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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2025-001176
Case No. 2014-CP-08-02424

Opinion No. 2025-UP-072

Builders FirstSource-Southeast Group, LLC, Petitioner,

v.

MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC, of which ECC Contracting, LLC and Charleston Exeriors, LLC are Respondents.

APPENDIX VOLUME II

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ELECTRONICALLY FILED - 2020 Jan 29 9:28 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0802547

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NO: 2018-CP-08-02547

Builders FirstSource-Southeast Group, LLC, Plaintiff, vs. MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC Defendants.	)	**BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC'S MEMORANDUM IN OPPOSITION TO THE PROPOSED AMENDED ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The Plaintiff, Builders FirstSource-Southeast Group, LLC, above named, in response to the Proposed Amended Order Granting Defendants' Motion for Summary Judgment, would object as follows:

I. Defendant Charleston Exterior's proposed order erroneously states throughout that Builders FirstSource is seeking to "force" Defendants to indemnify BFS for BFS's own negligence.

In pleadings and at oral arguments, BFS has consistently represented to the Court that BFS is *not* seeking to have Defendants indemnify BFS for BFS's own negligence. BFS is seeking to have Defendants indemnify BFS for *Defendants'* own negligence. The order contains findings of fact #6 and #7 that are irrelevant to the indemnity claims for Defendants' own negligence, and thus should be struck from the order.

II. Defendant's proposed order purposefully misrepresents Charleston Exterior's contract with the Plaintiff.

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The indemnity provision of the Contract between BFS and Charleston Exteriors contains four Paragraphs. Defendant's order pulls quotes from two different paragraphs of the contract. The first section highlighted in the order accurately quotes that BFS may seek indemnification for losses arising out of, among other things, property damage:

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

This paragraph expressly permits BFS to recover from Defendant subcontractors for the negligent acts or omissions of said subcontractors, and is consistent with the Court of Appeal's holding in Concord and Cumberland. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), reh'g denied (Oct. 18, 2018).

Defendant's order then goes on to quote a different paragraph of the Contract. This selection has been taken out of context. Had Defendant read the entire paragraph, he would have seen that this second section applies only to losses

> ARISING OUT OF OR RESULTING FROM **BODILY INJURY** TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS . . .

(emphasis added). This case involves claims for property damage, not bodily injury. Thus, the second paragraph in the order cited by Defendants is irrelevant to this case and should be struck from the order.

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Finally, Defendant's order incorrectly requires BFS to prove the indemnity language of its contracts is clear and unequivocal. However, that standard would apply only if BFS were seeking indemnity based on BFS's own negligence. Again, BFS is seeking no such thing. Thus, the order should be reformed striking the paragraphs that impose such a standard and should be reformed to allow BFS to pursue its claims against Defendants for Defendants' own negligence.

III. The statute of limitations on a claim for indemnity does not begin to run until the indemnitee (here, BFS) sustains an injury.

As Defendants noted, the statute of limitations on an indemnity claim runs from the time judgment is entered against the defendant. For indemnity against a liability, the liability must be established by a Court decision; for indemnity against a loss, the loss must be established by an actual payment made. Neither of those instances has happened here, and thus the statute of limitations has not even begun to run on Plaintiff's indemnity claim.

Furthermore, even assuming that the payment of attorneys' fees constituted a "loss" sufficient to trigger the running of the statute of limitations, the only attorneys' fees that would be unrecoverable would be those few dates outside the statute of limitations. Defendants claim the statute of limitations began to run on December 21, 2015. Thus, only attorneys' fees incurred from December 15 to December 21 of 2015 could potentially be barred. Plaintiff still has a viable claim for all attorneys' fees incurred after December 21, 2015.

IV. The Court in its order must consider whether it has jurisdiction to hear this case.

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"Lack of subject matter jurisdiction can be raised at any time . . . and can be raised sua sponte by the court." Badeaux v. Davis, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999). Additionally, "[l]ack of subject matter jurisdiction may not be waived, even by consent of the parties." Id.

Because the underlying action in this case is currently upon appeal, all matters affected by the appeal, including the issues before this Court, are automatically stayed. This Court is without jurisdiction to make substantive determinations affecting the underlying Damico case. For this reason, Plaintiff has argued from the beginning that this Court must stay these proceedings until they may be consolidated with the underlying case.

HOWELL, GIBSON & HUGHES, P.A.

By: ***s/ William H. Cox, III***
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(843) 522-2400
Attorney for Builders FirstSource-Southeast Group, LLC

Beaufort, South Carolina
January 29, 2020

CERTIFICATE OF SERVICE

I certify that I served the foregoing Builders FirstSource-Southeast group, LLC's Memorandum in opposition to the proposed Order granting Motion for Summary Judgment upon all counsel of record, in this proceeding, via electronic mail, and/or via United States Postal Service, with proper postage affixed thereto, to counsels' last known email address and/or mailing address on this 29th day of January, 2020.

By: ***s/ William H. Cox, III***
William H. Cox, III

ELECTRONICALLY FILED - 2020 Feb 13 5:05 PM - BERKELEY - COMMON PLEAS - CASE#2018CP0802547

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NO: 2018-CP-08-02547

Builders FirstSource-Southeast Group, LLC,	)	
Plaintiff,	)	MOTION TO RECONSIDER THIS COURT'S ORDER DATED FEBRUARY 3, 2020
vs.	)	
MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Builders FirstSource-Southeast Group, LLC, by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Presiding Judge, Berkeley County Court of Common Pleas, on the tenth (10^{th}) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of February 3, 2020.

The within motion, made pursuant to the provisions of the statutory and common laws of the State of South Carolina and Rules 52 and 59, South Carolina Rules of Civil Procedure, is based upon the following grounds outlined below.

On the face of the Amended Order filed February 3, 2020, the Court appears to have amended its order dated December 6, 2019. The February 3,

2020 Amended Order makes no reference to the Motion for Reconsideration filed by the Plaintiff BFS. The Berkeley County Public Index in this matter has no order disposing of that Motion for Reconsideration. Therefore, inasmuch as the Court amended its original order without reference to any disposition of the Motion for Reconsideration, the Plaintiff hereby moves for reconsideration of the February 3 Order, and adopts by reference all grounds and considerations set forth in its Motion for Reconsideration dated December 16, 2019. However, if it is the Court's intent to dispose of the Motion for Reconsideration by its February 3 Order, then this Defendant would request that such determination be set forth specifically.

HOWELL, GIBSON & HUGHES, P.A.

By: ***s/ Stephen P. Hughes***

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February 13, 2020

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ELECTRONICALLY FILED - 2020 Feb 13 5:05 PM - BERKELEY - COMMON PLEAS - CASE#2018CP0802547

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion for Reconsideration upon all counsel of record, in this proceeding, via electronic mail, and/or via United States Postal Service, with proper postage affixed thereto, to counsels' last known email address and/or mailing address on this 13th day of February, 2020.

By:***s/ Stephen P. Hughes***
Stephen P. Hughes

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

RECEIVED
MAR 19 2020
SC Court of Appeals

Case No. 2014-CP-08-02424
Appelate Case No. 2020-000415

Builders FirstSource-Southeast Group, LLC.....Appellant,

v.

MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC.....Respondents.

AMENDED NOTICE OF INTENT TO APPEAL

Builders FirstSource-Southeast Group, LLC, appeals the Order of the Honorable Clifton B. Newman, dated February 1, 2020, a copy of which is attached hereto. Counsel for the Appellant received written notice of this Order on February 3, 2020, and timely filed and served a Notice of Intent to Appeal on March 2, 2020. Builders FirstSource-Southeast Group, LLC, now also appeals the Order of the Honorable Clifton B. Newman, dated March 4, 2020, a copy of which is attached hereto. Counsel for the Appellant received written notice of this Order on March 5, 2020.

HOWELL, GIBSON & HUGHES, P.A.

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March 17, 2020

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2014-CP-08-02424
Appelate Case No. 2020-000415

Builders FirstSource-Southeast Group, LLC.....Appellant,

v.

MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC.....Respondents.

PROOF OF SERVICE

I certify that I have served the Amended Notice of Appeal on ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC by depositing a copy of it in the United States Mail, postage prepaid, on March 17, 2020, addressed to the following attorneys of record:

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Attorneys for Respondent ECC Contracting, LLC

RECEIVED
MAR 19 2020
SC Court of Appeals

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Attorney for Respondent Charleston Exteriors, LLC

All counsel was previously served with the original Notice of Appeal by United States Mail, postage prepaid, on March 2, 2020.[1]

The Amended Notice of Appeal has also been filed with the trial court clerk's office.

HOWELL, GIBSON & HUGHES, P.A.

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[1] Please note that MI Windows and Doors, Inc., was dismissed without prejudice from this suit pursuant to a stipulation of dismissal filed with the trial court on July 16, 2019.

Beaufort, South Carolina

March 17, 2020

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RECEIVED
MAR 19 2020
SC Court of Appeals

March 17, 2020

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Builders FirstSource Southeast Group, LLC v. ECC Contracting LLC, MI Windows and Doors, Inc., Hurley Services, LLC, Charleston Exteriors LLC
Case No.: 2020-000415
Civil Action No.: 2018-CP-08-02547
Our File No: 11742 1 SPH

Dear Ms. Kitchings:

Please find enclosed herewith for filing Amended Notice of Intent to Appeal and Proof of Service with regard to the above referenced matter. I would appreciate your filing the same and returning a filed copy to me in the enclosed self-addressed, stamped envelope provided for your convenience. It is our understanding, based on a conversation with your office, that in filing this proof of service today, we are correcting and replacing the deficient proof of service that was the subject of your office's letter of March 10, 2020.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

Catherine L. Floeder

Catherine L. Floeder
CLF/qkh
Enclosures
cc: All Counsel of Record

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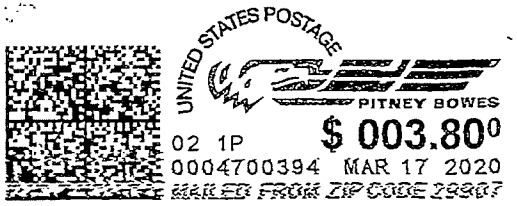

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MAR 19 2020

SC Court of Appeals
Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

000304

ELECTRONICALLY FILED - 2020 Feb 03 9:36 AM - BERKELEY - COMMON PLEAS - CASE#2018CP0802547

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Builders Firstsource-Southeast Group, LLC Plaintiff, V MI Windows And Doors, INC.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC, Defendant,	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL CASE NO. 2018-CP-08-02547 **AMENDED ORDER GRANTING CHARLESTON EXTERIORS, LLC'S AND ECC CONTRACTING, LLC'S MOTION FOR SUMMARY JUDGMENT**

RECEIVED
MAR 19 2020
SC Court of Appeals

This matter came before the Court on Friday, October 18th on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. Present and participating in the argument were the movants counsel, C. Clay Olson, Esquire of Harper Little, PLLC and the Plaintiff was represented by Witt Cox, Esquire of Howell Gibson & Hughes.

ECC Contracting filed a similar, if not identical motion which was also heard. Counsel for ECC, Heyward Grimball, Esquire of Richardson Plowden was in attendance to advocate and advance the arguments of ECC Contracting. The ECC Motion for Summary Judgment was heard concurrently with the Charleston Exteriors motion. The Court hereby rules on both Charleston Exteriors, LLC's Motion for Summary Judgment as well as ECC's Motion for Summary Judgment.

BACKGROUND

The Plaintiff, Builders First Source Southeast Group, Inc. ("BFS") is a supplier of building materials and components, as well as a provider of construction services for new construction and remodeling projects. BFS provided materials and services at a construction

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project known as the "Abbey at Spring Grove" which is located in Moncks Corner, South Carolina.

The Abbey at Spring Grove (the "Abbey") is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas[1]. To be precise, the Abbey is a portion, or phase, of the larger Spring Grove Plantation development.

A lawsuit was filed in 2014 by Patricia Damico on behalf of herself and other owners within the Abbey at Spring Grove. *See Patricia Damico and Lenna Lucas, individually and behalf of all other similarly situated v. Lennar Carolinas, LLC, et al., Case No. 2014-CP-08-02424 (the "Underlying Class Action").* The underlying matter was amended on more than one occasion as the Plaintiff asserted exterior window claims on November 23rd, 2015.

On November 25th, 2015, Lennar Carolinas answered the Amended Complaint and asserted Third-Party claims against several of its contractors and suppliers. Among these Third-Party Defendants was Builders First Source who signed its responsive pleading on December 15th, 2015 and filed it on December 21st, 2015.

The case before the Court was filed on December 21st, 2018 in Berkeley County, South Carolina. The allegations made against Charleston Exteriors, LLC are derived from allegations made by the Plaintiff Damico and Lennar in the underlying lawsuit. Specifically, the Plaintiff and Lennar Carolinas have alleged that BFS was negligent in the installation of windows at the Abbey; that BFS breached its subcontract agreement with Lennar by virtue of the allegations made by the Plaintiff against Lennar; that BFS breached express and implied warranties as alleged in the underlying lawsuit; that Lennar is entitled to both contractual indemnification or, alternatively, equitable indemnification from BFS due to the claims made in the underlying

[1] Lennar Carolinas is not a party to this litigation. Lennar is a Defendant in the matter styled Damico v. Lennar Carolinas, LLC.

lawsuit. As a consequence of these claims made in the underlying lawsuit, BFS has brought this lawsuit alleging that Charleston Exteriors and ECC breached their subcontract with BFS, that Charleston Exteriors and ECC breached certain implied and/or express warranties with BFS; that BFS is entitled to contractual/equitable indemnification from Charleston Exteriors and ECC; and that Charleston Exteriors and ECC were negligent in the installation of the windows at the Project.

FINDINGS OF FACT

1. Builders First Source "BFS" was on actual notice of potential claims against Charleston Exteriors, LLC on December 15, 2015. There can be no other conclusion with regard to this issue upon reviewing the Answer of Builders First Source dated December 15th, 2015. See Exhibit "A"

2. BFS has not submitted a Memorandum of Law to rebut Charleston Exteriors argument that BFS was on notice of a potential claim against Charleston Exteriors on or before December 15th, 2015.

3. Uncontroverted testimony from the hearing, coupled with a review of the D'amico record shows that at no time did BFS attempt to amend its pleadings in the underlying suit against Charleston Exteriors, LLC.

4. BFS began defending the underlying lawsuit on or before December 15, 2015.

5. BFS began incurring costs and attorneys fees when it began to defend this case on or before December 15, 2015.

6. The Subcontract Agreements entered into by ECC and Charleston Exteriors with BFS contain language concerning indemnity and the prospect of these Defendants being forced to indemnify BFS for the negligence of BFS.

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7. The contractual indemnification language referenced in Paragraph 6 is both confusing and contradictory at times. The language fails to clearly and unequivocally explain that these Defendants are obligated to indemnify BFS for BFS's negligence.

8. BFS failed to present any evidence suggesting that this lawsuit seeks damages for any acts or omissions which are separate or distinct from the underlying lawsuit. The Court concludes that the claims made in this lawsuit are wholly derivative of those brought in the Damico litigation.

9. BFS entered into a Master Subcontractor Agreement with Charleston Exteriors on October 17th, 2012.

LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

A trial court should grant a motion for summary judgment 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 judgment as a matter of law." Rule 56(c), SCRCP; see Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting Tupper v. Dorchester Cnty., 326 S.C. 318, 487 S.E.2d 187 (1997)). "Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and

indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

A. THE CLAIMS OF THE PLAINTIFF FOR NEGLIGENCE, BREACH OF CONTRACT, AND BREACH OF WARRANTIES ARE TIME BARRED

South Carolina recognizes the "discovery rule" when considering an action to be time barred. Under the discovery rule, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Also, Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999) The statute of limitations for negligence, breach of contract, and breach of warranties is three years. Compelling portions of the record in the underlying matter were presented by the Defendants which illustrates that the Plaintiff was on direct and actual notice of its potential claims against Charleston Exteriors and ECC on December 15th, 2015. Subsequently, more than three years went by before this lawsuit was filed on December 21st, 2018. These causes of action fail for being untimely.

B. DISGUISED INDEMNITY CLAIMS

Although the Court has already determined that claims of BFS for negligence, breach of contract, breach of warranties ("Non-Indemnity Claims) are each barred by the three-year statute of limitations, the Court will consider the Defendants' additional argument. The Defendants have alleged that the Non-Indemnity claims must fail pursuant to the "Stoneledge Defense" which bars claims that are disguised indemnification claims cloaked within separate

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causes of action.[2] Upon hearing the oral arguments and reviewing memoranda presented to the Court, it is evident that the Plaintiff's Non-Indemnity claims do not exist outside of the derivative Damico lawsuit. They must, therefore, fail.

The allegations in this case make no separate or unique contention(s) which are in addition to the allegations made by Lennar and the Plaintiff in the *Damico* matter. Builders First Source has failed to provide any admissible record evidence that it sustained any separate or independent damages outside the scope of the Damico lawsuit. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross- claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim");*

C. MASTER SUBCONTRACT AGREEMENT INDEMNITY PROVISIONS ARE NEITHER CLEAR NOR EQUIVOCAL

The Defendants seek Summary Judgment as to Builders First Source's contractual indemnification claim on the ground that it violates South Carolina rules of contract construction. Section 5 of the Master Subcontract Agreement is confusing at best and deceptive at worst.

Section 5 contains two Paragraphs. The first paragraph seems to suggest that BFS may only seek indemnification for damages.....

ONLY TO THE EXTENT CAUSED.IN WHOLE OR-IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR

[2] Counsel for ECC and Charleston Exteriors presented memoranda and oral arguments consistent with the reasoning in a recent S.C. appellate case which is known as "Stoneledge" and is specifically cited as *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015)*

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INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

Below this lengthy paragraph is an almost identically constructed paragraph which is slightly altered to indicate that BFS may seek indemnification from Charleston Exteriors for damages caused by the negligence of any person or entity. Specifically, the second paragraph suggests a duty to indemnify BFS.....

REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE ORIN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.

The Court can only conclude that the Master Subcontract Agreement is not what our courts had in mind when setting precedent regarding "anti-indemnity" clauses in contracts. Typically, courts will construe an indemnification contract *"in accordance with the rules for the construction of contracts generally." Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports "to relieve an indemnitee from the consequences of its own negligence," our case law requires strict construction of the clause. Laurens, 355 S.C. at 111, 584 S.E.2d at 378-79. "Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) see also Murray v. Texas Co., 172 S.C. 399, 402, 174 S.E.231, 234 (1934)(finding "broad and comprehensive" language was insufficient to prove the contract relieved a party from its own negligence).*

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question

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as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contractual indemnity claims.

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified for its own negligence, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

D. <u>BUILDERS FIRST SOURCE'S CONTRACTUAL INDEMNIFICATION CLAIM IS ALSO BARRED PURSUANT TO THE RELEVANT STATUTE OF LIMITATIONS</u>

The contractual indemnity claim(s) made by Builders First Source against ECC and Charleston Exteriors have also been challenged pursuant to the statute of limitations. As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. *Choate v. United States, 233 F. Supp. 463 (D.C. Okla. 1964) First Gen. Servs. v. Miller, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994).* Our courts, however, have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp.*, LLC, 415 S.C. 321, 330 (Ct. App. 2015). In this case, BFS has pled that it is "entitled to full

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contractual and common law indemnification for and against Liability". *See Complaint, Paragraph 34.*

The Court draws further distinction in this case because the relief prayed for in the BFS complaint seeks consequential damages for attorney's fees. Specifically, the Complaint against ECC and Charleston Exteriors states that, "....BFS has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action." *See Complaint, Paragraph 33; See also Paragraph 34* ("...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney's fees, costs, and other expenses incurred in defending the underlying action... ")

BFS began to incur liability for attorney's costs and fees – damages it seeks in this litigation when its Answer was drafted and served. BFS's Answer was executed and served more than three years prior to the filing of the present action. Thus BFS's claims for "contractual and common law indemnification against Liability" are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

The facts before the Court are distinguishable from the *First General Services* case in that BFS is seeking indemnification for damages which have begun to accrue more than three years prior to filing and, as a result, the Court is inclined to agree with the Defendants that consequential damages, as defined by the Complaint, began to accrue prior to December 15th, 2015 and, therefore, these damages cannot be recovered as Builders First Source discovered them more than three years prior to the filing of its lawsuit against Charleston Exteriors and ECC.

IT IS ORDERED that the Defendants Charleston Exteriors, LLC and ECC Contracting,

LLC's Motion for Summary Judgment is granted as to the following causes of action only:

a. Negligence

b. Breach of Contract

c. Breach of Warranties

d. Contractual Indemnity

IT IS ORDERED that these causes of action are hereby dismissed with prejudice and this ruling should serve precedent in the Damico matter as well.

THIS COURT FINDS THAT two claims remains which are subject to the Motion to Consolidate brought simultaneously by Builders First Source. The claims are for equitable indemnification and contribution. The Court finds that these claims are subject to consolidation with the related D'Amico matter which remain stayed until further notice or order.

IT IS FURTHER ORDERED that the cause of action for equitable indemnification involves a question for the jury and the Motion for Summary judgment is, therefore, denied as to that cause of action. The Plaintiff's Contribution claim survives as it was not before me as part of this motion for summary judgment.

AND IT IS SO ORDERED this_____day of_,2020, at_____, South Carolina.

_____

Clifton B. Newman Presiding Judge

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Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And Doors, Inc. , defendant, et al

Case Number: 2018CP0802547

Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

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STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Builders Firstsource-Southeast Group, LLC Plaintiffs, v. MI Windows And Doors, INC.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC, Defendant.	**Civil Action No. 2018-CP-08-02547** **ORDER DENYING RECONSIDERATION**

This matter came before the Court on October 18th, 2019 on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. The matter came before the Court again on January 17, 2020 on the Motion of the Defendants for Reconsideration of the Order Granting Summary Judgment on various claims. An amended Order was issued on February 3, 2020 to which the Defendant seeks reconsideration.

Having fully considered the matter, both Motions for Reconsideration are denied based on the reasons stated in the Order of February 3, 2020.

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

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Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And Doors, Inc. , defendant, et al

Case Number: 2018CP0802547

Type: Order/Other

So Ordered

s/ Clifton B. Newman, 2127

STATE OF SOUTH CAROLINA	) COMMON PLEAS COURT
COUNTY OF BERKELEY	) CASE NO. 2018CP002547
BUILDERS FIRSTSOURCE SOUTHEAST GROUP, LLC Plaintiff,	) Transcript of Record
vs.	) Date: October 18, 2019
ECC CONTRACTING, LLC, MI WINDOWS AND DOORS, INC., HURLEY SERVICES, LLC, CHARLESTON EXTERIORS, LLC Defendants.	)

* *

B E F O R E:

The Honorable Clifton Newman

* *

Krista Nicole Carney, Stenographic Court Reporter, transcribed by a Stenographic Court Reporter

A P P E A R A N C E S

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(No exhibits were offered or marked for identification.)

(These proceedings were had October 18, 2019, Berkeley Common Pleas.)

THE COURT: Okay. We're ready for you-all at this point.

MR. COX: Yes, Your Honor. William Cox for Builders FirstSource Southeast Group.

THE COURT: Yes, sir.

MR. COX: May it please the Court, we're the plaintiffs in this matter and this is our motion to stay and consolidate, or consolidate and stay.

A little procedural background, Your Honor. And I'm going to refer to the other pending matter in this county, the Damico litigation, which has also been referred to by our subcontractors in their memorandums, I believe.

But we were brought into the case by a general contractor Lennar of the Carolinas and the Damico litigation involving single-family residences at the Abbey Spring Grove. We were brought into that action --

THE COURT: Is that in Monks Corner?

MR. COX: It is in Berkeley County, Your Honor. I apologize. I do not have the exact address of it.

THE COURT: What area of the county?

MR. COX: I believe it is Monks Corner.

And that action is 2014-CP-08-02424. And, like I said, Lennar brought in my client, Builders FirstSource, for our involvement in providing turnkey window installation at that project.

And after being brought in and answering the complaint, and upon receipt of initial records from our client, we were able to establish that the window manufacturer was in my windows and doors, and at least one of our subcontractors was ECC Contracting. As such, we moved to amend our answer and bring third-party claims against those entities.

However, after filing our motion, the Court entertained arguments regarding Lennar's motion to compel arbitration in that matter. And after being denied their motion to compel and after being denied the motion to reconsider, Lennar filed a notice of appeal. And since then the Damico litigation has been stayed and is on appeal regarding Lennar's motion to compel arbitration issues. Since then --

THE COURT: The basis for compelling

arbitration or denying compelling arbitration, what was the controversy?

MR. COX: The best of my understanding, Your Honor, is that Lennar had agreements that compelled arbitration with certain subcontractors and not with all subcontractors. And, you know, to that extent, there's objections being had. And I believe Judge Nicholson denied that motion to compel. And then again upon reconsideration denied their motion to reconsider it.

In order to protect our client's interest and defenses in that matter, we had -- you know, had continued to speak with our client and we had discovered that a couple of other parties were involved, Hurley Services and Charleston Exteriors, for providing labor for turnkey window installation.

However, because the case was stayed, we weren't able to amend or bring those parties in. We felt that this was the proper course, in filing this action, that we are the plaintiff in. And we asserted those claims against the manufacturer and our subcontractors that were involved in the Damico litigation.

And once the parties appeared, we had

hoped that we would be able to reach an agreement of a stay of this matter and a consolidation with the Damico litigation. MI Windows and Doors instead requested that they would enter into a stipulation of dismissal, as well as the tolling agreement protecting my client's interest, respecting any sort of defenses, regarding statute oppose, regarding statute of limitation arguments.

Hurley Services was entered into default and an agreement to let them out of default, they agreed to consent to the stay and consolidation.

And Charleston Exteriors was somewhat on board, I believe, and then subsequently ended up filing a motion for summary judgment. And ECC Contracting also filed a motion for summary judgment.

And with respect to our motion to stay and consolidate, Your Honor, we believe that in the interest of justice and to promote judicial economy, the cleanest and easiest thing to do in matter is to stay and consolidate with the Damico litigation.

And the reason I'm using stay and consolidate, and consolidate and stay, is because

that case is on appeal. I'm not sure procedurally if you can consolidate us at this time, which is why we believe that a stay would be just and proper.

THE COURT: The one on appeal has been stayed?

MR. COX: Correct.

But with regards to our motion to consolidate, certainly the facts and controversy are the same, the witnesses will be the say, questions of law will be the same. And we believe it would -- but for that case being on appeal, we would meet every criteria necessary for consolidation.

THE COURT: And those criteria, again, is what?

MR. COX: Simply common questions of law and fact under the Keels case and some of the trial judge's wide discretion as to whether or not he would consolidate the matters. And really that's about it.

It's under Rule 42. And we would put forth -- and certainly I believe even subcontractor's counsel has agreed that the questions and facts are the same in both cases

so...

THE COURT: And the particular questions -- the common questions are what?

MR. COX: The questions of fact would be, you know, who did what, who provided what labor, what buildings, you know, who was involved in the installation of the windows. And then the questions of law would certainly be, you know, notice and all the, you know, laws of negligence and gross negligence.

THE COURT: Now, the two cases are from two separate apartment complexes?

MR. COX: No, sir. It's the same --

THE COURT: Same apartment place.

MR. COX: And in our pleadings we acknowledge that, you know, the whole procedural history of how, you know, we were brought into the Damico litigation. And that we are, you know, filing this complaint with respect to the same.

THE COURT: All right. Who's opposing?

MR. OLSON: I think we would both would be. I'm Clay Olson. I represent Charleston Exteriors.

I would just make a simple argument before my colleague, Heyward, would. We don't

think there's a basis for a stay in this case due to the fact that a separate case is on appeal. I don't think there's any precedent for that. And as he said, as far as, you know, joining the cases, I don't think there's any -- I think that the Damico, the parent case or the underlying case, is not within that trial judge's discretion any more. I think because of the Court of Appeals.

And, so, I mean, I understand his argument, but I don't think there's any precedence for staying a separate case based on the primary case being stayed, I guess.

THE COURT: All right.

MR. GRIMBALL: And, Your Honor, I guess part of what we're dealing with is we filed a motion for summary judgement with regard to most, but not all, of the claims that FirstSource had us presented.

And so it's a question of what claims remain as to whether or not, joined or a consolidation is necessary or appropriate.

You know, if we are going to -- if some of their claims is going to survive this motion hearing, obviously we have got to do something. I mean, we can't have a case that is derivative of

the Damico action. You know, go to trial before the Damico action is resolved. I mean, it's just impractical.

But, you know, I don't know whether consolidation or joined is more appropriate. You know, should you deny my motion, Mr. Olson's motion in whole, you know, I think --

THE COURT: Your motion for summary judgment?

MR. GRIMBALL: For summary judgement, yes. And, you know, part of the point of bringing these motions now is the Damico case is -- you know, it's a 54-unit single-family residence development. And it is -- not only are the plaintiffs litigating the vertical construction of the homes. You know, the flashing of the windows and the roofs and what have you, but they're also litigating some pretty substantial foundation and drainage. And when I say drainage, I mean site drainage issues.

And so, you know, it will end up being a case with 40 or 50 parties. And it's prejudicial to the defense of my client to get thrown in with all that and be trying to deal with these claims, when we now have the opportunity with just the five

of us to deal with some of these claims.

So I'd suggest that maybe before you rule on Mr. Cox's motion that Mr. Olson and I have the opportunity to argue our motion for summary judgement. And then perhaps we could do an order that addressed both of the motions.

THE COURT: All right. Mr. Olson.

MR. OLSON: I think that's a great point. I would only add that depending on how you rule on our motions for summary judgment, I mean, we would probably enter into a consent as to -- I can't speak for Heyward's client. But, I mean, I think his point's -- you know, I think basically what we were worried about is all of a sudden we get consolidated into a case that is dormant and not being able to hear our motion for summary judgement, which we think are timely and should be disposed of now. They're not going to change.

THE COURT: Mr. Cox.

MR. COX: Counsel made two quick points, Your Honor. With respect to the prejudice that Mr. Heyward claims that his client would be subjected to, we have a motion to amend in the Damico litigation that is pending, even though it's on appeal. So as soon that case calms down out of

appeal, our motion will be heard. And I've never not seen a motion to amend not get granted.

So there's no prejudice to the plaintiff in the Damico case. No one is going to be objecting to that motion. ECC, to the extent they're not in that case, will not be able to stay and object to that motion.

So the prejudice that he puts forth before your Court is not existence, in the fact that he will be brought into that case one way or the another.

And then, secondly, with respect to Mr. Olson's position, I just think that for all these reasons, the stay is most appropriate and it's the cleanest thing at this time for the Court to do in the interest of justice. And to protect all the party's interest, including my clients.

And, certainly, a stay and consolidation, any arguments they have with respect to summary judgment they will stay have even if the case stayed and consolidated. They will not lose those rights. The arguments they would be making to Your Honor today would still be the same arguments that they may or may not make in the future.

And then with respect to Mr. Olson claiming that he doesn't want to get dragged into this big Damico case, all of us in this room are aware, in following the Damico litigation. In fact, these attorneys notified our office of some developments in that case that we were not aware of because we weren't on the e-mail chain.

So there's no prejudice to these attorneys or their clients because they are already following that litigation, certainly billing for it, whether it be to the client or pro bono, whatever.

So for those reasons, again, we just believe that a stay and consolidation or a consolidation and stay are most appropriate in this situation.

THE COURT: You cannot consolidate a case with a case on appeal. Because the Court of Appeals has jurisdiction over the case. So I can't -- absent some kind of stipulation between all parties, I don't see how I can consolidate a case with a case on appeal.

So it leaves the question of a stay pending coming from the Court of Appeals. Now, as far as the underlying litigation, who represents

the plaintiff?

MR. GRIMBALL: Your Honor, the Steinberg Law Firm and John Hayes' Law Firm represents the plaintiffs.

THE COURT: And they have no interest in this issue?

MR. COX: No, Your Honor. In fact, the case is on appeal, but the parties have agreed to continue their oral arguments up on appeal to conduct a mediation. And that was what I had eluded to. But these attorneys informed us of that development. We were not on those e-mail threads where they are going to continue the arguments and do a mediation.

And, again, since then all of our subcontractors, everyone here at the table intends to participate in that mediation in the Damico matter, which I believe just further goes to the point that a stay is most appropriate in this case to afford them that right and opportunity and to bring all the parties to the table. And as Mr. Grimball said, you know, for all five of us to work it out together.

MR. GRIMBALL: And just to be clear, Your Honor, we have -- our firm represents two

other -- we represent a landscaper and a floor installer in the underlying litigation. And we actually resolved the plaintiff's claims against those parties independently. So, you know, as a courtesy I let them know about that.

But it doesn't have anything to do with this litigation. But it would have not known about that in the course of the representation of ECC.

MR. OLSON: And we were never made aware of the mediation. So I don't think it's really relevant.

THE COURT: Mr. Newberry, who do you have?

MR. NEWBERRY: Your Honor, I represent Hurley Services. When I first got involved in this matter they were in default. I have followed the underlying matter because some lawyers in my office are involved in that.

Essentially, what happened -- it's a huge mess. It's up on appeal. There are subs who Lennar moved to compel the plaintiffs to arbitrate and their subs. All the subs have different contracts. And so there are all these arguments.

And so, essentially, what's happened now is the Court of Appeals has stayed oral

argument to see if some of the parties can work it out. What happened with Builders FirstSource, I think, is they got caught filing a motion to bring in their parties. Everybody was scrambling as this motion for arbitration is getting ready to be heard, trying to figure out who we have to bring in.

They filed a motion. And now, out of fear of being precluded later by the statute of limitations from getting everybody into the underlying action, filed this suit. There's really no way this suit can go forward separately by itself because it's an indemnity. They're basically saying, you can't indemnify us for what we losing to Damico. So there's no way we can figure that without Damico.

I've agreed or consented to consolidation, because I just think that's the only way they would could actually handle it or stay, or whatever needs to be done. But that's really my only position here today. I don't have a motion for summary judgment.

MR. GRIMBALL: May I proceed with our motion for summary judgement?

THE COURT: Well, I'm trying to get the

gist of what it's all about. Or it may not be appropriate at this time.

Let me hear from Mr. Newberry first.

MR. NEWBERRY: The underlying action -- what happened was Lennar moved very early. And Your Honor deals with a lot of these cases. And so when they moved to compel arbitration, there had been no expert reports exchanged, nothing like that.

And so it ballooned, like construction cases do. And it's been on appeal for, I don't know, like two or three years. And it's still at the Court of Appeal level.

And so everyone is trying to figure out, you know, what are the real issues, who was really involved, who needs to be in this case, who doesn't need to be in this case.

And because the plaintiffs didn't sue the subs directly, it's all tied up, whereas he might have been able to carve out and proceed down this sort of trajectory.

And we've been sitting -- the underlying cases have been sitting in limbo for a long time. And now some parties are resolving, which is great, if you can do that. But this is a

spinoff.

THE COURT: Do you think that addressing a summary judgment at this is premature?

MR. NEWBERRY: I take no stance on that, Your Honor.

THE COURT: It helps sometimes to figure out all these issues.

All right. Mr. Grimball.

MR. GRIMBALL: All right. Your Honor, if I may, I've got a hard copy of my motion for you.

THE COURT: Yes, sir.

MR. GRIMBALL: Your Honor, we have moved for summary judgment on --

THE COURT: So I have a visual picture, does anyone here know where the Abbey at Spring Cove is located? Anyone ever heard of it? Do you have an address for it? Highway 52? Highway 17?

THE BAILIFF: I will not swear to it, Your Honor, but I believe it's at the corner of Cypress Garden Road and Old 52.

THE COURT: It's at the corner Cypress and Old 52.

MR. OLSON: Apparently, there's a master development called Spring Grove Plantation.

And the Abbey is a phase of that, but I can't really tell you where that is.

THE BAILIFF: Yeah. I think there's at least 10 different subdivisions in Spring Grove. But Spring Grove itself is at the corner Old 52.

THE COURT: Thank you. That at least positioned me in the right direction. Yes, sir.

MR. GRIMBALL: And, Your Honor, just before I start. I somehow -- this morning I sneezed and like whacked the three vertebrae in my neck. So if I look like a robot it's because I'm apparently getting old.

MR. OLSON: Sneezing injury.

MR. GRIMBALL: So we would move for summary judgment on three grounds. We move to dismiss for summary judgment on Builders FirstSource's claims of negligence breach of contract, breach of warranty.

On the basis of this Stoneledge Holding, the idea that those claims are all conditioned on their liability to Lennar and/or the plaintiffs in the Damico case.

We've also moved for summary judgement on their contractual indemnity claims under the Cumberland Holding. The language in their contract

is substantially the same as that in the Concord and Cumberland holding.

THE COURT: That was my case, Concord and Cumberland?

MR. GRIMBALL: Yes, sir. I don't think you needed it, but I included in your ruling in Seashore Villas as well, just because that was perhaps a little fresher on your mind.

THE COUR: Okay.

MR. GRIMBALL: And then the last ground is we've moved for summary judgement on all their claims but contribution, on the basis of the expiration of the statute of limitation.

And since that one is perhaps a little bit more novel, I'll start there and move backwards. This case was originally filed on December the 21st, 2018. The Damico case was filed October 30th, 2014. It was originally about the lot drainage and the foundation issues that I was telling you about earlier.

And the Steinberg Law firm associated Mr. Hayes, who had perhaps a bit more of an appreciation for the nuisances and the issues that can arise with construction. And they amended their pleading to assert claims related to the

vertical construction of all of the homes as well. And that's how Builders FirstSource came to be a party to the Damico case.

Builders FirstSource was served in the Damico case on December the 3rd, 2015. The affidavit of service in that case is Exhibit 1 to my memorandum. Their answer is dated September the 15th, 2015. And it was served by U.S. Mail on December the 18th, 2015.

Their answer -- in the Damico case is Exhibit 2 to my memorandum. So, obviously, they filed this litigation three years and three days after they served their answer in the underlying one.

Well, why is that important? In South Carolina there are two types of indemnifications. There's indemnification against loss, which is your traditional, what we think of, in terms of equitable indemnification. And there's also indemnification against liability. Indemnification against loss -- your claim for indemnification does not arise until a payment has been made.

So in your traditional context it wouldn't arise until a defendant had actually paid the judgment.

And indemnification against liability, on the other hand, arises when the liability is incurred. And the Builders FirstSource, in their complaint -- which I have a copy of, if you would like.

THE COURT: Yes, sir.

MR. GRIMBALL: So in their complaint, Builders FirstSource alleges that it is entitled to indemnification against liability. And so the claims they are bringing accrued when the liability was first incurred. You know, we don't know when they contacted Mr. Hughes or when they retained him to represent in that case. But we do that he was working for them and that they were accruing a liability of his attorney's fees on December the 18th, when he made an appearance and filed his answer.

And they are seeking attorney's fees and costs as damages in this litigation. I mean, you know, obviously those fees have not stopped to run, but it's just the same as any other construction defect case. It's a progressive damages case.

You know, if we were talking about the plaintiff's claims, just because they have brought

the suit doesn't mean that it stops raining and building stops being the subject of water intrusion. No. The damages often get much worse during the dependency of the litigation.

So for that reason, Your Honor, we believe that the plaintiff's claims are everything, but contribution are barred by the statute of limitations.

Then on to the Concord and Cumberland Holding. In that case, Your Honor, you held that a contractual indemnity provisions in order to be enforced have got to be clear and unequivocal. And in order for a contractor to prevail on contractual indemnity claims against a subcontractor it must be clear and unequivocal that the claims -- that the provision that supports the claim for contractual indemnity and the subcontractor are agreeing, that the subcontractor will indemnify the contractor for their mutual negligence.

I think in the opinion that it's called concurrent negligence, as opposed to sole negligence. And in that case you held and the Court of Appeals agreed that where the indemnification provision was limited to the extent said that it would indemnify for the loss resulting

from -- to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of the subcontractor, that that was not clear because it could be read to be in an agreement that the subcontractor would only be identifying -- or indemnifying the upstream party for its sole negligence.

In this case, Builders FirstSource has executed two master subcontract agreements with my client; one in 2008 and one in 2015. The one in 2008 temporally would seem to be the one governing worked performed in this case. However, it's irrelevant to address because the indemnification provision in both contracts are the same.

And in both cases, the provision, which is 12.1 of the contract says, that the subcontractor will agree to indemnify the Builders FirstSource to the extent caused or alleged to caused in whole or in part by any negligent act or omission of the subcontractor. And those contracts are Exhibit 3 to my memorandum. And just -- and that's on page 12, I believe.

Finally, Your Honor, the Stoneledge Holding. In Stoneledge, the Supreme Court ruled that claims conditioned on liability to another

party are merely claims for indemnity in disguise. In this case, Builders FirstSource has pled repeatedly in asserting its claims that in the event that plaintiffs and/or Lennar, in the underlying action, prove that the materials or services provided by BFS were not in accordance, et cetera, et cetera, then in that event ECC Contracting has materially breached their excessed warranties.

In the event that the plaintiffs and/or Lennar proves that Builders FirstSource breached a duty, then, in that event, ECC has breached its duty. These claims as pled are clearly conditional on liability to a third party and as such they're merely claims for indemnity in disguise. With that, Your Honor, I don't have anything further.

THE COURT: In summary what?

MR. GRIMBALL: In summary -- well, Your Honor, we're at a strange procedural position. I believe that addressing these legal questions now will make things easier for us in the future and makes most sense.

Builders FirstSource's claims are all conditional on their liability to Lennar and/or the plaintiffs, and as such they really are just claims

for indemnity.

THE COURT: And so if your motion is granted, then what -- where does that leave Builders FirstSource?

MR. GRIMBALL: They'll have a contribution claim. And obviously it will not be right because they would have only extinguished the liability of the subcontractors. So either we will consent to staying the contribution, if the Clerk of Court can do that. Or, you know, they can wait until they extinguish the liability of ECC and the other subcontractors. And they can pursue the contribution claiming a more traditional timeframe.

You know, I don't know if -- I don't know if Berkeley County stays cases when they aren't on appeal. I had a client go into bankruptcy and Dorchester County dismissed the case when I filed the notice of bankruptcy stay. And I talked with the Clerk of Court and she said they could not just stay the case. And what they did was they dismissed it and it could be restored when the bankruptcy stay was resolved or the bankruptcy stay was lifted.

THE COURT: Is there an option on the E-file que?

THE CLERK: Yes, Your Honor.

THE COURT: When was that?

MR. GRIMBALL: That was actually last month. And the plaintiff's attorney just had to file a motion to reconsider and it's sort of a mess.

THE COURT: You said the clerk did it?

MR. GRIMBALL: Yeah, the clerk did it.

THE COURT: Okay.

MR. GRIMBALL: So this really, I think, makes the most sense. I know Mr. Cox is opposed. I would be too, if I were in his shoes.

MR. COX: Your Honor, I would like to rebut, obviously.

THE COURT: Sure.

MR. COX: I believe that Mr. Grimball is misinterpreting the case law.

THE COURT: Let me hear from Mr. Olson first.

MR. OLSON: Thank you, Your Honor. I represent Charleston Exteriors. Our position is congruent with ECC. We're subject to a similar fender agreement, as he stated. It's dated 2012, which would make it the operating subcontract. I'm sorry, I need to give you this. We filed this a

few days ago. Here's a hard copy of it.

Primarily, though, the claims for negligence, breach of contract -- negligence, breach of contract, and breach of warranties, we don't think there's any issue for a jury as to -- they fail on two manners.

I mean, first of all, there's the Stone Legend office being availed in indemnity sequence. The other one is the statute of limitation. Had this lawsuit, brought by Mr. Cox's firm, been filed three weeks before, two weeks before, we would not have that argument to be made. And, although, it was close it's kind of like a sort of pregnant, kind of argument. You know, you're either within in it or you're not.

And I don't think there's an argument they can make within that they filed this suit within the three years. I haven't heard it yet. Maybe we will in a minute.

As far as -- I think he touched on equitable indemnity. If he didn't, I would just add that we can't find a scenario whereby -- under an equitable indemnity scenario where Builders FirstSource would not have at least joined in our negligence, if we were found to be negligent, being

that they were -- that's who we were working for.

That they not only supplied the windows, they were actually the contractor that we were subcontractors of.

Basically, what Lennar Contractors -- Builders FirstSource with us. And although they passed the burden of installation to my client, they still have the obligation to Lennar to install the windows and supervise that work.

And I don't want to get too stuck in the weeds on that. Mainly -- other than just simply doing the math of three years. South Carolina, especially a being a discovery rule state, we don't think that there was even construction -- we can prove they were on actual notice. I mean, we have the lawyer for Builders FirstSource signing a pleading December 15th of 2015 and then filing this one December 21st, 2018. I mean, it's three years and six days. There's just no doubt.

As far as -- we agree with your holding in the Concord and Cumberland. And in some way really we might have something to -- after Mr. Cox goes. But I think Mr. Heyward did a very adequate job covering our position.

THE COURT: All right. Mr. Cox.

MR. COX: I will stay with the order that Mr. Grimball did, Your Honor, with respect to his argument and statute of limitations and the incurring of liability and the two different types of liability recognized by South Carolina. I agree with that.

However, I disagree with his reading of the case that he is talking about, which is Jones vs. Builders Investment Group. It's a footnote citing Piper v. American Fidelity & Casualty Company. I have a copy of the Piper case, which is the case that he is referencing, if you would like for me to hand it up.

THE COURT: Yes, sir.

MR. COX: I assume that y'all have copies, but I have some for y'all, as well.

In Piper, Your Honor, as Mr. Grimball noted, it talks about the two different types of contracts for indemnity in South Carolina.

THE COURT: Boy, you are taking it back to 1930?

MR. COX: Absolutely. Well, Mr. Grimball is, so I'm just on the train with him, Your Honor, and trying to educate you as well.

In that case, you know, it discusses the two different types of contract for indemnity. And the case, as far as I know, and I think Mr. Grimball would agree, it's still good law. And it is the law. And in that case, the liability and the terms they are talking about, it's not the attorney's fees. It's a judgment. And the case goes into detail about when the judgment is rendered, then the insurance company is obligated to pay.

So it's not simply just attorney's fees being incurred. That is not at all what the case is talking about. It is when -- the liability is a judgment. And there's two different types of indemnity. When the liability attaches, i.e. the judgment is rendered, then there's that type of contract for indemnity. And the other is, once that judgment is paid, similar to like a contribution claim.

But those are the two types of contracts for indemnity. And it is not of the notion that because we start incurring attorney's fees that liability is attached and, therefore, the statute starts to running that day.

Our courts have made it very clear that

under the Services of Charleston case that as an indemnity statute of limitations runs from the time the judgements entered into the defendant. It's not when attorney's fees begin to accrue. It is not until a judgment is actually rendered.

And the different between the two different types of contract for indemnity under the Piper and the Jones' case is whether or not the insurance company has to pay the judgment once it is rendered or once it is discharged. And that is simply not the case here, Your Honor. We do not have a judgment against yet. Therefore, our statute of limitations has not begun to run on our indemnity claims.

THE COURT: Now, if the claim is approved, if the statute hasn't run, do you have a claim?

MR. COX: It is not accrued yet. Because a judgment has not been rendered.

THE COURT: So what is your goal in this litigation?

MR. COX: So we have a contract for our subcontracts. And I will go ahead agree, I, too, agree your ruling in Concord and Cumberland. However, again, they are misinterpreting that

reading. And our agreement for a contractual indemnification is that they will come in and our subcontractors will defend and indemnify Builders FirstSource upon the notice of all claims, and including the cost of the fence and arguing over whether or not they have to defend and indemnify us. Those are in that language.

THE COURT: Builders FirstSource, what type of services do they provide?

MR. COX: We are a material supplier, but we all also provide turnkey installation for windows and doors, at least in the Charleston market. And other markets we do all sorts of different things.

THE COURT: And you have these other companies working under --

MR. COX: Correct. We have a list of contractors where their primary source of income of work is to do installation services of Builders FirstSource.

THE COURT: So you want to prove -- through your litigation, you want to prove that they -- the subcontractors negligently performed services for Builders FirstSource and have that determined prior to any defect being established?

MR. COX: No. Our subcontractors agree contractually and then we also have insurance provisions, contractually requiring them with initial insured, that as soon as we get served with a lawsuit over, you know, your house and they were involved in that job, and to the extent that their services are at issue in that lawsuit, then they need to step in and defend us.

And similar to Concord and Cumberland, with the whole Muller Superior, Your Honor found that Muller did not have to indemnify Superior for Superior's negligence, whether it be sole or concurrent. But Muller did have to indemnify Superior for Muller's negligence.

And that is all we're asking in this case and in every case that we bring Your Honor, is that the party responsible for installing the windows, the doors, the roof, whatever, that to the extent those are issues in that case, that the proper party come in and defend against those claims.

THE COURT: Well, did Builders FirstSource agree in the underlying litigation that they were negligent?

MR. COX: No. We always deny

everything. I mean, really we do. You have to.

THE COURT: You have to cover yourselves and the subcontractor?

MR. COX: Exactly. And then we pled it as such is because we stand by our products and our services. And we believe whole heartily that there's never anything wrong with it. And it's, obviously, the plaintiff's job to prove otherwise.

THE COURT: Assuming you win your case against the subcontractors and you also win your case against the plaintiffs, then how do you -- what do you do with your judgment?

MR. COX: Well, that is why we believe that this case should be stayed so that we can consolidate it with underlying action, wherein the plaintiffs have brought allegations related to the window installation, which Charleston Exteriors and ECC, who are the people who provided those installation services. And to the extent there's any negligence there, those are the proper parties who need to stand and defend against those. Plus, they're contractually obligated do so, as they've agreed to do.

THE COURT: So it's another word for staying is that the cause of action doesn't accrue

until liability is established?

MR. COX: Well, this is a unique situation because the cases on appeal and stayed, there's a cause of action. And, again, we just felt this was the best and most appropriate way to protect our client's interest, and to give them notice, so they couldn't claim we all knew about it since 2016, you didn't give us any notice. You know, I don't think this situation happens every day.

And, again, in the interest of justice for all parties, you know, for everybody's interest that a stay is the most appropriate here. The clerk has already agreed that she can certainly stay the matter without it being on appeal. There is a button for that.

THE COURT: Are you saying that they can stay it, but the subs are saying, well, these causes are action are not really recognized or we will clean up the proceedings first by establishing if there are cases that say that you have no indemnity rights to pursue prior to --

MR. COX: That's not correct, Your Honor. That's the cases do not say that.

THE COURT: I'm saying that you can't

pursue it until a certain point in time. Well, then you have a statute of limitations issue regarding the suit. If the motion for summary judgment is granted regarding statute of limitation, that will only pertain to those particular claims; right?

MR. COX: Correct. It doesn't get rid of the whole case.

THE COURT: Right.

MR. COX: We're still here. And so we still have the issue of this matter needs to be stayed until Damico comes down from the Court of Appeals.

MR. OLSON: I think we would probably consent to -- you know, as to the contribution claim or whatever claims survived after this. I mean, I don't think we're going to keep this case going under the contribution theory alone.

MR. GRIMBALL: We can't.

MR. OLSON: Yeah, we couldn't.

So we do have -- you know, I would say that we have a very great interest in the negligence claim, breach of contract, and the indemnity claim, as you said being cleaned up and removed. I mean, there's also a chance that the

plaintiffs could bring us into the other suit. We're seeking summary judgment in this suit, though.

MR. COX: And their basis for summary judgment is not proper, Your Honor. They're misreading the Piper case. They're misreading your -- the Concord and Cumberland case.

THE COURT: Well, I don't know the last time that I read a 1929 case to establish any authority.

MR. OLSON: It's an old one, but good one.

MR. COX: And then also with respect to your Ocean Keys and Seashore Villas case, Your Honor, the position of ECC was that our indemnity agreement was the same as Your Honor was interpreting in that case. And that is not correct.

In that case, the indemnity provision had a work exclusion exception. We do not have that in our indemnity agreement. Our indemnity agreement is exactly like Mullers and Superior from Concord and Cumberland. And just like Your Honor ruled in that case, that Muller only had to indemnify Superior from Muller's negligence. That

is all we're asking of our subcontracts in this case and every case that we bring.

And so for those reasons, at least with respect to the Concord and Cumberland arguments, it's not here, Your Honor. And the same goes for the Seashore Villas. And then, again, I would argue once Your Honor has had a chance to review the Piper, the case from 1930s, that you will see that they're misconstruing the liability. And it is, in fact, a judgment, not just simply the incurring of attorney fees.

MR. GRIMBALL: Your Honor, if I may, I'd like to read you a part of the Piper case. This is from page three. And the Court's talking about the difference between contract for indemnification against liability versus law.

And the Court writes that the act specifically requires liability insurance, which should be a policy insuring indemnifying passengers receiving personal injury by reason of any act of negligence on the part of the insured.

Personal injury -- they're talking about insurance contracts, obviously. And this is a type of insurance contract insofar that the parties have agreed to indemnification under

certain terms. And they're talking about a personal injury.

Well, there's no judgment when somebody's hurt. You know, the Court goes on to state, the payment by the insured is not logically a conditional prescience to his liability to the injured person. And, consequently, not so to the obligation to the company to pay him.

The Court specially says that the injury to the individual person for which the insured is negligent is the grounds for liability and it is the basis for payment under the contract for insurance against liability.

In this case we have exactly the same scenario. The personal injury of Builders FirstSource is their attorney's fees and costs. Those are the damages, the personal injury to the individual contemplated in the case. They're talking about somebody getting hurt, medical damages.

And in this case, just because you've been -- when you get shot or break your leg or whatever, you don't instantly have medical damages. You have to receive medical treatment in order to have those kinds of expenses, those costs and then

those damages.

And, so, quite frankly, you could argue that the act of them being sued is like the passenger to the train falling and breaking his leg. And that's when the action actually -- the liability accrues.

And I wanted to touch on something else that Mr. Cox said, because he mentioned that they were seeking for their subcontractors to defend them, that they have a duty to defend. And that's in the contracts.

One of the most robust long-winded indemnity provisions I've ever seen. They've got multiple indemnity provisions covering every possible problem that could arise in a construction contract.

And the contract specifically says, that the duty to defend is distinct from and separate of the duty to indemnify. Well, if they're seeking for their subcontractors to defend them in the underlying litigation, they can't wait more than three years to do that. I mean, it's illogical. And it's prejudicial to the subcontractors. Because for three years Builders FirstSource has been doing whatever, defending

itself. And then it comes in after the fact and says, y'all have a duty to defend us, we did all this without telling you, we should be indemnified for these fees and costs.

And these subcontractors -- I mean, this is not the only case that I have ECC as a subcontractor of Builders FirstSource. They've been working together for years. They have had half a dozen or a dozen cases involving the same kind of parties. It is very much the usual suspects. It's not like they couldn't find them.

So with regard to the Concord and Cumberland case, Mr. Cox's client, Builders FirstSource, contractually agreed to provide certain services to Lennar and the plaintiffs. And then they turned around and they signed a contract with ECC and the other subcontracts and said, we want y'all to perform these services on our behalf.

It is impossible for ECC to be solely negligent in damaging Lennar. Because Builders FirstSource is contractually responsible for the acts and omissions of ECC.

So I think that Mr. Cox's argument explains precisely why those claims should fail. He didn't delve any further into the Stoneledge

case and didn't argue against it, that I heard, and so I won't repeat what we've said on that front, Your Honor. Thank you.

THE COURT: All right.

MR. COX: And that is correct, Your Honor. We still concede that the Stoneledge argument, we still pled the clients for negligence, breach of warranty, and breach of contract, because Stoneledge is a Court of Appeal decision. It's not the final decision. It should be taken up with the Supreme Court. Out of an abundance of caution we always pled those claims.

And, again, with going back to the Piper decision, which I would -- I hope Your Honor will read. You know, when the plaintiff on the train incurs the injury on the train, they don't get paid for the damages on day one. They've still got to get a judgment against the defendants who are responsible for causing those damages.

And that is what is happening here. There's no judgment. And until there's a judgment, the argument that the statute of limitation is run is simply without merit.

And going back to Concord and Cumberland it's -- Concord and Cumberland was

discussing the sole negligence and the standard necessary for you to claim to have an indemnity agreement that requires your subcontractor to indemnify you for your negligence.

The case talks about concurrent negligence. And concurrent means that both parties are responsible. However, in Concord and Cumberland, the Court found that when you were trying to -- Superior was seeking that Muller indemnify Superior for not only Muller's concurrent negligence, but for Superiors also. And the Court found that because they were, in fact, whether it be concurrent or sole, there's still a factor of sole in the concurrent negligence, two parties. And I'm partly responsible. I'm concurrently negligent. And to the extent that you are requiring or seeking your subcontractor to indemnify you for your sole portion of that concurrent negligence, you have you to rise to the higher standard of review to a clear and unequivocal, you know, language.

And that is not the case here. Again, we are seeking that Charleston Exteriors and ECC indemnify Builders FirstSource for ECC's sole negligence and ECC's concurrent negligence. But

solely their concurrent negligence, not our concurrent negligence. And the same goes for Charleston Exteriors, with respect to there can never be a situation because we agreed to provide these services. That's not true.

If ECC goes out there and, you know, recklessly installs different fasteners, after we've provided them with the fasteners they were suppose to instal, or they do something, you know, whatever it is fraudulently, that's on them. We didn't participate in that fraud and undertake that. That would be their sole negligence and their wrongdoing.

And to the extent that there was concurrent negligence, because we did have supervision duties over that, the jury portion, whether it be 50/50, or 51/49, or 5/95, there's going to be a portion of the concurrent negligence that is solely ECC's and Charleston Exteriors, which is exactly what Concord and Cumberland went through. It's what Your Honor went through.

And that's the law of South Carolina. And we would ask that you stay with those consistent rulings. And for those reasons, deny their motions for summary judgment in this case,

and ultimately stay this proceeding until the time that Damico is down and we call all go into the Damico litigation together.

THE COURT: All right.

MR. OLSON: The only thing that I was going to add, and pardon me if it's been covered or alluded to, in their contractual indemnification claim, had they not been seeking attorney's fees and costs, we might be able to agree that the injury hasn't accrued yet.

But because that's in the subcontract and that's part of their lawsuit against us, we can't help but to conclude that those damages began three years and seven or eight days ago, or whenever they, at least, drafted and filed their original answer in the case.

If they were to drop the attorney's fee claim, you know, we might be able to work something out. But we don't see how those could have accrued after.

THE COURT: I'm interested in accepting that offer.

MR. COX: I would request that they enter in this agreement to defend and indemnify, and it goes into detail, like Mr. Grimball said,

and Mr. Olson with his 12 pages.

Both parties enter into it. This isn't like a one-time thing. We work with them every day. The most interesting fact here, Your Honor, is that these insures -- you know, the owners of these companies, when you go to depose them, they're the most happy subcontractors in the world. They like working for us. They still work us. But then the insurance companies come in and the lawyers for insurance companies and they try to muddy all the waters. And, you know, said, well, you didn't really mean to do that. You know, I got you here.

But at the end of the day, with respect to us waiving our attorney's fees, that's what the parties agreed to. And I just wish that the insurance company would uphold their end of the bargain.

THE COURT: And what was your response to the statute of limitation argument specifically relating to that?

MR. COX: That there's no case on point with that, Your Honor, that the cases are clear that until a liability is imposed or incurred or attached, they use several different words in

there, Your Honor, but the liability is a judgment, not simply attorney's fees. It doesn't say when the train passenger hired an attorney and started accruing attorney's fees that the liability attached and the insurance company became obligated. It talks about how once the judgment is entered, the distinction is whether or not it attached to that point, whether or not the insurance company became obligated to pay once the judgment was rendered or once the insured paid the judgement.

THE COURT: But not when a lawyer was hired?

MR. COX: Correct. It has nothing to do with that. And the same goes for the Footnote case. They're not talking about attorney's fees. They're talking about whether or not a judgment had been rendered and whether or not they had to come in and pay it, you know, or it had to be discharged prior to. It's simply not on point.

MR. GRIMBALL: Your Honor, if I may briefly, I just want to be clear. I do not represent an insurance company. I represent ECC Contracting.

Mr. Cox's client has not contracted

with an insurance company to install windows and defend and indemnify them. He has contracted with ECC Contracting. Mr. Cox keeps talking about these cases, and a judgment being entered, if it's opposed to his attorney's fees.

Well, the problem he's got is the damages that he seeks are the attorney's fees. The duty he's trying to enforce is a duty to defend. So I don't see how he gets away from the fact that it's been more than three years that he's tried to enforce the provisions of this contract.

THE COURT: All right, Mr. Newberry.

MR. NEWBERRY: I'm hesitant to weigh in on anything, Your Honor. I think what you're saying is a little bit of bleed over from the underlying case and how it's become very difficult and a mess. I think what you're seeing.

In this case, is you have sort of unusual positions that you find everybody in. Where, you know, usually your typical construction case, day in and day out, from day one ECC is suing it's subs from indemnity. Has a claim accrued? I don't know. Has it accrued then? Has it accrued later? That's how it functions. That's how this litigation functions. So I think that's why you're

seeing this sort of unusual situation.

THE COURT: I'll take the matter under advisement. I would like for the parties to prepare proposed orders.

Thank you for your respective positions. And if you will send it to my e-mail and the opposing parties can respond within five days of the argument.

MR. OLSON: Your Honor, we don't know if we're going to do this or not. Would it be proper for us to submit a joint one, possibly?

THE COURT: That's fine. 14 days?

MR. OLSON: Yes, Your Honor.

MR. GRIMBALL: We'll try to get you one in seven days, and vice versa?

MR. COX: Yes.

THE COURT: All right. Thank you, you-all.

(The proceedings concluded.)

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Berkeley)

I, Krista Nicole Carney, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina do hereby certify that the foregoing is a true, accurate and complete Transcript of Record in the Court of Common Pleas for Berkeley County, South Carolina, on the 18th of October, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 21, 2020

_____

Krista Nicole Carney,
Stenographic Court Reporter

PROCEEDINGS

THE COURT: Good afternoon. Builders First Source, I'm ready to hear from you. Someone kind of set the scene for me one more time as to why we're here and what's at stake.

MR. COX: All right. You want me to go through and introduce all the attorneys that are here, Your Honor, or will everybody...

THE COURT: Well, everybody will introduce themselves for the benefit of the court reporter.

MR. COX: All right. My name is William Cox. I represent Builders First Source-Southeast Group, the Plaintiff in this case, Your Honor. This is our motion, the brief that I entitled Reconsideration under Rule 52 and 59.

After we filed a Motion to Consolidate and Stay the Proceedings in this action with the what we believe is the companion action or the underlying action, the Damico [phonetic] litigation. We had two of our subcontractors ECC Contracting and Charleston Exteriors, two of the Defendants in this action filed a Motion for Summary Judgment and in opposition to the I guess to the stay and the consolidation. After entertaining arguments Your Honor determined that you were not able to consolidate this case with the Damico [phonetic] litigation because

it's up on appeal and that you didn't have the jurisdiction to do that at that time. But you were going to stay this matter and consolidate for future purposes. I think there was a question that the court reporter ---

THE COURT: --- someone coughed as you were saying your last something. What did you say about the stay?

MR. COX: I'm sorry. With respect to the stay there is some confusion whether or not the Clerk could in fact stay this case while another case was on appeal. And the Clerk up in Berkeley County confirmed that she was able to do that.

Nevertheless we proceeded with hearing arguments, their argument over the ECC Contracting and Charleston Exteriors Motion for Summary Judgment. It was a pretty lengthy hearing and both sides argued a couple of times and rebutted each other. And then you requested that we submit proposed orders in favor of our clients as to their positions.

And, after submitting those proposed orders Your Honor adopted the order submitted by Charleston Exteriors. And in receipt of that order and in review of the same we felt that there was a couple of things that were misconstrued and a couple of findings that needed correction. That's why we filed the Motion for Reconsideration. And the bases is that under Concord and

Cumberland this order that is in effect right now gets rid of all our claims for contractual indemnity including those claims for the negligence of the Defendant's ECC Contracting and Charleston Exteriors. And that does not comply with the ruling in Concord and Cumberland ---

THE COURT: --- which is what?

MR. COX: That in Concord and Cumberland Your Honor briefly Superior Construction was the general contractor and they subcontracted with Muhler to provide window and door installation. And after litigating the case for years the two parties ended up settling separately and Superior moved for partial summary judgment against Muhler that Muhler indemnify Superior. And then Muhler obviously objected and said no, and they submitted briefs.

And I believe Your Honor actually was the Judge on that case. And in reviewing -- and you made the determination at trial level that the contractual language at issue did not require Muhler to indemnify Superior for Superior's negligence. However, Muhler did have to indemnify Superior for Muhler's negligence.

And so the case went up on appeal. Superior appealed that ruling that while they couldn't make Muhler indemnify them for their sole negligence they could hold Muhler under their contracts indemnify Superior for their

concurrent negligence. And so the Court of Appeals found that a clear and convincing -- you found that a clear and convincing standard must be applied when a party is seeking indemnify for the indemnitee's negligence whether sole or concurrent. And Superior disagreed with that and that's what they took upon appeal.

And the Court of Appeals upheld Your Honor's findings and ruled that whether a sole or concurrent that if the person seeking to be indemnified is seeking for the indemnitor to indemnify them for the indemnitee's negligence whether sole or concurrent that the clear and convincing does apply.

And you found that the contract at issue did not rise to that standard and therefore Muhler was not required to indemnify Superior for Superior's concurrent negligence. However, you found that Muhler still was obligated, and Muhler agreed, that they had to indemnify Superior for Muhler's negligence.

Here, Your Honor, I went through the contractual language at issue in that case. I'm happy to do so with you if you would like with our contracts. Even at the hearing I think both or all parties agreed that the contracts are the same, are virtually the same contract at issue in Concord and Cumberland and now we're just

disagreeing on the end result. And we believe that we still have our claim for the Defendant's negligence as you found in the underlying case of Concord and Cumberland. And then that reasoning applies here; it's no different. And so that was the first issue I have, Your Honor.

And then secondly this order that was adopted it speaks about the statute of limitations and how the type of claims that we have made are precluded by the statute of limitations because we have requested that we be indemnified for consequential damages that accrued three years prior to the filing of this suit.

And the order claims that while generally a statute of limitations for indemnity does not run until a judgment is entered because we are seeking indemnification for all sorts of damages that include attorney's fees that the statute of limitations has in fact run and is distinguishable from First General Services and it gets rid of our indemnification claims because of that.

And there is one omission of fact, Your Honor, in the order and that was with regard to how we pled in our complaint, our indemnification claims. And that language jumped halfway into the allegation and cuts off the start of the paragraph for the allegation, which is a

qualifying statement that limits any indemnity able to be sought only to when there is liability found, which is a judgment. And until that has occurred then there is no -- then we can't pursue the indemnity at that point, which goes hand in with First General Services ruling that says indemnification there is no statute on it until a judgment has been entered. And because there has been no judgment entered in this case or the Damico [phonetic] case, Your Honor, our claims are still valid and they are not barred by statute of limitations.

So those were the two reasons for our Motion to Reconsider/Alter or Amend. I appreciate that counsel for ECC Contracting submitted a memorandum in opposition to this motion last night or right before the close of business. And I'm happy to address those issues ---

THE COURT: --- I haven't seen that by the way. I don't know ---

MR. COX: --- I don't think that we need to go there but obviously ---

THE COURT: --- you're saying I haven't seen it. You said they submitted it through what means?

MR. GRIMBALL: I submitted it electronically and I emailed it to you and your law clerk.

THE COURT: I haven't seen it though I've reviewed all my emails. And I was looking for it.

MR. COX: It did come through Your Honor. It came through like 4:52; right around the same time that you requested that we come early. So I know and I...

THE COURT: Let's see then.

[Whereupon, the Court reviews his computer]

THE COURT: Not to start emphasizing his while you're still arguing. I'm just saying I didn't -- I haven't seen it.

MR. GRIMBALL: I could forward it to you again if that would help.

THE COURT: Let's see. If it was sent through those means I should have it.

MR. GRIMBALL: I do have a hard copy for you as well if that helps?

[Off the record momentarily]

[Whereupon, the Court reviews documents]

THE COURT: Interesting. I didn't see it. I mean it's not in my email. Let me see a hard copy.

MR. GRIMBALL: I just forwarded you the original email as well as this. This is a memo as well as some of the case law cited.

[Whereupon, Mr. Grimball provides documents to the Court]

THE COURT: Does anyone have a copy of the order that I signed?

MR. COX: I do, Your Honor. I only have one copy but you are welcome to it.

[Whereupon, Mr. Cox provides documents to the Court]

THE COURT: I'm functioning without a clerk so I have to juggle some things that I generally don't have to. Okay. Good deal. Yes, sir?

MR. COX: So just in conclusion, Your Honor we agree with the ultimate end result in that you did decide to stay the case upon future consolidation. However, you got rid of our contractual indemnity claim which we believe is still applicable pursuant to Concord and Cumberland and again the whole line of argument about the statute of limitations because of us claiming that we are entitled to attorney's fees as well in addition to all sorts of every type of category to use to describe damages.

THE COURT: So the question was whether or not if you're -- and I recall in the arguments now someone said it's clear that you were aware having a cause of action because of the ---

MR. COX: --- we didn't ---

THE COURT: --- the date the attorney's contention that attorney's fees are due ---

MR. COX: --- and the problem which came to this case when we filed Your Honor was we moved to amend once

we had -- we filed our Answer in December and then we filed our Motion to Amend in April and before our Motion to Amend could be heard. And I will note that our Motion to Amend only identified ECC Contracting and I believe MI Windows and Doors and did not identify two other subcontractors that we are now aware of; Hurley Services and Charleston Exteriors.

However, that case went up on appeal before that motion could be heard. I want to say that the Court then almost scheduled the motion or did schedule the motion and then the Court of Appeals said no, y'all don't have jurisdiction.

So I think to whatever extent the position, which I'm sure Charleston Exterior would claim is that they are not subject to that Motion to Amend but certainly would have been and will be when that motion is heard. And certainly because the motion filed doesn't include their name on it at the time of filing doesn't mean that when you're going before a Judge and you find the information before it can be heard that you can't you know do that therein.

So, the end result is all these parties I think there is a claim of prejudice to their being drug into this big case and that there is a mediation going on. They are all aware of it. They all know about it. They

informed our office of that mediation. I think some of those attorneys sitting here today attended that mediation. So to the extent that was any prejudice that doesn't exist. Your ultimate finding was that you would stay this case and consolidate it. We just believe that pursuant to Concord and Cumberland that our contractual indemnity claims should not be dismissed on summary judgment and so.

THE COURT: All right. Yes, sir?

MR. OLSON: I want to say one thing I think before Mr. Grimball speaks. As far as the Motion to Amend that Mr. Cox mentioned that wasn't able to be heard I believe. Charleston Exteriors was not a part of that Motion to Amend. But our position is that is completely beside the point because just as we are here today this law suit could have been brought against us separately from -- it has nothing to do with the fact that if they filed a Motion to Amend against another party, against other parties because that didn't stop them from suing us in this case late. So we would just -- I don't think it's really significant or before us today, Your Honor.

There was one other thing I think I will -- I think I'm going to take up when we actually go through our arguments in opposition. But basically if I could just make a summation. Your order I don't remember it being,

I mean I don't remember it really having a lot to do with the Motion to Stay. We didn't -- I don't think we take a huge issue with that. What we wanted to get out of it and did get out of it was that the contractual indemnity claims be barred for two reasons; either one of them is fine.

But what the order stated and the order was congruent with our argument that first of all it's uncontroverted evidence that the claimant seeking contractual indemnity for defense costs and everything else it had been more than three years. I think it was three years and ten days or something. But it's certainly been three years before this suit was filed. There -- the time bar status of it ended at some point, some point within the month prior to them filing this suit.

As far as the clear and unequivocal I think what's going on right now is that Builders First Source has concluded and it admitted and I appreciate them doing so, but they've admitted that yes, the language was not necessarily clear and unequivocal. What they're saying is well okay, you guys are you're right. We can't actually seek damages for our own negligence. We can't get that from you. Our position is that pursuant to authority far greater than just Concord and Cumberland

that's an illegal provision to have in a contract pursuant to the anti-indemnity statutes and pursuant to DR Horton v Builders First Source which I think is a case they would know about which basically voided the entire contractual indemnity clause on the basis of illegality and anti-indemnity -- the treatment of anti-indemnity provisions in the State.

So as far as them stating that well, you're right, we can't recover from you because of you know for our negligence but it does mean that we can still get you for your negligence. Well, that's not how the contract reads. And so it's basically asking you to reform the contract in a manner that is legal and then they would be able to maybe recoup against us what they would normally possibly be able to had the contract been fair and normal to begin with.

And we think that's a step too far to ask you to reform a contract that was entered into in like 2012. That's -- and I'm just trying -- that's my best summation of what our argument is in what the order said. I'm going to ---

MR. COX: --- I'd like to know this DR Horton case. I've never heard of it. I've never seen it. Certainly, I don't have it in my possession. And then secondly just reading the plain language of the contract Your Honor, if

we all need to go through it, I think he is mischaracterizing what we've asked here. I mean our contract says to the fullest extent permitted by law. So that means anything that is not allowed by law is not allowed. The subcontractor shall indemnify, defend and hold harmless the contractor -- I don't think it gets any simpler than that -- against any and all claims, suit, losses, causes of action, damages, liabilities, fines, penalties and expenses of any kind whatsoever including, but not limited to, court costs and attorney's fees which may be incurred in establishing the indemnification and other rights in this agreement arising out of or resulting from property damage including loss of use of property arising or alleged to arise out of any way the way this agreement or the subcontractor performance of the work but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor.

I mean where in there does it say anything about you must indemnify us for our negligence? And that is as I said Your Honor I went through the contract at issue in your case, which was then later affirmed by Concord and Cumberland at the Court of Appeals. And we can go line by line. The only thing that is different is that when we talk about the damages arising out of those two types

of phases are flipped in the two contracts but they both are there and they both are limited only to the negligent acts of the subcontractor.

We have pled in our Complaint that to the extent if any BFS may be held liable to the Plaintiffs and or to Lennar Carolinas in the underlying action we've limited that.

THE COURT: What is your view of the ---

MR. COX: --- and we use the term full contractual common law indemnification in paragraph 34. But in the Complaint of Superior they used the same type of pleading and Your Honor didn't get rid of it. Your Honor said that they could not be indemnified for Superior's negligence.

Nowhere in our Complaint, nowhere in the contractual agreement does BFS claim or allege or assert that it is entitled to indemnification for BFS's negligence. So there is no clear -- even applying the clear and convincing standard Your Honor it is very clear.

The second paragraph which is also in this Complaint, you know there are a lot of paragraphs in this agreement, Your Honor. Not all of them are applicable to this case. The paragraph that is applicable I just read to Your Honor. The next paragraph has to do with death. And that is not an issue here. It does not deal with

property damage. And unless I can't read I would ask my opposing counsel to tell me where it talks about property damage and how I'm misreading the indemnification provision that says that the subcontractor shall indemnify, defend and hold harmless the contractor but only to the extent caused in whole or in part by a negligent act or omission of the subcontractor period.

MR. GRIMBALL: Your Honor, if I may? I think we're starting to get a little far afield. To start off with Mr. Cox just explained to you that the indemnity provision requests for ECC and Charleston Exteriors and other subcontractors to indemnify them for the damages caused in whole or in part by their negligence. Well in part means somebody else joined in that. That means there is concurrent negligence. That means that there has to be negligence by BFS contemplated by that provision. And that was the case in Concord and Cumberland as well.

I apologize, Your Honor, I don't have that case with me but I have pulled it up on the Internet because the idea that Superior was entitled to recover in indemnity for the sole negligence of Muhler was new to me. And ---

MR. COX: --- it's on page 4 and at the end and at the beginning.

MR. GRIMBALL: Well, if the Court of Appeals said

that this is --- let me give you the actual page, Your Honor.

MR. COX: The Court requires Muhler to indemnify Superior for its limited indemnification for damages resulted from Muhler's performed work.

MR. GRIMBALL: The Circuit Court found Superior in order to prevail must show the language in the subcontract for the 2007 agreement can only be interpreted to reach the result that the party intended to indemnify the indemnitee for the indemnitee's own negligence.

MR. COX: Because Superior was asking that Muhler indemnify Superior for Superior's negligence. And that's exactly what y'all were ---

MR. GRIMBALL: --- no, it's not --

THE COURT: So now we're having a debate between the two of you.

MR. GRIMBALL: And you know Mr. Cox is asking you to read paragraph 34 of his Complaint but he's ignoring paragraph 30 -- or it's 33, he's ignoring paragraph 34 wherein they say full and complete indemnification. And he's also ignoring the third paragraph of section 5 of this contract wherein Builders First Source sets forth a duty to defend is separate and distinct from the duty to indemnify. And they call for the subcontractors to

defend them regardless of whether or not BFS is negligent concurrently or solely. So I think that the idea that we can separate out sole negligence and concurrent negligence and allow them to proceed with one that is not pled is not in the contract is we're rewriting the contract. We're rewriting the complaint. And not only that what is a claim for contractual indemnity for the sole negligence of ECC? That's an equitable indemnity claim. They've already got that.

I don't see how they can possibly proceed with identical claims for the sole negligence of ECC. And this notion that you can proceed with -- what they're asking you to do is set up a claim that requires us to try and parse out the negligence of ECC and of BFS. And they're going to say you're going to be responsible for your own negligence. But that in and of itself means they are concurrently negligent too. And unless they are absolutely exonerated there is no sole negligence for ECC.

And remember there were claims brought in this Complaint against the window manufacturer. BFS is strictly liable for the product defects in the windows it supplied. So that alone means it is impossible for ECC to be solely negligent for the installation of the windows that were also defective. You know the idea that

is getting lost in Mr. Cox's argument about the statute of limitations is the distinction that we drew in our memorandum and in the hearing between indemnification for loss and indemnification for liability. They have pled in paragraph 34 indemnification against liability.

That is as we discussed at last hearing and that's what is in their contract. It is a claim that accrues at the time of liability. And that's where we got to the idea that their claim accrued when they answered because that was the latest date in which they could have begun to accrue attorney's fees and costs.

You asked Mr. Cox if they were willing to drop their claims for attorney's fees and costs at the hearing or maybe Mr. Olsen did but it came up and he refused. And so First General Services is distinguishable in your order. You said that it was -- well, in the Charleston Exterior's order it was said to be distinguishable. The First General Services case is talking about equitable indemnity.

It talks about a special relationship. It talks about the indemnity claim arising upon loss. It doesn't talk about liability. It's a different type of indemnity and it's different than what we are dealing with in these contract claims. So, I don't -- I don't have much else to say. I don't think we need to pile on. I don't

understand why Mr. Cox started talking about prejudice and my firm having other clients involved in the underlying litigation. That is wholly irrelevant to the claims against ECC. And it doesn't -- you know the fact that we had another party in another case doesn't change the fact that ECC would be prejudiced by getting dragged into the bigger case. I don't have anything further.

THE COURT: All right. Mr. Newberry, do you have anything on this?

MR. NEWBERRY: I don't think so. I actually don't have a dog in this fight, Your Honor.

THE COURT: All right. Yes, sir?

MR. OLSON: I think we're set with arguments. I'm just going to say not to let the statute of limitations argument get lost in the other argument. We still think -- we think both arguments are winners and we think that they were already decided.

THE COURT: Well, with regard to the order that was issued and Mr. Cox pointed out a few things that he contends I either misstated the law or misstated the facts and drew a wrong conclusion. Do you find fault in any aspect of the order?

MR. OLSON: No. I don't -- I'm certain that the law wouldn't say this as far as I understand and if the facts would state then I would like to know specifically

which.

MR. COX: Subsection B on our Motion to Reconsider on the last page. And Your Honor I don't have the order in front of me because I gave you my copy but the finding by the Court it doesn't include the entire paragraph 33 in our Complaint and it jumps in in the middle saying that we haven't heard and it uses that proposition because we have incurred attorney's fees that a liability has already began and therefore the statute of limitations has run. And that's not the case here.

MR. GRIMBALL: And I also had something in my memorandum about that particular section of the order, Your Honor. From our discussion and the way, the conclusion that was drawn by the order Mr. Olson drafted seemed to me that you were relying on the cases that we discussed which distinguished between indemnity against liability and indemnity against loss. And so in my memorandum I actually suggest that if more clarify was necessary in response to Mr. Cox's order there is a paragraph that I thought could be added to that subject.

MR. OLSON: I'm still unclear as to what was supposedly misstated in the order. I mean that is certainly not my intention but I'm not ---

THE COURT: --- do you have a copy of the order that you could share Mr. Cox?

MR. COX: There was not a mistake. It was an omission of a fact.

MR. OLSON: Okay. What was omitted?

MR. COX: The first portion of paragraph 33. The order starts and you saw right here which is one, two, three, four, five lines down from where paragraph three starts and that language ---

THE COURT: --- what page are you on?

MR. COX: On our Complaint, Your Honor?

THE COURT: What page of the order?

MR. COX: This would be on page 4 of the order I believe. It's entitled (d) I think. I don't have the order in front of me.

THE COURT: Someone has to have it. Page four has (a) and (b).

MR. COX: Okay, it's (d).

THE COURT: (D)?

MR. COX: (D). It's towards the end right before the wherefore.

THE COURT: Okay. Let me catch up with you.

[Whereupon, the Court reviews documents]

THE COURT: (D) Builders First Source's contractual indemnification claim is also barred pursuant to the relevant statute of limitations.

MR. COX: And therein you cite First General

Services and say that the statute for indemnity claims do not accrue until a judgment is entered, which is consistent and is correct.

THE COURT: All right.

MR. COX: Generally. And that's what First General Services says that -- I'm happy to hand up the case here, Your Honor -- that as to indemnity the statute of limitations generally runs from the time judgment is entered against the Defendant. My position or point was that you are trying to draw or the order is claiming a distinction between this case and First General Services in that (b) ---

MR. OLSON: --- there is a huge distinction between those cases. And that's exactly -- that's my question I guess. That's an equitable indemnity case to begin with. And also when I say generally most of the opinions that talk about this were prior to the time of contractual indemnity provisions that include attorney's fees and stuff like that.

The general indemnity rules certainly as they apply to equitable indemnity certainly state that the loss must be incurred in the form of a judgment. This isn't -- to say the term generally is -- I mean maybe I should have drawn more of distinction in that. This is I mean this is completely separate from those fact patterns though I

think because you're seeking damages and to recoup the damages for something that has already occurred. It's already occurred. It occurred three years ago. That's the distinction I draw. Again, I mean if I misstated something I don't know what it is.

THE COURT: All right. Let's move to Mr. Grimball who thinks something might be stated clearer.

MR. GRIMBALL: Yes. So this is what we're -- these two are sort of going back and forth about is the First General Services case is talking about indemnification against loss. They've sought in their Complaint and in their contract indemnification against liability. And explaining that distinction just didn't make it into Mr. Olson's order.

The result, which obviously is the result that you intended, is that their claims of contractual indemnity are barred by the statute of limitations. I think that if we explained the difference in indemnity against loss and indemnity against liability could explain that they are seeking indemnity against liability that it, the thought -- the result would be supported by the -- work shown if you will.

We had a discussion about this in Berkeley County and you made up your mind. I just think that Mr. Olson didn't do necessarily the greatest job of showing the

work.

MR. OLSON: If anything I hardly -- our own position I don't think that I've overstated.

MR. GRIMBALL: So I suggest that we just add that paragraph and if Mr. Cox says that Mr. Olson cited the wrong paragraph of his Complaint I think that citing paragraph 34 of his Complaint will find a pleading and allegation where BFS seeks full and complete contractual indemnification against liability.

MR. COX: And Your Honor we also disagree clearly that the liability that was discussed previously in front of Your Honor in Piper and Jones -- Group ---

THE COURT REPORTER: --- I didn't hear the last case you named.

MR. COX: Jones v Builders Investment Group. Liability means a judgment and a judgment must be entered before liability is had. It's not what they are talking about where there is just an allegation and that because we started accruing attorney's fees to defend our own client that therefore we can't bring claims against them for their wrongdoing. I mean that's preposterous.

And I would -- to the extent Your Honor hasn't read Piper and Jones we believe that the reading that the liability is a judgment and that the distinction between liability and loss is that the insured doesn't have an

obligation to pay with respect to a loss claim until there has been -- they have paid the damages. Damages is a finding by a jury. It's a judgment. It's not what they're going for that because we started accruing attorney's fees on day one and because we didn't file suit against them until a couple months later that all our claims are barred in contractual indemnity because -- and that agreement attorney's fees is mentioned as a possible damage.

So to that extent that's where I was trying to draw a distinction. And I appreciate my Motion to Reconsider doesn't hit on that to that level but...

THE COURT: When the Court concluded that earlier in the order that the Defendants have alleged that the non-indemnity claims must fail pursuant to the Stoneledge defense which bars claims that are disguised as indemnification claims and cloaked with separate causes of actions.

I'm hearing oral arguments, reviewing memoranda. It's evident that the Plaintiffs non-indemnity claim do not exist outside of the derivative Damico lawsuit. They must therefore fail. Are you challenging that ---

MR. COX: --- as far as that line of argument, Your Honor, we conceded oral arguments that Stoneledge is valid law today and it stands for what it stands.

However, you still are allowed to proceed with indemnity and contractual indemnity where you have a contract. Here we have a contract so we're still allowed to proceed with our contractual indemnity claim. And ---

THE COURT: --- and you have no statute of limitations on either?

MR. COX: The statute of limitations on an indemnity claim be it contractual or equitable does not accrue until a judgment is entered. That's what the law in South Carolina is.

THE COURT: Right.

MR. COX: And we're confident that any court of higher jurisdiction will agree that that's the law, that's the case. And again I ---

THE COURT: --- so therefore because that's the law you can initiate a collection action on the indemnity claim prior to a judgment being entered. That doesn't trigger any statute of limitations?

MR. COX: Correct. Because the opposite would be if we didn't they would be claiming that we had notice of the claim and that we didn't bring them in and therefore we're barred by either a statute of limitation or a statute of repose. I mean when we got the case we filed our Answer within 30 days. We've done our due diligence. We figured out here's some of the people we need to bring

in. We moved to bring them in and we weren't able to. So therefore we brought this cause of action, this Complaint to provide them proper notice of those underlying claims.

And there -- it's our position that they're trying to twist words out of these cases for the position that because we filed it eight days after and three days from first having notice of the underlying case that all of our contractual indemnity and indemnity claims are barred because of their claiming that there is just a loss in the liability distinction.

And there certainly is but in both situations the liability and the damages is a judgment. And there has been no judgment entered in the Damico [phonetic] case. And there has been no judgment entered in this case.

THE COURT: So you brought a lawsuit ---

MR. COX: --- I would think ---

THE COURT: --- prior to ---

MR. COX: --- and then even going ---

THE COURT: --- having a cause of action ---

MR. COX: --- I think even going with their line of thinking that if anything only our consequential damages, the attorney's fees if taken with what they are saying is true only those would be barred by their line of reasoning not all our entire claim altogether.

THE COURT: All right.

MR. GRIMBALL: Your Honor, I -- we certainly went back and forth -- we went round and round about it the last time I don't have it with me but I think it's going to come up. But the Piper case involved a train car accident and an injury to a passenger.

Now, I believe the Court held and we talked about this over and over that liability accrued when the injury to the passenger happened not when there was a judgment. You might remember, it's a weird case because the Court actually talks about giving the Plaintiff the ability to sue both the Defendant and his insurance company at the same time because the insurance company had executed a contract for indemnity against liability with the Defendant.

Under that fact pattern obviously you can't have liability meaning a judgment because then why would you sue the Defendant and his insurance company if you already had a judgment against the Defendant, which doesn't make sense.

And you know that's another part of this that I feel like maybe haven't been thought through all the way. If we have this claim for sole -- for indemnity, contractual indemnity for the sole negligence of ECC related to BFS there should be a judgment against BFS in order for them

to have something to prevail on. This is what I think Mr. Cox is arguing if there is a judgment against BFS then ECC wasn't solely negligent.

So, I just -- I think that he's wrong about the Piper case and he's wrong about the distinction between contracts for indemnity against loss and contracts for indemnity against liability ---

THE COURT: --- tell me again your strongest argument why he missed the statute of limitations.

MR. GRIMBALL: Because so the idea is that the statute of limitations on a contract for indemnity against liability, which this is runs when you accrue the damages, when a train car accident happens, when the window starts to leak.

And the very latest date in which they could have started to accrue their damages, the attorney's costs and fees is the day in which they filed or rather executed their answer in the Damico [phonetic] matter. And we talked about this before. He's trying to parcel out his attorney's costs and fees damages and his indemnity damages.

This is a consequential damages case just like any other construction defect case. Sometimes the damages get worst and sometimes they don't. We've all had cases where the Plaintiff two years in discovers some new

horrible issue and the case goes from being 100,000 dollar case to being a 150 or 200,000 or a million dollar case. And that's exactly what he's got here. He just doesn't know if he's going to get the judgment. He might find out that his windows are leaking and he might find out they aren't.

THE COURT: And the net effect of granting this motion is what?

MR. GRIMBALL: The net effect of your -- that you sign will leave him with a claim for contribution and for equitable indemnity. A contribution claim obviously would not be barred by our sole -- whether it is sole or concurrent negligence.

And so you know there is four subcontractors involved in this case including the window manufacturer and would be entitled to recover up to 80 percent of any damages that he pays just by the contribution and if they are wholly innocent they can recover 100 percent on the equitable indemnity.

THE COURT: And that the indemnity excludes attorney's fees?

MR. GRIMBALL: That equitable indemnity wouldn't exclude attorney's fees ---

THE COURT: --- wouldn't exclude attorney fees?

MR. GRIMBALL: Yes, Your Honor.

MR. OLSON: And I think it's a fairly equitable result to and I'll say it again because that's one of the things they are seeking is attorney's fees. Those began to accrue December 15th of 2015. I believe this law suit was filed December 21st, 2018 and that goes back to the whole three years, three years and eight days.

But again, the net effect would be for those claims to survive and then I think we would figure out if there is going to be the joinder or the consolidation motion as to how that would work if we would just stay this case forever or we would agree to consolidate with the Damico [phonetic] matter.

I'm not sure what we decided on that. I'm not sure who would go first on that. Although, if he is right about the statute of limitations with regard to the contractual indemnity claims I don't know that any of the claims that survive are ripe. I don't know that we need to go through the whole exercise of staying the case and leaving it on the books because he is correct.

I mean the rules allow you can add someone with a derivative claim of indemnity. I don't know that they allow for you to file a derivative lawsuit and just to stay it because that's perhaps an issue we don't need to actually discuss with any details.

THE COURT: All right, Mr. Cox?

MR. COX: I've said all I need to say, Your Honor. Thank you.

THE COURT: Well, I haven't heard anything that would cause me to reverse my decision. I have heard enough to convince me that the order should be tweaked some. You know it is kind of difficult case for me to evaluate.

And certainly as far as the cause of action not accruing until a judgment, then we drew a distinction in this case that alleges that entitlement to consequential damages and those consequential damages allegedly occurred more than three years prior to filing the lawsuit.

It's rather difficult to analyze but I don't see a basis to change my decision. I'm happy for you to file another brief on that sole point if you think I'm missing the mark that much. I don't know that the argument based on Concord and Cumberland and all the authority cited up to this point I don't know that it really would cause me to change my mind solely on the issue of statute of limitations.

But I'm thinking as far as the order to the extent you know -- the comment was made that I adopted and signed Mr. Olson's order. I think I probably tweaked it and added and subtracted and all of that to make it my

order and not your order. But it may need to be modified to some extent. So I'm thinking about giving Mr. -- it's escaping me right now -- Mr. even though I've had four or five by the same last name.

MR. GRIMBALL: Grimball.

THE COURT: Mr. Grimball, yes. Mr. Grimball the opportunity to modify this order based on what you think was omitted and circulate it to both counsel. Then Mr. Cox if you believe any other comments based on what Mr. Grimball submits is fine and Mr. Cox if you want to hone in on that attorney's fees issue and submit anything else I'm happy to review it.

MR. COX: Thank you, Your Honor.

THE COURT: All right. Thank you all.

MR. OLSON: Thank you.

MR. GRIMBALL: Your Honor, so you would like me to revise the portion on the statute of limitations?

THE COURT: Yes. Of course resubmit it as an entire order.

MR. GRIMBALL: Right.

THE COURT: The part and including Mr. Cox's contention that between paragraph 33 and 34 something is misrepresented.

MR. GRIMBALL: Okay.

********END OF TRANSCRIPT OF RECORD********

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Berkeley County, South Carolina on the 16th day of January, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 24, 2020

Joyce C. Rueger, CVR-M
Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-08-02424

PATRICIA DAMICO AND LENNA LUCAS, individually and on behalf of all others similarly situated, JOSHUA AND BRETTANY BUETOW, EDWARD AND SYLVIA DENGG, JONATHAN AND THERESA DOUGLASS, ANTHONY AND STACEY RAY, DANNY AND ELLEN DAVIS MORROW, CZARA AND CHAD ENGLAND, BRYAN AND CYNTHIA CAMARA, AND MATTHEW COLLINS,

Plaintiffs,

vs.

LENNAR CAROLINAS, LLC, SPRING GROVE PLANTATION DEVELOPMENT, INC., MANALE LANDSCAPING, LLC, SUPER CONCRETE OF SC, INC., SOUTHERN GREEN, INC., TJB TRUCKING/LEASING, LLC, PARAGON SITEWORK CONSTRUCTORS, INC., CIVIL SITE ENVIRONMENTAL, INC., AND RICK BRYANT,

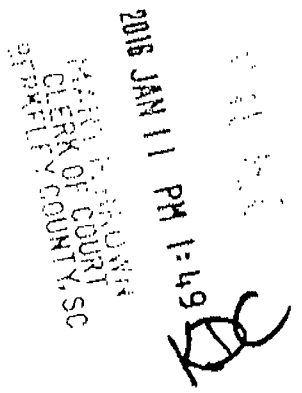
Defendants.

LENNAR CAROLINAS, LLC

Third-Party Plaintiff,

vs.

THE EARTHWORKS GROUP, INC., VOLKMAR CONSULTING SERVICES, LLC, GEOMETRICS CONSULTING, LLC, LAND/SITE SERVICES, INC., MYERS LANDSCAPING, INC., A.C. & A. CONCRETE, INC., KNIGHT'S CONCRETE PRODUCTS, INC., KNIGHT'S REDI-MIX, INC., COASTAL CONCRETE SOUTHEAST, LLC, COASTAL CONCRETE SOUTHEAST II, LLC, GUARANTEED FRAMING, LLC, OZZY CONSTRUCTION, LLC, CONSTRUCTION APPLICATORS



AFFIDAVIT OF SERVICE BY MAIL OF BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC

CHARLESTON, LLC, LA NEW ENTERPRISES, LLC, DÉCOR CORPORATION, DVS, INC., RAUL MARTINEZ MASONRY, LLC, ALPHA OMEGA CONSTRUCTION GROUP, INC., SOUTH CAROLINA EXTERIORS, LLC, BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC, AND LOW COUNTRY RENOVATIONS AND SIDING, LLP,

Third-Party Defendants.

PERSONALLY appeared before me, Kelly J. Gouin, who being duly sworn, says:

That on December 1, 2015, the undersigned placed a true copy of **Third-Party Summons and Lennar Carolinas, LLC's Answer to Plaintiffs' First Amended Complaint, Cross-Claims, and Third-Party Complaint** in the United States Mail via Certified Mail with Return Receipt Requested, Receipt # 7015 1660 0000 5071 7976 addressed as follows:

Builders FirstSource – Southeast Group, LLC
CT Corporation System, Registered Agent
2 Office Park Court, Suite 103
Columbia, SC 29223

That said Summons, Answer to First Amended Complaint, Cross-Claims, and Third-Party Complaint were served on Third-Party Defendant Builders FirstSource – Southeast Group, LLC on December 3, 2015, by being delivered to said defendant. See Certified Mail Confirmation # 7015 1660 0000 5071 7976 attached hereto.

By: Kelly J. Gouin

Kelly J. Gouin
PARKER POE ADAMS & BERNSTEIN LLP

SWORN TO BEFORE ME THIS
7th day of January, 2016.

Sara H. Lee

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: November 15, 2017

Parker Poe

Kelly J. Gouin
Paralegal
Telephone: 843.727.2667
Direct Fax: 843.727.2680
kellygouin@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

December 1, 2015

VIA CERTIFIED MAIL/RETURN RECEIPT/
RESTRICTED DELIVERY/ADDRESSEE ONLY
Builders FirstSource – Southeast Group, LLC
CT Corporation System, Registered Agent
2 Office Park Court, Suite 103
Columbia, SC 29223

Re: Damico, et al. v. Lennar Carolinas, LLC, et al.
Case No.: 2014-CP-08-02424

Dear Sir/Madam:

In connection with the above-referenced matter, enclosed for service on Builders FirstSource – Southeast Group, LLC, please find the filed Third-Party Summons and Lennar Carolinas, LLC's Answer to Plaintiffs' First Amended Complaint, Cross-Claims, and Third-Party Complaint. You are hereby summoned and required to answer the Third-Party Complaint herein, within thirty (30) days of receipt of this letter.

Please do not hesitate to call me if you have any questions.

Sincerely,

Kelly Gouin
Paralegal to Elliotte Quinn, Esq.

/klg
Enclosures

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only
For delivery information, visit our website at www.usps.com®
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Certified Mail Fee
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☐ Adult Signature Restricted Delivery $
Postage
$
Total Postage
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Sent To Builders FirstSource–Southeast Group, LLC
Street and Apt. CT Corporation System
City, State, ZIP Registered Agent
2 Office Park Court, Suite 103
Columbia, SC 29223
Postmark Here
7015 1660 0000 5071 7976
PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Builders FirstSource–Southeast Group, LLC
CT Corporation System
Registered Agent
2 Office Park Court, Suite 103
Columbia, SC 29223

9590 9403 0970 5223 1151 56

2. Article Number (Transfer from service label)
7015 1660 0000 5071 7976

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Pam Johnson ☐ Agent ☐ Addressee

B. Received by (Printed Name) Pam Johnson
C. Date of Delivery 12-3-15

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
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☐ Signature Confirmation™
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PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

HARPER LITTLE
PLLC

800 College Hill Road,
Suite 5201
P. O. Box 3150
Oxford, MS 38655

P: 662.234.0320
F: 662.259.8464

164 Market Street,
Suite 139
Charleston, SC 29401

P: 843.224.6676
F: 662.259.8464

James D. Harper*
Terry Little
C. Clay Olson***
Lauren Olson***

*Also licensed in Alabama and Tennessee
*** Licensed in South Carolina

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October 14, 2019

Leah Dupree
Berkeley County Clerk of Court
300 California Dr. # B
Moncks Corner, SC 29461

Re: Builders First Source v. MI Window, Charleston Exteriors, et al.
Cause No. 2018-CP-08-02547

Dear Ms. Dupree,

Attached please find Exhibits for our filed *Motion for Summary Judgment*. We were unable to file them with the *Motion for Summary Judgment* because the file size of the exhibits were too big.

Thank you for your attention to this matter. Should you have any questions please contact our office.

Sincerely,

/s/ Clay Olson

C. Clay Olson

CCO/cb

cc: Opposing counsel

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NO: 2014-08-0224

PATRICIA DAMICO and LENNA LUCAS, Individually and on behalf of all others similarly situated; JOSHUA and BRETTANY BUETOW; EDWARD and SYLVIA DENGG; JONATHAN and THERESA DOUGLASS; ANTHONY and STACEY RAY; DANNY and ELLEN DAVIS MORROW; BRYAN and CYNTHIA CAMARA; and MATTHEW COLLINS,

Plaintiffs,

vs.

LENNAR CAROLINAS, LLC; SPRING GROVE PLANTATION DEVELOPMENT, INC.; MANALE LANDSCAPING, LLC; SUPER CONCRETE OF SC, INC.; SOUTHERN GREEN, INC.; TJB TRUCKING/LEASING, LLC; PARAGON SITE CONSTRUCTORS, INC.; CIVIL SITE ENVIRONMENTAL; and RICK BRYANT, Individually,

Defendants.

LENNAR CAROLINAS, LLC,

Third-Party Plaintiff,

vs.

THE EARTHWORKS GROUP, INC.; VOLKMAR CONSULTING SERVICES, LLC; GEOMETRICS CONSULTING, LLC; LAND/SITE SERVICES, INC.; MYERS LANDSCAPING, INC.; A.C.& A. CONCRETE, INC.; KNIGHT'S CONCRETE PRODUCTS, INC.; KNIGHT'S REDI-MIX, INC.; COASTAL CONCRETE SOUTHEAST, LLC; COASTAL CONCRETE SOUTHEAST II, LLC; GUARANTEED FRAMING, LLC; OZZY

2015 DEC 21 PM 1:12
MARY E. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC'S ANSWER TO LENNAR CAROLINAS, LLC'S THIRD PARTY COMPLAINT

CONSTRUCTION, LLC; CONSTRUCTION APPLICATORS CHARLESTON, LLC; LA NEW ENTERPRISES, LLC; DÉCOR CORPORATION; DVS, INC.; RAUL MARTINEZ MASONRY, LLC; ALPHA OMEGA CONSTRUCTION GROUP, INC; SOUTH CAROLINA EXTERIORS, LLC; BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC; and LOW COUNTRY RENOVATIONS AND SIDING, LLP,

Third-Party Defendants.

The Third Party Defendant, Builders FirstSource-Southeast Group, LLC, reserving all rights under any and/or all pending and/or hereinafter filed motions, and answering the Third Party Complaint of the Third Party Plaintiff Lennar Carolinas, LLC, would respectfully allege unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. That each and every allegation set forth within the Third Party Complaint of Lennar Carolinas, LLC (hereinafter sometimes "Lennar"), not hereinafter specifically admitted, is denied, and strict proof demanded thereof.

2. That this Third Party Defendant would show that the allegations of Paragraphs 1 through 161 of the Lennar Third Party Complaint relate to the assertion of defenses, by Lennar, to the First Amended Complaint of the Plaintiffs, and require no response by this Third Party Defendant; to the extent that the allegations of said paragraph may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

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3. That this Third Party Defendant, in responding to Paragraph 162 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

4. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, and 213, of the Lennar Third Party Complaint.

5. That this Third Party Defendant admits only so much of Paragraph 214 of the Third Party Complaint as alleges, or may be construed to allege, that Builders FirstSource-Southeast Group, LLC is a limited liability company organized under one of the States of the United States, which limited liability company is authorized to do business in South Carolina, and which conducted business in whole or in part, in Berkeley County, South Carolina.

6. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 215 of the Third Party Complaint and therefore denies the same and demands strict proof thereof.

7. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 216 and 217 of the Third Party Complaint.

8. That this Third Party Defendant, in responding to Paragraph 218 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

9. That this Third Party Defendant would show that the best evidence of the Plaintiff's Amended Complaint is the Amended Complaint itself, and denies so much of Paragraph 219 of the Third Party Complaint as may be inconsistent or incompatible therewith, or which allege responsibility or liability of this Third Party Defendant for any damage claims asserted in the instant litigation.

10. That this Third Party Defendant admits the allegations set forth in Paragraph 220 of the Third Party Complaint.

11. That this Third Party Defendant denies so much of Paragraph 221 of the Third Party Complaint as alleges, or may be construed to allege, any deficiency or defect in the work, services, labor, or materials allegedly supplied, constructed, and/or installed by Builders FirstSource, and so much thereof as alleges or may be construed to allege, any responsibility or liability of this Third Party Defendant for any damage claims asserted in the instant litigation. This Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations against the remaining entities identified within Paragraph 221.

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12. That this Third Party Defendant denies the allegations set forth in Paragraphs 222, 223, 224, 225, 226, 227, and 228 of the Third Party Complaint.

13. That this Third Party Defendant, in responding to Paragraph 229 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

14. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 230 of the Third Party Complaint.

15. That this Third Party Defendant would show that the best evidence of the Plaintiff's Amended Complaint is the Amended Complaint itself and denies so much of Paragraph 231 of the Third Party Complaint as may be inconsistent and/or incompatible therewith, or which may allege liability and/or responsibility of this Third Party Defendant for any of the damages alleged in the instant litigation.

16. That this Third Party Defendant denies the allegations set forth in Paragraphs 232, 233, 234, and 235 of the Third Party Complaint.

17. That this Third Party Defendant, in responding to Paragraph 236 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

18. That this Third Party Defendant would show that the allegations of Paragraph 237 of the Third Party Complaint set forth conclusions of law which this Third Party Defendant need neither admit nor deny; to the

extent that the allegations of said paragraph may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

19. That this Third Party Defendant would show that the best evidence of the Plaintiff's Amended Complaint is the Amended Complaint itself, and denies so much of Paragraph 238 as may be inconsistent and/or incompatible therewith, or which may allege, or may be construed to allege, any liability and/or responsibility of this Third Party Defendant of the damages claimed in the instant litigation.

20. That this Third Party Defendant denies the allegations set forth in Paragraphs 239, 240, 241, and 242 of the Third Party Complaint.

21. That this Third Party Defendant, in responding to Paragraph 243 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

22. That this Third Party Defendant would show that the allegations contained in Paragraphs 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, and 268 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby denied.

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23. That this Third Party Defendant, in responding to Paragraph 269 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

24. That this Third Party Defendant would show that the best evidence of any contract allegedly entered into between Lennar and this Third Party Defendant is the contract itself, if any, and any amendments and/or provisions thereof, and denies so much of Paragraphs 270, 271, and 272 of the Third Party Complaint as may be inconsistent and/or incompatible therewith, or which may seek to expand any obligations allegedly undertaken by this Third Party Defendant thereunder. This Third Party Defendant denies the remaining allegations of Paragraphs 270, 271, and 272.

25. That this Third Party Defendant denies the allegations set forth in Paragraph 273, 274, 275, and 276 of the Third Party Complaint.

26. That this Third Party Defendant would show that the best evidence of any contract allegedly entered into between Lennar and this Third Party Defendant is the contract itself, if any, and any amendments and/or provisions thereof, and denies so much of Paragraphs 277 of the Third Party Complaint as may be inconsistent and/or incompatible therewith, or which may seek to expand any obligations allegedly undertaken by this Third Party Defendant thereunder. This Third Party Defendant denies the remaining allegations of Paragraphs 277.

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27. That this Third Party Defendant denies the allegations set forth in Paragraphs 278, 279, and 280.

28. That this Third Party Defendant, in responding to Paragraph 281 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

29. That this Third Party Defendant would show that the best evidence of the Plaintiff's First Amended Complaint is the First Amended Complaint itself, and denies so much of Paragraphs 282 as may be inconsistent and/or incompatible therewith, or which may allege, or may be construed to allege, liability and/or responsibility for the damage claims asserted in the instant litigation.

30. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 283 of the Third Party Complaint, and therefore denies the same and demands strict roof thereof.

31. That this Third Party Defendant is currently without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 284 of the Third Party Complaint. This Third Party Defendant denies so much of Paragraph 284 as alleged, or may be construed to allege, against Builders FirstSource any obligations to warn Lennar, and also specifically denies so much of Paragraph 284 as alleges, or may be construed to allege any danger, defect, deficiency

and/or any other problem inherent in the windows provided by Builders FirstSource.

32. That this Third Party Defendant denies the allegations set forth in Paragraphs 285 and 286 of the Third Party Complaint.

33. That this Third Party Defendant, in responding to Paragraph 287 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

34. That this Third Party Defendant would show that the allegations of Paragraphs 288 through 304 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

35. That this Third Party Defendant, in responding to Paragraph 305 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

36. That this Third Party Defendant would show that the allegations of Paragraphs 306 through 313 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

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37. That this Third Party Defendant, in responding to Paragraph 314 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

38. That this Third Party Defendant would show that the allegations of Paragraphs 315 through 320 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

39. That this Third Party Defendant, in responding to Paragraph 321 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

40. That this Third Party Defendant would show that the allegations of Paragraphs 322 through 329 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

41. That this Third Party Defendant, in responding to Paragraph 330 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

42. That this Third Party Defendant would show that the allegations of Paragraphs 331 through 333 relate to parties other than this Third Party

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Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Merger)

43. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

44. That this Third Party Defendant would show that, if any representations were made to the Third Party Plaintiff during the course of negotiations between the parties, which representations are hereby specifically denied, then all representations merged into the contract between the parties.

FOR AN AFFIRMATIVE DEFENSE
(Statutes of Limitations)

45. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

46. That this Third Party Defendant would show that all claims asserted by the Third Party Plaintiff are barred by the applicable statute and/or statutes of limitations.

FOR AN AFFIRMATIVE DEFENSE
(Notice)

47. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

48. That this Third Party Defendant would show that the Third Party Plaintiffs had constructive knowledge and/or actual knowledge of those conditions

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of which are alleged in the Complaint and/or Third Party Complaint. Such circumstances constitute a complete bar to the Third Party Plaintiff's claims.

FOR AN AFFIRMATIVE DEFENSE
(Insufficient Facts to Constitute Cause of Action)

49. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

50. That this Third Party Defendant would show that the allegations of the Complaint fail to state facts sufficient to constitute a cause of action and/or causes of action against this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE

51. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

52. That this Third Party Defendant would show that the Third Party Plaintiff had no right or entitlement to rely upon any representations allegedly made by the Third Party Defendant, which representations are hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Parol Evidence)

53. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

54. That this Third Party Defendant would show that any and all representations allegedly made by this Third Party Defendant, which representations are hereby specifically denied, constitute parol evidence

outside the terms of the contract for the sale and purchase of real estate, and therefore cannot serve to supplement the written contract.

FOR AN AFFIRMATIVE DEFENSE
(Superseding Negligence)

55. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

56. That this Third Party Defendant would show that the damages alleged by the Complaint, which damages are hereby specifically denied, were the sole and proximate result of the intervening and/or superseding negligence and/or intervening and/or superseding willful acts and/or recklessness of third persons or parties, which intervening and/or superseding negligence and/or willful acts and/or other actions are a bar to the causes of action asserted against this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Contributory Negligence)

57. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

58. That this Third Party Defendant would show that the damages alleged by the Third Party Plaintiff, which damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Third Party Plaintiff, which actions combined and concurred with any negligence on the part of this Third Party Defendant, which negligence is hereby

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specifically denied, to produce such damages, without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Comparative Negligence)

59. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

60. That this Third Party Defendant would show that the injuries and/or damages alleged by the Third Party Plaintiff, which injuries and damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Third Party Plaintiff, which acts were greater than any acts of negligence on the part of this Third Party Defendant, which acts on the part of this Third Party Defendant are hereby specifically denied, to produce such injury and/or damages, and without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Laches)

61. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

62. That this Third Party Defendant would show that the claims of the Third Party Plaintiff are barred by the doctrine of laches.

FOR AN AFFIRMATIVE DEFENSE
(Assumption of the Risk)

63. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

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64. That this Third Party Defendant would show that the Third Party Plaintiff, by and through their actions and/or inactions with regard to the subject alleged in the Complaint, have assumed the risk and/or accepted all portions of any damages alleged by the Third Party Plaintiff and such assumption of risk and/or acceptance is a bar to claims against this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Mitigate)

65. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

66. That this Third Party Defendant would show that the injuries and/or damages alleged by the Third Party Plaintiff, which injuries and/or damages are hereby specifically denied, were due to and caused by the Third Party Plaintiff's failure to mitigate, which failure is a complete bar to recovery by the Third Party Plaintiff.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Estoppel)

67. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

68. That this Third Party Defendant would show that the Third Party Plaintiff are barred by the doctrine of estoppel from asserting claims against this Third Party Defendant.

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FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Waiver)

69. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

70. That this Third Party Defendant would show that the claims of the Third Party Plaintiff are barred by the doctrine of waiver.

FOR AN AFFIRMATIVE DEFENSE
(Economic Loss Rule)

71. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

72. That this Third Party Defendant would show that the claims of the Third Party Plaintiff are barred by the economic loss rule.

FOR AN AFFIRMATIVE DEFENSE
(Sole Negligence of Third Parties)

73. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

74. That this Third Party Defendant would show that the injuries and/or damages alleged by the Third Party Plaintiff, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct this Third Party Defendant are not liable.

FOR AN AFFIRMATIVE DEFENSE

75. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

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76. That to the extent punitive damages are claimed, this Third Party Defendant demands a bifurcated jury trial pursuant to South Carolina Code Annotated §15-32-520, and demands that said damages, if any, be limited to three (3) times the amount of any compensatory damages, or the sum of $500,000.00, whichever is greater, if any.

FOR AN AFFIRMATIVE DEFENSE
(Exclusion of Warranty)

77. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

78. That this Third Party Defendant would show that any and/or all applicable warranties have been properly and effectively excluded by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Warranties)

79. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

80. That this Third Party Defendant would show that any and/or all applicable warranties have been properly and effectively modified by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Warranties)

81. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

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82. That this Third Party Defendant would show that any and all applicable warranties have been properly and effectively limited by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Expiration of Warranties)

83. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

84. That this Third Party Defendant would show that any relevant warranties have expired.

FOR AN AFFIRMATIVE DEFENSE
(Excluded Remedies)

85. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

86. That this Third Party Defendant would show that the available remedies have been properly and effectively excluded by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Remedies)

87. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

88. That this Third Party Defendant would show that all applicable remedies have been properly and effectively modified by this Third Party Defendant.

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FOR AN AFFIRMATIVE DEFENSE
(Limitation of Remedies)

89. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

90. That this Third Party Defendant would show that all available remedies have been properly and effectively limited by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Warranties)

91. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

92. That this Third Party Defendant would show that any and all applicable warranties have been properly and effectively disclaimed by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Remedies)

93. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

94. That this Third Party Defendant would show that any and all available remedies have been properly and effectively disclaimed by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Resolution by Arbitration)

95. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

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96. That this Third Party Defendant would show that, to the extent that the claims against this Third Party Defendant are subject to resolution by arbitration, the instant action against this Third Party Defendant should be dismissed.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Comply with Contractual Conditions Precedent)

97. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

98. That this Third Party Defendant would show that the Third Party Plaintiff have failed properly to comply with contractual conditions precedent to the assertion of those claims set forth in the Complaint, which failure is a bar to all claims against this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Failure to comply with Statutory Conditions Precedent)

99. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

100. That this Third Party Defendant would show that the Third Party Plaintiff have failed to comply with the statutory conditions precedent to the assertion of claims set forth in the Complaint.

FOR AN AFFIRMATIVE DEFENSE
(Failure to give notice of breach of warranty)

101. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

102. That this Third Party Defendant would show that the Third Party Plaintiff have failed to give reasonable notice of any alleged breach of any

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applicable warranty, which breach of warranty or warranties is hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Reservation and Non-Waiver)

103. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

104. That this Third Party Defendant do not waive, and hereby specifically reserves, any additional and/or further defenses, the propriety of which may be indicated by additional information which may be acquired by this Third Party Defendant or its/their counsel during the course of discovery or otherwise.

FOR AN AFFIRMATIVE DEFENSE
(Joint Tort Feasors Act)

105. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

106. That this Third Party Defendant would show that, in the event of a verdict rendered jointly against this Third Party Defendant and the remaining Defendant(s), this Third Party Defendant are entitled to contribution from said remaining Defendant(s), pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act and/or other provisions of law.

FOR AN AFFIRMATIVE DEFENSE

107. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

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108. That this Third Party Defendant would allege that any recovery against this Third Party Defendant must be set off or reduced or abated or apportioned to the extent that any other party's actions caused or contributed to any damages, if any, or as otherwise provided pursuant to relevant sections of the South Carolina Contribution Among Joint Tort Feasors Act, Section 15-38-10, et seq. SC Code Amended.

FOR AN AFFIRMATIVE DEFENSE

109. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

110. That this Third Party Defendant would show that the design and materials used in the construction of subject property in question were developed, selected, and/or approved by other defendants, thereby reliving this Third Party Defendant of any liability or responsibility for damages resulting from design deficiencies or materials which may not have been suitable for incorporation into the subject property.

FOR AN AFFIRMATIVE DEFENSE
(Protections under Constitution(s))

111. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

112. That this Third Party Defendant would show that the imposition of punitive damages is violative of protections afforded by the 5th, 8th, and 14th and/or other amendments to the United States and/or South Carolina constitutions.

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FOR AN AFFIRMATIVE DEFENSE
(Statutes of Repose)

113. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

114. That this Third Party Defendant would show that the Third Party Plaintiff's claims are barred by the applicable statute and/or statutes of repose.

FOR AN AFFIRMATIVE DEFENSE
(Statute of Frauds)

115. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

116. That this Third Party Defendant would show that the claims of the Third Party Plaintiff are barred by the Statute of Frauds.

FOR AN AFFIRMATIVE DEFENSE
(Learned Intermediaries and Sophisticated User Doctrine)

117. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

118. Without admitting its products were installed on the subject structure, this Third Party Defendant submits that the products installed on the structure were sold to learned intermediaries or sophisticated users who, in turn, through the exercise of their own knowledge and expertise, should have known and appreciated the proper uses and requirements of the products and, therefore, this Third Party Defendant pleads the Learned Intermediary and Sophisticated User Doctrines as a complete defense to this action.

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FOR AN AFFIRMATIVE DEFENSE
(Spoliation of Evidence)

119. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

120. Without admitting that its products were installed on the subject structure, this Third Party Defendant submits that repairs may have been made to the subject structure and further, that the alleged defective products may have been destroyed. To the extent that this Third Party Defendant has not been afforded the opportunity to inspect and examine the alleged defective products and/or their components, this Third Party Defendant pleads the Spoliation of Evidence Doctrine as a complete defense to this action.

FOR AN AFFIRMATIVE DEFENSE

121. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

122. That any products designed, manufactured, and/or distributed by this Third Party Defendant are found to be the cause of damages suffered by Third Party Plaintiffs, which this Third Party Defendant hereby specifically denies, the Third Party Plaintiff cannot recover against this Third Party Defendant if and to the extent that the use of such products was under circumstances constituting an alteration or modification of the products as provided in South Carolina Code Section 15-73-10, and/or otherwise.

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FOR AN AFFIRMATIVE DEFENSE

123. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

124. In the event that the products designed, manufactured, and/or distributed by this Third Party Defendant are found to be the cause of damages suffered by Third Party Plaintiff, which this Third Party Defendant specifically hereby denies, Third Party Plaintiff cannot recover against this Third Party Defendant if and to the extent that the use of the products was under circumstances constituting a lack of reasonable or diligent care, and/or was an unreasonable use as defined in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

125. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

126. Products manufactured by this Third Party Defendant conformed to the current state of the art at all relevant times and such products were reasonably designed. Upon information and belief, Third Party Plaintiff's claims of alleged defects in the products, which claims are hereby specifically denied, are based upon an inherent characteristic of such products, that cannot be eliminated without substantially compromising the products usefulness or desirability, which is recognized by the ordinary person with the ordinary knowledge, and to the community, such that Third Party Plaintiff cannot recover anything from this Third Party

Defendant, as provided in South Carolina Code Section 15-73-20, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

127. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

128. That all claims against this Third Party Defendant, based on warranty or the Uniform Commercial Code, are barred because, among other considerations, the transaction at issue is a contract primarily for services rather than goods, and this Third Party Defendant's products, once installed in improvements to real property, cease to be goods.

FOR AN AFFIRMATIVE DEFENSE

129. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

130. To the extent that any petition in bankruptcy has been filed by or on behalf of this Third Party Defendant, this Third Party Defendant would pled discharge in bankruptcy as a complete defense to any and all claims.

FOR AN AFFIRMATIVE DEFENSE

131. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

132. That this Third Party Defendant would show that the Plaintiff lacks sufficient legal privity with this Third Party Defendant to permit imposition of liability.

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FOR AN AFFIRMATIVE DEFENSE

133. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

134. That this Third Party Defendant would show that it has made no representations of warranties inducing the purchase for use of its products by Plaintiff or others, except such warranties which may be express and in writing, and such express warranties are the only and best evidence of their content and legal effect, and include lawful disclaimers of implied warranties of merchantability and fitness for a particular purpose, and include limitations and responsibility to this Third Party Defendant. This Third Party Defendant is not responsible for any warranties or representations of purchases and resellers of its products.

FOR AN AFFIRMATIVE DEFENSE

135. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

136. That the Third Party Plaintiff are without standing to assert those claims set forth within the relevant Complaint, and the Third Party Plaintiff's claims should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

137. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

138. That this Third Party Defendant would show that the Third Party Plaintiff have failed to comply with those conditions precedent to litigation, as set

forth within the relevant Master Deed, and the Third Party Plaintiff's Complaint, and all causes of action set forth therein, should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

139. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

140. That this Third Party Defendant is informed and believes that the Third Party Plaintiff have failed to comply with the provisions of Sections 40-59-10 et seq., and/or Section 40-11-10 et seq., South Carolina Code of Laws (1976), as amended, and the Third Party Plaintiff's Complaint should, therefore, be stayed and/or dismissed.

FOR AN AFFIRMATIVE DEFENSE

141. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

142. That, to the extent that the Third Party Plaintiff has failed to comply with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (Section 40-59-810 through 40-59-860), and/or Sections 40-11-500 through 40-11-570, South Carolina Codes of Laws (1976), including the provision of the required notice to the Third Party Defendant, and the provisions to the Third Party Defendant of an opportunity to cure, the Third Party Plaintiff's action must be stayed and/or otherwise barred.

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WHEREFORE, having fully answered the Third Party Complaint of Lennar Carolinas, LLC, this Third Party Defendant prays as follows:

a. That the third party claims of Lennar Carolinas, LLC be dismissed, with prejudice, as to this Third Party Defendant, with costs to this Builders FirstSource-Southeast Group, LLC;

b. That this Third Party Defendant be granted jury trial on all matters so triable;

c. That this Third Party Defendant be granted such other and further relief as this Court may deemed just and proper.

HOWELL, GIBSON & HUGHES, P.A.

By: _____
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorney for Builders FirstSource-Southeast Group, LLC

Beaufort, South Carolina

December 15, 2015

2015 DEC 21 PM 1:12
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answer to the Third Party Complaint upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on December 15, 2015.

By: _____
Stephen P. Hughes

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-08-02424

PATRICIA DAMICO AND LENNA LUCAS, individually and on behalf of all others similarly situated, JOSHUA AND BRETTANY BUETOW, EDWARD AND SYLVIA DENGG, JONATHAN AND THERESA DOUGLASS, ANTHONY AND STACEY RAY, DANNY AND ELLEN DAVIS MORROW, CZARA AND CHAD ENGLAND, BRYAN AND CYNTHIA CAMARA, AND MATTHEW COLLINS,

Plaintiffs,

vs.

LENNAR CAROLINAS, LLC, SPRING GROVE PLANTATION DEVELOPMENT, INC., MANALE LANDSCAPING, LLC, SUPER CONCRETE OF SC, INC., SOUTHERN GREEN, INC., TJB TRUCKING/LEASING, LLC, PARAGON SITEWORK CONSTRUCTORS, INC., CIVIL SITE ENVIRONMENTAL, INC., AND RICK BRYANT,

Defendants.

LENNAR CAROLINAS, LLC'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT, CROSS-CLAIMS, AND THIRD-PARTY COMPLAINT

FILED
15 NOV 25 PM 1:21
BERKELEY COUNTY, S.C.

LENNAR CAROLINAS, LLC

Third-Party Plaintiff,

vs.

THE EARTHWORKS GROUP, INC., VOLKMAR CONSULTING SERVICES, LLC, GEOMETRICS CONSULTING, LLC, LAND/SITE SERVICES, INC., MYERS LANDSCAPING, INC., A.C. & A. CONCRETE, INC., KNIGHT'S CONCRETE PRODUCTS, INC., KNIGHT'S REDI-MIX, INC., COASTAL CONCRETE SOUTHEAST,

217. Low Country Renovations' work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include installation of exterior trim together with all associated and related waterproofing, flashings, and components.

FOR A FIRST CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SPRING GROVE AND SUBCONTRACTOR AND SUPPLIER DEFENDANTS
(Indemnity)

218. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

219. Plaintiffs sued Lennar claiming damages allegedly caused by improper and defective construction, workmanship, and materials at the residences in The Abbey. Copies of Plaintiffs' pleadings are available from the Berkeley County public index and are incorporated herein by reference.

220. Lennar denied all of Plaintiffs' substantive allegations against it.

221. Plaintiffs allege their residences sustained actual damage by exposure to the defective or deficient work, services, labor, or materials supplied, constructed, or installed by Spring Grove and the subcontractor and supplier defendants and third-party defendants: Manale, Super Concrete, Southern Green, TJB, Paragon, CSE, Land/Site, Myers, A.C. & A., Knight's Concrete, Knight's Redi-Mix, Coastal Concrete, Guaranteed Framing, Ozzy Construction, Construction Applicators, LA New Enterprises, Décor, Alpha Omega, Carolina Exteriors, Builders FirstSource, and Low Country Renovations (collectively "Subcontractor and Supplier Defendants"). Plaintiffs further allege that their residences have sustained property damage caused by continuous exposure to Spring Grove's and Subcontractor and Supplier Defendants' defective and improper materials, installation, and construction that resulted in property damage and not merely negligent construction damaging only the work product itself. In addition, the

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alleged negligence, breaches, errors, omissions and wrongful acts of Spring Grove and Subcontractor and Supplier Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous, and/or injurious events that caused property damage.

222. A special relationship existed between Lennar and Spring Grove and between Lennar and Subcontractor and Supplier Defendants.

223. To the extent, if any, that Lennar is liable to Plaintiffs in this action, such liability would be because the wrongful acts, omissions, negligence, breaches, or representations of Spring Grove or Subcontractor and Supplier Defendants were imputed to Lennar.

224. A right of indemnity exists in favor of Lennar as the relation between Lennar and Spring Grove and the relation between Lennar and Subcontractor and Supplier Defendants is such that in law or equity there is an obligation for Spring Grove and Subcontractor and Supplier Defendants to indemnify Lennar, as Lennar is required to defend itself in this action and exposed to liability due to the alleged wrongful acts, omissions, negligence, breaches, or representations of Spring Grove or Subcontractor and Supplier Defendants.

225. To the extent, if any, that Lennar is held liable to Plaintiffs in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of Spring Grove and the Subcontractor and Supplier Defendants which damaged Lennar as Lennar has been subjected to liability and incurred consequential damages in attorney's fees and costs in defending this action.

226. To the extent, if any, that the materials, labor, services, or work provided by Spring Grove or the Subcontractor and Supplier Defendants were defective or deficient, such defects and deficiencies would be the result of the breaches of the express and implied contractual obligations and warranties that Spring Grove and the Subcontractor and Supplier

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Defendants provided to Lennar, damaging Lennar as Lennar has been subjected to liability and incurred consequential damages in attorney's fees and costs in defending this action.

227. In the event Lennar is liable to pay Plaintiffs for defective or deficient materials, labor, work, or services, the principles of equity and the applicable contracts require that Spring Grove and the Subcontractor and Supplier Defendants indemnify and hold harmless Lennar for any sums for which it is held liable to Plaintiffs, any sums it pays Plaintiffs' in settlement of Plaintiffs' claims, and all losses, damages, costs, and attorney's fees.

228. Should it be determined that Lennar does not owe any obligations that were the responsibility of Spring Grove or the Subcontractor and Supplier Defendants Lennar is entitled to be reimbursed for the costs and attorney's fees it incurred defending against claims that were the direct and consequent result of Spring Grove and the Subcontractor and Supplier Defendant's failure to comply with their legal and contractual obligations to Lennar.

FOR A SECOND CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SPRING GROVE AND SUBCONTRACTOR AND SUPPLIER DEFENDANTS
(Negligence/Gross Negligence)

229. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

230. Spring Grove and Subcontractor and Supplier Defendants provided labor, materials, services, and work for the construction of Plaintiffs' residences.

231. Plaintiffs allege the labor, materials, services, and work provided by Spring Grove and Subcontractor and Supplier Defendants are defective or deficient as a result of negligence, gross negligence, carelessness, or recklessness.

232. To the extent, if any, that the materials, labor, services, or work for Plaintiffs' residences were defective or deficient, which Lennar denies, such defects and deficiencies would

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be the result of the negligence, gross negligence, carelessness, or recklessness of Spring Grove and Subcontractor and Supplier Defendants.

233. As a direct and proximate result of such negligence, gross negligence, carelessness, and recklessness, Lennar has suffered damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

234. To the extent, if any, that the materials, labor, services, or work for Plaintiffs' residences were defective or deficient, Lennar is entitled to judgment collectively or individually against Spring Grove and the Subcontractor Defendants for actual damages including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

235. Plaintiffs' residences have allegedly suffered actual property damage caused by continuous exposure to the improper and negligent construction and faulty work of Subcontractor and Supplier Defendants resulting in property damage which is not the work product of each of the Subcontractor and Supplier Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, and wrongful acts of the Subcontractor and Supplier Defendants were, and have resulted in, alleged occurrences that were unintended, unforeseen, gratuitous, and injurious events that caused property damage.

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FOR A THIRD CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SPRING GROVE AND SUBCONTRACTOR AND SUPPLIER DEFENDANTS
(Breach of Warranties)

236. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

237. Spring Grove and Subcontractor and Supplier Defendants expressly and impliedly warranted to Lennar the labor, material, work, and services provided by them would be performed in a careful, diligent, and workmanlike manner, and that any materials designed, manufactured, supplied, or sold by them for use on the project would be merchantable and fit for their intended or specific purpose.

238. Plaintiffs allege the labor, material, work, and services at their residences are defective, deficient, not merchantable, or not fit for their intended or specific purpose, and not of the highest quality.

239. Plaintiffs allege their residences sustained actual damage by exposure to the defective, deficient, not merchantable, or not fit for the intended or specific purpose work, services, labor, or materials designed, manufactured, supplied, constructed, or installed by Spring Grove and Subcontractor and Supplier. Plaintiffs further allege their residences sustained property damage caused by continuous exposure to Spring Grove's and Subcontractor and Supplier Defendants' defective, deficient, not merchantable, or not fit for the intended or specific purpose work, labor, or materials that resulted in property damage and not merely negligent construction damaging only the work product itself. In addition, the alleged faulty construction, breaches, errors, omissions, and wrongful acts of the Subcontractor and Supplier Defendants were, and have resulted in, alleged occurrences that were unintended, unforeseen, gratuitous, and injurious events that caused property damage.

240. To the extent, if any, that the materials, labor, services, or work for Plaintiffs' residences were defective or deficient, Spring Grove and Subcontractor and Supplier Defendants breached their implied and express warranties of merchantability, workmanlike service, and fitness for a particular or intended purpose in the materials supplied to and the construction of The Abbey and Plaintiffs' residences.

241. As a direct and proximate result of such breaches of warranties, Lennar has suffered damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

242. To the extent, if any, that the materials, labor, services, or work for Plaintiffs' residences were defective or deficient, Lennar is entitled to judgment collectively or individually against Spring Grove and the Subcontractor Defendants for actual damages resulting from their breaches of the applicable express and implied warranties including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

FOR A FOURTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SPRING GROVE
(Breach of Contract)

243. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

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244. On or about October 22, 2010, Lennar and Spring Grove entered into a contract for the sale of the subdivision lots in The Abbey ("Agreement for the Purchase and Sale of Subdivision Lots").

245. The Agreement for the Purchase and Sale of Subdivision Lots is an enforceable contract between Lennar and Spring Grove supported by mutual consideration.

246. Pursuant to section 6.5 of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to develop the lots in accordance with requirements specified in Exhibit D to the agreement and in compliance with all applicable building codes and regulations.

247. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to:

(a) grade the lots and construct the building pads;

(b) install curbs and gutters;

(c) install streets and roads;

(d) install storm drainage, retention and detention facilities, and other storm drainage structures and systems.

248. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to grade and engineer The Abbey and the lots therein in accordance with all laws, ordinances, and governmental requirements and any engineering and grading plans.

249. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide lots suitable for Lennar to construct single-family residences.

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250. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide lots with building pads with fill compacted to 95% of standard proctor.

251. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide lots with building pads with a soil bearing pressure of 2500 PSF or greater.

252. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide a report prepared by a geotechnical engineer indicating the soil comprising the building pad for each lot in The Abbey has sufficient bearing capacity to safely accommodate the type of residential home Lennar intended to build thereon without the need for any additional compaction, displacement, removal or substitution of soil.

253. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide an in-ground storm drainage system to manage storm water.

254. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to engineer and grade the lots such that 2% drainage is established.

255. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide surface drainage such that there would be no standing water on the lots after twenty-fours elapse after a rain event.

256. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide grading and drainage such that storm

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water would not flow across more than three lots before being conveyed off the lot or managed through an underground storm drainage system.

257. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide streets and roads in The Abbey to include the necessary grading and storm sewer structures and system.

258. Plaintiffs allege their lots and The Abbey were improperly, deficiently, or defectively graded.

259. Plaintiffs allege their residences and The Abbey suffers from deficient or defective drainage.

260. Plaintiffs allege that their residences sustained actual damage by exposure to the defective or deficient drainage systems and grading in The Abbey and related work, services, labor, or materials designed, engineered, supplied, constructed, or installed by Spring Grove. Plaintiffs further allege that their residences have sustained property damage caused by continuous exposure to Spring Grove's defective and improper materials, installation, design, engineering, and construction that resulted in property damage and not merely negligent construction damaging only the work product itself. In addition, the alleged negligence, breaches, errors, omissions and wrongful acts of Spring Grove were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous, and/or injurious events that caused property damage.

261. In the event Plaintiffs prevail on any of their claims, Spring Grove materially breached the Agreement for the Purchase and Sale of Subdivision Lots in:

(a) improperly, deficiently, or defectively constructing the building pads;

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(b) improperly, deficiently, or defectively compacting the soil comprising the building pads;

(c) failing to provide building pads with sufficient bearing capacity;

(d) failing to provide a report from a geotechnical engineer accurately reflecting the native soils in The Abbey and their characteristics and the implications for construction of residences in The Abbey;

(e) failing to compact, displace, remove, substitute fill for, or otherwise treat or remedy any native soil conditions;

(f) improperly, deficiently, or defectively grading the lots;

(g) improperly, deficiently, or defectively installing curbs and gutters;

(h) improperly, deficiently, or defectively installing streets and roads;

(i) improperly, deficiently, or defectively installing storm drainage, retention and detention facilities and other storm drainage systems;

(j) failing to grade and engineer the lots in accordance with all laws, ordinances, and governmental requirements and any engineering and grading plans;

(k) providing a deficient and defective in-ground storm drainage system;

(l) improperly, deficiently, or defectively grading the lots such that a 2% drainage was not established;

(m) improperly, deficiently, or defectively grading the lots such that water remains standing on the lots more than twenty-four hours after a rain event;

(n) improperly, deficiently, or defectively grading and providing drainage such that water flows across more than three lots;

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(o) improperly, deficiently, or defectively grading and providing storm sewer for the streets and roads in The Abbey.

262. Spring Grove failed to cure any such breaches.

263. As a result of the material breaches of Spring Grove, Lennar has suffered direct, incidental, and consequential damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

264. Lennar is entitled to judgment against Spring Grove for Lennar's direct, incidental, and consequential damages resulting from the breaches including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

265. Further, Lennar has been required to expend sums for attorney's fees and costs, all of which were foreseeable to Spring Grove as a result of breaches of the Agreement for the Purchase and Sale of Subdivision Lots.

266. In light of the contractual provisions providing for an award of costs and reasonable attorney's fees, Lennar is entitled to recover the same from Spring Grove.

267. Spring Grove's breaches include breaches of warranties and representations made in regards to the fitness, quality, durability, performance, or use of its products and work.

268. Spring Grove's breaches of warranties and representations in the Agreement for the Purchase and Sale of Subdivision Lots are alleged by Plaintiffs to have caused property damage to their residences.

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FOR A FIFTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SUBCONTRACTOR AND SUPPLIER DEFENDANTS
(Breach of Contract)

269. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

270. Lennar contracted with or was a third-party beneficiary of contracts entered into by Subcontractor and Supplier Defendants.

271. Pursuant to those contracts, Subcontractor and Supplier Defendants were obligated, among other things, to provide labor, materials, and services for the residences in The Abbey and specifically for Plaintiffs' residences.

272. Pursuant to those contracts, Subcontractor and Supplier Defendants agreed to provide work, materials, or services meeting contractually specified standards.

273. To the extent, if any, that the materials, labor, services, or work for the residences constructed in The Abbey were defective or deficient, Subcontractor and Supplier Defendants breached their contracts with Lennar or their contracts for which Lennar was a third-party beneficiary by, among other things, failing to perform their work in a careful, diligent, and workmanlike manner, by failing to provide materials, work, or services that resulted in a quality residence free from defects and otherwise in conformance with all contract documents, and failing to provide materials, work, or services conforming with all appropriate building codes and industry standards.

274. As a result of the breaches of the applicable contracts by Subcontractor and Supplier Defendants, Lennar has suffered direct, incidental, and consequential damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe

Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

275. Further, Lennar has been required to expend sums for attorney's fees and costs, all of which were foreseeable to Subcontractor and Supplier Defendants as a result of breaches of the contracts.

276. Lennar is entitled to judgment against Subcontractor and Supplier Defendants for Lennar's direct, incidental, and consequential damages resulting from the breaches including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

277. Additionally, Lennar's contracts with Subcontractor and Supplier Defendants required that they name Lennar as an additional insured on their commercial general liability ("CGL") policies and thereby provide Lennar with coverage for claims arising out of a Subcontractor or Supplier Defendant's materials, labor, services, or work.

278. To the extent a Subcontractor or Supplier Defendant failed to name Lennar as an additional insured on its CGL policies or otherwise failed to follow the contractual provisions regarding naming Lennar as an additional insured and the Subcontractor or Supplier Defendant's insurance carrier refuses to defend and indemnify Lennar for Plaintiffs' claims, the Subcontractor or Supplier Defendant breached its contract with Lennar, Lennar will have suffered damages as a result of the breach, and Lennar is entitled to recover from the Subcontractor or Supplier Defendant for those damages including, but not limited to, Lennar's attorney's fees, costs, and expenses incurred in defending this action.

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279. Subcontractor and Supplier Defendants' breaches include breaches of warranties and representations made in regards to the fitness, quality, durability, performance, or use of its products and work.

280. Spring Grove's breaches of warranties and representations in the Agreement for the Purchase and Sale of Subdivision Lots are alleged by Plaintiffs to have caused property damage to their residences.

FOR A SIXTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST BUILDERS FIRSTSOURCE
(Strict Liability/Products Liability)

281. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

282. Plaintiffs allege the windows installed in their residences are defective or deficient.

283. Builders FirstSource designed, manufactured, supplied, sold, or distributed the windows installed in the residences in The Abbey.

284. Builders FirstSource never warned Lennar of any danger, defect, deficiency, or any other problem inherent in the windows that would cause the problems and damages alleged by Plaintiffs.

285. To the extent, if any, that the windows installed in the residences constructed in The Abbey are defective or deficient and Plaintiffs suffered damages as a result, which Lennar denies, Builders FirstSource sold and delivered a product in a defective condition presenting an unreasonable risk of harming the residences into which they were installed.

286. Builders FirstSource incorporating a defective and unreasonably dangerous product into the residences in The Abbey caused Lennar to suffer direct, incidental, and

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consequential damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

FOR A SEVENTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Indemnity)

287. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

288. Lennar entered into contracts with or was a third-beneficiary of contracts entered into with CSE, Earthworks, Volkmar, and Geometrics (collectively the "Design and Engineering Defendants").

289. CSE was responsible for, among other things, preparing the civil engineering plans, drawings, documents, and specifications including preparing grading and drainage plans, drawings, documents, and specifications for The Abbey.

290. Earthworks was responsible for, among other things, preparing the plans, drawings, documents, and specifications for the residences constructed in The Abbey.

291. Volkmar was responsible for providing geotechnical engineering services for construction of residences in The Abbey to include, but not limited to, site exploration, investigation, testing, and analysis of soils in The Abbey, preparing designs and specifications for grading, site preparation, groundwater control, fill, compaction, soils, building pads, footing excavations, footings, and slabs, and observation, investigation, testing, administration, and approval of soils, grading, building pads, and footing excavations for residences in The Abbey.

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292. Geometrics was responsible for providing geotechnical engineering services for construction of residences in The Abbey including, but not limited to, observation, investigation, testing, administration, and approval of soils, grading, building pads, and footing excavations for residences in The Abbey.

293. Design and Engineering Defendants provided some or all of those services for the construction of the residences in The Abbey.

294. Plaintiffs sued Lennar alleging damages caused by deficient design, engineering, and construction administration services provided by Design and Engineering Defendants.

295. Lennar denied all of Plaintiffs' substantive allegations against it.

296. Plaintiffs allege their residences sustained actual damage by exposure to the defective or deficient services of Design and Engineering Defendants.

297. A special relationship existed between Lennar and Design and Engineering Defendants.

298. Design and Engineering Defendants owed Lennar a duty to perform and provide their design, engineering, and construction administration services in accordance with their contracts and the applicable rules, regulations, and ethical requirements that relate to architects or engineers practicing in South Carolina and with the appropriate standard of professional care and generally accepted architectural and engineering standards.

299. To the extent, if any, that Lennar is liable to Plaintiffs in this action, such liability would be because the wrongful acts, omissions, negligence, breaches, or representations of Design and Engineering Defendants were imputed to Lennar.

300. A right of indemnity exists in favor of Lennar as the relation between Lennar and Design and Engineering Defendants and the relation between Lennar is such that in law or equity

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there is an obligation for Design and Engineering Defendants to indemnify Lennar, as Lennar is required to defend itself in this action and exposed to liability due to the alleged wrongful acts, omissions, negligence, breaches, or representations of Design and Engineering.

301. To the extent, if any, that Lennar is held liable to Plaintiffs in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, or representations of Design and Engineering Defendants which damaged Lennar as Lennar has been subjected to liability and incurred consequential damages in attorney's fees and costs in defending this action.

302. To the extent, if any, that the services, engineering, designs, plans, drawings, or specifications provided by Design and Engineering Defendants were improper, defective, deficient, or otherwise not suitable, such defects and deficiencies would be the result of the breaches of the express and implied contractual obligations and warranties that Design and Engineering Defendants provided to Lennar, damaging Lennar as Lennar has been subjected to liability and incurred consequential damages in attorney's fees and costs in defending this action.

303. In the event Lennar is liable to pay Plaintiffs' for any defect, deficiency, or other condition in their residences or any defect, deficiency, or other condition in or on their properties or The Abbey generally, the principles of equity and the applicable contracts require that Design and Engineering Defendants indemnify and hold harmless Lennar for any sums for which it is held liable to Plaintiffs, any sums it pays Plaintiffs' in settlement of Plaintiffs' claims, and all losses, damages, costs, and attorney's fees.

304. Should it be determined that Lennar does not owe any obligations that were the responsibility of Design and Engineering Defendants, Lennar is entitled to be reimbursed for the costs and attorney's fees it incurred defending against claims that were the direct and consequent

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result of Design and Engineering Defendants' failures to comply with their legal and contractual obligations to Lennar.

FOR AN EIGHTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Negligence)

305. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

306. Design and Engineering Defendants provided professional design and engineering services for the development of The Abbey and the construction of the residences therein.

307. Plaintiffs allege damages caused by the negligent, grossly negligent, careless, or reckless performance of design, engineering, and construction administration services by Design and Engineering Defendants.

308. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, which Lennar denies, such defects and deficiencies would be the result, in whole or in part, of the negligence, gross negligence, carelessness, or recklessness of Design and Engineering Defendants.

309. To the extent an affidavit is required pursuant to S.C. Code Ann. § 15-36-100, which Lennar does not admit or concede, Lennar states good faith concerns regarding the expiration of any applicable statute of limitations did not permit the timely preparation of an expert affidavit.

310. Design and Engineering Defendants owed Lennar a duty to perform and provide their professional services in accordance with their contracts and the applicable statutes, rules, regulations, and ethical standards applicable to architects and engineers practicing in South Carolina, and in accordance with the applicable industry standards, standard of care, generally

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accepted architectural and engineering standards, and any other applicable standard for architects and engineers.

311. As a direct and proximate result of such negligence, gross negligence, carelessness, and recklessness, Lennar suffered damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

312. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Lennar is entitled to judgment collectively or individually against Design and Engineering Defendants for damages including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

313. Plaintiffs' residences have allegedly suffered actual property damage caused by continuous exposure to the improper and negligent work and services of Design and Engineering Defendants resulting in property damage which is not the work product of each of the Design and Engineering Defendants. In addition, the alleged breaches, errors, omissions, and wrongful acts of the Design and Engineering Defendants were, and have resulted in, alleged occurrences that were unintended, unforeseen, gratuitous, and injurious events that caused property damage.

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FOR A NINTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Breach of Warranties)

314. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

315. Design and Engineering Defendants expressly or impliedly warranted to Lennar that the work and services performed by them would be performed in a careful, diligent, professional manner and that the designs, plans, drawings, and specifications prepared by them would suit the particular and intended purpose for use in the development and construction of The Abbey and the residences therein.

316. Design and Engineering Defendants owed Lennar an implied duty of workmanlike service to undertake their architectural and engineering tasks with appropriate skill and expertise and in accordance with their contracts and the applicable statutes, rules, regulations, and ethical standards applicable to architects and engineers practicing in South Carolina, and in accordance with the applicable industry standards, standard of care, generally accepted architectural and engineering standards, and any other applicable standard for architects and engineers.

317. Design and Engineering Defendants provided an implied warranty that their architectural or engineering services, designs, drawings, plans, and specifications were sufficient for their intended uses.

318. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Design and Engineering Defendants breached their express and implied warranties.

319. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Lennar is entitled to judgment collectively or individually against Design and Engineering Defendants for damages including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

320. Plaintiffs' residences have allegedly suffered actual property damage caused by continuous exposure to the improper and negligent work and services of Design and Engineering Defendants resulting in property damage which is not the work product of each of the Design and Engineering Defendants. In addition, the alleged breaches, errors, omissions, and wrongful acts of the Design and Engineering Defendants were, and have resulted in, alleged occurrences that were unintended, unforeseen, gratuitous, and injurious events that caused property damage.

FOR A TENTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Breach of Contract)

321. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

322. Lennar contracted with or was a third-party beneficiary of contracts entered into by Design and Engineering Defendants.

323. Pursuant to those contracts, Design and Engineering Defendants were obligated, among other things, to provide work and services for The Abbey generally, the residences constructed in The Abbey, and specifically for Plaintiffs' residences.

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324. Pursuant to those contracts, Design and Engineering Defendants agreed to provide work and services meeting contractually specified standards.

325. The terms of the contracts required Design and Engineering Defendants to provide design, engineering, and construction administration services that, among other things, would produce a quality residential development and residences free from defects and otherwise in conformance with all contract documents, building codes, statutes, codes, regulations, industry standards, and any other applicable standard. The contracts further required Design and Engineering Defendants to supervise and direct their work and services using their best skill and attention.

326. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Design and Engineering Defendants breached their contracts with Lennar or their contracts for which Lennar was a third-party beneficiary by, among other things, failing to perform their work in a careful, diligent, and workmanlike manner, by failing to work and services that resulted in a quality residential development and residences free from defects and otherwise in conformance with all contract documents, building codes, statutes, codes, regulations, industry standards, and any other applicable standard.

327. As a result of the breaches of the applicable contracts by Design and Engineering Defendants, Lennar has suffered damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

328. Further, Lennar has been required to expend sums for attorney's fees and costs, all of which were foreseeable to Design and Engineering Defendants as a result of breaches of the contracts.

329. Lennar is entitled to judgment against Design and Engineering Defendants for Lennar's damages resulting from the breaches including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

FOR AN ELEVENTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Non-Delegable Duty/Vicarious Liability)

330. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

331. Design and Engineering Defendants had a non-delegable duty to provide their services in accordance with the applicable statutes, regulations, rules, and ethical requirements governing the practices of architects and engineers in South Carolina, and in accordance with the appropriate and generally accepted architectural and engineering standards.

332. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Design and Engineering Defendants breached their non-delegable duties for the reasons stated herein, directly and proximately causing Lennar damages as described herein.

333. Design and Engineering Defendants are further vicariously liable for any and all errors, omissions, breaches and wrongful acts of any of their consultants and agents, which directly and proximately caused Lennar damages as described herein.

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WHEREFORE, Lennar prays that Plaintiffs' claims be dismissed, that Lennar be given judgment against Spring Grove, Manale, Super Concrete, Southern Green, TJB, Paragon, CSE, Earthworks, Volkmar, Geometrics, Land/Site, Myers, A.C. & A., Knight's Concrete, Knight's Redi-Mix, Coastal Concrete, Guaranteed Framing, Ozzy Construction, Construction Applicators, LA New Enterprises, Décor, DVS, Martinez Masonry, Alpha Omega, Carolina Exteriors, Builders FirstSource, and Low Country Renovations, and Lennar demands judgment requiring these Defendants and Third-Party Defendants to indemnify Lennar against any liability which Lennar may suffer in this action, to include Lennar's attorney's fees, costs, and other expenses incurred in defending this action.

PARKER POE ADAMS & BERNSTEIN LLP
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By: _____

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Attorneys for Lennar Carolinas, LLC

November 25, 2015

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November 25, 2015

VIA HAND DELIVERY

Berkeley County Clerk of Court
300 California Drive, Suite B
Moncks Corner, SC 29461

Re: *Damico, et al. v. Lennar Carolinas, LLC, et al.*
Case No.: 2014-CP-08-02424

Dear Sir/Madam

Enclosed for filing please find the original and one copy of the Lennar Carolinas, LLC's Answer to Plaintiffs' First Amended Complaint, Cross-Claims, and Third-Party Complaint and Third-Party Summons regarding the above matter. Please file the originals and return file-stamped copies to me with the courier.

Sincerely,

Elliotte Quinn

FEQiv/kjg
Enclosures

cc: John C. Hayes, IV, Esq. (via email and U.S. mail)
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CERTIFICATE OF SERVICE

On November 25, 2015, I served a copy of **LENNAR CAROLINAS, LLC'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT, CROSS-CLAIMS, AND THIRD-PARTY COMPLAINT** on counsel of record by U.S. mail and electronic mail to the following addresses:

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BERKELEY COUNTY, S.C.
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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	CASE NO: 2014-CP-08-02424

Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins.

Plaintiffs,

vs.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc. Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental, and Rick Bryant, individually.

Defendants.

Lennar Carolinas, LLC

Third-Party Plaintiff,

vs.

Super Concrete of SC, Inc. Southern Green, Inc., and TJB Trucking/Leasing, LLC,

Third-Party Defendants.

RULE 23 SOUTH CAROLINA RULES OF CIVIL PROCEDURE CLASS ACTION

FIRST AMENDED COMPLAINT
(Jury Trial Demanded)
(Class Action)
(Construction Defects)
(Verified)

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MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

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The Plaintiffs, Patricia Damico and Lenna Lucas, as Class Representatives and the above-named Plaintiffs (hereinafter collectively referred to as "Plaintiffs"), individually and as a class of similarly situated owners of homes in a residential community named the Abbey at Spring Grove Plantation complaining of the above-mentioned Defendants, allege and state as follows:

1. Plaintiffs Lenna Lucas and Patricia Damico are citizens and residents of Berkeley County, South Carolina, who at all times relevant hereto live in a residential community known as The Abbey at Spring Grove Plantation, located in Berkeley County, South Carolina. Plaintiffs Lenna Lucas and Patricia Damico further allege and state that they are bringing this action pursuant to Rule 23, SCRCP, as representing a class composed of each and every home owner in The Abbey at Spring Grove Plantation, and that:

a. The class is so numerous that joinder of all members is impracticable;

b. There are questions of law and fact common to the class;

c. The claims of the Plaintiffs, Lenna Lucas and Patricia Damico, are typical of the claims of the class;

d. The Plaintiffs Lenna Lucas and Patricia Damico will fairly and adequately protect the interest of the class; and

e. The amount in controversy exceeds One Hundred Dollars ($100.00) for each member of the class.

2. Plaintiffs Patricia Damico, Lenna Lucas, and other similarly situated home owners, own homes in of The Abbey.

3. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiffs Patricia Damico and Lenna Lucas bring this action both individually and as a proposed class action against the Defendants on behalf of themselves and

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all other similarly situated persons and entities, that own homes within The Abbey (hereinafter referred to collectively as the "Class"). The Class is more particularly defined as follows:

All persons and/or entities that own homes/property within The Abbey.

Excluded from the Class are:

a. Any Judge presiding over this action and members of their families;

b. Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and Defendants' current or former employees investors, members, or officers;

c. Any former owner of a home; and

d. All persons who properly execute and file a timely request for exclusion from the Class.

4. As representatives of the Class defined herein pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure, the Plaintiffs seek to recover monetary damages from the Defendants, for negligence, gross negligence, recklessness, wantonness, willfulness, breach of fiduciary duties, breach of express and implied warranties, with respect to their duties as a developer in the development, marketing, sale of, administration, care, and maintenance and/or repair of The Abbey, as well as their duties to design and construct The Abbey free from defects and in accordance with all applicable building and dwelling codes.

5. *Numerosity:* The Class is composed of in excess of sixty nine (69) persons or entities geographically dispersed throughout the State of South Carolina and other states, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of sixty nine (69) persons or entities.

6. *Typicality*: Plaintiffs Patricia Damico and Lenna Lucas' claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in the

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design, development, construction, reconstruction, marketing, selling, management and repair of The Abbey.

7. *Adequate Representation*: Plaintiffs Patricia Damico and Lenna Lucas will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiffs have retained counsel experienced in the prosecution of construction defect claims and complex litigation, including home defect claims and class actions.

8. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since, among other things, individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court systems while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

9. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice vis-à-vis each class member. All Class Members have the same legal right to, and interest in, redress for damages associated with the defective conditions existing within The Abbey.

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10. Plaintiffs Patricia Damico, Lenna Lucas, and the Class, who are all members of the Abbey, envision no unusual difficulty in the management of this action as a class action.

11. Each Class Member has an interest of more than $100.00.

12. The amount of money at stake for each Class Member is not sufficient for each member to hire their own counsel, forensic engineers and architects and bring their own action.

13. The individual Plaintiffs are citizens and residents of Berkeley County, South Carolina, who at all times relevant hereto live in a residential community known as The Abbey at Spring Grove Plantation, located in Berkeley County, South Carolina.

14. The Abbey is a section of the residential community, Spring Grove Plantation, located in Berkeley County, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.

15. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina or some other state and are authorized to conduct business in this state, and have a principal place of business in Berkeley County or have conducted business in Berkeley County.

16. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.

17. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed and constituted in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.

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18. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.

19. This Court has jurisdiction over the parties and subject matter hereto.

20. The construction of The Abbey was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and experienced in performing such construction work as to properly build The Abbey according to the normal standards of good and workmanlike practice in the construction field.

21. Construction defects in The Abbey have recently been discovered. A recent inspection of the subject Homes resulted in the discovery of major problems and deficiencies including but not limited to the following:

a. Lack of proper foundation work;

b. Lack of proper foundation slabs;

c. Structural damage to the homes;

d. Water damage resulting from defects;

e. Improper grading and drainage;

f. Improper roofing; and

g. Improper windows and installation of some.

22. Defendant Lennar Carolinas, LLC (hereinafter referred to as "Lennar") is a corporation organized and existing under the laws of the State of South Carolina and, at all times relevant hereto, was authorized to and did conduct business in the State of South Carolina, County of

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Berkeley for the purpose of planning, developing, marketing, owning, maintaining, leasing, selling, and constructing the homes in a manner for sale to the public.

23. Upon information and belief, the above-identified Lennar Defendant was, in various capacities, individually and collectively engaged in the planning and developing of the Project, and contracted with various entities for the design of the Project.

24. The Defendant, Spring Grove Plantation Development, Inc. (hereinafter SGPD), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; upon information and belief, this Defendant was the initial owner/developer and seller of the neighborhood.

25. The Defendant, Manale Landscaping, LLC (hereinafter Manale), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; this Defendant is a landscaping business that provided landscaping and grading at The Abbey.

26. The Defendant, Super Concrete of SC, Inc. (hereinafter Super Concrete), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; this Defendant is a concrete contracting business that provided concrete, flatwork, driveways, walkways, and foundation slabs at The Abbey.

27. The Defendant, TJB Trucking/Leasing, LLC (hereinafter TJB), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state; this Defendant is a business that provided grading and pads at The Abbey.

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28. The Defendant, Southern Green, Inc. (hereinafter Southern Green), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state; this Defendant is a landscaping business that provided landscaping and grading at The Abbey.

29. The Defendant, Paragon Site Constructors, Inc. (hereinafter Paragon), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; Paragon performed site preparation and/or grading work for the building pads at the lots now known as The Abbey that is the subject of this litigation.

30. The Defendant, Civil Site Environmental, Inc. (hereinafter referred to as "CSE") is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; CSE served as the professional civil engineer and designer for the development of The Abbey neighborhood and provided civil drawings for Phase I and Phase II of the development of the lots now known as The Abbey.

31. The Defendant, Rick Bryant (hereinafter referred to as "Bryant") is a citizen and resident of the County of Berkeley, State of South Carolina; Bryant is a former employee of Spring Grove who undertook certain work and/or provided labor and materials to the project now known as The Abbey neighborhood.

32. At the time of the incidents giving rise to the Plaintiffs' Complaints, Defendants Lennar, SGPD, Manale, Super Concrete, TJB, Southern Green, Paragon, CSE, and Bryant acted by and through its agents, contractors, and employees for the purpose of carrying on its business and

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therefore, is liable for the negligent acts of its agents, contractors, and employees under the theory of *respondeat superior*.

33. Defendant Lennar commenced to design, construct, develop, and sell the single family homes in The Abbey to, among others, the Plaintiffs in this action, and marketed and sold units in The Abbey despite the fact that they have been put on notice of numerous construction and design defects within the subject neighborhood and without disclosing those defects to any of the homeowners, including the Plaintiffs as well as new homeowners.

34. The Abbey is a neighborhood development started by Defendant SGPD; it was then sold to Defendant Lennar, who then took control over the development of the neighborhood and hired contractors.

35. By investigation of the subject structures, premises, roads, and property, the homeowners and/or Plaintiffs learned that said subject structures, premises, roads, and property have been deficiently designed and have significant construction defects. Construction was improperly performed and will have to be completely removed and replaced. The design, grading deficiencies, and construction to the subject structures and property include, but are not limited to, the following;

a. Water accumulation on the property of the Plaintiffs and homeowners;

b. Improper grading of the property of the Plaintiffs and homeowners;

c. Improper installation of drainage pipes;

d. Deterioration of the subject structures due to the drainage issues;

e. Improper foundation;

f. Improper flashing; and

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g. Water intrusion.

36. As a direct and proximate result and consequence of the numerous construction, design, installation, and implementation of the above defects, the Plaintiffs have and will continue to spend substantial sums of money for the repairs and reconstruction of the structures, property, and roads and will be subject to loss of use, enjoyment, and depreciation of value of their property.

37. Due to the actions of the Defendants, as stated above, the Plaintiffs are facing significant damage repairs, deteriorating property, significant and immediate expenses for investigation, destructive testing, and an analysis of construction defects, repairs defects, grading defects, drainage problems, damages deterioration, and a generally overall dilapidated condition which is the direct and proximate result of defective construction, management, maintenance, and abandonment of generally accepted fiduciary principles and/or duties on the part of the Defendants.

38. In connection with the Project, the Developer Defendants all became and/or acted as subsidiaries, parents, partners, associates, agents, affiliate, co-joint venturers, servants, instrumentalities and/or alter ego entities of each other and are responsible to the Plaintiffs herein for the condition of the Project and the damages set forth herein.

39. The Developer Defendants conducted business in connection with the Project by and through the use and control of subservient entities, and all of these entities in fact manifested no separate interest of their own, and demonstrated an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between any members of that group of corporations, shareholders, officers, agents, partners, employees, and assets.

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40. The Defendants listed above including Lennar, SGPD, Manale, Super Concrete, Southern Green, TJB, Paragon, CSE, and Bryant (hereinafter referred to collectively as the "Contractor Defendants") provided labor, materials, goods, and services in connection with the construction of The Abbey at Spring Grove Plantation as contractors, subcontractors, consultants, or independent contractors, or which manufactured, fabricated, and/or otherwise provided construction and building materials, equipment and goods for use in connection with the construction of the Project; and these entities provided labor, materials, goods, and services associated with the original construction of the Project, and the work of each of these Defendants was deficient and defective and resulted in damages to the Plaintiffs as set forth below.

41. All Defendants were instrumental in carrying out duties and actions relating to the construction of the Project, and each of these defendants had independent duties under South Carolina law to perform their duties in a good and workmanlike manner and in accordance with applicable building codes and accepted building practices.

JURISDICTION

42. Personal jurisdiction is vested and exists in the Court of Common Pleas, County of Berkeley, State of South Carolina, and venue is proper in the County of Berkeley, State of South Carolina, by virtue of, among other things, the fact that the property which is the subject matter of the Complaint is located in Berkeley County, South Carolina, and the great majority of the activities relating to the Project and the claims herein occurred in this jurisdiction.

BACKGROUND

43. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

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44. Plaintiffs are informed and believe that the Developer Defendants engaged contractors to construct the Project including 69 properties, and related facilities and amenities, collectively known as The Abbey at Spring Grove Plantation, which were thereafter substantially completed, and contained various homes. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project and/or are liable for the actions of the original Developer of the project.

45. The Developer Defendants directed and oversaw those listed as Defendants herein and contractors including the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

46. The Developer Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of units, and other activities solely relating to the Project which is the subject of this action.

47. There would exist a broad element of injustice and fundamental unfairness of the acts of the Developer Defendants, and each of them individually, were not regarded as the acts of one another.

48. The Defendants began the process of constructing the homes by engaging and directing the actions of the various contractors and/or subcontractors named as Defendants herein, and participated in the negligent, deficient, and shoddy workmanship which ignored and/or covered up design and construction defects then in existence and, thereafter, placed the

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units into the stream of commerce for sale, which they did sell to the general public and, in particular, to the current owners who are members of the Association.

49. At the time the homes were offered for sale and placed into the stream of commerce by the Developer Defendants, the units contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of the Developer Defendants.

50. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

51. These latent building defects have, unbeknownst to Plaintiffs, regularly resulted in water damage to the buildings and property damage and continue to do so through the date of this filing.

52. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

53. The Plaintiffs suffered damages when the Developer Defendants put these homes into the stream of commerce and continue to be damaged through the date of this filing.

54. The Developer Defendants were engaged in a joint venture, partnership, or other legal or de facto relationship with each other.

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55. The Developer Defendants caused, directed, participated in, or acted in willful, reckless, heedless, negligent and grossly negligent disregard of their collective and respective acts and omissions in the planning, development, design, construction, management and sale of the units in the Project, all as more fully described herein.

56. The Developer Defendants represented to the public over the internet and through various publications and other media that they, by and through their various affiliates, entities, venturers, and agents referenced herein, were qualified, experienced, and would in fact be directing, managing, and otherwise facilitating the construction and selling of the units, and these representations were relied upon by the Plaintiffs.

57. These collective and respective wrongful acts and omissions of the Developer Defendants and such other Defendants as set forth in the causes of action below, represent unfair trade practices and have resulted in substantial deterioration and/or failure of structures and building systems, building deficiencies, actual, incidental, special and consequential damages and loss of use. Remedying the above wrongful acts will result in actual, incidental, consequential, and special damages including loss of use to the Plaintiffs and its members, and entitle Plaintiffs and its members to punitive damages and attorney's fees. Further, these wrongful acts and omissions have directly and proximately caused substantial diminution in value, both pre- and post-repair.

58. The acts and omissions of the Defendants were contrary to the duties they owed, individually and collectively, to the Plaintiffs and actually caused damages to the Plaintiffs including, but not limited to, damages which did not result from the acts and omissions of other

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defendants and including, but not limited to, damages other than damages which resulted in physical injury or damage to tangible real and personal property in connection with this Project.

AS A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence and Gross Negligence)

59. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

60. Defendants, and each of them, owed a duty to Plaintiffs to act in a manner compliant with the reasonable standard of care, good faith, and fair dealing recognized under South Carolina law, and Defendants violated this duty to the Plaintiff and were negligent and grossly negligent, careless, reckless, willful and wanton in one or more of the following particulars:

a. In failing to properly design, construct, develop and repair the homes;

b. In failing to comply with the applicable Building Codes of the County of Berkeley and the State of South Carolina;

c. In failing to comply with the applicable Fire and Safety Codes of the County and of Berkeley and the State of South Carolina;

d. In failing to properly supervise the project developer entities and individuals, project architects and engineers, as well as contractors, subcontractors, suppliers and/or agents or employees of any of them in connection with the planning, development, design and construction of the homes offered for sale to the public;

e. In manufacturing, fabricating, preparing for the incorporation into a residential building, reviewing, approving, procuring, and incorporating into the construction of this project such items which were defective, deficient, inferior, inadequate, unsafe, dangerous, inappropriate for the use intended, noncompliant with approved design or design intent, non-compliant with applicable codes and standards in the industry, and otherwise improper for use in the project including, but not limited to, standard systems, grading, HVAC systems, windows, roofs, mechanical systems, plumbing systems, drainage systems, and sewer line systems without appropriate clean-out piping and/or other issues; electrical systems and equipment, interior and exterior drywall and other substrate and sheathing

material, windows, insulation, roofing, waterproofing systems, and other building materials and supplies, finishes, and other items relating to the construction and ultimate use of this residential project;

f. In designing, constructing, marketing, selling, homes and/or property with defective windows;

g. In designing, constructing, marketing, selling, homes and/or properly with inadequate flashing;

h. In designing, constructing, marketing, selling, homes and/or property with inadequate roofs;

i. In designing, constructing, marketing, selling, homes and/or property with inadequate water barriers;

j. In designing, constructing, marketing, selling, homes and/or property without weather proof building envelopes and exteriors;

k. In designing, constructing, marketing, selling, homes and/or property which were defective, deficient, inadequate, unsafe, dangerous, or otherwise non-compliant with codes and standards;

l. In placing defective and inferior construction into the stream of commerce;

m. In placing defective and inferior manufactured systems, equipment, building materials and other products into the stream of commerce;

n. In failing to permit and facilitate a proper evaluation of the condition of the Project prior to and during the process of offering homes and other property for the use and sale to the general public and, further, to obstruct and/or hinder efforts to conduct a proper evaluation of the Project by intended purchasers or users;

o. In misrepresenting the condition of the homes, common elements, garages and other property to prospective and actual purchasers and other users, and in making representations in negligent and/or intentional disregard of whether these representations were false or inaccurate;

p. In failing to undertake sufficient actions to develop a plan for repairs and otherwise failing to make adequate repairs to conditions at the project which were unsafe, dangerous, or otherwise not in compliance with applicable building codes or other authorities or standards of care;

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q. In negligently and/or intentionally covering up deficiencies prior to construction of the units and other property for sale or use by the general public;

r. In failing to determine accurate information required, failing to disclose the absence of such information, as well as negligently and/or intentionally providing misleading and inaccurate information regarding the proper level of financial capitalization and reserve funding required for the operations, maintenance, and repairs required by The Abbey for the Project and individual home owners;

s. In failing to act as reasonable persons would in circumstances then and there prevailing and in such other failures as will be shown during discovery and at trial.

61. Said failures above-described, as well as the Defendants' gross negligence, willfulness, and reckless disregard for the rights of Plaintiff and others, have actually and proximately caused damages to Plaintiffs, and the Defendants are liable to the Plaintiffs in an amount of actual, incidental, consequential, special, and punitive damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SECOND CAUSE OF ACTION
(Negligence-Developers)

62. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

63. The damages and injuries caused to the Plaintiffs and their property, are the direct and proximate result of the negligence, willfulness, wantonness, carelessness and recklessness of the Defendants SGPD and Lennar in one or more of the following particulars to wit:

a. In their capacity as developers in defectively overseeing the construction of the subject structures;

b. In failing to properly inspect, repair, and maintain the structures;

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c. In negligently effecting repairs to the structures, premises, property and roads;

d. In failing and omitting to exercise that degree of care and caution of a reasonably prudent manager of a homeowners association;

e. In failing and omitting to retain proper experts and to effectively inspect and repair the structures, premises, property, and roads; and

f. In placing their interests ahead of the owners thereby breaching their fiduciary duty.

64. As a direct and proximate result of the above stated negligent actions on behalf of Defendants SGPD and Lennar, the Plaintiffs and similarly situated homeowners will have to spend substantial sums of money for the repairs and reconstruction of their property and structures will be subject to loss of use, enjoyment, and depreciation of value of the property.

AS A THIRD CAUSE OF ACTION
(Against the Developer Defendants and Contractor Defendants)
(Negligent Misrepresentation)

65. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

66. These reports and representations were actually published and presented for information to the general public by these Defendants, and these representations were actually received by, and relied upon by, the prospective and actual purchasers of the townhomes at the Project.

67. At the time of the sale of the homes, Plaintiffs were not aware of the falsity of the representations or the lack of investigation and lack of candor by these Defendants in connection with the reports.

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68. Plaintiff subsequently determined that the representations made by these Defendants were false and that these Defendants failed to exercise due care, not only in failing to discover defects in the project, but also in failing to communicate information about the true condition of the Project. As a result of its justifiable reliance on the representations, reports, and other documents presented by these Defendants, Plaintiffs and its members have assumed control over the Project and/or purchased units, and have thereby suffered pecuniary losses in an amount to be determined by the trier of fact.

69. As a direct and proximate result of its justifiable reliance on numerous false representations made by these Defendants in connection with the Project, Plaintiffs have suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTH CAUSE OF ACTION
(Against the Contractor Defendants and the Developer Defendants)
(Breach of Implied Warranty)

70. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

71. The design, construction, development and sale of the units by these Defendants contained as a matter of law implied warranties of good faith and fair dealing, fitness for use merchantability, habitability, and workmanship with respect to construction, which warranties were not effectively disclaimed under South Carolina law.

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72. The Developer Defendants and Contractor Defendants through their acts and/or omissions, have breached the aforesaid implied warranties, which directly, actually, and proximately caused and resulted in damage which the Plaintiffs have suffered and continues to suffer in an amount to be determined by the trier of fact.

73. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FIFTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness of Habitability)

74. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

75. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

76. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiffs.

AS A SIXTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness for Particular Purpose)

77. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

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78. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

79. At the time of the sale of the subject Residences to the Plaintiffs, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

80. The Defendants, at the time of the sale of the subject Residences to the Plaintiffs, had reason to know that the Plaintiffs were relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

81. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

82. As a result of the Defendants' breach of its implied warranties, Plaintiffs have suffered physical damages.

AS A SEVENTH CAUSE OF ACTION
(Against the Developer Defendants and Contractor Defendants)
(Breach of Implied Warranties as to the Project's Development and Construction)

83. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

84. These Defendants engaged in conduct during the period of development and construction of the Project which gave rise to duties and implied warranties to the public including, but not limited to, tenants, purchasers and other users of the Project, in that by their

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conduct these Defendants placed the Project, which constitutes defective, deleterious, and dangerous property, into the stream of commerce.

85. The placement of the Project into the stream of commerce by these Defendants, contained as a matter of law implied warrantles of fitness, merchantability, workmanship and habitability, which warranties were not effectively disclaimed pursuant to South Carolina law.

86. As a direct and proximate result of the breaches of the above-described implied warranties by these Defendants, their affiliates, associates, sham entities, and/or joint venturers, whether named or unnamed on any documents transferring interest in the Project, the Plaintiffs has suffered and will continue to suffer damages, injuries and other losses.

87. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A EIGHTH CAUSE OF ACTION
(Individual Liability as to the Developer Defendants)

88. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

89. As a direct and proximate cause and result of the acts and omissions of these Defendants as aforesaid, Plaintiffs have been damaged, and these Defendants are liable to the Plaintiffs for actual, incidental, consequential, and special damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

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AS AN NINTH CAUSE OF ACTION
(Individual Liability as to the Contractor Defendants)

90. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

91. As a direct and proximate cause and result of the acts and omissions of these Defendants as aforesaid, Plaintiffs have been damaged, and these Defendants are liable to the Plaintiffs for actual, incidental, consequential, and special damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A TENTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.*)

92. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

93. These Defendants' construction and the subsequent offering and sale of the units, along with the issuance of the property condition reports and other representations to tenants, purchasers, and the public at large, constituted the conduct of trade and commerce within the meaning of S.C. Code Section 39-5-20(a).

94. The Defendants, and each of them, through their acts and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 39-5-140(a) and 27-31-430, S.C. Code of Laws as amended:

a. In failing to properly evaluate the plans and specifications for the Project prior to construction;

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b. In failing to conduct a reasonable inquiry into the conditions existing at the Project and marketing the homes, common elements, and other property at the Project to the public for sale and use;

c. In failing to repair the latent defects about which these Defendants were or should have been aware;

d. In failing to carry out duties owed to prospective and actual purchasers and other members of the public in their special relationships of trust and confidence by virtue of their role in the process of offering these units, common elements, and other property for sale and use by the general public, as design, construction, and sellers according to South Carolina law.

e. In attempting to disclaim implied warranties of merchantability and habitability in documents contrary to South Carolina law;

f. In failing to provide any additional consideration for these purported efforts to waive implied warranties of merchantability and habitability;

g. In failing to properly investigate the true conditions of the Project and putting them into the stream of commerce;

h. In making false representations as to the condition of the Project and/or representations as to the condition of the Project in reckless disregard as to the truth of the representations;

I. In failing to analyze relevant data and conditions to determine adequate capital reserves for maintenance and operation of the Project by future owners and users;

95. The conduct of the Defendants as described above was knowing and willful, and Defendants knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.

96. Plaintiffs are persons within the meaning of S.C. Code Section 39-5-140(a) and Plaintiffs have suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of these Defendants, in an amount to be determined by the trier of fact.

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97. The aforesaid acts of Defendants impact the public interest in that they constituted unfair and deceptive acts and have the potential for repetition and, in fact, occurred at each and every sale of the units of this Project and, as such, are acts which can, have and will affect the public at large by repetition.

98. These unfair and deceptive acts are acts which will affect members of the public, beyond the parties to the above-described transactions, in the form of other consumers who may be injured by purchasing townhomes by the Defendants and/or rely upon the actions and representations of these Defendants thereby placing members of the public in danger of physical and other injuries.

99. Plaintiffs are entitled to be compensated pursuant to S.C. Code Section 39-5-140(a) for the above-described actual, incidental, consequential, and special damages, as well as costs, interest, and attorney's fees, and to recover three (3) times these damages by reason of the knowing and willful nature of the unfair and deceptive acts by Defendants and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A ELEVENTH CAUSE OF ACTION
(Against the Developer Defendants)
(Breach of Contract)

100. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

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101. These Defendants entered into oral and/or written contractual arrangements with Plaintiffs relating to the representation in a purchase and sale transaction, as well as the purchase of units and other property within the Project, and the right to beneficial use of common elements and amenities to be established, coordinated, and managed by these Defendants, and these Defendants received consideration which was adequate and accepted pursuant to the terms of the Defendants' offer of ownership, goods, and/or services which were accepted by the Plaintiff.

102. Based upon the terms of their contractual agreements, along with the duties which flowed from these Defendants by virtue of the Master Deed and By-laws, real estate agency or other agreements for representation by these Defendants, and the purchase agreements for individual homes and other property interests at the Project, these Defendants owed a contractual obligation to Plaintiffs which required that these Defendants ensure that the Project was safe, habitable, code-compliant, and in a condition consistent with these Defendants' representations prior to turning over control of the Project to the home owners.

103. In breach of these contractual obligations and in breach of the Master Deed, By-laws, and real estate agency and other agreements, these Defendants failed to make a full investigation of conditions at the Project, and failed to disclose the existence of the known defects at the Project, which constitutes a breach of contract and violation of the terms of the Master Deed and By-laws by these Defendants as described above.

104. In addition to and accompanying this breach of these contractual and other obligations, these Defendants made material representations which were false as more fully described in this Complaint which the Plaintiffs relied upon to the Plaintiffs detriment.

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105. As a direct and proximate result thereof, Plaintiff have and will continue to suffer, and the actual, incidental, special, and consequential damages and other injuries including, but not limited to, the damages and injuries associated with the acts and omissions which constituted the breach of contract by these Defendants as aforesaid, all in an amount to be determined by the trier of fact.

106. These Defendants are therefore liable to the Plaintiffs for the actual, incidental, special, and consequential damages and other injuries as aforesaid in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS AN TWELFTH CAUSE OF ACTION
(Against the Developer Defendants)
(Violation of the Residential Property Condition Disclosure Act)

107. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

108. These Defendants were engaged in a joint venture, partnership, or some other form of business venture or association including, but not limited to, the formation of a Limited Liability Company, in connection with the development and construction of The Abbey at Spring Grove Plantation.

109. The Developer Defendants did so place the homes into the stream of commerce for sale to the general public and to the members of The Abbey in particular.

110. At all times relevant to this cause of action the Developer Defendants were "owners" as that term is used within S.C. Code Ann. § 27-50-10 *et seq.*, referred to as the "South Carolina

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Residential Property Condition Disclosure Act" (referred to in the remainder of this cause of action as the "Act").

111. The Developer Defendants failed to furnish to the purchasers of the townhome units a written disclosure statement in conformity and compliance with S.C. Code Ann. § 27-50-40.

112. These Defendants failed to inform the sellers of the homes of their obligations under the Act and had reasonable cause to suspect that the information, if any, supplied by the sellers to the individual purchasers was inherently false, incomplete, and misleading.

113. Upon information and belief, notwithstanding the above-described failures of these Defendants, and each of them, knowingly violated and/or failed to perform the duties described in§ 27-50-40.

114. The nature of the defects that were undisclosed in violation of§ 27-50-40, prevented and/or limited any inspection performed by the Plaintiff to uncover or discover the said defects.

115. As a direct and proximate result of these Defendants' violations of their respective and collective duty to furnish written disclosure to the purchasers as required by§ 27-50-10, *et seq.*, the Plaintiff has suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, along with costs, interest, and attorney's fees pursuant to the remedies set forth in the Act, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

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AS A THIRTEENTH CAUSE OF ACTION
(Against Developer Defendants)
(Alter Ego Liability and Piercing the Corporate Veil)

116. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

117. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project, and the Developer Defendants combined and joined together through various instrumentalities and alter egos to facilitate to process of building the homes.

118. The Developer Defendants created and controlled numerous and various entities. These Defendants created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of these Defendants to achieve their financial goals and to perpetrate the activities more particularly described herein. The subservient entities or individuals in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between these Defendants and the sham corporations, shareholders, officers, agents, partners, employees, assets, and each of them.

119. These Defendants created entities which were created to perform single purpose functions in order to effectuate the sole will of these Defendants in purchasing, developing, leasing, and/or selling the homes. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, these Defendants actively and directly participated in the development, purchase,

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sale, management, leasing, and/or operations of the Project, and in fact put the same into the stream of commerce.

120. These Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of homes, and other activities solely relating to the Project which is the subject of this action.

121. These Defendants directed and oversaw the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

122. There would exist a broad element of injustice and fundamental unfairness if the acts of these Defendants, and each of them individually, were not regarded as the acts of one another.

123. At the time the homes were offered for sale and placed into the stream of commerce by these Defendants, the homes contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of these Defendants.

124. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

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125. These latent building defects have, unbeknownst to Plaintiffs, regularly resulted in water intrusion into the buildings and property damage and continue to do so through the date of this filing.

126. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

127. The Plaintiffs suffered damages and injuries when these Defendants put these units into the stream of commerce and continue to be damaged and injured through the date of this filing.

128. As a direct and proximate result thereof, these Defendants are liable to the Plaintiffs for actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

129. WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

a. Enter judgment in favor of the Plaintiffs and against all Defendants, jointly and severally, in an amount to be determined for actual, incidental, consequential, special, and punitive damages;

b. Find that the Defendants have engaged in unfair trade practices and knowingly did so thereby entitling Plaintiffs to treble damages;

c. Award attorneys' fees and costs to the Plaintiffs; and

d. Award such other and further relief as the Court may deem just and proper.

[Signature Page to Follow]

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October 14, 2019

VIA E-MAIL ANDE-FILING
Leah Guerry Dupree
Berkley County Clerk of Court
P.O. Box 6122
Moncks Corner, SC 29461

RE: Builders Firstsource-Southeast Group, LLC v. ECC Contracting, LLC, et al.
In the Court of Common Pleas, County of Berkeley, South Carolina
Civil Case No.: 2018-CP-08-02547
RPR File No.: 889.277

Dear Ms. Dupree:

Please be advised that I filed ECC Contracting, LLC's Memorandum in Support of Its Motion for Summary Judgment in **Civil Case No.: 2018-CP-08-02547** on October 10, 2019. In preparing for the hearing of that motion, I have realized that the wrong document was filed as Exhibit 2 to the Memorandum. Attached please find the correct Exhibit 2, Builder's Firstsource's Answer in Case No. 2014-CP-08-00224. Please substitute the attached Exhibit 2, or in the alternative, file this letter as a correction to my Memorandum filed on October 10, 2019. My apologies for the confusion. Thank you for helping me to resolve it.

With Kindest Regards, I remain

Sincerely yours,

Heyward Grimball

F. Heyward Grimball

cc: All Counsel of Record (Via Email)

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF BERKELEY) CIVIL ACTION NO: 2014-08-0224

PATRICIA DAMICO and LENNA LUCAS, Individually and on behalf of all others similarly situated; JOSHUA and BRETTANY BUETOW; EDWARD and SYLVIA DENGG; JONATHAN and THERESA DOUGLASS; ANTHONY and STACEY RAY; DANNY and ELLEN DAVIS MORROW; BRYAN and CYNTHIA CAMARA; and MATTHEW COLLINS,

Plaintiffs,

vs.

LENNAR CAROLINAS, LLC; SPRING GROVE PLANTATION DEVELOPMENT, INC.; MANALE LANDSCAPING, LLC; SUPER CONCRETE OF SC, INC.; SOUTHERN GREEN, INC.; TJB TRUCKING/LEASING, LLC; PARAGON SITE CONSTRUCTORS, INC.; CIVIL SITE ENVIRONMENTAL; and RICK BRYANT, Individually,

Defendants.

LENNAR CAROLINAS, LLC,

Third-Party Plaintiff,

vs.

THE EARTHWORKS GROUP, INC.; VOLKMAR CONSULTING SERVICES, LLC; GEOMETRICS CONSULTING, LLC; LAND/SITE SERVICES, INC.; MYERS LANDSCAPING, INC.; A.C.& A. CONCRETE, INC.; KNIGHT'S CONCRETE PRODUCTS, INC.; KNIGHT'S REDI-MIX, INC.; COASTAL CONCRETE SOUTHEAST, LLC; COASTAL CONCRETE SOUTHEAST II, LLC; GUARANTEED FRAMING, LLC; OZZY

2015 DEC 21 PM 1:12
MARY E. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC'S ANSWER TO LENNAR CAROLINAS, LLC'S THIRD PARTY COMPLAINT

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CONSTRUCTION, LLC; CONSTRUCTION APPLICATORS CHARLESTON, LLC; LA NEW ENTERPRISES, LLC; DÉCOR CORPORATION; DVS, INC.; RAUL MARTINEZ MASONRY, LLC; ALPHA OMEGA CONSTRUCTION GROUP, INC; SOUTH CAROLINA EXTERIORS, LLC; BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC; and LOW COUNTRY RENOVATIONS AND SIDING, LLP,

Third-Party Defendants.

The Third Party Defendant, Builders FirstSource-Southeast Group, LLC, reserving all rights under any and/or all pending and/or hereinafter filed motions, and answering the Third Party Complaint of the Third Party Plaintiff Lennar Carolinas, LLC, would respectfully allege unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. That each and every allegation set forth within the Third Party Complaint of Lennar Carolinas, LLC (hereinafter sometimes "Lennar"), not hereinafter specifically admitted, is denied, and strict proof demanded thereof.

2. That this Third Party Defendant would show that the allegations of Paragraphs 1 through 161 of the Lennar Third Party Complaint relate to the assertion of defenses, by Lennar, to the First Amended Complaint of the Plaintiffs, and require no response by this Third Party Defendant; to the extent that the allegations of said paragraph may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

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3. That this Third Party Defendant, in responding to Paragraph 162 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

4. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, and 213, of the Lennar Third Party Complaint.

5. That this Third Party Defendant admits only so much of Paragraph 214 of the Third Party Complaint as alleges, or may be construed to allege, that Builders FirstSource-Southeast Group, LLC is a limited liability company organized under one of the States of the United States, which limited liability company is authorized to do business in South Carolina, and which conducted business in whole or in part, in Berkeley County, South Carolina.

6. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 215 of the Third Party Complaint and therefore denies the same and demands strict proof thereof.

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7. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 216 and 217 of the Third Party Complaint.

8. That this Third Party Defendant, in responding to Paragraph 218 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

9. That this Third Party Defendant would show that the best evidence of the Plaintiff's Amended Complaint is the Amended Complaint itself, and denies so much of Paragraph 219 of the Third Party Complaint as may be inconsistent or incompatible therewith, or which allege responsibility or liability of this Third Party Defendant for any damage claims asserted in the instant litigation.

10. That this Third Party Defendant admits the allegations set forth in Paragraph 220 of the Third Party Complaint.

11. That this Third Party Defendant denies so much of Paragraph 221 of the Third Party Complaint as alleges, or may be construed to allege, any deficiency or defect in the work, services, labor, or materials allegedly supplied, constructed, and/or installed by Builders FirstSource, and so much thereof as alleges or may be construed to allege, any responsibility or liability of this Third Party Defendant for any damage claims asserted in the instant litigation. This Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations against the remaining entities identified within Paragraph 221.

12. That this Third Party Defendant denies the allegations set forth in Paragraphs 222, 223, 224, 225, 226, 227, and 228 of the Third Party Complaint.

13. That this Third Party Defendant, in responding to Paragraph 229 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

14. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 230 of the Third Party Complaint.

15. That this Third Party Defendant would show that the best evidence of the Plaintiff's Amended Complaint is the Amended Complaint itself and denies so much of Paragraph 231 of the Third Party Complaint as may be inconsistent and/or incompatible therewith, or which may allege liability and/or responsibility of this Third Party Defendant for any of the damages alleged in the instant litigation.

16. That this Third Party Defendant denies the allegations set forth in Paragraphs 232, 233, 234, and 235 of the Third Party Complaint.

17. That this Third Party Defendant, in responding to Paragraph 236 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

18. That this Third Party Defendant would show that the allegations of Paragraph 237 of the Third Party Complaint set forth conclusions of law which this Third Party Defendant need neither admit nor deny; to the

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extent that the allegations of said paragraph may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

19. That this Third Party Defendant would show that the best evidence of the Plaintiff's Amended Complaint is the Amended Complaint itself, and denies so much of Paragraph 238 as may be inconsistent and/or incompatible therewith, or which may allege, or may be construed to allege, any liability and/or responsibility of this Third Party Defendant of the damages claimed in the instant litigation.

20. That this Third Party Defendant denies the allegations set forth in Paragraphs 239, 240, 241, and 242 of the Third Party Complaint.

21. That this Third Party Defendant, in responding to Paragraph 243 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

22. That this Third Party Defendant would show that the allegations contained in Paragraphs 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, and 268 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby denied.

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23. That this Third Party Defendant, in responding to Paragraph 269 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

24. That this Third Party Defendant would show that the best evidence of any contract allegedly entered into between Lennar and this Third Party Defendant is the contract itself, if any, and any amendments and/or provisions thereof, and denies so much of Paragraphs 270, 271, and 272 of the Third Party Complaint as may be inconsistent and/or incompatible therewith, or which may seek to expand any obligations allegedly undertaken by this Third Party Defendant thereunder. This Third Party Defendant denies the remaining allegations of Paragraphs 270, 271, and 272.

25. That this Third Party Defendant denies the allegations set forth in Paragraph 273, 274, 275, and 276 of the Third Party Complaint.

26. That this Third Party Defendant would show that the best evidence of any contract allegedly entered into between Lennar and this Third Party Defendant is the contract itself, if any, and any amendments and/or provisions thereof, and denies so much of Paragraphs 277 of the Third Party Complaint as may be inconsistent and/or incompatible therewith, or which may seek to expand any obligations allegedly undertaken by this Third Party Defendant thereunder. This Third Party Defendant denies the remaining allegations of Paragraphs 277.

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27. That this Third Party Defendant denies the allegations set forth in Paragraphs 278, 279, and 280.

28. That this Third Party Defendant, in responding to Paragraph 281 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

29. That this Third Party Defendant would show that the best evidence of the Plaintiff's First Amended Complaint is the First Amended Complaint itself, and denies so much of Paragraphs 282 as may be inconsistent and/or incompatible therewith, or which may allege, or may be construed to allege, liability and/or responsibility for the damage claims asserted in the instant litigation.

30. That this Third Party Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 283 of the Third Party Complaint, and therefore denies the same and demands strict roof thereof.

31. That this Third Party Defendant is currently without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 284 of the Third Party Complaint. This Third Party Defendant denies so much of Paragraph 284 as alleged, or may be construed to allege, against Builders FirstSource any obligations to warn Lennar, and also specifically denies so much of Paragraph 284 as alleges, or may be construed to allege any danger, defect, deficiency

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and/or any other problem inherent in the windows provided by Builders FirstSource.

32. That this Third Party Defendant denies the allegations set forth in Paragraphs 285 and 286 of the Third Party Complaint.

33. That this Third Party Defendant, in responding to Paragraph 287 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

34. That this Third Party Defendant would show that the allegations of Paragraphs 288 through 304 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

35. That this Third Party Defendant, in responding to Paragraph 305 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

36. That this Third Party Defendant would show that the allegations of Paragraphs 306 through 313 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

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37. That this Third Party Defendant, in responding to Paragraph 314 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

38. That this Third Party Defendant would show that the allegations of Paragraphs 315 through 320 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

39. That this Third Party Defendant, in responding to Paragraph 321 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

40. That this Third Party Defendant would show that the allegations of Paragraphs 322 through 329 relate to parties other than this Third Party Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

41. That this Third Party Defendant, in responding to Paragraph 330 of the Lennar Third Party Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.

42. That this Third Party Defendant would show that the allegations of Paragraphs 331 through 333 relate to parties other than this Third Party

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Defendant and require no response by this Third Party Defendant; to the extent that the said allegations of said paragraphs may be deemed to require a response by this Third Party Defendant, such allegations are hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Merger)

43. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

44. That this Third Party Defendant would show that, if any representations were made to the Third Party Plaintiff during the course of negotiations between the parties, which representations are hereby specifically denied, then all representations merged into the contract between the parties.

FOR AN AFFIRMATIVE DEFENSE
(Statutes of Limitations)

45. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

46. That this Third Party Defendant would show that all claims asserted by the Third Party Plaintiff are barred by the applicable statute and/or statutes of limitations.

FOR AN AFFIRMATIVE DEFENSE
(Notice)

47. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

48. That this Third Party Defendant would show that the Third Party Plaintiffs had constructive knowledge and/or actual knowledge of those conditions

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of which are alleged in the Complaint and/or Third Party Complaint. Such circumstances constitute a complete bar to the Third Party Plaintiff's claims.

FOR AN AFFIRMATIVE DEFENSE
(Insufficient Facts to Constitute Cause of Action)

49. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

50. That this Third Party Defendant would show that the allegations of the Complaint fail to state facts sufficient to constitute a cause of action and/or causes of action against this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE

51. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

52. That this Third Party Defendant would show that the Third Party Plaintiff had no right or entitlement to rely upon any representations allegedly made by the Third Party Defendant, which representations are hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Parol Evidence)

53. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

54. That this Third Party Defendant would show that any and all representations allegedly made by this Third Party Defendant, which representations are hereby specifically denied, constitute parol evidence

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outside the terms of the contract for the sale and purchase of real estate, and therefore cannot serve to supplement the written contract.

FOR AN AFFIRMATIVE DEFENSE
(Superseding Negligence)

55. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

56. That this Third Party Defendant would show that the damages alleged by the Complaint, which damages are hereby specifically denied, were the sole and proximate result of the intervening and/or superseding negligence and/or intervening and/or superseding willful acts and/or recklessness of third persons or parties, which intervening and/or superseding negligence and/or willful acts and/or other actions are a bar to the causes of action asserted against this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Contributory Negligence)

57. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

58. That this Third Party Defendant would show that the damages alleged by the Third Party Plaintiff, which damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Third Party Plaintiff, which actions combined and concurred with any negligence on the part of this Third Party Defendant, which negligence is hereby

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specifically denied, to produce such damages, without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Comparative Negligence)

59. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

60. That this Third Party Defendant would show that the injuries and/or damages alleged by the Third Party Plaintiff, which injuries and damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Third Party Plaintiff, which acts were greater than any acts of negligence on the part of this Third Party Defendant, which acts on the part of this Third Party Defendant are hereby specifically denied, to produce such injury and/or damages, and without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Laches)

61. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

62. That this Third Party Defendant would show that the claims of the Third Party Plaintiff are barred by the doctrine of laches.

FOR AN AFFIRMATIVE DEFENSE
(Assumption of the Risk)

63. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

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64. That this Third Party Defendant would show that the Third Party Plaintiff, by and through their actions and/or inactions with regard to the subject alleged in the Complaint, have assumed the risk and/or accepted all portions of any damages alleged by the Third Party Plaintiff and such assumption of risk and/or acceptance is a bar to claims against this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Mitigate)

65. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

66. That this Third Party Defendant would show that the injuries and/or damages alleged by the Third Party Plaintiff, which injuries and/or damages are hereby specifically denied, were due to and caused by the Third Party Plaintiff's failure to mitigate, which failure is a complete bar to recovery by the Third Party Plaintiff.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Estoppel)

67. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

68. That this Third Party Defendant would show that the Third Party Plaintiff are barred by the doctrine of estoppel from asserting claims against this Third Party Defendant.

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FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Waiver)

69. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

70. That this Third Party Defendant would show that the claims of the Third Party Plaintiff are barred by the doctrine of waiver.

FOR AN AFFIRMATIVE DEFENSE
(Economic Loss Rule)

71. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

72. That this Third Party Defendant would show that the claims of the Third Party Plaintiff are barred by the economic loss rule.

FOR AN AFFIRMATIVE DEFENSE
(Sole Negligence of Third Parties)

73. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

74. That this Third Party Defendant would show that the injuries and/or damages alleged by the Third Party Plaintiff, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct this Third Party Defendant are not liable.

FOR AN AFFIRMATIVE DEFENSE

75. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

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76. That to the extent punitive damages are claimed, this Third Party Defendant demands a bifurcated jury trial pursuant to South Carolina Code Annotated §15-32-520, and demands that said damages, if any, be limited to three (3) times the amount of any compensatory damages, or the sum of $500,000.00, whichever is greater, if any.

FOR AN AFFIRMATIVE DEFENSE
(Exclusion of Warranty)

77. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

78. That this Third Party Defendant would show that any and/or all applicable warranties have been properly and effectively excluded by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Warranties)

79. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

80. That this Third Party Defendant would show that any and/or all applicable warranties have been properly and effectively modified by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Warranties)

81. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

82. That this Third Party Defendant would show that any and all applicable warranties have been properly and effectively limited by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Expiration of Warranties)

83. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

84. That this Third Party Defendant would show that any relevant warranties have expired.

FOR AN AFFIRMATIVE DEFENSE
(Excluded Remedies)

85. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

86. That this Third Party Defendant would show that the available remedies have been properly and effectively excluded by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Remedies)

87. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

88. That this Third Party Defendant would show that all applicable remedies have been properly and effectively modified by this Third Party Defendant.

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FOR AN AFFIRMATIVE DEFENSE
(Limitation of Remedies)

89. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

90. That this Third Party Defendant would show that all available remedies have been properly and effectively limited by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Warranties)

91. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

92. That this Third Party Defendant would show that any and all applicable warranties have been properly and effectively disclaimed by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Remedies)

93. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

94. That this Third Party Defendant would show that any and all available remedies have been properly and effectively disclaimed by this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Resolution by Arbitration)

95. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

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96. That this Third Party Defendant would show that, to the extent that the claims against this Third Party Defendant are subject to resolution by arbitration, the instant action against this Third Party Defendant should be dismissed.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Comply with Contractual Conditions Precedent)

97. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

98. That this Third Party Defendant would show that the Third Party Plaintiff have failed properly to comply with contractual conditions precedent to the assertion of those claims set forth in the Complaint, which failure is a bar to all claims against this Third Party Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Failure to comply with Statutory Conditions Precedent)

99. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

100. That this Third Party Defendant would show that the Third Party Plaintiff have failed to comply with the statutory conditions precedent to the assertion of claims set forth in the Complaint.

FOR AN AFFIRMATIVE DEFENSE
(Failure to give notice of breach of warranty)

101. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

102. That this Third Party Defendant would show that the Third Party Plaintiff have failed to give reasonable notice of any alleged breach of any

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applicable warranty, which breach of warranty or warranties is hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Reservation and Non-Waiver)

103. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

104. That this Third Party Defendant do not waive, and hereby specifically reserves, any additional and/or further defenses, the propriety of which may be indicated by additional information which may be acquired by this Third Party Defendant or its/their counsel during the course of discovery or otherwise.

FOR AN AFFIRMATIVE DEFENSE
(Joint Tort Feasors Act)

105. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

106. That this Third Party Defendant would show that, in the event of a verdict rendered jointly against this Third Party Defendant and the remaining Defendant(s), this Third Party Defendant are entitled to contribution from said remaining Defendant(s), pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act and/or other provisions of law.

FOR AN AFFIRMATIVE DEFENSE

107. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

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108. That this Third Party Defendant would allege that any recovery against this Third Party Defendant must be set off or reduced or abated or apportioned to the extent that any other party's actions caused or contributed to any damages, if any, or as otherwise provided pursuant to relevant sections of the South Carolina Contribution Among Joint Tort Feasors Act, Section 15-38-10, et seq. SC Code Amended.

FOR AN AFFIRMATIVE DEFENSE

109. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

110. That this Third Party Defendant would show that the design and materials used in the construction of subject property in question were developed, selected, and/or approved by other defendants, thereby reliving this Third Party Defendant of any liability or responsibility for damages resulting from design deficiencies or materials which may not have been suitable for incorporation into the subject property.

FOR AN AFFIRMATIVE DEFENSE
(Protections under Constitution(s))

111. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

112. That this Third Party Defendant would show that the imposition of punitive damages is violative of protections afforded by the 5th, 8th, and 14th and/or other amendments to the United States and/or South Carolina constitutions.

FOR AN AFFIRMATIVE DEFENSE
(Statutes of Repose)

113. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

114. That this Third Party Defendant would show that the Third Party Plaintiff's claims are barred by the applicable statute and/or statutes of repose.

FOR AN AFFIRMATIVE DEFENSE
(Statute of Frauds)

115. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

116. That this Third Party Defendant would show that the claims of the Third Party Plaintiff are barred by the Statute of Frauds.

FOR AN AFFIRMATIVE DEFENSE
(Learned Intermediaries and Sophisticated User Doctrine)

117. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

118. Without admitting its products were installed on the subject structure, this Third Party Defendant submits that the products installed on the structure were sold to learned intermediaries or sophisticated users who, in turn, through the exercise of their own knowledge and expertise, should have known and appreciated the proper uses and requirements of the products and, therefore, this Third Party Defendant pleads the Learned Intermediary and Sophisticated User Doctrines as a complete defense to this action.

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FOR AN AFFIRMATIVE DEFENSE
(Spoliation of Evidence)

119. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

120. Without admitting that its products were installed on the subject structure, this Third Party Defendant submits that repairs may have been made to the subject structure and further, that the alleged defective products may have been destroyed. To the extent that this Third Party Defendant has not been afforded the opportunity to inspect and examine the alleged defective products and/or their components, this Third Party Defendant pleads the Spoliation of Evidence Doctrine as a complete defense to this action.

FOR AN AFFIRMATIVE DEFENSE

121. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

122. That any products designed, manufactured, and/or distributed by this Third Party Defendant are found to be the cause of damages suffered by Third Party Plaintiffs, which this Third Party Defendant hereby specifically denies, the Third Party Plaintiff cannot recover against this Third Party Defendant if and to the extent that the use of such products was under circumstances constituting an alteration or modification of the products as provided in South Carolina Code Section 15-73-10, and/or otherwise.

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FOR AN AFFIRMATIVE DEFENSE

123. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

124. In the event that the products designed, manufactured, and/or distributed by this Third Party Defendant are found to be the cause of damages suffered by Third Party Plaintiff, which this Third Party Defendant specifically hereby denies, Third Party Plaintiff cannot recover against this Third Party Defendant if and to the extent that the use of the products was under circumstances constituting a lack of reasonable or diligent care, and/or was an unreasonable use as defined in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

125. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

126. Products manufactured by this Third Party Defendant conformed to the current state of the art at all relevant times and such products were reasonably designed. Upon information and belief, Third Party Plaintiff's claims of alleged defects in the products, which claims are hereby specifically denied, are based upon an inherent characteristic of such products, that cannot be eliminated without substantially compromising the products usefulness or desirability, which is recognized by the ordinary person with the ordinary knowledge, and to the community, such that Third Party Plaintiff cannot recover anything from this Third Party

Defendant, as provided in South Carolina Code Section 15-73-20, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

127. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

128. That all claims against this Third Party Defendant, based on warranty or the Uniform Commercial Code, are barred because, among other considerations, the transaction at issue is a contract primarily for services rather than goods, and this Third Party Defendant's products, once installed in improvements to real property, cease to be goods.

FOR AN AFFIRMATIVE DEFENSE

129. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

130. To the extent that any petition in bankruptcy has been filed by or on behalf of this Third Party Defendant, this Third Party Defendant would pled discharge in bankruptcy as a complete defense to any and all claims.

FOR AN AFFIRMATIVE DEFENSE

131. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

132. That this Third Party Defendant would show that the Plaintiff lacks sufficient legal privity with this Third Party Defendant to permit imposition of liability.

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FOR AN AFFIRMATIVE DEFENSE

133. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

134. That this Third Party Defendant would show that it has made no representations of warranties inducing the purchase for use of its products by Plaintiff or others, except such warranties which may be express and in writing, and such express warranties are the only and best evidence of their content and legal effect, and include lawful disclaimers of implied warranties of merchantability and fitness for a particular purpose, and include limitations and responsibility to this Third Party Defendant. This Third Party Defendant is not responsible for any warranties or representations of purchases and resellers of its products.

FOR AN AFFIRMATIVE DEFENSE

135. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

136. That the Third Party Plaintiff are without standing to assert those claims set forth within the relevant Complaint, and the Third Party Plaintiff's claims should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

137. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

138. That this Third Party Defendant would show that the Third Party Plaintiff have failed to comply with those conditions precedent to litigation, as set

forth within the relevant Master Deed, and the Third Party Plaintiff's Complaint, and all causes of action set forth therein, should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

139. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

140. That this Third Party Defendant is informed and believes that the Third Party Plaintiff have failed to comply with the provisions of Sections 40-59-10 et seq., and/or Section 40-11-10 et seq., South Carolina Code of Laws (1976), as amended, and the Third Party Plaintiff's Complaint should, therefore, be stayed and/or dismissed.

FOR AN AFFIRMATIVE DEFENSE

141. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

142. That, to the extent that the Third Party Plaintiff has failed to comply with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (Section 40-59-810 through 40-59-860), and/or Sections 40-11-500 through 40-11-570, South Carolina Codes of Laws (1976), including the provision of the required notice to the Third Party Defendant, and the provisions to the Third Party Defendant of an opportunity to cure, the Third Party Plaintiff's action must be stayed and/or otherwise barred.

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WHEREFORE, having fully answered the Third Party Complaint of Lennar Carolinas, LLC, this Third Party Defendant prays as follows:

a. That the third party claims of Lennar Carolinas, LLC be dismissed, with prejudice, as to this Third Party Defendant, with costs to this Builders FirstSource-Southeast Group, LLC;

b. That this Third Party Defendant be granted jury trial on all matters so triable;

c. That this Third Party Defendant be granted such other and further relief as this Court may deemed just and proper.

HOWELL, GIBSON & HUGHES, P.A.

By: _____
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorney for Builders FirstSource-Southeast Group, LLC

Beaufort, South Carolina

December 15, 2015

2015 DEC 21 PM 1:12
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answer to the Third Party Complaint upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on December 15, 2015.

By: _____
Stephen P. Hughes

HARPER LITTLE
PLLC

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P: 662.234.0320
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James D. Harper*
Terry Little
C. Clay Olson***
Lauren Olson***

*Also licensed in Alabama and Tennessee
*** Licensed in South Carolina

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October 25, 2019

Leah Dupree
Berkeley County Clerk of Court
300 California Dr. # B
Moncks Corner, SC 29461

Re: Builders First Source v. MI Window, Charleston Exteriors, et al.
Cause No. 2018-CP-08-02547

Dear Ms. Dupree,

On October 11, 2019 we filed a Motion for Summary Judgment, regarding the above mentioned. At the time we filed the motion we inadvertently omitted the exhibits, which are attached. Please file these exhibits regarding the above-mentioned case number.

Thank you for your attention to this matter. Should you need anything further, please contact our office.

Sincerely,

/s/ Clay Olson

C. Clay Olson

CCO/cb

cc: Opposing counsel

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Builders FirstSource

BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into effective as of 10/17, 2012 between **Builders FirstSource – Southeast Group, LLC**, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com ("Contractor"), and Charleston Exteriors, LLC. address 610 Black Oak Blvd, Summerville, SC 29485, telephone 843-771-1494, fax: 843-771-1495, Contact: Eddie Taylor, e-mail: etaylor@charlestonexteriors.com ("Subcontractor").

SECTION 1. Introduction.

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

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

Subcontractor

Contractor

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

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

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

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

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

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

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

d. **Safety and Environmental.**

Subcontractor

Contractor

[Version – 5/17/06]

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

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

Subcontractor agrees as follows:

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

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

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

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

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

Subcontractor

Contractor

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

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

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

SECTION 3. Warranty.

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

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

SECTION 4. Insurance.

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

a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.

b. **Employer's Liability Insurance** - $1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.

c. **Commercial General Liability** - $1,000,000 per occurrence, $1,000,000 products-completed operations aggregate, $1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.

d. **Business Auto Liability**, including hired and non-owned auto coverage - $500,000 combined single limit.

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

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

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SECTION 5. INDEMNITY.

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

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

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

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

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

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

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

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

SECTION 7. Default and Damages.

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

(1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.

(2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.

(3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.

(4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)

(5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.

(6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.

(7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. **Damages.**

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

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

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

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

SECTION 8. Payment to Subcontractor.

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

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

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

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

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

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

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

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

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

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

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

(6) Contractor has received payment from Owner.

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

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

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

SECTION 9. Miscellaneous.

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

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

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

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

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

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

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

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

SUBCONTRACTOR:

CHARLESTON EXTERIORS, LLC

By: _____

Name: EDWARD L TAYLOR

Title: OWNER

45-4549180

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

BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC

By: _____

Name: Deryl Ward

Title: Vice President

Subcontractor _____

Contractor _____

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7/2/14

656 COLEMAN V. WINSOR SOUTH — CHARLESTON EXTERIORS000013

ACORD®

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY): 3/27/2014

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER INDEPENDENT INSURANCE ASSOCIATES 227 Main St. Fort Mill SC 29715	CONTACT NAME: Jeremy Stroud PHONE (A/C, No, Ext): (803) 802-3156 FAX (A/C, No): (803) 802-3158 E-MAIL ADDRESS: jeremy@iiassoc.com
INSURED Charleston Exteriors LLC 610 Black Oak Blvd. Summerville SC 29485-5809 SUB VID 525378 pls update/leave active	INSURER(S) AFFORDING COVERAGE — NAIC # INSURER A: Owners — 32700 INSURER B: Auto Owners INSURER C: Arch Insurance INSURER D: INSURER E: INSURER F:

COVERAGES — CERTIFICATE NUMBER: CL1231600023 — REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
C	GENERAL LIABILITY X COMMERCIAL GENERAL LIABILITY CLAIMS-MADE X OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: X POLICY PRO-JECT LOC			AGL0011184-00	03/26/2014	03/26/2015	EACH OCCURRENCE DAMAGE TO RENTED PREMISES (Ea occurrence) MED EXP (Any one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCTS - COMP/OP AGG	$ 1,000,000 $ 50,000 $ 10,000 $ 1,000,000 $ 2,000,000 $ 2,000,000
A	AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS X SCHEDULED AUTOS X HIRED AUTOS X NON-OWNED AUTOS			49-095465-00	3/14/2014	4/14/2015	COMBINED SINGLE LIMIT (Ea accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)	$ 1,000,000 $ $ $
	UMBRELLA LIAB OCCUR EXCESS LIAB CLAIMS-MADE DED RETENTION $						EACH OCCURRENCE AGGREGATE	$ $
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) Y/N N If yes, describe under DESCRIPTION OF OPERATIONS below	N/A		36122474	03/26/2014	03/26/2015	X WC STATU-TORY LIMITS OTH-ER E.L. EACH ACCIDENT E.L. DISEASE - EA EMPLOYEE E.L. DISEASE - POLICY LIMIT	$ 1,000,000 $ 1,000,000 $ 1,000,000

RECEIVED BY
HSA 4-2-14
BUILDERS FIRST SOURCE
LEGAL DEPARTMENT

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)
Certificate hholder is an additional insured per form CG 2010 07 04 on the general liability policy and automobile policy as required by written contract. Insurance coverage is primary and non-contributory to any other insurance available to the certificate holder. The insurance evidenced on this certificate includes a waiver of subrogation in favor of the certificate holder.

CERTIFICATE HOLDER

(214) 231-6160

Builders FirstSource - Southeast Group, LLC
Att.: Legal Department
2001 Bryan Street, Ste. 1600
Dallas, TX 75201

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

Jeremy Stroud/JEANNE

ELECTRONICALLY FILED - 2019-Oct-25 4:54 PM - BERKELEY - COMMON PLEAS - CASE#2018CP0802547

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856 COLEMAN V. WINSOR SOUTH

CHARLESTONEXTERIORS000014

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY) 4/1/2013

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER INDEPENDENT INSURANCE ASSOCIATES 227 Main St. Fort Mill SC 29715	CONTACT NAME: Jeremy Stroud PHONE (A/C, No, Ext): (803) 802-3156 FAX (A/C, No): (803) 802-3158 E-MAIL ADDRESS: jeremy@iiassoc.com
INSURED Charleston Exteriors LLC 610 Black Oak Blvd. Summerville SC 29485-5809 SUB VID53578 pls update & reactivate	INSURER(S) AFFORDING COVERAGE / NAIC # INSURER A: Owners 32700 INSURER B: Auto Owners INSURER C: Endurance American Specialty INSURER D: INSURER E: INSURER F:

COVERAGES CERTIFICATE NUMBER: CL1231600023 REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
C	GENERAL LIABILITY X COMMERCIAL GENERAL LIABILITY CLAIMS-MADE X OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: X POLICY PRO-JECT LOC			CBC10001517400	03/26/2013	03/26/2014	EACH OCCURRENCE DAMAGE TO RENTED PREMISES (Ea occurrence) MED EXP (Any one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCTS - COMP/OP AGG	$ 1,000,000 $ 50,000 $ 10,000 $ 1,000,000 $ 2,000,000 $ 2,000,000
A	AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS X SCHEDULED AUTOS X HIRED AUTOS X NON-OWNED AUTOS			49-095465-00 HSA 4-1-13	3/14/2013	3/14/2014	COMBINED SINGLE LIMIT (Ea accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)	$ 1,000,000 $ $ $
	UMBRELLA LIAB OCCUR EXCESS LIAB CLAIMS-MADE DED RETENTION $						EACH OCCURRENCE AGGREGATE	$ $
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) Y/N N If yes, describe under DESCRIPTION OF OPERATIONS below	N/A		36100335	03/26/13	03/26/2014	X WC STATU-TORY LIMITS OTH-ER E.L. EACH ACCIDENT E.L. DISEASE - EA EMPLOYEE E.L. DISEASE - POLICY LIMIT	$ 1,000,000 $ 1,000,000 $ 1,000,000

RECEIVED BY
BUILDERS FIRST SOURCE
LEGAL DEPARTMENT

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)
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CERTIFICATE HOLDER

(214)231-6160

Builders FirstSource - Southeast Group, LLC
Att.: Legal Department
2001 Bryan Street, Ste. 1600
Dallas, TX 75201

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

Jeremy Stroud/JEANNE

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CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY) 10/17/2012

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

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PRODUCER INDEPENDENT INSURANCE ASSOCIATES 227 Main St. Fort Mill SC 29715	CONTACT NAME: Jeremy Stroud PHONE (A/C, No, Ext): (803) 802-3156 FAX (A/C, No): (803) 802-3158 E-MAIL ADDRESS: jeremy@iiassoc.com
INSURED Charleston Exteriors LLC 610 Black Oak Blvd. Summerville SC 29485-5809	INSURER(S) AFFORDING COVERAGE — NAIC # INSURER A: Owners — 32700 INSURER B: Auto Owners INSURER C: Northfield Insurance Co. INSURER D: INSURER E: INSURER F:

COVERAGES CERTIFICATE NUMBER: CL1231600023 REVISION NUMBER:

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INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
C	GENERAL LIABILITY X COMMERCIAL GENERAL LIABILITY CLAIMS-MADE X OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: POLICY PRO-JECT LOC			W8136606	03/26/2012	03/26/2013	EACH OCCURRENCE DAMAGE TO RENTED PREMISES (Ea occurrence) MED EXP (Any one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCTS - COMP/OP AGG	$ 1,000,000 $ 50,000 $ 10,000 $ 1,000,000 $ 2,000,000 $ 2,000,000
A	AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS X SCHEDULED AUTOS X HIRED AUTOS X NON-OWNED AUTOS			49-095465-00	3/14/2012	3/14/2013	COMBINED SINGLE LIMIT (Ea accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)	$ 1,000,000 $ $ $
	UMBRELLA LIAB OCCUR EXCESS LIAB CLAIMS-MADE DED RETENTION $						EACH OCCURRENCE AGGREGATE	$ $
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? Y/N N (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	N/A		36100335	03/26/12	03/26/2013	X WC STATU-TORY LIMITS OTH-ER E.L. EACH ACCIDENT E.L. DISEASE - EA EMPLOYEE E.L. DISEASE - POLICY LIMIT	$ 1,000,000 $ 1,000,000 $ 1,000,000

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Att.: Legal Department
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Dallas, TX 75201

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AUTHORIZED REPRESENTATIVE

Jeremy Stroud/JEANNE

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MARY BASS LOHR
THOMAS A. BENDLE, JR.

WILLIAM H. COX, III
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CATHERINE L. FLOEDER

JAMES S. GIBSON, JR. *
Of Counsel

*Certified Mediator

25 RUE DU BOIS
LADY'S ISLAND
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January 17, 2020

The Honorable Clifton Newman
P O Box 516
Kingstree, SC 29556

Re: Builders FirstSource-Southeast Group, LLC v. ECC Contracting LLC, MI Windows and Doors, Inc., Hurley Services, LLC, and Charleton Exteriors LLC

Civil Action No.: 2018-CP-08-02547

Dear Judge Newman:

I am submitting this correspondence pursuant to your instruction that I was permitted to provide a memorandum or additional comment with respect to my positions at issue in Plaintiff's motion to reconsider.

You will recall that after filing this action, the Plaintiff moved to stay and consolidate this matter with Case Number 2014-CP-08-02424 referred to by the parties as the *Damico* litigation. As the Court is aware, this action involves common questions of law and fact with that of the *Damico* litigation. Additionally, the interest of justice and judicial economy will be served by a consolidation of these actions. While your honor agreed that a consolidation is appropriate, you determined that because the *Damico* litigation is on appeal this Court was without jurisdiction to consolidate the actions. Therefore, the Court determined that a stay was appropriate until such time that the *Damico* litigation is remanded back to this Court's jurisdiction because the cases will be consolidated.

Upon further reflection of all our motions, arguments and writings exchanged to date in this matter, I believe that we have lost sight of the stay and consolidation.

The Order at issue finds that the Plaintiffs claims are subject to consolidation with the *Damico* litigation and that this matter will remain stayed until further notice or order. However, the Order at issue also grants summary judgment on some of the claims of Plaintiff which has a direct impact upon the *Damico* litigation for

which this Court has previously determined that it has no jurisdiction because of the appeal.

I would respectfully submit that since the Court has determined that a consolidation and stay are appropriate, there shall be no rulings affecting the litigation upon appeal because the Court is without jurisdiction.

Yesterday, your honor indicated that you were not inclined to change your ruling, however you felt that the Order needed additional language and requested that Mr. Grimball submit a proposed Order including the same. However, should your honor now determine that a consolidation and stay will not be granted, I would note that our courts have found that refusing to grant a stay is not appropriate when conclusion of the proceeding before the court could act as a bar to relief in the related case. See *Civil Action No.: #2001-CP-32-0711 Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm'n*, 367 S.C. 141, 151 (Ct. App. 2006); *Talley v. John–Mansville Sales Corp.,* 285 S.C. 117, 118–19 n. 2 (1985).

With kindest regards, I am

Yours truly,

HOWELL, GIBSON & HUGHES, P.A.

s/Witt

William H. Cox, III

WHC/whc

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2014-CP-08-02424
Appellate Case No. 2020-000415

Builders FirstSource-Southeast Group, LLC.....Appellant,

v.

MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC.....Respondents.

CERTIFICATE OF COMPLIANCE

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

Via: Email
Clay Olson, Esq. (clay@harperwhitwell.com)
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Bar No.: 101991
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(843) 522-2400
Attorney for Appellant Builders
FirstSource – Southeast Group, LLC

Beaufort, South Carolina
December 1, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2014-CP-08-02424
Appellate Case No. 2020-000415

Builders FirstSource-Southeast Group, LLC.....Appellant,

v.

MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal contains all material proposed to be included of any of the parties, and no other material.

Via: Email
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164 Market Street, Suite 139
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Attorney for Charleston Exteriors, LLC

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Beaufort, South Carolina
December 1, 2020