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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-001496
Case No. 2019-CP-10-00772

Opinion No. 2025-UP-082

Dag Pavic and Stela Susac-Pavic……...……Plaintiffs,

v.

Carolina Cottage Homes, LLC d/b/a Saussy Burbank; SB Holding, LLC d/b/a Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services, LLC; Simons Contractors, LLC and Cohen's Drywall Company, Inc.,……...……..Defendants,

of which Hurley Services, LLC is the ……...……....Respondent.

AND

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

v.

MW Manufacturers, Inc.,……..……Third Party Defendant.

APPENDIX VOLUME II

HOWELL, GIBSON & HUGHES, P.A.

Stephen P. Hughes
Bar No.: 2805
William H. Cox, III
Bar No.: 10199
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
sphughes@hghpa.com
wcox@hghpa.com

Attorneys for Builders FirstSource-Southeast Group, LLC

HOLCOMBE BOMAR, P.A.

Todd Russell Flippin
Bar No.: 101197
Post Office Box 1897
Spartanburg, SC 29304
(864) 594-5300
tflippin@holcombebomar.com

Attorney for Hurley Services, LLC

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO: 2019-CP-10-00772
	)	
Dag Pavic and Stela Susac-Pavic,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**MEMORANDUM IN OPPOSITION TO HURLEY SERVICES, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
	)	
Carolina Cottage Homes, LLC dba Saussy Burbank; SB Holding, LLC dba Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services LLC; Simons Contractors, LLC and Cohen's Drywall Company, Inc.;	)	
	)	
Defendants,	)	
	)	
Builders FirstSource-Southeast Group, LLC	)	
	)	
Third Party Plaintiff,	)	
	)	
Vs.	)	
	)	
MW Manufacturers, Inc.	)	
	)	
Third Party Defendant.	)	

This Memorandum is submitted in opposition to the amended motion of Hurley Services, LLC, by which Hurley Services has sought partial summary judgment as to the crossclaims asserted by Builders FirstSource-Southeast Group, LLC. Based upon those considerations set forth hereinafter, it is respectfully submitted that the Hurley Services motion should be denied.

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FACTUAL ALLEGATIONS

The captioned action is one by which the plaintiffs, Pavic, have sought recovery of damages allegedly occasioned by deficiencies in original construction of the subject residence, located at 1368 Penshell Place, Mount Pleasant, South Carolina.

The plaintiffs' claims, as asserted against Builders FirstSource (hereinafter referred to as "BFS") and its subcontractor, Hurley Services LLC (hereinafter referred to as "Hurley"), are premised upon alleged deficiencies in installation of windows during original construction. Installation of windows, inclusive of related flashings and other components, was implemented, on behalf of BFS, by Hurley, pursuant to a Master Subcontractor Agreement executed between those parties on May 14, 2012. The Master Subcontractor Agreement included specific provisions by which Hurley undertook to defend and indemnify BFS against liability, loss, or damage arising out of the negligent acts or omissions of Hurley in the performance of its work.

The plaintiffs have alleged that the windows and related flashings were improperly installed, resulting in water infiltration and associated damages. In support of those contentions, the plaintiffs have offered testimony of their primary forensic expert, professional engineer Russell T. Mease. Mr. Mease, premised upon alleged findings during visual and destructive investigation, claimed, within his relevant report, and upon deposition testimony, to have identified deficiencies in the installation of windows, resulting in damages and necessary repairs.

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HURLEY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Hurley asserts in its motion for partial summary judgment the following bases:

1. There exists no issue as to any material fact and Hurley is entitled to judgment dismissing cross-claims for breach of express and implied warranty, negligence, breach of contract, and contractual indemnity as a matter of law.

2. The cross-claims for breach of express and implied warranty, breach of contract, and negligence are merely disguised claims for equitable indemnity and fail as a matter of law under *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group,* 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015).

3. The cross-claim for contractual indemnity is based on contractual provisions that are neither clear nor unequivocal, and are against public policy and the laws of South Carolina and fail as a matter of law under *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 819 S.E.2d 166, 172 (S.C. Ct. App. 2018).

4. The cross-claims for breach of express and implied warranty, negligence, and contractual indemnity are barred by the doctrine of collateral estoppel.

5. That the Master Subcontract, including indemnification provisions, is a contract of adhesion which was drafted by BFS and should be strictly construed against BFS and in favor of Hurley.

6. That the Master Subcontract of BFS is ambiguous, contains conflicting provisions, is unconscionable, gives Hurley no meaningful choices, and the inequality is so gross as to shock the conscience of the court.

7. That BFS provided MW Series 800 windows manufactured by MW Manufacturers Inc., for installation at the plaintiffs' residence; that although these windows were subject to a class-action suit and settlement, and BFS filed a third party complaint against MW Manufacturers Inc., the Master Subcontract drafted by BFS provides that Hurley warranty, guarantee, and indemnify BFS for loss or damage caused by theses windows, which BFS provided to Hurley; that these terms as so oppressive that no responsible

person would make them and if understood, no fair and honest person would accept them.

8. That the Master Subcontract drafted by BFS violates South Carolina public policy, and South Carolina law, including but not limited to Section 32-2-10 S.C. Code.

Hurley also requests that the Court take judicial notice of the order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of *Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC*, 2016-CP-10-3455 and the order of the Honorable Clifton Newman filed February 3, 2020 in the Court of Common Pleas for Berkeley County in the case of *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al.* as Civil Action No. 2018-CP-08-2547.

For the reasons set forth herein, the court should deny Hurley's motion for partial summary judgement.

BFS ARGUMENT IN OPPOSITION

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

Summary judgment is proper if "…there is no genuine issue as to any material fact", and the moving party is "entitled to judgment as a matter of law." Rule 56(c) SCRCP. To determine whether summary judgment is appropriate, the court must view "the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the non-moving party". *Hancock v. Mid Management Company*, 381 S.C. 326, 329, 673 S.E. 2nd 801, 802 (2009). To survive a motion for summary judgment,

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the non-moving party need only show a mere scintilla of evidence. *Id.* (holding that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand the motion for summary judgment").

As demonstrated hereinafter, the testimony, offered on behalf of the plaintiffs by their retained expert, Russell T. Mease, PE, is sufficient to establish a genuine issue of material fact, precluding summary judgment in favor of Hurley.

The windows and associated flashings at the plaintiffs' residence were installed by Hurley, pursuant to obligations undertaken by Hurley under the Master Subcontractor Agreement executed with BFS.

Plaintiffs' expert, Mease testified that he identified deficiencies in the installation of the windows at the Pavic residence. Specifically, Mr. Mease determined that

(a) the flexible Fortiflash rough opening flashing at the windows had not been properly weather lapped outboard of the woven building wrap installed beneath the window sill; See Exhibit A deposition transcript of Russell T. Mease, February 21, 2020, at line 10 page 189 through line 11 page 190 and lines 6 -19 page 195;

(b) the flexible Fortiflash material had not been installed to a sufficient depth within the window rough opening framing and the material did not appear to turn up the vertical leg of the jamb, rendering the flashing ineffective; See Exhibit A Mease deposition transcript at line 23 page 186 through line 11 page 187;

(c) the head flashing of the windows had not been properly integrated (weather lapped) with a building wrap above the windows. See Exhibit A Mease deposition transcript at line 25 page 120 through line 12 page 121.

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Mr. Mease further contended that the aforesaid failures constituted violations of Section 703.8, of the International Residential Code, 2006 Edition. He further opined that the aforesaid purported deficiencies in window flashing installations, coupled with the omission of a proper sealant joint around window perimeters, had resulted in water intrusion and associated damages at or around window locations. See Exhibit A Mease deposition transcript at lines 2 - 15 page 118.

Mr. Mease also testified that appropriate integration of window flashings and adjacent weather resistant barrier were addressed within the relevant building code, and that such procedures should have been known to the window installation subcontractor. See Exhibit A Mease deposition transcript at lines 11 - 19 page 166.

As noted above, plaintiffs have alleged that the windows were installed improperly and that the plaintiffs have sustained or will sustain damages resulting from the improper window installation. Plaintiffs have imputed fault associated with the improper window installation, by Hurley, to BFS. Thus, the evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to BFS, clearly suggest negligent acts or omissions by Hurley in its installations of the windows and related flashings, causing the water intrusion and associated damages at the subject residence. At the very least, the testimony of Mr. Mease establishes a scintilla of evidence adequate to preclude summary judgment in favor of Hurley.

2. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group,* 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015) is good law and therefore the BFS cross-claims for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity.

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

3. The BFS cross-claim for contractual indemnity is based on contractual provisions that comply with South Carolina law.

The indemnity claims, as asserted by BFS in this action, are premised upon rights afforded pursuant to its Master Subcontractor Agreement, executed between BFS and Hurley on May 14, 2012. A copy of the aforesaid Master Subcontractor Agreement is attached hereto and fully incorporated by reference as Exhibit B. The Master Subcontractor Agreement includes not only specific provisions relating to "Indemnity" at Section 5, but also specific severability provisions, as set forth in Section 9. All of those provisions, and the rights afforded thereunder, are specifically subject to relevant law, and the rights pursued by BFS are consistent with such law, as articulated by the Court of Appeals, in the matter of *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 819 S.E.2d 166 (S.C. Ct. App. 2018), reh'g denied (Oct. 18th, 2018).

Hurley argues that the BFS cross-claim for contractual indemnity is based on contractual provisions that are neither clear nor unequivocal and fail as a matter of law under *Concord & Cumberland.*

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It bears repeated emphasis, however, that BFS, by its cross-claim, is seeking indemnity, from its subcontractor, Hurley, not against liability for loss or damage arising out of any negligence of BFS itself, but rather is seeking indemnity only against liability for damage or loss arising out of the sole or concurrent negligent acts or omissions of its subcontractor, Hurley, in the performance of the subcontractor's work. Under the circumstances, the clear and unequivocal standard, as articulated by the Court of Appeals in *Concord & Cumberland*, does not apply.

As noted hereinabove, BFS undertook to supply and install windows and doors in connection with original construction of the subject residence. Actual installation of the windows and related flashings was, in turn, implemented by Hurley, pursuant to a subcontract agreement with BFS. BFS was thereafter subjected to claims asserted by the plaintiffs, which sought recovery of damages allegedly occasioned by purported deficiencies in such window installation.

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

> TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITY, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEYS FEES (SUCH LEGAL COSTS TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR

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> 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 SUCBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLEGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THE SUBJECT AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.
> (Emphasis Supplied)

BFS-Hurley Master Subcontractor Agreement paragraph one Section 5.

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

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

In *Concord & Cumberland*, the Court of Appeals considered indemnification provisions which were virtually identical to those at issue in the instant litigation. In that case, the general contractor, Superior Construction, sought indemnification from its window installation subcontractor, Muhler, against damages arising from both (a) the negligence of the subcontractor, and (b) the concurrent negligence of Superior (the general contractor) itself. The Circuit Court found that the indemnification provisions of the Subcontract Agreement were not sufficiently "clear and unequivocal" as to require

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Muhler to indemnify Superior for Superior's own negligence. However, the Circuit Court specifically determined that those indemnity provisions did in fact obligate the subcontractor, Muhler, to indemnify the general contractor, Superior, against claims and damages caused by the negligent acts or omissions of Muhler. The Court of Appeals affirmed the determination of the Circuit Court, noting, repeatedly within its opinion, that, although the indemnification provision of the relevant subcontract agreement was not sufficiently clear and unequivocal to require indemnification against the general contractor's own negligence, such indemnification provision nonetheless obligated the subcontractor to indemnify the general contractor against loss or damage caused by the negligence acts or omissions of the subcontractor.

At the crux of *Concord & Cumberland* was the fact that the general contractor was trying to recover from its subcontractor for the general contractor's own negligence. **That is not the case here**. BFS is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Hurley's negligence. When, as here, a contractor does not seek indemnity for its own negligence, the clear and unequivocal standard does not apply, and the indemnity provision is not invalid.

Appropriate application of the *Concord & Cumberland* standard to the contractual provision at issue in the instant proceeding clearly authorizes pursuit of contractual indemnity for damages caused by Hurley's negligence, whether sole or concurrent, (as opposed to damages occasioned by the sole or concurrent negligence of BFS), and, equally clearly, precludes summary judgement in favor of Hurley. The *Concord & Cumberland* opinion, in specifically authorizing indemnity in favor of a contractor, against

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losses occasioned by the negligent acts of its subcontractor, is controlling here, and requires denial of Hurley's motion for summary judgment as to the BFS cross-claim for contractual indemnity.

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

Hurley argues that the BFS cross-claims for breach of express and implied warranty, breach of contract, negligence, and contractual indemnity are barred by the doctrine of collateral estoppel. Hurley requests that the Court take judicial notice of the order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of *Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC*, 2016-CP-10-3455 and the order of the Honorable Clifton Newman filed February 3, 2020 in the Court of Common Pleas for Berkeley County in the case of *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al.* as Civil Action No. 2018-CP-08-2547 in support of its argument.

The doctrine of collateral estoppel is available when issues of fact or law are actually litigated and determined by valid and final judgment. *Carman v. South Carolina Alcoholic Beverage Control Com'n*, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis added). Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, re-litigation of those issues actually and necessarily litigated and determined in the first suit are precluded in any subsequent action based upon a different claim. *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (S.C. App. 1994) (emphasis added). A party may be collaterally estopped only by a prior final judgment. *See e.g. Jenkins v. Atlantic Coast Line Railroad Company*, 89 S.C. 408,

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71 S.E. 1010 (1911)(recognizing estoppel by judgment as distinguished from *res judicata*); *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)(discussing equitable basis for estoppel by judgment); *Graham v. State Farm Fire & Casualty Insurance Co.*, 277 S.C. 389, 287 S.E.2d 495 (1982) (lack of privity does not preclude collateral estoppel by judgment); *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct.App.1984)(further litigation of the identical issue was precluded by the former judgment); *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 684 S.E.2d 779 (Ct.App.2009)(collateral estoppel prevents relitigating an issue necessary to support the prior judgment).

Collateral estoppel is only applied when "the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action." *Graham v. State Farm Fire and Cas. Ins. Co.*, 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982); *Irby v. Richardson*, 278 S.C. 484, 298 S.E.2d 452 (1982)(where a party had a full and fair opportunity to litigate an issue he should be collaterally estopped to adjudicate the same issue in a subsequent case). BFS will not have had a full and fair opportunity to litigate the issues decided by Judge's Newman and Young until the resolution of any appeals and entry of final judgment. Only at that time could collateral estoppel be applied and then only as to the issues actually litigated and necessary to the judgment.

Here, the referenced orders of Judge Newman and Judge Young are on appeal, and thus cannot represent a final judgment for purposes of collateral estoppel. Copies of the "Notices of Intent to Appeal," are attached hereto and fully incorporated herein by referenced as collective Exhibit C. Because the orders of Judge Newman and Judge Young are not final, they cannot be used as the basis for collateral estoppel.

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5. The BFS Master Subcontractor Agreement is not a contract of adhesion.

Hurley's fifth argument is that the subcontract, including the indemnification provisions, is a contract of adhesion and should be strictly construed against BFS and in favor of Hurley.

A contract of adhesion is generally thought of as a standard form contract offered on a take-it-or-leave-it basis. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901–02 (Ct. App. 1998). The terms of the contract of adhesion are not negotiable. *Id.* An offeree faced with such a contract has two choices: complete adherence or outright rejection. *Id.* **Moreover, the fact that a contract is one of adhesion does not make it unconscionable. *Id.* at 395 (emphasis added)**. Determining whether a contract is one of adhesion is merely the beginning point in the analysis. *Id.* Unconscionability, on the other hand, requires a greater showing. *Id.* Unconscionability is characterized by the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* quoting *Fanning v. Fritz's Pontiac–Cadillac–Buick Inc.,* 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996).

BFS denies that the subcontract is one of adhesion and explains below in Section 6 why the agreement is also not unconscionable. Hurley's counsel has not submitted any evidence whatsoever in support of its argument that the subcontract is one of adhesion. Therefore, the Court must deny Hurley's motion as this argument is wholly lacking in merit and the requisite evidence needed to support a granting of summary judgment.

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6. The BFS Master Subcontractor Agreement is not ambiguous, does not contain conflicting provisions, and is not unconscionable.

Hurley's sixth argument is that the subcontract is ambiguous, contains conflicting provisions, is unconscionable, gives Hurley no meaningful choices, and the inequality is so gross as to shock the conscience of the court.

Whether one party lacks a meaningful choice in entering the agreement at issue typically speaks to the fundamental fairness of the bargaining process. *Gladden v. Boykin*, 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013). In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668–69 (2007). However, if a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. *Id.* citing S.C. Code Ann. § 36–2–302(1) (2003). As always, when construing a contract, the primary objective of the court must be to ascertain and give effect to the intention of the parties. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004).

Hurley and BFS entered into a Master Subcontractor Agreement in May 2012 and again in December 2014. A copy of the December 18, 2014 Master Subcontractor Agreement is attached hereto and fully incorporated herein by referenced as Exhibit D. Any amendments to the agreement were to be in writing. See Master Subcontractor Agreement Section 1(a). Hurley could terminate the agreement by written notice to BFS within 24 hours after any amendment that materially increased the cost or difficulty of

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performance by Hurley. *Id.* The Subcontractor may perform Work on multiple projects at multiple locations with the specifics thereof to be described in Work Orders that are incorporated into the Master Subcontractor agreement by reference. See Master Subcontractor Agreement Section 1(b). The term of the Master Subcontractor agreement is for three (3) years with automatic renewals for one (1) year periods unless either party gives written notice to the other that it is electing to terminate at the end of the term. See Master Subcontractor Agreement Section 1(c).

Hurley voluntarily entered into the Master Subcontractor Agreement in May 2012 and entered into a second Master Subcontractor Agreement in December 2014. Hurley was free to terminate the May 2012 Agreement, but instead chose to execute the December 2014 Agreement. Any argument that the Agreement is one-sided and unconscionable is simply not supported by the provisions of the Agreement itself or the actions of Hurley. At the very least, these facts are certainly more than a scintilla of evidence which precludes summary judgment in Hurley's favor. Thus, the Court must deny Hurley's motion for summary judgment on the BFS claim for contractual indemnity.

In the alternative, Section 9(f) of the Master Subcontractor Agreement states clearly that the provisions are independent and severable, and any invalid provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. Also in Section 9(f), the parties agreed that it was their intent that any invalid provision be reformed to the extent necessary to make it enforceable to the maximum extent of the law. BFS denies that the Master Subcontractor Agreement or any provision therein is unconscionable. However, if the Court finds that it needs to strike a provision,

as Hurley argues, the provisions are severable and may stand on their own, as the parties intended.

BFS also denies that the Master Subcontractor Agreement is ambiguous or that the indemnity provisions are conflicting as Hurley suggest.

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

Each of the four paragraphs of Section 5 Indemnity of the Master Subcontractor Agreement addresses separate and distinct rights and obligations of the parties.

The first paragraph of Section 5 is the applicable indemnity language for property damage claims caused by the subcontractor's negligence. By the specific provisions of the first paragraph, the subcontractor has undertaken to defend and indemnify ("to the fullest extent permitted by law") BFS against liability or loss arising out of negligent acts or omissions of the subcontractor in the performance of its work for BFS.

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

> "...arising out of or resulting from bodily injury to, or sickness, disease, or death of, the subcontractor, any agent,

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employee, or representatives of the subcontractor, or any of its subcontractors..."

The provisions of the second paragraph (which impose indemnity obligations "to the fullest extent permitted by law") of Section 5 address potential claims entirely distinct from those involved in the instant action, and are irrelevant to this Court's consideration of the propriety of the BFS claims.

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

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

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

By contrast, the provisions of paragraph three of Section 5 impose, upon the subcontractor, a duty to defend. This duty to defend

> "is independent and separate from the duty to indemnify, and the duty to defend exists regardless of any ultimate liability or negligence of the contractor".

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The provisions of paragraph three of Section 5 are "clear and unequivocal" in imposing, upon the subcontractor, the duty to defend BFS, and are clearly adequate to satisfy any heightened burden which might be imposed by *Concord & Cumberland.*

Moreover, there is nothing within the statutory law of South Carolina which would prohibit such an undertaking to defend, notwithstanding the negligence of the indemnitee. The prohibitions as set forth in S.C. Code Ann. § 32-2-10 (cited by Hurley), apply only to contract provisions agreeing to indemnify a party against liability for damages resulting from the sole negligence of the indemnitee. The statute specifically does not prohibit, or even address, agreements to defend against the sole or concurrent negligence of an indemnitee.

Similarly, S.C. Code Ann. § 32-2-210, prohibiting indemnification against "liability for damages" occasioned by the sole negligence of the indemnitee, neither addresses nor prohibits separate obligations to defend.

The obligations imposed upon the subcontractor here, to defend the interests of BFS, are clearly and unequivocally set forth within the relevant Master Subcontract Agreements, are not violative of any laws or public policy of South Carolina, and should be upheld by this Court.

In light of the foregoing, any grant of summary judgment, premised upon the arguments as asserted by the movant, Hurley, would be inconsistent with South Carolina law. Therefore, the Court must deny Hurley's motion for summary judgment.

7. The windows are not at issue in this litigation.

In its seventh argument, Hurley appears to claim that the MW Manufacturing windows are at issue in this litigation and that BFS seeks for Hurley to indemnify BFS for

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loss or damage caused by the windows. This is simply not true. Plaintiffs have stipulated that they are not seeking damages occasioned by any deficiencies in the windows and that none of their claims against BFS or Hurley are premised upon any alleged window deficiencies. See Stipulation attached hereto as Exhibit E.

Prior to the execution of the Stipulation, BFS did file a third-party complaint against MW Manufacturing, Inc. asserting claims relating to the plaintiffs' alleged window deficiencies. However, at no time, EVER, has BFS filed a claim against a subcontractor seeking for the subcontractor to indemnify BFS for claims relating to alleged manufactured material or component deficiencies. This case is no exception, and Hurley's seventh argument is an attempt to mislead the Court as to the facts and issues in this matter.

8. BFS master subcontractor agreement complies with South Carolina law.

Hurley's eighth and final argument claims that the subcontract violates South Carolina public policy, and South Carolina law, including but not limited to Section 32-2-10 of the South Carolina Code.

S.C. Code Ann. § 32-2-10 provides:

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

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> independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. (Emphasis added)

As more fully detailed hereinabove, the BFS claims for contractual indemnity are premised upon rights afforded under its Master Subcontractor Agreement with Hurley. BFS, by its crossclaims, is seeking indemnity not against liability for loss or damage arising out of any negligence of BFS itself. BFS is, by contrast, seeking indemnity only against liability for loss or damage arising out of the sole or concurrent negligent acts or omissions of its subcontractor, Hurley, in the performance of Hurley's work.

The propriety of claims in indemnity, as asserted by BFS in the instant action, was specifically recognized by the *Concord & Cumberland* court. The court determined that the indemnity provisions at issue in that case were not sufficiently clear and unequivocal to impose an obligation to indemnify against the indemnitee's sole or concurrent negligence. Nonetheless, the court also determined that those indemnity provisions (which were virtually identical to those at issue here), did in fact obligate the indemnitor (Hurley), to indemnify against liability for damages arising from the negligence of the indemnitor, whether sole or concurrent.

Unlike the general contractor/indemnitee in *Concord & Cumberland*, BFS is seeking indemnity only against liability or loss arising out of the sole or concurrent negligence of its indemnitor Hurley. Such claims are consistent with current South Carolina law, as set forth within the *Concord & Cumberland* opinion.

Moreover, the relevant provisions of the Master Subcontractor Agreement, pursuant to which BFS seeks indemnity from Hurley, are equally consistent with the provisions of S.C. Code Ann. § 32-2-10. BFS is not seeking indemnity against liability for

damages arising out of its own negligence, whether sole or concurrent. BFS is seeking indemnity solely against liability for damages occasioned by the negligent acts or omissions of its subcontractor Hurley. Under the circumstances, the provisions of § 32-2-10 are irrelevant, and afford no basis for an award of summary judgment in favor of Hurley.

CONCLUSION

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

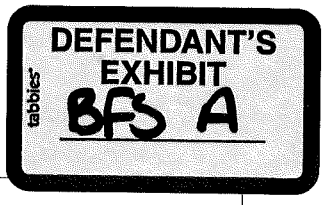
HOWELL, GIBSON & HUGHES, P.A.

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

Beaufort, South Carolina

September 25, 2020

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Q. Would you agree with me -- would you agree with me, Mr. Mease, that is your interpretation of that provision?

A. No. I'm reading it as it's written. That's what it says.

Q. Well, are you aware of other experts with different opinions with regard to the interpretation of that very specific provision?

A. I am not.

Q. Okay. We have exhausted that. And you said -- what is the other problem which you say is prevalent with regard to the installation of these rough opening flashings?

A. That they do not weather lap in a shingle fashion the other elements in the wall.

Q. Okay. Now, where is this -- again, I'm looking at Photo 46. I'm having difficulty seeing where this rough opening FortiFlash flashing does not weather lap the adjacent paper beneath it. Is there something that I am failing to see there?

A. If you will notice in the photo, the weather barrier has been folded down. Do you see that at the bottom of the picture?

Q. Hold on. I'll see. I'm looking at

the FortiFlash, which appears to me to be folded over and outward of the paper beneath it. Is that what I'm looking at?

A. No. At the bottom of the picture you'll notice that the weather-resistive barrier is folded down. I have cut it away.

Q. Right. Right. Right.

A. So the FortiFlash does not flash over to the weather barrier. It only flashes onto this piece of woven wrap that's below the window which renders it ineffective.

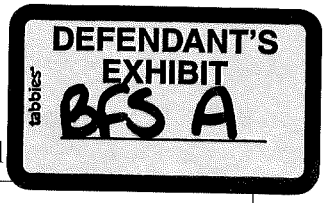
Q. Do you know when -- the piece that you folded down is part of a much, much, much larger piece of weather-resistant barrier; would you agree with that?

A. Yes. It's the primary weather barrier on the wall.

Q. Do you know when that much larger piece was installed?

A. It was after these were installed, just based upon the layering. That's all I know.

Q. Would it have been possible when installing this larger volume of weather-resistant barrier to install that beneath the piece of weather-resistant barrier over which the



regard to the installation of the flexible flashing. Was there another problem you had with that that is illustrated someplace within your documents or your report?

A. I don't believe so.

Q. Okay. So you -- again, the primary issue you have, again -- and you correct me if I'm wrong. I'm simply trying to restate your testimony so I understand it correctly. You have issues with what you consider to be an improper lapping of the FortiFlashing and the weather-resistant barrier; that's one, right?

A. Yes.

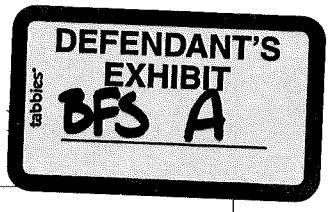
Q. And then you have a problem with what you consider to be the installation of the FortiFlashing to an inadequate depth within the framing -- rough opening framing itself; is that right?

A. Yes.

Q. Is there something else?

A. I don't believe so.

Q. Okay. Thank you. And, Mr. Mease, if I have offended you in any manner, I apologize. I did not mean to do that. I'm just trying to get certain information. I don't want you to feel as



and outbound and outside of the building wrap immediately beneath the window; is that correct?

A. Yes, essentially.

Q. That to me -- and maybe you would differ. That appears to me to be at least for the -- at least for the lap of that FortiFlash rough opening flashing and the adjacent building wrap to be an appropriate weather lapping. Would you agree with that?

A. I would if it was complete, but it's not. And here is the problem, as what we saw on the inside of the home when we removed the apron, you could see that the FortiFlash did not completely cover the rough opening. It was short of the inside edge. The other problem that you have is --

Q. Before you go any further, I want to ask you a question about that. Bear with me, please. You say it stopped short. Describe to me, please, the manner in which this FortiFlash rough opening flashing in your opinion stopped short.

A. Okay. If you will look at Photograph 78, you can see it clearly. The code requires the entire rough opening to be protected. The

FortiFlash essentially reaches halfway into the rough opening, and I believe this was because they were probably using a six-inch-wide FortiFlash, and there's about four inches that's on the outside wall, and there's about two inches that come into the rough opening. So it doesn't cover the entire framing.

Q. Is there some specific code requirement that mandates that the rough opening flashing extends the depth of the framing?

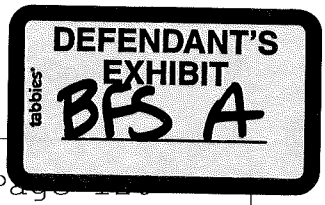
A. Yes, R-703.8.

Q. And what specifically does that say?

A. Section R-703.8 is entitled Flashing. It says: Approved corrosion-resistant flashing shall be applied shingle fashion in such a manner to prevent entry of water into the wall cavity or penetration of water to the building structural framing components.

Obviously, this building structural framing component that we see in Photo 78 is not protected by the flashing because it's not covered by it.

Q. So you're taking your interpretation of that -- it is your interpretation -- that that code provision, which does not specifically



earlier with regard to the improper fastener, more specifically, the head size being too small and the overdriven condition of the fasteners, is the same here?

A. Yes.

Q. Any additional opinions reflected in 51 that we didn't discuss earlier relative to the fasteners?

A. No.

Q. And Photo 52 is just measuring the head size of that fastener?

A. Yes.

Q. What is Photo 53 documenting?

A. 53 through 55 are all, again, just examples of the conditions that were identified that were labeled on the wall with the spacing, the overdriven condition, not-in-stud condition, those things that we discussed earlier, just examples of that.

Q. Just for purposes of trying to clarify the record, Mr. Mease, I believe specific to Photo 51 I asked you if we had previously discussed all of your opinions relative to the fasteners?

A. Yes.

Q. So jumping to Page 42 of 69, which is

Photo 56, I believe now we're getting to, perhaps, the head of the windows; am I correct?

A. Yes.

Q. What is being documented? What condition is being documented in Photo 56?

A. As specified in the caption there, the flashings do not have end dams. And as we took this area apart, the flashing has not been installed in a weather lapped configuration similar to the window below, and we did find saturated moisture content in the wall below these flashings because of the improper installation.

Q. Was any destructive -- strike that.

What location are we looking at with regard to this window head that's captured in Photo 56? Is this still at that powder room window?

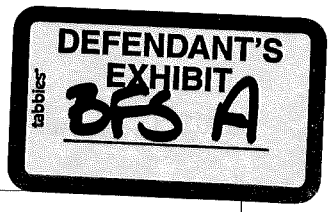
A. Yes. Yes.

Q. Which is DT-3?

A. Yes. It's the same window, just at the top.

Q. Did you make any cuts at the top of the window?

A. Yes. You see that in Photos 58 and 59.



inclusion of Photo 46 in your report?

A. Well, 46 through 50 all relay the same issue, and that is the water-intrusion damage that exists below the window and the saturated moisture content in the wall beneath this area. So it's just showing the damage that has resulted because of the improper installation.

Q. Of the weather lapping and window flashing?

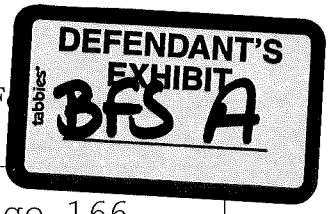
A. Yes, the flashing of the window, the lack of a sealant joint around the window. We're going to talk about the head of the window here in just a minute. There's a lot of contributing factors to the water getting in. But the failure of the system is what I would say.

Q. Okay. And I understand from looking at Photos 48, 49, and 50 and based on your prior testimony before lunch that the moisture content exceeded 40 percent at Destructive Test Site Number 3?

A. Yes.

Q. Did you observe damage to the sheathing at Destructive Site Test Number 3?

A. Yes. That's the sheathing that we're looking at in the photo.



instructions tell you is that you must have rough opening flashing and you may use a pan. And then it tells you to integrate those elements with the weather barrier based upon the weather barrier's instructions. So they kind of hand it off to the weather barrier's instructions.

Q. So the instructions provided by Ply Gem didn't give you any specific instructions on how to integrate the weather barrier; is that accurate?

A. No. It just tells you to do it according to the weather-resistant barrier manufacturer's recommendations. What I will say is the integration of weather barriers and flashings is covered by the code, and they tell you that you must lap the top element over the bottom element. I mean, it's in the code. So I don't think it is really necessary for a lot of guidance around that.

Q. By the way, have you ever installed a window?

A. I have.

Q. When did you install windows?

A. I helped install on my own house, quite a few.

DEFENDANT'S EXHIBIT tabbies BFS B

Builders FirstSource

BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this "**Agreement**") is entered into effective as of May 14, 2012, between **Builders FirstSource – Southeast Group, LLC**, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com ("**Contractor**"), and Hurley Services, LLC, address: 201 Sparkleberry Lane, Ladson, SC 29456, telephone: 843-425-5160, fax: 888-972-6563, Contact: Giovanni N. Mendes, e-mail: Hurleyservices LLC@gmail.com ("**Subcontractor**").

SECTION 1. Introduction.

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

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

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Subcontractor
Contractor

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

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

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

SECTION 2. Materials and Workmanship.

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

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

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

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

d. **Safety and Environmental.**

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

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

Subcontractor agrees as follows:

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

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

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

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

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

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Subcontractor

Contractor

[Version –5/17 /06]

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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Subcontractor

Contractor

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:	BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
Hurley Services, LLC	
By: Giovanni M. Mendes	By:
Name: Giovanni N. Mendes	Name: Deryl Ward
Title: Owner	Title: Vice President
80-0803713	
Subcontractor Social Security No. or Federal I.D. No.	

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THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Honorable Clifton B. Newman, Circuit Court Judge

2014-CP-08-02424

RECEIVED
MAR 05 2020
SC Court of Appeals

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

vs.

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

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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.

{Signature Page Follows}

HOWELL, GIBSON & HUGHES, P.A.

By: Catherine L. Floeder

Stephen P. Hughes
Mary Bass Lohr
William H. Cox, III
Catherine L. Floeder
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorneys for Builders FirstSource-
Southeast Group, LLC

Beaufort, South Carolina

March 2, 2020

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**

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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.

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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

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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

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

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

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

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

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

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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

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Honorable Clifton B. Newman, Circuit Court Judge

2014-CP-08-02424

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

vs.

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

---

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing Notice of Intent to Appeal upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on _____ day of March, 2020 addressed to the following:

L. Dean Best, Esquire
M. Shanter Chaparro
Best Honeycutt, PA
Post Office Box 13466
Charleston, SC 29422

F. Heyward Grimball, Esquire
James H. Elliott, Jr., Esquire
Richardson, Plowden & Robinson, P.A.
235 Magrath Darby Boulevard
Suite 100
Mount Pleasant, SC 29464

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SC Court of Appeals

Derek Micheal Newberry, Esquire
Hall Booth Smith, P.C.
111 Coleman Blvd
Suite 301
Mt. Pleasant, SC 29464

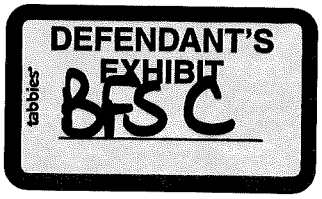
Clay Olson, Esq.
164 Market Street, Suite 139
Charleston, SC 29401

HOWELL, GIBSON & HUGHES, P.A.

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

Beaufort, South Carolina

March 2, 2020



ELECTRONICALLY FILED - 2020 Sep 24 3:00 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No.

Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually, and on behalf of others similarly situated,
Plaintiffs,

vs.

Winsor South, LLC and Jeffrey M. Thomas, individually, and on behalf of a class of construction defendants; Southeastern Recapitalization Group, LLC; WCM Construction, LLC; Jonathan J. Thomas; AC Heating and Air Conditioning Service, Inc.; ACME Doors, Inc.; Alpha Omega Construction Group, Inc.; Atlantic Construction Services, Inc.; Buck Lumber and Building Supply, Inc.; Builders FirstSource, Inc.; Builders FirstSource-Atlantic Group, LLC, Builders FirstSource-Florida, LLC a/k/a Builders FirstSource-Florida Design Center, LLC; Builders FirstSource-Southeast Group, LLC; Charlotte Flooring, Inc.; Diria Tawi Painting, Inc.; East Coast Wall Systems, Inc.; Fogel Services, Inc.; G&S Home Remodeling, LLC; Guaranteed Framing, LLC; J. Mora Brick & Block Mason, LLC; Land/Site Services, Inc.; Landmark Construction Company, Inc.; Lutzen Construction, Inc.; New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC; PJ Sanchez Masonry, LLC; Screens Plus, Inc., Simons Construction Company, LLC; Stucco by Design, LLC; Fine Builders, LLC; Speedtruss, Inc.; AS Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating, & Air, Inc.; Ashley Steel, Inc.; Cahill Contracting, LLC; Cohen's Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting and Construction a/k/a Sharon's Painting, LLC; Davis Tile; Timothy Mitchell; Electrical Design & Construction, Inc.; Fine Builders, LLC; Speedtruss, Inc.; Argentino Jose Campos d/b/a as Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating & Air, Inc.; Cahill Contracting, LLC; Cohen's Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting, LLC; David Tile; Timothy Mitchell; Electrical Design & Construction, Inc.; Hurley Services, LLC; Charleston Exteriors LLC; Jorge Diaz aka Jorge Louis Paz; San Luis Construction, Inc. nka Roofing America Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC; Horacio Jasso;

Standard Precast Walls, LLC; Alfonso Rodriguez Vasquez aka Alfonso Rodriguez, Sr.; and John Does 55-75
Defendants.

Of which Builders FirstSource – Southeast Group, LLC is the Appellant and Hurley Services, LLC and Charleston Exteriors, LLC are the Respondents.

NOTICE OF APPEAL

Builders FirstSource - Southeast Group, LLC, appeals the Order of the Honorable Roger M. Young, Sr., dated and filed April 29, 2020, a copy of which is attached hereto (Exhibit A). Counsel for the Appellant received written notice of this Order on Wednesday, April 29, 2020, and subsequently served and filed a timely motion for alteration and/or amendment of said Order. Builders FirstSource-Southeast Group, LLC also appeals the Order of the Honorable Roger M. Young, Sr., dated August 26, 2020, and filed August 27, 2020, whereby the Court denied the aforesaid motion for alteration and/or amendment. A copy of the Order denying the motion is also attached hereto (Exhibit B). Counsel for the Appellant received written notice of the latter Order on August 27, 2020.

ELECTRONICALLY FILED - 2020 Sep 24 3:00 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

ELECTRONICALLY FILED - 2020 Sep 24 3:00 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

HOWELL, GIBSON & HUGHES, P.A.

By: _____

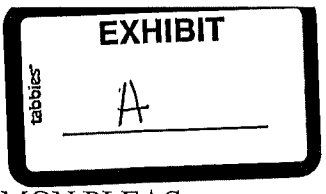
Stephen P. Hughes Bar No. 2805
William H. Cox, III Bar No. 101991
Mary Bass Lohr Bar No. 16927
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorneys for Appellant

Beaufort, South Carolina
September 24, 2020

Other Counsel of Record:

Ian W. Freeman Bar No. 72736
Jennifer S. Ivey Bar No. 102533
Walker Gressette Freeman & Linton, LLC
Attorneys for Hurley Services, LLC

C. Clay Olson Bar No. 17007
Harper Little Law
Attorney for Charleston Exteriors, LLC



ELECTRONICALLY FILED 2020-04-24 3:30:45 PM CHARLESTON COMMON PLEAS CASE #2016CP1003455

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Six Fifty Six Owners Association, Inc., et al., Plaintiffs, vs. Winsor South, LLC, et al., Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-3455 **ORDER GRANTING DEFENDANTS HURLEY SERVICES, LLC AND CHARLESTON EXTERIORS' MOTION FOR SUMMARY JUDGMENT AGAINST THE CLAIMS OF BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC**

This matter came before the Court on March 5, 2020 on Defendants Hurley Services, LLC and Charleston Exteriors' Motion for Summary Judgment against the claims of Builders First Source-Southeast Group, LLC.

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at Six Fifty Six Coleman Boulevard, a twelve-building townhome community in Mount Pleasant, SC ("the Project"). Builders First-Source is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that Builders First-Source holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is Builders First-Source's representative that serves as the "qualifying party" for such licensure in this state. Defendant supplied and installed windows and doors as a subcontractor of the Ryland Group for only the "Ryland Phase" buildings at the Project, which consists of nine (9) buildings that were constructed in 2013 and 2014. It is undisputed that Builders First-Source furnished the windows, related flashings, and caulk and provided superintendents to oversee such installation for the Ryland Phase buildings at the Project.

Builders First-Source filed a third-party complaint in the present litigation on May 9, 2017 asserting third-party claims against Hurley for contractual indemnity, breach of express and implied

ELECTRONICALLY FILED - 2020 Apr 23 3:30 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

warranties, breach of contract, and negligence. Hurley was ultimately made a direct defendant by Plaintiffs and Builders First-Source then asserted cross-claims against Hurley in lieu of it previously asserted third-party claims, but on all the same causes of action and grounds. Builders First-Source's operative cross-claims are contained in Builders First-Source's Answer to Plaintiffs' Third Amended Complaint filed on January 24, 2019. Builders First-Source's cross-claims allege that they are entitled to be indemnified in the amount which Builders First-Source "may pay in satisfaction" of Plaintiffs' claim "plus Builders First-Source [sic] costs for defense, inclusive of attorneys' fees, without regard for the fault of either Hurley or Builders First-Source.

Defendant Hurley Services, LLC is now before the Court on their Motion for Summary Judgment against the claims of Builders First-Source. Charleston Exteriors joins the Motion.

STANDARD OF REVIEW

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Singleton v. Sherer,* 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). A party's "response to the motion must set forth specific facts, *admissible in evidence*, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him." *Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (Ct. App. 1988) (emphasis added). Summary judgment "is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Nelson v. Piggly Wiggly Central, Inc.,* 390 S.C. 382, 388, 701 S.E.2d 776, 779 (2010).

DECISION

Based on the submitted Motions and Oral Arguments the Court hereby finds:

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(1) There exists no genuine issue as to any material fact and Hurley Services and Charleston Exteriors are entitled to judgment dismissing all cross-claims against it as a matter of law;

(2) Builders First Source-Southeast Group, LLC's cross-claims are barred by the doctrine of collateral estoppel because of Judge Clifton Newman's order filed on February 3, 2020 in the case of Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al, Case No. 2018-CP-08-2547. Specifically, the Court references and adopts the court's analysis in Paragraphs B and C therein.

(3) Builders First Source-Southeast Group, LLC's cross-claims for breach of contract, breach of express and implied warranty, and negligence are "merely disguised . . . claims for equitable indemnity" and fail as a matter of law. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634, (Ct. App. 2015);

(4) Builders First Source-Southeast Group, LLC's cross-claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law. *See Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App. 2018).

CONCLUSION

Therefore, it is ordered that Defendants Hurley Services, LLC and Charleston Exterior's Motion for Summary Judgment against the claims of Builders First Source-Southeast Group, LLC is GRANTED.

And it is SO ORDERED.

Charleston, South Carolina

ELECTRONICALLY FILED 2020 Apr 24 3:04 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

ELECTRONICALLY FILED 2020 Apr 29 3:30 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

Charleston Common Pleas

Case Caption:	Six Fifty Six Owners Association Inc , plaintiff, et al VS Winsor South Llc , defendant, et al
Case Number:	2016CP1003455
Type:	Order/Summary Judgment

It is so ordered.

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

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003455

Six Fifty Six Owners Association Inc et al
PLAINTIFF(S)

Jonathan J Thomas et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

Defendant Builders First-Source's Motion for Reconsideration of the Court's Order granting summary judgment on April 29, 2020 is denied.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/26/2020 .

Builders First Sourse Southeast Group
John 58 75 Doe
Doe, John 58 75
Sunrise Siding LLC
Davis Tile
Jonathan J Thomas
Acme Doors Inc
Garcia Roofing LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

EXHIBIT tabbies B

ELECTRONICALLY FILED - 2020 Aug 24 3:00 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

Court Reporter:

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

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ELECTRONICALLY FILED - 2020 Aug 27 3:00 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

Charleston Common Pleas

Case Caption:	Six Fifty Six Owners Association Inc , plaintiff, et al VS Winsor South Llc , defendant, et al
Case Number:	2016CP1003455
Type:	Order/Electronic Form 4

It is so ordered.

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

ELECTRONICALLY FILED - 2020 Sep 24 3:00 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No.

Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually, and on behalf of others similarly situated,
Plaintiffs,

vs.

Winsor South, LLC and Jeffrey M. Thomas, individually, and on behalf of a class of construction defendants; Southeastern Recapitalization Group, LLC; WCM Construction, LLC; Jonathan J. Thomas; AC Heating and Air Conditioning Service, Inc.; ACME Doors, Inc.; Alpha Omega Construction Group, Inc.; Atlantic Construction Services, Inc.; Buck Lumber and Building Supply, Inc.; Builders FirstSource, Inc.; Builders FirstSource-Atlantic Group, LLC, Builders FirstSource-Florida, LLC a/k/a Builders FirstSource-Florida Design Center, LLC; Builders FirstSource-Southeast Group, LLC; Charlotte Flooring, Inc.; Diria Tawi Painting, Inc.; East Coast Wall Systems, Inc.; Fogel Services, Inc.; G&S Home Remodeling, LLC; Guaranteed Framing, LLC; J. Mora Brick & Block Mason, LLC; Land/Site Services, Inc.; Landmark Construction Company, Inc.; Lutzen Construction, Inc.; New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC; PJ Sanchez Masonry, LLC; Screens Plus, Inc., Simons Construction Company, LLC; Stucco by Design, LLC; Fine Builders, LLC; Speedtruss, Inc.; AS Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating, & Air, Inc.; Ashley Steel, Inc.; Cahill Contracting, LLC; Cohen's Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting and Construction a/k/a Sharon's Painting, LLC; Davis Tile; Timothy Mitchell; Electrical Design & Construction, Inc.; Fine Builders, LLC; Speedtruss, Inc.; Argentino Jose Campos d/b/a as Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating & Air, Inc.; Cahill Contracting, LLC; Cohen's Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting, LLC; David Tile; Timothy Mitchell; Electrical Design & Construction, Inc.; Hurley Services, LLC; Charleston Exteriors LLC; Jorge Diaz aka Jorge Louis Paz; San Luis Construction, Inc. nka

ELECTRONICALLY FILED - 2020 Sep 24 3:00 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

Roofing America Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC; Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vasquez aka Alfonso Rodriguez, Sr.; and John Does 55-75
Defendants.

Of which Builders FirstSource – Southeast Group, LLC is the Appellant and Hurley Services, LLC and Charleston Exteriors, LLC are the Respondents.

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing Notice of Appeal upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 24 day of September, 2020 addressed to the following:

Ian W. Freeman, Esquire
Walker, Gressette, Freeman & Linton, LLC
Post Office Box 22167
Charleston, SC 29413

Jennifer S. Ivey, Esquire
Walker, Gressette, Freeman & Linton, LLC
Post Office Box 22167
Charleston, SC 29413

C. Clay Olson, Esquire
Harper Little PLLC
164 Market Street
Suite 139
Charleston, SC 29401

HOWELL, GIBSON & HUGHES, P.A.

By: _____
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Builders FirstSource - Southeast Group, LLC

Beaufort, South Carolina
September 23, 2020

ELECTRONICALLY FILED - 2020 Sep 24 3:00 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1003455

DEFENDANT'S EXHIBIT tabbies BFS D

Builders FirstSource

BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into effective as of 12-18, 2014, between **Builders FirstSource – Southeast Group, LLC**, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, TX 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com ("Contractor"), and HURLEY SERVICES, LLC address: 836 LEBBY ST, CHARLESTON SC 29412, telephone: 8433432045, fax: 8889726563, Contact: GIOVANNI MENDEZ e-mail: HURLEYSERVICESLLCSC@GMAIL.COM ("Subcontractor").

SECTION 1. Introduction.

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

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

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Subcontractor

Contractor

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.

GM
Subcontractor

Contractor

d. Safety and Environmental.

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

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

Subcontractor agrees as follows:

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

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

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

Subcontractor

Contractor

WITH THE REGULATIONS.

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

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

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

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

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If

Subcontractor

Contractor

Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

SECTION 4. Insurance.

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

a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.

b. **Employer's Liability Insurance** - $1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.

c. **Commercial General Liability** - $1,000,000 per occurrence, $1,000,000 products-completed operations aggregate, $1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.

d. **Business Auto Liability**, including hired and non-owned auto coverage - $500,000 combined single limit.

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

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and alternate employer's endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance

Subcontractor

Contractor

provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

SECTION 5. INDEMNITY.

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

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

Subcontractor

Contractor

OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

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

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (1) CAUSED BY OR RESULTS FROM: (A) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (B) 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,

Subcontractor

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DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (2) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

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

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and 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. Certification of Compliance with Equal Employment Opportunity Provisions If the Project contracted for herein is subject to or becomes subject to 41 CFR 60-741.5(a), then the Subcontractor and Contractor certify that they shall abide by the requirements of 41 CFR 60-741.5(a), such requirements being incorporated by reference herein. This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.

If the Project contracted for herein is subject to, or becomes subject to, 41 CFR 60-300.5(a), then the Subcontractor and Contractor certify that they shall abide by the requirements of 41 CFR 60-300.5(a), such requirements being incorporated by reference herein. This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.

Subcontractor further certifies that it has read and familiarized itself with the requirements contained in 41 CFR 60-741.5(a) and 41 CFR 60-300.5(a) and shall incorporate the above language into its purchase orders and subcontracts.

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)

Subcontractor

Contractor

ARISING OUT OF, RESULTING FROM OR RELATED TO SUBCONTRACTOR'S BREACH OF THE OBLIGATIONS SET FORTH IN THIS SECTION 7.

SECTION 8. 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

Subcontractor

Contractor

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

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

SECTION 9. 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.

Subcontractor

Contractor

Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.

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

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

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

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

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

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

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

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

(6) Contractor has received payment from Owner.

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

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue

Subcontractor

Contractor

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.

l. 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 10. 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.

Subcontractor

Contractor

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

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

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

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

f. **Release.** 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. Specifically, Subcontractor agrees that Subcontractor shall not file, or cause to be filed, any demand, claim, suit or cause of action against Contractor and all of its officers, directors, agents, and employees hereunder.

g. **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.

[The remainder of this page intentionally left blank.]

Subcontractor

Contractor

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

SUBCONTRACTOR:
HURLEY SERVICES, LLC

By: Giovanni Mendes

Name: GIOVANNI MENDES

Title: OWNER

80-0803713
Subcontractor Social Security No. or
Federal I.D. No.

BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC

By:

Name: Daryl Ward

Title: Vice President

Subcontractor

Contractor

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

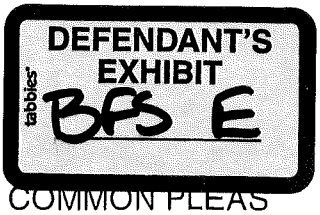
SUBCONTRACTOR:
HURLEY SERVICES, LLC

By: Giovanni Mendes
Name: GIOVANNI MENDES
Title: OWNER
80-0803713
Subcontractor Social Security No. or
Federal I.D. No.

BUILDERS FIRSTSOURCE –
SOUTHEAST GROUP, LLC

By: _____
Name: Deryl Ward
Title: Vice President

Subcontractor
Contractor



ELECTRONICALLY FILED - 2019 Oct 31 11:19 AM - CHARLESTON - COMMON PLEAS - CASE#2019CP1000772

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO: 2019-CP-10-00772
	)	
Dag Pavic and Stela Susac-Pavic,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**STIPULATION**
	)	
Carolina Cottage Homes, LLC dba Saussy Burbank; SB Holding, LLC dba Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services LLC; Simons Contractors, LLC and Cohen's Drywall Company, Inc.;	)	
	)	
Defendants,	)	
	)	
Builders FirstSource-Southeast Group, LLC	)	
	)	
Third Party Plaintiff,	)	
	)	
Vs.	)	
	)	
MW Manufacturers, Inc.	)	
	)	
Third Party Defendant.	)	

The within action is one whereby the plaintiffs, Dag Pavic and Stela Susac-Pavic, have sought recovery of damages allegedly occasioned by defects and/or deficiencies in construction of the subject residence at 1368 Penshell Place, Mount Pleasant, South Carolina, the certificate of occupancy for which was issued on May 13, 2013.

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The Third Amended Complaint, among other assertions, alleges that the defendant, Builders FirstSource-Southeast Group, LLC, supplied and installed the windows used in original construction of the subject residence. The Third Amended Complaint further alleges that the installation of the windows, and related flashing, was defective and/or improper, resulting in water infiltration and damage to the substrates.

Builders FirstSource-Southeast Group, LLC, within its pleadings responsive to the plaintiffs' Third Amended Complaint, set forth Third Party claims against MW Manufacturers Inc, which manufactured the windows (identified as MW Series 800 windows) that were supplied by Builders FirstSource-Southeast Group, LLC. BFS contends that the windows were installed by Hurley Services LLC, pursuant to a subcontract between BFS and Hurley Services, in connection with original construction of the residence at 1368 Penshell Place. The aforesaid third-party claims, as asserted by Builders FirstSource-Southeast Group, LLC against MW Manufacturers Inc., were premised upon deficiencies in design, development, manufacture, production, and sale of windows, as potentially alleged within the plaintiffs' Third Amended complaint.

The plaintiffs, Dag Pavic and Stela Susac-Pavic, have now confirmed and agreed (a) that they are not alleging or asserting any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the aforesaid windows and/or any, component parts thereof, or in any MW installation instructions or requirements for those windows, and (b) that they are

ELECTRONICALLY FILED - 2019 Oct 31 11:19 AM - CHARLESTON - COMMON PLEAS - CASE#2019CP1000772

not pursuing or asserting any claim premised upon any alleged or potential defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the aforesaid windows and/or any component parts thereof, or in any MW installation instructions or requirements for those windows.

In order adequately to memorialize the aforesaid agreement and intention of the plaintiffs, it is hereby stipulated, agreed, and understood, by and between the parties hereto, as follows:

a. That the plaintiffs, Dag Pavic and Stela Susac-Pavic are not asserting or alleging within the instant litigation against any defendant in this litigation (including but not limited to Builders FirstSource-Southeast Group, LLC), or against any third party defendant in this litigation, any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the windows installed at the subject residence, (identified herein as MW Series 800 Windows), and/or any component part of such windows, and/or in any MW installation instructions or requirements for those windows installed at the subject residence;

b. That the plaintiffs, Dag Pavic and Stela Susac-Pavic, are not seeking recovery against any of the defendants in the instant litigation based upon any potential defect in the development, design, manufacture, production, distribution, and/or sale of the windows installed at the subject residence,

(identified herein as MW Series 800 Windows), and/or any component part of such windows, and/or in any MW installation instructions or requirements for the windows installed at the subject residence.

By:_____
Stephen P. Hughes
Attorney for Builders FirstSource-Southeast Group, LLC

By:_____
Stanley C. Rodgers
Attorney for Dag Pavic and Stela Susac-Pavic

Beaufort, South Carolina

October 31, 2019

ELECTRONICALLY FILED - 2019 Oct 31 11:19 AM - CHARLESTON - COMMON PLEAS - CASE#2019CP1000772

LAW OFFICES
CLARKE, JOHNSON, PETERSON & McLEAN, P.A.
620 WEST EVANS STREET
POST OFFICE BOX 1865
FLORENCE, SOUTH CAROLINA 29503

FINLEY B. CLARKE
BROWN W. JOHNSON
JAMES W. PETERSON, JR.
JOSEPH P. McLEAN

TELEPHONE (843) 669-2401
FAX (843) 662-1779
E-MAIL fclarke@cjpmlaw.com

January 21, 2021

VIA EMAIL ONLY – jmccoysc@sccourts.org; jmccoylc@sccourts.org

Honorable Jennifer B. McCoy
100 Broad Street, Suite 348
Charleston, South Carolina 29401

RE: Dag Pavic, et al. vs. Hurley Services, LLC, et al.
C/A No. 2019-CP-10-00772
Our File No. 19-077

Judge McCoy:

I am enclosing the proposed order you requested granting partial summary judgment in favor of Hurley Services, LLC as to crossclaims of Builders FirstSource.

With best regards,

Yours very truly,

Finley B Clarke

FINLEY B. CLARKE

FBC:ktb

Enclosures

cc: All other counsel of record via email

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	) IN THE COURT OF COMMON PLEAS) NINTH JUDICIAL CIRCUIT) C/A NO. 2019-CP-10-00772	
Dag Pavic and Stela Susac-Pavic, Plaintiffs, vs. Carolina Cottage Homes, LLC d/b/a Saussy Burbank; SB Holding, LLC d/b/a Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services, LLC; Simons Contractors, LLC and Cohen's Drywall Company, Inc. Defendants.	)	**ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF HURLEY SERVICES, LLC**
Builders FirstSource-Southeast Group, LLC, Third Party Plaintiff, vs. MW Manufacturers, Inc., Third Party Defendant.	)	

This matter came on before me on September 28, 2020 as Presiding Judge of the Ninth Judicial Circuit on Motion of Hurley Services, LLC, hereinafter "Hurley", for partial summary judgment with respect to crossclaims filed by Builders FirstSource-Southeast

Group, LLC, hereinafter "BFS", for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity.

This is a construction defects suit relating to a single-family residence. Plaintiffs allege, among other things, defective/improper installation of windows and related flashing, causing water infiltration and damage to the substrate. Hurley was a labor-only subcontractor to BFS under a master subcontractor agreement drafted by BFS. BFS sold doors and MW 800 Series windows to the general contractor and provided them to Hurley for installation in Plaintiffs' residence. These windows are the subject of a class-action suit and settlement. *See Gulbankian v. MW Mfrs., Inc., United States District Court, District of Massachusetts, Civil Action No. 10-10392-RWZ (D. Mass. Dec. 29, 2014).*

Plaintiffs and BFS entered into a stipulation filed October 31, 2019, that Plaintiffs "are not alleging or asserting any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the aforesaid windows and/or any component parts thereof, or in any MW installation instructions or requirements for the windows."

An abbreviated procedural history is helpful in understanding the facts of the case:

1. Plaintiffs filed a Third Amended Complaint against the general contractor, BFS, Hurley, and others on April 2, 2019.

2. On April 19, 2019, BFS filed an Answer to the Third Amended Complaint, crossclaims against Hurley, and a third-party complaint against the window manufacturer,

MW Manufacturers, Inc.

3. On July 29, 2019, MW Manufacturers, Inc. filed an Answer to the Third-Party Complaint of BFS interposing as a defense the *Gulbankian* class-action settlement and attaching orders and documents relating to the settlement.

4. On January 28, 2020, BFS filed a dismissal of its third-party complaint against MW Manufacturers, Inc. without prejudice and under a tolling agreement.

5. On August 5, 2020, the general contractor filed an Amended Answer to Plaintiffs' Third Amended Complaint and crossclaims against BFS for negligence, contractual indemnification, and breach of express and implied warranties in connection with labor, materials, and products furnished by BFS in connection with the construction of Plaintiffs' residence.

6. On August 26, 2020, BFS filed an answer to crossclaims of the general contractor and also crossclaimed against Hurley for contractual and equitable indemnity, express and implied warranties, negligence, and breach of contract.

BFS CROSSCLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE

In its oral arguments and memorandum of law filed on September 25, 2020, BFS concedes that its crossclaims against Hurley for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity, and that they are subject to dismissal pursuant to *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct.*

App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Therefore, the Court will grant summary judgment with respect to those claims.

CONTRACTUAL INDEMNITY

Hurley contends that there are no issues of material fact and that the indemnification provisions contained in the BFS master subcontractor agreement violate South Carolina public policy and the provisions of §32-2-10 S.C. Code and are unconscionable. Hurley also contends that these indemnity provisions fail to meet the "clear and unequivocable" standard enunciated by *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018)*, and that BFS is collaterally estopped from contending otherwise.

BFS asserts that *Concord & Cumberland* is inapplicable because BFS is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Hurley's negligence. BFS also argues that the doctrine of collateral estoppel is inapplicable because there is no final order of a court deciding whether its indemnification provisions meet the "clear and unequivocable standard". BFS also contends that there are issues of material fact relating to installation of windows by Hurley.

The master subcontractor agreement between BFS and Hurley is a contract of adhesion. *Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).*

BFS drafted the agreement, and any ambiguous language in the contract should be construed liberally and interpreted strongly in favor of the non-drafting party. *Southern Atlantic Financial Services, Inc., 356 S.C. 444, 590 S.E.2d 27 (2003); Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981).*

Although the indemnity provisions in "Section 5. INDEMNITY" are printed in all capital letters, another indemnification provision is buried in the fine print of "Section 3. Warranty". The language of this section is set out, in pertinent part, as follows:

> "**Section 3. Warranty.**
> ... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... 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 ... including, without limitation, property damage to the homes or properties into which the Work is incorporated ..."

BFS is a merchant within the meaning of §36-2-104(1) S.C. Code which provides as follows:

> "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

Thus, BFS has superior knowledge regarding the products it sells. Hurley had nothing to do with the selection, design, sale, and manufacture of the doors and windows which BFS sold to the general contractor and gave to Hurley for installation in Plaintiffs' residence. The aforementioned provision allows BFS to seek indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation. This is a clear violation of §32-2-10 S.C. Code, is against public policy, and it is also unconscionable within the meaning of *Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007)*.

In finding contract provisions unconscionable in *Simpson*, the Court observed, in pertinent part, as follows:

> "While certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law ..." [644 S.E.2d at 670]

BFS denies asserting claims against Hurley for deficiencies in windows and doors it gave Hurley for installation in Plaintiffs' residence:

> "... However, at no time, EVER, has BFS filed a claim against a subcontractor seeking for the subcontractor to indemnify BFS for claims relating to alleged manufactured material or component deficiencies. This case is no exception ..." [Memorandum BFS, p. 19]

Notwithstanding this assertion by BFS, on April 19, 2019, it filed a third-party complaint against the window manufacturer, MW Manufacturers, Inc., alleging multiple claims for defective windows. In the same pleading, it filed multiple crossclaims against Hurley for materials it provided to Hurley that may be inadequate, poor quality, not in compliance with the contract documents, industry standards, and building codes. BFS reiterated these same claims against Hurley in its crossclaims filed on August 26, 2020, although the window manufacturer had already been dismissed from the suit.

Although Plaintiffs have stipulated with BFS not to claim damages against defendants arising from class-action windows, there may be testimony and evidence at trial that any moisture damage is the result of defective windows rather than installation deficiencies. The general contractor has filed breach of warranty claims against BFS as to the windows and BFS, despite its denial, is attempting to transfer that risk to the installer through the fine print in the master subcontractor agreement.

Section 5 of the master agreement contains multiple paragraphs dealing with indemnity and a duty to defend. The first paragraph plainly states that BFS may seek indemnification:

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

The next paragraphs 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 OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES."

The following paragraph provides that:

> "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 aforementioned paragraphs in Section 5 are ambiguous, conflict with each other, and do not meet the elevated clear and unequivocable standard found in *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).*

In addition, the provisions of paragraph 5 conflict with the indemnification provisions found in the fine print of Section 3. All of these provisions violate South Carolina public policy and §32-2-10 S.C. Code.

Read together, the provisions of Section 3 and Section 5 of the agreement are also unconscionable because they permit BFS to seek indemnity and a defense from labor-only subcontractors such as Hurley for materials selected and sold by BFS to third parties. Under the agreement, even if BFS were solely liable for causing the loss that gives rise to the claim for defense, the Master Agreement purports to place the entire duty to defend and responsibility to indemnify for the cost to defend upon BFS's subcontractor Hurley.

Other courts have considered the identical language of the BFS master agreement and have found that the indemnification provisions fail to meet the clear and unequivocable standard. *See Order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC, 2016-CP-10-3455 and the order of the Honorable Clifton Newman filed February 3, 2020, in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast Group, LLC v. M.I. Windows and Doors, Inc., et al. as Civil Action No. 2018-CP-08-2547 which are attached.*

It appears that the aforementioned orders are final orders and that BFS is collaterally estopped from contesting the findings and conclusions in the aforementioned Orders.

To invoke collateral estoppel, a party need not have been a party to the prior action; the law only requires that the party against whom estoppel is applied have been a party to that action and have a full and fair opportunity to litigate the issue in the prior action. *South Carolina Property Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (S.C. 1991).* Here the contract terms have been actually litigated, directly determined in the prior action, and the issues were essential to the judgment such that collateral estoppel should apply.

The law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus, will not be a barrier to applying collateral estoppel. *See Huron Holding Corporation v. Lincoln Mine Operating Co., 312*

U.S. 183, 61 S.Ct. 513, 85 L.Ed. 725 (1941). A final judgment is one that finally determines the rights of the parties. *First Union National Bank v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992).* Rule 201(a) SCACR, provides that an "appeal may be taken as provided by law, from any final judgment, appealable order, or decision".

Summary judgment is appropriate if the court finds that there is no genuine issue of any material fact. *Rule 56(c) SCRCP.* This Court finds that there are no issues of material fact with regard to the following:

1. The language of the master subcontractor agreement;
2. That BFS drafted the master subcontractor agreement;
3. The language of the pleadings and stipulations filed by the parties;
4. That BFS gave Hurley windows and doors for installation in Plaintiffs' residence which it had sold to the general contractor for installation in Plaintiffs' residence;
5. That the windows BFS provided to Hurley were the subject of a class-action suit and settlement;
6. That other courts have issued final orders holding that the master subcontractor agreement of BFS fails to meet the clear and unequivocable standard for indemnity contracts.

Although BFS contends that there are material issues of fact because of alleged installation deficiencies on the part of Hurley, those alleged deficiencies have no bearing on whether the language of the contract is against public policy, violates §32-2-10 S.C. Code, is unconscionable, and fails to meet the clear and unequivocable standard. This

Court's dismissal of the claims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity, does not leave BFS without a remedy. BFS still has its equitable indemnity claim against Hurley.

After carefully considering the pleadings in the case, the arguments of counsel, the memoranda of law and exhibits submitted by the parties, I find and conclude as follows:

1. That the crossclaims of BFS for breach of express and implied warranties, breach of contract, and negligence, are disguised equitable indemnity claims and are not viable as alternative causes of action.

2. That the indemnity and duty to defend provisions of the master subcontractor agreement are unconscionable, ambiguous, unintelligible, conflicting, oppressive, and are unenforceable.

3. That the indemnity and duty to defend provisions of the master subcontractor agreement violate South Carolina public policy and §32-2-10 S.C. Code.

4. That the indemnity and duty to defend provisions of the master subcontractor agreement are neither clear nor unequivocable, and fail as a matter of law.

5. That BFS is collaterally estopped by prior decisions from contending that the indemnity provisions contained in its Master Subcontractor Agreement are clear and unequivocable and meet the requirements of South Carolina law.

IT IS, THEREFORE,

ORDERED, that the motion of Hurley Services, LLC for partial summary judgment with regard to the crossclaims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity be and it is hereby granted.

AND IT IS SO ORDERED.

Document prepared for Electronic Signature

ELECTRONICALLY FILED - 2021 Feb 04 2:30 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1000772

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO: 2019-CP-10-00772
Dag Pavic and Stela Susac-Pavic,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**MOTION FOR RECONSIDERATION OF ORDER GRANTING PARTIAL SUMMARY JUDGMENT**
	)	
Carolina Cottage Homes, LLC dba Saussy Burbank; SB Holding, LLC dba Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services LLC; Simons Contractors, LLC and Cohen's Drywall Company, Inc.;	)	
	)	
Defendants.	)	

TO: THE HONORABLE JENNIFER B. MCCOY

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC, by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Jennifer B. McCoy, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of January 25, 2020.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina, and Rules 52 and 59, South Carolina Rules of Civil Procedure, is based upon the following grounds that the Court failed to understand and/or take into account:

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1. The Court improperly applied the clear and unequivocal standard when BFS has only sought recovery against loss occasioned by the negligence (whether sole or concurrent) of Hurley.
2. The Court's Order did not address the contract's severability provision.
3. The Court failed to recognize that the provisions of Section 32-2-10 specifically authorize recovery as sought by BFS pursuant to the indemnity provision of Section 5 Paragraph One.
4. The Court considered multiple irrelevant provisions of the contract in order to determine that the language of the contract was unclear and equivocal.
5. BFS is not collaterally estopped from arguing against summary judgment because the issues litigated in the earlier cases are different from the one at bar.
6. The Court unnecessarily and without foundation identified the contract as one of adhesion and thus unconscionable.

Each of these points is examined in further detail below.

1. **The Court improperly applied the clear and unequivocal standard when BFS has only sought recovery against loss occasioned by the negligence (whether sole or concurrent) of Hurley.**

BFS, by its cross-claim, is seeking indemnity, from its subcontractor, Hurley, not against liability for loss or damage arising out of any negligence of BFS itself, but rather is seeking indemnity only against liability for damage or loss arising out of the sole or concurrent negligent acts or omissions of its subcontractor, Hurley, in the performance of the subcontractor's work. Under the circumstances, the clear

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and unequivocal standard, as articulated by the Court of Appeals in *Concord & Cumberland*, does not apply.

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

At the crux of *Concord & Cumberland* was the fact that the general contractor was trying to recover from its subcontractor for the general contractor's own negligence. **That is not the case here**. BFS is not seeking indemnification

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for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Hurley's negligence. When, as here, a contractor does not seek indemnity for its own negligence, the clear and unequivocal standard does not apply, and the indemnity provision is not subject to that heightened standard.

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

2. The Court's Order did not address the Contract's Severability Provision.

The Court's Order does not address the Contract's severability provision, by which (1) any offending provision of the Contract (although BFS does not concede that there is any such provision) should be severed, and (2) the remaining provisions – including, in this case, the provision regarding indemnification for property damage – should be left intact. *See Beach Co. v. Twillman, Ltd.,* 351 S.C. 56, 65 (Ct. App. 2002) (explaining that "[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent

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of the parties"). The severability provision of the Contract demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

> The provisions of this Agreement shall be deemed independent and severable and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability or 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.

Master Subcontract Agreement, Section 9, Paragraph (f). This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the Contract may be invalid, the Court should simply sever it and leave the remaining provisions intact.

The Court, in its order, found that the Section 3 "Warranty" provision and the provision of Section 5 Paragraph Two violate South Carolina law. Section 3 Warranty, by its clear terms (which are further discussed below), imposes obligations upon Hurley, only when its own materials or services are determined to be defective. Section 5 Paragraph Two, which deals with cases of indemnity for bodily injury, is completely irrelevant to the claims before the Court. While BFS disagrees with the Court's findings regarding these provisions, the severability provision of the Contract should nonetheless have precluded summary judgment. The Court should have honored the stated intent of the parties and severed the two offending provisions, leaving intact Section Five Paragraph One, which governs indemnification in cases, such as this one, involving property damage. Notably, the Court did not find either that Section Five Paragraph One was unconscionable or that it violated South Carolina law. Thus, had the Court honored

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the severability provision, it would have been compelled to deny summary judgment and allow BFS's claim for indemnity under Section Five Paragraph One to proceed.

3. The Court failed to recognize that the provisions of Section 32-2-10 specifically authorize recovery as sought by BFS pursuant to the indemnity provision of Section 5 Paragraph One.

In its Order, the Court found that "the indemnity and duty to defend provisions . . . violate South Carolina public policy and § 32-2-10." Contrary to the Court's finding, Section 32-2-10 specifically authorizes these provisions. S.C. Code Ann. § 32-2-10 provides:

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

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

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Despite its prohibition against indemnity against the sole negligence of the indemnitee, the second half of Section 32-2-10 specifically authorizes agreements whereby the promisor shall indemnify or hold harmless the promisee against liability for damages resulting from the negligence, in whole or in part, of the promisor. The indemnity provision of Section 5 Paragraph One, relied upon by BFS in support of its claims in the instant action, is, therefore, specifically authorized by Section 32-2-10 because by that provision Hurley undertook to indemnify BFS for Hurley's own negligence (as opposed to BFS's own negligence). Furthermore, a contractual provision authorized by statute cannot logically be against public policy. Thus, the indemnity provision does not violate Section 32-2-10 or public policy, and provides no basis for an award of summary judgment in favor of Hurley.

The Court's Order also appears to find that the indemnity provision violates S.C. Code Ann. Section 32-2-10 because BFS will seek reimbursement of attorney's fees regardless of any ultimate liability or negligence of BFS.

The propriety of claims in indemnity, as asserted by BFS in the instant action, are specifically recognized by S.C. Code Ann. Section 32-2-10. Moreover, the relevant provisions of the Contract, pursuant to which BFS seeks indemnity from Hurley, are equally consistent with the provisions of S.C. Code Ann. § 32-2-10. BFS is not seeking indemnity against liability for damages arising out of its own negligence, whether sole or concurrent. BFS is only seeking indemnity solely against liability for damages occasioned by the negligent acts or omissions of its subcontractor Hurley. Section 5 Paragraph One notes that the "damages" include court costs and attorney's fees including costs incurred in establishing the

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indemnification and other rights agreed to in this paragraph. Nothing in Section 32-2-10 or *Concord & Cumberland* precludes or prohibits the recovery of attorney's fees as damages of a contractual indemnity claim.

4. The Court considered multiple irrelevant provisions in determining that the language of the Contract was not clear and unequivocal.

In finding that the indemnity provisions of the Contract "are neither clear nor unequivocable [*sic*], and fail as a matter of law," the Court considered various provisions of the Contract that are irrelevant and inapplicable to the situation at issue in this case. Specifically, the Court contends that when read together, Section 3 (which deals with warranties), Section 5 Paragraph One (which deals with indemnification in cases of property damage), and Section 5 Paragraph Two (which deals with indemnification in cases of bodily injury) are confusing and violate *Concord & Cumberland*.

The case at hand is one for property damage. The provision that applies to indemnification in this scenario is Section Five Paragraph One. The Court should not have twisted Section Three and Section Five Paragraph Two to try to apply it to this case. The Order's quotations from the Contract are misleading, because they do not distinguish that the quoted passage at the bottom of page seven of the Order applies only to cases involving property damage, whereas the quoted passage that allegedly obfuscates this language at the top of page eight of the Order applies only to cases involving bodily injury. There is no confusion, as these separate provisions govern two completely separate scenarios. This case does not involve bodily injury, and the language of Section Five Paragraph Two is

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completely irrelevant. Furthermore, as discussed below, this case does not involve a warranty claim, and the language of Section Three is irrelevant. The Court should not have considered either of these provisions. As stated above, however, even if the Court had considered the offending language from these provisions, it should have severed it. The language from Section Five Paragraph One on property damage is clear and unequivocal, and it satisfies *Concord & Cumberland* as well as the statutes and public policy of South Carolina.

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

The Court's Order finds that the BFS cross-claims are barred by collateral estoppel because identical issues have already been ruled upon in *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al.,* Civil Action No. 2018-CP-08-2547 and *Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al.*, Civil Action No. 2016-CP-10-3455.

The doctrine of collateral estoppel is available when issues of fact or law are actually litigated and determined by valid and final judgment. *Carman v. South Carolina Alcoholic Beverage Control Com'n*, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994). The Court's Order notes that other courts "have found that the indemnification provisions fail to meet the clear and unequivocable [*sic*] standard." Order p. 9. In fact, what the other courts actually found was as follows:

> 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 **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

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the indemnitee **for the indemnitee's own negligence.**

See Amended Order of Judge Newman filed February 3, 2020 in *Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al.*, Civil Action No. 2018-CP-08-02547 (emphasis added), which order was also adopted by Judge Young in *Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al.,* Civil Action No. 2016-CP-10-3455. As evidenced by the language of the order, Judge Newman only ruled on the issue of whether BFS could recover for its own negligence, finding that:

> (a) BFS was seeking to be indemnified for its own negligence, and
>
> (b) the relevant contract provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify BFS for BFS's own negligence.

This Court's Order does not make any finding regarding BFS's ability to recover in indemnity for its own negligence, because that is not the issue before this Court. Instead, the issue before this Court is whether BFS can recover for the negligence of its subcontractor, which is a separate issue from the one ruled upon by Judge Newman (and consequently, by Judge Young). This issue has not yet been "actually litigated" within the context of collateral estoppel. Here, because BFS is not seeking to be indemnified against BFS's own negligence, but only against liability for damages caused by the negligence of its subcontractor, neither Judge Newman's Order nor Judge Young's Order can, as a matter of law, operate to estop BFS from seeking indemnification for Hurley's negligence in this action.

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This Court's holding regarding collateral estoppel is also problematic because it mischaracterizes the prior rulings as having found that the indemnity provisions generally fail to "meet the requirements of South Carolina law." As discussed above, the holding of Judge Newman was limited to the issue of whether BFS could recover for its own negligence. That Court did not determine that the provisions fail to meet the requirements of South Carolina law. Additionally, no court has ever considered the provisions in light of Section 32-2-10 or any case law other than *Concord & Cumberland*. Judge Newman did not determine that the indemnity provision violated South Carolina law, but only that, in light of *Concord & Cumberland*, the indemnity provision was not sufficient to require the subcontractor to indemnify BFS for BFS's own negligence. When, as here, BFS is seeking indemnity only for its subcontractor's negligence (whether sole or concurrent), no court has ever held that the indemnity provision is insufficient grounds for recovery, and thus, it is impossible for collateral estoppel to apply to the situation before this Court.

6. The Court's determination that the Contract is one of adhesion and is unconscionable is both without support and unnecessary for the Court to reach its final conclusion.

There has been no evidence presented that the Contract is one of adhesion, nor that it is unconscionable. The Court's Order does not clearly separate its reasoning for finding the Contract unconscionable from its reasoning for finding that the Contract is contrary to South Carolina law and public policy. The Court does cite to *Simpson v. MSA of Myrtle Beach, Inc.,* where that court held that the "inconspicuous nature of a provision," which, unlike the Section 5 Paragraph One

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indemnity provision, was not drafted in capital letters, made the provision unconscionable. 373 S.C. 14, 644 S.E.2d 663, 670 (2007). Additionally, this Court's Order provides that, "Read together, the provisions of Section 3 and Section 5 of the agreement are also unconscionable because they permit BFS to seek indemnity and a defense from labor-only subcontractors such as Hurley for materials selected and sold by BFS . . ." Order p. 8. The Court, in so finding, has completely misinterpreted the Section 3 Warranty provision.

In Section 3, Hurley warrants and guarantees "the Work," which is a defined term found in Section 1(a) of the Contract. As defined, the Hurley "Work" encompasses only materials provided and/or services performed by Hurley. Neither the Hurley "Work" nor the warranty obligations undertaken by Hurley in Section 3 of the Contract include either any guarantee against defects in materials or services by BFS, or any undertaking to indemnify BFS against defects in materials supplied by BFS. The Court's finding to the contrary is simply erroneous.

Again, this is not a case involving either a Section 3 Warranty claim or a Section 5 Paragraph Two bodily injury claim, and thus those provisions should not be "read together" – or even read at all – for the purposes of this case. The Court has found nothing unconscionable about the Section 5 Paragraph One property damage provision under which BFS seeks indemnification, and thus the Court should not have denied summary judgment on the grounds that the Contract is unconscionable.

Additionally, the Court's language condemning the entire Contract as one of adhesion on page 4 of its Order is both unfounded and unnecessary for the

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Court to reach its final conclusion – especially because the Court does not find any independent grounds for unconscionability but rather points to public policy and Section 32-2-10 to support its findings. The Court's dicta regarding adhesion is irresponsible and dangerous in that it will encourage future litigation against BFS on the grounds that this Court found its contract to be one of adhesion. Because it is unnecessary here, BFS respectfully asks that the Court retract this finding.

CONCLUSION

Because the Court's Order did not address or failed to comprehend multiple important points of fact and issues of law, BFS respectfully requests that the Court reconsider its Order dated January 25, 2020 and deny Hurley's motion for summary judgment as to BFS' contractual indemnity claim.

HOWELL, GIBSON & HUGHES, P.A.

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

Beaufort, South Carolina
February 4, 2021

Q. Would you agree with me -- would you agree with me, Mr. Mease, that is your interpretation of that provision?

A. No. I'm reading it as it's written. That's what it says.

Q. Well, are you aware of other experts with different opinions with regard to the interpretation of that very specific provision?

A. I am not.

Q. Okay. We have exhausted that. And you said -- what is the other problem which you say is prevalent with regard to the installation of these rough opening flashings?

A. That they do not weather lap in a shingle fashion the other elements in the wall.

Q. Okay. Now, where is this -- again, I'm looking at Photo 46. I'm having difficulty seeing where this rough opening FortiFlash flashing does not weather lap the adjacent paper beneath it. Is there something that I am failing to see there?

A. If you will notice in the photo, the weather barrier has been folded down. Do you see that at the bottom of the picture?

Q. Hold on. I'll see. I'm looking at

the FortiFlash, which appears to me to be folded over and outward of the paper beneath it. Is that what I'm looking at?

A. No. At the bottom of the picture you'll notice that the weather-resistive barrier is folded down. I have cut it away.

Q. Right. Right. Right.

A. So the FortiFlash does not flash over to the weather barrier. It only flashes onto this piece of woven wrap that's below the window which renders it ineffective.

Q. Do you know when -- the piece that you folded down is part of a much, much, much larger piece of weather-resistant barrier; would you agree with that?

A. Yes. It's the primary weather barrier on the wall.

Q. Do you know when that much larger piece was installed?

A. It was after these were installed, just based upon the layering. That's all I know.

Q. Would it have been possible when installing this larger volume of weather-resistant barrier to install that beneath the piece of weather-resistant barrier over which the

regard to the installation of the flexible flashing. Was there another problem you had with that that is illustrated someplace within your documents or your report?

A. I don't believe so.

Q. Okay. So you -- again, the primary issue you have, again -- and you correct me if I'm wrong. I'm simply trying to restate your testimony so I understand it correctly. You have issues with what you consider to be an improper lapping of the FortiFlashing and the weather-resistant barrier; that's one, right?

A. Yes.

Q. And then you have a problem with what you consider to be the installation of the FortiFlashing to an inadequate depth within the framing -- rough opening framing itself; is that right?

A. Yes.

Q. Is there something else?

A. I don't believe so.

Q. Okay. Thank you. And, Mr. Mease, if I have offended you in any manner, I apologize. I did not mean to do that. I'm just trying to get certain information. I don't want you to feel as

and outbound and outside of the building wrap immediately beneath the window; is that correct?

A. Yes, essentially.

Q. That to me -- and maybe you would differ. That appears to me to be at least for the -- at least for the lap of that FortiFlash rough opening flashing and the adjacent building wrap to be an appropriate weather lapping. Would you agree with that?

A. I would if it was complete, but it's not. And here is the problem, as what we saw on the inside of the home when we removed the apron, you could see that the FortiFlash did not completely cover the rough opening. It was short of the inside edge. The other problem that you have is --

Q. Before you go any further, I want to ask you a question about that. Bear with me, please. You say it stopped short. Describe to me, please, the manner in which this FortiFlash rough opening flashing in your opinion stopped short.

A. Okay. If you will look at Photograph 78, you can see it clearly. The code requires the entire rough opening to be protected. The

FortiFlash essentially reaches halfway into the rough opening, and I believe this was because they were probably using a six-inch-wide FortiFlash, and there's about four inches that's on the outside wall, and there's about two inches that come into the rough opening. So it doesn't cover the entire framing.

Q. Is there some specific code requirement that mandates that the rough opening flashing extends the depth of the framing?

A. Yes, R-703.8.

Q. And what specifically does that say?

A. Section R-703.8 is entitled Flashing. It says: Approved corrosion-resistant flashing shall be applied shingle fashion in such a manner to prevent entry of water into the wall cavity or penetration of water to the building structural framing components.

Obviously, this building structural framing component that we see in Photo 78 is not protected by the flashing because it's not covered by it.

Q. So you're taking your interpretation of that -- it is your interpretation -- that that code provision, which does not specifically

earlier with regard to the improper fastener, more specifically, the head size being too small and the overdriven condition of the fasteners, is the same here?

A. Yes.

Q. Any additional opinions reflected in 51 that we didn't discuss earlier relative to the fasteners?

A. No.

Q. And Photo 52 is just measuring the head size of that fastener?

A. Yes.

Q. What is Photo 53 documenting?

A. 53 through 55 are all, again, just examples of the conditions that were identified that were labeled on the wall with the spacing, the overdriven condition, not-in-stud condition, those things that we discussed earlier, just examples of that.

Q. Just for purposes of trying to clarify the record, Mr. Mease, I believe specific to Photo 51 I asked you if we had previously discussed all of your opinions relative to the fasteners?

A. Yes.

Q. So jumping to Page 42 of 69, which is

Photo 56, I believe now we're getting to, perhaps, the head of the windows; am I correct?

A. Yes.

Q. What is being documented? What condition is being documented in Photo 56?

A. As specified in the caption there, the flashings do not have end dams. And as we took this area apart, the flashing has not been installed in a weather lapped configuration similar to the window below, and we did find saturated moisture content in the wall below these flashings because of the improper installation.

Q. Was any destructive -- strike that.

What location are we looking at with regard to this window head that's captured in Photo 56? Is this still at that powder room window?

A. Yes. Yes.

Q. Which is DT-3?

A. Yes. It's the same window, just at the top.

Q. Did you make any cuts at the top of the window?

A. Yes. You see that in Photos 58 and 59.

inclusion of Photo 46 in your report?

A. Well, 46 through 50 all relay the same issue, and that is the water-intrusion damage that exists below the window and the saturated moisture content in the wall beneath this area. So it's just showing the damage that has resulted because of the improper installation.

Q. Of the weather lapping and window flashing?

A. Yes, the flashing of the window, the lack of a sealant joint around the window. We're going to talk about the head of the window here in just a minute. There's a lot of contributing factors to the water getting in. But the failure of the system is what I would say.

Q. Okay. And I understand from looking at Photos 48, 49, and 50 and based on your prior testimony before lunch that the moisture content exceeded 40 percent at Destructive Test Site Number 3?

A. Yes.

Q. Did you observe damage to the sheathing at Destructive Site Test Number 3?

A. Yes. That's the sheathing that we're looking at in the photo.

instructions tell you is that you must have rough opening flashing and you may use a pan. And then it tells you to integrate those elements with the weather barrier based upon the weather barrier's instructions. So they kind of hand it off to the weather barrier's instructions.

Q. So the instructions provided by Ply Gem didn't give you any specific instructions on how to integrate the weather barrier; is that accurate?

A. No. It just tells you to do it according to the weather-resistant barrier manufacturer's recommendations. What I will say is the integration of weather barriers and flashings is covered by the code, and they tell you that you must lap the top element over the bottom element. I mean, it's in the code. So I don't think it is really necessary for a lot of guidance around that.

Q. By the way, have you ever installed a window?

A. I have.

Q. When did you install windows?

A. I helped install on my own house, quite a few.

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
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COUNTY OF CHARLESTON	)	DOCKET NO. 2019-CP-10-0772
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	)	
DAG PAVIC, STELA SUSAC-PAVIC	)	
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
CAROLINA COTTAGE HOMES, et al	)	
	)	
Defendants	)	
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_____	)	TRANSCRIPT OF RECORD

October 1, 2020
Charleston, South Carolina

B E F O R E:

THE HONORABLE JENNIFER B. MCCOY, JUDGE

A P P E A R A N C E S:

FINLEY B. CLARKE, ESQ.
Attorney for the Plaintiff

STEPHEN P. HUGHES, ESQ.
Attorney for the Defendant

JOYCE C. RUEGER,
Certified Verbatim Reporter-Master
Circuit Court Reporter

[Certified Transcript Provided for: Stephen P. Hughes, Esq.]

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No exhibits were introduced

PROCEEDINGS

THE COURT: All right. This is a motion for partial summary judgment filed by Hurley Services, LLC; one of the defendants in this action. And I'm happy to hear from you at this time.

MR. CLARKE: May it please the Court? My name is Finley Clarke and I represent Hurley Services. This is a hearing on a motion for partial summary judgment that Hurley has filed with respect to cross-claims filed by Builders First Source for contractual indemnity, breach of contract, negligence, and warranty.

Builders First Source has another cross-claim for equitable indemnity and the motion is not related to that claim. This is a construction defect suit regarding a residence. The plaintiff has sued the general contractor, suppliers, Builders First Source which supplied the windows and doors in the house, and various subcontractors.

Hurley Services -- pardon me just a moment. Builders First Source also filed during the course of the lawsuit a third party complaint against the window manufacturer MW. That third party complaint was dismissed without prejudice under a tolling agreement with MW.

Now Builders First Source as I said is a building supplier. They sold the windows and doors, which are

installed in the plaintiff's residence. Hurley was a subcontractor to Builders First Source under a master subcontract agreement prepared and drafted by Builders First Source.

Now these windows that were sold are subject to a multi-million dollar class action lawsuit and settlement. The plaintiffs and Builders First Source entered into a stipulation that any manufacturing or design defects in the windows would not be an issue in the case. Those are the only two parties who entered into this stipulation. And I will address it later in my arguments.

But these cross-claims filed by Builders First Source are not viable claims because they, because Builders First Source has no damages other than the possibility of the plaintiff getting a verdict against it or the attorney's fees that they have incurred in defending the action.

The case of Stoneledge v Builders First Source, 776 S.E. 2d 434 is directly in point, Your Honor. In that case Builders First Source provided building materials in connection with a project known as Stoneledge. The general contractor in that case was Marick. Marick filed cross-claims against Builders First Source. In that case Builders First Source took the position that we are now taking in this case and that was that the plaintiffs,

that the general contractor had no independent damages and that these were merely disguised equitable indemnity claims. Quoting from the decision on page 437 the Court says, Marick seeks to recover -- let's see -- only from its potential liability to Stoneledge and from the expenses Marick incurred in defending itself. And the Court granted summary judgment.

Now, as I understand the position of Builders First Source as set out on pages 6 and 7 of its brief it concedes that the cross-claims for contract, breach of warranty and negligence are disguised equitable indemnity claims. And so those issues are not in the case.

The remaining claim, the contractual indemnity claim should be no different from those because the rationale is the same; they have no damages other than the potential for an adverse verdict and the attorney's fees they filed.

On pages 3 and 4 of our brief I had referred to the allegations that Builders First Source makes in its cross-claims. It says it's been damaged. They have been subjected to liability and have incurred consequential damages in having to expend attorney's fees. In its answer to interrogatory number 13, initial interrogatory number 13 regarding damages they don't list any damages. And so the reasoning is the same. Now there are two

Circuit Court judges who have considered this indemnification contract of BFS. We've cited those in our brief and have also sent the Court copies of the orders in 56 Owners Association and in the case of BFS v MI Windows and Doors.

In those cases the Courts granted summary judgment based on the fact that the contractual indemnity claim was a disguised equitable indemnity claim and also on the fact that the indemnification provisions did not meet the clear and unequivocal standard set out in Concord v Concord and Cumberland, 819 S.E.2d 166.

Now when you look at the contractual indemnity claim Your Honor they are contained in this master subcontract agreement that was drafted by BFS. The law is this is a contract of adhesion. Every sentence in that agreement is in favor of Builders First Source and against its subcontractor. It does not and the case law is clear that it should be construed against the draft of BFS and in favor of the subcontractor Hurley.

If you look at the agreement in fine print in section 3 they jumbled an indemnification provision in with a warranty provision. And they have an indemnification provision which appears to require the subcontractor to indemnify them for the design and materials. They picked out the materials, they sold

them, they warranted them and buried this in the fine print. It's a clear violation, Your Honor, of section 32-2-10 of the South Carolina Code which prohibits indemnification of an entity for their sole negligence.

Now what is interesting to me is on page 19 of the brief of Builders First Source it states as follows: at no time ever has BFS filed a claim against a subcontractor seeking for the subcontractor to indemnify BFS for claims relating to alleged manufactured material or component deficiencies. This case is no exception and Hurley's seventh argument is an attempt to mislead the Court as to the facts and issues in the matter.

Well, the windows are manufactured products that they picked out, sold to the general contractor, warrantied to the general contractor and gave us to be installed. They are subject to a class action lawsuit and settlement.

If you look at the cross-claim that BFS filed on August 26th of 2020 against Hurley on page, in paragraph 164 Hurley was responsible for provision of materials and services in connection with the installation of the aforesaid components of construction for proper quality control and compliance with the contract documents, industry standards, and relevant building codes. Well, these windows may not meet industry standards. I don't

know if they do or not but we didn't sell them, we didn't pick them out. They have included materials in that cross-claim. Then let's flip over to paragraphs 170 and 171. Cross-claimed defendant made express warranties that materials would be required by and in accordance with the contract documents, applicable building codes, and industry standards. Cross-claimed defendant expressly undertook to provide materials. They gave us the materials.

Paragraph 175, defendant made implied warranties of merchant ability and fitness. Paragraph 179 that cross-claimed defendant owed a duty of due care in providing services and materials. Paragraph 183, cross-claimed defendant was contractually responsible for adequate materials. Paragraph 184 breaches subcontract by properly failing to provide materials.

Now on paragraph 5 of the agreement, Your Honor they have bold type with multiple paragraphs about indemnity. The bold type indemnify provisions are more conflicting and confusing and ambiguous than this fine print indemnify provision which they put in here.

Paragraph 1, the duty of the subcontractor only arises upon his negligence. But paragraph 2, it can arise by the alleged sole negligence of BFS. Now BFS in its brief says well paragraph 2 is different. That's

bodily injury. Paragraph 1 is only property damage. That is not the case. If you look down on paragraph 1, 9 or 10 lines you see it also applies to bodily injury. They drafted the agreement. In paragraph 1 they don't say how negligence is to be determined. They could have said upon a finding of a judge or jury but they didn't do that. And so that paragraph should be construed against them.

In their answers to interrogatories which I've cited in the brief they say they are not alleging any construction deficiencies. They got an expert. In answer to paragraph 13 or interrogatory number 13 the defendant is not making any specific allegations of construction deficiencies. They've got an expert. They've looked at the house. That paragraph should be construed in our favor.

These provisions are not clear and unequivocal. You cannot look at them and tell what your obligations are. In their brief they go on and refer to the I think its paragraph 3 relating to a duty to defend. They say all of these things are different. They are severable.

The duty to defend arises if there is no negligence on the part of anybody. Yet in paragraph 1 it says the duty to defend, indemnify and hold harmless only arises if the subcontractor is negligent; a clear conflict.

Nobody can tell what it means. They don't know what it means themselves as evidenced by these pleadings they filed. Now, they say look, we've entered into this stipulation. The windows are not a problem. The plaintiff he's not going to make a big deal out of the windows; he's not even going to bring it up.

Well, this stipulation was entered into on October 31st of 2019. These cross-claims that they filed, the last cross-claims they filed against us were on August 26th of 2020; some 8 or 9 months later where they in fact are making a claim for the materials. In addition to that why haven't they dismissed their third party complaint against a manufacturer with prejudice? They dismissed it without prejudice under a tolling agreement because they know that the windows are an issue.

The windows are installed in the house. The plaintiff has made a decision that it is in the best interest of his clients to allege installation deficiencies rather than defects with the windows. Maybe they weren't going to get anything of significance out of the class action; I don't know.

But these windows are in the house and there is a possibility that this moisture damage, which has been documented in connection with the windows, is going to be transferred to us under these confusing, conflicting,

oppressive and unconscionable conditions. The cross-claims or disguised indemnity claims, the contractual indemnity claim does not meet the clear and unequivocal standard and also violates section -- I can't read my own writing -- I think its 33-210 of the Code. Thank you, Your Honor.

THE COURT: All right. Thank you so much. I'll give him a minute to sit down and you can take the podium next.

[Whereupon, Mr. Clarke is seated and Mr. Hughes takes the podium]

MR. HUGHES: May it please the Court?

THE COURT: Yes, sir.

MR. HUGHES: I'm Steve Hughes here on behalf of Builders First Source. Needless to say we disagree with virtually every component of the movant's arguments. However, I would like to reiterate for the Court's advantage the circumstances of the case.

This case arises initially from the commencement of litigation by the plaintiffs Pavic who sought recovery for damages allegedly occasioned by deficiencies in the construction of their residence in Mount Pleasant. Builders First Source in conjunction with Hurley Construction undertook to install windows and associated flashings. Our installations were in turn implemented on

our behalf by Hurley Services pursuant to a master subcontract agreement executed between Builders First Source and Hurley on May 14th of 2012 --

THE COURT REPORTER: I'm sorry, could you slow down just a little bit?

MR. HUGHES: Just tell me if I'm going too fast. That subcontract agreement contained explicit provisions whereby the subcontractor agreed to indemnify Builders First Source against liability for damages arising out of the negligence of the subcontractor and the installation of those components. It is upon that contract that we rely on pursuit of our claims here.

They contended within their motion and within their memorandum that there was no genuine issue as to any material fact. The fact is that the plaintiff's claims of deficient installation of windows and flashings is supported by the testimony of their primary forensic expert, engineer R.T. Mease. Mr. Mease testified redundantly that he had identified several alleged deficiencies in installation including an installation of flexible flashing of window sills which was not properly integrated with the bicker beneath the sills, the failure properly to install that flexible flashing to a sufficient depth within the framing, and a failure to integrate the flexible flashings and other flashings that

the window heads with the adjacent building components. All of those are allegations which we certainly contest. Nonetheless they are viable held evidence which must be considered by this Court in determining whether or not there is, in fact, any genuine issue of material fact as to the negligence of our subcontractor.

I would note that Mr. Mease also testified that those alleged deficiencies were violations of the provisions of the relevant building code. He said those violations have contributed to water intrusion and associated damages for which my client is being sued.

He also testified that those, that the appropriate installation of those components and the appropriate integration of flashings with adjacent waterproofing elements was something that was set forth within the code and any informed subcontractor should have known how to properly implement those.

Bottom line for purposes of their initial argument is that the evidence and all inferences reasonable and deducible there from must be construed in favor of the non-moving party, Builders First Source.

I would submit to you that there is virtually no credible contention that there is not some genuine issue of material fact at least on that issue, which would certainly preclude the issuance of an order of summary

judgment here. Now with regard to the Stoneledge arguments put forth by Hurley's counsel.

I think we all know that the current status of the law under the two Stoneledge opinions is that causes of action which accompany indemnity, equitable indemnity claims if those causes of action are set forth in breach of contract, breach of warranty or negligence those are deemed by the current status of the law to be creatures of equity. And those are simply reiterations of equitable claims and they subject under current law to dismissal. I'm certainly not arguing that.

However, there is no authority for the contention that causes of action in equitable and contractual indemnity are encompassed by either of the Stoneledge rulings. As I am sure this Court is aware the only, with the Court, the Stoneledge Court specifically addressed the contention that a cause of action in contractual indemnity should be dismissed.

In that case the Court did in fact dismiss the claims in contractual indemnity solely, solely upon the basis that the indemnitee had not put forth any evidence of the existence of a contract. That is categorically not the case here. Our exhibit B is the contract pursuant to which the parties operated here. That contract contains a specific written provision whereby

the subcontractor has agreed to indemnify Builders First Source against liability or damages arising out of the negligence of the subcontractor. I would submit that Stoneledge stands implicitly for the proposition that they are not entitled to summary judgment on our claims in the contractual indemnity.

Thirdly, they rely heavily upon the articulation of law in the matter of Concord and Cumberland by the Court of Appeals. I know from personal experience that that case has been misconstrued abroad within the bar of this state. However, Hurly argues here that the Builders First claims for contractual indemnity are based upon indemnity provisions which are neither clear nor unequivocal and thus subject to dismissal as a matter of law under the concepts and articulated by the Concord and Cumberland Court.

The indemnity claims as asserted by Builders First Source here however are factually and legally distinct from the ultimate resolution against the contractor in Concord and Cumberland.

My client in this case as I hope I'm communicating effectively to the Court seeks indemnification only, only against liability for damages arising out of the negligence acts or omissions of our subcontractor. We are categorically not making claims for indemnity against

damages occasioned by my client's negligence. That is completely different factually and legally from the position asserted by the indemnity in Concord and Cumberland. The general contractor indemnity there sought indemnification against his subcontractor not only for the negligence of the subcontractor but also for the negligence of the general contractor itself.

Now the Court of Appeals in interpreting provisions which were virtually identical to those within our contract and are currently before this Court said that where an indemnitee seeks indemnity against liability for damages arising out of its own negligence the contractual provisions imposing those allegations to indemnify must be clear and unequivocal.

The Court in that case clearly found that the indemnification provisions upon which the indemnitee relied did not meet that standard and granted summary judgment to the extent that the indemnitee were seeking damages occasioned by its own negligence.

Now, perhaps more importantly the Court of Appeals in affirming the finding of the lower Court noted again that although an indemnitee cannot seek indemnification from its indemnitors against its own negligence. The same provisions which are at issue here clearly authorized indemnity in favor of the indemnitee against

damages occasioned by the negligence of the subcontractor. The recovery in indemnitee which was explicitly recognized by the Concord and Cumberland Court is exactly, exactly the relief which my clients are seeking before this court.

There is not a particle of difference in the theory upon which we seek recovery. There are differences in terms of the actions of the parties as to whether or not those give rise to the findings of negligence against the respective parties but those are always individual to a particular case.

The fact is the theoretical basis for the claims we are asserting indemnity premised upon damages occasioned by the negligence of our subcontractor are clearly recognized as appropriate by the Concord and Cumberland Court. And I would submit again that any ruling against my client at this juncture on a summary judgment basis is simply incompatible with the Concord and Cumberland ruling.

Plaintiff also relies in support of its -- plaintiff -- Mr. -- Hurley also relies in support of its motion for summary judgment upon a supposed collateral estoppel arising out of the rulings of Judges Young and Newman. As this Court I'm sure is aware collateral estoppel arises only where issues of law or fact have been

actually eliminated -- actually litigated and determined by a valid final judgment. It is only where a valid final judgment has in fact an issue that collateral estoppel applies and then only to issues which have been actually litigated and determined.

I would submit that neither of those criteria is satisfied here. In the first instance as demonstrated by our submissions and the associated, the exhibits, both of those orders are currently pending upon appeal before the Court of Appeals.

Unless and until our appellate courts have issued a final authoritative resolution my client has not had a fair and full opportunity to litigate those issues. In the absence of that full and fair opportunity there is no final judgment which is the sine qua non of the availability of collateral estoppel.

There is simply no such final judgment here that would allow the Court in my humble opinion to grant a summary judgment based on that basis. However, even more important and of more immediate relevance here each of those orders issued by Judges Young and Newman were clearly based upon those Courts determinations that my client was seeking recovery and indemnity against damages occasioned by my client's own negligence.

We are categorically not doing that here. The

Courts in each of those cases also determined that the contractual provisions of our indemnity agreement were not sufficiently clear and unequivocal to allow such recovery under the law as subject to in Concord and Cumberland.

Again neither of the criteria necessary to impose a bar of collateral estoppel has been established here. There is no basis for Hurley's reliance upon such a theory to bar our claims and an appropriate amount of leave to rule upon that motion in favor of Hurley today.

THE COURT: All right. Mr. Hughes, before you step down what about his argument that the plaintiffs aren't making claims about window installation.

MR. HUGHES: I have more to talk to you about if you want to hear me.

THE COURT: Oh good. I'm sorry; I thought you were wrapping up ---

MR. HUGHES: --- no, no ---

THE COURT: --- I was going to say I have more questions. By all means continue ---

MR. HUGHES: --- I hope to address them.

THE COURT: Okay.

MR. HUGHES: He has also contended that the contract is marred as one of adhesion and unconscionability. As this Court knows a contract of

adhesion is one where it's often on a take it or leave it basis. I would submit that there is absolutely no evidence that this contract was offered on a take it or leave it basis without any opportunity for any party to negotiate. That however is hardly the end of the inquiry.

The fact is that in order for a contract to be unconscionable you must have both an absence of meaningful choice on the part of one party due to the one-sided provisions and, and equally importantly you must have terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.

The provisions of this contract simply do not satisfy the latter criteria for a finding of unconscionability in the first place. Again, there is no evidence at all nor could there be that Hurley Services was forced to enter into this contract.

Moreover, there is no evidence nor could there be that Hurley Services has been forced to perform under this contract. Hurley Services has collected over three quarters of a million dollars from Builders First Source over the years; always on a voluntary basis implementing services which we requested pursuant to this contract.

Moreover the contract, I believe it's in section 1,

authorized the subcontractor in the event that an addendum or an amendment to the contract proves difficult for him to withdraw from that contract without any further exposure or liability.

Moreover, notwithstanding the contention that it was unconscionable they first entered into this contract at least as early as May of 2012. They reentered the same contract in December of 2014. That certainly goes to the point of finding that there was no compulsion here in the undertaking of the responsibilities encompassed by this contract.

I would submit that these circumstances belie any credible contention of either adhesion or unconscionability. And I don't believe there is sufficient evidence here to rule in favor of Hurley Services premised upon that particular basis.

I would like to address his arguments which arise out of section 3 of our agreement. He has taken the position both in his brief and in oral arguments before this Court that section 3 imposes upon the subcontractor an obligation to indemnify us against defects in products.

Section 3 in terms of imposing warranty obligations and guarantee obligations and indemnity obligations addresses the work quote unquote the work of the

subcontractor. That work is specifically defined in section 1 of our contract to encompass materials and services provided by the subcontractor.

The indemnity obligations under section 3 do not relate to materials that we provide. Those provide for an indemnification agreement in our favor solely, solely in the event that materials or services provided by our subcontractor are defective. The language of our contract, the language of our pleadings is designed to encompass those circumstances where the subcontractor does in fact provide some materials.

Now in our case that not infrequently includes fasteners and other components of appropriate installation. We have to protect ourselves by our pleadings and our contracts against deficiencies or deviations from contractual undertakings in the services of the subcontractor.

I would submit that article 3 I realize it was an innocent misrepresentation by Mr. Clarke that is an argument without foundation. Paragraph 3 of our agreement, section 3 of our contract simply does not provide for indemnity against materials provided by them.

Moreover as the Court knows we have stipulated with the plaintiff that no claims are being asserted premised upon deficiencies in the windows. The plaintiffs I

suppose are going to exercise whatever options they might have under the class action resolution by -- windows and doors.

They also address alleged ambiguities between paragraphs 1 and 2 of our section 5. As I've represented to this Court our claims for indemnity in this case are premised upon the provisions of section 1 of article 5 which are virtually identical to those which were approved implicitly by the Court of Appeals in the matter of Concord and Cumberland.

Section 2 paragraph 2 of section 5 deals with a completely different factual situation; personal injury or death to the subcontractor, its employees, or its subcontractors. It is factually distinct from the claims asserted here.

Moreover, if the Court -- equally and importantly with regard to paragraph 2 of section 5 it by its specific provisions entitles us to indemnification only to the fullest extent required by law. Clearly an appropriate interpretation of that provision means that we are only seeking recovery to the extent the law might allow us to recover.

Not only are we not relying upon that provision in our assertion of claims here that provision when appropriately interpreted does not bar our claims here.

Equally importantly and as I'm sure this Court is aware despite I think a derf of appellate opinions concerning section 32-210. Section 32-210 while baring agreements to indemnify against the sole negligence of the indemnitee sets forth specifically that a separate agreement whereby a promisor undertakes to indemnify an indemnitee against the negligence of the promisor, against the negligence of the promisor, here Hurley, is valid.

That is exactly what our contract includes; a specific undertaking whereby our subcontractor has agreed to indemnify and hold harmless my client against liability for damage occasioned by the negligence of the subcontractor. There is nothing invalid about that provision and nothing invalid in South Carolina law.

Two more elements on that point the contract again is subject to appropriate interpretation where necessarily in doubt. These provisions as properly interpreted do not violate any relevant South Carolina prohibition.

Finally our contract contains a severability provision. And to the extent the parties have specifically, specifically agreed in writing that it is their intent that any provision of the contract which might be found to be somehow adverse to South Carolina

law be reformed by the Court. Both of them have agreed that is their intention that the rights afforded under this contract be consistent with South Carolina law.

There is nothing within our contract notwithstanding the wholesale assaults that have been blatantly made against it that is antithetical to South Carolina law. And I would contend most forcefully that an order of summary judgment in favor of Hurley Services at this point simply do not appear --

I'll be glad to take any other questions, Your Honor.

THE COURT: I'll get back to my question from earlier which is just that his argument is sort of that the windows are not at issue and I realize that you state that is not true in your briefs. You say the plaintiffs have stipulated they are not seeking damages based on any deficiencies in the windows. So maybe clear up what that means a little bit more for me.

I mean you're not -- you're not alleging in your eyes that the installation was proper. They're more when they talk about deficiencies they're talking about the actual manufactured window itself, is that correct?

MR. HUGHES: There were -- there was a possibility upon my initial review of the complaint against Builders First Source that the claims encompassed therein against

my client related not only to deficiencies in installation but also to possible deficiencies in design, manufacture, or construction of the windows. Stanley Rogers and I discussed those questions and he agreed specifically as is set forth in our stipulation that the plaintiffs were seeking, I think the stipulation itself says basically we are not seeking, plaintiffs are not seeking recovery for alleged damages related to any purported deficiencies in design, manufacture, or construction of the windows.

Those are simply not issues and they are not issues here. To the extent he might wish to claim them later that's certainly his prerogative I suppose. I have represented to this Court as our representation we are not seeking recovery against our subcontractor for damages occasioned by deficiencies in the design, manufacture of the windows.

We are seeking recovery solely to the extent that a fact finder may determine that there were in fact deficiencies in the installation of those components which have resulted in damages for which we are being held responsible.

THE COURT: Okay. Let me get back and this is a point I just want to make sure it's really clear on the record because I'm not sure; you were speaking a little

bit quick earlier. Are the plaintiffs seeking damages arising out of the installation of the windows?

MR. HUGHES: Yes, ma'am.

THE COURT: Okay.

MR. HUGHES: Which again not to belabor the point to the extent that they should successfully show that the windows were not appropriately or properly installed that is occasioned by the negligence of our subcontractor for which I would contend the subcontractor has validly agreed to indemnify my client ---

THE COURT REPORTER: --- I'm sorry; repeat the very last thing you said, the subcontractor?

MR. HUGHES: The subcontractor has validly agreed to indemnify my client against damages occasioned by his own deficiencies and performance.

THE COURT: All right. So very simply they aren't seeking damages related to installation of the windows and you're alleging you are entitled to indemnity as to the subcontractor's installation of those windows. And there is evidence in the record by virtue of Russell Mease, who has identified installation problems, is that correct?

MR. HUGHES: Yes, ma'am.

THE COURT: Okay.

MR. HUGHES: And let me make sure. I assume that

my submission of my memorandum in opposition with all of the exhibits are considered properly before the Court?

THE COURT: They are and they are all part of the record and fully incorporated therein for purposes of this hearing.

MR. HUGHES: Okay. Thank you, Your Honor.

THE COURT: Absolutely. You can step down and I'll let Mr. Clarke respond if he wishes to.

[Whereupon, Mr. Hughes is seated and Mr. Clark takes the podium again]

MR. CLARKE: Your Honor, I have on just a few points. First of all, in the first Stoneledge case the Court did not address whether or not the contractual indemnification provision between Marick and Builders First Source were equitable indemnity claims.

The reason they didn't the Court to my recollection is that the Court said that that agreement did not apply to this project so it didn't get to that question. But the reasoning of the Court is the same and that is that they have no damages other than the possibility of suffering an adverse verdict or their attorney's fees and that is not enough to have an independent and viable claim.

This stipulation was entered into between the plaintiffs and BFS; nobody else. The plaintiff wants to

blame all of these damages on installation deficiencies. They think they can get more money that way than saying you know the windows are defective. That's what BFS wants. They don't want to be on the hook for defective windows.

But Saussy Burbank, the general contractor that they sold the windows to, has filed a cross-claim against them, multiple cross-claims dealing with the quality of the windows. And they in turn have filed this cross-claim against Hurley on August 26th where every single one of the claims blames Hurley for windows.

And so they are trying to transfer this liability for these windows that are in the house to us under the guise of installation deficiencies. There is nobody on the planet who can understand that agreement. They don't understand it.

They've represented to the Court they never make a claim against a subcontractor for these manufactured materials that they pick out, they sell, they warrant and give us to install. And yet that's exactly what they've done in black and white.

Every single cross-claim alleges my client is responsible for these manufactured materials that they picked out, sold, warranted, and gave to us and which is subject to a class action suit and settlement. Thank

you.

THE COURT: Okay. All right. Well, thank you both. I'll certainly take a closer look at your memoranda and the exhibits attached and expect to issue an order with regards to this motion for partial summary judgment in the next two weeks.

MR. HUGHES: Thank you, Your Honor.

THE COURT: Yes, sir. Thank you very much. I'll just remind you to use hand sanitizer since you were both touching the podium and put your mask back on before you exit the courtroom, please. Thank you very much.

MR. CLARKE: Thank you, Your Honor.

THE COURT: Thank y'all.

MR. HUGHES: Excuse me, Your Honor. I didn't hear you if you said you wanted us to submit orders. Did you want us ---

THE COURT: --- I'll let you know if I need one.

MR. HUGHES: Thank you.

MR. CLARKE: Thank you, Your Honor.

********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 Charleston County, South Carolina on the 1st day of October, 2020.

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

April 5, 2021

_____

Joyce C. Rueger, CVR-M

Court Reporter

ELECTRONICALLY FILED - 2020 Aug 27 11:44 AM - CHARLESTON - COMMON PLEAS - CASE#2019CP1000772

Builders FirstSource

BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into effective as of May 14, 2012, between **Builders FirstSource – Southeast Group, LLC**, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com ("Contractor"), and Hurley Services, LLC, address: 201 Sparkleberry Lane, Ladson, SC 29456, telephone: 843-425-5180 fax: 888-972-6563 Contact: Giovanni N. Mendes, e-mail: HurleyservicesLLC@gmail.com ("Subcontractor").

SECTION 1. Introduction.

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

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

GM
Subcontractor
Contractor

[Version –5/17 /06]

EXHIBIT
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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.**

GM
Subcontractor
Contractor

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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

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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:

Hurley Services, LLC

By: Giovanni N. Mendes

Name: Giovanni N. Mendes

Title: Owner

80-0803713

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

BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC

By:

Name: Daryl Ward

Title: Vice President

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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 12-18, 2014, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, TX 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com ("Contractor"), and HURLEY SERVICES, LLC address: 836 LEBBY ST, CHARLESTON SC 29412, telephone: 8433432045, fax: 8889726563, Contact: GIOVANNI MENDEZ e-mail: HURLEYSERVICESLLCSC@GMAIL.COM ("Subcontractor").

SECTION 1. Introduction.

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

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

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Subcontractor
Contractor

EXHIBIT
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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.

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d. Safety and Environmental.

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

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

Subcontractor agrees as follows:

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

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

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

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WITH THE REGULATIONS.

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

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

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

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

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If

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Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

SECTION 4. Insurance.

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

a. Workers' Compensation Insurance - statutory limits in the state where each Project is located.

b. Employer's Liability Insurance - $1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.

c. Commercial General Liability - $1,000,000 per occurrence, $1,000,000 products-completed operations aggregate, $1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.

d. Business Auto Liability, including hired and non-owned auto coverage - $500,000 combined single limit.

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

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and alternate employer's endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance

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provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

SECTION 5. INDEMNITY.

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

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

Subcontractor

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OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

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

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (1) CAUSED BY OR RESULTS FROM: (A) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (B) 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,

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DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (2) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

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

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

If the Project contracted for herein is subject to or becomes subject to 41 CFR 60-741.5(a), then the Subcontractor and Contractor certify that they shall abide by the requirements of 41 CFR 60-741.5(a), such requirements being incorporated by reference herein. This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.

If the Project contracted for herein is subject to, or becomes subject to, 41 CFR 60-300.5(a), then the Subcontractor and Contractor certify that they shall abide by the requirements of 41 CFR 60-300.5(a), such requirements being incorporated by reference herein. This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.

Subcontractor further certifies that it has read and familiarized itself with the requirements contained in 41 CFR 60-741.5(a) and 41 CFR 60-300.5(a) and shall incorporate the above language into its purchase orders and subcontracts.

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)

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ARISING OUT OF, RESULTING FROM OR RELATED TO SUBCONTRACTOR'S BREACH OF THE OBLIGATIONS SET FORTH IN THIS SECTION 7.

SECTION 8. 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

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

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

SECTION 9. 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.

Subcontractor

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Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.

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

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

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

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

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

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

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

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

(6) Contractor has received payment from Owner.

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

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue

Subcontractor

Contractor

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Joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

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

SECTION 10. 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.

Subcontractor

Contractor

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

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

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

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

f. **Release.** 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. Specifically, Subcontractor agrees that Subcontractor shall not file, or cause to be filed, any demand, claim, suit or cause of action against Contractor and all of its officers, directors, agents, and employees hereunder.

g. **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.

[The remainder of this page intentionally left blank.]

Subcontractor

Contractor

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

SUBCONTRACTOR:
HURLEY SERVICES, LLC

By: Giovanni Mendes

Name: GIOVANNI MENDES

Title: OWNER

80-0803713
Subcontractor Social Security No. or Federal I.D. No.

BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC

By:

Name: Daryl Ward

Title: Vice President

14

GM
Subcontractor

Contractor

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

SUBCONTRACTOR:
HURLEY SERVICES, LLC

By: Giovanni Mendes
Name: GIOVANNI MENDES
Title: OWNER
80-0803713
Subcontractor Social Security No. or
Federal I.D. No.

BUILDERS FIRSTSOURCE –
SOUTHEAST GROUP, LLC

By: _____
Name: Deryl Ward
Title: Vice President

14

Subcontractor
Contractor

ELECTRONICALLY FILED - 2020 Aug 27 11:44 AM - CHARLESTON - COMMON PLEAS - CASE#2019CP1000772

HOWELL, GIBSON AND HUGHES, P.A.
ATTORNEYS AT LAW
Post Office Box 40
Beaufort, South Carolina 29901-0040
www.hghpa.com

STEPHEN P. HUGHES
ROBERT W. ACHURCH III *
DAVID S. BLACK
MARY BASS LOHR
THOMAS A. BENDLE, JR.

WILLIAM H. COX, III
NATHAN E. AKERS
ROBERT S. DENNIS

* Certified Mediator

Catherine L. Floeder (Of Counsel)

25 RUE DU BOIS
LADY'S ISLAND
BEAUFORT, SOUTH CAROLINA 29907

TELEPHONE: 843 – 522-2400
FAX NUMBER: 843 – 522-2429
WRITER'S DIRECT: 843-522-2426
DIRECT E-MAIL:
Sphughes@hghpa.com
PARALEGAL E-MAIL:

January 11, 2021

VIA EMAIL ONLY

The Honorable Jennifer B. McCoy
100 Broad Street, Suite 348
Charleston, South Carolina 29401

Re: Dag Pavic and Stela Susac-Pavic vs. Carolina Cottage Homes, LLC dba Saussy Burbank; SB Holding, LLC dba Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC
Civil Action No.: 2019-CP-10-00772
Our File No: 12313 SPH

Dear Judge McCoy:

We are in receipt of your Form 4 Order by which you have announced the Court's decision to grant Defendant Hurley Services' Motion for Partial Summary Judgment as to Defendant Builders FirstSource-Southeast Group, LLC's cross-claims. Therein you also request that Defendant, presumably Hurley Services, submit a proposed Order for the Court's review within the next 10 business days.

Notwithstanding this filing, it is our understanding that the Court will issue a subsequent Order comprehensively setting forth the findings of fact and conclusions of law. It is our further understanding that the issuance of the subsequent Order will serve as the Court's final dispositive Order, and that the date of the dispositive Order will serve as the date for commencement of any post-judgment procedures for the parties.

We would respectfully request confirmation of the accuracy of the information herein.

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

s/Stephen P. Hughes

Stephen P. Hughes

SPH/sph

Kaci Willis

From: McCoy, Jennifer Law Clerk (Joseph Grooms) <jmccoylc@sccourts.org>
Sent: Monday, January 11, 2021 7:29 PM
To: Meredith Irion
Cc: Bernadene Giles; Catherine L. Floeder; Chip Emge; Finley Clarke; Greg Shelton; Hailea Demers; John H. "Jack" Capitano; Katherine Miller; Kevin Mims, Esquire; LM Support (lmsupport@lmlawllp.com); Robin Anderson; Ryan Ellard; Stanley C. Rodgers (scr@stanleyrodgers.com); Stephen P. Hughes; William Chase McNair Esquire (cmcnair@lmlawllp.com); Witt Cox
Subject: RE: {Matter No.[12313 SPH]}{File No.[P 949-342736]}{Pavic vs. Builders FirstSource}

Good afternoon,

Mr. Hughes is correct on all accounts. A formal order will be signed and filed, which will commence the time for appeal once it is filed. Let me know if there is anything else I can do to help.

Thanks,

J. Hayden Grooms
Law Clerk
The Honorable Jennifer B. McCoy
100 Broad Street, Suite 348
Charleston, SC 29401
Phone: (843) 958-5064

From: Meredith Irion <MIrion@hghpa.com>
Sent: Monday, January 11, 2021 4:44 PM
To: McCoy, Jennifer Law Clerk (Joseph Grooms) <jmccoylc@sccourts.org>
Cc: Bernadene Giles <BGiles@hghpa.com>; Catherine L. Floeder <CFloeder@hghpa.com>; Chip Emge <cemge@rlattorneys.com>; Finley Clarke <FClarke@cjpmlaw.com>; Greg Shelton <greg@sheltonlawcarolinas.com>; Hailea Demers <hdemers@rlattorneys.com>; John H. "Jack" Capitano <Jack.Capitano@offitkurman.com>; Katherine Miller <kmiller@lmlawllp.com>; Kevin Mims, Esquire <kmims@lmlawllp.com>; LM Support (lmsupport@lmlawllp.com) <lmsupport@lmlawllp.com>; Meredith Irion <MIrion@hghpa.com>; Robin Anderson <randerson@rlattorneys.com>; Ryan Ellard <Ryan.Ellard@wbd-us.com>; Stanley C. Rodgers (scr@stanleyrodgers.com) <scr@stanleyrodgers.com>; Stephen P. Hughes <SPHughes@hghpa.com>; William Chase McNair Esquire (cmcnair@lmlawllp.com) <cmcnair@lmlawllp.com>; Witt Cox <WCox@hghpa.com>
Subject: {Matter No.[12313 SPH]}{File No.[P 949-342736]}{Pavic vs. Builders FirstSource}

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *******

Attached please find correspondence from Mr. Hughes in the above captioned action.

Many Thanks,

Meredith Irion
Assistant to Stephen P. Hughes
Howell Gibson & Hughes, PA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO: 2019-CP-10-00772
	)	
Dag Pavic and Stela Susac-Pavic,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC ANSWERS TO HURLEY SERVICES, LLC'S INTERROGATORIES**
	)	
Carolina Cottage Homes, LLC dba Saussy Burbank; SB Holding, LLC dba Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services LLC; Simons Contractors, LLC and Cohen's Drywall Company, Inc.;	)	
	)	
Defendants.	)	
_____	)	
	)	
Builders FirstSource-Southeast Group, LLC	)	
	)	
Third Party Plaintiff,	)	
	)	
Vs.	)	
	)	
MW Manufactures, Inc.,	)	
	)	
Third Party Defendant.		

TO: FINLEY B. CLARKE, ESQUIRE, ATTORNEY FOR HURLEY SERVICES, LLC:

The Defendant, Builders FirstSource-Southeast Group, LLC, above named, answering the Interrogatories propounded by Hurley Services, LLC would show unto this Honorable Court:

GENERAL OBJECTIONS AND STATEMENTS

This Defendant responds and objects generally to the Interrogatories propounded by Hurley Services, LLC on the following grounds:

1. This Defendant objects to the extent that the Interrogatories intend to impose upon this Defendant a duty of disclosure or other obligation not required by the South Carolina Rules of Civil Procedure.

2. This Defendant objects to each discovery request to the extent that they pertain to (a) this Defendant's products other than those which may have been used in the house or building; (b) sales of this Defendant's products to purchasers other than those involved in the construction of the house or building; (c) conditions or damages that are not alleged to have occurred on the house or building; (d) circumstances beyond the time period relevant to this action. Such information and/or documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Also requests for such information or documents pertaining to such extraneous subject matters are overly broad as to time, scope and subject matter, and would be unduly burdensome to produce.

3. This Defendant also objects to the Interrogatories to the extent they assume that all products manufactured by this Defendant are uniform in composition, formulation, manufacture, design, specifications and applications.

4. This Defendant objects to the Interrogatories to the extent they call for responses that would disclose privileged information, including information protected by the attorney-client privilege, attorney work product doctrine, confidential business information, trade secret privilege information or any other applicable privileges. This Defendant also objects to the Interrogatories to the extent that they seek documents protected by the South Carolina Trade Secrets Act (§§39-8-10 - 130).

5. This Defendant objects to the Interrogatories to the extent they require information, documents, things, facts, opinions or any other matter prepared in anticipation of litigation or for trial, which is outside the scope of discovery permitted by Rule 26(b)(3) of the South Carolina Rules of Civil Procedure.

6. This Defendant incorporates its General Objections and Statements by reference as though fully set forth into its specific response to each and every request served by Hurley Services.

7. This Defendant reserves the right to supplement its responses to the Interrogatories as additional information or documents become known.

ANSWERS TO INTERROGATORIES

1. Give the names and addresses of all persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from these witnesses and indicate who has possession of such statements.

ANSWER:

Terry Rosamond
Representative of Builders FirstSource-Southeast Group, LLC

Upon information and belief, these witnesses will testify to their knowledge of the facts and circumstances of the underlying allegations in the Plaintiff's Complaint.

All Rule 30(b)(6) SCRCP and other representative witnesses for any corporate entity in the case, including our client.

All records custodians or other qualified witnesses, for the purpose of admitting business records or other materials into evidence.

All additional witnesses as are identifiable through documents, exchanged between the parties or other (Rule 33(c), SCRCP).

2. Set forth a list of photographs, videotapes, plats, sketches or other prepared documents in the possession of the party that relates to the claim or the defense of this case.

ANSWER: This Defendant is in possession of Builders FirstSource documentation, the C.V. of its expert, documents received from other parties via discovery, and records received pursuant to subpoenas. The records are available upon request by counsel and for review and copying

by counsel at the law firm of Howell, Gibson & Hughes, PA at a mutually convenient date and time.

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: This Defendant objects to Interrogatory Number 3 upon the grounds that the request seeks information and/or documentation that is neither relevant nor reasonably calculated to lead the discovery of admissible evidence.

Subject to and without waiving the foregoing objection, coverage and defense of this claim is being provided by Liberty Mutual.

Liberty Mutual Insurance Co
TB2-651-004212-032
06/01/2012 to 06/01/2013

4. For each policy of insurance identified in your answer to interrogatory number three (3), whether primary or excess, state whether the available limits of coverage are anything less than the full policy limits. If so, please state the amount of available limits of coverage for each policy.

ANSWER: This Defendant objects to Interrogatory Number 4 upon the grounds that the request seeks information and/or documentation that is neither relevant nor reasonably calculated to lead the discovery of admissible evidence.

5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or

provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: This Defendant is not in possession of any witness statements and discovery is ongoing with this regard.

6. List the names and addresses of any expert witness whom the party proposes to use in the trial of this case and provide the following information:

a. The subject matter on which each such person has been retained or specifically employed by you;

b. The profession, occupation, employer, and field of expertise;

c. The substance of the facts and opinions about which each alleged expert is expected to testify and a summary of the grounds for each opinion;

d. The dates and locations of each test, analysis or examination relating to this litigation conducted by each person or persons listed above and the examiner's conclusion as to the results of the test, analysis or examination; and

e. Whether you have ever employed the alleged expert or experts listed above as an expert witness or as litigation consultants in other matters. If so, indicate the dates, the name of each case, the court, and the civil action number.

ANSWER:

This Defendant has retained the following persons to serve as their expert witnesses in the defense of this case.

W. Randall Still, P.E.
RanDrew Consulting
Post Office Box 1588
Seneca, SC 29678-1588

Mr. Still, and/or other representatives of RanDrew Consulting are expected to offer testimony concerning their findings upon inspection, evaluation, and/or analysis of the subject structure, concerning alleged deficiencies in design, development, construction, and/or component materials, concerning deficiencies in maintenance, concerning appropriate scopes of remediation, concerning costs potentially associated with such remediation efforts, concerning attribution of fault as to the aforementioned matters, and concerning other matters at issue. It is expected that these individuals will rely upon their knowledge, education, skill, and training, their findings upon inspections of the subject residence, and/or the review of relevant documents or other materials, as well as their personal and professional experience.

This Defendant further reserves the right to designate and/or to utilize as an expert witness, and/or expert witnesses, any persons designated and/or otherwise identified in the discovery responses of any other party to the instant action, or otherwise identified during the course of discovery, or who may be qualified by background, training, and/or experience, to offer testimony as an expert.

7. If you contend that the work performed by Hurley on the subject residence was deficient, defective, or not in compliance with the plans and specifications for the project, building codes, governmental statutes, industry standards, rules, regulations, and good construction practices, please state with respect to each such defect, deficiency or violation:

a. Its exact location;

b. The exact nature of the defect, deficiency or non-compliance;

c. When the defect, deficiency or non-compliance was first discovered and by whom;

d. The nature, extent, and exact location including unit number of any damage resulting from said defect or deficiency;

e. The names and addresses of the persons or entities making repairs as a result of the defects or deficiencies, and the cost of such repairs.

ANSWER: This Defendant craves reference to the Plaintiffs' Complaint and notes that discovery is ongoing.

8. Please set forth in detail the scope of all work performed by Hurley on the subject residence.

ANSWER: Discovery is still ongoing. However, upon information and belief, Hurley Services, LLC subcontracted with Builders FirstSource-Southeast Group, LLC to provide labor for installation of the windows, doors, and limited framing at the Plaintiffs' residence during original construction.

9. Please identify by name and last known address all of your subcontractors who performed work on the subject property during original construction, and indicate what scope of work was performed by you and each of your subcontractors.

ANSWER: In addition to Hurley Services, LLC, it appears that MAF Finish Carpentry provided interior trim installation services as a subcontractor to Builders FirstSource-Southeast Group, LLC. MAF Finish Carpentry 26 Saxony Lane Bluffton, SC 29910.

10. Please give the names and last known addresses of all of your agents, employees, and personnel charged with performing any field supervision or having any site inspection responsibility with respect to the work performed by you and your subcontractors.

ANSWER: Discovery is ongoing with this regard.

11. Please give the names and last known addresses of all of your supervisory personnel who inspected and/or approved the work performed by Hurley.

ANSWER: Discovery is ongoing with this regard.

12. Please set forth in detail the inspection and approval process which you used at the project which had to occur before Hurley was paid for the work it performed on the subject residence.

ANSWER: This Defendant will defer to the testimony of its witnesses with this regard.

13. Please set forth in detail all damages claimed by you and explain how you calculate your damages.

ANSWER: This Defendant is not making any specific allegations of any construction deficiencies. Such claims are being made by the Plaintiffs. To the extent the evidence shows any deficiencies in the work performed by Hurley Services, LLC, this Defendant seeks recovery from Hurley Services, LLC.

14. Please identify all documents which you claim constitute the project plans and specifications and amendments thereto for work performed by Hurley.

ANSWER: Discovery is ongoing. However, this Defendant is in possession of records obtained from the Town of Mt. Pleasant Building Department which include some of the house plans.

15. Please identify all documents which you claim constitute the contract between you and Hurley for work on the subject residence.

ANSWER: The Master Subcontractor Agreement entered between Builders FirstSource-Southeast Group, LLC and Hurley Services, LLC on May 14, 2012 and the respective work orders for this project.

16. Please set forth the details of all settlements which you have reached with any present or former party or parties to this litigation.

ANSWER: None at this time.

17. Please set forth the dates and amounts of all payments made by you to Hurley relating to this project.

ANSWER: Discovery is ongoing with this regard. However, it appears that Hurley Services, LLC was paid on or about November 21, 2012 $867.00 for the window and door installation at this project.

18. Did you at any time tell, warn or otherwise advise Hurley that its work under the alleged contract was not satisfactory? If you answer to this interrogatory is in the affirmative, state in detail:

a. The identity of each person known by you to have any knowledge of the facts set forth in your answers to this interrogatory;

b. The identity of each document and oral communication that relates to or in any way supports your answers to this interrogatory; and

c. The substance of the communication.

ANSWER: Discovery is ongoing with this regard.

19. Please identify what materials you supplied under your alleged contract with Hurley and what materials were supplied by Hurley.

ANSWER: Discovery is ongoing with this regard.

20. Please identify any windows and/or other products manufactured by you which are incorporated into Plaintiffs' residence.

ANSWER: Upon information and belief, this Defendant did not manufacture any products. The windows are MW Series 800 windows manufactured by MW Manufacturing, Inc.

HOWELL, GIBSON & HUGHES, P.A.

By:___s/William H. Cox, III___
William H. Cox, III
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Builders First-Source-Southeast Group, LLC

Beaufort, South Carolina

July 25, 2019

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answers to Hurley Services' Interrogatories were served 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 25 day of July, 2019.

By:_____Wiliiam H. Cox, III_____
William H. Cox, III

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO: 2019-CP-10-00772
	)	
Dag Pavic and Stela Susac-Pavic,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC SUPPLEMENTAL ANSWERS TO HURLEY SERVICES, LLC'S INTERROGATORIES**
	)	
Carolina Cottage Homes, LLC dba Saussy Burbank; SB Holding, LLC dba Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services LLC; Simons Contractors, LLC and Cohen's Drywall Company, Inc.;	)	
	)	
Defendants.	)	
	)	
Builders FirstSource-Southeast Group, LLC	)	
	)	
Third Party Plaintiff,	)	
	)	
Vs.	)	
	)	
MW Manufactures, Inc.,	)	
	)	
Third Party Defendant.		

TO: FINLEY B. CLARKE, ESQUIRE, ATTORNEY FOR HURLEY SERVICES, LLC:

The Defendant, Builders FirstSource-Southeast Group, LLC, above named, answering the Interrogatories propounded by Hurley Services, LLC would show unto this Honorable Court:

GENERAL OBJECTIONS AND STATEMENTS

This Defendant responds and objects generally to the Interrogatories propounded by Hurley Services, LLC on the following grounds:

1. This Defendant objects to the extent that the Interrogatories intend to impose upon this Defendant a duty of disclosure or other obligation not required by the South Carolina Rules of Civil Procedure.

2. This Defendant objects to each discovery request to the extent that they pertain to (a) this Defendant's products other than those which may have been used in the house or building; (b) sales of this Defendant's products to purchasers other than those involved in the construction of the house or building; (c) conditions or damages that are not alleged to have occurred on the house or building; (d) circumstances beyond the time period relevant to this action. Such information and/or documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Also requests for such information or documents pertaining to such extraneous subject matters are overly broad as to time, scope and subject matter, and would be unduly burdensome to produce.

3. This Defendant also objects to the Interrogatories to the extent they assume that all products manufactured by this Defendant are uniform in composition, formulation, manufacture, design, specifications and applications.

4. This Defendant objects to the Interrogatories to the extent they call for responses that would disclose privileged information, including information protected by the attorney-client privilege, attorney work product doctrine, confidential business information, trade secret privilege information or any other applicable privileges. This Defendant also objects to the Interrogatories to the extent that they seek documents protected by the South Carolina Trade Secrets Act (§§39-8-10 - 130).

5. This Defendant objects to the Interrogatories to the extent they require information, documents, things, facts, opinions or any other matter prepared in anticipation of litigation or for trial, which is outside the scope of discovery permitted by Rule 26(b)(3) of the South Carolina Rules of Civil Procedure.

6. This Defendant incorporates its General Objections and Statements by reference as though fully set forth into its specific response to each and every request served by Hurley Services.

7. This Defendant reserves the right to supplement its responses to the Interrogatories as additional information or documents become known.

SUPPLEMENTAL ANSWERS TO INTERROGATORIES

6. List the names and addresses of any expert witness whom the party proposes to use in the trial of this case and provide the following information: (6)

a. The subject matter on which each such person has been retained or specifically employed by you;

b. The profession, occupation, employer, and field of expertise;

c. The substance of the facts and opinions about which each alleged expert is expected to testify and a summary of the grounds for each opinion;

d. The dates and locations of each test, analysis or examination relating to this litigation conducted by each person or persons listed above and the examiner's conclusion as to the results of the test, analysis or examination; and

e. Whether you have ever employed the alleged expert or experts listed above as an expert witness or as litigation consultants in other matters. If so, indicate the dates, the name of each case, the court, and the civil action number.

ANSWER:

This Defendant has retained the following persons to serve as their expert witnesses in the defense of this case.

W. Randall Still, P.E.
RanDrew Consulting
Post Office Box 1588
Seneca, SC 29678-1588

Mr. Still, and/or other representatives of RanDrew Consulting are expected to offer testimony concerning their findings upon inspection, evaluation, and/or analysis of the subject structure, concerning alleged deficiencies in design, development, construction, and/or component materials, concerning deficiencies in maintenance, concerning appropriate scopes of remediation, concerning costs potentially associated with such remediation efforts, concerning attribution of fault as to the aforementioned matters, and concerning other matters at issue. It is expected that these individuals will rely upon their knowledge, education, skill, and training, their findings upon inspections of the subject residence, and/or the review of relevant documents or other materials, as well as their personal and professional experience.

This Defendant further reserves the right to designate and/or to utilize as an expert witness, and/or expert witnesses, any persons designated and/or otherwise identified in the discovery responses of any other party to the instant action, or otherwise identified during the course of discovery, or who may be qualified by background, training, and/or experience, to offer testimony as an expert.

7. If you contend that the work performed by Hurley on the subject residence was deficient, defective, or not in compliance with the plans and specifications for the project, building codes, governmental statutes, industry standards, rules, regulations, and good construction practices, please state with respect to each such defect, deficiency or violation: (7)

a. Its exact location;

b. The exact nature of the defect, deficiency or non-compliance;

c. When the defect, deficiency or non-compliance was first discovered and by whom;

d. The nature, extent, and exact location including unit number of any damage resulting from said defect or deficiency;

e. The names and addresses of the persons or entities making repairs as a result of the defects or deficiencies, and the cost of such repairs.

ANSWER: This Defendant craves reference to the allegations in the Plaintiffs' Complaint, Plaintiffs' experts' and Saussy Burbank's experts' testimony regarding their observations, investigations, and opinions relating to the alleged deficiencies in the exterior doors and windows installation performed by Hurley Services. This Defendant also craves reference to the expert reports and documents produced in this matter.

8. Please set forth in detail the scope of all work performed by Hurley on the subject residence. (8)

ANSWER: Hurley Services, LLC subcontracted with Builders FirstSource-Southeast Group, LLC to provide labor for installation of the windows and exterior doors at the Plaintiffs' residence during original construction.

10. Please give the names and last known addresses of all of your agents, employees, and personnel charged with performing any field supervision or having any site inspection responsibility with respect to the work performed by you and your subcontractors. (10)

ANSWER: The salesman for the subject residence was Jamie Massalon. Rhame "Rooster" Cannon served as the project manager for the installation of the exterior doors and windows. James Kelley served as the project manager for the installation of the interior trim. Hurley Services installed the exterior doors and windows and MAF Finish Carpentry installed the interior trim.

11. Please give the names and last known addresses of all of your supervisory personnel who inspected and/or approved the work performed by Hurley. (11)

ANSWER: Rhame "Rooster" Cannon c/o Howell, Gibson & Hughes, PA.

12. Please set forth in detail the inspection and approval process which you used at the project which had to occur before Hurley was paid for the work it performed on the subject residence. (12)

ANSWER: This Defendant will defer to the testimony of its witnesses with this regard.

18. Did you at any time tell, warn or otherwise advise Hurley that its work under the alleged contract was not satisfactory? If you answer to this interrogatory is in the affirmative, state in detail: (18)

a. The identity of each person known by you to have any knowledge of the facts set forth in your answers to this interrogatory;

b. The identity of each document and oral communication that relates to or in any way supports your answers to this interrogatory; and

c. The substance of the communication.

ANSWER: Upon information and belief, no.

19. Please identify what materials you supplied under your alleged contract with Hurley and what materials were supplied by Hurley. (19)

ANSWER: Upon information and belief, this Defendant supplied the materials and Hurley provided the labor for installation of the exterior doors and windows at the subject residence.

HOWELL, GIBSON & HUGHES, P.A.

By: _____
William H. Cox, III
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Builders First-Source-
Southeast Group, LLC

Beaufort, South Carolina
September 16, 2020

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answers to Hurley Services' Interrogatories were served 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 16 day of September, 2020.

By: _____
Tori Walker

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2019-CP-10-00772
Appellate Case No. 2021-000290

Dag Pavic and Stela Susac-Pavic.....Plaintiffs,

vs.

Carolina Cottage Homes, LLC dba Saussy Burbank; SB Holding, LLC dba Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services LLC; Simons Contractors, LLC and Cohen's Drywall Company, Inc.....Defendants,

of which

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

and

Hurley Services, LLC is.....Respondent.

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.

SIGNATURE PAGE FOLLOWS

HOWELL, GIBSON & HUGHES, P.A.

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

Beaufort, South Carolina
July 28, 2021

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of which

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

and

Hurley Services, LLC is.....Respondent.

CERTIFICATE OF COMPLIANCE

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

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By: Catherine L. Floeder

Stephen P. Hughes
Mary Bass Lohr
William H. Cox, III
Catherine L. Floeder
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorneys for Builders FirstSource-
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of which

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

and

Hurley Services, LLC is.....Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief and Final Reply Brief of Appellant comply with Rule 211(b).

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Mary Bass Lohr
William H. Cox, III
Catherine L. Floeder
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorneys for Builders FirstSource-
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Hurley Services, LLC is.....Respondent.

PROOF OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing Final Brief of Appellant and Final Reply Brief of Appellant upon all counsel of record by email on this 28th day of July, 2021 addressed to the following:

Finley B. Clarke, Esq.
Clarke, Johnson, Peterson & McLean, P.A.
Post Office Box 1865
Florence, SC 29503
(843) 669-2401
fclarke@cjpmlaw.com
Attorney for Hurley Services

HOWELL, GIBSON & HUGHES, P.A.

By: Catherine L. Floeder

Stephen P. Hughes
Mary Bass Lohr
William H. Cox, III
Catherine L. Floeder
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorneys for Builders FirstSource-
Southeast Group, LLC

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