand for trial by jury, however, to the extent that the Second Amended Complaint seeks an interpretation of contract terms and conditions, the right to a jury trial is denied;

FOR A SECOND DEFENSE

50. That the Second Amended Complaint fails to state facts sufficient to constitute a cause of action against this Defendant;

FOR A THIRD DEFENSE

51. That the Plaintiffs may have failed to provide adequate and timely notice to this Defendant of all claims and lawsuits as required under the terms and conditions of the insurance policies and this Defendant raises late notice as a bar to this action;

FOR A FOURTH DEFENSE

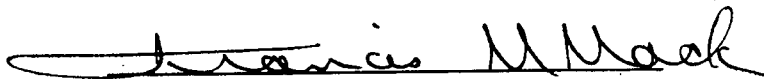
52. That some or all of the damages alleges in the underlying complaints do not fall within the coverage of the underlying policies and within the coverage of the Cincinnati policies and this Defendant reserves all coverage defenses in this matter;

FOR A FIFTH DEFENSE

53. That this Defendant incorporates by reference herein all defenses raised by the co-defendants who issued the "underlying insurance" policies.

WHEREFORE having fully answered the Second Amended Complaint, the Defendant, Cincinnati Insurance Company, demands that the same be dismissed with costs and for such other and further relief as the Court deems just and proper.

Respectfully submitted,



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Dated: June 7, 2005

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CROSSMANN COMMUNITIES
OF NORTH CAROLINA, INC.,
BEAZER HOMES INVESTMENT
CORP., and DANIEL ROGERS,

CASE NO. 2004-CP-26-84

Plaintiffs,

v.

HARLEYSVILLE MUTUAL
INSURANCE COMPANY,
CINCINNATI
INSURANCE COMPANY, and
ASSOCIATED INSURORS, INC.
OF MYRTLE BEACH,

Defendants.

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT
REGARDING THE INSURERS' JOINT AND SEVERAL
OBLIGATION TO PAY DEFENSE AND INDEMNITY COSTS**

Plaintiffs, Beazer Homes Investment Corp. ("Beazer"), Crossmann Communities of North Carolina, Inc. ("Crossmann"), and Daniel Rogers ("Mr. Rogers") (collectively, "Plaintiffs"), submit this Memorandum of Law in support of their motion requesting that the Court grant partial summary judgment in favor of Plaintiffs and against Defendants Harleysville Mutual Insurance Company ("Harleysville") and Cincinnati Insurance Company ("Cincinnati"). Specifically, Plaintiffs in this motion seek entry of an Order declaring that for each policy of insurance that is triggered by one of the Underlying Lawsuits against Plaintiffs, each insurer has a joint and several obligation to defend and indemnify Plaintiffs with respect to all losses arising from such Underlying Lawsuits, up to the applicable limits of those triggered policies. The plain language in the liability insurance policies issued by Harleysville and Cincinnati is clear - once

an insurer's policy is triggered by an Underlying Lawsuit, that insurer has a joint and several obligation to pay all defense and indemnity costs on behalf of Plaintiffs for that Underlying Lawsuit. This motion is based on the affidavits of Mr. H. Gilford Edwards and Mr. W. Mark Berry and, submitted herewith, as well other evidence from the record in this case.

Plaintiffs in this motion do not seek entry of an Order directing either Harleysville or Cincinnati to pay Plaintiffs a particular sum of money for defense costs or indemnity costs with respect to any of the Underlying Lawsuits. Rather, Plaintiffs in this motion seek the following declaration regarding the scope of Harleysville's and Cincinnati's duties to defend and indemnify Plaintiffs in the Underlying Lawsuits:

For those Underlying Lawsuits that "trigger" the insurance policies of remaining insurer-defendants, Harleysville Mutual Insurance Company or Cincinnati Insurance Company, the insurers have a joint and several duty to pay for all defense costs and all indemnity costs -- all settlement payments or judgments -- arising from such Underlying Lawsuits, up to the applicable limits of the policies that are triggered by the Underlying Lawsuits.¹

I. STATEMENT OF FACTS

The insurance coverage dispute that is the subject of this lawsuit involves Beazer, a residential home builder, and certain of its predecessors-in-interest: Crossmann Communities of North Carolina, Inc. ("Crossmann"), Pinehurst Builders, Inc. ("Pinehurst"), River Oaks Golf Development, Inc. ("ROGD"), and Buck Creek Development, Inc. ("Buck Creek"), as well as Mr. Daniel Rogers, an employee of Beazer and certain of its predecessors (collectively, the "Beazer Entities"). The Beazer Entities have made claims for insurance coverage under the primary general liability policies issued by Harleysville and the excess liability coverage issued by Cincinnati (collectively referred to herein as the "Insurers"). The Beazer Entities also assert

¹ As described below, Plaintiffs have settled their coverage disputes with Regent Insurance Company, Massachusetts Bay Insurance Company, and Indiana Insurance Company, and each of those insurers has been or will soon be dismissed as a defendant from this insurance coverage litigation.

claims against the insurance agent for Harleysville, Associated Insurors, Inc. of Myrtle Beach ("Associated Insurors"), through which the Beazer Entities purchased the Harleysville policies in the 1990s.²

Beginning in 2000, the Beazer Entities have been named as defendants in seven lawsuits in the state courts of South Carolina (all seven lawsuits are collectively referred to herein as the "Underlying Lawsuits"). These lawsuits seek damages from the Beazer Entities for property damage that occurred over an extended period of time to condominium projects constructed in South Carolina. (Edwards Aff. ¶¶ 8, 13, 18, 23, and 29.) The plaintiffs in these property damage cases allege that the damage to their properties was caused by occurrences resulting from the actions or inactions of the Beazer Entities and their subcontractors beginning as early as 1993. (*Id.*) The Underlying Lawsuits are described in Plaintiffs' Second Amended Complaint. (*See* Second Am. Compl., ¶¶ 61 - 103.)

Beginning in 1993, Pinehurst and ROGD purchased primary and excess liability insurance policies from Harleysville.³ Pinehurst, River Oaks, and Buck Creek were acquired by Crossmann Communities, Inc. ("CCI") in May 1998. (Berry Aff., ¶ 4.) CCI's insurer at the time of the 1998 acquisition was Indiana, which provided coverage for Pinehurst, River Oaks, and Buck Creek as subsidiaries of CCI. (Berry Aff., ¶ 8.) After the Indiana insurance policy was cancelled in August 1998, CCI then purchased primary coverage for itself and its subsidiaries from Massachusetts Bay beginning in 1998 and Regent in 2000, and also purchased excess coverage from Cincinnati in 1998.⁴ (Berry Aff. ¶ 7, 9-10.) The Harleysville and Cincinnati policies covering the Beazer Entities are, for the most part, standard form ISO general liability policies. (*Id.*) The Harleysville policies obligate Harleysville to defend and indemnify the

² Plaintiffs seek no relief against Associated Insurors in this motion for partial summary judgment.

³ Buck Creek was added as a named insured in 1994.

⁴ A schedule of insurance covering the Beazer Entities is attached as Exhibit J to the Affidavit of W. Mark Berry.

Beazer Entities for “those sums” which the Beazer Entities are obligated to pay with respect to the Underlying Lawsuits. Harleysville is currently paying costs to defend the Beazer Entities in the Underlying Lawsuits under a reservations of rights, but has denied any indemnity obligations to the Beazer Entities for the Underlying Lawsuits. The Cincinnati policies obligate Cincinnati to pay on behalf of the Beazer Entities the “ultimate net loss” arising from the Underlying Lawsuits, which means all costs paid as settlements or judgments. The Harleysville and Cincinnati policies thus require payment by the Insurers of all damages (in the form of either settlements or judgments) that the Beazer Entities are obligated to pay arising from the Underlying Lawsuits that trigger their coverage. The Insurers could have sought in their policies to limit the scope of their obligations to the Beazer Entities to pay something less than all losses arising from the Underlying Lawsuits, but they did not. As a result, for any Underlying Lawsuit that triggers a policy issued by Harleysville or Cincinnati, that Insurer must pay for all losses that the Beazer Entities become legally obligated to pay arising from such lawsuit, subject to the limits of the policies.

A. *The Harleysville Policies*

Harleysville issued six successive primary insurance policies to ROGD and Pinehurst (the “Harleysville Policy”). (Berry Aff., ¶ 12.) The first Harleysville policy incepted on July 29, 1993, and the last Harleysville policy expired on August 29, 1998. (*Id.*) Each annual policy period has a separate \$1,000,000 “each occurrence limit” and a \$2,000,000 “products - completed operations aggregate limit.” (*Id.*)⁵ Under the Harleysville primary policies, Harleysville agreed that it would it “pay those sums that the insured becomes legally

⁵ Harleysville also issued six successive excess general liability policies covering the Beazer Entities, the first of which incepted on July 23, 1993 and the last of which expired on August 29, 1998. Each of the six annual excess policy periods has a separate \$10,000,000 “each occurrence limit” and “products - completed operations aggregate limit.”

obligated to pay as damages because of 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising injury' to which this insurance applies." (Harleysville Policy, **Exhibit I** to Affidavit of W. Mark Berry) (emphasis added).) The Harleysville policies also provide that Harleysville "will have the right and duty to defend any 'suit' seeking those damages." (*Id.* § I.A.1.b.) The Harleysville policies contain no language that limits its obligations to pay anything less than "those sums" that the Beazer Entities became obligated to pay for the Underlying Lawsuits.

B. *The Cincinnati Policy*

Similarly, the Cincinnati coverage obligates Cincinnati to pay "on behalf of the insured the 'ultimate net loss' which the insured is legally obligated to pay as damages." (Cincinnati Policy, **Exs. B and C** to the Berry Affidavit.) The term "ultimate net loss" is defined in the Cincinnati policy as the "sum actually paid or payable in the settlement or satisfaction of the insured's legal obligation for 'damages'." (*Id.*) There is no language in the policy that limits Cincinnati's obligation to pay anything less than the "sum actually paid or payable" by the Beazer Entities with respect to the Underlying Lawsuits that trigger the policy.

II. ARGUMENT AND CITATION OF AUTHORITY

A. *Summary Judgment Standard*

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Standard Fire Ins. Co. v. Marine Contracting and Towing Co., 301 S.C. 418, 421 (1990) (citing SCRCP 56(c)). "As a general rule, [insurance policies] are to be construed by the Court...." Wheeler v. Globe & Rutgers Fire Ins. Co., 125 S.C. 320, 325 (1923).

Plaintiffs in this motion seek an interpretation of the liability insurance policies issued by the two remaining insurer-defendants. Specifically, Plaintiffs seek a declaration that each Harleysville and Cincinnati policy triggered by an Underlying Lawsuit is obligated, jointly and severally, to pay all losses, i.e., all defense costs and settlement payments or judgments, arising from the Underlying Lawsuits. South Carolina law provides that claims seeking damages from policyholders for property damage that results from acts or omissions of a general contractor's subcontractors are claims for "property damage" caused by an "occurrence," and are therefore covered under standard form general liability policies, like those issued by Harleysville and Cincinnati. See, e.g., Okatie Hotel Group LLC v. Amerisure Ins. Co., 2006 WL 91577, slip op. (D.S.C. Jan. 13, 2006) (copy attached hereto). Once coverage is triggered under a policy, that "insurance policy provides coverage for property damage that occurred during the policy period and for any continuing damage." Century Indemnity Company v. Golden Hills Builders, Inc., 348 S.C. 559, 564, 561, S.E. 2d 355, 358 (2002) (emphasis in original). Therefore, once the Insurers' policies are triggered by any of the claims in the Underlying Lawsuits, those policies are liable to the Beazer Entities for all damages arising from the claims in the Underlying Lawsuits, up to the triggered limits of the policies.

B. The Underlying Lawsuits Seek Damages For "Property Damage" Caused By An "Occurrence"

"Property damage" under the Harleysville policies means "[p]hysical injury to or destruction of tangible property including all resulting loss of use" (Policy § V.12.a., attached as **Exhibit I** to Berry Affidavit), as well as "[l]oss of use of tangible property that is not physically injured." (Id. § V.12.b.) Each of the Underlying Lawsuits specifically seeks damages from the Beazer Entities for property damage continuing from the initial date that the certificate of occupancy was issued until the lawsuits were filed. The Beazer Entities are covered under the

Policies for claims alleging “property damage” if any of the damage occurs during the policy period so long as such “property damage” was caused by an “occurrence.” (Policy §§ I.A.1, 2.) The Policies define “occurrence” as “an accident, including **continuous or repeated exposure** to substantially the same general harmful conditions, that results in ‘bodily injury’ or ‘property damage.’” (Id. § V.9.a) (emphasis added.)

A claim based upon allegations that negligent construction caused and resulted in property damage to a residence is an occurrence under a general liability policy like those issued by the Insurers. E.g., L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 123 n.4 (recognizing that a “CGL policy may [] provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property.”) In Okatie Hotel, 2006 WL 91577, at *5, a decision issued after the South Carolina Supreme Court’s decision on rehearing in L-J, the Court held that

the property damage to Plaintiff’s [the policyholder’s] hotel -- caused by exposure to the harmful conditions of leaks and moisture -- constituted an occurrence under the CGL [general liability] policies issued by Defendant.

See also Boggs v. Aetna Cos. & Sur. Co. 272 S.C. 460, 463 (1979) (holding that “the allegedly negligent location of [a] house on [a] lot which created the exposure to a [drainage problem] which resulted in property damage constituted an ‘occurrence’ ” within the meaning of a general liability policy).

The Underlying Lawsuits allege that negligence by the Beazer Entities resulted in an unexpected happening without an intention or design, i.e. an “accident” or “occurrence,” in the form of water intrusion and other events that caused damage to property and loss of use of that property. While the Insurers may contend that repair of allegedly defective construction itself, standing alone, might not be covered -- a position the Beazer Entities dispute -- the damage that

results from water intrusion arising from the faulty workmanship, that is, damage to drywall, framing, carpet, or any other parts of the structure, is clearly property damage caused by an occurrence. Therefore, each of the Underlying Lawsuits triggers at least one of the policies issued by Harleysville and Cincinnati.

C. The Scope Of The Beazer Entities' Losses Covered Under The Policies

1. Each Triggered Policy Is Jointly And Severally Obligated To Pay All Losses – Defense Costs And Settlement Payment Or Judgments -- Arising From The Underlying Lawsuits

The Harleysville Policy provides that Harleysville “will pay those sums that the insured becomes legally obligated to pay as damages because of ... ‘property damage’ ... to which this insurance applies.” Similarly, the Cincinnati policy requires Cincinnati to pay the “Ultimate Net Loss,” which means all settlement payments and judgments arising from claims that trigger the policy. (See pages 4 - 5 above) Because there is no policy language limiting the scope of the Insurers’ obligations to the Beazer Entities, each triggered policy is jointly and severally liable for all costs arising from the Underlying Lawsuits.

a. Each Insurer Has A Joint And Several Defense Obligation

Each Insurer whose policy is triggered by an underlying claim has a joint and several obligation to pay all of the policyholders’ defense costs for that claim. As an initial matter, the Beazer Entities have the right to select any one of the Insurers to pay one hundred percent of all defense costs for potentially covered claims, such as the Underlying Lawsuits. See Sloan Construction Co., Inc. v. Central National Insurance Company of Omaha, 269 S.C. 183, 236 S.E.2d 818 (1977) (recognizing that “the duty to defend is personal to each insurer ... [t]he obligation is several and the insurer is not entitled to divide the duty nor require contribution from another absent a specific contractual right”). In Sloan, the South Carolina Supreme Court,

in defining the obligations of insurers under general liability insurance policies like the policies at issue in this case, stated that

each insurer contracted to defend, at its own expense, any suit within the terms of its policy. Where two companies insure the identical risks and both policies provide for furnishing the Insured with a defense, neither [insurance] company, absent a contractual relationship, can require a contribution from the other for the expenses of the defense where one denies liability and refuses to defend. The duty to defend is personal to both insurers; neither is entitled to divide the duty.

Id., 269 S.C. at 187, 236 S.E.2d at 819. Because Harleysville is the last remaining primary insurer in this action, Harleysville must pay all defense costs for all the Underlying Lawsuits, given the recent settlements by primary insurers Indiana and Massachusetts Bay.⁶ Because Cincinnati has an immediate duty to “drop down” in the place of the exhausted primary insurance policies issued by Indiana, Massachusetts Bay, and Regent, Cincinnati also has an immediate duty to pay all of the Beazer Entities’ defense costs.⁷

b. The Insurers Also Have A Joint And Several Obligation For All Indemnity Costs In The Underlying Lawsuits

There is no language in any of the policies limiting the Insurers’ responsibility for indemnification to any share other than “those sums” which the Beazer Entities become obligated to pay to the plaintiffs in the Underlying Lawsuits. As a result, if any property damage occurs during the Harleysville or Cincinnati policy periods and is part of the damages sought by the Plaintiffs in the Underlying Lawsuits, then the Insurers must pay all losses that Plaintiffs are

⁶ Harleysville, and Indiana and Massachusetts Bay before settling, have paid all costs for South Carolina-based counsel to defend Beazer in the Underlying Lawsuits. Plaintiffs have incurred additional defense costs, however, in the form of payments to trial counsel retained to assist South Carolina counsel at trial in the River Oaks II, Waterway Village, Buck Creek, and Lightkeepers cases. The Insurers have refused to reimburse Plaintiffs for these defense costs. Plaintiffs will assert at trial that these additional defense costs must be paid by the Insurers, however, Plaintiffs seek no relief in this motion with respect to the parties’ dispute as to whether trial counsel defense costs are covered by the policies.

⁷ The basis for Cincinnati’s immediate duty to defend the Beazer Entities is fully explained in the Brief in Support of Plaintiffs’ Motion for Partial Summary Judgment against Cincinnati Insurance Company, filed on March 30, 2006.

legally obligated to pay in such Underlying Lawsuits, in the form of either settlements or judgments.

Under South Carolina law, the policies in effect “at the time of the injury-in-fact covers all of the ensuing damages.” Joe Harden Builders, Inc. v. Aetna Casualty and Surety Company, 326 S.C. 231, 486 S.E. 2d 89 (1997). The injury-in-fact with respect to the Underlying Lawsuits is the gradual, progressive property damage caused by water intrusion and other conditions at the various condominium projects which occurred during the Harleysville and Cincinnati policy periods. The South Carolina Supreme Court has held that any “policy in effect at the time of the injury-in-fact covers all the ensuing damages.” Century Indemnity Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 564, 561 S.E. 2d 355, 357 (2002) (quoting from Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 326 D.C. 231, 236, 486 S.E. 2d 89, 91 (1997)). The court reiterated its holding and stated that any insurance policy triggered by a claim against the policyholder “provides coverage for property damage that occurred during the policy period and for any continuing damage.” Id., 348 S.C. at 564, 561 S.E. 2d at 355 (emphasis added). The South Carolina courts have clearly adopted a joint and several approach to an insurer’s obligation to indemnify its insured.

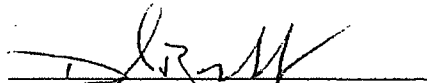
The practical effect of the “joint and several” allocation principle applicable to this case is significant. So long as any covered property damage occurs during an Insurer’s policy period, that Insurer is obligated to pay for all “continuing damage” with respect to which the Beazer Entities become legally obligated to pay, even if such damage continues after expiration of the policy period of that Insurer. As a result, the Insurers have a joint and several defense and indemnity obligation and must pay all defense costs and indemnity costs for each of the Underlying Lawsuits that triggers their policies.

III. CONCLUSION

Under the plain language of the policies and applicable law, the Insurers have a joint and several obligation to defend and to indemnify Plaintiffs for all losses arising from the Underlying Lawsuits that trigger their policies. For these reasons, Plaintiffs respectfully request that the Court grant partial summary judgment in favor of Plaintiffs and enter a judgment declaring that any policy issued by Harleysville or Cincinnati that is triggered by an Underlying Lawsuit has a joint and several obligation to defend and indemnify Plaintiffs for all losses arising from such Underlying Lawsuit, up to the limits of the policy.

Respectfully submitted, this 30th day of March, 2006.

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CROSSMAN COMMUNITIES
OF NORTH CAROLINA, INC.,
BEAZER HOMES INVESTMENT
CORP., and DANIEL ROGERS

Plaintiffs,

v.

CASE NO. 2004-CP-26-84

HARLEYSVILLE MUTUAL
INSURANCE COMPANY,
CINCINNATI INSURANCE
COMPANY, and
ASSOCIATED INSURORS, INC. OF
MYRTLE BEACH,

Defendants.

**PLAINTIFFS' THIRD SUPPLEMENTAL RESPONSES
TO DEFENDANTS HARLEYSVILLE MUTUAL INSURANCE COMPANY,
CINCINNATI INSURANCE COMPANY, AND
ASSOCIATED INSURORS, INC. OF MYRTLE BEACH'S INTERROGATORIES**

Plaintiffs, Crossmann Communities of North Carolina, Inc., Beazer Homes Investment Corp., and Daniel Rogers ("Plaintiffs" or "Beazer"), hereby supplement their objections and responses to Defendants Harleysville Mutual Insurance Company ("Harleysville"), Cincinnati Insurance Company ("Cincinnati"), and Associated Insurors, Inc. of Myrtle Beach's ("Associated Insurors") Interrogatories, specifically those interrogatories relating to Plaintiffs' claimed damages. Plaintiffs incorporate by reference, as if fully set forth herein, the general objections interposed by Plaintiffs in response to Defendants' earlier interrogatories and requests for production of documents.

Plaintiffs object to the extent that interrogatories involving Plaintiffs' claimed damages seek information exempt from discovery and protected from disclosure by the attorney-client

privilege and work product doctrine. Subject to and without waiving these objections, as set forth more fully in Plaintiffs' Amended Complaint, Plaintiffs' submissions in opposition to Associated Insurors' Motion for Summary Judgment, and Plaintiffs' Second Supplemental Objections and Responses to Specific Interrogatories by Associated Insurors, Plaintiffs claim damages from Harleysville and Associated Insurors, jointly and severally, for Harleysville's refusal to indemnify Plaintiffs against the claims in the Underlying Lawsuits as promised by Associated Insurors at the time Plaintiffs' predecessors decided to purchase Harleysville policies through Associated Insurors. Plaintiffs also claim damages from Cincinnati as a result of its refusal to indemnify Plaintiffs for the claims in the Underlying Lawsuits to the extent that Plaintiffs' damages are not recovered from Harleysville and Associated Insurors.

The following payments have been made by Beazer to resolve the Underlying Lawsuits:

A.	<u>River Oaks I</u>	-	\$ 7,425,000
B.	<u>River Oaks II</u>	-	\$ 2,841,000 ¹
C.	<u>Buck Creek</u>	-	\$ 2,800,000
D.	<u>Waterway Village</u>	-	\$ 3,925,000 ²
	TOTAL	-	\$16,991,000 ³

Beazer has recovered monies from certain other insurance companies that were previously Defendants in this action, specifically Regent Insurance Company ("Regent"), Indiana Insurance Company ("Indiana"), and Massachusetts Bay Insurance Company ("Massachusetts Bay"). Beazer has recovered the following amounts from those insurance companies:

¹ Total settlement amount of \$3,800,000 less contributions of \$958,500 from sub-contractors and/or their insurers.

² Total settlement amount of \$4,700,000 less contributions of \$825,000 from subcontractors and/or their insurers. Includes additional \$50,000 Beazer paid as reimbursement of defense costs paid for expert witness George McGee's expenses that have not been paid by any insurer.

³ Beazer also seeks from Harleysville, Associated Insurors, and Cincinnati all costs that may be incurred to settle or satisfy a judgment in favor of the plaintiffs in the Lightkeepers Village underlying lawsuit.

A.	<u>Regent</u>	-	\$3,000,000
B.	<u>Indiana</u>	-	\$2,700,000
C.	<u>Massachusetts Bay</u>	-	\$2,900,000

In addition to the Underlying Lawsuits pending in South Carolina that are at issue in this insurance coverage litigation, Beazer has faced and is facing additional claims and lawsuits in several other states, including Kentucky and Indiana, with the same or substantially the same allegations as the Underlying Lawsuits at issue in this coverage litigation, i.e., losses arising from third-party claims for property damage caused by acts or omissions of subcontractors, to which the Regent and Massachusetts Bay policies were fully applicable. As a result, while the Regent and Massachusetts Bay settlements were reached in part in the context of the South Carolina insurance coverage case, the entirety of the Regent settlement and one-half of the Massachusetts Bay settlement were allocated as partial reimbursement for losses in Indiana and Kentucky respectively.

Specifically, the Colon lawsuit, filed against Beazer in the Superior Court of Hamilton County, Indiana, was a putative class action setting forth substantial claims against Beazer for property damage to a certain class of homes caused by the acts and omissions of subcontractors. Beazer and the Colon plaintiffs reached a settlement agreement, for homes with a brick veneer if the closing of the initial sale of the home took place between June 1, 1998 and October 31, 2002, which was approved by the Court on October 18, 2004. Beazer has expended over \$38,000,000 in the defense, investigation, and remediation of the homes involved in the Colon lawsuit to date. Beazer also faces a number of other similar property damage claims and lawsuits in Indiana, and Beazer's estimate of the costs to resolve all asserted complaints is, in total, approximately \$70,000,000. As a result of such significant losses, Beazer allocated the entirety of the \$3,000,000 Regent settlement to help fund a small portion of the settlements of those claims and

lawsuits in Indiana. Additionally, in response to numerous claims from homeowners in the Beaumont subdivision near Lexington, Kentucky, Beazer agreed to remediate certain aspects of the property damage to those homes. Beazer has completed remediation on approximately one-third of homes in the subdivision for costs exceeding \$6,000,000 to date. Beazer allocated one-half of the Massachusetts Bay settlement, or \$1,450,000, as indemnity to offset portions of those settlement costs. Beazer allocated the remaining one-half of the amount received from Massachusetts Bay to help fund the River Oaks I settlement.

Beazer allocated the entirety of the amount received from Indiana as indemnity for the River Oaks II settlement. As a result of the allocation of the Regent, Massachusetts Bay, and Indiana settlements set forth above, the following payments, made by Beazer to resolve the Underlying Lawsuits, have not been reimbursed by any insurer or other party:

A.	<u>River Oaks I</u>	-	\$ 5,975,000 (\$7,425,000 - 1,450,000 ⁴)
B.	<u>River Oaks II</u>	-	\$ 141,000 (\$2,841,000 - 2,700,000 ⁵)
C.	<u>Buck Creek</u>	-	\$ 2,800,000
D.	<u>Waterway Village</u>	-	\$ 3,925,000
	TOTAL	-	\$12,841,000

Plaintiffs seek these damages, jointly and severally, from Harleysville and Associated Insurors and, to the extent those damages remain unreimbursed by Harleysville and Associated Insurors, Plaintiffs seek all unreimbursed damages from Cincinnati. Plaintiffs also seek an order obligating the Defendants, jointly and severally, to indemnify Plaintiffs for any judgment or settlement in the Lightkeepers Village case.

⁴ One-half of the settlement from Massachusetts Bay was allocated to the River Oaks I settlement.

⁵ The Indiana settlement was allocated to the River Oaks II settlement.

Defendants are also liable to Plaintiffs for pre-judgment interest as provided for by South Carolina law. While the amount of pre-judgment interest is continually accruing, as estimate of the amounts that Defendants are liable for to date is as follows:⁶

A. River Oaks I - 8.75% (annual rate of interest) x \$5,975,000 = \$522,812 per annum

$\$522,812/12 = \$43,568$ interest per month
 $\times 9 \text{ mos. (payment made 10/24/05)} = \$392,109$
 $\$392,109 + 5,975,000 = \$6,367,109$

B. River Oaks II - 8.75% (annual rate of interest) x \$141,000 =
\$12,337 per annum

$\$12,337/12 = \$1,028$ per month
 $\times 4$ mos. (payment made 3/14/06) = **$\$4,112$**
 $\$4,112 + 141,000 = \$145,112$

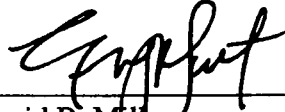
Plaintiffs have made or will make the payments to finalize the settlements in the Buck Creek and Waterway Village cases in July 2006, and pre-judgment interest as to those settlements will run from the date those payments are made. In addition, Plaintiffs incurred necessary and reasonable defense costs as a result of work performed by Plaintiffs' national trial counsel in preparing the Underlying Lawsuits for trial that remain unreimbursed. Plaintiffs have also incurred \$50,000 in expert witness fees for the Waterway Village litigation that are unreimbursed. Defendants are also jointly and severally liable to Plaintiffs for (a) Beazer's attorneys' fees for prosecuting this coverage action and (b) punitive damages in an amount sufficient to punish Harleysville and Associated Insurers and deter future misrepresentations by agents to prospective policyholders in South Carolina.

⁶ Prejudgment interest is 8.75% per annum (S.C. Code Ann. § 34-31-20).

Dated: July 24, 2006

Respectfully Submitted,

BELLAMY, RUTENBERG,
COPELAND, EPPS, GRAVELY
& BOWERS, P.A.



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February 13, 2007
Via Email and FedEx

FEB 14 2007

The Honorable Steven H. John
Judge, Fifteenth Judicial Circuit
Horry County Courthouse
1301 Second Ave.
Conway, SC 29526

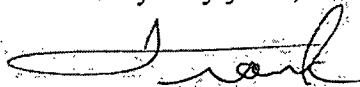
Re: Crossman Communities of North Carolina, Inc. v. Harleysville et al
C/A No.: 2004-CP-26-84

Dear Judge John:

Enclosed please find Cincinnati Insurance Company's Memorandum of Authority on Stipulated Issues along with copies of legal authority cited. I am forwarding copies to the other parties via email and regular mail.

With kind regards, I am

Very truly yours,



FRANCIS M. MACK

FMM/ays
Enclosure

Cc: David B. Miller
Martin McNerny
David L. Brown
Clifford L. Welsh
Susan Taylor Wall

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A No. 04-CP-26-0084
	)	
Crossman Communities of North Carolina,	)	
Inc., Beazer Homes Investment Corp., and	)	
Daniel Rogers,	)	
	)	
Plaintiffs,	)	CINCINNATI INSURANCE COMPANY'S
	)	MEMORANDUM OF AUTHORITY
v.	)	ON STIPULATED ISSUES
	)	
Harleysville Mutual Insurance Company,	)	
Cincinnati Insurance Company and	)	
Associated Insurers, Inc. of Myrtle Beach,	)	
	)	
Defendants.	)	
	)	

I. SUMMARY

Cincinnati's policy provides excess insurance coverage on a "follow form" basis. There is no "occurrence" under South Carolina Law. Even if the Court finds there has been an "occurrence," the primary policies have not been exhausted and therefore Cincinnati has no obligation to make any payments to Crossman.

Cincinnati Insurance Company issued excess insurance policies to Crossman Communities. Stipulation 13. There has been no "occurrence" as defined by South Carolina law and accordingly there is no coverage under the primary policies or Cincinnati's excess policy.

If the Court find that there has been an "occurrence," there are various primary insurance policies that provide coverage for the claims in the underlying lawsuits. A summary of the insurance coverage is as follows:

<u>Date</u>	<u>Primary Carrier</u>	<u>Excess Carrier</u>
July 1993 – June 1994	Harleysville	
July 1994 – June 1995	Harleysville	Harleysville
July 1995 – June 1997	Harleysville	Harleysville & Cincinnati
July 1997 – August 1998	Harleysville & Indiana	Harleysville & Cincinnati

September 1998 – August 2000	Massachusetts Bay	Cincinnati
September 2000 – January 2002	Regent	Cincinnati

The Cincinnati policy purchased by Crossman includes a provision that Cincinnati will have no obligation to pay until all other available insurance has been exhausted by payment of claims. (See Policy, Section III, paragraph 4, Exhibit 1, attached hereto).

Crossman settled with Indiana, Regent and Massachusetts Bay for less than the policy limits. Crossman and Indiana, Regent and Massachusetts Bay agreed on an amount of covered damages that occurred during the respective policy periods. There has been an accord and satisfaction as to all damages except those that may have occurred during the Harleysville policy period.

As discussed later in this memorandum, Cincinnati is entitled to the benefit of the full policy limits rather than the amounts paid in settlement pursuant to the terms of the policy purchased by Crossman even if there were additional covered damages.

Accordingly, the amounts available for payment of the remaining claims in this lawsuit are as follows:

<u>Primary Carrier</u>	<u>Policy Limits</u>	<u>Settlement Amount</u>	<u>Balance Remaining</u>
Harleysville	\$12 Million	--	\$12 Million
Indiana	\$4 Million	\$2.7 Million	\$1.3 Million
Massachusetts Bay	\$4 Million	\$2.9 Million	\$1.1 Million
Regent	\$4 Million	\$3 Million	\$1 Million

If the court finds that there has not been an "occurrence" as defined in the policy and under South Carolina Law, Cincinnati will not be required to make any payment.

If the court finds that there has been an "occurrence" and that the obligation of the primary insurers is joint and several, Cincinnati will not be required to make any payment to Crossman.

Even if the court finds that there has been an "occurrence" and that coverage is based on "time on risk," the limits of the primary policies have not been exhausted by payment of claims and Cincinnati will not be required to make any payments to Crossman.

ISSUE ONE
(Stipulation 8(a))

A. Did the property damage giving rise to Plaintiffs' claims for coverage arise from an "occurrence"?

There has not been an "occurrence" as defined under South Carolina Law, and therefore, neither the primary carriers nor Cincinnati's excess policy, has any obligation to make any payments to Crossman. The Cincinnati policy is a "follow form" excess policy. Stipulation 13. Accordingly, there can only be coverage under the Cincinnati policy if there is coverage under the primary policies.

Plaintiffs and their subcontractors constructed the condominiums that are the subject of the six underlying lawsuits. As a result of the Plaintiffs' faulty workmanship on these condominium buildings, the claimants in the underlying cases have brought claims of negligence and breach of express and implied warranties against them. The damages sought by the claimants in the underlying actions are for the repair of defects and the correction of deficiencies that arose out of Plaintiffs' faulty workmanship in the construction of the condominiums. The only damages claimed in these underlying lawsuits relate directly to Insureds' own defective work.

There has not been an "occurrence" as defined in the policy. An occurrence is defined as "[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in 'bodily injury' or 'property damage.'" (Exhibit 1, Section V, paragraph 9.a.). It is alleged that the condominiums were poorly constructed and have

deteriorated over time. There is no allegation of an accident. There are only allegations of poor workmanship and failure to comply with applicable building standards.

A general liability policy is intended to provide coverage for tort liability for physical damage to the property of others; it is not intended to provide coverage for the insured's contractual liability which causes economic losses. *C.D. Walters Constr. Co. v. Fireman's Ins. Co.*, 281 S.C. 593, 596, 316 S.E.2d 709, 711 (S.C. Ct. App. 1984). It is for this reason that a general liability insurance policy typically does not cover faulty workmanship, but instead covers faulty workmanship that causes an accident. *Id.* The exclusion of faulty workmanship claims from a CGL policy is supported by the rationale that the contrary result would enable a contractor to be indemnified by his insurer for the cost of repairing or replacing his own faulty work. See *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 336 S.C. 117, 121, 621 S.E.2d 33, 35 (2005) (the business risks of a general contractor are not covered under a commercial general liability policy); See also *G.L. Shaw Builders, Inc. v. State Auto Mut. Ins. Co.*, 182 Ga. App. 220, 355 S.E.2d 130 (1987).

When a builder undertakes to construct a building, the builder expects that it will have to erect the structure in a proper manner. *Harbor Court Associates v. Kiewit Construction Company*, 6 F.Supp.2d 449 (D.Md. 1998). Builders "further expect that if they do not do so, they will have to repair any defects in their work so as to 'deliver' the product they promised to provide." *Id.* Any alleged claims for the cost of repairing the work must be deemed damages which were "expected" by the insureds. *Id.* Cincinnati's policies define "occurrence" as "[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in "bodily injury" or "property damage" (Exhibit 1, Section V.9.a). In South Carolina, whether an event is an accident is determined from the standpoint of the insured.

See *General Insurance Co. of America v. Palmetto Bank*, 268 S.C. 355, 233 S.E.2d 699 (1977).

Because alleged claims for the cost of repairing an insured's defective work is to be "expected" by the insured, in the instant case there has not been an "occurrence" under Cincinnati's policies. Moreover, a CGL policy does not purport to serve the purpose of a builder's performance bond. *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 336 S.C. 117, 621 S.E.2d 33 (2005).

Consequently a builder's economic loss for poor performance is outside the scope of CGL coverage.

In *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, *supra*, the South Carolina Supreme Court held that "because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence." There, a Contractor, L-J, Inc. (Contractor), began construction of a roadway for a Developer in 1989 and completed the project in 1990. By 1994 the roadway had deteriorated to such a point that the Developer brought suit against the Contractor for breach of warranty, breach of contract, and negligence. Experts attributed the damage to faulty preparation of the subgrade (including failure to remove tree stumps and to compact the soft clay sufficiently); a road course that was too thin, excessive traffic, and an improper drainage system. Several insurers provided commercial general liability (CGL) coverage for the project, including Bituminous, whose policy period began in 1990 and ended in 1992.

After the Contractor and Developer settled out of court for \$750,000, the Contractor sought indemnification from the insurers covering the project. Three of the insurers agreed to indemnify the Contractor for a certain amount, but Bituminous refused to cover the claim. The Contractor and the three former insurers then brought a declaratory judgment action against

Bituminous, seeking contribution for part of the settlement amount and indemnification for defense costs. The circuit court referred the declaratory judgment action to a special master, who determined "the damage to the roadway system was covered under the Bituminous policy." In addition, the master found that the damage to the roadway did in fact constitute an "occurrence" under the policy; he found that the "expected or intended" consequences and "your work" exclusions did not exclude Bituminous from coverage because a subcontractor performed the work on the Contractor's behalf. The master ordered Bituminous to pay \$103,571.42 to the other carriers. On appeal, the South Carolina Supreme Court, in reversing the trial court and the Court of Appeals, held that there had been no "occurrence." The Supreme Court addressed the definition of an "occurrence" under the CGL policy and whether or not the deterioration of the roadway in this case constituted an "occurrence." The Court agreed with Bituminous that the property damage resulting from faulty grading and construction of the roads did not constitute an "occurrence" under the CGL policy. The Court elaborated:

Although the alligator cracking may have constituted property damage, we find that an "occurrence" as defined under the CGL policy did not take place. According to [deposition testimony], the only "occurrences" were various negligent acts by the Contractor during road design, preparation, and construction which led to the premature deterioration of the roads We find these negligent acts constitute faulty workmanship, which damaged the roadway system only. And because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence.

The Court further opined that if the only loss the developer suffered is to the property or product itself, then that loss would fall under the category of an economic loss which the contractor must bear as part of the business risk it assumed in taking the job. The Court summarized its argument by emphasizing the roadway damage in this case was the result of faulty workmanship

alone, could not constitute an accident, and ultimately did not rise to the meaning of an occurrence as intended by the CGL policy. *L-J*, 336 S.C. 117, 123-24, 621 S.E.2d 33, 36 (2005).

In the present case, all the damages claimed in the underlying cases are to the work product of the insured. As the *L-J* decision makes clear, when the insured's defective workmanship damages the insured's own work, no accident or occurrence has taken place. The defects and deficiencies alleged by claimants in the underlying lawsuits involve the failure of Plaintiffs to construct adequate systems, failure to adhere to the building specifications, improper installation of building components, failure to provide adequate material, failure to provide material in appropriate places, failure to provide appropriate safety features as required by building codes, and improper construction techniques. Plaintiffs and its subcontractors failed to properly construct the condominium projects consistent with the plans, specifications, industry standards and applicable building codes. Plaintiffs' construction of the condominiums constitutes faulty workmanship which caused damaged to the Plaintiffs' own work.

The Court in *Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002) noted that a CGL policy "is not intended to insure business risks, *i.e.*, risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage" and that "[t]he policies do not insure [an insured's] work itself, but rather, they generally insure consequential risks that stem from that work." The court then assessed the arguments of the plaintiff-homeowners in the suit.

Homeowners argue that the provision, which excludes from coverage property damage to "[t]hat particular part of any property that must be restored, repaired, or replaced because 'your work' was incorrectly performed on it," should be interpreted to mean that only the work that was incorrectly performed (the exterior stucco) is excluded and repairs to other parts of the property where the work was correctly performed (the substrate and substructure) are not excluded. Because the substrate and substructure were correctly constructed but were damaged by the improperly installed stucco, Homeowners argue that repairs to the

substrate and substructure are not barred by the exclusion because the work was not "incorrectly performed on" those parts. . . However, given the purpose of CGL policies as pointed out above, Homeowners' argument cannot be sustained. Based on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision. *See Engineered Prods., Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 368 S.E.2d 674 (Ct.App.1988) (under policy excluding coverage of insured's liability for damages resulting from restoration, repair, or replacement of its own defective work, insurer had *no duty to defend* its insured in action seeking compensation for replacement of rack system lost in storm, *where losses were result of faulty workmanship by insured's subcontractor who failed to anchor system properly*); *C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, New Jersey*, 281 S.C. 593, 316 S.E.2d 709 (Ct.App.1984) (CGL insurer is not obligated to defend insured where action against insured did not involve accidental injury to *property other than that on which insured was performing its work*). *See also Bituminous Cas. Corp. v. Northern Ins. Co. of New York*, 249 Ga.App. 532, 548 S.E.2d 495 (2001) (faulty workmanship provision of CGL insurance policy excluded coverage for water damage sustained by owners' unfinished residence as result of contractor's alleged negligence in building deck; also rejected argument that coverage not excluded because negligence caused damage to "other property," that is, other parts of project other than those on which contractor worked). . . . Accordingly, the answer to the question of whether coverage is excluded by the faulty workmanship provision is yes.

In the instant matter, Plaintiffs are alleged to have built defective condominiums. Plaintiffs made substantial profits on the construction of these condominiums. The claimants in the underlying lawsuits against Plaintiffs sought the cost of repair and replacement of the Plaintiffs' work. As the Supreme Court's ruling in *L-J* indicates, these damages are not recoverable under a commercial general liability policy. *L-J*, 366 S.C. at 123-24, 621 S.E.2d at 36. There simply was no accident or occurrence from the standpoint of the Plaintiffs. Moreover, liability to the condominium owners for failure to properly construct the condominiums should have been reasonably expected by the Plaintiffs.

ISSUE TWO
(Stipulation 8(b))

B. In the event the Court finds that there was an occurrence or occurrences, how shall the \$7.2 million in insured damages referred to in paragraph 1 (of the stipulation) above be allocated, whether by “joint and several” or by “time on risk.”

Under South Carolina Law, the primary carriers’ (Harleysville, Indiana, Massachusetts Bay & Regent) obligations are joint and several. As an excess carrier, Cincinnati has no obligation to pay until all of the primary carriers’ limits have been exhausted by payment of claims. Each insurer whose policy is triggered by an underlying claim has a joint and several obligation to pay all of the policyholders’ defense and indemnity costs for that claim, up to the limits of the policy.

With respect to the insurers’ indemnity obligations under their policies, the Harleysville primary policies provide that Harleysville will pay those sums that Plaintiff become legally obligated to pay as damages because of “‘property damage’ to which this insurance applies.”

Under South Carolina law, the policies in effect “at the time of the injury-in-fact covers all ensuing damages.” *Joe Harden Builders, Inc. v. Aetna Casualty and Surety Company*, 326 S.C. 231, 486 S.E.2d 89 (1997). The injury-in-fact with respect to the Underlying Lawsuits is the gradual, progressive property damage caused by water intrusion and other conditions at the various condominium projects. The damage began shortly after the Certificate of Occupancy was issued and continued until the damage was repaired or until the underlying cases were settled. Stipulation 2.

The South Carolina Supreme Court has held that any “policy in effect at the time of the injury-in-fact covers all the ensuing damages.” *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 564, 561 S.E. 2d 355, 357 (2002) (quoting from *Joe Harden Builders, Inc. v.*

Aetna Cas. & Sur. Co., 326 D.C. 231, 236, 486 S.E. 2d 89, 91 (1997)). In *Century Indemnity*, the Court later reiterated its holding, and stated that any insurance policy triggered by a claim “provides coverage for property damage that occurred during the policy period and for any continuing damage.” *Id.*, 348 S.C. at 564, 561 S.E. 2d at 355 (emphasis added).

The practical effect of the “joint and several” allocation principle applicable to this case is significant. Pursuant to the plain language in the policies and applicable South Carolina precedent, so long as any covered property damage occurs during a Harleysville policy period, Harleysville must reimburse Plaintiffs for the costs to remedy that damage and all “continuing damage,” even if such damage continues after expiration of a Harleysville policy period.

Under joint and several liability, the Harleysville, Indiana, Massachusetts Bay and Regent policies provide coverage for all damages alleged by Crossman. Cincinnati would have no obligation to indemnify Crossman until all of these policy limits have been exhausted.

ISSUE THREE **(Stipulation 8(c))**

C. In the event judgment is entered for Plaintiffs, and that the Court determines that “time on the risk” is the proper allocation method, what is the proper period over which the “time on risk” should be calculated.

Under the terms of the excess policy that Crossman purchased from Cincinnati, Cincinnati is not obligated to indemnify Crossman until the limits of all of the primary policies have been exhausted by payment of claims. Regardless of the period chosen over which the “time on risk” is calculated, Cincinnati’s excess coverage is not reached. Cincinnati is entitled to the benefit of the policy limits of the primary carriers, not just the settlement amount.

In determining an insurer’s duty to provide coverage to a claim, South Carolina law is quite clear that the parties’ intent is to be measured solely by the language of the policies unless

the language is ambiguous. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (when contract is unambiguous, clear, and explicit, it must be construed according to the terms used by the parties). Accordingly, whether an excess insurer is required to “drop down” and defend or to indemnify an insured would depend solely on the terms of the excess insurance contract. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 440 S.E.2d 367 (1994) (Supreme Court must enforce, not write, contracts of insurance and must give to policy language, its plain, ordinary, and popular meaning); *see also National Union fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273 (11th Cir. 2000) (“whether an excess insurer is required to ‘drop down’ and defend its insured depends solely on how that duty is defined by the terms of the excess insurance contract”). Plaintiffs’ argument that Cincinnati’s policies “drop down” to provide coverage fails because the express language of Cincinnati’s policies do not obligate Cincinnati in any manner to assume the obligations of a primary insurer (i.e., Harleysville, Indiana, Massachusetts Bay or Regent) which has not paid the policy limits. *See B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, *supra*, at 535, S.E.2d at 330 (1999) (court must give policy language its plain, ordinary, and popular meaning). An insurance policy is to be read like any contract, and the words which it contains are to be given their ordinary meaning.

There are various provisions in Cincinnati’s policies that emphasize the excess nature of the coverage provided. One provision entitled “Other Insurance” states “[t]he insurance provided by this policy is excess over any other valid and collectible insurance, other than insurance written specifically to be excess over this insurance, and shall not be contributory.” (Exhibit 1, Section IV, paragraph 11.). Another section of the CGL policies entitled “Insuring Agreement” states in relevant part, “We will pay on behalf of the insured the ‘ultimate net loss’ which the Insured is legally obligated to pay as damages in excess of the ‘underlying

insurance' ...". (Exhibit 1, Section I.A). The term "Ultimate net loss" is defined by the policy to mean:

the sum actually paid or payable in the settlement or satisfaction of the insured's legal obligation for damages, covered by this insurance, either by adjudication or compromise. "Ultimate net loss" does not include Defense and Supplementary Payments as described in Section I.C. of this policy.

(Exhibit 1, Section V, paragraph 15).

In addition, another policy provision states:

We shall be liable for payment of the 'ultimate net loss' for any 'occurrence' to which this policy applies...

In excess of the 'underlying limit' applicable to the 'occurrence' only after the insurers who provide the applicable 'underlying insurance' have paid or become obligated to pay the amount of the 'underlying limit' applicable to the 'occurrence.'

Our payment will be made following final determination of the amount of the insured's obligation to pay either by final judgment against the insured or by written agreement with the insured, the claimant, the underlying insurers and us.

(Exhibit 1, Section IV, paragraph 9.6).

Furthermore, a "Products Completed Operations Hazard Limitation" endorsement states:

Exclusions (SECTION I.B.) is modified to add the following:

This policy does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" unless such coverage is provided by valid and collectible "underlying insurance" as listed in the Schedule of Underlying Policies, and then only for such hazards for which coverage is afforded by such "underlying insurance".

These policy sections unambiguously manifest the parties' intention that Cincinnati's policies would only activate following the complete exhaustion and cessation of coverage under all "underlying policies." *B.L.G. Enters., Inc., v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514

S.E.2d 327, 330 (1999) (when contract is unambiguous, clear and explicit, it must be construed according to the terms used by the parties).

As the above quoted policy language demonstrates, Cincinnati's policies clearly and unambiguously make the obligation to provide coverage consecutive to, rather than concurrent with, the duty of all other insurers providing underlying insurance coverage to the Plaintiffs. 46 CJS *Insurance* § 1152 (2005) ("An excess insurance company has no duty to participate in insured's defense until primary coverages are exhausted"); *see also* 46 CJS *Insurance* § 1138 (2005) ("'Primary Coverage' is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability, and 'excess' or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted.").

Cincinnati's policies issued to the Plaintiffs do not provide primary coverage and instead are excess only. Consequently, where the full limits of coverage under the policies provided to the Plaintiffs by the other insurers have not been paid, Cincinnati's potential liability as an excess insurer, if at all, is only for those amounts exceeding the actual limits of the underlying policies as opposed to the settlement amount paid by other insurers which provided underlying insurance. The fundamental purpose of excess insurance, of course, is to provide coverage for an insured's liability that is greater than the limits of the insured's primary coverage and an excess insurer has no duty to provide coverage for any amounts that are below the limits of the insured's primary insurance.

An insurance company providing excess only insurance is not liable for any part of the loss or damage that is covered by other insurance but is liable for the amount of damage or loss in excess of the coverage provided by other policies of insurance. *See e.g.*, 44A AM. JUR. 2d

Insurance § 1755 (2003). An excess insurer's liability should not be increased by the decision of a primary insurer (which has a more immediate obligation than the excess insurer) to settle a claim for an amount less than the limits of the policy or policies issued by the primary insurer. See, e.g., *Koppers Co. v. Aetna Casualty & Surety Co.* 98 F.3d 1440 (3d Cir. 1996). Cincinnati is entitled to a credit for the full amount of the settling primary carriers' coverage and is not responsible for any gap that exists between the settlement amount and the limits of the primary policies.

If Cincinnati were not credited for the full amount of the settling primary carriers' coverage, then Cincinnati would essentially be forced to provide a portion of primary coverage in addition to providing excess coverage. To require a nonsettling excess insurer to provide coverage excess of a below-limits settlement—instead of excess of the applicable policy limits of the underlying policies—would be an unfair and inequitable transfer of obligations from the settling parties to the nonsettling excess insurer. In addition, such a requirement in this case would render the underlying limits and clear language of Cincinnati's excess insurance policies illusory and would obligate Cincinnati to provide insurance coverage much greater than that for which it bargained. See e.g., *First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co.*, 803 F.2d 1308 (3d Cir. 1986) (ignoring underlying limits of excess insurance policy would obligate excess insurer to provide greater coverage than it bargained for and would render intent of policy to provide excess coverage illusory).

Although there does not appear to be any cases directly on point in this jurisdiction, courts in other jurisdictions have addressed the effect on excess carriers where a primary carrier agrees to a below-limits settlement. One of the leading insurance coverage decisions concerning the effect of underlying settlements on the obligations of excess insurers is the Third Circuit's

decision in *Koppers Co. v. Aetna Casualty & Surety Co.*, 98 F.3d 1440 (3d Cir. 1996). In *Koppers*, the policyholder sought coverage from its general liability insurers for environmental liabilities that the policyholder faced with respect to 150 different sites. *Id.* at 1444. Although all of the insurers initially denied coverage, by the time of trial, all of Koppers' insurers other than its London market insurers had settled. *Id.* Because the London market insurers had subscribed to excess policies only, the court was confronted with determining the effect of underlying insurers' settlements on an excess insurer's obligations. *Id.* The Third Circuit recognized that the appropriate way to deal with underlying below-limit settlements was to hold the excess insurer liable *only for the portion of the policyholder's liability that exceeds the applicable policy limits of the underlying settled policies.* *Id.* at 1454. The court stated that settlement with a primary insurer results in the policyholder losing any right to coverage of the difference between the settlement amount and the primary policy's limits. *Id.*

by settling the policyholder loses any right to coverage of the difference between the settlement amount and the primary policy's limits. The excess insurer cannot be made liable for any part of this difference because the excess insurer never agreed to pay for losses below a specified floor (i.e., below the limits of the underlying primary policies). Courts have adopted this rule because it encourages settlement and allows the insured to obtain the benefit of its bargain with the excess insurer, while at the same time preventing the insured from obtaining a double recovery.

Id.

Other courts have reached similar conclusions. See, e.g., *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 173 (2d Cir. 2001) (per curiam) (explaining that "the settling parties are the ones who took the risk of settlement, and the nonsettling parties are left precisely as they would have been had no settlement occurred").

Plaintiffs have argued that Cincinnati is barred by the collateral source rule from obtaining any set-off or credit for the settlements of Regent Insurance Company, Indiana

Insurance Company and Massachusetts Bay Insurance Company. Plaintiffs assert that the collateral source rule applies here because the Regent, Indiana, and Massachusetts Bay policies are independent and unrelated to the policies issued by Cincinnati. Plaintiffs' argument lacks any sound basis and should be rejected. Cincinnati's policies provide excess coverage and were explicitly written so that any coverage obligation of Cincinnati does not arise until the limits of all other underlying insurance policies have paid out. As such, coverage under Cincinnati's policies is dependant on and related to the policies issued by Regent, Indiana, and Massachusetts Bay. Plaintiffs' argument also lacks merit because none of the caselaw relied upon by Plaintiffs in their brief deal with application of the collateral source rule within the context of determining coverage obligations of primary and excess carriers. Rather, the cases relied upon by Plaintiffs include factual backgrounds and parties completely irrelevant and unrelated to the instant case before this Court.

Cincinnati's policy clearly and unambiguously makes the insurer's duty to indemnify consecutive to, rather than concurrent with, the duty of all other insurers that provided coverage to Plaintiffs. Because Harleysville, Indiana, Massachusetts Bay and Regent provided primary insurance and have not paid up to the limits of their coverage, Cincinnati's contractual duty to indemnify, if any, has **not** been triggered. See *e.g.*, 44A AM. JUR. 2d *Insurance* § 1755 (2003) (an insurance company providing excess insurance only is not liable for any part of the loss or damage that is covered by other insurance but is liable for the amount of damage or loss in excess of the coverage provided by other policies of insurance); *National Union fire Ins. Co. v. Travelers Ins. Co.*, 214 F.3d 1269, 1273 (11th Cir. 2000) (Eleventh Circuit found that primary insurer's refusal to defend the insured did not trigger excess insurer's duty to defend since the

continued existence of primary insurer's contractual obligation to defend forestalled commencement of excess insurer's potential coverage).

Cincinnati's policies unequivocally establish that its coverage, if any, is excess to "underlying insurance" as well as "any other insurance." The insurance provided by Harleysville, Indiana, Massachusetts Bay and Regent is precisely the type of "underlying insurance" and "other insurance" to which Cincinnati's policy refers. Thus, the clear and unambiguous language of Cincinnati's policies requiring it to indemnify Crossman only if the underlying insurance and any other insurance has been exhausted precludes the interpretation, as offered by Plaintiffs, that Cincinnati is required to "drop down" and indemnify it.

The decision by Crossman to settle with Indiana, Massachusetts Bay and Regent and accept less than policy limits is not the same thing as payment or "exhaustion" of policy limits. The logical explanation for the settlement is that Crossman, Indiana, Regent and Massachusetts Bay reached an agreement as to the amount of covered damage that occurred during the respective policy periods. Since Crossman has been paid for all covered losses during those periods, there is nothing left to claim under the excess policy. Moreover, since the language of Cincinnati's policies states that coverage is triggered only after exhaustion of the underlying policies and any other insurance, Plaintiffs cannot contend that they had a reasonable expectation that Cincinnati would provide coverage before the limits of other insurers had been paid or that it would be obligated under any circumstances to "drop down" to provide such coverage.

Because there is a total absence of any policy language indicating that the parties intended to provide for drop down in a situation such as the case at bar, the Court would be impermissibly adding coverage which was not provided (or intended) by the contract if it were to require a "drop down" of coverage. "It is not the province of the court to alter a contract by

construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves ... the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract." *McPherson v. J.E. Sirrine & Co.*, 206 SC 183, 33 S.E.2d 501 (1945), citing 17 C.J.S., Contracts, § 296, pp. 702-707.

Importantly, Cincinnati is not attempting to escape any contractual responsibility. Rather, it is simply asking that the Court enforce the unambiguous language of its policies which make clear that the insurance to be provided by Cincinnati is true excess coverage over and above any type of primary coverage. See 8A J. Appleman, *Insurance Law & Practice*, § 4909.85 at 452, 453-54 (1981) ("Therefore, umbrella coverages, almost without dispute, are regarded as true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses"). The liability of an excess carrier does not attach until all primary policy limits are exhausted.

An additional point of significance is that the Cincinnati policies issued to Plaintiffs contain, as most excess policies do, a provision requiring the insured to maintain specified levels of underlying insurance. (Exhibit 1, Section IV, paragraph 10). This provision states:

10. Maintenance of Underlying Insurance

While this policy is in effect, the insured shall maintain in force the "underlying insurance" listed in the Schedule of Underlying Policies as collectible insurance. The terms, conditions and endorsements of "underlying insurance" will not materially change and renewals or replacements of "underlying insurance" will not be more restrictive in coverage. Limits of "underlying insurance" will not be reduced except for any reduction or exhaustion in the aggregate limits of insurance due to payment of claims. In the event you fail or neglect to maintain "underlying insurance" as required, this policy will apply as though such underlying insurance was in force and collectible at the time of the "occurrence."

The limits of "underlying insurance" shall be deemed applicable regardless of any defense which the insurer who provides the "underlying insurance" may assert

because of the insured's failure to comply with any Condition of the policy or the inability of the insurer to pay by reason of bankruptcy or insolvency.

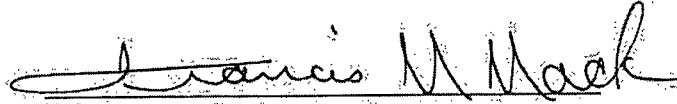
Thus, the obligation to maintain viable primary insurance rests with the insured Plaintiffs. In this case Harleysville has underlying limits of \$12 million. In addition, Indiana, Regents, and Massachusetts Bay have settled for less than their policy limits.

An excess policy is excess because there are underlying policies. For Cincinnati to be ordered to provide primary coverage where the primary insurers have not paid their limits would render the underlying limits and clear language of Cincinnati's excess insurance policies illusory and would obligate Cincinnati to provide insurance coverage much greater than that for which it bargained. See *e.g.*, *First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co.*, 803 F.2d 1308 (3d Cir. 1986) (ignoring underlying limits of excess insurance policy would obligate excess insurer to provide greater coverage than it bargained for and would render intent of policy to provide excess coverage illusory); see also *Continental Marble & Granite v. Canal Ins. Co.*, 785 F.2d 1258 (5th Cir. 1986) (finding that to impose a duty on excess insurer to "drop down" where primary insurer failed to provide coverage would in effect transmogrify the policy into a guarantee on the primary insurer chosen by the insured and noting that an excess liability insurer obviously does not anticipate this heavy onus); *Molina v. USF&G Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978) (excess insurer had no duty to "drop down" and assume primary insurer's coverage obligations where primary insurer was insolvent).

Even if the court finds that the time on risk method of allocation of damages should be utilized, Cincinnati's excess policy would not be reached. Harleysville has \$12 million in limits remaining. Crossman accepted a settlement from Indiana, Massachusetts Bay and Regent to cover the damages that occurred during their respective policy periods. Even if some covered

damages from the Indiana, Massachusetts Bay and Regent policy periods remain, Crossman would have to show that they exceeded \$3.4 million before Cincinnati excess coverage is reached.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Francis M. Mack", with a horizontal line drawn underneath it.

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