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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No.: 2021-CP-27-00069
Appellate Case No. 2025-001116

Mark W. McGilton,..... Respondent,

v.

1223 May River Road, LLC, D.R. Horton, Inc., and
Lotty Trucking, LLC f/k/a Ramos Trucking, LLC,..... Defendants,

of which D.R. Horton, Inc. is the Appellant,

AND

1223 May River Road, LLC, ...Third-Party Plaintiffs,

v.

Kenneth Scott Builders, Inc., ...Third-Party Defendants.

RECORD ON APPEAL
VOLUME II

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Appeal 2025-001116

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STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

Mark W. McGilton,)
)
Plaintiff,)

v.)

1223 May River Road, LLC;)
D.R. Horton, Inc.; and Lotty Trucking, LLC)
f/k/a Ramos Trucking, LLC,)
)
Defendants.)

1223 May River Road, LLC,)
)
Third-Party Plaintiff,)

v.)

Kenneth Scott Builders, LLC,)
)
Third-Party Defendant.)

D.R. Horton, Inc.,)
)
Third-Party Plaintiff,)

v.)

Kenneth Scott Builders, LLC,)
)
Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-27-00069

**SUMMONS TO THIRD-PARTY
COMPLAINT**

**TO: THIRD-PARTY DEFENDANT KENNETH SCOTT BUILDERS, LLC AND ITS
COUNSEL OF RECORD STEPHEN L. BROWN, ESQUIRE AND STEPHEN A.
GRIFFITH, JR., ESQUIRE:**

YOU ARE HEREBY SUMMONED and required to answer the Third-Party Complaint
contained in the Amended Answer of D.R. Horton, Inc., to Plaintiff's Complaint in this action, a

copy of which is hereby served upon you, and to serve a copy of your Answer to said Third-Party Complaint on the subscriber hereto at this office at 704 East McBee Avenue, Greenville, South Carolina, 29601, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Third-Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Third-Party Complaint.

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

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October 26, 2022

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-27-00069

Mark W. McGilton,)
)
Plaintiff,)

v.)

1223 May River Road, LLC;)
D.R. Horton, Inc.; and Lotty Trucking, LLC)
f/k/a Ramos Trucking, LLC,)
)
Defendants.)

1223 May River Road, LLC,)
)
Third-Party Plaintiff,)

v.)

Kenneth Scott Builders, LLC,)
)
Third-Party Defendant.)

**D.R. HORTON, INC.'S AMENDED
ANSWER AND THIRD-PARTY
COMPLAINT**

D.R. Horton, Inc.,)
)
Third-Party Plaintiff,)

v.)

Kenneth Scott Builders, LLC,)
)
Third-Party Defendant.)

**TO: THIRD-PARTY DEFENDANT KENNETH SCOTT BUILDERS, LLC AND ITS
COUNSEL OF RECORD STEPHEN L. BROWN, ESQUIRE AND STEPHEN A.
GRIFFITH, JR., ESQUIRE:**

Pursuant to Rule 15, SCRCP, Defendant D.R. Horton, Inc. (hereinafter “Defendant” or “D.R. Horton”), hereby amends its answer and asserts a Third-Party Complaint and answers the Complaint of Plaintiff, Mark W. McGilton (“Plaintiff”), as set forth below by denying each and every allegation not hereinafter specifically admitted, demanding strict proof thereof, and further respond as follows:

Each and every allegation set forth in Plaintiff’s Complaint, not expressly admitted herein, is hereby denied.

FOR A FIRST DEFENSE
(Answer to Complaint)

1. D.R. Horton is without sufficient information to form a belief as to the allegations contained in Paragraph 1 of Plaintiff’s Complaint, and therefore denies the same.

2. D.R. Horton denies the allegations contained in Paragraph 2 of Plaintiff’s Complaint.

3. D.R. Horton is without sufficient information to form a belief as to the allegations contained in Paragraph 3 of Plaintiff’s Complaint, and therefore denies the same.

4. D.R. Horton is without sufficient information to form a belief as to the allegations contained in Paragraph 4 of Plaintiff’s Complaint, and therefore denies the same.

5. D.R. Horton admits so much of Paragraph 5 of Plaintiff’s Complaint as alleges that D.R. Horton was a builder in Cypress Ridge community. D.R. Horton denies the remaining allegations contained in Paragraph 5 of Plaintiff’s Complaint.

6. The allegations contained in Paragraph 6 of Plaintiff’s Complaint are legal conclusions to which no response is required; however, to the extent an answer is required of D.R. Horton, D.R. Horton denies the same.

7. D.R. Horton is without sufficient information to form a belief as to the allegations contained in Paragraph 7 of Plaintiff's Complaint, and therefore denies the same.

8. D.R. Horton denies the allegations contained in Paragraph 8 of Plaintiff's Complaint.

9. D.R. Horton is without sufficient information to form a belief as to the allegations contained in Paragraph 9 of Plaintiff's Complaint, and therefore denies the same.

10. D.R. Horton denies the allegations contained in Paragraph 10 of Plaintiff's Complaint.

11. D.R. Horton denies the allegations contained in Paragraph 11 of Plaintiff's Complaint.

12. D.R. Horton denies the allegations contained in Paragraph 12 of Plaintiff's Complaint.

13. D.R. Horton denies the allegations contained in Paragraph 13 of Plaintiff's Complaint.

14. D.R. Horton denies the allegations contained in Paragraph 14 of Plaintiff's Complaint.

15. D.R. Horton denies the allegations contained in Paragraph 15 of Plaintiff's Complaint.

16. D.R. Horton is without sufficient information to form a belief as to the allegations contained in Paragraph 16 of Plaintiff's Complaint, and therefore denies the same.

17. D.R. Horton is without sufficient information to form a belief as to the allegations contained in Paragraph 17 of Plaintiff's Complaint, and therefore denies the same.

18. D.R. Horton is without sufficient information to form a belief as to the allegations contained in Paragraph 18 of Plaintiff's Complaint, and therefore denies the same.

19. The allegations contained in Paragraph 19 of Plaintiff's Complaint are legal conclusions to which no response is required; however, to the extent an answer is required of D.R. Horton, D.R. Horton denies the same.

20. The allegations contained in Paragraph 20 of Plaintiff's Complaint are legal conclusions to which no response is required; however, to the extent an answer is required of D.R. Horton, D.R. Horton denies the same.

21. The allegations contained in Paragraph 21 of Plaintiff's Complaint are legal conclusions to which no response is required; however, to the extent an answer is required of D.R. Horton, D.R. Horton denies the same.

22. D.R. Horton is without sufficient information to form a belief as to the allegations contained in Paragraph 22 of Plaintiff's Complaint, and therefore denies the same.

23. The allegations contained in Paragraph 23 of Plaintiff's Complaint are legal conclusions to which no response is required; however, to the extent an answer is required of D.R. Horton, D.R. Horton denies the same.

24. D.R. Horton denies the allegations contained in Paragraph 24 of Plaintiff's Complaint.

25. Paragraph 25 of Plaintiff's Complaint can neither be admitted nor denied, and D.R. Horton herein reasserts and realleges its answers and defenses to the prior allegations of Plaintiff's Complaint as set forth above.

26. The allegations contained in Paragraph 26 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required,

D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 26 of Plaintiff's Complaint and, therefore, denies the same.

27. The allegations contained in Paragraph 27 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 27 of Plaintiff's Complaint and, therefore, denies the same.

28. The allegations contained in Paragraph 28 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 28 of Plaintiff's Complaint and, therefore, denies the same.

29. The allegations contained in Paragraph 29 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 29 of Plaintiff's Complaint and, therefore, denies the same.

30. The allegations contained in Paragraph 30 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 30 of Plaintiff's Complaint and, therefore, denies the same.

31. The allegations contained in Paragraph 31 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 31 of Plaintiff's Complaint and, therefore, denies the same.

32. The allegations contained in Paragraph 32 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 32 of Plaintiff's Complaint and, therefore, denies the same.

33. The allegations contained in Paragraph 33 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 33 of Plaintiff's Complaint and, therefore, denies the same.

34. The allegations contained in Paragraph 34 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 34 of Plaintiff's Complaint and, therefore, denies the same.

35. The allegations contained in Paragraph 35 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 35 of Plaintiff's Complaint and, therefore, denies the same.

36. The allegations contained in Paragraph 36 of Plaintiff's Complaint are not directed to D.R. Horton; therefore, a response is not required. However, to the extent a response is required, D.R. Horton lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 36 of Plaintiff's Complaint and, therefore, denies the same.

37. Paragraph 37 of Plaintiff's Complaint can neither be admitted nor denied, and D.R. Horton herein reasserts and realleges its answers and defenses to the prior allegations of Plaintiff's Complaint as set forth above.

38. D.R. Horton denies the allegations contained in Paragraph 38 of Plaintiff's Complaint.

39. D.R. Horton denies the allegations contained in Paragraph 39 of Plaintiff's Complaint.

40. D.R. Horton denies the allegations contained in Paragraph 40 of Plaintiff's Complaint.

41. D.R. Horton denies the allegations contained in Paragraph 41 of Plaintiff's Complaint.

42. D.R. Horton denies the allegations contained in Paragraph 42 of Plaintiff's Complaint.

43. D.R. Horton denies the allegations contained in Paragraph 43 of Plaintiff's Complaint.

44. D.R. Horton denies the allegations contained in Paragraph 44 of Plaintiff's Complaint.

45. D.R. Horton denies the allegations contained in Paragraph 45 of Plaintiff's Complaint.

46. D.R. Horton denies the allegations contained in Paragraph 46 of Plaintiff's Complaint.

47. D.R. Horton denies the allegations contained in Paragraph 47 of Plaintiff's Complaint.

48. Paragraph 48 of Plaintiff's Complaint can neither be admitted nor denied, and D.R. Horton herein reasserts and realleges its answers and defenses to the prior allegations of Plaintiff's Complaint as set forth above.

49. D.R. Horton denies the allegations contained in Paragraph 49 of Plaintiff's Complaint.

50. D.R. Horton denies the allegations contained in Paragraph 50 of Plaintiff's Complaint.

51. D.R. Horton denies the allegations contained in Paragraph 51 of Plaintiff's Complaint.

52. D.R. Horton denies the allegations contained in Paragraph 52 of Plaintiff's Complaint.

53. D.R. Horton denies the allegations contained in Paragraph 53 of Plaintiff's Complaint.

54. D.R. Horton denies the allegations contained in Paragraph 54 of Plaintiff's Complaint.

55. Paragraph 55 of Plaintiff's Complaint can neither be admitted nor denied, and D.R. Horton herein reasserts and realleges its answers and defenses to the prior allegations of Plaintiff's Complaint as set forth above.

56. D.R. Horton denies the allegations contained in Paragraph 56 of Plaintiff's Complaint.

57. D.R. Horton denies the allegations contained in Paragraph 57 of Plaintiff's Complaint.

58. D.R. Horton denies the allegations contained in Paragraph 58 of Plaintiff's Complaint.

59. D.R. Horton denies the allegations contained in Paragraph 59 of Plaintiff's Complaint.

60. Paragraph 60 of Plaintiff's Complaint can neither be admitted nor denied, and D.R. Horton herein reasserts and realleges its answers and defenses to the prior allegations of Plaintiff's Complaint as set forth above.

61. The allegations contained in Paragraph 61 of Plaintiff's Complaint are legal conclusions to which no response is required; however, to the extent an answer is required of D.R. Horton, D.R. Horton denies the same.

62. D.R. Horton denies the allegations contained in Paragraph 62 of Plaintiff's Complaint.

63. D.R. Horton denies the allegations contained in Paragraph 63 of Plaintiff's Complaint.

64. D.R. Horton denies the allegations contained in Paragraph 64 of Plaintiff's Complaint.

65. D.R. Horton denies the allegations contained in Paragraph 65 of Plaintiff's Complaint.

66. With respect to the WHEREFORE Paragraph of Plaintiff's Complaint, D.R. Horton denies that Plaintiff is entitled to any relief it seeks by and through the Complaint.

FOR A SECOND DEFENSE

67. D.R. Horton incorporates herein the allegations of their first defense not inconsistent herewith.

68. D.R. Horton alleges that insofar as Plaintiff's Complaint seeks punitive damages, such damages are violative of both the United States and South Carolina Constitutions. As such, Plaintiff's claim for punitive damages is barred.

FOR A THIRD DEFENSE
(Superseding/Intervening Negligence)

69. D.R. Horton incorporates herein the allegations of their first defense not inconsistent herewith.

70. That if D.R. Horton was negligent, which is expressly denied, the superseding and intervening acts of third parties broke the chain of causation and were the proximate cause of any injuries as alleged by Plaintiff and D.R. Horton pleads superseding, intervening negligence of third parties as a complete bar to this action.

FOR A FOURTH DEFENSE

71. D.R. Horton incorporates herein the allegations of their first defense not inconsistent.

72. Defendant reserves and does not waive any additional further defenses that may be revealed by additional information that may be acquired in discovery or otherwise.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT AND BY WAY OF
THIRD-PARTY PLAINTIFF'S COMPLAINT AGAINST THIRD-PARTY
DEFENDANT KENNETH SCOTT BUILDERS, LLC

73. D.R. Horton incorporates herein the allegations of their first defense not inconsistent herewith.

74. D.R. Horton asserts claims against Third-Party Defendant, Kenneth Scott Builders, LLC, ("KSB").

79. To the extent the allegations contained in the Plaintiff's Complaint are not subject to binding arbitration, the Circuit Court has jurisdiction over the claims asserted in the Third-Party Complaint because the claims asserted herein are so related to the claims in the action within the Court's original jurisdiction that they form part of the same case or controversy.

80. Plaintiff, in the underlying litigation, has filed a Complaint against D.R. Horton seeking damages related to a collision on May River Road in Bluffton, Beaufort County, South Carolina (“Collision”).

81. D.R. Horton contracted with KSB such that KSB was obligated to supply certain labor, materials, and designs used or incorporated into the construction one or more of the Cypress Ridge development.

82. KSB entered into an agreement (the “Agreement”) with D.R. Horton regarding its work (attached as **Exhibit A**).

83. The Agreement speaks for itself, and D.R. Horton craves reference to the terms of the agreements, the same being are incorporated herein.

84. As provided in the Agreement, KSB was to supply certain labor, materials, and/or designs regarding one or more of the improvements, including but not limited to the Cypress Ridge development.

85. KSB implicitly and expressly agreed to perform its work in a good and workmanlike manner.

86. KSB was aware of the need and the importance of providing competent and licensed drivers and employees, vehicles, and safety measures, including but not limited to licensed, safe drivers with appropriately maintained and inspected vehicles and liability insurance.

87. D.R. Horton contends that KSB failed to meet its requirements of the Agreement, including, but not limited to, providing competent and licensed drivers and employees, vehicles, and safety measures, including but not limited to licensed, safe drivers with appropriately maintained and inspected vehicles and liability insurance.

88. As part of the Agreement, KSB agreed to indemnify and hold harmless D.R. Horton and provide liability insurance for D.R. Horton on behalf of itself and any subcontractors.

89. D.R. Horton fully satisfied and performed all requirements associated with and with respect to the Agreement.

90. D.R. Horton alleges KSB, and its subcontractor was negligent, improperly licensed, and operating a vehicle that was not road worthy, maintained, or inspected without insurance.

91. Although D.R. Horton is without fault, by virtue of the alleged acts and omissions of KSB, D.R. Horton has been subjected to suit and to the costs, expenses, attorneys' fees, and other damages associated therewith.

FOR A FIRST CAUSE OF ACTION
(Contractual Indemnification as to Co-Defendant)

92. D.R. Horton re-alleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

93. Plaintiff has sued D.R. Horton claiming damages related to the Collision.

94. KSB contracted with D.R. Horton to perform certain construction services and/or furnish certain materials on the Property and within the Community.

95. Plaintiff has alleged that damages were incurred in the Collision by the acts of KSB and its subcontractor.

96. D.R. Horton is informed and believes that if, in fact, Plaintiff is entitled to recover under the allegations of the Complaint, that the allegations are the result of the wrongful acts omissions, negligence, gross negligence, and/or representations of KSB, all of which are contrary to the agreements and common laws of the State of South Carolina.

97. To the extent, if any, that D.R. Horton is held liable to Plaintiff in this action, such liability would be the direct and proximate result of the wrongful acts, errors, and/or omissions,

negligence and/or gross negligence of KSB, which have damaged D.R. Horton as it has been subjected to liability and has incurred consequential damages in incurring the attorneys' fees and costs necessary to defend this action.

98. KSB is contractually obligated to indemnify and hold D.R. Horton harmless from damages arising out of KSB's respective work pursuant to the Agreement as well as provide liability insurance to D.R. Horton.

99. The alleged acts or omissions of KSB are the independent, active, primary, superseding, and/or intervening cause of damages allegedly suffered by Plaintiff, if any, and any wrongful acts or omissions by D.R. Horton, which are expressly denied, were passive and secondary only.

100. D.R. Horton is entitled to a judgment for full contractual indemnification from any liability D.R. Horton is found to have to Plaintiff for the allegations and relief sought in the Complaint, and D.R. Horton would be entitled to damages for the acts, errors, and/or omissions, negligence and/or gross negligence of KSB that D.R. Horton, as described hereinabove, entitling D.R. Horton to recover from KSB, the attorneys' fees, costs, and any and all other expenses incurred by D.R. Horton associated with defending this action as well as any sums for which it may be held liable to Plaintiff, whether by judgment, compromise, settlement, or otherwise.

FOR A SECOND CAUSE OF ACTION
(Equitable Indemnification as to Co-Defendant)

101. D.R. Horton re-alleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

102. Plaintiff has sued D.R. Horton seeking damages related to a collision on May River Road in Bluffton, Beaufort County, South Carolina.

103. D.R. Horton has denied all substantive allegations against it that were made by Plaintiff.

104. A sufficient special relationship exists between D.R. Horton and KSB.

105. D.R. Horton is informed and believes that if, in fact, Plaintiff is entitled to recover under its allegations, that the allegations are the result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of KSB, all of which are contrary to the statutory and common laws of the State of South Carolina.

106. To the extent, if any, that D.R. Horton is held liable to Plaintiff in this action, such liability would be the direct and proximate result of the alleged wrongful acts, errors, and/or omissions, negligence and/or gross negligence of KSB, which has damaged D.R. Horton as it has been subjected to liability and has incurred consequential damages in incurring the attorneys' fees and costs necessary to defend this action.

107. To the extent, if any, D.R. Horton is held liable to Plaintiff in this action, the alleged acts or omissions of KSB is the independent, active, primary, superseding, and/or intervening cause of damages allegedly suffered by Plaintiff, and any wrongful acts or omissions by D.R. Horton, which are expressly denied, were passive and secondary only.

108. D.R. Horton is entitled to a judgment for full common law or equitable indemnification from KSB for any liability D.R. Horton is found to have to Plaintiff for the allegations and relief sought in the Complaint, and D.R. Horton would be entitled to damages for the acts, errors, and/or omissions, negligence and/or gross negligence of KSB as afore described, entitling D.R. Horton to recover from KSB its attorneys' fees, costs, and any and all other expenses associated with defending this action as well as any sums for which D.R. Horton may be held liable to Plaintiff, whether by judgment, compromise, settlement, or otherwise.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract as to Co-Defendant)

109. D.R. Horton re-alleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

110. KSB was contractually responsible for performing the requirements in the Agreement correctly.

111. To the extent that Plaintiff proves that KSB was responsible for the damages incurred in the Collision, KSB materially breached the Agreement as set forth above.

112. D.R. Horton is entitled to judgment against KSB for breach of contract plus costs, expenses, attorneys' fees, and other damages associated therewith.

FOR A FOURTH CAUSE OF ACTION
(Negligence/Gross Negligence/Recklessness as to Co-Defendant)

113. D.R. Horton re-alleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

114. Upon information and belief, KSB owed a duty to use due care in ensuring that proper subcontractors and vehicles were used in its work.

115. If due care was not used in ensuring safety was achieved, then KSB breached its duty of care owed pursuant to the requirements under the Agreement and under the laws of South Carolina.

116. D.R. Horton has been damaged as a direct and foreseeable and proximate result of KSB negligence/gross negligence/recklessness, and D.R. Horton is entitled to judgment against KSB for its damages, including costs, expense, attorneys' fees, and other damages associated therewith.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant, D.R. Horton, Inc. prays for:

- (a) Dismissal of the Complaint and all causes of action contained therein, with prejudice, and an award to D.R. Horton for the attorney fees, costs, and other expenses incurred by D.R. Horton in defending this action;
- (b) On D.R. Horton's First and Second Causes of Action, judgment in favor of D.R. Horton and against KSB in the amount of any liability D.R. Horton is found to have to the Plaintiff and requiring Co-Defendant to defend and indemnify D.R. Horton against any liability which D.R. Horton may be liable with regard to safety or insurance for which KSB was responsible;
- (c) On D.R. Horton's Third Cause of Action, judgment in favor of D.R. Horton and against KSB for any costs, losses, or damages D.R. Horton may incur as it relates to KSB's breach of contract, including, attorneys' fees, costs, and any and all other expenses incurred in defending the Plaintiff's Complaint;
- (d) On D.R. Horton's Fourth Cause of Action, judgment in favor of D.R. Horton and against KSB awarding actual, special, consequential and punitive damages in an amount to be determined at trial;
- (e) Attorneys' fees;
- (f) Costs of this action; and
- (g) Such other and further relief that this Court deems just and proper.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

Jason M. Imhoff (SC Bar # 69355)

704 East McBee Avenue

Greenville, South Carolina 29601

Telephone: (864) 242-4899

Facsimile: (864) 242-4844

imhoff@conlaw.com

Counsel for Defendant D.R. Horton, Inc.

October 26, 2022
Greenville, South Carolina



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tesley DBA Kenneth Scott Builders ("Contractor")
 _____ Sole Proprietorship _____ Partnership ☒ Corporation _____ L.L.C. _____ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-0393282
 Name of Owner(s)/Officer(s): Kenneth J. Tesley
 Division Name: COASTAL CAROLINA Area Name: HILTON HEAD / SAVANNAH Assigned Vendor No.: 2016181
 Address for All Notices: PO Box 1590
 City: Hilton State: SC Zip Code: 29910
 Telephone: 843-247-1025 Fax: 843-813-3491 E-Mail Address: Ken@KennethScottBuilders.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February 2016 between DR Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 15-42 AND 15-43 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTRADICT AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February 2016.

Owner:
 By: [Signature]
 Name: DR Horton
 Title: Assistant Vice-President

Contractor:
 By: [Signature]
 Name: Kenneth Tesley
 Title: Owner

INITIALS: OWNER [Signature] CONTRACTOR [Signature]

AGREES THAT OWNER DOES, AND WILL, NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and those joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("Purchase Order"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("Inspector") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which

INITIALS: OWNER  CONTRACTOR 

the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("Waste"), caused by its operations and shall remove all of Contractor's materials at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

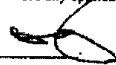
8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers; (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home; and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1)-year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

INITIALS: OWNER  CONTRACTOR 

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

INITIALS: OWNER  CONTRACTOR 

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL policy shall not contain a deductible or self-insured retention of more than \$25,000.00, and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc. (collectively "Horton") as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise; (b) did not pay the insurance premium directly or indirectly; and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs to complete, repair, or replace, plus any related costs or damage including re-inspection fees, with any excess to be paid to Contractor. If such costs exceed the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens

INITIALS: OWNER  CONTRACTOR 

are filed against the job location as a result of Contractor's acts or omissions, (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

INITIALS: OWNER  CONTRACTOR 

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

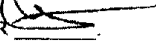
16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

SOUTH CAROLINA VERSION (REV. 22 JUNE 2015)

INITIALS: OWNER  CONTRACTOR 



GEORGIA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tashy DBA Kenneth Scott Builders,
 ("Contractor")
 Sole Proprietorship ☐ Partnership ☒ Corporation ☐ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-0393282
 Name of Owner(s)/Officer(s): Kenneth S. Tashy HT-201618
 Address for All Notices: PO Box 1590
 City: Blakely State: SC Zip Code: 29910
 Telephone: 803 247-1025 Fax: 803 815-3410 E-Mail Address: Ken@KennethScottBuilders.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February, 2016, between
DR Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Orders, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February, 2016

Owner:

By:

Name:

Title:

Assistant Vice-President

INITIALS: OWNER

Contractor:

By:

Name:

Title:

Owner

INITIALS: CONTRACTOR

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made) of all items for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("**Purchase Order**"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work as Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "**Requirements**"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, **INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS** from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("**Inspector**") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("**Change Order**") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("**Waste**"), caused by its operations and shall remove all of Contractor's materials

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at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drug" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHIA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

INITIALS: OWNER  CONTRACTOR 

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO DEFEND, INSURE, INDEMNIFY OR HOLD INDEMNITEE HARMLESS FOR LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv)

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contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL Policy shall not contain a deductible or self-insured retention of more than Twenty Five Thousand Dollars (\$25,000.00), and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) Employer's Liability Insurance in an amount not less than Five Hundred Thousand Dollars (\$500,000.00) for each accident for bodily injury, Five Hundred Thousand Dollars (\$500,000.00) policy limit for bodily injury by disease, and Five Hundred Thousand Dollars (\$500,000.00) for each employee for bodily injury by disease; (c) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (d) Commercial Automobile Liability Insurance coverage with limits of not less than Five Hundred Thousand Dollars (\$500,000.00) per person for bodily injury and Five Hundred Thousand Dollars (\$500,000.00) for property damage per occurrence specifying "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc., collectively "Horton" as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 0704 and CG 2037 0704). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits and any excess or umbrella coverages. Contractor shall immediately notify Owner in writing of any incident, occurrence, injury, or situation related in any way with the Work which may give rise to any claim or loss under any of the insurance coverages required by this Section 11.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor

INITIALS: OWNER  CONTRACTOR 

fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Dispute") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor

INITIALS: OWNER M CONTRACTOR [Signature]

agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of Georgia.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

GEORGIA VERSION (REV. February 11, 2015)

INITIALS: OWNER *M* , CONTRACTOR *S*



Exhibit "A" Part I-General Scope Of Work

General & Miscellaneous

- Mobilization
- Layout and staking
- Build construction entrance
- Asbuilts
- Installation of stop and street signs
- Installation of conduit

Clearing and Demolition

- Clear and grub site

Drainage

- Installation of RCP
- Insulation of HDPE
- Install catch basins, curb inlets, and junction boxes

Erosion Control

- Tree protection
- Temporary gravel
- Silt fence
- Seeding and sod
- Rip-rap sediment basin

Initials: Contractor

A handwritten signature in black ink, appearing to be 'J. [unclear]', written over a horizontal line.

DR Horton

A handwritten signature in black ink, appearing to be 'JH', written over a horizontal line.

Earthwork

- Strip/respreads topsoil
- Off-site fill
- Demucking and backfill
- Rough grade

Grading

- Fine grade for curb and base
- Fine grade shoulders and easements

Asphalt Paving & Pavement Marking

- Asphalt surface and binder

Concrete

- Concrete curb
- Installation of handicap ramps

Utilities

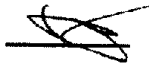
- Utility layout and record drawings

Sanitary Sewer

- Installation of sewer
- Pump stations

Water Distribution

- Installation of water

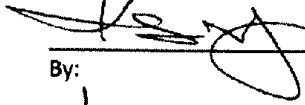
Initials: Contractor 

DR Horton 

Contractor

Owner

Kenneth Tasly DBA Kenneth Scott Builders D.R. Horton, Inc.
Company Name:


By:

Ken S. Tasly
Name:

Owner
Title:

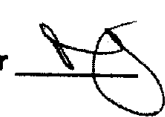
2/12/16
Date:


By:

Ron Bunn
Name:

A.V.P
Title:

2/22/16
Date:

Initials: Contractor 

DR Horton 

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
MARK W. MCGILTON,	)	CASE NO. 2021-CP-27-00069
	)	
Plaintiff,	)	
	)	
vs.	)	KENNETH SCOTT BUILDERS, LLC'S
	)	ANSWER TO D.R. HORTON, INC.'S
	)	THIRD PARTY COMPLAINT
	)	(JURY TRIAL DEMANDED)
1223 MAY RIVER ROAD, LLC, D.R.	)	
HORTON, INC., AND LOTTY TRUCKING,	)	
LLC F/K/A RAMOS TRUCKING, LLC,	)	
	)	
Defendants.	)	
1223 MAY RIVER ROAD, LLC	)	
	)	
Third Party Plaintiff,	)	
	)	
vs.	)	
	)	
KENNETH SCOTT BUILDERS, LLC	)	
	)	
Third Party Defendant.	)	

The Third-Party Defendant Kenneth Scott Builders, LLC, ("KSB" or "Third-Party Defendant"), files this Answer to D.R. Horton, Inc.'s ("D.R. Horton") Third-Party Complaint. Third-Party Defendant notes that each and every allegation of D.R. Hortons Third-Party Complaint not specifically admitted is denied.

1-72. Paragraphs 1 through 72 of D.R. Horton's Amended Answer and Third-Party Complaint do not relate to KSB or the Third-Party Claims brought by D.R. Horton against KSB in the above captioned matter. To the extent that paragraphs 1 through 72 of the Third-Party Complaint may be construed to contain allegations relating to KSB, KSB denies all allegations and demands strict proof thereof.

73. Responding to paragraph 73 of the Third-Party Complaint, KSB repeats and realleges each and every answer to the Third-Party Complaint as if fully set forth herein verbatim.

74. Paragraph 74 of the Third-Party Complaint is a mere statement requiring no response.

75-78. KSB notes the Third-Party Complaint does not contain allegations numbered 75, 76, 77, or 78.

79. Paragraph 79 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny.

80. Responding to paragraph 80 of the Third-Party Complaint, KSB asserts the Complaint speaks for itself.

81. Responding to paragraph 81 of the Third-Party Complaint, KSB asserts “any contract” speaks for itself.

82. Responding to paragraph 82 of the Third-Party Complaint, KSB asserts “the Agreement” speaks for itself.

83. KSB responds to paragraph 83 of the Third-Party Complaint by noting and alleging that the “Agreement” attached to the Third-Party Complaint is unrelated to this litigation. Further, any work performed by KSB on or for 1223 May River Road, LLC was unrelated to any work performed for D.R. Horton or the terms and conditions of the “Agreement.”

84. Responding to paragraph 84 of the Third-Party Complaint, KSB denies the allegations as the Agreement was unrelated to work performed on or for 1223 May River Road, LLC. The Agreement has no application to this case and likewise has no legal force or effect between KSB and D.R. Horton.

85. Paragraph 85 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB’s work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 85 of the Third-Party Complaint.

86. Paragraph 86 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 86 of the Third-Party Complaint.

87. KSB denies the allegations contained in paragraph 87 of the Third-Party Complaint. Further, KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case.

88. Paragraph 88 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 88 of the Third-Party Complaint.

89. Paragraph 89 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 89 of the Third-Party Complaint.

90. Paragraph 90 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 90 of the Third-Party Complaint.

91. KSB has insufficient information to admit or deny the allegations contained in paragraph 91 of the Third-Party Complaint.

AS TO THE FIRST CAUSE OF ACTION
(Contractual Indemnification as to Co-Defendant)

92. Responding to paragraph 92 of the Third-Party Complaint, KSB repeats and realleges each and every answer to the Third-Party Complaint as if fully set forth herein verbatim.

93. Responding to paragraph 93 of the Third-Party Complaint, KSB asserts the Complaint speaks for itself.

94. Paragraph 94 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 94 of the Third-Party Complaint.

95. Responding to paragraph 95 of the Third-Party Complaint, KSB asserts the Complaint speaks for itself.

96. Paragraph 96 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 96 of the Third-Party Complaint.

97. Paragraph 97 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 97 of the Third-Party Complaint.

98. Paragraph 98 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 98 of the Third-Party Complaint.

99. Paragraph 99 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 99 of the Third-Party Complaint.

100. Paragraph 100 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 100 of the Third-Party Complaint.

AS TO THE SECOND CAUSE OF ACTION
(Equitable Indemnification as to Co-Defendant)

101. Responding to paragraph 101 of the Third-Party Complaint, KSB repeats and realleges each and every answer to the Third-Party Complaint as if fully set forth herein verbatim.

102. Responding to paragraph 102 of the Third-Party Complaint, KSB asserts the Complaint speaks for itself.

103. Responding to paragraph 103 of the Third-Party Complaint, KSB alleges that D.R. Horton's answer speaks for itself.

104. Paragraph 105 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. Notwithstanding, KSB denies the allegations contained in paragraph 104 as related to this lawsuit.

105. Paragraph 105 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny.

106. Paragraph 106 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or

implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 106 of the Third-Party Complaint.

107. Paragraph 107 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 107 of the Third-Party Complaint.

108. Paragraph 108 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 108 of the Third-Party Complaint.

AS TO THE THIRD CAUSE OF ACTION
(Breach of Contract as to Co-Defendant)

109. Responding to paragraph 109 of the Third-Party Complaint, KSB repeats and realleges each and every answer to the Third-Party Complaint as if fully set forth herein verbatim.

110. Paragraph 110 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 110 of the Third-Party Complaint.

111. Paragraph 111 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 111 of the Third-Party Complaint.

112. Paragraph 112 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. KSB's work for D.R. Horton is not at issue or

implicated in this lawsuit and the Agreement has no applicability to this case. Notwithstanding, KSB denies the allegations contained in paragraph 112 of the Third-Party Complaint.

AS TO THE FOURTH CAUSE OF ACTION
(Negligence/Gross Negligence/Recklessness as to Co-Defendant)

113. Responding to paragraph 113 of the Third-Party Complaint, KSB repeats and realleges each and every answer to the Third-Party Complaint as if fully set forth herein verbatim.

114. Paragraph 114 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny.

115. Paragraph 115 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny.

116. Paragraph 116 of the Third-Party Complaint states a conclusion of law which KSB is neither required to admit nor deny. Notwithstanding, KSB denies the allegations contained in paragraph 116 of the Third-Party Complaint.

**RESPONDING TO D.R. HORTON'S
AD DAMNUM AND/OR PRAYER FOR RELIEF**

117. KSB denies that D.R. Horton is entitled to recovery as prayed for in D.R. Horton's *Ad Damnum* Clause and/or Prayer for Relief.

**FURTHER ANSWERING AND FOR
A FURTHER AND AFFIRMATIVE DEFENSE**

118. D.R. Horton's Third-Party Complaint fails to state any claims upon which relief can be granted as to this Third-Party Defendant, and D.R. Horton's Third-Party Complaint should, therefore, be dismissed pursuant to Rule 12(b)(6), SCRCP.

**FURTHER ANSWERING AND FOR
A FURTHER AND AFFIRMATIVE DEFENSE**

119. D.R. Horton's Third-Party Complaint is improper pursuant to Rule 13, SCRCP.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

120. To the extent applicable, KSB pleads S.C. Code Ann. § 15-32-520.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

121. To the extent applicable, KSB pleads S.C. Code Ann. §15-32-530.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

122. To the extent D.R. Horton's Third-Party Complaint includes a claim for punitive damages, D.R. Horton's claims for punitive damages violate the Fifth, Sixth, Seventh, and Fourteenth Amendments of the Constitution of the United States and Article I of the Constitution of the State of South Carolina in the following particulars:

- a. D.R. Horton's claims for punitive damages violate the Fifth Amendment of the Constitution of the United States and Article I of the Constitution of the State of South Carolina for the following reasons:
 - i) The double-jeopardy clause is violated because multiple awards of punitive damages can be imposed upon the Defendants for the same act or omission, and because an award of punitive damages can be imposed upon the Defendants, even though the Defendants were convicted or acquitted of a factually related defense in an underlying criminal proceeding; and
 - ii) The self-incrimination clause is violated because Defendants can be compelled to give testimony against them;
- b. D.R. Horton's claim for punitive damages violates the Sixth and Fourteenth Amendments Fifth Amendment of the Constitution of the United States and Article I of the Constitution of the State of South Carolina because such damages may be imposed according to the lesser standard of proof applicable in civil cases, whereas punitive damages are a fine or penalty and are quasi-criminal in nature and, as such require the "beyond the reasonable doubt" standard of proof;
- c. D.R. Horton's claim for punitive damages violates the Defendants' rights to access to the courts guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of unlimited punitive damages chills the Defendants' exercise of that right;
- d. D.R. Horton's claims for punitive damages violate the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the

United States and Article I of the Constitution of the State of South Carolina for the following reasons:

- i) The standard or test for determining the requisite mental state of Defendants for imposition of punitive damages is void for vagueness;
- ii) Insofar as punitive damages are not measured against actual injury to the Plaintiff and are left up to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be awarded is indeterminate at the time of Defendants' alleged egregious conduct;
- iii) In cases involving more than one Defendant, the evidence of the net worth of each is admissible, and the jury is permitted to award punitive damages in differing amounts based upon the affluence of a given Defendant;
- iv) The tests or standards for the imposition of punitive damages differ from state to state, such that a specific act or omission of a given Defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the state in which the suit is filed, such that the Defendant is denied equal protection of law; and
- v) Punitive damages may be imposed without a requisite showing of hatred, spite, ill will or wrongful motive.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

123. KSB is entitled to a set-off for any monies received by D.R. Horton from any party or non-party as a result of the claims set forth in D.R. Horton's Third-Party Complaint. A dollar-for-dollar set-off must be applied to the damages asserted in this case.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

124. All claims asserted against KSB are barred by the applicable statute of limitations and/or the applicable statute of repose.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

125. D.R. Horton's claims, if any, are barred, or should be reduced, by D.R. Horton's own comparative negligence and recklessness which combined, contributed, and concurred with any alleged negligence on the part of KSB, if any, and which is expressly denied.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

126. D.R. Horton's claims, if any, are the result of negligent acts and omissions of other entities or persons over whom KSB had no control, barring D.R. Horton's claims against KSB.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

127. One or more of D.R. Horton's Causes of Action fails to state facts sufficient to constitute a cause of action against KSB and therefore should be dismissed under Rule 12 (b)(6), *SCRCP*.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

128. That the injury or damage suffered by Plaintiff, if any, was due to, and caused by, and was the direct and proximate result of the intervening and superseding negligence, willfulness, wantonness and recklessness of others, such constitutes a complete defense to the claims of D.R. Horton.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

129. D.R. Horton had an obligation to mitigate damages but has failed to do so.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

130. Punitive damages are inappropriate in this case since the Third-Party Defendant did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages would be based.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

131. This Third-Party Defendant alleges that the damages suffered by D.R. Horton, if any, were the result of the acts or omissions of other parties, unnamed in this action, for which the answering Third-Party Defendant bears no responsibility.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

132. D.R. Horton fails to join and add all parties necessary to a just adjudication of this matter pursuant to Rule 19, SCRCP, and thus D.R. Horton's Third-Party Complaint should be dismissed.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

133. D.R. Horton's Third-Party Complaint fails to state any claims upon which relief can be granted as to this Third-Party Defendant, and D.R. Horton's Third-Party Complaint should, therefore, be dismissed pursuant to Rule 12(b)(6), SCRCP.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

134. Even if Third-Party Defendant was negligent as alleged in the Third-Party Complaint, which is specifically denied, Third-Party Defendant's negligence is not the direct or proximate cause of any injury D.R. Horton alleges, and therefore Third-Party Defendant is not liable for any damages D.R. Horton allegedly sustained.

**FURTHER ANSWERING
AND AS AN AFFIRMATIVE DEFENSE**

135. This Third-Party Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered D.R. Horton's Third-Party Complaint, Third-Party Defendant prays that the same be dismissed, together with the costs and disbursements of this action, and for such other and further relief as this Court deems proper. Third-Party Defendant also requests a trial by jury on all issues and claims subject to a jury trial.

CLEMENT RIVERS, LLP

By: s/Stephen L. Brown

Stephen L. Brown (SC Bar No. 66468)

Stephen A. Griffith, Jr. (SC Bar No. 103744)

P.O. Box 993, Charleston, SC 29402

25 Calhoun Street, Suite 400, Charleston, SC 29401

Telephone: (843) 720-5488

sbrown@ycrlaw.com

sgriffith@ycrlaw.com

*Attorneys for Third-Party Defendant Kenneth Scott
Builders, LLC*

Charleston, South Carolina

Dated: November 22, 2022

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2023-CP-27-00069

**PLAINTIFF MARK W. MCGILTON'S
RENEWED MOTION TO COMPEL D.R.
HORTON, INC., AND RULE TO SHOW
CAUSE REGARDING SANCTIONS PER
RULE 37(d), SCRPC, AGAINST
DEFENDANT D.R. HORTON, INC.**

**TO: JOHN T. CRAWFORD, JR., ESQ., AND JASON IMHOFF, ESQ., ATTORNEYS FOR
D.R. HORTON, INC.:**

PLEASE TAKE NOTICE, Plaintiff Mark W. McGilton (hereinafter, "McGilton"), by and through his undersigned counsellors, moves this Court pursuant to Rules 33, 34, and 37 of the South Carolina Rules of Civil Procedure for an Order compelling Defendant, D.R. Horton, Inc. (hereinafter, "D.R. Horton"), to respond to outstanding supplemental discovery requests.

On November 4, 2021, McGilton filed a Motion to Compel Defendant D.R. Horton, and a Motion for Sanctions Per Rule 37(d), SCRPC, Against Defendant D.R. Horton (**Exhibit 1**) due to blatant discovery abuse after D.R. Horton failed to respond to Plaintiff's Discovery Requests for over three months (Motion to Compel). Despite the Motion to Compel being filed, D.R. Horton failed to provide any responses to the Plaintiff's Interrogatories or Requests for Production until

the summer of 2022, and only partially responded to Plaintiff's requests, and only responded after the Plaintiff's Motion to Compel had been placed on the Court's roster. At the hearing on the Plaintiff's Motion to Compel, the Parties reached a consent agreement that resolved both Plaintiff's Motion to Compel and D.R. Horton's Motion to Stay and Motion to Transfer Venue. (**Exhibit 2**, Consent Order).

In the Consent Order filed September 22, 2022, Plaintiff agreed to withdraw his Motion to Compel without prejudice with leave to Plaintiff to file the motion again and seek sanctions should Defendant D.R. Horton "not comply with Plaintiff's outstanding discovery requests, comply with continuing discovery obligations, and work in good faith with Plaintiff to resolve any further discovery disputes."

After the Consent Order was filed, Plaintiff coordinated with Defendant for months in effort to take the first deposition of the Defendant to help Plaintiff understand what other material might be outstanding. Finally, on June 13, 2023, Plaintiff took the deposition of a D.R. Horton employee, Jared O'Saka (hereinafter, "O'Saka"). During the deposition of O'Saka, it was discovered that D.R. Horton possessed numerous files of material relevant to Plaintiff's discovery requests that it had not previously produced, nor supplemented. After the deposition, counsel for Plaintiff and Defendant mutually agreed that responses would be supplemented, and that D.R. Horton would furnish information to allow Plaintiff to understand the nature of the material that exists, and the scope of what material is missing from responses.

On July 17, 2023, the undersigned e-mailed D.R. Horton's counsel as a follow-up concerning supplemental discovery responses, wherein D.R. Horton agreed to look into providing McGilton with a "file tree" of the filing system disclosed by Mr. O'Saka and also providing files for projects involving Kenneth Scott Builders, LLC (hereinafter, "KSB"). On July 21, 2023, McGilton's counsel followed up with D.R. Horton's counsel again regarding the outstanding supplemental discovery responses. On July 21, 2023, D.R. Horton's counsel responded that discovery would be supplemented the following week. On August 11, 2023, D.R. Horton's

counsel provided a screen shot of some folders purportedly contained within D.R. Horton's files of relevance to the case and asked what the Plaintiff would like to review. In an email on August 15, 2023, Plaintiff's counsel asked to review all documents in the folders. On August 15, 2023, D.R. Horton's counsel agreed to get the material ready to produce and suggested a confidentiality agreement prior to producing due to certain financial material. Plaintiff consented to a reasonable confidentiality agreement on August 22, 2023 relative to confidential material and asked that the non-confidential material be furnished immediately.

After receiving no further response or further material from D.R. Horton, On September 19, 2023 Plaintiff served counsel for D.R. Horton a letter pursuant to Rule 11, SCRCP, relating to D.R. Horton's failure to respond to discovery, and to D.R. Horton's pattern of discovery violations, asking D.R. Horton immediately fully respond to discovery (**Exhibit 3**, Plaintiff's Sept 19, 2023 Rule 11 letter). Plaintiff has received no response to his September 19, 2023 Rule 11 letter to date.

Here, Plaintiff McGilton renews his Motion to Compel that he has been forced to file a second time against D.R. Horton relating to its failure to respond to initial discovery in this important, significant matter, and files this Rule to Show Cause as to why the Court should not sanction D.R. Horton for its continued discovery abuse, or otherwise find it in Contempt.

Plaintiff has substantial rights and needs to obtain the information and documents relevant to his case in the possession of the adverse party. D.R. Horton's failure to reasonably, fully, and completely respond to McGilton's discovery requests has impaired McGilton's ability to timely prosecute and investigate his case (which was filed in January 2021) and will continue to impair McGilton's ability to adequately and timely investigate this case and prepare for trial.

Therefore, McGilton not only renews his Motion to Compel D.R. Horton to respond to McGilton's discovery requests fully and completely, he also seeks enforcement of the Court's September 21, 2022, Order, wherein D.R. Horton consented to allow the Plaintiff to refile with

this Court and seek sanctions should D.R. Horton fail to respond to his outstanding discovery requests.

It is undisputed that D.R. Horton holds significant material responsive to the Plaintiff's initial discovery requests served on July 21, 2021, that, despite being duly served with the same, and despite the passage of over two years, it has failed to produce.

Therefore, Plaintiff seeks just sanctions congruent with the blatant, prolonged discovery abuse displayed by Defendant D.R. Horton: namely, striking it's Answer pursuant to Rule 37(b)(2)(C), SCRCF as authorized and contemplated pursuant to Rule 37(d), SCRCF, and, for attorney's fees, and costs, any and all other sanctions this Honorable Court finds just and proper. This motion is based on the pleadings in this case, the South Carolina Rules of Civil Procedure, relevant case law, and any briefs, memoranda of law, or affidavits as may be filed in support thereof.

Plaintiff submits that it is D.R. Horton's burden to show cause as to why such appropriate sanctions should not be Ordered in the matter.

This Motion is based upon the pleadings, the South Carolina Rules of Civil Procedure, the applicable common law of South Carolina and such other documents and argument as the Court will allow at the hearing.

I SO MOVE!

<SIGNATURE PAGE FOLLOWS>

Respectfully submitted,

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

Benjamin T. Shelton, S.C. Bar No. 77207

S. Harrison Williams, S.C. Bar No. 102410

P.O. Box 21069

Hilton Head Island, South Carolina 29926

(843) 802-0087

ben@sheltonlawsc.com

harrison@sheltonlawsc.com

Attorneys for Plaintiff McGilton

Hilton Head Island, South Carolina
October 17, 2023

EXHIBIT 1

FILED FROM CALLY HUEHD - 2022/3/20/10:47 21:54 PM - JASPER - COMMON PLEAS - CASE# 2021 CP 27 000659

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC; D.R.
HORTON, INC.; AND LOTTY
TRUCKING, LLC F/K/A RAMOS
TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC

Third Party Plaintiff,

v.

KENNETH SCOTT BUILDER'S, INC.,

Third Party Defendant.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.:2021-CP-27-00069

PLAINTIFF'S MOTION TO COMPEL
DEFENDANT D.R. HORTON, AND,
MOTION FOR SANCTIONS PER RULE 37(d),
SCRCP, AGAINST DEFENDANT D.R.
HORTON

PLEASE TAKE NOTE THAT the Plaintiff, by and through the undersigned counsel, will move before the Court, on the tenth day after service hereof or at such other time as is designated by the Court, for an Order compelling Defendant D.R. Horton to respond to Plaintiff's Interrogatories and Requests for Production, and sanctioning D.R. Horton for its discovery misconduct.

Despite being duly served with Interrogatories and Requests for Production on July 22, 2021, D.R. Horton failed to respond or request an extension to respond on or before August 23, 2021. (**Exhibit 1**, Interrogatories and Requests for Production with COS). Thereafter, Plaintiff

requested responses from Defendants on September 3, 2021, and consented to an extension to answer and respond by September 15, 2021. (**Exhibit 2**, email correspondence with Defendant's counsel). When no answers or responses were received on September 15, 2021, Plaintiff sent correspondence to Defendants pursuant to Rule 11, SCRCP. (**Exhibit 3**). When Plaintiff received no response to his Rule 11 letter, Plaintiff again followed up with the Defendant on the matter via email and at the time of filing, has received no response (See **Exhibit 2**).

To date, three and one-half months after discovery requests were first duly served and nearly two months after a consent extension to the discovery deadline has expired, Plaintiff still has not received any answers or responses to his discovery requests from D.R. Horton.

Therefore, Plaintiff seeks just sanctions congruent with the blatant discovery abuse displayed by Defendant D.R. Horton: namely, striking it's Answer pursuant to Rule 37(b)(2)(C), SCRCP as authorized and contemplated pursuant to Rule 37(d), SCRCP, and, for attorney's fees and costs, any and all other sanctions this Honorable Court finds just and proper. This motion is based on the pleadings in this case, the South Carolina Rules of Civil Procedure, relevant case law, and any briefs, memoranda of law, or affidavits as may be filed in support thereof.

Respectfully submitted,

s/ Benjamin T. Shelton
 Shelton Law Firm, LLC
 10 Hospital Center Commons
 Suite 400
 (P.O. Box 21069)
 Hilton Head Island, SC 29926 (29925)
 ben@sheltonlawsc.com
 (843) 802-0087
 (843) 459-7908 (f)

November 4, 2021

EXHIBIT 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF JASPER	)	
	)	C.A. NO. 2021-CP-27-00069
MARK W. MCGILTON	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CONSENT ORDER
	)	
1223 MAY RIVER ROAD, LLC, D.R.	)	
HORTON, INC., and LOTTY	)	
TRUCKING, LLC f/k/a RAMOS	)	
TRUCKING, LLC,	)	
	)	
Defendants.	)	
	)	
1223 MAY RIVER ROAD, LLC,	)	
	)	
Third-Party Plaintiff,	)	
vs.	)	
	)	
KENNETH SCOTTS BUILDERS, LLC,	)	
	)	
Third-Party Defendant.	)	
	)	

This matter is before me by way of Plaintiff's Motion to Compel Defendant D.R. Horton, and Motion for Sanctions per Rule 37(d), SCRCF, Against D.R. Horton ("Motion to Compel") and Defendant D.R. Horton, Inc.'s Motion to Transfer Venue ("Motion to Transfer Venue"). These motions appeared on the August 17, 2022, Jasper County Motions Roster and counsel for the parties appeared before me on that date. On the day of the motions hearing, counsel for the parties presented to this Court that an agreement had been reached among counsel to resolve the pending motions and said agreement was entered into the record in this matter.

The parties agreed that the Motion to Compel would be withdrawn without prejudice with leave to Plaintiff to file the motion again and seek sanctions should Defendant D.R. Horton not

comply with Plaintiff's outstanding discovery requests, comply with continuing discovery obligations, and work in good faith with Plaintiff to resolve any further discovery disputes.

Further, Defendant D.R. Horton, Inc. agreed to withdraw its Motion to Transfer Venue with prejudice and Defendant D.R. Horton, Inc. agreed that venue is proper in Jasper County and this case will continue to be pending and tried in Jasper County Circuit Court.

As these matters were agreed to among the parties and the agreement was entered upon the record and memorialized in this Order, it is now the Order of this Court that Plaintiff's Motion to Compel is withdrawn without prejudice with leave to file again, and Defendant D.R. Horton's Motion to Transfer Venue is dismissed with prejudice.

IT IS SO ORDERED.

The Honorable Bentley Price

WE CONSENT:

KENISON, DUDLEY & CRAWFORD, LLC

/s/Jason M. Imhoff

Jason M. Imhoff (S.C. Bar No. 69355)
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899
Imhoff@conlaw.com

Attorney for D.R. Horton, Inc.

WE CONSENT:

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

Benjamin T. Shelton, (S.C. Bar No. 77207)
S. Harrison Williams (S.C. Bar No. 102410)
P.O. Box 21069
Hilton Head Island, SC 29925
(843) 802-0087
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harrison@sheltonlawsc.com

Attorney for Plaintiff



Jasper Common Pleas

Case Caption: Mark W. McGilton VS 1223 May River Road, Llc , defendant, et al
Case Number: 2021CP2700069
Type: Order/Consent Order

IT IS SO ORDERED!

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

Electronically signed on 2022-09-20 10:16:05 page 3 of 3

EXHIBIT 3



September 19, 2023

Via email only

KENSON, DUDLEY, & CRAWFORD, LLC
Mr. John Crawford
crawford@conlaw.com

Re: Mark McGilton v. DR Horton, Inc., et al. / Civil Action No. 2021-CP-27-00069 / Rule 11 Letter re Supplemental Discovery and General Discovery Obligations

Dear John,

I am writing in regard to D.R. Horton's ("DRH") failure to supplement discovery that was disclosed during Jared O'saka's ("O'Saka") deposition held on June 13, 2023. After the deposition, we agreed that you would provide Mark McGilton ("Plaintiff") with a file "tree" of the filing system discussed by Mr. O'Saka, and also the entire project files for projects involving Kenneth Scott Builders (and not just files that are specifically named or reference Kenneth Scott Builders or Ken Tosky). We still have not received discovery relative to the volumes of material that have not been produced which were disclosed during Mr. O'Saka's deposition.

On July 17, 2023, we sent you an email informing you it has been over a month since the agreement of producing supplemental documents, and we still do not have the material agreed upon. On July 21, 2023, we sent a follow-up email requesting an update from the July 17, 2023 email. On July 21, 2023, you replied that you would follow-up with Mr. O'Saka and have the material produced between July 24-28, 2023. On August 3, 2023 we agreed that you would provide a "mapping" of folders on or before August 11, 2023.

On August 11, 2023, you sent us a screenshot of the files contained in the folders to be produced asking what we would like to review. On August 15, 2023, we replied that we would like to review everything in the folder. You responded that you will get it ready to produce and would like to enter into a confidentiality agreement prior to producing the material. We agreed to enter into a reasonable confidentiality agreement on August 23, 2023, and asked that all non-confidential material be immediately produced.

BENJAMIN T. SHELTON
SHELTON LAW FIRM, LLC, a South Carolina limited liability company
PO BOX 21069
HILTON HEAD ISLAND, SC 29925

ben@sheltonlawsc.com
(843) 802-0087

To date, we have not received a confidentiality agreement nor supplemental non-confidential discovery. It is not our duty or burden to continuously request material responsive to requests, and your client has demonstrated a pattern of discovery violations.

We request that your client immediately supplement the responses per its obligations under the South Carolina Rules of Civil Procedure. Please provide this firm with supplemental discovery responses immediately. We reserve the right to file a motion to compel same.

This letter is our Rule 11, SCRPC, consultation in this regard. Please know that this letter does not identify all deficiencies related to DRH's discovery responses and production. Instead, the issues above constitute DRH's failure to produce material that was agreed upon over three months ago, and does not waive any argument to identify and demand answers and more thorough responses to other deficiencies in the future. Please let us know if you have any questions.

With kind regards, I am

Most Sincerely Yours,

SHELTON LAW FIRM, LLC

s/Benjamin T. Shelton

Attorney at Law

SC Bar No. 77207

cc: All counsel of record

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069

**AFFIDAVIT OF ATTORNEY'S FEES
AND COSTS**

PERSONALLY appeared before me, Benjamin T. Shelton, Attorney at Law, who being duly sworn, deposes and says that:

1. His firm and all others referred to herein are the attorneys for the Plaintiff, Mark W. McGilton.

2. Benjamin T. Shelton was admitted to the South Carolina Bar in 2008, and since that time has been continuously engaged in criminal trial practice, and since March 2014 has been engaged in private civil litigation practice. Further, since being admitted to practice law in South Carolina Benjamin T. Shelton has remained in good standing with the South Carolina Bar. Benjamin T. Shelton is employed with the law firm of Shelton Law Firm, LLC, and spends the

majority of his practice on litigation on behalf of Plaintiffs in personal injury and insurance litigation matters. Benjamin T. Shelton is the supervising attorney of Shelton Law Firm, LLC, and oversees four employees, including an associate attorney, two paralegals and an office administrator, all of whom have devoted time to this matter and whose time related to compelling the discovery responses is contained within the total sum of attorney's fees and costs sought herein.

3. Benjamin T. Shelton is a member of the South Carolina Bar Association.

4. Benjamin T. Shelton represents the Plaintiff, Mark W. McGilton, in the proceedings which have been pending before the Court in this action alleging negligence, negligent supervision, negligent entrustment, joint enterprise liability and other alleged actions or inactions by D.R. Horton which allegedly did proximately cause serious personal injury to the Plaintiff Mark W. McGilton. This Affidavit is filed in support of Mark W. McGilton's request for costs and attorneys' fees related to his attorney's preparation, drafting and transmitting letters pursuant to Rule 11, SCRCP, the preparation and filing of Motions to Compel discovery responses, the preparation and drafting of memorandum in support of the same, the preparation for and appearance at court hearings on Plaintiff's Motions to Compel, and the preparation of, drafting and filing of the Order sanctioning Defendant D.R. Horton and holding D.R. Horton in contempt for its discovery violations, as requested by the Court.

5. Affiant incorporates herein Rule 22, Rules of the South Carolina Supreme Court, which contains the Canons of Ethics concerning the setting of attorneys' fees.

6. Affiant further calls the attention of the Court to the plethora of case law by the Supreme Court of South Carolina concerning the factors and criteria which should be considered in the setting of attorneys' fees.

7. Affiant relies upon the discretion of this Court in the determination of the amount of fees based upon, among other things, the Court's file herein and the Court's knowledge of the litigation between these parties, which reflect the difficulty of the services rendered, the time necessarily expended and the other factors which are set forth in the Canons of Ethics and the case law of this State.

8. Affiant is informed and believes during this case the time spent as set forth more fully hereinafter was necessary to the protection of his client's interests and in order to make a concise and clear presentation of the issues to the Court, and only includes time and costs expended in relation to the matters set forth in paragraph four, above, directly relating to Plaintiff's law firm's work and costs associated with compelling the defendant to answer and respond to discovery, from the preparation of Plaintiff's first Rule 11 letter, through the filing of the Order which accompanies this Affidavit of Attorney's Fees. This includes work completed relating to compelling Defendant D.R. Horton's discovery from September 17, 2021 through the present date.

9. Affiant states that as of January 3, 2024, *no less than* Thirteen Thousand, One Hundred Seventy-Two and 50/100 (\$13,172.50) Dollars in attorney's fees, paralegal fees and costs have been incurred in connection with compelling D.R Horton's discovery responses.

10. Affiant states to the Court that *no less than* a total of forty-four and 40/100 (44.4) hours were necessarily expended by Shelton Law Firm, LLC in connection with compelling D.R. Horton's discovery responses. Time and expense records are maintained on a daily basis. Affiant's hourly rate is presently four hundred and 00/100 (\$400.00) per hour. Shelton Law Firm, LLC's associate attorney's hourly rate presently is three hundred and fifty and 00/100

(\$350.00) per hour, and Shelton Law Firm, LLC's paralegals' hourly rates presently are one hundred and 00/100 (\$100.00) per hour.

11. The time and charges reflected in this Affidavit were expended and/or incurred on behalf of Mark W. McGilton in connection with this matter and specifically related to compelling D.R. Horton's discovery responses.

12. The foregoing time and expenditures have been computed as of January 3, 2024. The undersigned reserves leave to supplement this Affidavit of Attorney's Fees and Costs if additional work is expended prior to filing of the Order of Sanctions and Contempt

13. Based not only upon the time necessarily devoted to this case, but also upon the other criteria which have been held to be relevant in the setting of costs and attorneys' fees, the undersigned, on behalf of this client, requests that this Court review the file herein, together with this Affidavit and grant the Plaintiff Mark W. McGilton reasonable attorney's fees and award actual costs as a sanction against D.R. Horton's discovery abuse, as ordered and requested by the Court.

[Signature Page Follows]

SHELTON LAW FIRM, LLC



Benjamin T. Shelton
10 Hospital Center Common, Suite 400
Post Office Box 21069
Hilton Head, South Carolina 29925-4005
(843) 802-0087
Attorney for Plaintiff Mark W. McGilton

SWORN to before me this
15 day of March 2024



Notary Public for South Carolina

My Commission Expires: 10-11-2027



STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

DR Horton,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069**THIRD-PARTY DEFENDANT
KENNETH SCOTT BUILDER'S
MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that Third-Party Defendant Kenneth Scott Builders, LLC. (“KSB”), by and through its undersigned counsel, will move before this Court on the 10th day after service, or at such other time and place as is convenient to the Court and counsel, for an Order dismissing all of Third-Party Plaintiff DR Horton’s (“DRH”) claims against Kenneth Scott pursuant to Rule 56, *SCRCP*. Based on the evidence to date, including, but not limited to, pleadings, depositions, answers to interrogatories, and affidavit(s) to be submitted in support hereof, Third-Party Plaintiff has failed to present evidence sufficient to satisfy the elements of the causes of action asserted.

Specifically, Defendant 1223 May River Road, LLC engaged with KSB to perform construction related work at the May River development site. Plaintiff’s Complaint, ¶ 7. KSB

then subcontracted with Jacob-AU Trucking, LLC, and Alfredo Uriostegui to perform the work. *Id.* KSB also had a separate and unrelated contract with DRH to clear and grade a subdivision named Cypress Ridge located in Bluffton, SC. Defendant 1223 May River Road, LLC filed an Amended Stipulation of Dismissal on February 10, 2023 as to all claims filed, or which could have been filed arising out of the subject matter of the within lawsuit against KSB. *See* Exhibit A.

At the time of the Accident, the driver of the dump truck had delivered his final delivery to the **May River Project** and had finished work for the day. The May River Project had no relationship with the Cypress Ridge project as evidenced by the independent contractor agreement between KSB and DRH. *See* Exhibit B.

There is no evidence that any of KSB's work performed at the May River Project was in any way related to the independent contract it had with DRH, nor did the work performed at the Cypress Ridge Project contribute to the damages complained of by Plaintiff. Consequently, there is no contractual relationship between DRH and KSB with regard to the work KSB performed at the May River Project.

Further, the claims for breach of contract and negligence are merely disguised indemnity claims that are improper under South Carolina law. The Supreme Court of South Carolina has held third-party claims for negligence and breach of contract are included within a claim for equitable indemnity. *Town of Winnsboro v. Weidman-Singleton, Inc.*, 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). DRH's claims for negligence and breach of contract are subject to dismissal as they are merely disguised claims for equitable indemnity.

Finally, DRH failed to plead a proper claim for indemnity as DRH has not established a

special or sufficient relationship between KSB and DRH. As such, DRH's claims indemnity should be dismissed against KSB.

Based on the evidence to date, including, but not limited to, pleadings, depositions, answers to interrogatories, and affidavit(s) to be submitted in support hereof, DRH has failed to present evidence sufficient to satisfy the elements of the causes of action asserted. Accordingly, there is no genuine issue as to any material fact and, as a result, KSB is entitled to judgment as a matter of law. A detailed Memorandum of Law in support of this motion shall be submitted at the appropriate time. This motion may be further supported by the pleadings filed and served to date, information obtained through discovery, affidavit(s), witness testimony, and any other material the Court may receive as permitted under the Rules of Civil Procedure

LUZURIAGA MIMS, LLP

By: *s/Ryan W. Conner*

Ryan W. Conner, SC Bar No. 101702

Kevin W. Mims SC Bar No. 69418

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Attorneys for Kenneth Scott Builders, LLC

Charleston, South Carolina
March 29, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
MARK W. MCGILTON,	)	CASE NO. 2018-CP-07-00607
	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	AMENDED STIPULATION OF
	)	DISMISSAL
	)	WITH PREJUDICE
ALFREDO URIOSTEGUI, JACOB-AU	)	
TRUCKING LLC AND KENNETH	)	
SCOTT BUILDERS INC.,	)	
	)	
DEFENDANTS.	)	
	)	

By and through their undersigned counsel, the Plaintiff, Mark W. McGilton, and Defendant, Kenneth Scott Builders, Inc., stipulate, pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, that this matter is hereby voluntarily dismissed and forever ended, in its entirety, WITH PREJUDICE as to all claims filed, or which could have been filed arising out of the subject matter of the within lawsuit against Kenneth Scott Builders, Inc. only. The parties further agree to bear their own costs, expenses, and attorneys' fees.

WE STIPULATE:
SHELTON LAW FIRM, LLC

By: s/Benjamin T. Shelton
Benjamin T. Shelton, Esquire
P.O. Box 21069, Hilton Head Island, SC 29925
Telephone: (843) 802-0087
ben@sheltonlawsc.com
Attorney for Plaintiff

Date: February 10, 2023

WE STIPULATE:
CLEMENT RIVERS, LLP

By: s/Stephen L. Brown
Stephen L. Brown, Esquire
Stephen A. Griffith, Jr., Esquire
25 Calhoun Street, Suite 400, Charleston, SC 29401
P.O. Box 993, Charleston, SC 29402
Telephone: (843) 720-5488
Email: sbrown@ycrlaw.com;
sgriffith@ycrlaw.com
Attorneys for Defendant Kenneth Scott Builders, Inc.

Date: February 10, 2023



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tesley DBA Kenneth Scott Builders ("Contractor")
 _____ Sole Proprietorship _____ Partnership ☒ Corporation _____ L.L.C. _____ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-0393282
 Name of Owner(s)/Officer(s): Kenneth J. Tesley
 Division Name: COASTAL CAROLINA Area Name: HILTON HEAD / SAVANNAH Assigned Vendor No.: 2016181
 Address for All Notices: PO Box 1590
 City: Hilton State: SC Zip Code: 29910
 Telephone: 843-247-1025 Fax: (843) 813-3491 E-Mail Address: Ken@KennethScottBuilders.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February 2016 between DR Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

~~CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 15-42 AND 15-43 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTRADICT AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR~~

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February 2016.

Owner:
By: [Signature]
Name: DR Horton
Title: Assistant Vice-President

Contractor:
By: [Signature]
Name: Kenneth Tesley
Title: Owner

INITIALS: OWNER [Signature] CONTRACTOR [Signature]

AGREES THAT OWNER DOES, AND WILL, NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and those joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("Purchase Order"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("Inspector") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which

INITIALS: OWNER  CONTRACTOR 

the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("Waste"), caused by its operations and shall remove all of Contractor's materials at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

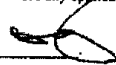
8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers; (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home; and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1)-year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

INITIALS: OWNER  CONTRACTOR 

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

INITIALS: OWNER  CONTRACTOR 

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL policy shall not contain a deductible or self-insured retention of more than \$25,000.00, and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc. (collectively "Horton") as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise; (b) did not pay the insurance premium directly or indirectly; and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs to complete, repair, or replace, plus any related costs or damage including re-inspection fees, with any excess to be paid to Contractor. If such costs exceed the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens

INITIALS: OWNER  CONTRACTOR 

are filed against the job location as a result of Contractor's acts or omissions, (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

INITIALS: OWNER  CONTRACTOR 

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

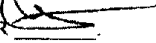
16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

SOUTH CAROLINA VERSION (REV. 22 JUNE 2015)

INITIALS: OWNER  CONTRACTOR 



GEORGIA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tashy DBA Kenneth Scott Builders,
 ("Contractor")
 Sole Proprietorship ☐ Partnership ☒ Corporation ☐ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-0393282
 Name of Owner(s)/Officer(s): Kenneth S. Tashy HT-201618
 Address for All Notices: PO Box 1590
 City: Blakely State: SC Zip Code: 29910
 Telephone: 803 247-1025 Fax: 803 815-3410 E-Mail Address: Ken@KennethScottBuilders.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February, 2016, between
DR Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Orders, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February, 2016

Owner:

By:

Name:

Title:

Assistant Vice-President

INITIALS: OWNER

Contractor:

By:

Name:

Title:

Owner

CONTRACTOR

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made) of all items for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("**Purchase Order**"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work as Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "**Requirements**"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, **INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS** from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("**Inspector**") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("**Change Order**") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("**Waste**"), caused by its operations and shall remove all of Contractor's materials

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at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drug" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHIA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHIA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

INITIALS: OWNER  CONTRACTOR 

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO DEFEND, INSURE, INDEMNIFY OR HOLD INDEMNITEE HARMLESS FOR LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv)

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contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL Policy shall not contain a deductible or self-insured retention of more than Twenty Five Thousand Dollars (\$25,000.00), and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) Employer's Liability Insurance in an amount not less than Five Hundred Thousand Dollars (\$500,000.00) for each accident for bodily injury, Five Hundred Thousand Dollars (\$500,000.00) policy limit for bodily injury by disease, and Five Hundred Thousand Dollars (\$500,000.00) for each employee for bodily injury by disease; (c) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (d) Commercial Automobile Liability Insurance coverage with limits of not less than Five Hundred Thousand Dollars (\$500,000.00) per person for bodily injury and Five Hundred Thousand Dollars (\$500,000.00) for property damage per occurrence specifying "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc., collectively "Horton" as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 0704 and CG 2037 0704). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits and any excess or umbrella coverages. Contractor shall immediately notify Owner in writing of any incident, occurrence, injury, or situation related in any way with the Work which may give rise to any claim or loss under any of the insurance coverages required by this Section 11.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYERS OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor

INITIALS: OWNER  CONTRACTOR 

fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Dispute") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor

INITIALS: OWNER  CONTRACTOR 

agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of Georgia.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

GEORGIA VERSION (REV. February 11, 2015)

INITIALS: OWNER *M* , CONTRACTOR *S*



Exhibit "A" Part I-General Scope Of Work

General & Miscellaneous

- Mobilization
- Layout and staking
- Build construction entrance
- Asbuilts
- Installation of stop and street signs
- Installation of conduit

Clearing and Demolition

- Clear and grub site

Drainage

- Installation of RCP
- Insulation of HDPE
- Install catch basins, curb inlets, and junction boxes

Erosion Control

- Tree protection
- Temporary gravel
- Silt fence
- Seeding and sod
- Rip-rap sediment basin

Initials: Contractor

A handwritten signature in black ink, appearing to be 'J. J. [unclear]', written over a horizontal line.

DR Horton

A handwritten signature in black ink, appearing to be 'JH', written over a horizontal line.

Earthwork

- Strip/respreads topsoil
- Off-site fill
- Demucking and backfill
- Rough grade

Grading

- Fine grade for curb and base
- Fine grade shoulders and easements

Asphalt Paving & Pavement Marking

- Asphalt surface and binder

Concrete

- Concrete curb
- Installation of handicap ramps

Utilities

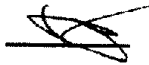
- Utility layout and record drawings

Sanitary Sewer

- Installation of sewer
- Pump stations

Water Distribution

- Installation of water

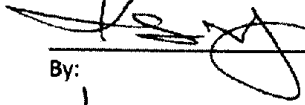
Initials: Contractor 

DR Horton 

Contractor

Owner

Kenneth Tasly DBA Kenneth Scott Builders D.R. Horton, Inc.
Company Name:


By:

Ken S. Tasly
Name:

owner
Title:

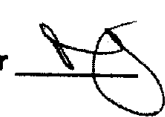
2/12/16
Date:


By:

Ron Bunn
Name:

A.V.P
Title:

2/22/16
Date:

Initials: Contractor 

DR Horton 

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
	)	
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking, LLC	)	
f/k/a Ramos Trucking, LLC,	)	
	)	
Defendants.	)	DEFENDANT D.R. HORTON, INC.'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT AS TO PLAINTIFF
	)	MARK W. MCGILTON
	)	
1223 May River Road, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	
	)	
	)	

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service of this Notice upon you or as soon thereafter as counsel may be heard, the undersigned attorneys for Defendant D.R. Horton, Inc. (“Defendant” or “D.R. Horton”) will move before the presiding Judge of the Jasper County Court of Common Pleas for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting D.R. Horton summary judgment as to Plaintiff Mark W. McGilton

I. INTRODUCTION

On May 20, 2018, Plaintiff filed a lawsuit against Alredo Uristegui, Jacob-Au Trucking, LLC and Kenneth Scott Builders, Inc. (Case No. 2018-CP-07-00607) in Beaufort County, South

Carolina. This action arose out of a motor vehicle accident that took place in Bluffton, South Carolina. On May 13, 2018, Mr. Uristegui was operating a dump truck owned by Jacob-Au Trucking, LLC and crossed the centerline, colliding with the Plaintiff. (See Complaint ¶2.) An Amended Complaint was filed on April 12, 2018, naming Kenneth Scott Builders Inc., employer of Mr. Uristegui, as a Defendant in the action. Almost two (2) years after the initial filing, Plaintiff then filed an action in Jasper County, South Carolina on February 17, 2021, against Defendant 1223 May River Road, LLC, Defendant D.R. Horton, Inc. and Defendant Lotty Trucking, LLC (Case No. 2021-CP-27-00069) involving the same facts and injuries in the Beaufort County action. On April 15, 2021, Defendant 1223 May River Road filed an Amended Answer and Third-Party Plaintiff's Complaint against Kenneth Scott Builders, Inc. Both actions arose out of the March 13, 2018, accident that took place in Beaufort County, South Carolina. Plaintiff has alleged that D.R. Horton, along with all other defendants, is liable to Plaintiff for the actions of a subcontractor's subcontractor which resulted in the accident. D.R. Horton brings this motion for summary judgment for dismissal of the action against D.R. Horton.

The grounds for this motion are as follows:

1. D.R. Horton owed no duty to Plaintiff;
2. D.R. Horton did not breach any duty to Plaintiff;
3. D.R. Horton was not the proximate cause of the accident; and
4. D.R. Horton is insulated from liability based upon the doctrines of superseding or intervening cause.

III. CONCLUSION

D.R. Horton's Motion is based upon the pleadings, discovery, affidavits, exhibits, deposition transcripts, and other admissible evidence as well as the applicable common law and

statutory law. D.R. Horton reserves the right to submit a Memorandum of Law in support of this Motion and to make additional arguments at a hearing on this Motion.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

John T. Crawford, Jr. (SC Bar # 69682)

Jason M. Imhoff (SC Bar # 69355)

Kathryn Harden

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Greenville, South Carolina 29601

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imhoff@conlaw.com

Counsel for Defendant D.R. Horton, Inc.

May 21, 2024

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069

**THIRD-PARTY DEFENDANT KENNETH
SCOTT BUILDER'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

DR Horton,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

Third-Party Defendant Kenneth Scott Builders, LLC. ("KSB") submits this Memorandum in Support of its Motion for Summary Judgment concerning the Third-Party Complaint filed by D.R. Horton, Inc. ("DR Horton"). As there is a lack of evidence that KSB performed any work that is alleged in DR Horton's Third-Party Complaint, or that KSB failed to provide competent drivers and/or failed to maintain a roadworthy vehicle, KSB's motion should be granted. Moreover, the causes of action asserted against the Third-Party Defendant are legally deficient, and KSB is entitled to summary judgment on that basis.

BACKGROUND

This is a personal injury action¹ arising from a motor vehicle accident that occurred on or about March 13, 2018 on May River Road in Bluffton, Beaufort County, South Carolina.

¹ There is another pending case in Beaufort County, C/A 2018-CP-07-00607 where Plaintiff has filed causes of action against KSB, Alfredo Uriostegui, and Jacob-AU Trucking, LLC based on the same facts and circumstances as in this case. Plaintiff has dismissed KSB in the Beaufort Action.

Plaintiff, Mark W. McGilton (“Plaintiff”) was operating his vehicle when he collided head on with a dump truck owned by Jacob-AU Trucking, LLC (“AU”). The dump truck was maintained by Defendant Lotty trucking LLC f/k/a Ramos Trucking, LLC (“Ramos Trucking” AU and Ramos Trucking collectively known as the “Dump Truck Parties”).

Defendant 1223 May River Road, LLC² (“1223 May River”) is the owner and developer of a commercial real estate development located at 1223 May River Road, Bluffton, SC 29910 (“May River Project”) and hired KSB to perform construction related work at the development site. KSB hired various subcontractors to provide materials and services to the May River Project. While engaged in its work with 1223 May River, KSB had a separate and unrelated contract with DR Horton to clear and grade a subdivision named Cypress Ridge located in Bluffton, South Carolina.

At the time of the accident, the driver of the dump truck had delivered his final delivery to the May River Project and had finished work for the day. As evidenced by the independent contractor agreement between KSB and DR Horton, the May River Project had nothing to do with the Cypress Ridge project and vice versa.

There is no evidence that any of the work performed by KSB at the May River Project was in any way related to the independent contract it had with DR Horton nor contributed to the damages complained of by Plaintiff. Further, Plaintiff’s claims for breach of contract and negligence are merely disguised indemnity claims that are improper under South Carolina law. Finally, DR Horton failed to plead a proper claim for indemnity as it would only be entitled to indemnity if it is proven at fault for causing Plaintiff’s damages and the entire case should be dismissed against KSB.

² Defendant 1223 May River Road, LLC was dismissed from this action on October 26, 2022.

ANALYSIS

1. The evidence does not support DR Horton's Third-Party Complaint.

First and foremost, there is simply no evidence that KSB owed DR Horton any duty of care as the vehicle involved in the accident with Plaintiff was a subcontractor working on the May River Project. While it is understood that Plaintiff is claiming amalgamation or joint venture between 1223 May River and DR Horton through the connection of KSB, the evidence is clear that the May River Project is completely and totally unrelated to DR Horton. Further, the evidence is clear that the driver of the dump truck was not working for, or on behalf, of DR Horton. Accordingly, there is no genuine issue as to any material fact concerning KSB'S liability, and, construing all of the evidence in the light most favorable to DR Horton, KSB is entitled to summary judgment concerning the Third-Party Complaint.

2. DH Horton's Claims are "Disguised Indemnity" claims, and the Third and Fourth Causes of Action Should be Dismissed.

DR Horton's claims for breach of contract and negligence should be dismissed because they are merely "disguised" claims for equitable indemnity and are not viable as alternative causes of action. The Supreme Court of South Carolina has held third-party claims for negligence and breach of contract are included within a claim for equitable indemnity. *Town of Winnsboro v. Weidman-Singleton, Inc.*, 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). DR Horton's claims for negligence and breach of contract are subject to dismissal as they are merely disguised claims for equitable indemnity.

South Carolina law defines indemnity as "that form of compensation in which a first-party (KSB) is liable to pay a second party (DH Horton) for a loss or damage the second party (DH Horton) incurs to a third party (Plaintiffs)." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper, Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of*

Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992)). *See also* Rock Hill Telephone Co. v. Globe Communications, 363 S.C. 385, 611 S.E.2d 235 (2005).

The Court of Appeals upheld the maxim that "The character of an action is primarily determined by the allegations contained in the complaint." Stonedge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC, 413 S.C. 615, 620, 776 S.E.2d 426, 429 (Ct. App. 2015) quoting Seebaldt v. First Fed. Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." Walsh v. Evans, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Courts may use the allegations in the complaint to determine the correct character of an action. *See* Seebaldt, 269 S.C. at 692, 239 S.E.2d at 727.

Looking to the allegations of DR Horton in its Third-Party Complaint, there is no question its only claim is for indemnity and that DR Horton's remaining claims are all disguised indemnity claims. The third-party complaint for negligence states:

If due care was not used in ensuring safety was achieved, then KSB breached its duty of care owed pursuant to the requirements under the Agreement and under the laws of South Carolina. (DR Horton Complaint, ¶ 115.)

DR Horton's third-party complaint for breach of contract states, "KSB was contractually responsible for performing the requirements in the Agreement correctly. To the extent that Plaintiff proves that KSB was responsible for the damages incurred in the Collision, KSB materially breached the Agreement as set forth above."

DR Horton's third-party claims seek to recover the amount DR Horton will owe the Plaintiff after trial due to the alleged acts or omissions of others. The "damages" are contingent

on the outcome of the trial. DR Horton does not seek damages from KSB for personal injury, property damage, or other damages actually incurred by DR Horton. These claims are textbook claims for indemnity. *See Vermeer Carolina's, Inc.*, 336 S.C. at 60, 518 S.E.2d at 305.

The Stoneledge opinion is instructive: “Under Marick's own allegations, its negligence cross-claim arose only when it faced potential liability for Stoneledge's damages and incurred fees and costs defending against Stoneledge's lawsuit. Marick's negligence cross-claim is nothing more than a claim for equitable indemnity.” Stoneledge, 413 S.C. at 622, 776 S.E.2d at 430. Therefore, the Court can and should characterize the contract and negligence claims as indemnity claims. As noted by South Carolina’s federal district court, “a rose by any other name is still a rose,” and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one’s liability to a third party are “nothing more than claims for ... indemnification with a slight change in wording.” SCNB v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990).

3. The Third-Party Plaintiff Cannot Seek Indemnification for a Claim On Which They Are Found At-Fault.

The “most important requirement” for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault. Vermeer Carolina's, Inc., 518 S.E.2d at 307. DR Horton seeks indemnification from KSB only, “if, in fact, Plaintiff is entitled to recover under the allegations of the Complaint, that the allegations are the result of the wrongful acts omissions, negligence, gross negligence, and/or representations of KSB, all of which are contrary to the agreements and common laws of the State of South Carolina.” (DR Horton’s Amended Answer and Third-Party Complaint, ¶¶ 96 and 105 (filed October 26, 2022)). In order for damages to be awarded, as the claim is pled, this Court must first find DR Horton to be at fault with regard to Plaintiff’s claims. If DR Horton is at

fault, it is plain that it is not entitled to indemnity. Therefore, the indemnity claim must be dismissed.

CONCLUSION

There is no evidence that KSB was responsible for the actions of the Dump Truck Parties or that it was negligent as to the maintenance of the vehicle itself. However, even if the Court should find there is evidence sufficient to deny summary judgment to KSB, the Third-Party Complaint should be limited only to indemnity and in any event the indemnity claim is not pled to permit DR Horton to recover. Therefore, summary judgment in favor of KSB is proper and the Third-Party Complaint against it should be dismissed.

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Charleston, South Carolina
May 23, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
	)	
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking, LLC	)	
f/k/a Ramos Trucking, LLC,	)	
	)	DEFENDANT D.R. HORTON, INC.'S
Defendants.	)	MEMORANDUM IN SUPPORT OF ITS
	)	MOTION FOR SUMMARY
	)	JUDGMENT AS TO PLAINTIFF
	)	MARK W. MCGILTON
_____	)	
D.R. Horton, Inc.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	
	)	
_____	)	

**TO: PLAINTIFF MARK W. MCGILTON AND HIS COUNSEL OF RECORD
BENJAMIN T. SHELTON, ESQUIRE:**

COMES NOW, Defendant D.R. Horton, Inc. (“D.R. Horton”) and hereby provides its Memorandum in Support of its Motion for Summary Judgment against Plaintiff Mark W. McGilton (“Plaintiff”), showing this honorable Court as follows:

I. PROCEDURAL POSTURE

On May 20, 2018, Plaintiff filed a lawsuit against Alfredo Uristegui, Jacob-Au Trucking, LLC and Kenneth Scott Builders, Inc. (hereinafter “KSB”) (hereinafter collectively “Dump Truck Operators”) (Case No. 2018-CP-07-00607) in Beaufort County, South Carolina. This action arose out of a motor vehicle accident that took place in Bluffton, South Carolina. On May 13, 2018, Mr.

Uristegui was operating a dump truck owned by Jacob-Au Trucking, LLC (hereinafter “Jacob-Au Trucking”) and crossed the centerline, colliding with the Plaintiff. (See Complaint ¶2.) The dump truck was maintained by Defendant Lotty trucking LLC f/k/a Ramos Trucking, LLC. An Amended Complaint was filed on April 12, 2018, naming KSB, employer of Mr. Uristegui, as a Defendant in the action. Almost two (2) years after the initial filing, Plaintiff then filed an action in Jasper County, South Carolina on February 17, 2021, against Defendant 1223 May River Road, LLC, Defendant D.R. Horton, Inc. and Defendant Lotty Trucking, LLC (Case No. 2021-CP-27-00069) involving the same facts and injuries in the Beaufort County action. On April 15, 2021, Defendant 1223 May River Road filed an Amended Answer and Third-Party Plaintiff’s Complaint against Kenneth Scott Builders, Inc. Both actions arose out of the March 13, 2018, accident that took place in Beaufort County, South Carolina. Plaintiff has alleged that D.R. Horton, along with all other defendants, is liable to Plaintiff for the actions of a general contractor’s subcontractor which resulted in the accident.

At the time of the accident, D.R. Horton had a contract with KSB to clear and grade a subdivision named Cypress Ridge located in Bluffton, South Carolina. KSB was also working on a separate and unrelated job at 1223 May River at the time of the accident. As evidenced by the independent contractor agreement between KSB and D.R. Horton (hereinafter “KSB ICA”), the May River project had nothing to do with the Cypress Ridge project and vice versa.

There is no evidence that D.R. Horton was involved in the Plaintiff’s accident. Therefore, D.R. Horton’s Motion for Summary Judgment against Plaintiff should be granted.

II. LEGAL STANDARD

Summary judgment should be granted “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 a judgment as a matter of law.” SCRCP 56(c). “Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed.” Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001).

“Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by ‘showing’ -- that is, pointing out to the [trial] court -- that there is an absence of evidence to support the nonmoving party's case.’ Id. (quoting Celotex, 477 U.S. at 325).

“Once moving party carries its initial burden, opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with ‘specific facts showing that there is a genuine issue for trial.’” Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (emphasis in original)). This showing must be based on evidence that would be admissible at trial. Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002).

In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom are viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004).

III. ARGUMENT

1. D.R. Horton is Not Negligent as it Was Not Involved in a Joint Enterprise with the Dump Truck Operators

D.R. Horton cannot be liable for negligence because D.R. Horton was not involved in a joint enterprise with the Dump Truck Operators as neither entity had the right to control the other.

The South Carolina Supreme Court has repeatedly held that "to constitute a joint enterprise, so that the negligence of one may be imputed to another, there must be a common purpose and a community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto:

A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose. Further, in order to constitute a joint enterprise, there must be a common purpose and community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto.

Peoples Federal Savings & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 425 S.E.2d 764 (S.C. Ct. App. 1992).

The court in Peoples found that a building contractor and a lender were engaged in a joint venture for profit of the construction of several apartment complexes because the lender owned half of the construction company's stock and the lender had approached the contractor to joint venture the construction project. Id.

This case is distinct from Peoples. Here, there is no evidence that D.R. Horton or the Dump Truck Operators owned a portion of the other entity or that either entity contacted the other to form a joint venture regarding Cypress Ridge. Additionally, there is no evidence that the Dump Truck Operators or D.R. Horton had the right to direct and control the other in the development of Cypress Ridge or the removal of dirt from the Cypress Ridge Project.

D.R. Horton hired KSB as a general contractor to perform horizontal work including clearing, demolition, drainage, and erosion control work. (See **Ex. 1, KSB ICA**). Under KSB's ICA with D.R. Horton, "Contractor [KSB] in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and

performance of the Work...Contractor shall be responsible and liable for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses...Any provision in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that the Contractor shall follow the desires of the Owner in the results of the Work only.” KSB as the general contractor then subcontracted the dirt hauling portion of its scope of work for Cypress Ridge during the time the accident occurred (See **Ex. 2, Tosky 2024 Depo. 32:4-14**).

KSB also admitted that D.R. Horton did not control its work, or its subcontractor’s work, as D.R. Horton had no knowledge of who KSB’s subcontractors, the other Dump Truck Operators, were. (See **Ex. 2, Tosky 2024 Depo. 55:22-25 and 123:6-9** and **Ex. 3, O’Sako Depo. 65:6-12 and 162:7-12**). Specifically, Kenneth Tosky of KSB in his 2024 Deposition stated that:

Q. So what oversight does an owner/developer of property have over the horizontal part of the development?

A. From my perspective in the projects that we’ve done on horizontal, when we do that work, we’re usually dealing with the engineer direct. The owner really does not get involved in the process unless there’s a change to the situation.

(**Ex. 2, Tosky 2024 Depo. 11:15-22**).

Q. And when you went and loaded that dirt up into these trucks, was D.R. Horton there?

A. They were probably on the site but –

Q. Were they there watching the dirt that’s moved, whether it good, bad or something else?

A. No, sir.

Q. And did they know - - did you tell them when you were going to take dirt off the site?

A. No, sir.

Q. Did you tell them how much dirt you were going to take off the site other than the general, original engineering plans?

A. No, sir.

Q. Did you tell them who was going to be taking the dirt off the site?

A. No, sir.

Q. Did you tell them who was going to be loading the dirt on the site?

A. No, sir.

Q. Did D.R. Horton direct you in the way that you would either remove, haul, or pick up that dirt?

A. Absolutely not.

Q. Did they direct you in any way: Time, location, purpose, transportation, delivery, any of those things on that dirt?

A. No, sir.

Q. It is possible they didn't even know it was happening?

A. Probably possible.

Q. And didn't know where it was going.

A. No, sir.

Q. And didn't know what it was going to be used for.

A. No, sir.

(Ex. 2, Tosky 2024 Depo. 125:13-126:13).

Therefore, D.R. Horton was not in a joint enterprise with the Dump Truck Operators as D.R. Horton did not have the right to control the work of its general contractor, KSB, or the work of KSB's subcontractors, the other Dump Truck Operators, on the Cypress Ridge project.

2. D.R. Horton is Not Negligent as it Did Not Negligently Entrust Anything to the Dump Truck Operators

D.R. Horton cannot be liable for negligence as D.R. Horton did not negligently entrust a dump truck or dirt to the Dump Truck Operators.

The theory of negligent entrustment provides the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment. Whaley v. Amazon.com, 2:23-cv-04317-DCN (D.S.C. Feb. 1, 2024). In Whaley, the court found that Plaintiff's negligent entrustment claim survived Defendant's motion to dismiss as the Complaint stated the subcontractor, Carcast Express, entrusted its truck and that Amazon, who subcontracted Carcast Express, entrusted its trailer to the truck driver that injured

Plaintiff in a motor vehicle collision. Id.

This case is distinguishable from Whaley. Here, Plaintiff has not submitted evidence that D.R. Horton entrusted the dump truck or any equipment to the Dump Truck Operators. In fact, the evidence shows that D.R. Horton did not provide any equipment to the Dump Truck Operators. D.R. Horton hired KSB as a general contractor, not as a subcontractor as Amazon did in Whaley, to perform horizontal work and KSB then subcontracted the dirt hauling portion of its scope of work. (**Ex. 2, Tosky 2024 Depo. 32:4-14**). Jacob-Au Trucking, not D.R. Horton or KSB, owed the truck(s) it operated. (**Ex. 2, Tosky 2024 Depo. 92:25-93:2 and Tosky 2024 33:10-11**). Additionally, there is no case law that negligent entrustment can be extended to dirt and not to a vehicle.

Thus, D.R. Horton did not negligently entrust anything to the Dump Truck Operators.

3. D.R. Horton is Not Vicariously Liable for the Acts of the Dump Truck Operators

D.R. Horton is not vicariously liable for the acts of the Dump Truck Operators because they are independent contractors and D.R. Horton did not have the right to control them.

As a general rule, a principal is not vicariously liable for the negligent acts of an independent contractor. Ruh v. Metal Recycling Servs., LLC, 436 F. Supp. 3d 844, 845 (D.S.C. 2020). An employer is not liable for the torts of an independent contractor committed in the performance of contracted work. Id. Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work.” Whaley v. Amazon.com, 2:23-cv-04317-DCN (D.S.C. Feb. 1, 2024). In evaluating the right of control, the court examines four factors: "(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; [and] (4) right to fire. Id.

As explained by the Whaley court,

In Whaley, the court found that Plaintiff's claim of vicarious liability survived a motion to dismiss. The action arose out of a tractor-trailer collision between Whaley and defendant Yahia who was a commercial motor vehicle operator for Carcast Express. At the time of the accident, the Amazon Defendants had entered into an agreement with Carcast Express to participate in the Amazon Relay Program. The Agreement between the Amazon Defendants and Carcast Express required Carcast Express and its employees and drivers, including Yahia, to comply with the Agreement, which included, inter alia, Amazon's Code of Business Conduct and Ethics and Amazon's Supplier Code of Conduct. The Agreement also specified that Amazon would retain control of many aspects of transportation related services, such as receiving, loading, storing, transporting, delivering, and unloading Amazon products, as well as complying with Amazon and any third party's safety and security policies related to premises and cargo. The Complaint also alleged that a truck driver's participation in the Amazon Relay Program—even as an employee of a participating trucking company such as Carcast Express—requires that truck driver to download the Amazon Relay phone app. That driver thereafter uses the app to receive Amazon assignments, to communicate directly with Amazon, to view and manage load status, report delays, and to use commercial navigation. For navigation, the app generates a map with an exact route the driver must follow and dictates the stops and delivery times on that map. Additionally, Amazon grades the drivers who use the Amazon Relay Program app based on individual performance, in addition to the carrier's overall performance.

Additionally, the complaint alleges that Carcast Express owned the tractor and the Amazon Defendants owed or leased the trailer which Yahia was using at the time of the accident. The Amazon Relay Program app also automatically generated invoices to pay truck drivers. Altogether the court found that Whaley had pleaded facts plausible to indicate that Amazon Defendants exerted sufficient control over Yahia such that he acted as their agent and not as an independent contractor. Thus, the court denied the motion to dismiss on the claims of vicarious liability. Id.

Unlike in Whaley, D.R. Horton did not have the right to control the Dump Truck Operators.

Contrary to Whaley, D.R. Horton hired KSB as a general contractor, not as a subcontractor, and KSB's ICA specifically denounced control instead of retaining control over aspects of KSB's

work. (See ¶2 of Ex. 1 KSB ICA)

Furthermore, this case is distinguishable from Whaley as D.R. Horton did not provide the Dump Truck Operators with any assignments, communicate directly with the Dump Truck Operators about how to perform their work, provide a map with a route for the Dump Truck Operators, specify when the Dump Truck Operators were to haul the dirt, or judge the Dump Truck Operators independent performance. D.R Horton also did not provide the Dump Truck Operators with any equipment like the Amazon Defendants in Whaley. (Ex. 2, Tosky 2024 Depo. 92:25-93:2 and Tosky 2024 33:10-11). Additionally, D.R. Horton did not pay the Dump Truck Operators, Jacob-Au Trucking or Alfredo Uriostegui, or generate invoices for any of the Dump Truck Operators unlike the Amazon Defendants in Whaley. (Ex. 3, O’Sako Depo. 163:21-164:7 and Ex. 2, Tosky 2024 76:24-77:7). Finally, D.R. Horton did not have the right to fire Jacob-Au Trucking or Alfredo Uriostegui as they were a subcontractor of its general contractor KSB and D.R. Horton did not know that KSB subcontracted the dump truck portion of its scope of work. (Ex. 2, Tosky 2024 Depo. 125:13-126:13).

Therefore, D.R. Horton is not vicariously liable for the negligent acts of its general contractor KSB or for any negligent acts of KSB’s subcontractors, Jacob-Au Trucking and Alfredo Uriostegui, as D.R. Horton did not have the right to control these entities.

4. D.R. Horton Was Not Negligent in its Selection of the Dump Truck Operators

D.R. Horton was not negligent in its selection of the Dump Truck Operators because D.R. Horton used reasonable care in its selection, the risk of harm was low, the Dump Truck Operators are careful and competent, and D.R. Horton’s selection of the Dump Truck Operators is not the proximate cause of Plaintiff’s accident.

As a general rule, the principal is not vicariously liable for the negligent acts of an

independent contractor. Ruh v. Metal Recycling Servs., LLC, 436 F. Supp. 3d 844, 845 (D.S.C. 2020). There can be no recovery against the principal unless the plaintiff separately proves the negligence of the principal in selecting that particular independent contractor and that the principal's negligence was a proximate cause of the alleged injuries. Id. The features to consider analyzing future cases for negligent selection of an independent contractor are (1) that the defendant principal did not exercise reasonable care; (2) the risk of physical harm unless done skillfully and carefully; (3) selecting a competent and careful contractor; and (4) the negligence of the principal was a proximate cause of the physical harm. Id.

As explained by the Ruh court,

In Ruh, the Supreme Court certified that a negligent selection cause of action could be brought by an injured plaintiff against a cargo company for hiring an independent trucking company that was involved in an accident that injured plaintiff. The plaintiff must establish by proof a standard of care for selecting a contractor for the particular work and that the principal breached that standard. Most participants in the modern economy already act reasonably in selecting contractors. One who employs a contractor to perform relatively simple and safe work within the contractor's field is entitled to assume that a contractor of good reputation is competent to do such work safely. The principal's liability is contemplated only when the work of the contractor involves a risk of physical harm unless it is skillfully and carefully done. Thus, the principal should make reasonable inquiry into the extent to which the work the contractor is being hired to complete involves danger, a foreseeable risk of physical harm, to third parties. A more risky job generally requires a higher level of competence and care. A contractor hauling toxic chemicals on public highways, for example, needs expertise and equipment, and must act with a level of care, that would not be required for a contractor hauling paper products. Thus, hiring a trucking company to haul paper products may require no more than a surface level assessment of competence. The risk associated with delivering newspapers is unlikely to result in serious physical harm or property damage.

Competent and careful, denotes a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable [principal] would realize that a contractor must have in

order to do the work . . . without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary. It is necessary to show that the harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him. Sticking with the trucking example to illustrate the point, if a principal hires a contractor unqualified to handle emergencies that may arise while hauling toxic chemicals, the principal is negligent in hiring the contractor. But if the contractor causes an accident by negligently failing to yield the right of way, and the dangerous quality of his cargo plays no part in the accident or injury, then the plaintiff will be unable to establish cause-in-fact and thus unable to establish proximate cause. Even if the defendant/principal was negligent in hiring a contractor because he had no experience with this particular type of job, the accident resulted from a completely different error, the accident was no more probable because the contractor was inexperienced. Id.

Here, unlike in Ruh, D.R. Horton hired KSB as a general contractor and not as a subcontractor. Additionally, as contemplated in Ruh, D.R. Horton used reasonable care in selecting KSB as its general contractor and in turn, the other Dump Truck Operators, as the Dump Truck Operators had a good reputation, and therefore it is fair for D.R. Horton to assume that the Dump Truck Operators are competent to perform its work on the Cypress Ridge project safely. When selecting contractors, including KSB, D.R. Horton looks at past performance and recommendations. Jared O'Sako, Land Development Project Manager of D.R. Horton, stated in his Deposition that:

A. The process would be -- on the actual selection of the contractor?

Q. Correct. Selection and ultimate hiring.

A. Okay. The process is you bid it out, review, compare bids. Review, compare schedules. Because oftentimes, we just ask them to turn in your bid and then turn in what your timeline for you building the project. We -- oftentimes, we don't set the --we don't set the deadline. They set -- they set the deadline. They tell us what they can do. And so they provide us with a schedule. And then, based on -- I guess the next thing would be their history with the different groups that I have a relationship with, including the engineers, and their past performance, whether they be recommended; or current workload, their ability to perform the work.

(Ex. 3, O’Sako Depo. 42:22-43:24).

KSB also used reasonable care in hiring Jacob-Au Trucking as it was previously recommended by another subcontractor. **(Ex. 2, Tosky 2024 Depo. 48:1-5).** Additionally, KSB’s ICA requires KSB to have insurance and to meet all legal requirements. (See **Ex. 1, KSB ICA** and **Ex. 3, O’Sako Depo. 125:8-11 and 60:12-13).**

Furthermore, as discussed in Ruh, the risk of harm associated with the Dump Truck Operators’ scope of work was low. At the time of Plaintiff’s accident, KSB was working as a general contractor on Cypress Ridge Phase 7 and the RV/boat parking which only required hauling on site. **(Ex. 4, Tosky 2021 Depo. 36:12-37:6 and Ex. 3, O’Sako Depo. 75:5-11).** The Dump Truck Operators’ scope of work of hauling dirt is akin to the example in Ruh of hauling paper products which Ruh contemplated was unlikely to result in serious physical harm.

Additionally, as contemplated in Ruh, the Dump Truck Operators are competent and careful to perform the work because they possess the knowledge, skill, experience and have available equipment that a reasonable contractor would have to perform the work without risk of injury to others. KSB possesses significant knowledge and skill in the scope of work of horizontal construction as Kenneth Tosky, the owner of KSB, had twenty-seven years of experience in the horizontal process before working on D.R. Horton’s Cypress Ridge project and holds an unlimited builder’s license which covers horizontal work. **(Ex. 2, Tosky 2024 Depo. 28:1-21 and 6:25-7:6 and Ex. 6, KSB License).** The other Dump Truck Operators also possessed the necessary skill, experience and equipment as KSB had used Jacob-Au Trucking and Alfredo Uriostegui prior to KSB’s work on D.R. Horton’s Cypress Ridge project and they had previously been recommended to KSB by another subcontractor **(Ex. 2, Tosky 2024 Depo. 48:1-5 and 32:15-35:24).** The Dump Truck Operators had access to the equipment and personnel necessary to complete the scope of

work as KSB would rent necessary equipment for jobs and Jacob-Au Trucking and Alfredo Uriostegui owed their dump trucks (**Ex. 4, Tosky 2021 Depo 32:15-36:9** and **Ex. 3, O'Sako Depo. 41:19-44:15 and 69:9-19**).

Finally, Plaintiff cannot prove that D.R. Horton's selection of the Dump Truck Operators proximately caused Plaintiff's accident. As contemplated in Ruh, even if D.R. Horton was negligent in hiring the Dump Truck Operators because they had no experience with this particular type of job, which D.R. Horton expressly denies, if the accident resulted from a completely different error, the accident was no more probable because the contractor was inexperienced and the Plaintiff cannot say that D.R. Horton's selection of the Dump Truck Operators was the proximate cause of Plaintiff's accident. As explained in Ruh, if the accident was caused by a traffic violation and the dangerous quality of his cargo played no part in the accident or injury, then the plaintiff will be unable to establish cause-in-fact and thus unable to establish proximate cause. Here, as explained in Ruh, the accident was caused by a traffic violation, the Dump Truck Operator crossing the center line, and the allegedly dangerous cargo and maintenance of the dump truck played no part in the accident or injury to Plaintiff. (See Complaint ¶2, **Ex. 2, Tosky Depo. 2024 65:9-66:17**, and **Ex. 5, McGilton Depo. 30:3-5 and 32:24-33:25**). Thus, Plaintiff cannot establish that D.R. Horton's selection of the Dump Truck Operators proximately caused Plaintiff's accident.

Therefore, D.R. Horton's selection of the KSB and in turn, KSB's selection of the other Dump Truck Operators, was not negligent as D.R. Horton and KSB used reasonable care in selecting the Dump Truck Operators, the scope of work of the Dump Truck Operators involved a low risk of harm, the Dump Truck Operators were competent and careful, and the selection of the Dump Truck Operators did not proximately cause Plaintiff's accident.

IV. CONCLUSION

Based on the foregoing, Plaintiff has not met its burden of proof, and therefore, D.R. Horton's Motion for Summary Judgment on Plaintiff's claims must be granted.

WHEREFORE, Defendant D.R. Horton shall, and hereby does, move the Court for an Order granting D.R. Horton's Motion for Summary Judgment on Plaintiff's claims.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

John T. Crawford, Jr. (SC Bar # 69682)

Jason M. Imhoff (SC Bar # 69355)

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Counsel for Defendant D.R. Horton, Inc.

May 29, 2024



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tesley DBA Kenneth Scott Builders ("Contractor")
 Sole Proprietorship ☐ Partnership ☐ Corporation ☒ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-2393282
 Name of Owner(s)/Officer(s): Kenneth J. Tesley
 Division Name: COASTAL CAROLINA Area Name: HILTON HEAD / SAVANNAH Assigned Vendor No.: 2016181
 Address for All Notices: PO Box 1590
 City: Bluffton State: SC Zip Code: 29910
 Telephone: 843-247-1025 Fax: (843) 813-3491 E-Mail Address: KennethScottBuilders.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February 2016 between DR Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 28-4-30 AND 28-4-50 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February 2016.

Owner:
By: [Signature]
Name: DR Horton
Title: ASSISTANT VICE-PRESIDENT

Contractor:
By: [Signature]
Name: Kenneth Tesley
Title: Owner

INITIALS: OWNER [Initials] CONTRACTOR [Initials]

AGREES THAT OWNER DOES, AND WILL, NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Orders, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and those joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("Purchase Order"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("Inspector") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which

INITIALS: OWNER  CONTRACTOR 

the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("Waste"), caused by its operations and shall remove all of Contractor's materials at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers; (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home; and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

INITIALS: OWNER CONTRACTOR

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

INITIALS: OWNER  CONTRACTOR 

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, e, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL policy shall not contain a deductible or self-insured retention of more than \$25,000.00, and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc., (collectively "Horton") as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs to complete, repair, or replace, plus any related costs or damage including re-inspection fees, with any excess to be paid to Contractor. If such costs exceed the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens

INITIALS: OWNER  CONTRACTOR 

are filed against the job location as a result of Contractor's acts or omissions, (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claims, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

INITIALS: OWNER  CONTRACTOR 

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

SOUTH CAROLINA VERSION (REV. 22 JUNE 2015)

INITIALS: OWNER

CONTRACTOR



GEORGIA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tashy DBA Kenneth Scott Builders,
 ("Contractor")
 Sole Proprietorship Partnership ☒ Corporation ☐ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-0393282
 Name of Owner(s)/Officer(s): Kenneth S. Tashy HT-201618
 Address for All Notices: PO Box 1590
 City: Blackshear State: SC Zip Code: 29910
 Telephone: 803-247-1025 Fax: 803-815-3410 E-Mail Address: KSC@KennethScottBuilders.com
 Insurance Carrier: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February, 2016, between
D.R. Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Orders, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February, 2016

Owner:

By:

Name:

Title: Assistant Vice-President

INITIALS: OWNER OK

Contractor:

By:

Name:

Title: Owner

INITIALS: CONTRACTOR KT

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made) of all items for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("**Purchase Order**"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "**Requirements**"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, **INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS** from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("**Inspector**") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("**Change Order**") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("**Waste**"), caused by its operations and shall remove all of Contractor's materials

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at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHIA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

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9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO DEFEND, INSURE, INDEMNIFY OR HOLD INDEMNITEE HARMLESS FOR LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnities to the same extent that Contractor is required to indemnify Indemnities in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnities to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnities from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv)

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contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL Policy shall not contain a deductible or self-insured retention of more than Twenty Five Thousand Dollars (\$25,000.00), and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) Employer's Liability Insurance in an amount not less than Five Hundred Thousand Dollars (\$500,000.00) for each accident for bodily injury, Five Hundred Thousand Dollars (\$500,000.00) policy limit for bodily injury by disease, and Five Hundred Thousand Dollars (\$500,000.00) for each employee for bodily injury by disease; (c) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (d) Commercial Automobile Liability Insurance coverage with limits of not less than Five Hundred Thousand Dollars (\$500,000.00) per person for bodily injury and Five Hundred Thousand Dollars (\$500,000.00) for property damage per occurrence specifying "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc., (collectively "Horton") as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 0704 and CG 2037 0704). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits and any excess or umbrella coverages. Contractor shall immediately notify Owner in writing of any incident, occurrence, injury, or situation related in any way with the Work which may give rise to any claim or loss under any of the insurance coverages required by this Section 11.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

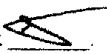
11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor

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fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("**Disputes**") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("**FAA**"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("**AAA**") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor

INITIALS: OWNER M CONTRACTOR [Signature]

agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of Georgia.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

GEORGIA VERSION (REV. February 11, 2015)

INITIALS: OWNER *W* , CONTRACTOR *S*



Exhibit "A" Part I-General Scope Of Work

General & Miscellaneous

- Mobilization
- Layout and staking
- Build construction entrance
- Asbuilts
- Installation of stop and street signs
- Installation of conduit

Clearing and Demolition

- Clear and grub site

Drainage

- Installation of RCP
- Insulation of HDPE
- Install catch basins, curb inlets, and junction boxes

Erosion Control

- Tree protection
- Temporary gravel
- Silt fence
- Seeding and sod
- Rip-rap sediment basin

Initials: Contractor

A handwritten signature in black ink, appearing to be 'J. [unclear]', written over a horizontal line.

DR Horton

A handwritten signature in black ink, appearing to be 'JH', written over a horizontal line.

KDC 000269

Earthwork

- Strip/respreads topsoil
- Off-site fill
- Demucking and backfill
- Rough grade

Grading

- Fine grade for curb and base
- Fine grade shoulders and easements

Asphalt Paving & Pavement Marking

- Asphalt surface and binder

Concrete

- Concrete curb
- Installation of handicap ramps

Utilities

- Utility layout and record drawings

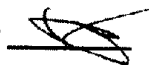
Sanitary Sewer

- Installation of sewer
- Pump stations

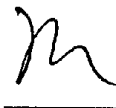
Water Distribution

- Installation of water

Initials: Contractor



DR Horton

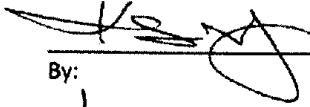


KDC 000270

Contractor

Owner

Kenneth Tasly DBA Kenneth Scott Builders D.R. Horton, Inc.
Company Name:


By:

Ken S. Tasly
Name:

Owner
Title:

2/12/16
Date:


By:

Ron Bunn
Name:

A.V.P
Title:

2/22/16
Date:

Initials: Contractor 

DR Horton 

KDC 000271

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
JASPER COUNTY

DEPOSITION OF KENNETH TOSKY

MARK W. McGILTON,

Plaintiff,

Case No. 2021-CP-27-00069

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC. and LOTTY TRUCKING,
LLC t/k/a RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

DEPONENT: KENNETH TOSKY

DATE: April 19, 2024

TIME: 10:26 A.M.

LOCATION: SHELTON LAW FIRM
HILTON HEAD ISLAND, SOUTH CAROLINA

REPORTED BY: TERILL KENNELLY, NCRA
CERTIFIED REAL TIME REPORTER
CLARK BOLEN, INC.
P.O. Box 73129
Charleston, SC 29415
843-762-6294
WWW.CLARKBOLEN.COM
Office@ClarkBolen.com

A P P E A R A N C E S

ON BEHALF OF MARK W. McGILTON:

SHELTON LAW FIRM
BY: BENJAMIN T. SHELTON
P.O. Box 21069
Hilton Head Island, SC 29925

ON BEHALF OF D.R. HORTON, INC.:

KENISON, DUDLEY & CRAWFORD
BY: JASON M. IMHOFF
704 East McBee Avenue
Greenville, SC 29601

ON BEHALF OF KENNETH SCOTT BUILDERS, LLC:

LUZURIAGA MIMS
BY: RYAN CONNER
1156 King Street
Charleston, SC 29403

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EXHIBITS		
EXHIBIT	DESCRIPTION	PAGE
Exhibit No. 1*	April certificate of insurance with Builders Mutual and Kenneth Scott Builders	75
Exhibit No. 2*	May certificate of insurance with Builders Mutual and Kenneth Scott Builders	75
Exhibit No. 3	D.R. Horton's South Carolina independent contractor agreement with Kenneth Scott Builders	75

*Retained by Mr. Imhoff

KENNETH TOSKY,

having been first duly sworn, was examined and
testified as follows:

EXAMINATION

BY MR. IMHOFF:

Q. Mr. Tosky, my name is Jason Imhoff, and
I represent D.R. Horton in these -- I guess
they're cases that were ultimately brought by
Mr. McGilton.

D.R. Horton was not in the lawsuit when
you were deposed the first time, but we do have
the benefit of your deposition transcript so we
don't have to replot all that ground as I was
telling you before the deposition.

Have you ever -- other than that time,
have you ever had your deposition taken?

A. Yes, sir.

Q. How many times?

A. This will be the fourth time.

Q. Fourth time, all right. So you're
generally familiar with the deposition process in
South Carolina?

A. Yes, sir.

Q. All right. I have to say a couple of
things. One, if you have any questions, ask me.

Page 5

1 You can't ask your attorney or to phone a friend,
 2 that kind of thing.
 3 A. I understand.
 4 Q. If I can't handle it, then we'll talk
 5 and try to resolve whatever issue you have, okay?
 6 A. Understood.
 7 Q. Sometimes I ask bad questions or you're
 8 listening to something else or thinking about the
 9 last question. If you didn't hear my question or
 10 you don't understand it, please ask me to repeat
 11 it or rephrase it or explain it, and I'll be
 12 happy to do that, okay?
 13 A. Yes, sir.
 14 Q. If you don't do that, I'll assume that
 15 you understood and you're answering that
 16 question; is that fair?
 17 A. That is fair.
 18 Q. All right. Take a break anytime you
 19 want to. Comfort, you know, temperature or water
 20 or whatever, just let us know, okay?
 21 A. Understood.
 22 Q. All right. State your full name if you
 23 would, please.
 24 A. Full name?
 25 Q. Full name.

Page 6

1 A. Kenneth Scott Tosky.
 2 Q. And have you read your deposition in
 3 this case?
 4 A. I've summary reviewed it, yes, sir, but
 5 not recently.
 6 Q. I understand. Were you given an
 7 opportunity to read it and correct any
 8 information in it that was transcribed
 9 incorrectly or you may have misunderstood the
 10 question?
 11 A. Yes, sir.
 12 Q. You were provided that opportunity?
 13 A. Yes, sir.
 14 Q. Did you change anything?
 15 A. There was a couple items, and I don't
 16 recall what those were. It was minor details.
 17 Q. Other than those changes that you made,
 18 do you believe that your answers were honest and
 19 correct in that deposition?
 20 A. Yes, I do.
 21 Q. Let me go -- because I was late, I'm
 22 going to get sort of to the point of it, right to
 23 it, okay?
 24 A. Yes, sir.
 25 Q. You have an unlimited commercial

Page 7

1 builder's license; is that right?
 2 A. That is correct.
 3 Q. And under that unlimited commercial
 4 license, that includes grading and utility work
 5 and that type of thing?
 6 A. That is correct.
 7 Q. So horizontal work?
 8 A. Horizontal and vertical.
 9 Q. Is there a -- and for D.R. Horton in
 10 Cypress Ridge, you were doing horizontal work,
 11 right?
 12 A. That is correct.
 13 Q. Do you know if D.R. Horton has a license
 14 to do that work?
 15 A. No, sir, I do not know.
 16 May I expand?
 17 Q. Yes, please.
 18 A. So we had priced their commercial
 19 building on the Cypress Ridge, phase 7, that we
 20 were performing the horizontal, and they came
 21 back and did it themselves. I believe they had a
 22 member on staff that had a license.
 23 Q. For vertical construction?
 24 A. For vertical.
 25 Q. And I --

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1 A. Which, in general contracting, whether
 2 you're unlimited or not, you can do horizontal or
 3 vertical.
 4 Q. That was one of my next questions. Do
 5 you need a specialty license or some type of
 6 specialty training or specialty oversight to do
 7 horizontal work?
 8 A. No, sir.
 9 Q. And I've already read your deposition.
 10 In your previous deposition, you said that D.R.
 11 Horton was the developer and owner; is that
 12 right?
 13 A. The developer and -- I don't know their
 14 specifics on the back end, but I would assume
 15 they were the owner.
 16 Q. And do you know the process of getting
 17 the horizontal work done on a raw piece of
 18 property?
 19 A. Yes, sir.
 20 Q. What is that process?
 21 A. Would that be in reference to this
 22 project or any project?
 23 Q. Let's go generally first.
 24 A. Generally. You go through the
 25 development permit process, which is usually

Page 25

Page 27

1 Q. Sure.

2 A. So D.R. Horton --

3 Q. Depends on what you're going to say.

4 Let's go off the record first.

5 A. Well, it's funny because we do a lot of
6 work for a lot of developers. D.R. Horton, our
7 personal vehicles, Kenneth Scott Builders, have
8 to have special license -- or special insurance
9 to drive on a project, ours, if it is a part of
10 what they require from my COI to them, period.

11 So that's what I want to say about that.
12 It's a very difficult process, and they make it a
13 difficult process for that reason.

14 Q. Who does?

15 A. The developer.

16 Q. D.R. Horton or any developer?

17 A. Any developer. It doesn't -- they're
18 more difficult than most, but me, as an employee
19 of Kenneth Scott Builders, as Kenneth Scott
20 Builders, I have to have a particular COI that
21 satisfies their contract, and it states it in the
22 contract.

23 Q. And is that the additional insured
24 provision and the policy amount provisions and
25 that type of thing?

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1 A. That is correct.

2 Q. Because I got here late, I didn't pull
3 this stuff up.

4 A. No problem.

5 Q. So we're going to take a break and then
6 I'll pull those things up but I don't want to
7 make you wait anymore.

8 A. No problem.

9 Q. But we'll go over that.

10 MR. IMHOFF: Do you mind if I get a
11 coffee?

12 THE WITNESS: No. Go ahead.

13 (Off-the-record discussion.)

14 Q. All right. When you were in the Army,
15 did you have a specialty?

16 A. I did.

17 Q. Was it crane operator?

18 A. 62 foxtrot, crane operator.

19 Q. Tell me what licenses either you or
20 Kenneth Scott Builders holds.

21 A. Unlimited GC in the state of South
22 Carolina, unlimited GC in the state of Georgia,
23 all local licenses -- and there's numerous. We
24 have them in Charleston, City of Charleston,
25 Beaufort County, Town of Hilton Head, City of

1 Hardeeville, Pooler. Those are the local

2 jurisdictional. But the power ones are for the
3 state of Georgia and state of South Carolina.

4 And I'm in the process of testing for my state of
5 Florida.

6 Q. So you're unlimited in both South
7 Carolina and Georgia?

8 A. That is correct.

9 Q. Do you have any -- as a commercial
10 builder; is that right?

11 A. Commercial, yes, sir, and residential.
12 It all falls under the same -- I can do
13 residential, commercial.

14 Q. You can do anything with your license;
15 is that right?

16 A. That is correct.

17 Q. You're not -- let me say it differently.
18 You're not prevented from any particular type of
19 construction work with your particular license?

20 A. As an unlimited, that is correct.

21 (Off-the-record discussion.)

22 Q. Do you have any specialty licenses in
23 addition to your unlimited, just because you've
24 obtained them over the years?

25 A. No, sir.

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1 Q. What kind of training and/or education
2 do you have in being a grading contractor or a
3 horizontal general contractor?

4 A. 27 years experience. And that started
5 in Maryland right out of the Army. I tried to
6 come out and be a crane operator, and all they
7 wanted to do was hire me as an oiler because it's
8 all union. So I jumped on a dump truck and drove
9 a dump truck for an Italian utility contractor up
10 there and just worked my way up and went through
11 the whole horizontal process.

12 Moved down here and went to work for
13 Malphrus Construction, the one that went out of
14 business, which was one of the largest
15 contractors in this -- in the southeast. I was a
16 project manager for them. And I had built a
17 couple houses prior to that, and I decided I
18 wanted to get back into the building. So it's
19 strictly experience, OSHA training. There's been
20 a lot of courses that I've taken, but most of
21 it's just personal knowledge of experience.

22 Q. Yeah. Sometimes that's overlooked. I
23 mean, on-the-job training and experience is
24 sometimes overlooked in lieu of going to classes
25 or having a degree.

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1 A. And they really don't teach you in
2 classes. You know, it's not -- I have an
3 architect that's one of my -- he's actually my
4 project manager, and what he learned in
5 architectural school from Clemson -- I pick on
6 Clemson because I'm an FSU fan, but he -- you
7 know, is not -- a lot of it's not applicable to
8 the actual situation. You have to go to work for
9 an architect and learn, the same as an attorney
10 or paralegal, whatever the situation.

11 Q. I haven't learned anything since law
12 school. They cover it all.

13 A. Understood.

14 Q. You said that you were a tow truck
15 operator in a past life.

16 A. Dump truck.

17 Q. Dump truck. You know what? When I
18 wrote some stuff last night, I put tow truck.

19 A. That's okay.

20 Q. At the time that you were driving, were
21 there federal and state requirements for the safe
22 operation of tow trucks?

23 A. Of dump trucks?

24 Q. See. Did it again. Dump trucks.

25 (Off-the-record discussion.)

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1 A. It's okay. So from a driver standpoint,
2 I had to have the proper licensing. I had to
3 do -- I didn't do the maintenance on the truck,
4 but I'd check oil, check brake lines, stuff like
5 that. That more, to me, and knowing what I know
6 now is more the responsibility of the actual
7 company that is supplying the truck or supplying
8 the situation, where they need to meet --

9 State of South Carolina is so difficult.
10 We have purchased a dump truck, and the DOT
11 requirements and inspections is -- you almost
12 have to hire a person to handle it. It's so
13 convoluted. Convoluted is a bad word. It is so
14 regimented, okay, with what you have to do.
15 There's companies out there that offer the
16 service that do it. That's how complicated it
17 is. So, in answer to your question, at that
18 time, I was just -- I was driving a truck for a
19 company.

20 Q. Right.

21 A. I didn't know what they were dealing
22 with, what their paperwork or whatever they had.
23 I know what I had to do as a dump truck driver.

24 Q. How long ago was that?

25 A. 27 years ago when I first started.

1 Q. And over that 27 years, are you
2 generally familiar with the requirements for dump
3 truck drivers, maintenance, safe operation,
4 insurance, that type of thing?

5 A. I would say somewhat. Once I graduated
6 past the dump truck 27 years ago and started --
7 I'd pull up to the job site, get off the dump
8 truck at lunchtime. While they're all at lunch,
9 I'd get on a piece of equipment and learn how to
10 run a piece of equipment. That's how I grew in
11 the industry.

12 There for a long period of time, I was
13 more of a manager of operations. I don't -- I
14 carry a class A license. I've never driven a
15 tractor-trailer except to do my test, okay? So I
16 have driven -- I drove a -- the last time I drove
17 a dump truck is when I bought that new one and
18 brought it down from Virginia, so -- and that was
19 eight months ago.

20 So, to be quite honest, I'm not familiar
21 with the -- it's not something I do every day.
22 If you ask me about an excavator, I can tell you
23 the rollers, the idlers, I can tell you the
24 grease fittings, everything on it, because that's
25 what we do every day.

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1 Q. Well, let me go back to 2017, 2018. Let
2 me back up.

3 A. Yes, sir, I'm sorry.

4 Q. So when you were working in Cypress
5 Ridge, was that about 2017, 2018?

6 A. That sounds right.

7 Q. Time period?

8 A. Yeah.

9 Q. And did Kenneth Scott Builders have any
10 of its own dump trucks?

11 A. No, sir.

12 Q. Did it have to hire dump truck companies
13 or dump trucks from outside companies?

14 A. Yes, sir.

15 Q. And when you would hire dump trucks or
16 frankly any other large equipment operator, what
17 is the procedure for, you know, due diligence and
18 vetting them to make sure that they're legal and
19 safe?

20 A. The due diligence -- excuse me. You
21 know, and I'm just referencing the time period.
22 You know, when we hire contractors, we generally
23 ask for a COI. And at the time of Cypress
24 Ridge -- and I'll refer to Alfredo Trucking
25 because that's what this is about.

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1 Q. Jacob AU Trucking?

2 A. Jacob AU Trucking, I'm sorry. Again
3 it's been a good period of time here. So prior
4 to that time, he had -- his company had done
5 hauling for us. So if you're referencing Cypress
6 Ridge in particular, I can't say that I requested
7 anything from him at that time.

8 Because, prior to that, he did have the
9 proper insurance. And I went over this in my
10 previous deposition. He brought on another dump
11 truck. He had a lapse in his insurance, and I
12 was not aware of that.

13 Q. Do you know -- and again, we can look if
14 you want to refer to the document and see the
15 document, okay?

16 A. Absolutely.

17 Q. Do you know if Kenneth Scott Builders
18 was the certificate holder on the certificate of
19 insurance?

20 A. On Alfredo -- or Jacob AU Trucking?

21 Q. Well, let me ask it two ways: One, yes,
22 on Jacob AU Trucking, but, two, do you require
23 that you be added as a certificate holder on
24 their certificate of insurance if you know what
25 that means?

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1 A. I understand exactly what that means.
2 In most -- we do now, from an educational curve,
3 okay? At the time, when we do a job for like --
4 let's just use D.R. Horton, when we do our COI,
5 it must list them as additional insured in that
6 bottom box with specific language.

7 Q. Right.

8 A. Okay. We were not doing that at that
9 time.

10 Q. Let me make a distinction for you, okay?
11 And I may be wrong about this, but as I
12 understand it, you can have a certificate holder
13 or you can have an additional insured endorsement
14 or you can have both.

15 The certificate holder, as I understand
16 it, tells the insurance company or the insurance
17 agency that if that insurance lapses or is
18 canceled or isn't paid that they then have to
19 tell the certificate holder, Hey, that
20 certificate of insurance that our client gave you
21 is no longer valid. Did you know that?

22 A. I did know that. As long as you're
23 listed as the additional insured.

24 Q. Okay. And that may be true.

25 A. It is true.

1 Q. I thought you could be a certificate

2 hold and not an additional insured but --

3 A. So, you know, this is one of the
4 problems we have with our insurance industry, and
5 now we have checks and balances that we do it
6 ourselves. So we have a date register when we
7 know theirs is coming up on expiration, and we
8 send out a notice. I don't rely on the insurance
9 company anymore, because sometimes you get
10 notices; sometimes you don't. And that's
11 general -- that's just what it is.

12 Q. So let me go back. So at the time that
13 you were doing -- that you had hired Jacob AU
14 Trucking and that you were doing work on Cypress
15 Ridge, you were not requiring your subcontractors
16 to add Kenneth Scott Builders as an additional
17 insured?

18 A. No, sir.

19 Q. And as far as you know, were you
20 requiring your subcontractors to identify you as
21 a certificate holder who would be notified if the
22 insurance lapsed or was canceled or not paid?

23 A. I don't recall that.

24 Q. What other types of things were you
25 doing either at the time of or before the Cypress

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1 Ridge project to vet any subcontractors that were
2 working for you but specifically dump trucks?

3 A. Usually our subcontractor rental
4 trucking was kind of done by word of mouth. So
5 you're saying vetting. I didn't really vet, as
6 we don't now -- when you say vet, two things. I
7 mean, we're doing a big project over in the city
8 of Hardeeville. Number one, they all have to
9 have a certificate of insurance and we have to be
10 listed as additional insured, period.

11 Q. Okay.

12 A. Can't drive for us. They cannot
13 subcontract trucking. Cannot do anything until
14 we have that. Hence experience.

15 Q. Sure.

16 A. So -- but to vet, I don't -- and here's
17 what I've learned. By buying a dump truck,
18 the -- I don't even know how people get through
19 the process without -- I mean, the DOT
20 regulations, the inspections, I mean, you get
21 pulled over if you don't have the proper sticker
22 that has to be updated every couple months. I
23 mean, it's rigorous. I wish they had been doing
24 this a while back, but that's what it is now.

25 So you say vetting. We don't vet

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1 A. No, sir.

2 Q. What's the next commercial carrier that
3 comes to a site?

4 A. The large one would probably be the
5 drywall truck. They deliver the drywall.

6 Q. Sure. So another material delivery.

7 A. Yeah. And we have intermittent
8 deliveries, insulation, have subcontractors in
9 and out. You know, there's always some --

10 Q. Shingles?

11 A. Shingles.

12 Q. Sure.

13 A. Whatever it is. There could be -- with
14 cabinets, countertops, trim trucks, I mean, you
15 could be looking at 45 deliveries per project.

16 Q. Is a general contractor required to
17 check the commercial driver's license status of
18 each one of those subcontractors or material
19 providers?

20 A. No, sir.

21 Q. Are you to check the maintenance records
22 for each one of those commercial carriers?

23 A. No, sir.

24 Q. Do you know if you're to check anything
25 related to insurance, qualification, or

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1 maintenance of the vehicles for any of the
2 commercial carriers that come onto your site?

3 A. Being specific about insurance, or are
4 we talking about COI or insurance of the actual
5 vehicle?

6 Q. I was actually doing the whole thing,
7 so, yes, insurance for the vehicle, proper
8 licensure for the driver, proper maintenance for
9 the vehicle. Is a general contractor required to
10 check any of those things in the state of South
11 Carolina?

12 A. Insurance only.

13 Q. You're required to make sure they have
14 insurance?

15 A. If they're working for us -- no, we're
16 not required to check anything. What we require
17 is the insurance.

18 Q. Now, is that company that has a
19 commercial vehicle required to make sure that
20 their driver is properly licensed?

21 A. Absolutely.

22 Q. Are they required to make sure that
23 the -- they have proper insurance on their driver
24 in that vehicle?

25 A. What I know now, yes, sir.

1 Q. And are they required to do proper
2 maintenance and upkeep on those vehicles?

3 A. Absolutely.

4 Q. And then are they also required to do
5 periodic inspections or have some interaction
6 with whoever the governing entity is?

7 A. DOT, yes, sir.

8 Q. So the people operating and owning those
9 vehicles have that obligation, legally, agree?

10 A. The subcontractor, yes, sir.

11 Q. You as a general contractor aren't aware
12 that the general contractor has that obligation
13 legally; is that correct?

14 A. That is correct. We do not have that
15 obligation.

16 Q. Does the owner/developer have the
17 obligation to check the general contractor's
18 subcontractors' commercial driver's license,
19 insurance, or maintenance history?

20 A. Absolutely not.

21 Q. Do you know how long Jacob AU Trucking
22 had been operating as a commercial entity?

23 A. No, sir.

24 Q. How did they come to you?

25 A. I don't remember off the top of my head.

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1 I want to -- I don't even want to guess. I think
2 it was Sandhill Station. We had a trucking
3 subcontractor in there, and we needed additional
4 trucks, and they recommended Jacob AU Trucking.
5 I think that's what happened.

6 And if it wasn't that particular job --
7 that's usually -- I'll give you an example. Exit
8 5, we needed, you know, 50 different trucking
9 companies a day. A lot of them were referred by
10 other truckers. You know, that's kind of how you
11 locate people.

12 Q. Who was your project manager/site
13 manager for the work that was going on on Cypress
14 Ridge?

15 A. Gabrielle Tosky, my daughter.

16 Q. And how often would she be on the site?

17 A. Every day.

18 Q. Every day? Was she on the Cypress Ridge
19 site on the day of the accident?

20 A. I'm sure she was.

21 Q. Have you asked her what was happening on
22 the site that day?

23 A. I don't recall asking her anything, no.

24 I think the only thing I had said that morning,
25 we needed a couple loads of dirt, and that was

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1 we had to get rid of out at Cypress, yes, sir.

2 Q. And you take -- because you had too much
3 good dirt, you were taking it off site?

4 A. We had too much good dirt, yes, sir.

5 Q. I'm going to get into some things that
6 you may not remember, okay?

7 A. Absolutely. Go ahead.

8 Q. Do you ask D.R. Horton if you could take
9 that dirt, or is it sort of built into your
10 contract price that you'll be able to take and
11 reuse fill dirt somewhere else?

12 A. It is -- when we do a bid on a project,
13 we do a fill and balance sheet. You'll have
14 spoil -- you'll have spoils on topsoil. You may
15 or may not have spoils on select fill. And per
16 that balance sheet, we know how much we have to
17 take off site. We know what we need to bring
18 on-site. That would be in any job in general.

19 Q. And let me -- I'm just going to break it
20 down, okay?

21 A. Absolutely.

22 Q. So when you do an estimate and you know
23 you have to bring in a bunch of fill dirt, you
24 know that you're going to have to pay for the
25 dirt potentially.

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1 A. That's correct.

2 Q. And the transportation and then putting
3 it on-site, right?

4 A. That is correct.

5 Q. So your estimate goes up, right?

6 A. That's correct.

7 Q. If you have to take bad dirt off a site,
8 same thing, you need to estimate in how long it's
9 going to get up, get it into the truck that you
10 have to hire, and then go potentially have a dump
11 fee somewhere because it's bad dirt?

12 A. That is correct.

13 Q. Right? Now, the opposite side of that
14 is you have to -- there's a bunch of good fill
15 dirt on a site that you know that you can utilize
16 and/or sell off site, right?

17 A. That is correct.

18 Q. And so if you do your calculations
19 correctly, then you can actually put in a
20 contingent amount of money or use you can get out
21 of that extra fill dirt, and you could actually
22 lower your bid, right?

23 A. That is correct.

24 Q. But that doesn't have anything to do
25 with D.R. Horton. That's your internal

1 estimating and your expectations, right?

2 A. That is correct.

3 Q. There has been an allegation in this
4 case that D.R. Horton sold you fill dirt. Is
5 that true?

6 A. That is not true.

7 Q. Did you ever buy fill dirt from D.R.
8 Horton?

9 A. No.

10 Q. Did you ever tell D.R. Horton
11 specifically that you were taking fill dirt off
12 the D.R. Horton site?

13 A. No, sir.

14 Q. It's just part of your work, right?

15 A. It's a part of our schedule of what we
16 have for cuts and fills, that is correct.

17 Q. And it's part of the original
18 engineering documents about what needs to either
19 come onto or be taken off the site, directed by
20 the engineer, right?

21 A. That is correct.

22 Q. So if there was dirt coming off of
23 Cypress Ridge, would D.R. Horton have known about
24 it?

25 A. They would not have known.

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1 MR. SHELTON: What did he just say?
2 They would not have known?

3 THE WITNESS: They would not have
4 known about it.

5 MR. SHELTON: Thank you.

6 Q. Let me ask you about certain industry
7 standard. When any of the work that you've done
8 or been around or commercial general contractors
9 that you've worked for, have you ever seen a
10 commercial general contractor look into the
11 licensure status or maintenance status of a
12 commercial carrier on their site?

13 A. No, sir.

14 Q. There's been an allegation in this case
15 that Jacob AU or Alfredo's trucks were on-site
16 overnight or broke down. What do you know about
17 that?

18 A. I do know that I saw his site -- his --
19 and I stated it in a deposition, that his dump
20 truck was at the site at Cypress Ridge overnight.
21 I do not know what the situation with his truck
22 is. That's not for me. I don't know his
23 maintenance issues. But I do know it was there
24 overnight.

25 Q. Do you know if it was broken down?

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1 But also, I want to add to that that he
2 was hysterical. When he called me on the phone,
3 he was literally crying. So I knew it was bad at
4 that moment, and I immediately got in my truck
5 and drove down there to see if there was anything
6 I could do. But that's what I recall.

7 Q. So I'll ask you a series of questions.

8 A. Absolutely.

9 Q. Based on your observations and your
10 conversations with him, did anything lead you to
11 believe that the maintenance of the truck caused
12 the accident or was partially responsible for
13 part of the accident?

14 A. I can't even comment on that. No, sir.

15 Q. Did he say anything to you, that the
16 brakes didn't work or the brakes locked up or
17 something was wrong with the truck?

18 A. Not that I recall.

19 Q. So based on your conversations and your
20 observations at the site, did you come away with
21 any opinion of how the accident had happened?

22 A. Not -- I mean, I could see if you looked
23 down and looked back up, you could have veered
24 off to the left. I have no idea. I don't --
25 when you looked at the accident, it was like,

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1 man, this is kind of weird because literally the
2 one truck was pushed into the tree, which means
3 he would have had to go across the line.

4 Q. Into oncoming traffic?

5 A. Into oncoming traffic and pushed the --
6 but, again, I'm not an investigator. I have no
7 idea. I wasn't in that driver seat. I don't
8 know what -- I mean, for all I know, I mean,
9 let's be realistic, my negative thoughts were,
10 you know, dude might have been texting. I don't
11 know. I have no idea -- you know, we're all
12 responsible when we get behind the wheel of a
13 vehicle to make sure we make good decisions.

14 Q. Sure.

15 A. So I don't know. All I know is what I
16 saw indicated to me that somehow that truck got
17 across that yellow line. How he did it or how he
18 got there, I have no clue.

19 Q. The office building that you were
20 building at 1223 May River Road, who were you
21 building that for?

22 A. It was Geoff Block. I'm trying to
23 remember the -- RB Squared. I don't remember the
24 name of it, I'm sorry.

25 MR. SHELTON: The contract was with

1 Geoff Block.

2 Q. I had heard that it was a Dollar General
3 or something like that.

4 A. There was a Downtown Deli. The Dollar
5 General, we did some renovation to the outside of
6 the building. And then the corner building,
7 1223, was an office building.

8 Q. Was the renovations to the Dollar
9 General separate from this work --

10 A. That is correct.

11 Q. -- for the office building?

12 A. That is correct.

13 Q. Have you done work -- or I'm sorry.

14 Had Kenneth Scott Builders done work for
15 regional or national tract home builders prior to
16 this accident?

17 A. Small repairs. Nothing of the magnitude
18 of this one. And it turned into magnitude
19 because of the building undercuts and so forth.
20 We had done site development jobs but nothing of
21 that magnitude.

22 Q. Who had you done site -- who had Kenneth
23 Scott Builders done site development work before
24 this accident?

25 A. Sandhill development, which was a

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1 commercial -- it wasn't a residential, but it was
2 a commercial development, which is right on the
3 other side of Bluffton across from the movie
4 theater.

5 Q. Any others?

6 A. At that time, we'd -- so we were more --
7 we did a lot of commercial buildings with the
8 parking lots, things like that. So, again, the
9 magnitude of what we did for Cypress Ridge at the
10 time was probably our largest.

11 Q. At the time that you were hired by D.R.
12 Horton, were you an unlimited commercial builder?

13 A. I'm trying to remember when I got that
14 license, because you have to go through -- I
15 don't think I was at that time. I think I was --
16 there's five different classes. I think we were
17 class 4. For a class 5, you have to have an
18 audited statement and go through the bonding
19 processes, which is now -- I don't think we were
20 at that time, but I could be incorrect.

21 Q. Is the only difference between class 4
22 and class 5 financial stability of the company?

23 A. Yes.

24 Q. Yeah.

25 A. And, really, from a standpoint -- so an

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1 topsoil, where you have spoils in dirt, whether
 2 you have dirt coming in, that's all inclusive of
 3 that contract.
 4 I can't -- I don't remember the
 5 overburden quantities. I know we had overburden
 6 in topsoil, and we had overburden in select. And
 7 it wasn't a lot, so you -- as you're sitting
 8 there stating, are we stealing? We didn't steal
 9 anything --
 10 Q. And I'm --
 11 A. -- that wasn't inclusive of the
 12 contract.
 13 Q. I don't want you to believe that I am
 14 stating that you're stealing. I'm just asking
 15 you whether you were stealing.
 16 A. Absolutely not.
 17 Q. I'm not accusing you of it. I want to
 18 make sure you're aware of that.
 19 A. Understood.
 20 Q. Did your daughter -- is it Gabrielle?
 21 Is that correct?
 22 A. Gabrielle.
 23 Q. Did she tell you anything since the
 24 previous deposition that gave you the belief as
 25 you testified to earlier today that the dirt that

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1 Jacob AU Trucking dumped on May River Road came
 2 from Cypress Ridge?
 3 A. No. She didn't -- she wasn't sure if
 4 the truck had been loaded there. And, you
 5 remember, now we're working on four different
 6 parts of the site. If you've ever been to
 7 Cypress Ridge, it extends a long way, so no.
 8 Q. Would Jacob AU Trucking know where the
 9 dirt came from?
 10 A. I would assume he would.
 11 Q. And would you have any reason to dispute
 12 whatever Alfredo Uriostegui -- and that's
 13 U-R-I-O-S-T-E-G-U-I.
 14 A. I would say he just needs to provide the
 15 tickets that show. Remember, we submitted to you
 16 every ticket of everything.
 17 Q. And we will get to that a little bit
 18 later. And anytime that you, Kenneth Scott
 19 Builders, brought dirt off the Cypress Ridge
 20 site, it was purchased from D.R. Horton; is that
 21 fair to say?
 22 A. In the contract, yes.
 23 Q. And Kenneth Scott Builders obviously
 24 hired trucking companies, including Jacob AU
 25 Trucking, to transport the dirt off of the

1 Cypress Ridge site?
 2 A. That is correct.
 3 Q. And you had testified previously that
 4 Kenneth Scott Builders did work at Cypress Ridge
 5 that was outside of your main contracts.
 6 A. Under the change orders.
 7 Q. Were there change orders --
 8 A. Which became a part of the contract.
 9 Q. On page 37 of your previous deposition,
 10 you stated, During the large project, they had us
 11 doing other smaller projects, like putting in a
 12 fire road that wasn't related to that contract.
 13 A. That is correct.
 14 Q. Was that a change order, or was that
 15 just a separate project?
 16 A. That was a separate project.
 17 Q. Were there other separate projects that
 18 didn't necessarily have a contract related to
 19 them you were performing?
 20 A. There was a mailbox kiosk. There was a
 21 couple other small things, yeah.
 22 Q. What about a pond that had infilled? Do
 23 you recall that project?
 24 A. Pond that had infilled? Yes, sir,
 25 behind the office building, yeah.

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1 Q. Did all those projects involve -- or did
 2 any of those projects involve moving dirt?
 3 A. We moved dirt on the fire road, did not
 4 move any dirt for the kiosk, we did move some
 5 dirt for the pond infill.
 6 Q. And would you have used dump trucks in
 7 those projects?
 8 A. No, sir, not on that one.
 9 Q. Would that just be moving dirt with
 10 excavators, et cetera?
 11 A. That is correct.
 12 Q. Including the fire road?
 13 A. The fire road, we used -- we actually
 14 had stone hauled in by a subcontractor.
 15 Q. But no haul-out on those projects to
 16 your recollection?
 17 A. Not that I recall.
 18 Q. Could there have been haul-out?
 19 A. No. I think we utilized the dirt that
 20 we dug out for the actual fire road and built the
 21 banks on each side of the fire road. Doesn't
 22 mean -- we could have. I wasn't physically there
 23 doing the work. I'm just assuming that's what
 24 they did.
 25 Q. Do you remember the truck that Jacob AU

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1 there. That had to have been the second load.
2 Now, did I physically watch him? No. But there
3 was two loads that weren't there, so that had to
4 be his second load.

5 Q. Well, the only time that you had seen
6 him there -- you only saw him at 1223 or 1227,
7 whichever one it was, May River Road --

8 A. Whatever it is.

9 Q. -- one time that day?

10 A. I did.

11 MR. SHELTON: Okay. That's all
12 I've got right now. Do you want to take a break
13 and convene?

14 MR. IMHOFF: Yeah, let's talk a
15 minute.

16 (A recess was taken.)

17 EXAMINATION

18 BY MR. IMHOFF:

19 Q. Mr. Tosky, I just have maybe 20 more
20 minutes of questions, and I'm going to be all
21 over the place, okay?

22 A. Okay.

23 Q. So you said the phrase overburden
24 earlier in regard to grading. What does that
25 mean?

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1 A. Overburden is an excess of material.

2 Q. Yeah. So you have more than you need?

3 A. More than you need.

4 Q. Can that be an excess of good material
5 or bad material?

6 A. Bad, good, it could be anything.

7 Q. Any dirt that you are -- do you know if
8 you took any bad or unusable dirt off the Cypress
9 Ridge site?

10 A. Absolutely, yeah. It was probably close
11 to 15,000 yards.

12 Q. And you used different dump trucks and
13 different companies to do that?

14 A. That is correct.

15 Q. Now, the dirt we're talking about that
16 was taken to 1223 May River Road, that is good
17 dirt; it's an asset essentially, correct?

18 A. That is correct.

19 Q. You were asked questions earlier if
20 you -- if D.R. Horton sold you that dirt. Do you
21 recall that?

22 A. I do.

23 Q. Now let's just clarify this because we
24 know what we were talking about, okay?

25 A. Right. Understood.

1 Q. Now, you didn't have an agreement or a
2 contract with D.R. Horton to take a dump truck or
3 two dump trucks of clean, usable fill dirt off
4 the site, right?

5 A. Absolutely not.

6 Q. They didn't -- they didn't watch you
7 load it up, and you didn't hand them a check or
8 cash for that dirt, right?

9 A. No, sir.

10 Q. There was no agreement that you were
11 going to take certain material, good, usable
12 material, off for some payment for D.R. Horton,
13 correct?

14 A. That is correct.

15 Q. The way the industry works is, when
16 you're estimating, you estimate if you need to
17 take off overburden, bad materials, and pay to
18 move them and also pay to put them on a site,
19 right?

20 A. That is correct.

21 Q. Versus good materials, which you also
22 have to move, but they're actually an asset that
23 you could either sell to another grading company,
24 you could put on another site that you're working
25 on so you don't have to go buy good fill dirt,

1 right?

2 A. That is correct.

3 Q. Or, in this case, because there's
4 multiple phases of Oyster Point, you could have
5 gone back to D.R. Horton and said, I have good
6 fill dirt. Would you like it? Would you need
7 it? Right?

8 A. That is correct.

9 Q. But the reason you wouldn't do that is
10 because then you wouldn't get the benefit of
11 using and/or selling that, correct?

12 A. In this situation, we were the last
13 phase.

14 Q. Is that right?

15 A. That is correct. So there was nowhere
16 to take it.

17 Q. So what I wanted to do is clarify your
18 answers that D.R. Horton sold you dirt isn't
19 quite accurate, is it?

20 A. No. What I meant, it's in the contract
21 bid item.

22 Q. Right. And because you are benefiting
23 from the ability to use some good fill dirt that
24 you suspect is there when you're estimating,
25 right?

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1 A. Correct.

2 Q. Then you can lower your bid because

3 that's actually a benefit for you doing the job,

4 right?

5 A. That would be correct.

6 Q. And that's the way the industry works,

7 right?

8 A. That is correct.

9 Q. But there is no agreement that you are

10 buying dirt or D.R. Horton is selling dirt to

11 you, correct?

12 A. That is correct.

13 Q. And when you went and loaded that dirt

14 up into these trucks, was D.R. Horton there?

15 A. They were probably on the site but --

16 Q. Were they there watching the dirt that's

17 moved, whether it be good, bad, or something

18 else?

19 A. No, sir.

20 Q. And did they know -- did you tell them

21 when you were going to take dirt off the site?

22 A. No, sir.

23 Q. Did you tell them how much dirt you were

24 going to take off the site other than the

25 general, original engineering plans?

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1 A. No, sir.

2 Q. Did you tell them who was going to be

3 taking the dirt off the site?

4 A. No, sir.

5 Q. Did you tell them who was going to be

6 loading dirt on the site?

7 A. No, sir.

8 Q. Did you direct -- or did D.R. Horton

9 direct you in the way that you would either

10 remove, haul, or pick up that dirt?

11 A. Absolutely not.

12 Q. Did they direct you in any way: Time,

13 location, purpose, transportation, delivery, any

14 of those things on that dirt?

15 A. No, sir.

16 Q. Is it possible they didn't even know it

17 was happening?

18 A. Probably possible.

19 Q. And didn't know where it was going.

20 A. No, sir.

21 Q. And didn't know what it was going to be

22 used for.

23 A. No, sir.

24 Q. Do you know who loaded the dirt onto

25 Alfredo's truck that morning?

1 A. No, sir.

2 Q. Would it have been an employee or a

3 subcontractor --

4 A. Let me clarify. I don't even know if it

5 came -- it could have been Hampton Lakes. We

6 were taking out of two different areas. And let

7 me be clear: The overburden was like 1,200 cubic

8 yards. We do mass projects involving millions of

9 yards of dirt. So this wasn't a lot. The

10 topsoil was like 15,000 yards. That's a lot.

11 So being truthfully clarified on this,

12 we're not talking an immense amount of dirt. And

13 I don't --

14 Q. To move off of Cypress Ridge?

15 A. That's correct. And I don't even know

16 that that came from Cypress Ridge.

17 Q. I think Alfredo is going to say it came

18 from Cypress Ridge based on an affidavit we have

19 from him.

20 A. Looking back at our records, we were

21 taking stuff out of Hampton Lakes, so I don't

22 recall.

23 Q. But my point is, if that dirt did come

24 from Cypress Ridge --

25 A. You-all had --

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1 Q. D.R. Horton wasn't selling you dump

2 loads of trucks?

3 A. No, he was not selling us dump loads of

4 trucks.

5 Q. You weren't getting paid for dump loads

6 of trucks. You weren't getting a check for dump

7 loads of trucks, right?

8 A. That is correct.

9 Q. And D.R. Horton did not direct oversee

10 any of that, right?

11 A. D.R. Horton would not care because they

12 had a contract in place, and I can state that

13 because, from all the projects we've done, we

14 submit our bid quantities, we submit what we're

15 doing, and that's pretty much it.

16 It's our responsibility -- that period

17 when you sign that contract whether you have

18 overburdens, whether you have topsoil leaving,

19 whether you have topsoil coming in, it's our

20 responsibility to make sure that happens, not the

21 developer, not the owner. They've given the

22 contract. We know the parameters. We have the

23 drawings. Period.

24 Q. When you were a project director or

25 superintendent for the big construction company,

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

CIVIL ACTION NO. 2021-CP-27-00069

MARK W. MCGILTON,
Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., and LOTTY
TRUCKING, LLC f/k/a RAMOS
TRUCKING, LLC,
Defendants.

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1223 MAY RIVER ROAD, LLC,
Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,
Third-Party Defendant.

-----/

D.R. HORTON, INC.,
Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,
Third-Party Defendant.

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Deponent: Jared O'Sako

Date/Time: June 13, 2023 10:14 a.m.

Place: Shelton Law Firm, LLC
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Hilton Head, South Carolina

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1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 the quality of the soil or there for additional
3 reasons?

4 **A Quality of the soil works.**

5 **Q** Or the -- you tell me because you know
6 a lot more about it than I do. So what are the
7 soil techs there to do? You're the -- you're
8 the -- at this time the -- the project
9 development -- the land development project
10 manager. Why do you have soil techs come out to
11 the property? What's their role?

12 (Whereupon, the record
13 was read back as requested
14 by the witness.)

15 BY MR. SHELTON:

16 **Q** The question is tell me more about what
17 the soil techs do. You said that works, so I
18 want you to elaborate on what -- give me
19 technical details of why they're there, please.

20 **A They're there to determine if the soil
21 is suitable for the type of use specified in the
22 set of plans that the contractor was given.**

23 **Q** And who provides the contractor with
24 the set of plans.

25 **A Thomas and Hutton engineering.**

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 **Q** And who engages Thomas and Hutton
3 engineering?

4 **A The developer.**

5 **Q** And the developer is D.R. Horton?

6 **A Correct.**

7 MR. CRAWFORD: And I'm going to object
8 to form. And I hate doing speaking
9 objections, but it seems like we were
10 talking generally --

11 MR. SHELTON: Right.

12 MR. CRAWFORD: -- and so are we talking
13 project specific now? Because those names
14 and parties may change as we're talking
15 about particular projects on there. I just
16 don't want to be confused.

17 MR. SHELTON: Yeah, that's very fair.

18 BY MR. SHELTON:

19 **Q** So let's get dialed in with the Kenneth
20 Scott Builders part.

21 **A Okay.**

22 **Q** So what role, if any, at Cypress Ridge
23 did you hold while Kenneth Scott Builders was
24 performing work for their various projects at
25 Cypress Ridge?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 **A Land development project manager.**

3 **Q** And I think you've answered this, but
4 how often were you at Cypress Ridge while that
5 work was being performed?

6 **A My office was at that neighborhood, so
7 I was at that neighborhood pretty much daily, I
8 would guess, or every other day.**

9 **Q** And what was your role relative to
10 Cypress Ridge specifically, in late 2016 through
11 the spring of 2018? I understand you were land
12 development project manager, but what was going
13 on at Cypress Ridge during that time period that
14 you were overseeing?

15 **A At that time period, obviously, I know
16 that Ken was building the town homes because of
17 all this, but if it wasn't for this, I would not
18 know what was going on in 2016.**

19 **Q** And "this," you're referencing the
20 litigation?

21 **A This case, yeah. There's no way I
22 would not know that that's the timeline when we
23 did that project.**

24 **Q** And "Ken" is Ken Tosky?

25 **A Correct.**

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 **Q** And you said he was building the town
3 homes?

4 **A Correct. I'm -- yeah, the town homes.
5 I'm guessing the town homes. That's where we
6 started, is town homes.**

7 **Q** And do you know what he was engaged to
8 do? And I'll -- I can break that down later
9 with specifics with some of these exhibits.

10 **A Okay.**

11 **Q** That would be better.

12 So I asked earlier, is it fair to say
13 that, you know, you supervised construction
14 projects at Cypress Ridge from 2016 to 2018?

15 **A No. I coordinate the different groups.**

16 **Q** Do you have personal knowledge of
17 anyone within D.R. Horton that was in charge of
18 supervising the construction projects at Cypress
19 Ridge during that time frame?

20 **A The word supervision can be misleading,
21 and people can have different definitions of
22 supervision.**

23 **Q** I understand.

24 **A So I don't -- a supervisor has the
25 ability to dictate means and direction, and we**

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 **don't -- we don't do that.**

3 Q What is -- do you have knowledge of
4 what the construction manager does?

5 A **The construction manager is over the
6 superintendents who build the homes.**

7 Q So that's related to the vertical
8 construction and not the horizontal
9 construction. Is that fair to say?

10 A **Correct.**

11 Q Is there anyone that is -- has a role
12 similar to construction manager relative to
13 horizontal construction other than you?

14 A **Sean O'Toole.**

15 Q So would -- did you oversee the
16 horizontal construction projects at Cypress
17 Ridge?

18 A **Yes.**

19 Q And did you assist in the hiring of
20 contractors for work at Cypress Ridge?

21 A **Yes.**

22 Q Is there a process that you follow when
23 selecting, engaging contractors during that
24 timeframe at Cypress Ridge, that timeframe being
25 2016 to 2018?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A **Yes.**

3 Q Can you describe that process?

4 A **The process would be --
5 On the actual selection of the
6 contractor?**

7 Q Correct. Selection and ultimate
8 hiring.

9 A **Okay. The process is you bid it out,
10 review, compare bids. Review, compare
11 schedules. Because oftentimes, we just ask them
12 to turn in your bid and then turn in what your
13 timeline for you building the project.**

14 **We -- oftentimes, we don't set the --
15 we don't set the deadline. They set -- they set
16 the deadline. They tell us what they can do.
17 And so they provide us with a schedule.**

18 **And then, based on -- I guess the next
19 thing would be their history with the different
20 groups that I have a relationship with,
21 including the engineers, and their past
22 performance, whether they be recommended; or
23 current work load, their ability to perform the
24 work.**

25 Q What qualities are you looking for in a

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 contractor when you are weighing their ability
3 to perform the work?

4 A **Available personnel and equipment.**

5 Q What would you want to see in a
6 contractor to be assured that they have
7 available personnel and equipment?

8 A **I don't see anything.**

9 Q What would you want to know?

10 A **We would want to know if they have
11 equipment available and if they have personnel
12 available.**

13 Q And that would be the equipment to do
14 the job. Is that fair to say?

15 A **That's correct.**

16 Q How did you first come to know Kenneth
17 Tosky?

18 A **His wife was the -- she was the sales
19 manager.**

20 Q Sales manager for?

21 A **D.R. Horton.**

22 Q Did she work out of Cypress Ridge?

23 A **She did.**

24 Q And did you know Kenneth Tosky first,
25 or did you know Kenneth Scott Builders first?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A **They're the same, aren't they?**

3 Q Fair enough. To you, are they one and
4 the same?

5 A **They're the same, I think.**

6 Q Do you recall your first communication
7 with Kenneth Tosky?

8 A **No.**

9 Q Do you recall who contacted who? Did
10 you contact him, or did he contact you?

11 A **I don't recall.**

12 Q Do you know how you got his name?

13 A **His wife was the sales manager.**

14 Q So did she work in the same office as
15 you?

16 A **In Cypress -- or Mill Creek.**

17 Q So did it come about just from office
18 talk, that my husband is a contractor, and you
19 should speak with him or something along those
20 lines?

21 A **Correct. Correct.**

22 Q And do you recall then -- what's the
23 first -- what's the first communication with
24 Kenneth Tosky that you recall? Let me ask that.

25 A **The first conversation I had with Ken**

58 1 SHELTON - O'SAKO (DIRECT EXAMINATION) 2 A I don't. 3 Q Would it be normal for D.R. Horton to 4 engage a vertical land contractor that did 5 the -- 6 A Horizontal? 7 Q Horizontal, excuse me, thank you -- 8 horizontal land contractor that didn't own any 9 equipment? 10 A Yes. 11 Q And what would you expect to see 12 from -- from them? How would they obtain the 13 equipment to do the job? 14 A Typically, everybody rents it or leases 15 it. 16 Q And is it common for a construction 17 company not to own any equipment it uses to do 18 business? 19 A I don't know. I don't know what's 20 common or not common. I don't own a 21 construction company. 22 Q And how long have you been working with 23 construction companies? 24 A In what aspect? 25 Q In general. You were an engineer,	60 1 SHELTON - O'SAKO (DIRECT EXAMINATION) 2 short term or long term? 3 A I don't know. 4 Q For example, if you hire an excavating 5 contractor, do you expect them to either own or 6 have an ongoing lease with an excavator? 7 A I don't expect them to. They could 8 rent it. 9 Q As part of your role with D.R. Horton, 10 do you require contractors you hire to hold 11 insurance? 12 A It's in the contractor's agreement, 13 yeah, that they have to have insurance, correct? 14 Q What types of insurance, do you know? 15 A No, I don't know. 16 Q Do you verify whether companies hold 17 insurance before you engage them? 18 A Me? 19 Q You, yeah, as part of your job. I'm 20 asking you as part of your job. 21 A No. 22 Q Who would, to your knowledge? If you 23 don't know, it's fine. I mean, it's just . . . 24 A Well, we have people that do the 25 insurance stuff, so, you know, I don't deal with
59 1 SHELTON - O'SAKO (DIRECT EXAMINATION) 2 correct -- or you are an engineer, correct? 3 A That's correct. 4 Q So did you work for construction 5 companies at Thomas and Hutton? 6 A No. 7 Q Did you send them -- did you do 8 engineering -- did you send them engineering 9 drawings? 10 A We sent -- yes, we would send drawings. 11 Q Did you ever go to any sites to inspect 12 to see whether the drawings were being completed 13 as they were supposed to be? 14 A I went to sites to observe. 15 Q And then when you worked with, was it 16 Palm Beach -- what was it called, I'm sorry -- 17 A Palm Beach Grading. 18 Q -- Grading, that was a construction 19 company; is that correct? 20 A Correct. 21 Q Okay. And Palm Beach Grading owned its 22 own equipment, correct? 23 A They had some equipment, but for the 24 most part, you rent and lease equipment. 25 Q Do you know whether they leased it	61 1 SHELTON - O'SAKO (DIRECT EXAMINATION) 2 insurance. 3 MR. CRAWFORD: And I just want to 4 interject on the record right now, there's 5 been a little bit of overlap between what we 6 consider 30(b)(6) versus a fact witness. 7 Any time you reference the word "you," 8 you're asking for Mr. O'Sako's, Jared's, 9 personal role and not whether D.R. Horton 10 does something? 11 MR. SHELTON: Correct. 12 MR. CRAWFORD: Okay. 13 MR. SHELTON: And that can be an 14 ongoing understanding, and I can put that on 15 the record: 16 BY MR. SHELTON: 17 Q When I say "you," I'm speaking with you 18 as your role that I'm speaking relative to the 19 time. Okay? 20 A Versus the company. 21 Q Versus the company, correct. And I'm 22 not speaking of you personally, what you do in 23 your personal time off of the job. I'm speaking 24 relative to you as an employee with the company. 25 A But I'm not speaking for the company;

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1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 is that right?

3 Q You're not -- you're not the official
4 representative of the company for the purposes
5 of this deposition. That's what we were just
6 specifying.

7 A I'm still a little confused on all
8 that, to be honest with you.

9 MR. CRAWFORD: Do you mind going off?

10 MR. SHELTON: Let's go off the record,
11 yeah.

12 MR. CRAWFORD: And I'm going to have a
13 discussion with Jared.

14 MR. SHELTON: That's fine, yeah.

15 MR. CRAWFORD: And Jared can be in the
16 room.

17 MR. SHELTON: Yeah.

18 (Off the record.)

19 BY MR. SHELTON:

20 Q Let's go back on the record.

21 Just to be clear, today I'm asking you
22 questions that you have personal knowledge of.

23 A Okay.

24 Q And we're not here to -- there's no
25 jury in this room, but this is a formal

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 proceeding, obviously. So there are certain
3 objections that your attorney will raise for
4 form, but I'm free to ask you, well, do you know
5 if someone else knows this or do you know if
6 someone else knows that, do you have knowledge
7 of this. And whether or not that ultimately is
8 admissible in court is a different fight for a
9 different day. I'm just trying to figure out
10 what you know and what other people may know
11 within your orbit. Does that make it clear?

12 A Yes.

13 Q Okay. And again, when I said "you," I
14 was speaking with you as the project supervisor,
15 okay, and not as D.R. Horton's corporate
16 representative binding the company, relative to
17 that question.

18 A Okay.

19 Q So as supervisor of the development, do
20 you require all contractors that work on a D.R.
21 Horton job site to be insured?

22 A I don't require that. The company
23 requires insurance.

24 Q Do you have an understanding of
25 different levels of contractors; like, you have

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 your general contractor, then you have
3 subcontractors or the general contractor,
4 et cetera? Do you have any terms for that?

5 A The terms that you used are -- I'm
6 aware of those terms.

7 Q Have you ever heard of first tier,
8 second tier, third tier, anything like -- have
9 you ever heard of those terms?

10 A No.

11 Q As supervisor of a development, do you,
12 within your role, have any role in seeing that
13 subcontractors or other vendors retained by a
14 general contractor hold insurance?

15 A You keep saying I'm a supervisor. I'm
16 not a supervisor. There's no supervision in my
17 title or . . .

18 Q Well -- and I apologize. I promise I'm
19 not trying to trick you. That's just me. Land
20 development project manager. As land
21 development project manager, do you have any
22 role -- do you require -- let me back up after
23 that.

24 As the land development project manager
25 for a site, okay, like Cypress, do you have any

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 role in seeing that anyone that the contractor
3 engages with, whether it be a sub or a vendor,
4 has insurance?

5 A No.

6 Q Did you have any role in monitoring who
7 came to and from your project sites?

8 A No.

9 Q Is there any monitoring that you're
10 aware of as to who comes and goes to a project
11 site?

12 A No.

13 Q Do you have any role in approving of
14 bids or proposals from contractors?

15 A Yes.

16 Q If a contractor does not have
17 insurance, will you accept a bid from a
18 contractor?

19 MR. CRAWFORD: I object to form.

20 You can answer the question.

21 THE WITNESS: We -- we don't -- we
22 don't accept bids -- there's no way I could
23 get a bid from someone who doesn't have
24 insurance, because they're not a vendor.

25 I'm not allowed to just bid. Because

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 you have a shell on a pickup truck, you
 3 can't submit a bit to me. You have to be a
 4 signed up vendor. And to be a vendor, you
 5 have to agree to the terms of the contract,
 6 which state that you have insurance.

7 BY MR. SHELTON:

8 Q And does that go for all vendors that
 9 are working on D.R. Horton properties, to your
 10 knowledge?

11 A Does what go?

12 Q That rule.

13 A What rule?

14 Q The rule that you just described, that
 15 you have to have insurance or else you can't be
 16 even be a vendor.

17 A Correct.

18 Q So does that -- that applies to any
 19 vendors that are working on D.R. Horton's
 20 projects?

21 A Any vendor in my department. I don't
 22 know all the departments, but I'm sure that
 23 you're not allowed on our sites if you don't
 24 have insurance.

25 Q And your department is horizontal land

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 development?

3 A That's correct.

4 Q And I already asked this, but just to a
 5 certain extent, but my recollection is that you
 6 answered that you did not receive any other bids
 7 on this exhibit number -- I believe it's Exhibit
 8 Number 2?

9 A No, that's incorrect.

10 Q Okay.

11 A I just said I'm unaware if any other
 12 bids came in on that.

13 Q Okay. That's fair to say.

14 Would it be -- and I don't mean to
 15 misconstrue what you testified to. Is that
 16 normal? Would you normally -- whether or not
 17 there was another bid here, would you normally
 18 seek more than one bid for a project?

19 A We normally seek more than one bid for
 20 a contract, that's correct.

21 Q Had you previously as your role as the
 22 land development project manager engaged other
 23 horizontal construction companies prior to
 24 Kenneth Scott Builders?

25 A Yes.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Who are some of those companies, if you
 3 recall?

4 A Hiers Construction, Eagle Construction,
 5 Dustcom Limited.

6 Q What was that last one?

7 A Dustcom Limited.

8 Q How do you spell that?

9 A D-u-s-t-c-o-m Limited.

10 Q Do you know whether those companies own
 11 their own equipment?

12 A No, I don't.

13 Q Do you know whether those companies
 14 have a corporate office?

15 A I know where their office is, local.

16 Some of them have multiple offices.

17 And I know some of them -- I know some
 18 of them lease their equipment. I mean, I don't
 19 know what pieces they -- if they owned any or
 20 what of that, but . . .

21 Q But you as the development project
 22 manager would not have a vendor hired for a
 23 project that didn't have access to the equipment
 24 needed to do the project. Is that fair to say?

25 A That's fair to say.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Did, and again, you, I'm speaking to
 3 you as project manager, determine whether
 4 Kenneth Scott Builders had either owned
 5 equipment or had leased equipment required to
 6 perform its obligations under its first bid with
 7 D.R. Horton before signing him up?

8 A Can you rephrase that?

9 Q Did you determine as project manager
 10 whether Kenneth Scott Builders had the equipment
 11 necessary to do the job before accepting the
 12 first bid that they were engaged for?

13 A I'm not sure that this is the first bid
 14 that he's engaged for, but -- I don't believe it
 15 is actually. But we absolutely have to make
 16 sure that the person that was going to sign up
 17 to be a land development vendor has access to
 18 the equipment that's required to be a
 19 landscape -- a land development contractor.

20 Q Were you D.R. -- to your knowledge,
 21 were you D.R. Horton's main contact with Kenneth
 22 Scott Builders during the bidding process?

23 A I don't know that. I mean, it was just
 24 me and Sean, so it just depends. Sometimes we
 25 had -- sometimes Sean would bid a project. But

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 Q Where is Phase 7 in general?
 3 A **It's between the Mill Creek entrance**
 4 **and the Cypress Ridge entrance.**
 5 Q How many phases total were there to
 6 Cypress Ridge and/or Mill Creek?
 7 A **20.**
 8 Q And they're all completed now, correct?
 9 We talked about that earlier.
 10 A **There's one other phase. Phase 20 is**
 11 **not completed. It's a commercial area that**
 12 **we're dealing with the town of Bluffton on,**
 13 **getting permission to complete it.**
 14 Q What was Phase 7?
 15 A **Town homes.**
 16 Q So I see handwritten notes, "common
 17 area dig out old borrow pit filled in with
 18 unsuitables." That's Bates stamp 407.
 19 A **Yes.**
 20 Q "Under lob." What is L-o -- is that
 21 lob? Am I reading that correctly?
 22 A **"Under the lots."**
 23 Q I see. Lots. Thank you. Is that your
 24 underwriting?
 25 A **It is.**

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 Q And is this your handwriting down
 3 below?
 4 A **It is.**
 5 Q Can you describe for me the scope of
 6 the work that was involved in this bid?
 7 A **The scope of the work would be:**
 8 **on site hauling only. Material to be excavated**
 9 **from the RV lot and hauled to Phase 7B building**
 10 **pads. Unsuitable material hauled from the 7**
 11 **Phase B to the rear side of the RV lot.**
 12 Q And then below, it says "Alternates."
 13 And we're just reading from this page Bates
 14 stamped 408, which is part of Exhibit Number 3.
 15 What are the alternates? What does
 16 that indicate? What does that mean?
 17 A **Alternates are different options.**
 18 Q And why would they be included in a
 19 bid?
 20 A **Because there's more than one way to**
 21 **fix a problem.**
 22 Q And these alternates, it says "Add
 23 \$5.50 per" looks like "cubic yard for quantities
 24 above proposal. These quantities are measured
 25 by GHD."

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 A **Yes.**
 3 Q What is GHD?
 4 A **That is the soils testing group.**
 5 Q And what does it mean? What is GHD
 6 specifically? What does that acronym stand for?
 7 A **I don't know.**
 8 Q And you say soils testing group. Are
 9 there different levels of testing within soil --
 10 or not within soil but --
 11 A **I don't know.**
 12 Q Did you learn about that as an
 13 engineer?
 14 A **I did.**
 15 Q So what does "quantities are measured
 16 by GHD" mean?
 17 A **It means if you -- an area was**
 18 **excavated the size of this room, GHD measured it**
 19 **and gave us the quantity.**
 20 Q Okay.
 21 A **It means the quantities are measured.**
 22 **Literally, those words mean what they -- there's**
 23 **nothing hidden in that message there for you.**
 24 Q Okay. Quantity, not quality. I
 25 thought you said quality earlier, so that's why

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 I was confused.
 3 MR. CRAWFORD: And, Ben, just for
 4 clarification I think there may be some
 5 confusion. GHD isn't a measurement acronym.
 6 It's the sub -- it's the classification of
 7 soil company that he was talking about.
 8 THE WITNESS: That's correct.
 9 MR. CRAWFORD: That's just a company
 10 name, GHD. It changed and --
 11 MR. SHELTON: Okay, I see. That's it.
 12 MR. CRAWFORD: He testified to that
 13 earlier.
 14 MR. SHELTON: Yeah, yeah, yeah. Now
 15 that's syncing.
 16 THE WITNESS: Yeah. It was
 17 C-R-A-H-S-A, and now it's GHD or GHD
 18 something.
 19 BY MR. SHELTON:
 20 Q So GHD is a soil management company,
 21 right?
 22 A **They're the engineers. They're the**
 23 **civil engineers.**
 24 Q Okay, thank you.
 25 So then it says, number 2, "When supply

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 happen?
 3 **A** **Myself, Tim, and the engineers are**
 4 **there at different times. But the removal of**
 5 **suitable material when we're struggling to find**
 6 **suitable material would be theft, and he would**
 7 **be fired. So he -- there was -- yeah, there**
 8 **would be no removal of suitable material from**
 9 **this project.**

10 **Q** To your knowledge in the building
 11 industry and of the building industry, is it
 12 normal industry practice to have excess topsoil
 13 removed from one site and brought to another
 14 construction site?

15 **A** **No. In general, you try and balance**
 16 **your sites, and that's what we work hard to do.**
 17 **So any time a truck enters your site bringing**
 18 **material or leaves your site taking material,**
 19 **it's going to increase your development costs,**
 20 **and it's typically not necessary.**

21 **Q** Did you as the land development project
 22 manager have any processes in place to see that
 23 suitable material was not removed from your
 24 site?

25 **A** **Yeah. The processes are the**

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 **observation.**
 3 **You also have GHD who were quantifying**
 4 **the material in these holes that are billed from**
 5 **this previous exhibit, and they're measuring**
 6 **them, and that's how we have to pay for the**
 7 **suitable material to backfill into these holes.**
 8 **It would 100 percent be theft. He would be**
 9 **fired. If I allowed it, I would be fired. If**
 10 **Tim allowed it, he would be fired. It would be**
 11 **theft.**

12 **We were working very hard with the**
 13 **engineers to solve a big problem of unsuitables.**
 14 **And you have to fill that unsuitable hole with**
 15 **suitables.**

16 **Q** Who was responsible for obtaining the
 17 required permits for the 7B project and that pit
 18 project you were describing?

19 **A** **Thomas and Hutton.**

20 **Q** And do you know what permits were in
 21 effect on or about March 13th, 2018?

22 **A** **I don't.**

23 **Q** Would the permits be in your project
 24 file?

25 **A** **No. We don't get copied on all the**

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 **permits.**

3 **Q** Thomas and Hutton should have those?

4 **A** **They would have obtained them. I don't**
 5 **know if they have them still or not.**

6 **Q** But as the landowner, to your
 7 knowledge, do you know whether D.R. Horton would
 8 have possession of the permits for the site on
 9 site?

10 **A** **Ask me that a different way.**

11 **Q** In your experience, would you have
 12 all required permits at the location that was
 13 affected by the permits, where the work that the
 14 permits allowed was to be done?

15 **A** **No, sir, that's not required.**

16 **Q** Okay. So you wouldn't necessarily have
 17 the permits on site?

18 **A** **No.**

19 **Q** Would it be fair to say you had access
 20 to the permits at the time?

21 **A** **By calling the state agency?**

22 **Q** Correct.

23 **A** **If I wanted to, I guess I could call.**
 24 **I'm not sure of the response.**

25 **Q** But Thomas and Hutton may have a copy

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 of the permits?

3 **A** **Correct.**

4 **Q** Do you know whether any permits or
 5 licenses were held by Kenneth Scott Builders
 6 related to its work for D.R. Horton in March of
 7 2018?

8 **A** **No. But I know that the subcontractor**
 9 **agreement, the contractor agreement that he**
 10 **signed, states that he has all legal**
 11 **requirements met.**

12 **Q** And when -- when was he required to
 13 sign that agreement, do you know?

14 **A** **Prior to doing work with us.**

15 **Q** Do you ever revisit that agreement over
 16 the course of your work with them, with the
 17 contractor?

18 **A** **That agreement is updated, correct,**
 19 **from time to time.**

20 **Q** And do you know whether Kenneth Tosky's
 21 agreement was updated at all after his initial
 22 agreement?

23 **A** **I don't know.**

24 **Q** If it were, you would probably have
 25 that in your file; is that fair to say?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 in either of those pictures?
 3 **A I don't.**
 4 **Q** Do you know whether that was a dump
 5 truck that worked with Ken Tosky?
 6 **A I don't.**
 7 **Q** Have you ever heard of Jacob AU
 8 Trucking, LLC?
 9 **A I haven't.**
 10 **Q** And what about Jacob Uriostegui or
 11 Stegwee?
 12 **A No, sir.**
 13 **Q** Are you saying that you don't recall
 14 ever seeing this truck, or are you saying
 15 affirmatively that you don't -- have never seen
 16 this truck before?
 17 **A I'm saying Bluffton is a small town.**
 18 **It could have passed me at some point. But no,**
 19 **I don't remember seeing this truck. I don't**
 20 **think I've seen this truck.**
 21 **Q** Do you recall ever seeing it at the --
 22 at Cypress Ridge?
 23 **A I do not.**
 24 **Q** Do you know who Pamela Stamford is?
 25 She's referenced in one of these exhibits, and

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 I'm just trying to -- I think she may have been
 3 in accounting.
 4 **A Yeah. It's Pam Sanford.**
 5 **Q** Sanford?
 6 **A No "T."**
 7 **Q** Okay. What was her job?
 8 **A She -- yeah, she does the -- well, she**
 9 **-- she processes -- yeah, she's in charge of all**
 10 **of the --**
 11 **She processes all the checks, so all**
 12 **the people that -- all the vendors that send in**
 13 **their bills and all, she -- she processes them**
 14 **for payment.**
 15 **Q** So I understand, there's an email where
 16 she writes to Tim and says that there's an
 17 attached invoice billed to Kenneth Scott. We
 18 need an invoice from Kenneth Scott. The
 19 attached invoice is from Malphrus Utilities,
 20 billed to Kenneth Scott.
 21 So is it -- when a contractor hires a
 22 subcontractor and the subcontractor bills the
 23 contractor, you expect those bills to flow
 24 through the contractor and not be provided --
 25 you don't want a bill from the subcontractor?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 **A Correct.**
 3 **Q** Is it standard protocol to, though,
 4 include the subcontractor or the vendor's
 5 invoice along with your bill, if you're the
 6 contractor, to verify?
 7 **A No.**
 8 **Q** Do you know why --
 9 **A Ken did that?**
 10 **Q** Yeah, why Ken would do that in certain
 11 instances.
 12 **A I guess Ken's showing us that he only**
 13 **put a little bit on it. I don't know. Trying**
 14 **to get more work?**
 15 **Q** What do you mean "a little bit on it?"
 16 **A So if that bill -- I guess what -- does**
 17 **it show what that guy billed Ken and what Ken**
 18 **billed us?**
 19 **Q** Yeah. And I was trying to shorten this
 20 up.
 21 **A So if Ken put something reasonable**
 22 **instead of marking it up 50 percent, Ken marked**
 23 **it up 20 percent, whatever. He's showing us the**
 24 **mark-up, evidently.**
 25 **Maybe there was something where --**

1 SHELTON - O'SAKO (DIRECT EXAMINATION)
 2 **maybe there was something -- I don't know. I'll**
 3 **just -- I'll just leave it at that.**
 4 **Q** Do you know whether it could be that he
 5 just didn't have the funds to pay the sub, and
 6 he was just trying to get you to pay it
 7 directly?
 8 **A No, I don't know. I don't ever recall**
 9 **Ken -- being in that situation with Ken ever.**
 10 **Q** What is structural fill? Is that . . .
 11 **A Structural fill is just -- is the fill**
 12 **that's placed beneath homes or beneath the road.**
 13 **Q** And why would a contractor need to
 14 remove and replace structural fill?
 15 **A Because there is too much in one area**
 16 **but you could use it in a different area. We**
 17 **could cut it from one, remove and replace it**
 18 **over there.**
 19 **Q** Did you ever personally meet Ken Tosky
 20 at a job site, at one of his job sites?
 21 **A Sure.**
 22 **Q** How often would you do that?
 23 **A No set -- no set schedule.**
 24 **Q** Did you know of anyone else that was
 25 working at his job sites besides himself?

MARK W. McGILTON vs 2018-CP-07-00607 ALFREDO URIOSTEGUI and JACOB-AU TF
2018-CP-07-00607 - KENNETH TOSKY

1 IN THE COURT OF COMMON PLEAS
2 FOURTEENTH JUDICIAL CIRCUIT
3 STATE OF SOUTH CAROLINA
4 COUNTY OF BEAUFORT

5
6 MARK W. MCGILTON,
7 Plaintiff,
8

9
10
11 vs.

CIVIL ACTION NUMBER
2018-CP-07-00607

12
13
14 ALFREDO URIOSTEGUI and JACOB-AU TRUCKING LLC,
15 and KENNETH SCOTT BUILDERS, INC.,

16 Defendants.
17 -----/

18 The deposition of KENNETH SCOTT TOSKY, a
19 witness in the above-entitled cause, taken
20 pursuant to Notice and agreement, before Ceil
21 Weser, Certified Court Reporter and Notary
22 Public, at The Nexsen Pruet Law Firm, 7 Arley
23 Way, Bluffton, South Carolina, on the 15th day
24 of September, 2021, commencing at or about the
25 hour of 10:40 a.m.



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1 I will have to get you the names on the
2 other one's. I don't recall. It has been a
3 while since we have had that site portion of the
4 work that we self-performed.
5 **Q Do you remember how many?**
6 A There were two others.
7 **Q So three total that were doing --**
8 A Three total equipment operators.
9 **Q And these would be employees that were**
10 **operating the equipment?**
11 A Yes, sir.
12 **Q Did those employees work for anyone**
13 **else?**
14 A No, sir.
15 **Q To your knowledge?**
16 A To my knowledge; and I will say that
17 two of them were fire fighters so they had their
18 shifts at the Fire Department. I did know they
19 were fire fighters.
20 **Q But to your knowledge none of the**
21 **equipment operators otherwise worked in the**
22 **construction industry?**
23 A Not that I am aware of.
24 **Q What is the nature of Kenneth Scott**
25 **Builders? What do you do?**

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1 **Q So would that include equipment?**
2 A That includes -- I don't recall. I
3 could see the paragraph, but I don't recall the
4 exact words for exactly what it said that is
5 included in that value. It is an audited
6 statement by an accountant.
7 **Q Who was your accountant that did that**
8 **statement for you? I am assuming one was done**
9 **for you.**
10 A It was done for us. It was a fellow on
11 Hilton Head and I don't recall his name. And
12 again I can get you the information, but I don't
13 recall.
14 **Q Is that the same accountant that you**
15 **use now?**
16 A No, sir.
17 **Q Who is the accountant you use now?**
18 A Troy Lowther L-o-w-t-h-e-r.
19 **Q And where does Troy Lowther work out**
20 **of?**
21 A Out of Ridgeland, South Carolina.
22 **Q Does he work for a company?**
23 A He does, and I am trying to remember
24 the company name. And I don't recall the
25 company name.

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1 A We are classified as a BD 5 general
2 contractor, which allows us to build any
3 vertical construction; any site work, which is
4 horizontal; renovations for residential;
5 renovations for commercial; new builds for
6 commercial; new builds for residential.
7 **Q You said BD 5?**
8 A BD 5 is unlimited, which allows us to
9 do any type of aboveground or below ground
10 construction.
11 **Q How long have you had that designation?**
12 A I would have to look that up. It took
13 me a while to get qualified for that
14 financially-wise; and I don't know what year
15 exactly that was.
16 **Q What are the qualifications for that**
17 **financial-wise?**
18 A Financially you have to be -- I don't
19 recall. I can give you a guess, but I can't
20 recall the exact numbers.
21 **Q Give me to the best of your**
22 **recollection.**
23 A I think it was a \$250,000 value of
24 construction or value of company without debt or
25 anything like that.

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1 **Q How long has he been your accountant?**
2 A Four years.
3 **Q When you had the audit done, did you**
4 **use your normal accountant?**
5 A I had to go a specialty. He wasn't
6 certified to do audited.
7 **Q And was this relatively recently that**
8 **you attained this certification, or was it**
9 **within the last ten years? Or the last five**
10 **years?**
11 A It was within the last five years.
12 **Q Did you have it in 2018?**
13 A Yes, sir.
14 **Q At the beginning of 2018?**
15 A Yes, sir.
16 **Q You are capable of doing any type of**
17 **construction? You were capable of doing any**
18 **type of construction in 2018, is that correct?**
19 A Yes, sir.
20 **Q What did you focus on in 2018? Let us**
21 **talk about the beginning of 2018.**
22 MR. BROWN: Objection to the form.
23 THE WITNESS: We focused on custom
24 homes. We focused on-site work, which
25 is horizontal construction; and we



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1 reason not to believe it.
2 BY MR. SHELTON:
3 Q So it is possible that Alfredo operated
4 equipment that you had rented at Cypress Ridge?
5 A It could be.
6 Q And then at 355, 896023: Hauled
7 on-site at Cypress Ridge.
8 The next invoice -- both invoices state
9 that, is that correct?
10 A That is correct.
11 Q And one is 8:00 to 4:30. The next is
12 8:00 to 5:00.
13 Then I am going to 356, and we have an
14 invoice that ends in 021 and an invoice that
15 ends in 020, and both of those indicate at least
16 in part: Hauled on-site at Cypress Ridge, is
17 that correct?
18 A That is correct.
19 Q On 357, 026, that is the last three
20 digits of the invoice state: Hauled on-site at
21 Cypress Ridge, 8:00 to 5:00, is that correct?
22 A That is correct.
23 Q And then 896, ending in 027, invoice
24 states: Hauled on-site moving dirt at Cypress
25 Ridge.

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1 Is that correct?
2 A Yes.
3 Q And then the last three invoices dated
4 March 8th, March 9th and March 7th all say:
5 On-site hauling dirt?
6 A Yes, sir.
7 Q So on-site hauling dirt, to be specific
8 that means he is at Cypress Ridge working all
9 day, is that fair to say?
10 A That is fair to say.
11 Q And does it appear that the last 14
12 invoices state: Hauled on-site at Cypress
13 Ridge?
14 A Yes, sir.
15 Q Did you ever see his truck overnight at
16 Cypress Ridge?
17 A Not personally.
18 Q But referring back earlier in your
19 deposition, I believe I recall that your
20 daughter referred to --
21 A That is correct.
22 Q That has happened in the past?
23 A That is correct.
24 Q And you do not know how many times?
25 A I do not know how many times.

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1 Is that correct?
2 A That is correct.
3 Q It has an indication it says: This
4 truck started late. I was fixing it.
5 A It does.
6 Q And truck number 702, do you have any
7 idea what that references?
8 A I am assuming the other truck that --
9 that the other trucking company that he brought
10 in to assist him. I don't know it for a fact.
11 I am assuming that is what it means.
12 Q And then 358, again truck number 701:
13 Hauled on-site moving dirt at Cypress Ridge.
14 Is that correct?
15 A Yes, sir.
16 Q 8:00 to 5:00?
17 A Yes, sir.
18 Q And then at the bottom of 358 the same?
19 A Yes, sir.
20 Q And then we are now at March 5, 2018:
21 Hauled on-site dirt to Cypress Ridge, 8:00 to
22 5:00.
23 March 6, 2018 -- if I didn't say 2018,
24 I want to correct the record, 2018. It says:
25 Hauled on-site at Cypress Ridge.

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1 Q Do you have any idea where Alfredo had
2 work done on his truck? That is a very poorly
3 worded question. Let me reword it.
4 A Yeah.
5 Q Do you have any knowledge as to where
6 Alfredo serviced his truck?
7 A I have no clue.
8 Q When his truck was broken down, do you
9 know the nature of those breakdowns?
10 A No, sir.
11 Q But you do know it happened more than
12 once?
13 A From what Gabby said, yes. I don't
14 know how many times, but I do from what she had
15 told me.
16 Q I notice there is no invoice from
17 March 13, 2018.
18 Do you know whether you paid him for
19 the load or the time that he worked that day?
20 A I don't know the answer to that.
21 Q It is true that he loaded dirt for you
22 that day, correct? Or unloaded dirt at 1227 May
23 River Road?
24 A Yes, sir.
25 Q I am about to go into another exhibit



1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF BEAUFORT

3 MARK W. MCGILTON,

4 Plaintiff,

5 vs.

CASE NO. 2018-CP-07-00607

6 ALFREDO URIOSTEGUI,
7 JACOB-AU TRUCKING, LLC,
8 and KENNETH SCOTT
BUILDERS, LLC,

9 Defendants.

10 DEPOSITION OF: MARK WILLIAM MCGILTON

11 DATE: September 17, 2019

12 TIME: 2:09 p.m.

13 LOCATION: Vaux Marscher Berglind, P.A.
14 1251 May River Road
Bluffton, SC

15 TAKEN BY: Counsel for the Defendant

16 REPORTED BY: TRISHA M. THOMAS

17
18 A. WILLIAM ROBERTS, JR. & ASSOCIATES

19 Fast, Accurate & Friendly

20 Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (843) 839-3376

21 Columbia, SC Greenville, SC Charlotte, NC
22 (803) 731-5224 (864) 234-7030 (704) 573-3919

23 Asheville, NC
24 (828) 785-5699
25



A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

1 A. I have a couple, yes.

2 Q. How many?

3 A. Two.

4 Q. Okay. And what are their names?

5 A. Nick Holman and Kevin -- what's Kevin's
6 -- it's actually my ex's ex -- I mean it's my
7 girlfriend's ex, so -- Brigman.

8 Q. Brigman?

9 A. Yeah.

10 Q. Okay.

11 A. Kevin Brigman. He's been working with
12 me for a little while here.

13 Q. Okay. And what type of line of work is
14 FCC Home Improvements?

15 A. We do residential improvements, repairs
16 and stuff like that. Roof systems and windows and
17 decks and stuff like that, siding, flooring.

18 Q. Do you ever construct new homes from
19 start to finish?

20 A. No, ma'am.

21 Q. Okay. Do you ever do structural work?

22 A. On occasion. Depends on the project,
23 but typically no.

24 Q. Okay. And do you pay yourself a
25 salary?

1 approximately ten years.

2 Q. Okay. And you said you headed to
3 Savannah to get materials. Do you know what type
4 of materials they were?

5 A. Vinyl siding.

6 Q. Okay. And then you headed back to the
7 shop. Do you recall what -- you're more familiar
8 with the roads around here than I am, obviously.
9 Do you recall how you got back from Savannah to
10 here generally, to Bluffton?

11 A. How I drove?

12 Q. Let me rephrase that. You mentioned
13 this road, so this road being May River Road?

14 A. May River Road, yes, ma'am.

15 Q. Okay. And so how did you get onto May
16 River Road?

17 A. Yes, ma'am. Off of -- I was coming
18 from seven -- let's see. I took 95 to Exit 8, then
19 I drove -- I don't know the name of those roads,
20 but I drove by the fire -- the fireworks stores,
21 drove by there, and then I hit Main Street, and I
22 drove Main Street all the way to -- I guess that
23 would still be May River Road there on this side of
24 the rotary and then I headed toward Bluffton from
25 there.

1 Q. Okay. So is it accurate to say --
2 'cause you said you were going eastbound, is that
3 accurate to say that you were on May River Road,
4 like going into historic downtown Bluffton?

5 A. Yes, ma'am.

6 Q. Okay. And so the truck was going
7 westbound --

8 A. Yes, ma'am.

9 Q. -- so like crossing paths. Can you
10 tell me what type of car you were in?

11 A. Yes, ma'am. I was in a Chevrolet
12 Silverado. It was a -- what year was that truck?
13 2016, I think it was. Chevrolet Silverado.

14 Q. And was anyone in the car with you?

15 A. No, ma'am.

16 Q. And just before the accident happened,
17 do you remember anything about the moments prior?
18 Like do you recall if you were on the phone before
19 the accident happened or were listening to music,
20 anything like that?

21 A. No, ma'am. I was just riding, and I
22 was contemplating on getting my materials to the
23 guys. And I was following behind this smaller
24 vehicle and -- and then that was it. The truck
25 came into my lane, and I kind of saw it out of the

1 corner of my eye, and I turned my wheel to the
2 right at the very last second, but it was way too
3 late. The impact happened.

4 Q. Okay. And the truck that came into
5 your lane, do you recall what type of truck it was?

6 A. Yes, ma'am. It was a dump truck.

7 Q. Okay. And do you have any idea why the
8 truck was coming into your lane?

9 A. They never really determined it, so,
10 no, ma'am, I don't really know why.

11 Q. And do you know approximately how far
12 into your lane the truck came, like how many feet
13 over the center line?

14 A. All the way. He hit me and pushed me
15 off the road into an oak tree.

16 Q. So did he cross the center line and
17 come at you like head on in your lane?

18 A. Yes, ma'am.

19 Q. I'm just trying to understand all the
20 way to the best of your recollection 'cause
21 obviously we have the police report and whatnot.

22 A. As far as him all the way over in my
23 lane, I would say he probably hit me about halfway
24 into my lane, from what I would gather, what I
25 would think. And then he pushed me off the road at

[Print this page](#)**Board: Commercial Contractors****KENNETH SCOTT BUILDERS INC**

254 RED CEDAR ST STE 12
BLUFFTON, SC 29910-8967
843-548-3069

License number: 115797**License type:** GENERAL CONTRACTOR**Status:** ACTIVE**Expiration:** 10/31/2024**First Issuance Date:** 08/13/2010**Classification:**

Building-BD5

Qualified By: Financial Statement**President / Owner:** KENNETH S TOSKY[Click here for Classification definitions and licensee's contract dollar limit](#)**Supervised By****TOSKY KENNETH (CQG)**[File a Complaint against this licensee](#)**Board Public Action History:**[View Orders](#)[View Other License for this Person](#)

No Orders Found

ELECTRONICALLY FILED - 2024 May 29 4:56 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
	)	
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking, LLC	)	
f/k/a Ramos Trucking, LLC,	)	
	)	DEFENDANT D.R. HORTON, INC.’S
Defendants.	)	MEMO IN OPPOSITION TO
	)	KENNETH SCOTT BUILDERS’
	)	MOTION FOR SUMMARY
	)	JUDGMENT AS TO D.R. HORTON,
	)	INC.’S CLAIMS
	)	
D.R. Horton, Inc.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	
	)	
	)	

TO: THIRD-PARTY DEFENDANT KENNETH SCOTT BUILDERS, INC. AND ITS COUNSEL OF RECORD RYAN W. CONNER, ESQUIRE, KEVIN W. MIMS, ESQUIRE, W. CHASE MCNAIR, ESQUIRE, AND J. HAYDEN GROOMS, ESQUIRE:

COMES NOW, Defendant D.R. Horton, Inc. (“DRH”) and hereby provides its Memorandum in Opposition to Third-Party Defendant Kenneth Scott Builders’ (“KSB”) Motion for Summary Judgment, showing this honorable Court as follows:

I. PROCEDURAL POSTURE

On May 20, 2018, Plaintiff filed a lawsuit against Alfredo Uristegui, Jacob-Au Trucking, LLC and Kenneth Scott Builders, Inc. (Case No. 2018-CP-07-00607) in Beaufort County, South Carolina. This action arose out of a motor vehicle accident that took place in Bluffton, South

Carolina. On May 13, 2018, Mr. Uristegui was operating a dump truck owned by Jacob-Au Trucking, LLC and crossed the centerline, colliding with the Plaintiff. (See Complaint ¶12.) The dump truck was maintained by Defendant Lotty trucking LLC f/k/a Ramos Trucking, LLC. An Amended Complaint was filed on April 12, 2018, naming Kenneth Scott Builders Inc. (hereinafter “KSB”), employer of Mr. Uristegui, as a Defendant in the action. Almost two (2) years after the initial filing, Plaintiff then filed an action in Jasper County, South Carolina on February 17, 2021, against Defendant 1223 May River Road, LLC, Defendant D.R. Horton, Inc. and Defendant Lotty Trucking, LLC (Case No. 2021-CP-27-00069) involving the same facts and injuries in the Beaufort County action. On April 15, 2021, Defendant 1223 May River Road filed an Amended Answer and Third-Party Plaintiff’s Complaint against Kenneth Scott Builders, Inc. Both actions arose out of the March 13, 2018, accident that took place in Beaufort County, South Carolina. Plaintiff has alleged that D.R. Horton, along with all other defendants, is liable to Plaintiff for the actions of a subcontractor’s subcontractor which resulted in the accident.

At the time of the accident, D.R. Horton had a contract with KSB to clear and grade a subdivision named Cypress Ridge located in Bluffton, South Carolina. KSB was also working on a separate and unrelated job at 1223 May River at the time of the accident. As evidenced by the independent contractor agreement between KSB and D.R. Horton, the May River project had nothing to do with the Cypress Ridge project and vice versa.

DRH entered into an agreement with KSB to perform the work (collectively hereinafter referred to as the “ICA”). The ICA included indemnity provisions (collectively hereinafter referred to as the “Indemnity Provisions”). The ICA incorporates the following applicable provisions:

2. Independent Contractor Status.

Contractor, in performing the Work, shall do so as an independent contractor and shall have sole right and obligation to control the

manner, means, method and performance of the Work. Contractor shall ensure that the results achieved shall satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors, and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provision in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that the Contractor shall follow the desires of Owner in the results of the Work only.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation and all statutory and common law ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over less specific, the more stringent will take precedence over the less stringent, the more expensive item will take precedence over the less expensive, later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in anyway related to the Work or the construction site on which the Work is being performed (the "Work Site), and ensuring full compliance with all governmental safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment may exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER

CONTRACTOR'S SAFETY PROORAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe condition or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment practices, including but not limited to federal and state OSHA regulations ("Safety Laws"). IN addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violations of, or noncompliance with, the Safety Law, and shall to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD HARMLESS from and against any and all claims, demands, liability, losses, costs, damages, or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of actions, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide with written verification of compliance with Hazard Communication Standard, 29 C.F.R. 1926.59 et seq. and if required by law provide written notice to Owner of the contact persona responsible for Contractor's safety compliance.

The ICA also incorporates the following Indemnity and Insurance Requirements:

10.1 Generally. TO THE FIJLLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS ASSIGNS AND EACH OF THESE ENTITIES' RESPECTIVE

OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE") FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS, OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK AS DEFINED IN SECTION I, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE, OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITY EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT,

ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OVER BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.4 Subcontractor's and Suppliers Indemnity Obligations. Contractor shall require each of its Subcontractors to agree to indemnify Indemnatee to the same extent Contractor is required to indemnify Indemnatee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnatee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require subcontractor and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work and all obligations of Contractor under this Agreement shall be deemed also to be the obligations of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton Inc. and all affiliates and subsidiaries of D.R Horton, Inc. (collectively "Horton") as named, Additional Insureds, specifically identifying Horton on the CGL Policy and policies required above covering both ongoing and completed operations....

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be

carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent Contractor is required to do so. Further, Contractor shall require subcontractors and material supplies to provide Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

KSB contends that they are entitled to summary judgment because DRH's claims for breach of contract, and negligence/gross negligence/recklessness are merely disguised claims for equitable indemnity and DRH's claims for contractual indemnity are barred and unenforceable. KSB contends that they are entitled to summary judgment against DRH's indemnity claims as there is not a sufficient.

II. ARGUMENT

A. KSB Has a Contract With DRH

KSB should not be granted summary judgment on DRH's claims because there is a written contract between DRH and KSB. Kenneth S. Tosky, owner of KSB signed an independent contractor agreement on or about February 17, 2016, and added DRH as an additional insured on its insurance policies. (KSB ICA, attached as **Exhibit A**).

Accordingly, KSB has contractual obligations to DRH and KSB's motion for summary judgment on these grounds should be denied.

B. DRH's Causes of Action for Negligence and Breach of Contract Are NOT Disguised Claims for Equitable Indemnity

DRH could arguably sue and recover damages against the KSB under theories of negligence, gross negligence, recklessness, and breach of warranties related to product deficiencies regardless of whether Plaintiff ever filed a lawsuit. Therefore, DRH's causes of action are not "disguised" equitable indemnity claims derivative of Plaintiff's lawsuit. DRH's rights to pursue these claims do not evaporate simply because DRH was not the first to discover KSB's alleged

failures and a lawsuit was instituted by Plaintiff. KSB's reliance upon *Stoneledge v. Clear View, LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (hereinafter referred to as "Stoneledge I") and *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) (hereinafter referred to as "Stoneledge II") (collectively referred to as "Stoneledge") is misplaced. Moreover, KSB's interpretation of the Stoneledge decisions is overbroad.

Instead, a more reasonable interpretation of the Stoneledge decisions is that if the general contractor alleges and proves damages that arise separately from having to defend itself in the purchasers' lawsuit, the general contractor's claims are independent from the equitable indemnity claim. Indeed, a careful reading of Stoneledge reveals that the court did not make a blanket bright line rule, but rather did an analysis, mostly of the allegations in the third-party complaint, to determine if the general contractor had plead, alleged, or proved a factual issue of the existence of damages not arising from the Plaintiff's lawsuit.

As the court explained in Stoneledge II, "[t]he issue [the general contractor] raises – whether the circuit court properly interpreted its claims for breach of contract and breach of warranty as one claim for equitable indemnity – requires us to construe its cross-complaint, and thus presents a question of law." Stoneledge II at 634. In determining that the general contractor's claims for breach of warranty and breach of contract were equitable indemnity claims, the court explained that "[the general contractor's] injuries arose exclusively from having to defend itself in [plaintiff's] lawsuit." Id. at 636.

In reviewing the general contractor's allegations, the court held that the

allegations demonstrate [the general contractor] did not sustain its own damages as a result of any breach of contract or breach of warranty by the respondents. Rather, the allegations show [plaintiff] is the party that suffered damages, and [the general contractor's]

injuries arose exclusively from having to defend itself in [plaintiff's] lawsuit. Consequently, the damages [the general contractor] seeks to recover resulted only from its potential liability to [plaintiff] and from the expenses [the general contractor] incurred defending itself.

Id. at 634. (Emphasis added). The court then highlighted this point further:

[u]nder [the general contractor's] own allegations, its cross-claims arose only when it faced potential liability for [plaintiff's] damages and incurred fees and costs defending against [plaintiff's] lawsuit.

Id. at 637.

The Stoneledge court looked to two federal court cases in making this decision: *South Carolina National Bank v. Stone*, 749 F. Supp. 1419 (D.S.C. 1990) and *United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority*, 788 F. Supp. 880 (D.S.C. 1992) (“USF&G”). As explained by the Stoneledge court,

In *Stone*, the defendants asserted cross-claims for breach of contract, negligence, and fraud against co-defendants that settled with the plaintiffs. The district court barred the non-settling defendants from asserting these cross-claims against the settling defendants because it found they were not independent causes of action. The court explained the cross-claims arose only if the non-settling defendants were liable to the plaintiffs, and these purported causes of action are nothing more than claims for ... indemnification with a slight change in wording.

Similarly, in *USF&G*, the defendants argued they had “independent claims” against a co-defendant in addition to their claim for indemnification. The district court barred the defendants from bringing these claims, finding “without plaintiffs suing the ... defendants[,] the ‘independent claims’ ... would not exist,” and thus “these claims are really nothing more than claims for indemnity.” Id. We agree with *Stone* and *USF&G* and find the reasoning in those decisions applies to this case. Under [the general contractor's] own allegations, its cross-claims arose only when it faced potential liability for [plaintiff's] damages and incurred fees and costs defending against [plaintiff's] lawsuit.

Stoneledge II at 636-637 (emphasis added).

Here, Plaintiff's lawsuit did not give rise to DRH's legal rights against KSB. DRH can bring claims of negligence/gross negligence/recklessness or breach of contract against KSB. See *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 384 S.E.2d 730, 299 S.C. 335 (S.C. 1988). Those rights existed before the lawsuit was initiated by Plaintiff, which only provided notice of those issues to DRH. Thus, these claims, which existed but were allegedly latent, are not disguised indemnity claims derivative of the Plaintiff's lawsuit – they are preexisting claims which are separate and distinct from DRH's claim for equitable indemnity. Moreover, in addition to the damages DRH is incurring related to defending this lawsuit, DRH seeks to recover for extra workload, costs of investigation, and damage and harm to reputation.

These separate damages are explained by the court in *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). In *Addy*, the defendant owner of a building was sued by its tenant when the building caught fire. The building owner then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owner's] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." *Addy* at 33. As explained by the Stoneledge court, "[u]nlike in this case, the Addy appellants did suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit." *Stoneledge II* at 639 (emphasis added).

The facts in *Addy* are aligned with the facts of this case. Like the building owner in *Addy*, DRH is forced to defend itself from the Plaintiff's claims unrelated to DRH's work. Moreover, DRH seeks not only damages related to defending this lawsuit, but also for costs to investigate, attorneys' fees and costs, and damage to reputation. These facts distinguish this case from

Stoneledge I and Stoneledge II. DRH's damages are thus recoverable under the separate causes of action it has pled, and those claims must remain in this action.

South Carolina courts have consistently found that equitable indemnity claims may be brought against a negligent co-defendant during the initial action. See, e.g., *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015) (stating that "[w]e agree Addy controls this case to the extent it shows Marick may assert a claim for equitable indemnity against a negligent co-defendant"). Additionally, Stoneledge held that the lower court erred in granting summary judgment on the merits of the general contractor's equitable indemnity crossclaim because the general contractor presented a question of fact as to whether it was at fault for the alleged construction defect.

It is well settled that where a party is exposed to liability to a third party due to the conduct of another, through no fault of its own, that party may recover in equitable indemnity against the second party. See *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990)(emphasis added). Here, if the DRH properly selected KSB without knowledge of its subcontractor oversight and supervision practices it arguably would not be liable to Plaintiffs yet still have a claim against KSB for damages separate and apart from the damages the Plaintiff alleges. In other words, it was exposed to liability due to the conduct of another through no fault of its own.

Finally, "the doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010) (citation omitted). KSB bears the burden of proof in seeking summary judgment on such an affirmative defense. However, KSB has failed to come forward with any evidence that DRH has unclean hands

as a matter of law. Because there is a question of fact as whether DRH had fault, KSB's unclean hands defense does not preclude DRH's claim for equitable indemnity at this time.

CONCLUSION

Based on the foregoing, KSB has not met its burden of proof, and therefore, KSB's Motion for Summary Judgment on DRH's Crossclaims must be denied.

WHEREFORE, Defendant DRH shall, and hereby does, move the Court for an Order denying KSB's Motion for Summary Judgment on DRH's Crossclaims.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

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Counsel for Defendant D.R. Horton, Inc.

May 29, 2024



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tesley DBA Kenneth Scott Builders ("Contractor")
 Sole Proprietorship ☐ Partnership ☐ Corporation ☒ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-2393282
 Name of Owner(s)/Officer(s): Kenneth J. Tesley
 Division Name: COASTAL CAROLINA Area Name: HILTON HEAD / SAVANNAH Assigned Vendor No.: 2016181
 Address for All Notices: PO Box 1590
 City: Bluffton State: SC Zip Code: 29910
 Telephone: 843-247-1025 Fax: 843-813-3491 E-Mail Address: Kenc@KennethScottBuilders.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February 2016 between DR Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 28-4-30 AND 28-4-50 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February 2016.

Owner:
By: [Signature]
Name: RON BUNNIE
Title: ASSISTANT VICE-PRESIDENT

Contractor:
By: [Signature]
Name: Kenneth Tesley
Title: Owner

INITIALS: OWNER [Initials] CONTRACTOR [Initials]

AGREES THAT OWNER DOES, AND WILL, NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Orders, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and those joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("Purchase Order"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("Inspector") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which

INITIALS: OWNER

CONTRACTOR

the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("Waste"), caused by its operations and shall remove all of Contractor's materials at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers; (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home; and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

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8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

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11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, e, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL policy shall not contain a deductible or self-insured retention of more than \$25,000.00, and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc., (collectively "Horton") as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs to complete, repair, or replace, plus any related costs or damage including re-inspection fees, with any excess to be paid to Contractor. If such costs exceed the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens

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are filed against the job location as a result of Contractor's acts or omissions, (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claims, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

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16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

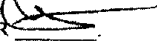
16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

SOUTH CAROLINA VERSION (REV. 22 JUNE 2015)

INITIALS: OWNER  CONTRACTOR 



GEORGIA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tashy DBA Kenneth Scott Builders,
 ("Contractor")
 Sole Proprietorship Partnership ☒ Corporation ☐ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-0393282
 Name of Owner(s)/Officer(s): Kenneth S. Tashy 44-201618
 Address for All Notices: PO Box 1590
 City: Blackshear State: SC Zip Code: 29910
 Telephone: 843-247-1025 Fax: 843-815-3410 E-Mail Address: KSC@KennethScottBuilders.com
 Insurance Carrier: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February, 2016, between
D.R. Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Orders, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February, 2016

Owner:

By:

Name:

Title:

Assistant Vice-President

INITIALS: OWNER DRH

CONTRACTOR KTB

Contractor:

By:

Name:

Title:

Owner

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KDC 000262

made) of all items for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("**Purchase Order**"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "**Requirements**"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, **INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS** from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("**Inspector**") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("**Change Order**") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("**Waste**"), caused by its operations and shall remove all of Contractor's materials

INITIALS: OWNER CONTRACTOR

at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHIA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

INITIALS: OWNER  CONTRACTOR 

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO DEFEND, INSURE, INDEMNIFY OR HOLD INDEMNITEE HARMLESS FOR LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv)

INITIALS: OWNER CONTRACTOR

contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL Policy shall not contain a deductible or self-insured retention of more than Twenty Five Thousand Dollars (\$25,000.00), and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) Employer's Liability Insurance in an amount not less than Five Hundred Thousand Dollars (\$500,000.00) for each accident for bodily injury, Five Hundred Thousand Dollars (\$500,000.00) policy limit for bodily injury by disease, and Five Hundred Thousand Dollars (\$500,000.00) for each employee for bodily injury by disease; (c) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (d) Commercial Automobile Liability Insurance coverage with limits of not less than Five Hundred Thousand Dollars (\$500,000.00) per person for bodily injury and Five Hundred Thousand Dollars (\$500,000.00) for property damage per occurrence specifying "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc., (collectively "Horton") as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 0704 and CG 2037 0704). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits and any excess or umbrella coverages. Contractor shall immediately notify Owner in writing of any incident, occurrence, injury, or situation related in any way with the Work which may give rise to any claim or loss under any of the insurance coverages required by this Section 11.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

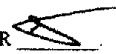
11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor

INITIALS: OWNER  CONTRACTOR 

fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("**Disputes**") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("**FAA**"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("**AAA**") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor

INITIALS: OWNER M CONTRACTOR JS

agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of Georgia.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

GEORGIA VERSION (REV. February 11, 2015)

INITIALS: OWNER *W* , CONTRACTOR *S*



Exhibit "A" Part I-General Scope Of Work

General & Miscellaneous

- Mobilization
- Layout and staking
- Build construction entrance
- Asbuilts
- Installation of stop and street signs
- Installation of conduit

Clearing and Demolition

- Clear and grub site

Drainage

- Installation of RCP
- Insulation of HDPE
- Install catch basins, curb inlets, and junction boxes

Erosion Control

- Tree protection
- Temporary gravel
- Silt fence
- Seeding and sod
- Rip-rap sediment basin

Initials: Contractor

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DR Horton

A handwritten signature in black ink, appearing to be 'JH', written over a horizontal line.

KDC 000269

Earthwork

- Strip/respreads topsoil
- Off-site fill
- Demucking and backfill
- Rough grade

Grading

- Fine grade for curb and base
- Fine grade shoulders and easements

Asphalt Paving & Pavement Marking

- Asphalt surface and binder

Concrete

- Concrete curb
- Installation of handicap ramps

Utilities

- Utility layout and record drawings

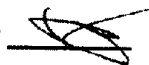
Sanitary Sewer

- Installation of sewer
- Pump stations

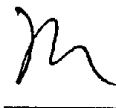
Water Distribution

- Installation of water

Initials: Contractor



DR Horton

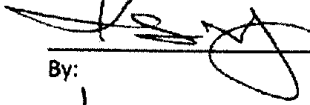


KDC 000270

Contractor

Owner

Kenneth Tasly DBA Kenneth Scott Builders D.R. Horton, Inc.
Company Name:



By:

Ken S. Tasly

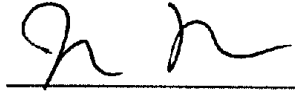
Name:

Owner

Title:

2/12/16

Date:



By:

Ron Bunn

Name:

A.V.P

Title:

2/22/16

Date:

Initials: Contractor 

DR Horton 

KDC 000271

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

MARK W. MCGILTON,
Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,
Defendants.

1223 MAY RIVER ROAD, LLC,
Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,
Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2023-CP-27-00069

**PLAINTIFF MARK W. MCGILTON'S
MEMORANDUM IN OPPOSITION TO
D.R. HORTON'S MOTION FOR
SUMMARY JUDGMENT**

**TO: JOHN T. CRAWFORD, JR., ESQ., AND JASON IMHOFF, ESQ., ATTORNEYS FOR
D.R. HORTON, INC.:**

PLEASE TAKE NOTICE, Plaintiff Mark W. McGilton (hereinafter, "McGilton"), by and through his undersigned counsellors, comes now and submits this memorandum in opposition to Defendant, D.R. Horton, Inc.'s (hereinafter, "D.R. Horton"), Motion for Summary Judgment.

D.R. Horton filed its Motion for Summary Judgment last week. Counsel for D.R. Horton and the undersigned have agreed to hold the motion on an expedited basis for the roster hearing previously scheduled on May 30, 2024.

The Plaintiff submits that D.R. Horton's Motion, while untimely, should be denied on the merits based on the discovery existing in the matter thus far and the case law which thoroughly supports the Plaintiff's theories of liability.

I. SUMMARY OF PLAINTIFF'S CASE AGAINST D.R. HORTON

D.R. Horton is in the business of developing land and building houses. It should know the rules. D.R. Horton hired a company called Kenneth Scott Builders, Inc. to perform significant horizontal land development work (that is, earth moving, site prep, road prep, drainage, etc.) at a residential development near the corner of Highway 170 and Highway 46 in Bluffton, South Carolina. According to D.R. Horton's employee who was the project manager for the site that Kenneth Scott Builders, Inc. was hired to work, D.R. Horton "absolutely [has] to make sure that the person that was going to sign up to be a land development vendor has access to the equipment that's required to be a . . . land development contractor." O'Sako Dep. 69:9-19. However, at the time Kenneth Scott Builders, Inc. was hired, a D.R. Horton supervising employee has testified that he didn't "think he had an office. I think he worked out of his truck." Id. 71: 9-19. When asked whether he knew Kenneth Scott Builders first or Kenneth Tosky first, the D.R. Horton employee responsible for selecting Kenneth Scott Builders and supervising Kenneth Scott Builders testified, "They're the same, aren't they." Id. 44: 24-45:5. This employee, Mr. Jared O'Sako testified to his knowledge of the nature of D.R. Horton's bid process:

Q: Is there a process that you follow when selecting, engaging contractors during that timeframe at Cypress Ridge, that timeframe being 2016-2018?

A: Yes

Q: Can you describe that process?

A: The process would be – on the actual selection of the contractor?

Q: Correct. Selection and ultimate hiring.

A: Okay. The process is you bid it out, review, compare bids. Review, compare schedules. Because oftentimes we just ask them to turn in your bid and then turn to what your timeline for you building the project.

And then, based on – I guess the next thing would be their history with different groups that I have a relationship with, including the engineers, and their past performance, whether they be recommended; or current work load, their ability to perform the work.

Q: What qualities are you looking for in a contractor when you are weighing their ability to perform the work?

A: Available personnel and equipment.

....

Q: What would you want to know?

A: We would want to know if they have equipment available and if they have personnel available.

Q: And that would be the equipment to do the job. Is that fair to say?

A: Correct.

Q: How did you first come to know Kenneth Tosky?

A: His wife was the – she was the sales manager.

Q: Sales manager for?

A: D.R. Horton

Id. 42:22 – 44:23

Thereafter, Mr. O’Sako describes how he first came to know who Kenneth Tosky was, by answering “Correct, Correct,” to the question, “So did it come about just from office talk, that my husband is a contractor, and you should speak with him or something along those lines.” Id. 45: 17-21.

In other words, a reasonable inference may be drawn, that Kenneth Tosky aka Kenneth Scott Builders, Inc. was hired by D.R. Horton because he was married to D.R. Horton's sales office manager. D.R. Horton has produced no documents or evidence that it obtained bids for work done by Kenneth Scott Builders other than from Kenneth Scott Builders.

Kenneth Scott Builders had never been hired for a job of this magnitude before. Tosky Dep. 67:13-21, April 19, 2024 (In answering a question as to whether KSB had done work for regional or national tract home builders prior to this accident, stating, "We had done site development jobs but nothing of that magnitude.") This work requires the use of heavy machinery, such as dump trucks, excavators, bulldozers, etc. Tosky Dep. 29:23-25; 35:22-24, Sept. 15, 2021. At the time Kenneth Scott Builders was hired by D.R. Horton, it owned none of this equipment. Id. 35:12-14. The vehicles that Kenneth Scott Builders did "own" were two pick-up trucks and were titled in the name of Kenneth Tosky, personally, as the business did not have "a lot of strong credit." Id. 160:24-161:5. D.R. Horton never asked KSB what equipment it would use to transport dirt to and from Cypress Ridge. Tosky Dep. 98: 1-5, April 19, 2024. D.R. Horton never asked Kenneth Tosky for a roster of the motor carriers it would used to move dirt to and from Cypress Ridge. Id. 6-10. D.R Horton never asked Kenneth Scott Builders for a list of the subcontractors or vendors that it used for its work at the project site. Id. 10-14. D.R. Horton never asked Kenneth Tosky whether he had equipment necessary to transport dirt to and from Cypress Ridge. Id. 99:6-10. D.R. Horton was aware that dirt was being removed from its project site by Kenneth Scott Builders, and that D.R. Horton was aware that Kenneth Scott Builders was moving dirt from their site to other sites. Id. 88:12-19. Kenneth Tosky testified that anytime his company removed dirt from D.R. Horton's site, he was paid for it as a part of his contract. Id. 87:24-88:11.

The sole shareholder, owner, president, of Kenneth Scott Builders, Inc. is Kenneth Scott Tosky and the Vice-President is his wife, Jennifer Tosky, and it has no other officers. Tosky Dep. 26:2-11 Sept. 15, 2021. It has never held a shareholders meeting, has no record of corporate

meeting minutes, do not hold corporate meetings, even yearly. See Tosky Dep. 173:19-174:5, Sept. 15, 2021.

There is no evidence that D.R. Horton performed any due diligence before retaining Kenneth Scott Builders, Inc. (hereinafter, “KSB”) other than determining whether it was affiliated with a contractor’s license (and determining that its owner was married to a D.R. Horton employee). After it was retained, D.R. Horton required KSB to add D.R. Horton as an additional insured or certificate holder to its insurance policies. Id. 81:18-22; 171:8-13. However, D.R. Horton did not ask Kenneth Scott Builders for insurance certificates for any subcontractors or vendors. Id. 81:23-82:2 As referenced above, the only vehicles or equipment insured by Kenneth Scott Builders at the time were two pick-up trucks. Kenneth Scott Builders never verified that the dump truck that it hired on a nearly daily basis had insurance. Id. 75:3-5; 187:1-7. (Kenneth Tosky admitted that it is fair to say that Alfredo Uriostegui or his company worked for Kenneth Scott Builders on nearly a daily basis for at least 2018 and most of 2017). There is no evidence that D.R. Horton determined whether Kenneth Scott Builders had the means, knowledge, or experience to perform the work it was hired to do as a company. Instead, the evidence shows that D.R. Horton hired Kenneth Scott Builders for a low price Tosky 166:3-22 (stating that D.R. Horton was “looking for low prices” and that pricing seemed to be a “very important” issue for D.R. Horton).

This was a decision that had nearly deadly consequences. At the time that Kenneth Scott Builders was hired, it had little or no knowledge of the rules and regulations that govern the transportation of goods over public roadways. See Tosky Dep. 94:6-23 April 19, 2024 (explaining that he had no knowledge of what a driver qualification file was at the time of the accident) Tosky 74:19-75:21, Sept. 15, 2021 (disclaiming all responsibility to determine or verify whether the dump truck he hired that was involved in the collision has insurance, was licensed, whether it was inspected, maintained, or any other responsibility over the dump truck at issue); Tosky 76:21-23 (disclaiming all responsibility over the mechanical operation of a truck he hired on almost a daily basis).

Kenneth Scott Builders and D.R. Horton were engaged in unlawful activity. For example, Kenneth Tosky has testified that removing dirt from D.R. Horton sites to sites away from D.R. Horton's development was a part of the work it was contracted to do. The Plaintiff has engaged an expert who will testify that removing soil from a site without a permit for use as fill or top-soil from another site is a violation of several rules and regulations under South Carolina and/or Federal law. See Plaintiff's Supplemental Interrogatory/Expert Disclosure dated February 26, 2024.

D.R. Horton has not identified or engaged its own expert relative to this or any other subject. The expert disclosure deadline that D.R. Horton consented to in the second amended scheduling order in this matter has expired. See Consent Scheduling Order Dated February 26, 2024 (setting expert disclosure deadlines on or before February 26, 2024). D.R. Horton has been sanctioned and found in contempt of court in this litigation relative to its discovery abuses and must strictly comply with discovery deadlines. See Order of Sanctions and Contempt, March 5, 2024 by the Honorable Diane Goodstein. Therefore, the only expert testimony which will be presented to the jury in this matter most probably will be those retained by the Plaintiff.

The Plaintiff's experts are expected to testify that operating a 20,000+ lb dump truck on a public highway is an inherently dangerous, highly regulated activity. The Plaintiff's experts are expected to testify that moving dump truck loads of dirt on public roadways is also an inherently dangerous and potentially toxic activity, which is subject to even more rules and regulations. The facts in the case will show that the negligent maintenance and dangerous instrument of the dump truck in question was a proximate cause to the collision and to the degree of Plaintiff's injuries.

Further, the evidence shows that the dump truck at issue in this case only worked for Kenneth Scott Builders (contained in an Affidavit of Alfredo Uriostegui) and evidence shows that Uriostegui was working on the D.R. Horton site consistently for over 18 Months prior to the collision and for the 14 consecutive days leading up to the accident. K. Tosky Dep. 117:1-120:14 Sept. 15, 2021. Indeed, at the time of the collision, evidence shows that the dump truck had just unloaded dirt that was brought from D.R. Horton's work site onto another work site, and was

headed back in the direction of the D.R. Horton work site. D.R. Horton, Kenneth Scott Builders, Inc. and Jacob AU Trucking, LLC did not preserve and/or do not have appear to have records of the work performed by the dump truck on date of the collision.

II. ADDITIONAL FACTUAL BACKGROUND

a. Collision at issue

McGilton (the Plaintiff) was lawfully operating a Chevrolet 2500 Silverado on May River Road in Bluffton, South Carolina, heading east on May River Road on March 13, 2018. Alfredo Uriostegui (Uriostegui), operating a dump truck that was owned by Jacob AU Trucking, LLC, upon information and belief a single member LLC wherein Uriostegui is the sole member, heading west on May River Road. According to eyewitness reports produced in discovery by Plaintiff, Uriostegui began to weave into oncoming traffic slowly, and then operated his dump truck directly into McGilton's lane, to avoid colliding with traffic which was backing up in front of the dump truck, causing a head-on collision with McGilton at approximately 40 miles per hour. McGilton suffered devastating injuries, was helicopter evacuated to Savannah Memorial Hospital, where he underwent several surgeries and was in intensive care for over a month. The fair market value of the medical treatment McGilton required after the collision approaches or exceeds \$3,000,000.00.

b. The Disgraceful Condition of the Dump Truck that Caused the Collision

The dump truck at issue in this litigation:

1. Was uninsured;
2. Had six out of eight brakes had out of service violations (Palmetto Accident Reconstruction Service and inspection video produced in discovery);
3. Had broken down on D.R. Horton's project site multiple times. Tosky Dep. 80:24-81:17.

As referenced above, the Plaintiff has retained an accident reconstruction expert, who is expected to testify as to how the disgraceful condition and maintenance failures of the dump truck

was a contributing factor and proximate cause of the collision, and to the severity of the collision. The truck was in operation for and at the direction of and benefit of D.R. Horton and Kenneth Scott Builders.

c. Uriostegui is an agent and/or employee of Kenneth Scott Builders, Inc.

In his Complaint, McGilton alleges that Jacob AU Trucking, LLC, Uriostegui, and Kenneth Scott Builders, Inc. are one and the same entity. Discovery in the case has shown that Uriostegui did not have insurance for the dump truck that caused the collision. Discovery has revealed that Uriostegui worked as an alleged subcontractor of Kenneth Scott Builders, Inc. for nearly two years prior to the collision. Indeed, discovery shows that Uriostegui was much more akin to an agent or employee of Kenneth Scott Builders, Inc. than an employee. For example, records produced by Kenneth Scott Builders, Inc. show that neither Uriostegui nor Jacob AU Trucking, LLC held a contract with Kenneth Scott Builders, Inc. Uriostegui produced an affidavit stating that Kenneth Scott Builders, Inc. controlled his day-to-day activities, and that he worked for no other company or entity other than Kenneth Scott Builders, and that he only made money from Kenneth Scott Builders.

III. LAW/ANALYSIS

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "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 to any material fact and that the moving parties are entitled to judgment as a matter of law. Rule 56(c) SCRPC." Singleton v. Sherer, 377 S.C. 185, 659 S.E. 2d 196, 197 (Ct. App. 2008). However, in determining whether summary judgment is appropriate, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. Epstein v. Brown, 363 S.C. 372, 375, 610 S.E.2d 816, 817 (2005). "Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue

of material fact and the moving party is entitled to a judgment as a matter of law.” Town of Hollywood v. Floyd, 403 S.C. 466, 477, 7j44 S.E.2d 161, 166 (2013). “However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Id.* (citing Evans v. Stewart, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006)). “Summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom.” Laurens Emergency Med. Specialists, P.A. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108–09, 584 S.E.2d 375, 377 (2003). “A Court considering summary judgment makes neither factual determinations nor considers the merits of competing testimony.” Chastain v. Hiltabridle, 381 S.C. 508, 514, 673 S.E.2d 826, 829 (Ct. App. 2009). “Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on dispute of factual issues.” Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004).

A. Law Relative to Negligent Selection

PREAMBLE OF AUTHORITY

The United States Court of Appeals for the Fourth Circuit certified the following question to this Court pursuant to Rule 244 of the South Carolina Appellate Court Rules:

Under South Carolina Law, can an employer be subject to liability for harm caused by the negligent selection of an independent contractor?

We answer the certified question:

Yes, the principal in an independent contractor relationship may be subject to liability for physical harm proximately caused by

the principal's own negligence in selection of the independent contractor.

Rhu v. Metal Recycling Servs., LLC, 439 S.C. 649, 652, 889 S.E.2d 577, 579 (2023).

There are four elements to proving the liability of a principal in the selection of an independent contractor: the lack of reasonable care on the part of the principal; the degree of risk of the work that the principal hired the independent contractor to perform; the application of the standard of reasonable care to the principal's selection of the independent contractor in question; and the principal's negligence in the selection of the independent contractor was the proximate cause of the resulting physical injury. Id. at 656–57, 889 S.E.2d at 581.

“The standard for the liability of the principal is reasonable care, or, “that [care] which a reasonable [principal] would exercise under the circumstances.” Id. at 657, 889 S.E.2d at 582 (citing Restatement (Second) of Torts § 441 cmt. c.). The plaintiff must establish by proof a standard of care for selecting a contractor for the particular work and that the principal breached that standard. Id.

The principal can be held liable for the negligent selection of an independent contractor when “the work of the contractor involves a ‘risk of physical harm unless it is skillfully and carefully done.’” Id. at 65 –58, 889 S.E.2d at 582 (citing Restatement (Second) of Torts § 441(a)). “Thus, the principal should make reasonable inquiry into the extent to which the work the contractor is being hired to complete involves danger—a foreseeable risk of physical harm—to third parties.” Id.

“Whether a particular contractor is sufficiently competent and careful to perform the work safely will depend on the difficulty and danger associated with the particular work.” Id. “The words ‘competent and careful contractor’ denote a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable [principal] would realize that a contractor must have in order to do the work . . . without creating unreasonable risk of injury to others, and

who also possesses the personal characteristics which are equally necessary." Id. at 659, 889 S.E.2d at 583 (citing Restatement (Second) of Torts § 441 cmt. a.).

To establish proximate cause, the plaintiff must establish that the harm resulted from "some quality in the contractor which made it negligent for the employer to entrust the work to him." Id. at 659, 889 S.E.2d at 583 (citing Restatement (Second) of Torts § 441 cmt. b.). That is, the cause of the injury must be the proximate cause of one of the characteristics of the contractor that the principal should have investigated to ensure that the contractor was competent to perform the work they were hired to perform. Id.

B. Law Relative to Joint Enterprise

"The general rule was early established that if two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to the others." Long v. Carolina Baking Co., 190 S.C. 367, 372, 3 S.E.2d 46, 48 (1939) (citing Funderburk v. Powell, 181 S.C. 412, 187 S.E. 742, 750 (1936)). "Further, in order to constitute a joint enterprise, there must be a common purpose and community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto." Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 147, 425 S.E.2d 764, 774 (Ct. App. 1992) (citing Spradley v. Houser, 247 S.C. 208, 146 S.E.2d 621 (1966)).

C. Proximate Cause

Proximate cause requires proof of both causation in fact and legal cause.

Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 804 (1993).

"Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." *Id.* at 379, 426 S.E.2d at 804.

"Legal cause, in contrast to the 'but for' nature of causation in fact, turns on the issue of foreseeability." *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 210, 544 S.E.2d 38, 46 (Ct. App. 2001), cert. granted (Oct. 10, 2001). "It is not necessary that the actor must have contemplated or could have anticipated the particular event which occurred. . . ." *Young v. Tide Craft, Inc.*, 270 S.C. 453, 463, 242 S.E.2d 671, 675 (1978).

He may be held liable for anything which appears to have been a natural and probable consequence of his negligence. If the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability.

Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 408-409, 563 S.E.2d 109, 112-113 (S.C. Ct. App 2002)

Proximate cause does not mean the sole cause. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury." *Id.*, at 409, at 843.

"Proximate cause does not mean the sole cause. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury." *Id.*.

D. Application of the Law to the Facts.

i. Negligent Selection

Here, the facts at hand fit squarely within the type of action that is contemplated and authorized by the South Carolina Supreme Court in Ruh. The business of dirt hauling and moving is inherently dangerous. It is subject to insurance requirements, licensing requirements, and regulatory requirements on both the state and federal level. The Plaintiff has identified experts to testify to these requirements, and D.R. Horton has not even taken those depositions.

Further, the Plaintiff has shown through deposition testimony that the contractor D.R. Horton hired to perform the work, Kenneth Scott Builders, did not possess knowledge of the safety and regulatory requirements of operating dump trucks—work that it was hired to perform. It did not possess the equipment to do the job it was hired to do. It did not ensure that the equipment it hired downstream was safe, operational, or insured. And, it hired a contractor who had never performed a job of this scope before.

ii. Joint Enterprise

This moves the court to the analysis of the Plaintiff's Joint Enterprise cause of action. Here, D.R. Horton failed to follow its own protocols when procuring Kenneth Scott Builders. It failed to ensure that the vehicles that operated on its property was insured. It failed to oversee the project to keep dirt from being removed from the site. Kenneth Scott Builders and Jacob AU Trucking did not have a written agreement. Alfredo Uriostegui was utilized as an employee, controlled as an employee, and paid like an employee despite Kenneth Scott Builders alleging that he was subcontractor. Due to the absence of formalities, and the failure to follow the formalities that they allegedly set for themselves, the relationship between D.R. Horton and Kenneth Scott Builders merged into a Joint Enterprise, with a common purpose of developing Cypress Ridge and moving dirt within, to, and away from the same. Each stood to make a profit from their endeavors, and each assert that they had control to do what they wished to do.

iii. Negligence, Vicarious Liability and Negligent Entrustment

One or more experts retained by Plaintiff are expected to testify that, in hauling soil (aka dirt) from one construction site to another without a proper permit, D.R. Horton and Kenneth Scott Builders and Jacob AU Trucking were engaged in activity in violation of South Carolina law and regulations. The facts in this case support a finding that but for those activities allowed and occasioned by dirt being hauled to and from D.R. Horton's job site, in violation of law, the Plaintiff's injuries would not have occurred. The Plaintiff's experts are also expected to testify that in engaging a motor carrier to haul regulated goods for value, certain duties are non-delegable. The Defendant D.R. Horton should not be allowed to delegate its regulatory responsibilities to a contractor, particularly when they fail to reasonably supervise their own land and operations. Whether or not D.R. Horton "contemplated or could have anticipated the particular event which occurred", the injuries sustained by the Plaintiff arise from D.R. Horton's negligence in maintaining its own project site, from the liability of companies and individuals it hired to perform dangerous and/or illegal work, and its negligent entrustment of a good (i.e. soil) from its project site to those contractors and individuals.

CONCLUSION

The available evidence shows that D.R. Horton retained an unqualified and unsuitable contractor to perform work that is inherently dangerous. D.R. Horton did this to save money. As Kenneth Tosky testified, D.R. Horton was most concerned over price. D.R. Horton's carelessness cost Mark McGilton his livelihood, quality of life, and caused him to suffer devastating injuries from which he will never recover. For these reasons, and by reference of the Pleadings and case law cited herein, Mark McGilton respectfully submits that the court should deny D.R. Horton's motion for Summary Judgment and allow the questions of fact to be presented to a jury.

Respectfully submitted,

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

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harrison@sheltonlawsc.com

Attorneys for Plaintiff McGilton

Hilton Head Island, South Carolina
May 29, 2024

EXHIBIT 3

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF BEAUFORT	)	
MARK W. McGILTON,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF ALFREDO URIOSTEGUI
	)	
v.	)	
	)	
ALFREDO URIOSTEGUI and	)	
JACOB-AU TRUCKING LLC,	)	
	)	
<u>Defendants.</u>	)	

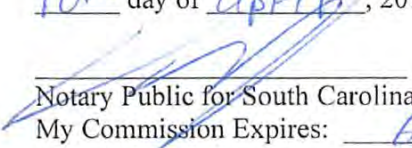
I, Alfredo Uriostegui, submit this affidavit in connection with the above caption action and testify as follows:

1. I am over eighteen (18) years of age and otherwise competent to make this statement.
2. I have had the opportunity to review this affidavit and make changes to the facts stated herein.
3. I know the facts stated in this affidavit are true or believe the facts to be true based upon information known to me after a reasonable inquiry.
4. I was involved in a collision on March 13, 2018 on May River Road in Bluffton while driving a dump truck.
5. The dump truck was owned by Jacob-AU Trucking LLC, of which I am the owner.
6. At the time, I was working for Kenneth Scott Builders hauling fill dirt from Cypress Ridge to 1223 May River Road in Bluffton.
7. I do not haul for any other person, company, or entity, other than Kenneth Scott Builders.
8. Ken Tosky, of Kenneth Scott Builders, was my supervisor.
9. All of my individual income, and that of my company, came from working for Kenneth Scott Builders.

10. Kenneth Scott Builders informed me what time to start work in the mornings.
11. Kenneth Scott Builders informed me what I was to haul, where to pick the load up, and where to take the load.
12. I cannot remember the name of the company that loaded my truck with fill dirt, although I believe it was arranged by Kenneth Scott Builders.
13. Kenneth Scott Builders paid me by the hour, not by the job.
14. There is no written contract between me and/or Jacob-AU Trucking LLC and Kenneth Scott Builders.
15. I believe Kenneth Scott Builders had the right to exercise control over:
 - a. the material I hauled;
 - b. the location where my truck was loaded;
 - c. the location where I took the material;
 - d. the hours I worked; and
 - e. the days that I worked.
16. Kenneth Scott Builders had the absolute right to fire me and terminate our relationship without liability.


Alfredo Uriostegui

Sworn to before me this
10th day of April, 2017


Notary Public for South Carolina

My Commission Expires: 6/21/26

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
	)	
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking, LLC	)	
f/k/a Ramos Trucking, LLC,	)	
	)	
Defendants.	)	DEFENDANT D.R. HORTON, INC.'S
	)	NOTICE OF MOTION AND
	)	MOTION TO AMEND SCHEDULING
	)	ORDER
	)	
D.R. Horton, Inc.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	
	)	
	)	

**TO: PLAINTIFF MARK W. MCGILTON AND HIS COUNSEL OF RECORD
BENJAMIN T. SHELTON, ESQUIRE:**

PLEASE TAKE NOTICE THAT ten (10) days after the service of this Notice upon you, or as soon thereafter as counsel may be heard, the undersigned attorney for Defendant D.R. Horton, Inc. (hereinafter “D.R. Horton”), may move for an Order revising the current Scheduling Order in this matter to allow rebuttal experts.

This Motion is made pursuant to the South Carolina Rules of Civil Procedure (“SCRPC”) and is based upon the present procedural posture of the case, the pleadings, motions, and briefs, Defendant’s briefs and submissions, other discovery materials filed or to be filed, affidavits filed or to be filed, and the common and statutory law of the State of South Carolina.

WHEREFORE, Defendant D.R. Horton, Inc. shall move for an Order revising the current Scheduling Order in this matter.

KENISON, DUDLEY, & CRAWFORD, LLC

s/ Jason M. Imhoff

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Counsel for Defendant D.R. Horton Inc.

June 6, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
	)	
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking, LLC	)	
f/k/a Ramos Trucking, LLC,	)	
	)	
Defendants.	)	DEFENDANT D.R. HORTON, INC.'S
	)	MEMORANDUM IN SUPPORT OF ITS
	)	MOTION TO EXTEND SCHEDULING
	)	ORDER
	)	
D.R. Horton, Inc.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	
	)	
	)	

**TO: PLAINTIFF MARK W. MCGILTON AND HIS COUNSEL OF RECORD
BENJAMIN T. SHELTON, ESQUIRE:**

COMES NOW, Defendant D.R. Horton, Inc. (“D.R. Horton”) and hereby provides its Memorandum in Support of its Motion to Extend Scheduling Order, showing this honorable Court as follows:

I. FACTS

On May 20, 2018, Plaintiff filed a lawsuit against Alfredo Uristegui, Jacob-Au Trucking, LLC and Kenneth Scott Builders, Inc. (hereinafter “KSB”) (hereinafter collectively “Dump Truck Operators”) (Case No. 2018-CP-07-00607) in Beaufort County, South Carolina. This action arose out of a motor vehicle accident that took place in Bluffton, South Carolina. On May 13, 2018, Mr.

Uristegui was operating a dump truck owned by Jacob-Au Trucking, LLC (hereinafter “Jacob-Au Trucking”) and crossed the centerline, colliding with the Plaintiff. (See Complaint ¶2.) The dump truck was maintained by Defendant Lotty trucking LLC f/k/a Ramos Trucking, LLC. An Amended Complaint was filed on April 12, 2018, naming KSB, employer of Mr. Uristegui, as a Defendant in the action. Almost two (2) years after the initial filing, Plaintiff then filed an action in Jasper County, South Carolina on February 17, 2021, against Defendant 1223 May River Road, LLC, Defendant D.R. Horton, Inc. and Defendant Lotty Trucking, LLC (Case No. 2021-CP-27-00069) involving the same facts and injuries in the Beaufort County action. On April 15, 2021, Defendant 1223 May River Road filed an Amended Answer and Third-Party Plaintiff’s Complaint against Kenneth Scott Builders, Inc. Both actions arose out of the March 13, 2018, accident that took place in Beaufort County, South Carolina. Plaintiff has alleged that D.R. Horton, along with all other defendants, is liable to Plaintiff for the actions of a general contractor’s subcontractor which resulted in the accident.

Plaintiff served its First Supplemental Responses to D.R. Horton’s First Set of Interrogatories on February 26, 2024. In those Supplemental Responses, Plaintiff states as follows:

GENERAL OBJECTIONS

6. Plaintiff reserves leave to supplement these answers on a rolling basis as additional material and information is discovered, reviewed, and identified by Plaintiff during the course of this litigation.

PLAINTIFF’S FIRST SUPPLEMENTAL ANSWERS TO INTERROGATORIES

2. Identify by name, address and telephone number each person and entity who, you believe, may have information or knowledge relating to the allegations, claims, defenses, or facts set forth in the Pleadings filed in this Lawsuit, including a brief summary of the facts of which you believe the person or entity has knowledge, and whether or not any written or recorded statements have been taken

from each individual or entity.

SUPPLEMENTAL ANSWER: Plaintiff objects to this interrogatory to the degree that it calls for work product, attorney's mental impressions, and the production and creation of material that is not in physical existence; Reserving leave to supplement or withdraw any expert identified herein, and to supplement opinions on a rolling basis, Plaintiff identifies the following experts at this time.

“Theodore "Andy" Rowland, CIH
Imprimis FHS, LLC
3141 Linksland Road
Mt. Pleasant, SC 29466

Mr. Rowland is an expert in regulatory, industrial, environmental, and health and safety standards and compliance, including but not limited to fields of OSHA and DHEC regulation and compliance, the transport of material subject to regulation, and, industrial and construction safety standards, practices, and compliance, including within the construction industry. He is expected testify to and identify regulatory and industry standards at issue in the matter and provide an opinion relative to the Defendants' compliance or noncompliance with the same. Mr. Rowland's CV is enclosed.”

Plaintiff Mark W. McGilton’s First Supplemental Answers to D.R. Horton, Inc.’s First Set of Interrogatories to Plaintiff Relating to Expert Disclosure and Designations, February 26, 2024.

Counsel for Plaintiff has advised Mr. Rowland is available for a deposition in July:

From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Wednesday, June 5, 2024 3:15 PM
To: Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; rconner@lmlawllp.com; Warren Johnson <wpj@johnsonslawoffice.com>
Cc: Brooklyn Valentine <brooklyn@sheltonlawsc.com>; Harrison Williams <harrison@sheltonlawsc.com>; Roopal Ruparelia <rruparelia@hsblawfirm.com>; John Crawford <crawford@conlaw.com>; Andrea S Tata <atata@lmlawllp.com>
Subject: RE: McGilton v. 1223 May River Road -- Supplemental Discovery

Andy Rowland is available July 16, 17, or 18.

Ben

June 5, 2024, email from Plaintiff's Counsel.

This matter is currently scheduled for trial the week of October 21, 2024.

II. AMENDED SCHEDULING ORDER

D.R. Horton moves the Scheduling Order be amended as follows:

1. **Experts:** The Parties shall disclose rebuttal experts no later than two weeks after any deposition.
2. This case is currently scheduled for trial the week of October 21, 2024.
3. This Order may be amended upon consent by the parties or a showing of good cause and only by approval of the Court.

II. CONCLUSION

WHEREFORE, Defendant D.R. Horton shall, and hereby does, move the Court for an Order granting D.R. Horton's Motion to Extend Scheduling Order.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

John T. Crawford, Jr. (SC Bar # 69682)

Jason M. Imhoff (SC Bar # 69355)

Ashley C. Thibault

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imhoff@conlaw.com

Counsel for Defendant D.R. Horton, Inc.

June 10, 2024

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2023-CP-27-00069

**PLAINTIFF MARK W. MCGILTON'S
MEMORANDUM IN OPPOSITION TO
D.R. HORTON, INC.'S MOTION TO
AMEND SCHEDULING ORDER**

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

Preamble of Authority

“I hold D.R. Horton in contempt of court for its willful and repeated discovery violations in this matter. D.R. Horton may purge the contempt before trial by engaging in no more willful discovery violations. ***It shall strictly abide by time deadlines. It shall fully and timely answer and respond to discovery requests.*** It shall cooperate fully with Plaintiff in scheduling and producing witnesses for depositions. It shall otherwise strictly comply with this court’s September 22, 2022 Order and with this Order.” (Order Granting Plaintiff’s Motion to Compel, for Sanctions, and Holding D.R. Horton in Contempt, orally issued on December 7, 2023, with written order filed March 5, 2024) (emphasis added).

PLEASE TAKE NOTE THAT Plaintiff, Mark W. McGilton (hereinafter, “McGilton” or “Plaintiff”), by and through his undersigned counsellors, comes now and submits this Memorandum in Opposition to Defendant, D.R. Horton, Inc.’s (hereinafter, “D.R. Horton”), Motion to Amend Scheduling Order filed on June 6, 2024. As admitted by the Defendant in filing its Motion to Amend the Scheduling Order, it has again failed to follow discovery orders that it consented to by failing to disclose experts within the deadlines contained in the Consent Scheduling Order.

The Existing Order of Contempt and Sanctions for D.R. Horton, Inc.’s Dilatory Discovery Conduct and Disregard of a Previous Order of this Court

D.R. Horton is in contempt of court for failing to follow discovery rules and previous consent orders (Order Granting Plaintiff’s Motion to Compel, for Sanctions, and Holding D.R. Horton in Contempt, filed March 5, 2024. (hereinafter referenced as, “Contempt and Sanctions Order”)) (**Exhibit 1**). To purge itself of the contempt, D.R. Horton must strictly abide by time deadlines. As stated by this Court in its March 5, 2024 written Order, which memorialized the court’s order orally delivered at the hearing on December 7, 2023, “I hold D.R. Horton in contempt of court for its willful and repeated discovery violations in this matter. D.R. Horton may purge the contempt before trial by engaging in no more willful discovery violations. It shall strictly abide by time deadlines. It shall fully and timely answer and respond to discovery requests. It shall cooperate fully with Plaintiff in scheduling and producing witnesses for depositions. It shall otherwise strictly comply with this court’s September 22, 2022 Order and with this Order.” (Contempt and Sanctions Order); (See Transcript of December 7, 2023 Hearing (**Exhibit 2**)). In holding D.R. Horton in contempt, this court found that “D.R. Horton willfully failed to follow a previous order of the court on at least two occasions, and willfully failed to comply with its discovery obligations.” (Contempt and Sanctions Order). This Court already has found no excuse

for D.R. Horton's repeated failures to follow orders to which it previously consented, stating "[a]s a major corporation, D.R. Horton is no stranger to litigation. For it to have been as tardy and non-compliant with the court's order—an order that it consented to—is concerning." (Sanctions and Contempt Order).

Standard of Law

"If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment." *Griffin Grading & Clearing v. Tire Serv. Equip. Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999); Rule 37(b)(2)(B), SCRCP (stating that if a party fails to obey an order to permit discovery or fails to obey a scheduling order, the trial court may make an order refusing to allow the disobedient party to support or oppose designated claims or defense or prohibiting him from introducing designated matters in evidence).

D.R. Horton, Again, Has Failed to Timely Answer Discovery and is in Violation of the Contempt and Sanctions Order

The Plaintiff submits that D.R. Horton's Motion to Amend the Scheduling Order should be denied based on D.R. Horton again violating the terms of an order to which it had consented—in this instance, the failure to follow the terms of the Consent Scheduling Order dated January 17, 2024 (**Exhibit 3**) (herein, "Consent Scheduling Order"). Also, by failing to timely disclose experts within the deadlines imposed by the Consent Scheduling Order, and now seeking to do so after the deadline has passed, D.R. Horton violates the Contempt and Sanctions Order.

As referenced above, the Contempt and Sanctions Order requires D.R. Horton to "*strictly* abide by time deadlines," and to "*fully and timely* respond to and answer discovery requests." (Contempt and Sanctions Order) (emphasis added). D.R. Horton failed to disclose experts within the time deadlines to which it previously consented. It failed to file a motion to extend the Consent

Scheduling Order prior to the expiration of the deadline to disclose experts. By failing to disclose experts within the deadlines that it consented to, and by now asking the court to disclose experts, D.R. Horton admits that it again has failed to abide by time deadlines and that it has failed to fully and timely respond to and answer discovery requests.

No Good Cause Exists to Extend the Consent Scheduling Order

The Consent Scheduling Order specifically states that “this Order may be amended upon consent by the parties or a showing of good cause and only by approval of the Court.” (Consent Scheduling Order at ¶ 4). Plaintiff cannot consent to the amendment of the Consent Scheduling Order as Plaintiff would suffer great prejudice by now having to prepare to defend against unknown experts that should have been disclosed months ago. Further, Plaintiff would be deprived of the right to disclose rebuttal experts as that deadline has passed as well. And, even if Plaintiff were allowed to identify additional rebuttal experts after the disclosure of the Defendant’s experts, the Plaintiff would be prejudiced by having to scramble to take those depositions before trial or have the trial date further postponed to Plaintiff’s prejudice. As this Court stated: “D.R. Horton’s willful disregard for its discovery obligations burdens the court system, and it burdens the ability of both a plaintiff and a defendant to obtain appropriate and efficient resolution of cases.” (Contempt and Sanctions Order). Additionally, D.R. Horton cannot show good cause as to why the expert disclosure deadline was ignored by it. D.R. Horton consented to the Consent Scheduling Order. D.R. Horton was aware of the deadlines contained in the Consent Scheduling Order and it did nothing to comply with the Consent Scheduling Order or to secure an extension of the Consent Scheduling Order before the deadlines had passed. The Consent Scheduling Order required expert disclosures on or before February 26, 2024 by all Parties. The Consent Scheduling Order contemplated the disclosure of reply experts and allowed all Parties 30 days to respond to

any other party's expert disclosure, and even granted leave to disclose additional reply experts through April 26, 2024 ("The parties shall disclose experts no later than February 26, 2024. Reply expert disclosures no later than March 27, 2024 (limited to areas disclosed by one party but not the other) by April 26, 2024." (Consent Scheduling Order, ¶ 1)). The Plaintiff complied with the Consent Scheduling Order and disclosed his experts by serving supplemental discovery responses on February 26, 2024. (**Exhibit 4**, Plaintiff Mark McGilton's Supplemental Answers to Interrogatories Relating to Expert Disclosures and Designations). D.R. Horton failed to disclose experts on February 26, 2024. D.R. Horton had at least 30 days to reply to Plaintiff's expert disclosures and failed to do so.

D.R. Horton had adequate notice of Plaintiff's claims. In addition to receiving Plaintiff's expert designations on February 26, 2024, D.R. Horton was on notice of the nature of the Plaintiff's claims since it was served with the Plaintiff's Complaint, and certainly since it answered the Plaintiff's Complaint on April 14, 2024. D.R. Horton has long been on notice that the Plaintiff alleges that the removal and transport of dirt is at issue in this litigation. (*See e.g.* Complaint ¶¶ 10, 11, 12, 13, 50, 51). D.R. Horton was on notice that the Plaintiff's claims relating to the Defendants operating as a motor carrier and/or its practice in engaging motor carriers. (*See e.g.* Complaint ¶¶ 13, 44, 50, 51). D.R. Horton was on notice of Plaintiff's claims that D.R. Horton was involved in activity constituting a public safety hazard (*See* Complaint ¶¶ 18, 21, 31, 46, 50, 51). D.R. Horton was on notice that the Plaintiff alleged public safety hazards and violations of mandatory public safety requirements (*See* Complaint ¶¶ 18, 21, 31, 50, 62).

As this court found in the Contempt and Sanctions Order, "[a]s a major corporation, D.R. Horton is no stranger to litigation." Therefore, there is no good cause available to D.R. Horton to now argue at this late point in the case that it should be allowed to disclose experts in violation of

the Consent Scheduling Order it failed to follow. This is not the first time D.R. Horton has come to this Court to have to explain its tardiness, and this Court should be hesitant to allow D.R. Horton to repeatedly ignore orders of the Court. Again, D.R. Horton clearly did not learn from the prior warnings of this Court, and D.R. Horton should not be allowed to repeatedly ignore orders of this Court without consequences.

This case is subject to being called to trial on or after August 1, 2024. The Plaintiff would be highly prejudiced if it was forced to conduct additional discovery and to rush to schedule depositions for experts that D.R. Horton could have easily identified months ago.

By Moving to Amend the Scheduling Order, D.R. Horton, Inc. Admits that it Failed to Follow the Strict Terms of the Contempt and Sanctions Order, which Constitutes Another Discovery Violation

The instant Motion to Amend is evidence of D.R. Horton's contempt of court. D.R. Horton had every right not to disclose any experts in this matter. However, D.R. Horton does not have the right to fail to timely disclose experts and then only now come to this Court to attempt to explain why it did not comply with an order that it consented to. This is a pattern of discovery abuse by D.R. Horton, which this Court should not allow to continue, especially after stating that "I am providing D.R. Horton with a clear and explicit warning that upon a finding of any further discovery violation could result in its pleadings being stricken." (Contempt and Sanctions Order). Indeed, D.R. Horton continues to be in contempt of this Court by failing to follow the deadlines of the Consent Scheduling Order. This is because this Court ordered D.R. Horton to "strictly abide by time deadlines" and that D.R. Horton was to purge its previous contempt of court by "strict compliance with all discovery deadlines." (Contempt and Sanctions Order).

The Plaintiff has been forced to again expend his time and resources to respond to D.R. Horton's failure to follow discovery rules, deadlines, and discovery orders. D.R. Horton's motion

to extend and/or amend the Consent Scheduling Order should be denied. Plaintiff reserves all rights relative to seeking further relief for D.R. Horton's willful disregard of discovery deadlines and Orders of this Court.

Respectfully submitted,

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

Benjamin T. Shelton, S.C. Bar No. 77207

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Attorneys for Plaintiff McGilton

Hilton Head Island, South Carolina
June 10, 2024

EXHIBIT 1

ELECTRONICALLY FILED - 2024 Mar 05 9:32 AM - JASPER - COMMON PLEAS - CASE#2021CP2700069
ELECTRONICALLY FILED - 2024 Jun 10 10:14 AM - JASPER - COMMON PLEAS - CASE#2021CP2700069

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2023-CP-27-00069

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL, FOR SANCTIONS, AND HOLDING D.R. HORTON IN CONTEMPT

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

On December 7, 2023, the court heard the Plaintiff Mark W. McGilton (hereinafter, "Plaintiff's) renewed Motion to Compel, for Sanctions, and Rule to Show Cause as to Defendant D.R. Horton's failure to answer discovery responses, failure to timely supplement discovery responses, and failure to abide by the court's September 22, 2022 Consent Order requiring D.R. Horton to "comply with Plaintiff's outstanding discovery requests, comply with continuing discovery obligations, and work in good faith with Plaintiff to resolve any further discovery disputes."

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

As factual and procedural background, the court finds that D.R. Horton was served with Plaintiff's First Set of Interrogatories and First Requests for Production on July 22, 2021 (herein, "Initial Discovery Requests"). D.R. Horton failed to timely respond to Plaintiff's initial Discovery

Request. Plaintiff provided an extension through September 15, 2021, to answer discovery at D.R. Horton's request after Plaintiff notified D.R. Horton of its deficiency. D.R. Horton again failed to respond to Plaintiff's Initial Discovery Requests. On September 17, 2021, the Plaintiff served D.R. Horton's counsel with a letter pursuant to Rule 11, SCRCF, asking D.R. Horton to answer discovery and stating to D.R. Horton that Plaintiff's counsel would seek attorney's fees and costs and other appropriate relief if it were necessary to file a Motion to Compel. D.R. Horton again failed to answer Plaintiff's Initial Discovery Requests despite being served with the Rule 11 letter.

Plaintiff filed his first Motion to Compel and for Sanctions on November 4, 2021 (the "First Motion to Compel"). On April 16, 2022, D.R. Horton filed a motion to change venue. D.R. Horton continued to fail to respond to Plaintiff's initial request for discovery. On July 11, 2022, the court published notice that Plaintiff's First Motion to Compel would be heard on the August 17, 2022, motion's roster. On July 15, 2022, 359 days after Plaintiff's discovery requests were served D.R. Horton, Inc. responded to Plaintiff's Initial Request for discovery.

Plaintiff deemed D.R. Horton's responses to initial discovery to be deficient. The hearing on the Motion to Compel set for August 17, 2022, remained. Plaintiff provided to D.R. Horton, Inc. another Rule 11 letter on August 10, 2022, explaining what he considered to be the deficiencies with the discovery responses. On August 3, 2022, D.R. Horton, Inc. filed a Motion to Stay under Rule 26(c), SCRCF. The parties reached a consent agreement resolving Plaintiff's Motion to Compel and D.R. Horton Inc.'s Motions to Stay and to Transfer Venue.

Pursuant to the Consent Order filed September 22, 2022 (herein, "the Consent Order"), Plaintiff's Motion to Compel was withdrawn *without prejudice* with leave to refile and to seek sanctions should Defendant D.R. Horton fail to "comply with Plaintiff's outstanding discovery requests, comply with continuing discovery obligations, and work in good faith with Plaintiff to resolve any further discovery disputes."

After the Consent Order was filed, Plaintiff and D.R. Horton coordinated over search terms for months and agreed to take a deposition of a defense witness to help Plaintiff understand what other material might be outstanding and not disclosed. On June 13, 2023, Plaintiff took the deposition of a D.R. Horton employee, Jared O’Saka (hereinafter, “O’Saka”). During the deposition of O’Saka, it was discovered that D.R. Horton possessed numerous files of material relevant to Plaintiff’s discovery requests that it had not previously produced. After the deposition, counsel for Plaintiff and Defendant mutually agreed D.R. Horton would supplement its initial discovery responses, and that D.R. Horton would furnish information to allow Plaintiff to understand the nature of the material that exists, and the scope of what material was missing from responses.

Although D.R. Horton had agreed to provide information and materials the information was not immediately forthcoming. On July 17, 2023, Plaintiff’s counsel e-mailed D.R. Horton’s counsel as a follow-up concerning outstanding discovery responses, wherein D.R. Horton agreed to look into providing Plaintiff with a “file tree” of the filing system disclosed by Mr. O’Saka at his deposition and also providing files for projects involving Kenneth Scott Builders, LLC (hereinafter, “KSB”). On July 21, 2023, Plaintiff’s counsel followed up with D.R. Horton’s counsel again regarding the discovery material that had not been produced. On July 21, 2023, D.R. Horton’s counsel responded that discovery would be supplemented the following week. On August 11, 2023, D.R. Horton’s counsel provided a screen shot of some folders purportedly contained within D.R. Horton’s digital files of relevance to the case including its work with KSB and asked which material the Plaintiff would like to review. In an email on August 15, 2023, Plaintiff’s counsel asked to review all documents in the folders. On August 15, 2023, D.R. Horton’s counsel agreed to prepare the material for production and suggested a confidentiality agreement prior to producing due to certain financial material. Plaintiff consented to a reasonable confidentiality agreement on August 22, 2023, relative to confidential material and asked that the non-confidential material be furnished immediately.

After receiving no further response or further material from D.R. Horton, on September 19, 2023, Plaintiff served counsel for D.R. Horton another letter pursuant to Rule 11, SCRCF, relating to and detailing D.R. Horton's failure to respond to discovery, describing the material sought, and reiterating D.R. Horton's pattern of discovery violations. Plaintiff received no response to his September 19, 2023 letter and filed the present Motion to Compel, for Sanctions, and Rule to Show Cause on October 17, 2023 (herein, the "Second Motion to Compel").

The Second Motion to Compel was filed and the motion roster for the instant motion was published on November 7, 2023, scheduling the motion for December 7, 2023. On Friday, December 1, 2023, D.R. Horton sent Plaintiff its proposed confidentiality order, but no additional discovery. On the evening of December 6, 2023, D.R. Horton provided Plaintiff with discovery. This discovery was provided nearly 29 months after Plaintiff's initial discovery request.

LAW/ANALYSIS

The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court. *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987). In deciding on an appropriate sanction, the court should consider a sanction that will "serve to protect the rights of discovery provided by the Rules." *Id.* (citing *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir.), *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970) ("[O]ver- leniency [in the imposition of sanctions] is to be avoided where it results in inadequate protection of discovery."); C. Wright, *The Law of Federal Courts* § 90 at 596 (4th ed. 1983) ("Without adequate sanctions, the procedure for discovery would be ineffectual."); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976) (dictum) ("[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.")).

“Rule 37 expressly grants the trial court power to order judgment by default for either the violation of a court order, or, upon motion, for a party’s failure to respond to certain discovery requests.” *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997) (citing Rule 37(b)(2)(C)(d), SCRCP). While the sanction of striking a defendant’s answer is severe, South Carolina courts have done so when the situation necessitates the “harsh medicine” of default for discovery abuses. *Id.*, see also *McNair v. Fairfield Cnty*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008) (holding the circuit court did not abuse its discretion by striking the defendant's answer because the defendant failed to (1) produce documents requested during discovery, (2) coherently organize the documents it did produce, and (3) provide complete responses to interrogatories, and the court told defendant to correct the discovery issues several times and warned the defendant “it was inclined to strike [defendant's] answer.” “However, severe sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party’s rights.” *McNair*, 379 S.C. at 466, 665 S.E.2d at 832. If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment. *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198-199; 511 S.E.2d 716, 718-719 (S.C.Ct. App. 1999) (affirming trial court’s order to strike and render default judgment where the record was full of multiple egregious discovery abuses that blocked the opposing party’s attempts to conduct meaningful discovery). An order striking pleadings is an appropriate sanction when a Defendant fails to comply with multiple court orders and when a “clear and explicit warning of the consequences if the defendant failed to comply with the order of the Court” was rendered by the trial court. *See Id.* at 199, at 719.

Here, it is undisputed that D.R. Horton held significant material responsive to the Plaintiff's initial discovery requests served on July 21, 2021, and that, despite being served, despite the Consent Order, and despite the passage of over two years, it failed to produce until the eve of the Plaintiff's Second Motion to Compel was scheduled to be heard. For these reasons, and for the other findings of fact set forth above, I find:

I find that DR Horton willfully failed to follow a previous order of the court on at least two occasions, and willfully failed to comply with its discovery obligations. It is clear that but for the filing of the motions to compel, the motions for sanctions, and but for the motions to compel hearings being scheduled, that D.R. Horton would have produced no discovery in this case. D.R. Horton's willful disregard for its discovery obligations burdens the court system, and it burdens the ability of both a plaintiff and a defendant to obtain appropriate and efficient resolution of cases.

As a major corporation, D.R. Horton is no stranger to litigation. For it to have been as tardy and non-compliant with the court's order—an order that it consented to—is concerning.

I find that D.R. Horton has failed to produce discovery as required by the SCRCR, necessitating the Plaintiff's first motion to compel. Thereafter, it agreed to the language of the Consent Order requiring it to "comply with Plaintiff's outstanding discovery requests, comply with continuing discovery obligations, and work in good faith with Plaintiff to resolve any further discovery disputes."

I find that DR Horton willfully failed to follow the terms of the consent order dated September 22, 2022, by repeatedly failing to produce discovery in its possession thereafter. I find that it violated the terms of the Consent Order on at least two occasions by repeatedly acknowledging discovery material existed, promising to produce discovery, and failing to produce discovery or cooperate with Plaintiff to timely produce discovery thereafter. This willful disregard of the Plaintiff's rights forced Plaintiff to serve another Rule 11 letter, which D.R. Horton again ignored. Then, even after the Second Motion to Compel was filed, D.R. Horton only produced

certain discovery the day before the hearing on this Second Motion to Compel was scheduled to be heard. These two acts alone constitute two distinct violations of the Consent Order.

I find DR Horton's failure to answer discovery requests was willful, and that D.R. Horton willfully failed to follow an order of this Court to which it had consented.

I find two instances of willful discovery abuse by D.R. Horton in this instance, but I find striking D.R. Horton's answer upon a finding of two violations of the court's order would be premature. Additionally, I am providing D.R. Horton with a clear and explicit warning that upon a finding of any further discovery violations could result in its pleadings being stricken.

Therefore, I hold D.R. Horton in contempt of court for its willful and repeated discovery violations in this matter. D.R. Horton may purge the contempt before trial by engaging in no more willful discovery violations. It shall strictly abide by time deadlines. It shall fully and timely answer and respond to discovery requests. It shall cooperate fully with Plaintiff in scheduling and producing witnesses for depositions. It shall otherwise strictly comply with this court's September 22, 2022 Order and with this Order.

Nothing in this order shall be construed to limit or restrict D.R. Horton's ability to reasonably object to discovery requests, to seek appropriate confidentiality orders, to seek orders of protection or seek other similar reasonable relief or protection from discovery requests or practices of the Plaintiff in good faith.

Finally, as a sanction for its discovery abuses, I Order that D.R. Horton shall pay Plaintiff a reasonable sum of attorney's fees and costs, for all fees and costs related to work done to compel the Defendant's discovery responses, from the time the Plaintiff began drafting his first Rule 11 letter to D.R. Horton, through the time expended by Plaintiff's counsel in drafting this Order, as requested by this Court. Upon the filing of this Order, counsel for Plaintiff shall have ten days to file an Affidavit of Attorney's Fees, after which counsel for D.R. Horton shall have 10 days after the receipt of Plaintiff's Affidavit of Attorney's Fees to raise objections thereto. Should counsel for

D.R. Horton raise objections to the Plaintiff's Affidavit of Attorney's Fees, counsel for D.R. Horton may cross-examine Plaintiff's counsel on the contents thereof before any judge sitting in the Fourteenth Judicial Circuit of South Carolina. Such questioning does not need to be heard by this judge. Payment of Attorney's Fees to Plaintiff shall be made within 30 days after the Affidavit of Attorney's Fees is filed if no objections are raised by D.R. Horton. If objections to Plaintiff's attorney's fees are raised by D.R. Horton, payment of attorney's fees must be made to Plaintiff within 10 days after the date any Order resolving objections made to Plaintiff's Affidavit of Attorney's Fees is filed.

I find nothing in the record that imputes D.R. Horton's deleterious conduct and discovery violations to the acts of its attorneys. Indeed, I find that D.R. Horton's lawyers did a substantial job in defending the conduct of their client.

The Court holds D.R. Horton in contempt. It may purge its contempt by:

1. Fulfilling all of its discovery obligations from this point forward, and by avoiding any actions that warrant further Motions to Compel or Rule to Show Cause being filed by the Plaintiff;
2. By strict compliance with all discovery deadlines and answering any existing or supplemental discovery requests; and,
3. By strict compliance with this Order and the Court's September 22, 2022 Consent Order.

IT IS SO ORDERED

s/
The Honorable Diane Schafer Goodstein
Presiding Circuit Court Judge
5200 East Jim Bilton Blvd.
Post Office Box 234
St. George, SC 29477
OFFICE: (843) 832-0332
FAX: (843) 832-0389

[DIGITAL SIGNATURE PAGE FOLLOWS]



Jasper Common Pleas

Case Caption: Mark W. McGilton VS 1223 May River Road, Llc , defendant, et al
Case Number: 2021CP2700069
Type: Order/Sanctions

It is so Ordered!

s/Diane S. Goodstein

Electronically signed on 2024-03-04 16:35:06 page 9 of 9

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EXHIBIT 2

ELECTRONICALLY FILED - 2024 Jun 10 10:14 AM - JASPER - COMMON PLEAS - CASE#2021CP2700069

STATE OF SOUTH CAROLINA) IN THE SOUTH CAROLINA CIRCUIT COURT 14

COUNTY OF JASPER) COURT C.A NO. 2021-CP-27-00069

Mark W. McGilton,)

Plaintiff,)

Versus)

1223 May River Road, LLC)

Defendant.)

H E A R I N G

DATE: December 7, 2023

LOCATION: South Carolina Circuit Court 14

JUDGE: Diane Schafer Goodstein

TRANSCRIBED BY: ERIN REILLY

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EXHIBITS

(None Marked)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH IS
REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 PROCEEDINGS

2 THE CLERK: Yes, Your Honor. This is Mark McGilton
3 vs 1223 May River Road, LLC. This is a motion to compel filed
4 by the plaintiff, Mr. McGilton.

5 THE COURT: Good morning.

6 MR. SHELTON: Good morning, Your Honor, this is Ben
7 Shelton with Shelton Law Firm. I'm doing well this morning.

8 THE COURT: I am fine, Mr. Shelton. And Mr.
9 Shelton, you are here on behalf of -- you are representing the
10 plaintiff?

11 MR. SHELTON: Yes. The plaintiff, Mr. Mark
12 McGilton. That's correct.

13 THE COURT: All right. And who is here on behalf of
14 the defendant?

15 MS. WOOTEN: Your Honor, Kim Wooten with Kennison,
16 Dudley & Crawford this morning. On behalf of D.R. Horton.
17 There are multiple defendants, Your Honor, but none of the
18 other defendants are involved in this motion. So it's just Mr.
19 Shelton and I this morning.

20 THE COURT: Thank you so much, Ms. Wooten. All
21 right. I'm listening to you, Mr. Shelton.

22 MR. SHELTON: Thank you, Your Honor. May I please
23 the Court. This is a renewed motion to compel a motion for
24 sanctions and also rule to show cause against D.R. Horton, Your
25 Honor. For a brief history, we originally filed a motion to

1 compel November 4th, 2021 in this matter. The defendant was
2 served with discovery requests on July 22nd, 2021, and they
3 were granted an extension to answer. And then a Rule 11 letter
4 was originally sent on September 17th, 2021 after we received
5 no discovery. After no discovery received and multiple emails
6 were not returned with additional discovery or any discovery
7 whatsoever. We filed that first motion to compel on November
8 4th, 2021. Thereafter we received no discovery responses
9 whatsoever from Ms -- from D.R. Horton until after the first
10 motion to compel and for sanctions for failing to respond
11 whatsoever to discovery responses was scheduled to be heard in
12 August of 2021. After that --

13 THE COURT: 2022.

14 MR. SHELTON: 2021 -- 2022, yes. Thank you, Your
15 Honor. I apologize. Thank you, 2022. After -- and that --
16 those were provided in July 15th, 2022. Again, only after the
17 first motion to compel hearing was scheduled. We went forward
18 with the motion to compel hearing because we did not believe
19 the discovery responses were adequate. At the hearing we
20 entered in an agreement with D.R. Horton and that agreement was
21 memorialized in a consent order that was signed by Judge
22 Bentley Price, and that was filed on September, 2022. And
23 where D.R. Horton agreed to -- now, first of all, our motion
24 was withdrawn without prejudice, with leave to refile, and DR
25 agreed to comply with plaintiff's outstanding discovery

1 requests, comply with continued discovery obligations and work
2 in good faith with plaintiff to resolve any further discovery
3 or disputes.

4 MR. SHELTON: We thereafter -- I'll submit and I'll
5 also say that this is not against DR. Horton's law firm. This
6 is against D.R. Horton. Their attorneys I enjoyed working
7 with, but we have had a very hard time getting any material
8 from D.R. Horton. Thereafter, we worked with D.R. Horton's
9 firm and eventually scheduled one deposition in June of 2023
10 after several months of coordination. And during that
11 deposition, and I have it set forth in my motion -- renewed
12 motion it was discovered that there were several files of
13 relevance to the discovery requests that were not produced.
14 And we agreed after that deposition to work on getting those
15 produced. That was in June of 2022. Thereafter, we worked
16 with opposing counsel. Opposing counsel suggested that we
17 would need a confidentiality order in August of 2022.

18 THE COURT: 23.

19 MR. SHELTON: I'm so sorry, Your Honor. It's 23,
20 you're right.

21 THE COURT: It's okay.

22 MR. SHELTON: Yeah. And I need to be reading from my
23 notes and not just speaking with you.

24 THE COURT: It's okay.

25 MR. SHELTON: 2023. And in August of 2023, opposing

1 counsel submitted that they would prepare the production, send
2 the confidentiality agreement and we'd move forward. I ask
3 that just whatever is not confidential, we produce then, and
4 we'll be fine with any reasonable confidentiality agreement.
5 We sent follow-up requests after not receiving anything from
6 them. Finally, in September of -- September of 2023, we sent
7 another Rule 11 letter, received no response from the Rule 11
8 letter. Then we filed this motion in October of 2023 and after
9 this hearing was scheduled on Friday of this past week, on
10 December 1st, we received the proposed confidentiality order
11 and yesterday we received a dump of production material, which
12 I haven't even been able to review yet. Your Honor, this is
13 material that should have been produced two years ago almost,
14 and this material that should have been produced without
15 question after the consent order was entered back in 2022. We
16 are here not only for a motion to compel, Your Honor, we're
17 here to renew our motion for sanctions that was thoroughly
18 briefed. The memorandums were provided for the gross and we're
19 seeking a sanction to strike the defendant's answer because of
20 this prolonged discovery abuse. This is gross indifference to
21 my client's rights, this is a serious case. My client has
22 suffered nearly \$3 million in medical bills from the injuries
23 that are at issue in this case. This is a significant case and
24 we are having to file motions to compel simply to get material
25 that should have been produced two years ago, frankly, over two

1 years ago. And the case was filed initially in February of
2 2021. We have been able to take one deposition of the
3 defendant. We are at a standstill and is severely impacting my
4 client's rights, who is permanently injured as medical. I'll
5 leave it at that, Your Honor. I briefed the matter. I wish
6 that I didn't have to get the court's involvement in these
7 discovery disputes, but this I believe is a complete disregard
8 for the authority of the Court, their own agreement by consent
9 order to comply with discovery requests. So in that regard,
10 it's a rule to show cause while they should not be sanctioned,
11 while their answer should not be stricken. Thank you, Your
12 Honor.

13 THE COURT: Thank you so much, Mr. Shelton and Ms.
14 Wooten.

15 MS. WOOTEN: Yes, Your Honor. I just -- I do have to
16 tell you, I just got into this case to handle this hearing. So
17 I wasn't involved in everything. So I went back yesterday,
18 Your Honor, and did a full and thorough analysis of everything
19 that's been done in this case. And I'm afraid that Mr. Shelton
20 has bordered on misrepresenting what's happened in this case.
21 But at the very least has left out most of the relevant facts.
22 Your Honor, first of all this case was filed and served. It
23 was served in March of 2021. As you know we were on the end of
24 Covid and our client at that time was severely hamstrung with
25 layoffs, et cetera, et cetera. However, we did timely answer

1 the case, and we filed a motion to transfer venue and a motion
2 to dismiss at that time because we don't believe our client is
3 a proper -- party to the case. At any rate the motion to
4 dismiss was filed. We, in conjunction with that, we moved to
5 stay discovery and we did not get a hearing on that motion
6 until the next year. As you know, the courts were far behind
7 at that time. I have a motion that has a timeline on it and I
8 can tell you if, Your Honor, just bear with me because I wasn't
9 involved. I do have a timeline that I need to refer to. Is
10 that all right?

11 THE COURT: Yes.

12 MS. WOOTEN: Okay. All right. So, Your Honor, in a
13 motion to stay -- well, let's just go back. We filed our
14 answer on April 14th, 2021. We also filed in connection with
15 that, a motion to transfer venue and a motion to dismiss. That
16 was all served upon the plaintiff. And then despite that, they
17 filed discovery responses. So we're waiting for the Court to
18 determine when we will get our motion to transfer venue and
19 motion to dismiss and motion to stay discovery. So the motion
20 to stay discovery was filed in 2022 and in that motion we ask
21 that the Court stay until the Motion to Transfer venue could be
22 could be heard. And that's because we believe that the case
23 should be dismissed and the motion to transfer should be
24 granted at that time. So it's not as though D.R. Horton wasn't
25 responding. Mr. Shelton indicated that D.R. Horton wasn't

1 responding to any of his requests. That's not true at all. We
2 filed motions to transfer, we filed motions to dismiss, we
3 filed motions to stay.

4 THE COURT: Was the motion to stay granted?

5 MS. WOOTEN: Okay. So what happened, Your Honor, is
6 Mr. Shelton said or as Mr. Shelton said, the parties were able
7 to resolve the motion after it was filed in 2023. The parties
8 entered into that consent order that he referenced. So in his
9 motion and in his argument and, Your Honor, I need to look at
10 that as well. Okay. After the consent order was filed, the
11 consent order was filed in -- I have the date here, September
12 of 2022. We filed the consent order. He agreed to withdraw
13 his motion to compel without prejudice and we agreed to drop
14 our motion to stay discovery and our motion to transfer venue
15 and our motion to dismiss for the time being, all were dropped
16 without prejudice to refile. After that consent order was
17 filed, Mr. Shelton has said that he coordinated with defendant
18 for months in an effort to take the first deposition of the
19 plaintiff. That is not true. What happened after the consent
20 order was filed is that we asked him to send us a list or we
21 agreed with him. Actually, he wanted to send a list of things
22 search terms of documents that he wanted. So he sent us a list
23 of search terms. When we got the search terms, the search
24 terms were so broad and asked for things like dirt. So if we
25 were to submit a search term in our email base, it would've

1 produced millions and millions of documents. So we recommended
2 not Mr. Shelton, we recommended that instead of trying to
3 narrow that search more that we would offer a deposition
4 defendant. We offered that to help him understand, to help Mr.
5 Shelton understand what types of documents might be outstanding
6 that would be responsive to his request. So on June 13th,
7 2023, he took the deposition. We coordinated with that with
8 him, we did not delay taking that deposition, Your Honor. So
9 any suggestion that we did that is simply not so. And then in
10 his motion Mr. Shelton says that during the deposition of Mr.
11 Osaka, which is that deposition. It was discovered that D.R.
12 Horton possessed numerous files of material relevant to
13 plaintiff's discovery request. Well, that is true but that was
14 the very purpose of the deposition for -- to offer Mr. Shelton
15 the opportunity to discover what documents existed that he
16 wanted out of our database. That was the whole purpose that we
17 offered that deposition. That was in June of this year. On
18 July 17th he sent us a follow-up and at that time we discussed
19 an offered to provide him with a file treat of the filing
20 system. There's a rather complex filing system that is
21 involved with all of the documents that Mr. Shelton had
22 requested in this case. We also agreed to provide during this
23 whole time, Your Honor, you have to look at the pleadings and
24 determine that parties are being added, pleadings are being
25 amended. So we also agreed in July that we would provide files

1 for other projects that Mr. Shelton had requested later
2 involving Kenneth Scott Builders, LLC. This is all in his
3 motion, by the way. So he agrees with all this. And then he
4 followed back up in like four days regarding the outstanding
5 supplemental discovery request the next month in two more
6 weeks, we provided a screenshot of folders contained within our
7 files of relevance and asked which folders he would like to
8 review. And then he got back with us and said he would like to
9 review all documents in the folders. So we are making efforts
10 this whole time Your Honor to get him the information that he
11 needs, to get him file folders that he needs to decide, what it
12 is he wants to review. Then in August of this year we talked
13 with Mr. Shelton about getting materials ready to produce and
14 suggested a confidentiality agreement. Because he had decided
15 he wanted to look at certain financial materials, including
16 things that are proprietary and confidential. And so on
17 September 19th of this year we had not gotten him. We do
18 admit, Your Honor, that particular one we did have a fall down.
19 We were all involved in a trial up here. It was a -- the Zetec
20 trial, you may or may not have heard about it. But during
21 September and August, we were involved in that and then after
22 that we got this motion to compel. So that's where we are.
23 Your Honor, we did provide a confidentiality agreement to Mr.
24 Shelton, we did not hear back from him on that until the day
25 before the hearing. Actually two days before the hearing

1 yesterday, a day before yesterday. And so what we're saying
2 here, Your Honor, is because of number one, the delays from the
3 Court but number two, the story that Mr. Shelton's told is not
4 the story of this case. The story of this case has to do with
5 a lot of different things besides failures to produce things.
6 We have not -- and as Mr. Shelton said, we have worked with
7 him. This is not a problem that we've had with his law firm,
8 we have worked in good faith to get him the information. He
9 now has all the information that he needs. And we certainly
10 think, Your Honor, that striking an answer and with all the
11 facts that we've provided you today would not be an appropriate
12 sanction. And we believe that we've done the best that we can
13 to cooperate. Any striking of an answer would also be very
14 prejudicial to the firm -- to my law firm as well as the
15 client. And we do think, Your Honor, that you know, Mr.
16 Shelton's in recent days has tried to cooperate with us as well
17 and we think that the motion should be denied today.

18 THE COURT: Let me ask you this question. Is it true
19 that discovery there was a substantial document production
20 yesterday?

21 MS. WOOTEN: Well, there was a substantial document
22 production before this and there was a supplemental production
23 yesterday.

24 THE COURT: Okay. And the supplemental discovery was
25 in response to what?

1 MS. WOOTEN: To his supplemental discovery requests.

2 THE COURT: Which was served when?

3 MS. WOOTEN: Ben, you tell -- I am not as familiar,
4 Your Honor. I'm sorry. Ben, you correct me there.

5 MR. SHELTON: I'm not going to accuse Ms. Wooten of
6 making any misrepresentations or any infer that she's made
7 misrepresentations. She's new to this case, so I'm going to
8 correct a couple of things on the record. First, the motion to
9 stay that she references was not filed until August 3rd, 2022.
10 We filed our initial motion to compel in November of 2021. The
11 motion to stay was only filed after the hearing on the motion
12 to compel. The initial motion to compel. The motion --
13 initial motion to strike. Their answer was filed was filed and
14 after the hearing was scheduled, Your Honor, for my
15 recollection, so to act as if there's a motion to stay pending,
16 and that's an excuse as to not answer discovery responses, that
17 is simply untrue. And again, I'm not saying that Ms. Wooten is
18 misrepresenting facts intentionally, it's just she's new to
19 this case. The other issue that I need to correct is that the
20 motion to transfer venue was not withdrawn without prejudice is
21 withdrawn and is ordered with prejudice. The motion -- their
22 motion to transfer venue. Okay. So to that regard, I wanted
23 to correct that. As to the discovery responses, these are our
24 initial discovery requests. We have filed no supplemental
25 discovery response requests. All of these requests relate to

1 our initial discovery requests and this is why this motion is a
2 renewed motion for sanctions motion to compel that was
3 initially filed in November of 2021 and subject to the consent
4 order in September of 2022. Thank you, Your Honor.

5 THE COURT: Said that they would produce --
6 cooperate?

7 MR. SHELTON: Correct. Comply with plaintiff's
8 outstanding discovery requests, comply with continued discovery
9 obligations. And let me be clear, most things that Ms. Wooten
10 said I completely agree with as far as the timeline she sets
11 out, except for what I just clarified. Many, many things and
12 what I'd like to point out again is that we were having these
13 discussions after Mr. Osaka deposition was in June. We were
14 having these discussions on how to receive this material
15 between June and August and then after August, we received no
16 further responses and we were forced to file this motion to
17 compel again and again. They did not provide us with the
18 consent -- with the confidentiality order until last Friday.
19 And this new document dump was yesterday. This is a pattern of
20 conduct, which they only produced and answered discovery
21 request before, after the motion to compel was scheduled just
22 like today. Thank you, Your Honor.

23 THE COURT: All right. Yes, ma'am. Any response?

24 MS. WOOTEN: Yes, Your Honor. The question that you
25 asked about whether it was original or supplemental I'm afraid

1 that's not accurate what Mr. Shelton has said. A lot of these
2 documents we didn't even know existed, and he didn't even ask
3 for until he got the deposition of Mr. Osaka. That was at the
4 time that he discovered he needed certain other documents and
5 told us which ones he needed, gave us search terms for those.
6 The search terms were, as I said, too broad. So no these are
7 not all initial discovery requests.

8 THE COURT: And when was his deposition taken?

9 MS. WOOTEN: June of 2023, Your Honor.

10 THE COURT: June. Okay.

11 MS. WOOTEN: Yes.

12 THE COURT: Okay.

13 MS. WOOTEN: June of --

14 THE COURT: And so they weren't provided until
15 December of 2023?

16 MS. WOOTEN: The -- yes, sir -- yes, ma'am, I believe
17 but during that time, I also I think told you that we had sent
18 -- after the deposition we sent over and we've been talking
19 with Mr. Shelton about all this stuff. We sent over to him a
20 screenshot of the files that we discovered were available.
21 After the deposition he said, these are the ones I want. So
22 after that, in between June and this time we sent him a list of
23 all the files that we have and said, which ones do you want? He
24 didn't get back with us the next day but he did tell us these
25 are the ones that we want. So when we received the documents

1 we had to have a docket. There are a lot of documents. We had
2 to have a paralegal review them for privilege. We had to have
3 a paralegal review, which ones had to be stamped as
4 confidential. We did get him the confidential -- the
5 confidentiality agreement. So there was some time involved in
6 getting these documents ready for him to produce.

7 THE COURT: Okay. Very well. All right. Thank you
8 so much for your presentation.

9 THE COURT: First of all, I find that D.R. Horton has
10 willfully failed to follow the orders and has willfully failed
11 to comply with discovery. I think that the duration of the --
12 of each step of this process concerns me. And it appears
13 fairly clear to me. Well, it doesn't fairly -- it appears very
14 clear to me but for the filing of the motions to compel the
15 motions for sanctions and a hearing being scheduled, that there
16 would be no discovery in this case. And I find that based on
17 everything that I have heard. That burdens our system, it
18 burdens the ability of both a plaintiff and defendant to obtain
19 appropriately efficient resolution of cases. And again, that's
20 both for plaintiffs and defendants. A note that D.R. Horton is
21 a major American corporation and is no stranger to litigation
22 and for them to have been as tardy and non-compliant with the
23 court's order is very disturbing. Having said that, if you
24 look at the case law, it's almost like baseball. A defendant
25 has to violate three orders before an answer is struck. It's

1 always -- again, it's like baseball. And so --

2 MS. WOOTEN: It looks like baseball, Your Honor.

3 THE COURT: It's like baseball. And so this would be
4 the third order. Any more problems and the answer really will
5 be subject, I think to being struck. I think if I was to
6 strike the answer with the failure to comply with two orders it
7 would be inappropriate. So here's what I'm going to do.
8 Obviously, Mr. Shelton, you have to prepare your attorney's
9 fees affidavit, I want you to share it with Ms. Wooten. And I
10 would like you to begin with the preparation of the first
11 motion to compel.

12 MR. SHELTON: Yes, Your Honor.

13 THE COURT: In other words -- well, let me back that
14 up a little bit with your Rule 11 letter for the first motion
15 to compel. Preparation of that letter and carry it through to
16 today. Well, no to the preparation of this order. I want you
17 to give it to Ms. Wooten. Give her an -- give her 10 days to
18 review it and review it with her client. And Ms. Wooten, if
19 you want to cross-examine Mr. Shelton on that affidavit, then
20 yeah we'll just simply come back to the Court. Not me, you
21 know, I don't want you to -- because I don't know when I'll be
22 back to the 14th or let me say it this way. Lucky enough to
23 come back to the 14th. But anybody can hear it and I want you
24 to have an opportunity to cross-examine Mr. Shelton regarding
25 his submittal. But attorney's fees will be granted for sure.

1 With regards to sanctions, I'm holding D.R. Horton in contempt.
2 They can purge the contempt by having no more discovery issues,
3 no meaning this. No more motions to compel for failure to
4 comply with time deadlines. In other words, I am in no way
5 restricting D.R. Horton's ability to say that is not fair,
6 that's not fair discovery. That document is privileged. I'm
7 not -- they're not waiving any of that. Just they've got to
8 have strict compliance with the time deadlines now. Ms.
9 Wooten, in the event that you and Mr. Shelton or somebody --
10 you know, somebody in the firm, y'all work out an alternate
11 deadline, that is perfectly fine. But from here on time
12 matters. Time deadlines matter and if y'all can't work them
13 out then two things. You can within the time deadline file a
14 motion with the Court for an extension if you cannot work it
15 out with Mr. Shelton. But if you lose that with the Court,
16 then that's going to be a problem for you. In other words, I
17 don't want that to be an every time, you know, solution, just
18 file something with the Court for an extension of time, because
19 if you lose it then you got a problem. I am confident from
20 what I hear from the -- to be completely candid with the two of
21 you. My sense is that with this order, Ms. Wooten, your firm
22 is going to be able to say, I client -- when we say, ha you
23 better jump.

24 MS. WOOTEN: Right, Your Honor.

25 THE COURT: And again, please put in this order. I

1 do not find any deleterious conduct at all with regards to the
2 law firm. My concern lies with client based on everything I
3 have heard, and that I think that the firm did a substantial
4 job in defending the conduct of their client. However, the
5 Court is concerned based upon everything that I have heard,
6 that it is the client that is -- I don't want to say foot
7 dragon, come up with something more eloquent than that. I
8 could come up with that. And it is my hope, Ms. Wooten, that
9 with this -- my intention is with this order, it will -- see
10 when lawyers are in control, the world is a better place.

11 MS. WOOTEN: I'm with you.

12 THE COURT: It's my hope to put my lawyers in
13 control.

14 MS. WOOTEN: Your Honor, too. While we're on the
15 record. Ben, how long will it take you to review the document
16 production we've just given you and get back to me because I
17 don't want this getting out of hand.

18 MR. SHELTON: I understand

19 MS. WOOTEN: I really don't. I don't want to --

20 MR. SHELTON: I would be --

21 MS. WOOTEN: I want to make sure this is the last
22 time we're here.

23 MR. SHELTON: I'd be telling a lie if I told you I've
24 even begun to look at it yet or I was preparing for this. And
25 as I've referenced Ms. Wooten, I had a basketball team to coach

1 last night. So I haven't even been able to look at it yet. So
2 once I do I'll reach out.

3 THE COURT: So you'll get to it when you get to it.
4 You'll get to it soon.

5 MS. WOOTEN: Right. Please just let me know when
6 you've finished so that if there's something missing that I can
7 jump on it

8 THE COURT: Talk to --

9 MS. WOOTEN: You know --

10 THE COURT: That sounds good. I'll let y'all talk
11 about it. We got other folks?

12 MR. SHELTON: Yes.

13 THE COURT: An order in 30 days if you need longer.
14 Y'all confer, figure out what the extended period is and just
15 let my law clerk know so that I'll know when to expect it.
16 That's why we keep up with them so we know when stuff is coming
17 in.

18 MS. WOOTEN: Thank you, Your Honor.

19 THE COURT: Thank you so much.

20 MR. SHELTON: Thank you, Your Honor.

21 THE COURT: Y'all have a great rest of your week.

22 MR. SHELTON: You as well. Happy Holidays. Thank
23 you.

24 THE COURT: Thank you very much. You too.

25 [End of hearing.]

CERTIFICATE OF TRANSCRIBER

I, ERIN REILY, a court-approved transcriber, 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 South Carolina Circuit Court 14, Jasper County, South Carolina, on the 7th day of December, 2023.

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

December 15th, 2023

ERIN REILLY

TRANSCRIBER

EXHIBIT 3

FILED ELECTRONICALLY FILED - 20224 Jan 10 10:34 PM - JASPER - COMMON PLEAS - CASE#20221CP2700069

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069

CONSENT SCHEDULING ORDER

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

The parties hereby request the entry of the following Consent Scheduling Order in order to manage discovery and the trial date in this case. Consent of all parties having been given, the Court finds that the Scheduling Order as proposed is reasonable and in the interest of all parties.

1. **Experts:** The parties shall disclose experts no later than **February 26, 2024**. Reply expert disclosures no later than **March 27, 2024** (limited to areas disclosed by one party but not the other) by **April 26, 2024**.
2. **Mediation:** The parties shall conduct mediation on or before **June 5, 2024**.
3. This case shall be called to trial not before **August 1, 2024**.
4. This Order may be amended upon consent by the parties or a showing of good cause and only by approval of the Court.

AND IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]

WE SO CONSENT:

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

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Hilton Head Island, South Carolina
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/s/Ryan W. Conner

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Charleston, South Carolina
January 12, 2024

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*Attorney for Lotty Trucking, LLC
f/k/a Ramos Trucking, LLC*

Hardeeville, South Carolina
January 12, 2024

KENISON, DUDLEY & CRAWFORD, LLC

/s/Jason M. Imhoff

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Greenville, South Carolina
January 12, 2024



Jasper Common Pleas

Case Caption: Mark W. McGilton VS 1223 May River Road, Llc , defendant, et al
Case Number: 2021CP2700069
Type: Order/Scheduling Order

So Ordered

s/ Robert Bonds, 2770

Electronically signed on 2024-01-17 14:06:20 page 3 of 3

FILED ELECTRONICALLY FILED - 2024 Jan 17 13:36 PM -- JASPER -- COMMON PLEAS -- CASE#2021CP2700069

EXHIBIT 4

ELECTRONICALLY FILED - 2024 Jun 10 10:14 AM - JASPER - COMMON PLEAS - CASE#2021CP2700069

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY
TRUCKING, LLC F/K/A RAMOS
TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069

**PLAINTIFF MARK W MCGILTON'S
FIRST SUPPLEMENTAL ANSWERS TO
D.R. HORTON, INC.'S FIRST SET OF
INTERROGATORIES TO D.R.
HORTON, INC. RELATING TO EXPERT
DISCLOSURE AND DESIGNATIONS**

**PLAINTIFF MARK W. MCGILTON'S FIRST SUPPLEMENTAL
ANSWERS TO DEFENDANT D.R. HORTON'S INTERROGATORIES**

Pursuant to South Carolina Rule of Civil Procedure 33, the Plaintiff Mark W. McGilton (herein, "Plaintiff" or "Mark"), by and through undersigned attorneys, hereby supplements answers to the Interrogatories propounded by D.R. Horton as follows:

GENERAL OBJECTIONS

Mark makes the following general objections, which are incorporated into its answers below and are in addition to its specific objections to individual discovery requests (whether by Interrogatory, Requests for Production, or any other means of discovery).

1. Plaintiff objects to discovery seeking medical records and/or detailed medical information pertaining to Plaintiff not logically related to the issues in this litigation. Discovery of extraneous medical records of would be extraordinarily intrusive and expose highly personal and private information. Such invasion of the privacy would not lead to the discovery of relevant or admissible evidence in this case.

2. Plaintiff objects to the discovery requests to the extent they seek privileged information and/or information beyond the scope of permissible discovery. Plaintiff further objects to the discovery requests to the extent they are vague and ambiguous, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, propounded solely for the purpose of harassment, and constitute an impermissible "fishing expedition."

3. Plaintiff neither admits the existence of any facts set forth in any request or assumed by any request. Plaintiff does not concede the relevance of any request or any subject matter to which a request refers.

4. Plaintiff objects to these interrogatories to the extent the number of

interrogatories exceeds the number allowed under Rule 33 of the South Carolina Rules of Civil Procedure. Any answer by Plaintiff to excess interrogatories does not concede the propriety of that interrogatory.

5. Plaintiff objects to these interrogatories to the extent that they are duplicative, repetitive, cumulative or otherwise pose the same or substantially the same questions or seek the same or substantially the same information as those formerly propounded to Plaintiff by any other Defendant in this civil action. To the extent Defendant's interrogatories below reiterate previous interrogatories propounded by other Defendants in this litigation, the Plaintiff incorporates by reference any previous answer or response to the same.

6. Plaintiff reserves leave to supplement these answers on a rolling basis as additional material and information is discovered, reviewed, and identified by Plaintiff during the course of this litigation.

**PLAINTIFF'S FIRST SUPPLEMENTAL
ANSWERS TO INTERROGATORIES**

2. Identify by name, address and telephone number each person and entity who, you believe, may have information or knowledge relating to the allegations, claims, defenses, or facts set forth in the Pleadings filed in this Lawsuit, including a brief summary of the facts of which you believe the person or entity has knowledge, and whether or not any written or recorded statements have been taken from each individual or entity.

ANSWER: Plaintiff repeats and incorporates by reference its answer to Defendant 1223 May River Road, LLC's Interrogatories, and specifically, its answer to 1223 May River's Interrogatories No. 1 and No. 3. Plaintiff reserves leave to supplement its answer to this Interrogatory.

SUPPLEMENTAL ANSWER: Please refer to expert designations in Plaintiff's supplemental answers to Interrogatory No. 3, below. Plaintiff further specifically identifies the following medical providers. Please refer to previous material produced in response to requests for production, and specifically medical records, concerning the subject matter of the expected testimony:

Craig Denlinger, MD
c/o Savannah Surgical Group
4750 Waters Avenue
Savannah, GA 31404

Alvaro Fonseca, MD
c/o Memorial Health University Medical Center
4700 Waters Avenue
Savannah, GA 31404-6220
(General Surgery)

Craig R. Smith, MD
c/o Memorial Health University Medical Center
4700 Waters Avenue
Savannah, GA 31404-6220
(General Surgery)

Joseph Brungardt, MD
c/o Memorial Health University Medical Center
4700 Waters Avenue
Savannah, GA 31404-6220

(General Surgery)

**Matthew Mader, MD
c/o Memorial Health University Medical Center
4700 Waters Avenue
Savannah, GA 31404-6220
(General Surgery)**

**Paul R. Mitchell, DO
c/o Paul Mitchell Pain Management, P.A.
15 Moss Creek Village
Hilton Head Island, SC 29926**

**Joseph Robert Hsu, MD
c/o Atrium Health Carolinas Medical Center
Morehead Medical Plaza
1025 Morehead Medical Drive, Ste. 300
Charlotte, NC 28204**

**Horizon Rehab and Sports
(various employees and providers, as identified in medical records)
8 Hospital Blvd., Ste. 250
Hilton Head Island, SC 29926**

3. Identify each person that you expect to call as a witness or an expert witness at the trial of this Lawsuit, including a brief summary of the facts upon which the witness or expert is expected to testify and a brief summary of the opinions and grounds for each opinion upon which the expert is expected to testify.

ANSWER: Plaintiff further objects to this interrogatory as premature; Subject to the foregoing general and specific objections, Plaintiff repeats and incorporates by reference its answer to Defendant 1223 May River Road, LLC's Interrogatories, and

specifically, its answer to 1223 May River's Interrogatories No. 1 and No. 3. Plaintiff reserves leave to supplement its answer to this Interrogatory.

SUPPLEMENTAL ANSWER: Plaintiff objects to this interrogatory to the degree that it calls for work product, attorney's mental impressions, and the production and creation of material that is not in physical existence; Reserving leave to supplement or withdraw any expert identified herein, and to supplement opinions on a rolling basis, Plaintiff identifies the following experts at this time:

Initial Answer:

Bryan C. Miller
Engineering Experts, Inc.
1127 Queensborough Blvd., Ste. 101
Mt. Pleasant, SC 29464

David Hill
Palmetto Accident Reconstruction Service
PO Box 96
Ridgeville, SC 29472

Supplemental Answer:

Plaintiff repeats all medical providers identified in his answers to Interrogatory Number 2, above, and reserves the right to elicit expert testimony from each provider relative to their fields of training, experience, and treatment of Mark.

Bryan C. Miller
Engineering Experts, Inc.
1127 Queensborough Blvd., Ste. 101
Mt. Pleasant, SC 29464
ACTAR No. 2941

Mr. Miller is an expert in the field of traffic accident reconstruction, and is expected to testify about his investigation of the traffic collision at issue, the vehicles

involved in the collision, and the safety compliance of the vehicles at issue in the collision, and specifically the dump truck.

David Hill
Palmetto Accident Reconstruction Service
PO Box 96
Ridgeville, SC 29472
ACTAR No. 912

Mr. Hill is an expert in the field of traffic accident reconstruction, vehicle safety inspections and compliance, and is expected to testify about his investigation of the traffic collision at issue, the vehicles involved in the collision, and the safety compliance of the vehicles at issue in the collision, and specifically the multiple safety violations relative to the dump truck that he observed when he inspected the dump truck shortly after the collision.

Theodore "Andy" Rowland, CIH
Imprimis FHS, LLC
3141 Linksland Road
Mt. Pleasant, SC 29466

Mr. Rowland is an expert in regulatory, industrial, environmental, and health and safety standards and compliance, including but not limited to fields of OSHA and DHEC regulation and compliance, the transport of material subject to regulation, and, industrial and construction safety standards, practices, and compliance, including within the construction industry. He is expected testify to and identify regulatory and industry standards at issue in the matter and provide an opinion relative to the Defendants' compliance or noncompliance with the same. Mr. Rowland's CV is enclosed.

Trisha M. Yount, CPA, MAFF
Forvis, LLP
525 East Bay Street, Ste. 100
Charleston, SC 29403

Ms. Yount is an expert in forensic accounting and is expected to testify to the economic loss suffered by Mark after the accident. Ms. Yount's CV is enclosed.

**Lindsay Moore, MSPAS, PA-C, CLCP
Moore Medical Consulting, LLC
1150 Hungryneck Blvd., Ste. C-378
Mt. Pleasant, SC 29464**

Ms. Moore is an expert in the field of life care planning, medical review and summaries and chronology, and is expected to testify to her assessment of Mark's past medical treatment, residual medical conditions, and her opinion of Mark's future plan of care, and the foreseeable costs relating to the same. Ms. Moore's CV and a copy of the life care plan for Mark McGilton is enclosed.

**Michael Fryar, M.S., CRC, RN, CCM, QRP, CLCP
Inquis Global, LLC
999 Lake Hunter Circle, Ste. A
Mt. Pleasant, SC 29464**

Mr. Fryar is an expert in the field of vocational rehabilitation and evaluation and life care planning and is expected to testify to the degree and extent of Mark's vocational limitations occasioned by the injuries he suffered in the collision and the impact of the same. Mr. Fryar's CV is enclosed.

Plaintiff reserves leave to supplement and amend his expert designations and to qualify as an expert any witness who may have special knowledge regarding a subject which would aid a reasonable jury in its understanding of a matter and will supplement this interrogatory as additional experts for trial are later identified. Plaintiff reserves the right to use as an expert any expert witness identified by any other party in this matter.

[Signature Page Follows]

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

Benjamin T. Shelton, SC Bar No. 77207

S. Harrison William, SC Bar No. 104210

P.O. Box 21069

Hilton Head Island, SC 29925

(843) 802-0087

ben@sheltonlawsc.com

Attorneys for Plaintiff

Hilton Head Island, South Carolina

February 26, 2024

CERTIFICATE OF SERVICE

This is to certify that I, Brooklyn Valentine West, paralegal at Shelton Law Firm, LLC, have this 26th day of February 2024, served a true and correct copy of the foregoing Plaintiff's First Supplemental Answers to Defendant D.R. Horton, Inc.'s First Set of Interrogatories upon counsel of record for D.R. Horton, Inc. and all other parties via email as follows:

KENISON, DUDLEY & CRAWFORD, LLC

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crawford@conlaw.com
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LAW OFFICES OF DARRELL THOMAS JOHNSON, JR.

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wpj@johnsonslawoffice.com
Attorneys for Lotty Trucking, LLC


Brooklyn Valentine West

Hilton Head Island, South Carolina
February 26, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
	)	
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking, LLC	)	
f/k/a Ramos Trucking, LLC,	)	
	)	
Defendants.	)	DEFENDANT D.R. HORTON, INC.'S
	)	MOTION TO RECONSIDER, ALTER
	)	OR AMEND ORDER ON ITS MOTION
	)	FOR SUMMARY JUDGMENT
_____	)	
D.R. Horton, Inc.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	
_____	)	

COMES NOW, Defendant D.R. Horton, Inc. (“D.R. Horton”) and, pursuant to SCRCP 59(e), hereby moves this Court to reconsider, alter or amend the Order denying D.R. Horton’s Motion for Summary Judgment against Plaintiff Mark W. McGilton (“Plaintiff”), and shows as follows:

I. PROCEDURAL POSTURE

On May 20, 2018, Plaintiff filed a lawsuit against Alfredo Uristegui, Jacob-Au Trucking, LLC and Kenneth Scott Builders, Inc. (hereinafter “KSB”) (Case No. 2018-CP-07-00607) in Beaufort County, South Carolina. This action arose out of a motor vehicle accident that took place in Bluffton, South Carolina. On May 13, 2018, Mr. Uristegui was operating a dump truck owned

by Jacob-Au Trucking, LLC (hereinafter “Jacob-Au Trucking”) and crossed the centerline, colliding with the Plaintiff. (See Complaint ¶2.) The dump truck was maintained by Defendant Lotty trucking LLC f/k/a Ramos Trucking, LLC. An Amended Complaint was filed on April 12, 2018, naming KSB, employer of Jacob-Au, as a Defendant in the action. Almost two (2) years after the initial filing, Plaintiff then filed an action in Jasper County, South Carolina on February 17, 2021, against Defendant 1223 May River Road, LLC, Defendant D.R. Horton, Inc. and Defendant Lotty Trucking, LLC (Case No. 2021-CP-27-00069) involving the same facts and injuries in the Beaufort County action. On April 15, 2021, Defendant 1223 May River Road filed an Amended Answer and Third-Party Plaintiff’s Complaint against Kenneth Scott Builders, Inc. Both actions arose out of the March 13, 2018, accident that took place in Beaufort County, South Carolina. Plaintiff has alleged that D.R. Horton, along with all other defendants, is liable to Plaintiff for the actions of a general contractor’s subcontractor which resulted in the accident.

At the time of the accident, D.R. Horton had a contract with KSB to clear and grade a subdivision named Cypress Ridge located in Bluffton, South Carolina. KSB was also working on a separate and unrelated job at 1223 May River at the time of the accident. As evidenced by the independent contractor agreement between KSB and D.R. Horton (hereinafter “KSB ICA”), the May River project had nothing to do with the Cypress Ridge project and vice versa.

There is no evidence that D.R. Horton was involved in the Plaintiff’s accident. The law is clear that D.R. Horton is too far removed as a party to be held liable under the circumstances of this case. Therefore, D.R. Horton’s Motion for Summary Judgment against Plaintiff should be granted.

II. LEGAL STANDARD

A. Summary Judgment Standard

Summary judgment should be granted “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 a judgment as a matter of law.” SCRCP 56(c). “Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed.” Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001).

“Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by ‘showing’ -- that is, pointing out to the [trial] court -- that there is an absence of evidence to support the nonmoving party’s case.’ Id. (quoting Celotex, 477 U.S. at 325).

“Once moving party carries its initial burden, opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with ‘specific facts showing that there is a genuine issue for trial.’” Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (emphasis in original)). This showing must be based on evidence that would be admissible at trial. Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002).

In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom are viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004).

This case is the perfect example of a case that should be decided on the legal issues. Plaintiff has shown no genuine issue of fact that should have defeated D.R. Horton's Motion. Plaintiff's legal argument is at odds with the controlling case law, and the Motion should be granted.

B. Rule 59(e) Standard

Under SCRCP 59(e), a trial judge may alter or amend an order if a motion is served not later than ten (10) days after the receipt of written notice of the entry of the order. This is the only procedure for a party to amend a judgment. Norris v. Heyward, 312 S.C. 67, 439 S.E.2d 264 (1993). The purpose of Rule 59(e), to alter or amend a judgment, is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). South Carolina courts have specifically held that the issues raised in a motion for summary judgment may be raised by a **motion to reconsider** the denial of a summary judgment motion. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994).

III. ARGUMENT

1. D.R. Horton is Not Negligent as it Was Not Involved in a Joint Enterprise with the Dump Truck Operators or KSB

D.R. Horton cannot be liable for negligence because D.R. Horton was not involved in a joint enterprise with KSB or the Dump Truck Operators as neither entity had the right to control the other.

The South Carolina Supreme Court has repeatedly held that "to constitute a joint enterprise, so that the negligence of one may be imputed to another, there must be a common purpose and a community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto:

A joint enterprise exists where there are two or more persons united

in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose. Further, in order to constitute a joint enterprise, there must be a common purpose and community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto.

Peoples Federal Savings & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 425 S.E.2d 764 (S.C. Ct. App. 1992).

The court in Peoples found that a building contractor and a lender were engaged in a joint venture for profit of the construction of several apartment complexes because the lender owned half of the construction company's stock and the lender had approached the contractor to joint venture the construction project. Id.

This case is distinct from Peoples. Here, there is no evidence that KSB or the Dump Truck Operators owned a portion of the other entity or that either entity contracted with D.R. Horton or the other to form a joint venture regarding Cypress Ridge. Additionally, there is no evidence that D.R. Horton had the right to direct and control KSB's means and methods of its work, or its subcontractor's work, other than the final product envisioned by the engineering plans and development of Cypress Ridge.

D.R. Horton hired KSB as a general contractor to perform horizontal work including clearing, demolition, drainage, and erosion control work. (See **Ex. 1, KSB ICA**). Under KSB's ICA with D.R. Horton, "Contractor [KSB] in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work...Contractor shall be responsible and liable for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses...Any provision in this Agreement which may

appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that the Contractor shall follow the desires of the Owner in the results of the Work only.” KSB as the general contractor then subcontracted the dirt hauling portion of its scope of work for Cypress Ridge during the time the accident occurred (See **Ex. 2, Tosky 2024 Depo. 32:4-14**).

KSB also admitted that D.R. Horton did not control its work, or its subcontractor’s work, as D.R. Horton had no knowledge of who KSB’s subcontractors, the other Dump Truck Operators, were. (See **Ex. 2, Tosky 2024 Depo. 55:22-25 and 123:6-9** and **Ex. 3, O’Sako Depo. 65:6-12 and 162:7-12**). Specifically, Kenneth Tosky of KSB in his 2024 Deposition stated that:

Q. So what oversight does an owner/developer of property have over the horizontal part of the development?

A. From my perspective in the projects that we’ve done on horizontal, when we do that work, we’re usually dealing with the engineer direct. The owner really does not get involved in the process unless there’s a change to the situation.

(**Ex. 2, Tosky 2024 Depo. 11:15-22**).

Q. And when you went and loaded that dirt up into these trucks, was D.R. Horton there?

A. They were probably on the site but –

Q. Were they there watching the dirt that’s moved, whether it good, bad or something else?

A. No, sir.

Q. And did they know - - did you tell them when you were going to take dirt off the site?

A. No, sir.

Q. Did you tell them how much dirt you were going to take off the site other than the general, original engineering plans?

A. No, sir.

Q. Did you tell them who was going to be taking the dirt off the site?

A. No, sir.

Q. Did you tell them who was going to be loading the dirt on the site?

A. No, sir.

Q. Did D.R. Horton direct you in the way that you would either remove, haul, or pick up that dirt?

A. Absolutely not.

Q. Did they direct you in any way: Time, location, purpose, transportation, delivery, any of those things on that dirt?

A. No, sir.

Q. It is possible they didn't even know it was happening?

A. Probably possible.

Q. And didn't know where it was going.

A. No, sir.

Q. And didn't know what it was going to be used for.

A. No, sir.

(Ex. 2, Tosky 2024 Depo. 125:13-126:13).

Therefore, D.R. Horton was not in a joint enterprise with the Dump Truck Operators as D.R. Horton did not have the right to control the work of its general contractor, KSB, or the work of KSB's subcontractors, the other Dump Truck Operators, on the Cypress Ridge project.

2. D.R. Horton is Not Negligent as it Did Not Negligently Entrust Anything to the Dump Truck Operators

D.R. Horton cannot be liable for negligence as D.R. Horton did not negligently entrust a dump truck or dirt to the Dump Truck Operators.

The theory of negligent entrustment provides the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment. Whaley v. Amazon.com, 2:23-cv-04317-DCN (D.S.C. Feb. 1, 2024). In Whaley, the court found that Plaintiff's negligent entrustment claim survived Defendant's motion to dismiss as the Complaint stated the subcontractor, Carcast Express, entrusted its truck and that Amazon, who subcontracted Carcast Express, entrusted its trailer to the truck driver that injured Plaintiff in a motor vehicle collision. Id.

This case is distinguishable from Whaley. Here, Plaintiff has not submitted evidence that D.R. Horton entrusted the dump truck or any equipment to the Dump Truck Operators. In fact, the evidence shows that D.R. Horton did not provide any equipment to the Dump Truck Operators.

D.R. Horton, as a developer/property owner, hired KSB as a general contractor, not as a subcontractor as Amazon did in Whaley, to perform horizontal work and KSB then subcontracted the dirt hauling portion of its scope of work. (Ex. 2, Tosky 2024 Depo. 32:4-14). Jacob-Au Trucking, not D.R. Horton or KSB, owned the truck(s) it operated. (Ex. 2, Tosky 2024 Depo. 92:25-93:2 and Tosky 2024 33:10-11). Additionally, there is no case law that negligent entrustment can be extended to dirt and not to a vehicle.

Thus, D.R. Horton did not negligently entrust anything to the Dump Truck Operators.

3. **D.R. Horton is Not Vicariously Liable for the Acts of the Dump Truck Operators**

D.R. Horton is not vicariously liable for the acts of KSB or their subcontractor, the Dump Truck Operators, because they are independent contractors and D.R. Horton did not have the right to control them.

As a general rule, a principal is not vicariously liable for the negligent acts of an independent contractor. Ruh v. Metal Recycling Servs., LLC, 436 F. Supp. 3d 844, 845 (D.S.C. 2020). An employer is not liable for the torts of an independent contractor committed in the performance of contracted work. Id. Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work.” Whaley v. Amazon.com, 2:23-cv-04317-DCN (D.S.C. Feb. 1, 2024). In evaluating the right of control, the court examines four factors: "(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; [and] (4) right to fire. Id.

As explained by the Whaley court,

In Whaley, the court found that Plaintiff’s claim of vicarious liability survived a motion to dismiss. The action arose out of a tractor-trailer collision between Whaley and defendant Yahia who

was a commercial motor vehicle operator for Carcast Express. At the time of the accident, the Amazon Defendants had entered into an agreement with Carcast Express to participate in the Amazon Relay Program. The Agreement between the Amazon Defendants and Carcast Express required Carcast Express and its employees and drivers, including Yahia, to comply with the Agreement, which included, inter alia, Amazon's Code of Business Conduct and Ethics and Amazon's Supplier Code of Conduct. The Agreement also specified that Amazon would retain control of many aspects of transportation related services, such as receiving, loading, storing, transporting, delivering, and unloading Amazon products, as well as complying with Amazon and any third party's safety and security policies related to premises and cargo. The Complaint also alleged that a truck driver's participation in the Amazon Relay Program—even as an employee of a participating trucking company such as Carcast Express—requires that truck driver to download the Amazon Relay phone app. That driver thereafter uses the app to receive Amazon assignments, to communicate directly with Amazon, to view and manage load status, report delays, and to use commercial navigation. For navigation, the app generates a map with an exact route the driver must follow and dictates the stops and delivery times on that map. Additionally, Amazon grades the drivers who use the Amazon Relay Program app based on individual performance, in addition to the carrier's overall performance.

Additionally, the complaint alleges that Carcast Express owned the tractor and the Amazon Defendants owed or leased the trailer which Yahia was using at the time of the accident. The Amazon Relay Program app also automatically generated invoices to pay truck drivers. Altogether the court found that Whaley had pleaded facts plausible to indicate that Amazon Defendants exerted sufficient control over Yahia such that he acted as their agent and not as an independent contractor. Thus, the court denied the motion to dismiss on the claims of vicarious liability. Id.

Unlike in Whaley, D.R. Horton did not have the right to control the Dump Truck Operators.

Contrary to Whaley, D.R. Horton hired KSB as a general contractor, not as a subcontractor, and KSB's ICA specifically denounced control instead of retaining control over aspects of KSB's work. (See ¶2 of Ex. 1 KSB ICA)

Furthermore, this case is distinguishable from Whaley as D.R. Horton did not provide the Dump Truck Operators with any assignments, communicate directly with the Dump Truck

Operators about how to perform their work, provide a map with a route for the Dump Truck Operators, specify when the Dump Truck Operators were to haul the dirt, or judge the Dump Truck Operators independent performance. D.R Horton also did not provide the Dump Truck Operators with any equipment like the Amazon Defendants in Whaley. (Ex. 2, Tosky 2024 Depo. 92:25-93:2 and Tosky 2024 33:10-11). Additionally, D.R. Horton did not pay the Dump Truck Operators, Jacob-Au Trucking or Alfredo Uriostegui, or generate invoices for any of the Dump Truck Operators unlike the Amazon Defendants in Whaley. (Ex. 3, O'Sako Depo. 163:21-164:7 and Ex. 2, Tosky 2024 76:24-77:7). Finally, D.R. Horton did not have the right to fire Jacob-Au Trucking or Alfredo Uriostegui as they were a subcontractor of its general contractor KSB and D.R. Horton did not know that KSB subcontracted the dump truck portion of its scope of work. (Ex. 2, Tosky 2024 Depo. 125:13-126:13).

Therefore, D.R. Horton is not vicariously liable for the negligent acts of its general contractor KSB or for any negligent acts of KSB's subcontractors, Jacob-Au Trucking and Alfredo Uriostegui, as D.R. Horton did not have the right to control these entities.

4. D.R. Horton Was Not Negligent in its Selection of the Dump Truck Operators

D.R. Horton was not negligent in its selection of the Dump Truck Operators because D.R. Horton did not select or hire Jacob-Au Trucking or Alfredo Uriostegui. D.R. Horton hired a licensed qualified general contractor according to the state, the risk of harm was low, and D.R. Horton's selection of KSB is not the proximate cause of Plaintiff's accident.

As a general rule, the principal is not vicariously liable for the negligent acts of an independent contractor. Ruh v. Metal Recycling Servs., LLC, 436 F. Supp. 3d 844, 845 (D.S.C. 2020). There can be no recovery against the principal unless the plaintiff separately proves the negligence of the principal in selecting that particular independent contractor and that the

principal's negligence was a proximate cause of the alleged injuries. Id. The features to consider analyzing future cases for negligent selection of an independent contractor are (1) that the defendant principal did not exercise reasonable care; (2) the risk of physical harm unless done skillfully and carefully; (3) selecting a competent and careful contractor; and (4) the negligence of the principal was a proximate cause of the physical harm. Id.

As explained by the Ruh court,

In Ruh, the Supreme Court certified that a negligent selection cause of action could be brought by an injured plaintiff against a cargo company for hiring an independent trucking company that was involved in an accident that injured plaintiff. The plaintiff must establish by proof a standard of care for selecting a contractor for the particular work and that the principal breached that standard. Most participants in the modern economy already act reasonably in selecting contractors. One who employs a contractor to perform relatively simple and safe work within the contractor's field is entitled to assume that a contractor of good reputation is competent to do such work safely. The principal's liability is contemplated only when the work of the contractor involves a risk of physical harm unless it is skillfully and carefully done. Thus, the principal should make reasonable inquiry into the extent to which the work the contractor is being hired to complete involves danger, a foreseeable risk of physical harm, to third parties. A more risky job generally requires a higher level of competence and care. A contractor hauling toxic chemicals on public highways, for example, needs expertise and equipment, and must act with a level of care, that would not be required for a contractor hauling paper products. Thus, hiring a trucking company to haul paper products may require no more than a surface level assessment of competence. The risk associated with delivering newspapers is unlikely to result in serious physical harm or property damage.

Competent and careful, denotes a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable [principal] would realize that a contractor must have in order to do the work . . . without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary. It is necessary to show that the harm shall result from some quality in the contractor which made it negligent for the employer to entrust the work to him. Sticking with the trucking example to illustrate the point, if a principal hires a

contractor unqualified to handle emergencies that may arise while hauling toxic chemicals, the principal is negligent in hiring the contractor. But if the contractor causes an accident by negligently failing to yield the right of way, and the dangerous quality of his cargo plays no part in the accident or injury, then the plaintiff will be unable to establish cause-in-fact and thus unable to establish proximate cause. Even if the defendant/principal was negligent in hiring a contractor because he had no experience with this particular type of job, the accident resulted from a completely different error, the accident was no more probable because the contractor was inexperienced. Id.

Here, unlike in Ruh, D.R. Horton hired KSB as a general contractor and not as a subcontractor. Additionally, as contemplated in Ruh, D.R. Horton used reasonable and common care in selecting KSB as its general contractor. When selecting contractors, including KSB, D.R. Horton looks at past performance and recommendations. Jared O’Sako, Land Development Project Manager of D.R. Horton, stated in his Deposition that:

A. The process would be – on the actual selection of the contractor?

Q. Correct. Selection and ultimate hiring.

A. Okay. The process is you bid it out, review, compare bids. Review, compare schedules. Because oftentimes, we just ask them to turn in your bid and then turn in what your timeline for you building the project. We -- oftentimes, we don't set the --we don't set the deadline. They set -- they set the deadline. They tell us what they can do. And so they provide us with a schedule. And then, based on -- I guess the next thing would be their history with the different groups that I have a relationship with, including the engineers, and their past performance, whether they be recommended; or current workload, their ability to perform the work.

(Ex. 3, O’Sako Depo. 42:22-43:24).

KSB also used reasonable care in hiring Jacob-Au Trucking as it was previously recommended by another subcontractor. **(Ex. 2, Tosky 2024 Depo. 48:1-5).** Additionally, KSB’s ICA requires KSB to have insurance and to meet all legal requirements. (See **Ex. 1, KSB ICA** and **Ex. 3, O’Sako Depo. 125:8-11 and 60:12-13).**

Furthermore, as discussed in Ruh, the risk of harm associated with the Dump Truck

Operators' scope of work was low. At the time of Plaintiff's accident, KSB was working as a general contractor on Cypress Ridge Phase 7 and the RV/boat parking which only required hauling on site. (**Ex. 4, Tosky 2021 Depo. 36:12-37:6** and **Ex. 3, O'Sako Depo. 75:5-11**). The Dump Truck Operators' scope of work of hauling dirt is akin to the example in Ruh of hauling paper products which Ruh contemplated was unlikely to result in serious physical harm.

Additionally, as contemplated in Ruh, KSB possesses significant knowledge and skill in the scope of work of horizontal construction as Kenneth Tosky, the owner of KSB, had twenty-seven years of experience in the horizontal process before working on D.R. Horton's Cypress Ridge project and holds an unlimited builder's license which covers horizontal work. (**Ex. 2, Tosky 2024 Depo. 28:1-21 and 6:25-7:6** and **Ex. 6, KSB License**). The other Dump Truck Operators also possessed the necessary skill, experience and equipment as KSB had used Jacob-Au Trucking and Alfredo Uriostegui prior to KSB's work on D.R. Horton's Cypress Ridge project and they had previously been recommended to KSB by another subcontractor (**Ex. 2, Tosky 2024 Depo. 48:1-5 and 32:15-35:24**). The Dump Truck Operators had access to the equipment and personnel necessary to complete the scope of work as KSB would rent necessary equipment for jobs and Jacob-Au Trucking and Alfredo Uriostegui owned their dump trucks (**Ex. 4, Tosky 2021 Depo 32:15-36:9** and **Ex. 3, O'Sako Depo. 41:19-44:15 and 69:9-19**).

Finally, Plaintiff cannot prove that D.R. Horton's selection of KSB proximately caused Plaintiff's accident. As contemplated in Ruh, even if D.R. Horton was negligent in hiring KSB because they had no experience with this particular type of job, which D.R. Horton expressly denies, if the accident resulted from a completely different error, the accident was no more probable because the contractor was inexperienced, and the Plaintiff cannot say that D.R. Horton's selection of KSB was the proximate cause of Plaintiff's accident. As explained in Ruh, if the

accident was caused by a traffic violation and the dangerous quality of his cargo played no part in the accident or injury, then the plaintiff will be unable to establish cause-in-fact and thus unable to establish proximate cause. Here, as explained in Ruh, the accident was caused by a traffic violation, the Dump Truck Operator crossing the center line, and the allegedly dangerous cargo played no part in the accident or injury to Plaintiff. (See Complaint ¶2, **Ex. 2, Tosky Depo. 2024 65:9-66:17**, and **Ex. 5, McGilton Depo. 30:3-5 and 32:24-33:25**). Thus, Plaintiff cannot establish that D.R. Horton's selection of the KSB proximately caused Plaintiff's accident.

Therefore, D.R. Horton's selection of the KSB and in turn, KSB's selection of the other Dump Truck Operators, was not negligent as D.R. Horton used reasonable and ordinary care in selecting KSB, the scope of work of KSB and the other Dump Truck Operators involved a low risk of harm, the KSB was competent and careful, and D.R. Horton selection of KSB as well as KSB's selection of the remaining Dump Truck Operators did not proximately cause Plaintiff's accident.

IV. PLAINTIFF'S ARGUMENTS

Plaintiff's arguments against summary judgment in its brief and at the hearing were insufficient to overcome summary judgment. Plaintiff argued that D.R. Horton "hired Kenneth Tosky a/k/a Kennath Scott Builders," who was not the driver or the company responsible for the accident, "because he was married to D.R. Horton's sales office manager." Plaintiff's Brief in Opposition to D.R. Horton's Motion for Summary Judgment ("Plaintiff's Brief"), p. 4. The Plaintiff further argued that D.R. Horton "never asked Kenneth Scott Builders for a roster of the motor carriers it would used (sic) to move dirt to and from D.R. Horton's project." Plaintiff's Brief, p. 4. Then, Plaintiff states that "D.R. Horton was aware that dirt was being removed from its project site by Kenneth Scott Builders, and that . . . Kenneth Scott Builders was moving dirt from their site to another site." Plaintiff then reaches the irrelevant conclusion that "there is no evidence that D.R.

Horton performed any due diligence before retaining Kenneth Scott Builders.”

The Plaintiff then improperly cites Ruh v. Metal Recycling Servs., Inc., 439 S.C. 649, 889 S.E.2d 577 (2023) in support of its argument against summary judgment. The party responsible for the accident is one Alfredo Uriostegui and Jacob-Au Trucking. Under the law set forth in Ruh, **the principal in an independent contractor relationship** may be subject to liability for physical harm **proximately caused by the principal’s own negligence in selecting the independent contractor.**” Rhu, 439 S.C. 649, 652, 889 S.E.2d 577, 579 (2023) (emphasis added). Here, the Plaintiff’s only “summary judgment evidence” is that D.R. Horton allegedly was negligent in hiring its independent contractor, Kenneth Scott Builders. There is no factual dispute that the party who caused the accident, Alfredo Uriostegui and Jacob-Au Trucking, were not in an independent contractor relationship with D.R. Horton. Rather, Kenneth Scott Builders is the principal in that independent contractor relationship. Accordingly, the Ruh case is inapposite. It is a giant leap and would be improper to extend the Ruh holding to a party that is not a principal in an independent contractor relationship with the actor who caused the accident.

Plaintiff also argued, inexplicably, that the “joint enterprise” doctrine somehow applies in this case. The record is completely devoid of any evidence that D.R. Horton is a “joint enterprise” with the party who caused the accident, Mr. Uriostegui. The Plaintiff argues, without any evidentiary support or cites to the record, that “Alfred Uriostegui was utilized as an employee” by Kenneth Scott Builders.” Plaintiff’s Brief, p. 13. He then argues, likewise without any evidentiary support, that D.R. Horton and Kenneth Scott Builders “merged into a Joint Enterprise (sic), with a common purpose of developing (a neighborhood that is not near the accident site) and moving dirt within, to, and away from the same.” This argument, in addition to being unsupported by the record, borders on the frivolous.

In cases closely on point, the South Carolina courts have held that in the case of a vehicle accident, to establish joint enterprise liability, there must be a common purpose or community of interest, and each party “must have an equal right to control the direction and management of the vehicle.” Pruitt v. Bowers, 330 S.C. 483 (1998). The Pruitt case involved an attempt on the part of the plaintiff to have a passenger adjudged liable for a driver’s accident resulting from drunk driving. The passenger had consumed alcohol and marijuana with the driver, and encouraged him to drive even knowing that the driver was impaired. The court held that in order to judge the non-driver a proximate cause of a third person’s injuries in a car wreck, there must be evidence that the non-driver had control over the vehicle. The Pruitt court also cited Padgett v. Southern Ry. Co., 219 S.C. 353, 65 S.E.2d 297 (1951). In that case, the plaintiff’s intestate was killed in an accident on a railroad track owned by the railroad defendant. The court held that in order to constitute a joint enterprise so that the negligence of the driver of an automobile may be imputed to an occupant, there must be a common purpose and a community of interest in the object of the enterprise and **an equal right to direct and control the conduct of each other with respect thereto** (emphasis added).

The “joint enterprise” theory was also shot down in a summary judgment case in Peoples Fed. Sav. & Lan Ass’n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 425 S.E.2d 764 (1994). In that case, the plaintiff sought to recover against a lender as a “joint enterprise” with a developer. Citing Spradley v. Houser, 247 S.C. 208, 146 S.E.2d 621 (1966), the court held that in order to constitute a joint enterprise, there must be a common purpose and community of interest in the object of the enterprise **and an equal right to direct and control the conduct of each other with respect thereto**. Peoples Fed., 425 S.E.2d 764, 774 (1992).

There simply is no evidence to support a “joint enterprise theory” in this case.

V. CONCLUSION

Based on the foregoing, Plaintiff has not met its burden of proof, and therefore, D.R. Horton's Motion for Summary Judgment on Plaintiff's claims should have been granted. D.R. Horton respectfully request that this Court reconsider its Order denying its summary judgment and GRANT D.R. Horton's Motion for Summary Judgment.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

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June 13, 2024



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tesley DBA Kenneth Scott Builders ("Contractor")
 Sole Proprietorship ☐ Partnership ☐ Corporation ☒ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-2393282
 Name of Owner(s)/Officer(s): Kenneth J. Tesley
 Division Name: COASTAL CAROLINA Area Name: HILTON HEAD / SAVANNAH Assigned Vendor No.: 2016181
 Address for All Notices: PO Box 1590
 City: Bluffton State: SC Zip Code: 29910
 Telephone: 843-247-1025 Fax: 843-813-3491 E-Mail Address: Kenc@KennethScottBuilders.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February 2016 between DR Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 28-4-30 AND 28-4-50 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February 2016.

Owner:
By: [Signature]
Name: RON BUNNIA
Title: ASSISTANT VICE-PRESIDENT

Contractor:
By: [Signature]
Name: Kenneth Tesley
Title: Owner

INITIALS: OWNER [Initials] CONTRACTOR [Initials]

AGREES THAT OWNER DOES, AND WILL, NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Orders, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and those joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("Purchase Order"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("Inspector") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which

INITIALS: OWNER



CONTRACTOR



the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("Waste"), caused by its operations and shall remove all of Contractor's materials at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers; (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home; and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

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8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

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11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, e, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL policy shall not contain a deductible or self-insured retention of more than \$25,000.00, and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc., (collectively "Horton") as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs to complete, repair, or replace, plus any related costs or damage including re-inspection fees, with any excess to be paid to Contractor. If such costs exceed the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens

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are filed against the job location as a result of Contractor's acts or omissions, (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claims, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

INITIALS: OWNER  CONTRACTOR 

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

SOUTH CAROLINA VERSION (REV. 22 JUNE 2015)

INITIALS: OWNER

CONTRACTOR



GEORGIA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Kenneth Tashy DBA Kenneth Scott Builders,
 ("Contractor")
 Sole Proprietorship Partnership ☒ Corporation ☐ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 27-0393282
 Name of Owner(s)/Officer(s): Kenneth S. Tashy HT-201618
 Address for All Notices: PO Box 1590
 City: Blackshear State: SC Zip Code: 29910
 Telephone: 803-247-1025 Fax: 803-815-3410 E-Mail Address: KSC@KennethScottBuilders.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 17 day of February, 2016, between
D.R. Horton, INC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Orders, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 17 day of February, 2016

Owner:

By:

Name:

Title:

RON BUNN
ASSISTANT VICE-PRESIDENT

Contractor:

By:

Name:

Title:

Kenneth Tashy
Owner

INITIALS: OWNER RB

CONTRACTOR KT

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made) of all items for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("**Purchase Order**"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "**Requirements**"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, **INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS** from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("**Inspector**") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("**Change Order**") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("**Waste**"), caused by its operations and shall remove all of Contractor's materials

INITIALS: OWNER CONTRACTOR

at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHIA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

INITIALS: OWNER  CONTRACTOR 

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO DEFEND, INSURE, INDEMNIFY OR HOLD INDEMNITEE HARMLESS FOR LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv)

INITIALS: OWNER CONTRACTOR

contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL Policy shall not contain a deductible or self-insured retention of more than Twenty Five Thousand Dollars (\$25,000.00), and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) Employer's Liability Insurance in an amount not less than Five Hundred Thousand Dollars (\$500,000.00) for each accident for bodily injury, Five Hundred Thousand Dollars (\$500,000.00) policy limit for bodily injury by disease, and Five Hundred Thousand Dollars (\$500,000.00) for each employee for bodily injury by disease; (c) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (d) Commercial Automobile Liability Insurance coverage with limits of not less than Five Hundred Thousand Dollars (\$500,000.00) per person for bodily injury and Five Hundred Thousand Dollars (\$500,000.00) for property damage per occurrence specifying "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc., (collectively "Horton") as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 0704 and CG 2037 0704). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits and any excess or umbrella coverages. Contractor shall immediately notify Owner in writing of any incident, occurrence, injury, or situation related in any way with the Work which may give rise to any claim or loss under any of the insurance coverages required by this Section 11.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

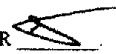
11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor

INITIALS: OWNER  CONTRACTOR 

fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("**Disputes**") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("**FAA**"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("**AAA**") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor

INITIALS: OWNER M CONTRACTOR JS

agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of Georgia.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

GEORGIA VERSION (REV. February 11, 2015)

INITIALS: OWNER *W* , CONTRACTOR *S*



Exhibit "A" Part I-General Scope Of Work

General & Miscellaneous

- Mobilization
- Layout and staking
- Build construction entrance
- Asbuilts
- Installation of stop and street signs
- Installation of conduit

Clearing and Demolition

- Clear and grub site

Drainage

- Installation of RCP
- Insulation of HDPE
- Install catch basins, curb inlets, and junction boxes

Erosion Control

- Tree protection
- Temporary gravel
- Silt fence
- Seeding and sod
- Rip-rap sediment basin

Initials: Contractor

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DR Horton

A handwritten signature in black ink, appearing to be "JH", written over a horizontal line.

KDC 000269

Earthwork

- Strip/respreads topsoil
- Off-site fill
- Demucking and backfill
- Rough grade

Grading

- Fine grade for curb and base
- Fine grade shoulders and easements

Asphalt Paving & Pavement Marking

- Asphalt surface and binder

Concrete

- Concrete curb
- Installation of handicap ramps

Utilities

- Utility layout and record drawings

Sanitary Sewer

- Installation of sewer
- Pump stations

Water Distribution

- Installation of water

Initials: Contractor 

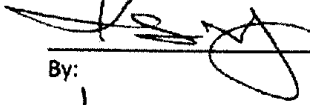
DR Horton 

KDC 000270

Contractor

Owner

Kenneth Tasly DBA Kenneth Scott Builders D.R. Horton, Inc.
Company Name:



By:

Ken S. Tasly

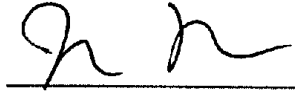
Name:

Owner

Title:

2/12/16

Date:



By:

Ron Bunn

Name:

A.V.P

Title:

2/22/16

Date:

Initials: Contractor 

DR Horton 

KDC 000271

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
JASPER COUNTY

DEPOSITION OF KENNETH TOSKY

MARK W. McGILTON,

Plaintiff,

Case No. 2021-CP-27-00069

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC. and LOTTY TRUCKING,
LLC t/k/a RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

DEPONENT: KENNETH TOSKY

DATE: April 19, 2024

TIME: 10:26 A.M.

LOCATION: SHELTON LAW FIRM
HILTON HEAD ISLAND, SOUTH CAROLINA

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Exhibit No. 1*	April certificate of insurance with Builders Mutual and Kenneth Scott Builders	75
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Exhibit No. 3	D.R. Horton's South Carolina independent contractor agreement with Kenneth Scott Builders	75

*Retained by Mr. Imhoff

KENNETH TOSKY,

having been first duly sworn, was examined and
testified as follows:

EXAMINATION

BY MR. IMHOFF:

Q. Mr. Tosky, my name is Jason Imhoff, and
I represent D.R. Horton in these -- I guess
they're cases that were ultimately brought by
Mr. McGilton.

D.R. Horton was not in the lawsuit when
you were deposed the first time, but we do have
the benefit of your deposition transcript so we
don't have to replot all that ground as I was
telling you before the deposition.

Have you ever -- other than that time,
have you ever had your deposition taken?

A. Yes, sir.

Q. How many times?

A. This will be the fourth time.

Q. Fourth time, all right. So you're
generally familiar with the deposition process in
South Carolina?

A. Yes, sir.

Q. All right. I have to say a couple of
things. One, if you have any questions, ask me.

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1 You can't ask your attorney or to phone a friend,
 2 that kind of thing.
 3 A. I understand.
 4 Q. If I can't handle it, then we'll talk
 5 and try to resolve whatever issue you have, okay?
 6 A. Understood.
 7 Q. Sometimes I ask bad questions or you're
 8 listening to something else or thinking about the
 9 last question. If you didn't hear my question or
 10 you don't understand it, please ask me to repeat
 11 it or rephrase it or explain it, and I'll be
 12 happy to do that, okay?
 13 A. Yes, sir.
 14 Q. If you don't do that, I'll assume that
 15 you understood and you're answering that
 16 question; is that fair?
 17 A. That is fair.
 18 Q. All right. Take a break anytime you
 19 want to. Comfort, you know, temperature or water
 20 or whatever, just let us know, okay?
 21 A. Understood.
 22 Q. All right. State your full name if you
 23 would, please.
 24 A. Full name?
 25 Q. Full name.

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1 A. Kenneth Scott Tosky.
 2 Q. And have you read your deposition in
 3 this case?
 4 A. I've summary reviewed it, yes, sir, but
 5 not recently.
 6 Q. I understand. Were you given an
 7 opportunity to read it and correct any
 8 information in it that was transcribed
 9 incorrectly or you may have misunderstood the
 10 question?
 11 A. Yes, sir.
 12 Q. You were provided that opportunity?
 13 A. Yes, sir.
 14 Q. Did you change anything?
 15 A. There was a couple items, and I don't
 16 recall what those were. It was minor details.
 17 Q. Other than those changes that you made,
 18 do you believe that your answers were honest and
 19 correct in that deposition?
 20 A. Yes, I do.
 21 Q. Let me go -- because I was late, I'm
 22 going to get sort of to the point of it, right to
 23 it, okay?
 24 A. Yes, sir.
 25 Q. You have an unlimited commercial

1 builder's license; is that right?
 2 A. That is correct.
 3 Q. And under that unlimited commercial
 4 license, that includes grading and utility work
 5 and that type of thing?
 6 A. That is correct.
 7 Q. So horizontal work?
 8 A. Horizontal and vertical.
 9 Q. Is there a -- and for D.R. Horton in
 10 Cypress Ridge, you were doing horizontal work,
 11 right?
 12 A. That is correct.
 13 Q. Do you know if D.R. Horton has a license
 14 to do that work?
 15 A. No, sir, I do not know.
 16 May I expand?
 17 Q. Yes, please.
 18 A. So we had priced their commercial
 19 building on the Cypress Ridge, phase 7, that we
 20 were performing the horizontal, and they came
 21 back and did it themselves. I believe they had a
 22 member on staff that had a license.
 23 Q. For vertical construction?
 24 A. For vertical.
 25 Q. And I --

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1 A. Which, in general contracting, whether
 2 you're unlimited or not, you can do horizontal or
 3 vertical.
 4 Q. That was one of my next questions. Do
 5 you need a specialty license or some type of
 6 specialty training or specialty oversight to do
 7 horizontal work?
 8 A. No, sir.
 9 Q. And I've already read your deposition.
 10 In your previous deposition, you said that D.R.
 11 Horton was the developer and owner; is that
 12 right?
 13 A. The developer and -- I don't know their
 14 specifics on the back end, but I would assume
 15 they were the owner.
 16 Q. And do you know the process of getting
 17 the horizontal work done on a raw piece of
 18 property?
 19 A. Yes, sir.
 20 Q. What is that process?
 21 A. Would that be in reference to this
 22 project or any project?
 23 Q. Let's go generally first.
 24 A. Generally. You go through the
 25 development permit process, which is usually

Page 25

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1 Q. Sure.

2 A. So D.R. Horton --

3 Q. Depends on what you're going to say.

4 Let's go off the record first.

5 A. Well, it's funny because we do a lot of
6 work for a lot of developers. D.R. Horton, our
7 personal vehicles, Kenneth Scott Builders, have
8 to have special license -- or special insurance
9 to drive on a project, ours, if it is a part of
10 what they require from my COI to them, period.

11 So that's what I want to say about that.
12 It's a very difficult process, and they make it a
13 difficult process for that reason.

14 Q. Who does?

15 A. The developer.

16 Q. D.R. Horton or any developer?

17 A. Any developer. It doesn't -- they're
18 more difficult than most, but me, as an employee
19 of Kenneth Scott Builders, as Kenneth Scott
20 Builders, I have to have a particular COI that
21 satisfies their contract, and it states it in the
22 contract.

23 Q. And is that the additional insured
24 provision and the policy amount provisions and
25 that type of thing?

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1 A. That is correct.

2 Q. Because I got here late, I didn't pull
3 this stuff up.

4 A. No problem.

5 Q. So we're going to take a break and then
6 I'll pull those things up but I don't want to
7 make you wait anymore.

8 A. No problem.

9 Q. But we'll go over that.

10 MR. IMHOFF: Do you mind if I get a
11 coffee?

12 THE WITNESS: No. Go ahead.

13 (Off-the-record discussion.)

14 Q. All right. When you were in the Army,
15 did you have a specialty?

16 A. I did.

17 Q. Was it crane operator?

18 A. 62 foxtrot, crane operator.

19 Q. Tell me what licenses either you or
20 Kenneth Scott Builders holds.

21 A. Unlimited GC in the state of South
22 Carolina, unlimited GC in the state of Georgia,
23 all local licenses -- and there's numerous. We
24 have them in Charleston, City of Charleston,
25 Beaufort County, Town of Hilton Head, City of

1 Hardeeville, Pooler. Those are the local

2 jurisdictional. But the power ones are for the
3 state of Georgia and state of South Carolina.

4 And I'm in the process of testing for my state of
5 Florida.

6 Q. So you're unlimited in both South
7 Carolina and Georgia?

8 A. That is correct.

9 Q. Do you have any -- as a commercial
10 builder; is that right?

11 A. Commercial, yes, sir, and residential.
12 It all falls under the same -- I can do
13 residential, commercial.

14 Q. You can do anything with your license;
15 is that right?

16 A. That is correct.

17 Q. You're not -- let me say it differently.
18 You're not prevented from any particular type of
19 construction work with your particular license?

20 A. As an unlimited, that is correct.

21 (Off-the-record discussion.)

22 Q. Do you have any specialty licenses in
23 addition to your unlimited, just because you've
24 obtained them over the years?

25 A. No, sir.

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1 Q. What kind of training and/or education
2 do you have in being a grading contractor or a
3 horizontal general contractor?

4 A. 27 years experience. And that started
5 in Maryland right out of the Army. I tried to
6 come out and be a crane operator, and all they
7 wanted to do was hire me as an oiler because it's
8 all union. So I jumped on a dump truck and drove
9 a dump truck for an Italian utility contractor up
10 there and just worked my way up and went through
11 the whole horizontal process.

12 Moved down here and went to work for
13 Malphrus Construction, the one that went out of
14 business, which was one of the largest
15 contractors in this -- in the southeast. I was a
16 project manager for them. And I had built a
17 couple houses prior to that, and I decided I
18 wanted to get back into the building. So it's
19 strictly experience, OSHA training. There's been
20 a lot of courses that I've taken, but most of
21 it's just personal knowledge of experience.

22 Q. Yeah. Sometimes that's overlooked. I
23 mean, on-the-job training and experience is
24 sometimes overlooked in lieu of going to classes
25 or having a degree.

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1 A. And they really don't teach you in
2 classes. You know, it's not -- I have an
3 architect that's one of my -- he's actually my
4 project manager, and what he learned in
5 architectural school from Clemson -- I pick on
6 Clemson because I'm an FSU fan, but he -- you
7 know, is not -- a lot of it's not applicable to
8 the actual situation. You have to go to work for
9 an architect and learn, the same as an attorney
10 or paralegal, whatever the situation.

11 Q. I haven't learned anything since law
12 school. They cover it all.

13 A. Understood.

14 Q. You said that you were a tow truck
15 operator in a past life.

16 A. Dump truck.

17 Q. Dump truck. You know what? When I
18 wrote some stuff last night, I put tow truck.

19 A. That's okay.

20 Q. At the time that you were driving, were
21 there federal and state requirements for the safe
22 operation of tow trucks?

23 A. Of dump trucks?

24 Q. See. Did it again. Dump trucks.

25 (Off-the-record discussion.)

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1 A. It's okay. So from a driver standpoint,
2 I had to have the proper licensing. I had to
3 do -- I didn't do the maintenance on the truck,
4 but I'd check oil, check brake lines, stuff like
5 that. That more, to me, and knowing what I know
6 now is more the responsibility of the actual
7 company that is supplying the truck or supplying
8 the situation, where they need to meet --

9 State of South Carolina is so difficult.
10 We have purchased a dump truck, and the DOT
11 requirements and inspections is -- you almost
12 have to hire a person to handle it. It's so
13 convoluted. Convoluted is a bad word. It is so
14 regimented, okay, with what you have to do.
15 There's companies out there that offer the
16 service that do it. That's how complicated it
17 is. So, in answer to your question, at that
18 time, I was just -- I was driving a truck for a
19 company.

20 Q. Right.

21 A. I didn't know what they were dealing
22 with, what their paperwork or whatever they had.
23 I know what I had to do as a dump truck driver.

24 Q. How long ago was that?

25 A. 27 years ago when I first started.

1 Q. And over that 27 years, are you
2 generally familiar with the requirements for dump
3 truck drivers, maintenance, safe operation,
4 insurance, that type of thing?

5 A. I would say somewhat. Once I graduated
6 past the dump truck 27 years ago and started --
7 I'd pull up to the job site, get off the dump
8 truck at lunchtime. While they're all at lunch,
9 I'd get on a piece of equipment and learn how to
10 run a piece of equipment. That's how I grew in
11 the industry.

12 There for a long period of time, I was
13 more of a manager of operations. I don't -- I
14 carry a class A license. I've never driven a
15 tractor-trailer except to do my test, okay? So I
16 have driven -- I drove a -- the last time I drove
17 a dump truck is when I bought that new one and
18 brought it down from Virginia, so -- and that was
19 eight months ago.

20 So, to be quite honest, I'm not familiar
21 with the -- it's not something I do every day.
22 If you ask me about an excavator, I can tell you
23 the rollers, the idlers, I can tell you the
24 grease fittings, everything on it, because that's
25 what we do every day.

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1 Q. Well, let me go back to 2017, 2018. Let
2 me back up.

3 A. Yes, sir, I'm sorry.

4 Q. So when you were working in Cypress
5 Ridge, was that about 2017, 2018?

6 A. That sounds right.

7 Q. Time period?

8 A. Yeah.

9 Q. And did Kenneth Scott Builders have any
10 of its own dump trucks?

11 A. No, sir.

12 Q. Did it have to hire dump truck companies
13 or dump trucks from outside companies?

14 A. Yes, sir.

15 Q. And when you would hire dump trucks or
16 frankly any other large equipment operator, what
17 is the procedure for, you know, due diligence and
18 vetting them to make sure that they're legal and
19 safe?

20 A. The due diligence -- excuse me. You
21 know, and I'm just referencing the time period.
22 You know, when we hire contractors, we generally
23 ask for a COI. And at the time of Cypress
24 Ridge -- and I'll refer to Alfredo Trucking
25 because that's what this is about.

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1 Q. Jacob AU Trucking?

2 A. Jacob AU Trucking, I'm sorry. Again
3 it's been a good period of time here. So prior
4 to that time, he had -- his company had done
5 hauling for us. So if you're referencing Cypress
6 Ridge in particular, I can't say that I requested
7 anything from him at that time.

8 Because, prior to that, he did have the
9 proper insurance. And I went over this in my
10 previous deposition. He brought on another dump
11 truck. He had a lapse in his insurance, and I
12 was not aware of that.

13 Q. Do you know -- and again, we can look if
14 you want to refer to the document and see the
15 document, okay?

16 A. Absolutely.

17 Q. Do you know if Kenneth Scott Builders
18 was the certificate holder on the certificate of
19 insurance?

20 A. On Alfredo -- or Jacob AU Trucking?

21 Q. Well, let me ask it two ways: One, yes,
22 on Jacob AU Trucking, but, two, do you require
23 that you be added as a certificate holder on
24 their certificate of insurance if you know what
25 that means?

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1 A. I understand exactly what that means.
2 In most -- we do now, from an educational curve,
3 okay? At the time, when we do a job for like --
4 let's just use D.R. Horton, when we do our COI,
5 it must list them as additional insured in that
6 bottom box with specific language.

7 Q. Right.

8 A. Okay. We were not doing that at that
9 time.

10 Q. Let me make a distinction for you, okay?
11 And I may be wrong about this, but as I
12 understand it, you can have a certificate holder
13 or you can have an additional insured endorsement
14 or you can have both.

15 The certificate holder, as I understand
16 it, tells the insurance company or the insurance
17 agency that if that insurance lapses or is
18 canceled or isn't paid that they then have to
19 tell the certificate holder, Hey, that
20 certificate of insurance that our client gave you
21 is no longer valid. Did you know that?

22 A. I did know that. As long as you're
23 listed as the additional insured.

24 Q. Okay. And that may be true.

25 A. It is true.

1 Q. I thought you could be a certificate

2 hold and not an additional insured but --

3 A. So, you know, this is one of the
4 problems we have with our insurance industry, and
5 now we have checks and balances that we do it
6 ourselves. So we have a date register when we
7 know theirs is coming up on expiration, and we
8 send out a notice. I don't rely on the insurance
9 company anymore, because sometimes you get
10 notices; sometimes you don't. And that's
11 general -- that's just what it is.

12 Q. So let me go back. So at the time that
13 you were doing -- that you had hired Jacob AU
14 Trucking and that you were doing work on Cypress
15 Ridge, you were not requiring your subcontractors
16 to add Kenneth Scott Builders as an additional
17 insured?

18 A. No, sir.

19 Q. And as far as you know, were you
20 requiring your subcontractors to identify you as
21 a certificate holder who would be notified if the
22 insurance lapsed or was canceled or not paid?

23 A. I don't recall that.

24 Q. What other types of things were you
25 doing either at the time of or before the Cypress

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1 Ridge project to vet any subcontractors that were
2 working for you but specifically dump trucks?

3 A. Usually our subcontractor rental
4 trucking was kind of done by word of mouth. So
5 you're saying vetting. I didn't really vet, as
6 we don't now -- when you say vet, two things. I
7 mean, we're doing a big project over in the city
8 of Hardeeville. Number one, they all have to
9 have a certificate of insurance and we have to be
10 listed as additional insured, period.

11 Q. Okay.

12 A. Can't drive for us. They cannot
13 subcontract trucking. Cannot do anything until
14 we have that. Hence experience.

15 Q. Sure.

16 A. So -- but to vet, I don't -- and here's
17 what I've learned. By buying a dump truck,
18 the -- I don't even know how people get through
19 the process without -- I mean, the DOT
20 regulations, the inspections, I mean, you get
21 pulled over if you don't have the proper sticker
22 that has to be updated every couple months. I
23 mean, it's rigorous. I wish they had been doing
24 this a while back, but that's what it is now.

25 So you say vetting. We don't vet

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1 A. No, sir.

2 Q. What's the next commercial carrier that
3 comes to a site?

4 A. The large one would probably be the
5 drywall truck. They deliver the drywall.

6 Q. Sure. So another material delivery.

7 A. Yeah. And we have intermittent
8 deliveries, insulation, have subcontractors in
9 and out. You know, there's always some --

10 Q. Shingles?

11 A. Shingles.

12 Q. Sure.

13 A. Whatever it is. There could be -- with
14 cabinets, countertops, trim trucks, I mean, you
15 could be looking at 45 deliveries per project.

16 Q. Is a general contractor required to
17 check the commercial driver's license status of
18 each one of those subcontractors or material
19 providers?

20 A. No, sir.

21 Q. Are you to check the maintenance records
22 for each one of those commercial carriers?

23 A. No, sir.

24 Q. Do you know if you're to check anything
25 related to insurance, qualification, or

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1 maintenance of the vehicles for any of the
2 commercial carriers that come onto your site?

3 A. Being specific about insurance, or are
4 we talking about COI or insurance of the actual
5 vehicle?

6 Q. I was actually doing the whole thing,
7 so, yes, insurance for the vehicle, proper
8 licensure for the driver, proper maintenance for
9 the vehicle. Is a general contractor required to
10 check any of those things in the state of South
11 Carolina?

12 A. Insurance only.

13 Q. You're required to make sure they have
14 insurance?

15 A. If they're working for us -- no, we're
16 not required to check anything. What we require
17 is the insurance.

18 Q. Now, is that company that has a
19 commercial vehicle required to make sure that
20 their driver is properly licensed?

21 A. Absolutely.

22 Q. Are they required to make sure that
23 the -- they have proper insurance on their driver
24 in that vehicle?

25 A. What I know now, yes, sir.

1 Q. And are they required to do proper
2 maintenance and upkeep on those vehicles?

3 A. Absolutely.

4 Q. And then are they also required to do
5 periodic inspections or have some interaction
6 with whoever the governing entity is?

7 A. DOT, yes, sir.

8 Q. So the people operating and owning those
9 vehicles have that obligation, legally, agree?

10 A. The subcontractor, yes, sir.

11 Q. You as a general contractor aren't aware
12 that the general contractor has that obligation
13 legally; is that correct?

14 A. That is correct. We do not have that
15 obligation.

16 Q. Does the owner/developer have the
17 obligation to check the general contractor's
18 subcontractors' commercial driver's license,
19 insurance, or maintenance history?

20 A. Absolutely not.

21 Q. Do you know how long Jacob AU Trucking
22 had been operating as a commercial entity?

23 A. No, sir.

24 Q. How did they come to you?

25 A. I don't remember off the top of my head.

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1 I want to -- I don't even want to guess. I think
2 it was Sandhill Station. We had a trucking
3 subcontractor in there, and we needed additional
4 trucks, and they recommended Jacob AU Trucking.
5 I think that's what happened.

6 And if it wasn't that particular job --
7 that's usually -- I'll give you an example. Exit
8 5, we needed, you know, 50 different trucking
9 companies a day. A lot of them were referred by
10 other truckers. You know, that's kind of how you
11 locate people.

12 Q. Who was your project manager/site
13 manager for the work that was going on on Cypress
14 Ridge?

15 A. Gabrielle Tosky, my daughter.

16 Q. And how often would she be on the site?

17 A. Every day.

18 Q. Every day? Was she on the Cypress Ridge
19 site on the day of the accident?

20 A. I'm sure she was.

21 Q. Have you asked her what was happening on
22 the site that day?

23 A. I don't recall asking her anything, no.

24 I think the only thing I had said that morning,
25 we needed a couple loads of dirt, and that was

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1 we had to get rid of out at Cypress, yes, sir.

2 Q. And you take -- because you had too much
3 good dirt, you were taking it off site?

4 A. We had too much good dirt, yes, sir.

5 Q. I'm going to get into some things that
6 you may not remember, okay?

7 A. Absolutely. Go ahead.

8 Q. Do you ask D.R. Horton if you could take
9 that dirt, or is it sort of built into your
10 contract price that you'll be able to take and
11 reuse fill dirt somewhere else?

12 A. It is -- when we do a bid on a project,
13 we do a fill and balance sheet. You'll have
14 spoil -- you'll have spoils on topsoil. You may
15 or may not have spoils on select fill. And per
16 that balance sheet, we know how much we have to
17 take off site. We know what we need to bring
18 on-site. That would be in any job in general.

19 Q. And let me -- I'm just going to break it
20 down, okay?

21 A. Absolutely.

22 Q. So when you do an estimate and you know
23 you have to bring in a bunch of fill dirt, you
24 know that you're going to have to pay for the
25 dirt potentially.

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1 A. That's correct.

2 Q. And the transportation and then putting
3 it on-site, right?

4 A. That is correct.

5 Q. So your estimate goes up, right?

6 A. That's correct.

7 Q. If you have to take bad dirt off a site,
8 same thing, you need to estimate in how long it's
9 going to get up, get it into the truck that you
10 have to hire, and then go potentially have a dump
11 fee somewhere because it's bad dirt?

12 A. That is correct.

13 Q. Right? Now, the opposite side of that
14 is you have to -- there's a bunch of good fill
15 dirt on a site that you know that you can utilize
16 and/or sell off site, right?

17 A. That is correct.

18 Q. And so if you do your calculations
19 correctly, then you can actually put in a
20 contingent amount of money or use you can get out
21 of that extra fill dirt, and you could actually
22 lower your bid, right?

23 A. That is correct.

24 Q. But that doesn't have anything to do
25 with D.R. Horton. That's your internal

1 estimating and your expectations, right?

2 A. That is correct.

3 Q. There has been an allegation in this
4 case that D.R. Horton sold you fill dirt. Is
5 that true?

6 A. That is not true.

7 Q. Did you ever buy fill dirt from D.R.
8 Horton?

9 A. No.

10 Q. Did you ever tell D.R. Horton
11 specifically that you were taking fill dirt off
12 the D.R. Horton site?

13 A. No, sir.

14 Q. It's just part of your work, right?

15 A. It's a part of our schedule of what we
16 have for cuts and fills, that is correct.

17 Q. And it's part of the original
18 engineering documents about what needs to either
19 come onto or be taken off the site, directed by
20 the engineer, right?

21 A. That is correct.

22 Q. So if there was dirt coming off of
23 Cypress Ridge, would D.R. Horton have known about
24 it?

25 A. They would not have known.

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1 MR. SHELTON: What did he just say?
2 They would not have known?

3 THE WITNESS: They would not have
4 known about it.

5 MR. SHELTON: Thank you.

6 Q. Let me ask you about certain industry
7 standard. When any of the work that you've done
8 or been around or commercial general contractors
9 that you've worked for, have you ever seen a
10 commercial general contractor look into the
11 licensure status or maintenance status of a
12 commercial carrier on their site?

13 A. No, sir.

14 Q. There's been an allegation in this case
15 that Jacob AU or Alfredo's trucks were on-site
16 overnight or broke down. What do you know about
17 that?

18 A. I do know that I saw his site -- his --
19 and I stated it in a deposition, that his dump
20 truck was at the site at Cypress Ridge overnight.
21 I do not know what the situation with his truck
22 is. That's not for me. I don't know his
23 maintenance issues. But I do know it was there
24 overnight.

25 Q. Do you know if it was broken down?

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1 But also, I want to add to that that he
2 was hysterical. When he called me on the phone,
3 he was literally crying. So I knew it was bad at
4 that moment, and I immediately got in my truck
5 and drove down there to see if there was anything
6 I could do. But that's what I recall.

7 Q. So I'll ask you a series of questions.

8 A. Absolutely.

9 Q. Based on your observations and your
10 conversations with him, did anything lead you to
11 believe that the maintenance of the truck caused
12 the accident or was partially responsible for
13 part of the accident?

14 A. I can't even comment on that. No, sir.

15 Q. Did he say anything to you, that the
16 brakes didn't work or the brakes locked up or
17 something was wrong with the truck?

18 A. Not that I recall.

19 Q. So based on your conversations and your
20 observations at the site, did you come away with
21 any opinion of how the accident had happened?

22 A. Not -- I mean, I could see if you looked
23 down and looked back up, you could have veered
24 off to the left. I have no idea. I don't --
25 when you looked at the accident, it was like,

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1 man, this is kind of weird because literally the
2 one truck was pushed into the tree, which means
3 he would have had to go across the line.

4 Q. Into oncoming traffic?

5 A. Into oncoming traffic and pushed the --
6 but, again, I'm not an investigator. I have no
7 idea. I wasn't in that driver seat. I don't
8 know what -- I mean, for all I know, I mean,
9 let's be realistic, my negative thoughts were,
10 you know, dude might have been texting. I don't
11 know. I have no idea -- you know, we're all
12 responsible when we get behind the wheel of a
13 vehicle to make sure we make good decisions.

14 Q. Sure.

15 A. So I don't know. All I know is what I
16 saw indicated to me that somehow that truck got
17 across that yellow line. How he did it or how he
18 got there, I have no clue.

19 Q. The office building that you were
20 building at 1223 May River Road, who were you
21 building that for?

22 A. It was Geoff Block. I'm trying to
23 remember the -- RB Squared. I don't remember the
24 name of it, I'm sorry.

25 MR. SHELTON: The contract was with

1 Geoff Block.

2 Q. I had heard that it was a Dollar General
3 or something like that.

4 A. There was a Downtown Deli. The Dollar
5 General, we did some renovation to the outside of
6 the building. And then the corner building,
7 1223, was an office building.

8 Q. Was the renovations to the Dollar
9 General separate from this work --

10 A. That is correct.

11 Q. -- for the office building?

12 A. That is correct.

13 Q. Have you done work -- or I'm sorry.

14 Had Kenneth Scott Builders done work for
15 regional or national tract home builders prior to
16 this accident?

17 A. Small repairs. Nothing of the magnitude
18 of this one. And it turned into magnitude
19 because of the building undercuts and so forth.
20 We had done site development jobs but nothing of
21 that magnitude.

22 Q. Who had you done site -- who had Kenneth
23 Scott Builders done site development work before
24 this accident?

25 A. Sandhill development, which was a

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1 commercial -- it wasn't a residential, but it was
2 a commercial development, which is right on the
3 other side of Bluffton across from the movie
4 theater.

5 Q. Any others?

6 A. At that time, we'd -- so we were more --
7 we did a lot of commercial buildings with the
8 parking lots, things like that. So, again, the
9 magnitude of what we did for Cypress Ridge at the
10 time was probably our largest.

11 Q. At the time that you were hired by D.R.
12 Horton, were you an unlimited commercial builder?

13 A. I'm trying to remember when I got that
14 license, because you have to go through -- I
15 don't think I was at that time. I think I was --
16 there's five different classes. I think we were
17 class 4. For a class 5, you have to have an
18 audited statement and go through the bonding
19 processes, which is now -- I don't think we were
20 at that time, but I could be incorrect.

21 Q. Is the only difference between class 4
22 and class 5 financial stability of the company?

23 A. Yes.

24 Q. Yeah.

25 A. And, really, from a standpoint -- so an

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1 topsoil, where you have spoils in dirt, whether
 2 you have dirt coming in, that's all inclusive of
 3 that contract.
 4 I can't -- I don't remember the
 5 overburden quantities. I know we had overburden
 6 in topsoil, and we had overburden in select. And
 7 it wasn't a lot, so you -- as you're sitting
 8 there stating, are we stealing? We didn't steal
 9 anything --
 10 Q. And I'm --
 11 A. -- that wasn't inclusive of the
 12 contract.
 13 Q. I don't want you to believe that I am
 14 stating that you're stealing. I'm just asking
 15 you whether you were stealing.
 16 A. Absolutely not.
 17 Q. I'm not accusing you of it. I want to
 18 make sure you're aware of that.
 19 A. Understood.
 20 Q. Did your daughter -- is it Gabrielle?
 21 Is that correct?
 22 A. Gabrielle.
 23 Q. Did she tell you anything since the
 24 previous deposition that gave you the belief as
 25 you testified to earlier today that the dirt that

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1 Jacob AU Trucking dumped on May River Road came
 2 from Cypress Ridge?
 3 A. No. She didn't -- she wasn't sure if
 4 the truck had been loaded there. And, you
 5 remember, now we're working on four different
 6 parts of the site. If you've ever been to
 7 Cypress Ridge, it extends a long way, so no.
 8 Q. Would Jacob AU Trucking know where the
 9 dirt came from?
 10 A. I would assume he would.
 11 Q. And would you have any reason to dispute
 12 whatever Alfredo Uriostegui -- and that's
 13 U-R-I-O-S-T-E-G-U-I.
 14 A. I would say he just needs to provide the
 15 tickets that show. Remember, we submitted to you
 16 every ticket of everything.
 17 Q. And we will get to that a little bit
 18 later. And anytime that you, Kenneth Scott
 19 Builders, brought dirt off the Cypress Ridge
 20 site, it was purchased from D.R. Horton; is that
 21 fair to say?
 22 A. In the contract, yes.
 23 Q. And Kenneth Scott Builders obviously
 24 hired trucking companies, including Jacob AU
 25 Trucking, to transport the dirt off of the

1 Cypress Ridge site?
 2 A. That is correct.
 3 Q. And you had testified previously that
 4 Kenneth Scott Builders did work at Cypress Ridge
 5 that was outside of your main contracts.
 6 A. Under the change orders.
 7 Q. Were there change orders --
 8 A. Which became a part of the contract.
 9 Q. On page 37 of your previous deposition,
 10 you stated, During the large project, they had us
 11 doing other smaller projects, like putting in a
 12 fire road that wasn't related to that contract.
 13 A. That is correct.
 14 Q. Was that a change order, or was that
 15 just a separate project?
 16 A. That was a separate project.
 17 Q. Were there other separate projects that
 18 didn't necessarily have a contract related to
 19 them you were performing?
 20 A. There was a mailbox kiosk. There was a
 21 couple other small things, yeah.
 22 Q. What about a pond that had infilled? Do
 23 you recall that project?
 24 A. Pond that had infilled? Yes, sir,
 25 behind the office building, yeah.

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1 Q. Did all those projects involve -- or did
 2 any of those projects involve moving dirt?
 3 A. We moved dirt on the fire road, did not
 4 move any dirt for the kiosk, we did move some
 5 dirt for the pond infill.
 6 Q. And would you have used dump trucks in
 7 those projects?
 8 A. No, sir, not on that one.
 9 Q. Would that just be moving dirt with
 10 excavators, et cetera?
 11 A. That is correct.
 12 Q. Including the fire road?
 13 A. The fire road, we used -- we actually
 14 had stone hauled in by a subcontractor.
 15 Q. But no haul-out on those projects to
 16 your recollection?
 17 A. Not that I recall.
 18 Q. Could there have been haul-out?
 19 A. No. I think we utilized the dirt that
 20 we dug out for the actual fire road and built the
 21 banks on each side of the fire road. Doesn't
 22 mean -- we could have. I wasn't physically there
 23 doing the work. I'm just assuming that's what
 24 they did.
 25 Q. Do you remember the truck that Jacob AU

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1 there. That had to have been the second load.
2 Now, did I physically watch him? No. But there
3 was two loads that weren't there, so that had to
4 be his second load.

5 Q. Well, the only time that you had seen
6 him there -- you only saw him at 1223 or 1227,
7 whichever one it was, May River Road --

8 A. Whatever it is.

9 Q. -- one time that day?

10 A. I did.

11 MR. SHELTON: Okay. That's all
12 I've got right now. Do you want to take a break
13 and convene?

14 MR. IMHOFF: Yeah, let's talk a
15 minute.

16 (A recess was taken.)

17 EXAMINATION

18 BY MR. IMHOFF:

19 Q. Mr. Tosky, I just have maybe 20 more
20 minutes of questions, and I'm going to be all
21 over the place, okay?

22 A. Okay.

23 Q. So you said the phrase overburden
24 earlier in regard to grading. What does that
25 mean?

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1 A. Overburden is an excess of material.

2 Q. Yeah. So you have more than you need?

3 A. More than you need.

4 Q. Can that be an excess of good material
5 or bad material?

6 A. Bad, good, it could be anything.

7 Q. Any dirt that you are -- do you know if
8 you took any bad or unusable dirt off the Cypress
9 Ridge site?

10 A. Absolutely, yeah. It was probably close
11 to 15,000 yards.

12 Q. And you used different dump trucks and
13 different companies to do that?

14 A. That is correct.

15 Q. Now, the dirt we're talking about that
16 was taken to 1223 May River Road, that is good
17 dirt; it's an asset essentially, correct?

18 A. That is correct.

19 Q. You were asked questions earlier if
20 you -- if D.R. Horton sold you that dirt. Do you
21 recall that?

22 A. I do.

23 Q. Now let's just clarify this because we
24 know what we were talking about, okay?

25 A. Right. Understood.

1 Q. Now, you didn't have an agreement or a
2 contract with D.R. Horton to take a dump truck or
3 two dump trucks of clean, usable fill dirt off
4 the site, right?

5 A. Absolutely not.

6 Q. They didn't -- they didn't watch you
7 load it up, and you didn't hand them a check or
8 cash for that dirt, right?

9 A. No, sir.

10 Q. There was no agreement that you were
11 going to take certain material, good, usable
12 material, off for some payment for D.R. Horton,
13 correct?

14 A. That is correct.

15 Q. The way the industry works is, when
16 you're estimating, you estimate if you need to
17 take off overburden, bad materials, and pay to
18 move them and also pay to put them on a site,
19 right?

20 A. That is correct.

21 Q. Versus good materials, which you also
22 have to move, but they're actually an asset that
23 you could either sell to another grading company,
24 you could put on another site that you're working
25 on so you don't have to go buy good fill dirt,

1 right?

2 A. That is correct.

3 Q. Or, in this case, because there's
4 multiple phases of Oyster Point, you could have
5 gone back to D.R. Horton and said, I have good
6 fill dirt. Would you like it? Would you need
7 it? Right?

8 A. That is correct.

9 Q. But the reason you wouldn't do that is
10 because then you wouldn't get the benefit of
11 using and/or selling that, correct?

12 A. In this situation, we were the last
13 phase.

14 Q. Is that right?

15 A. That is correct. So there was nowhere
16 to take it.

17 Q. So what I wanted to do is clarify your
18 answers that D.R. Horton sold you dirt isn't
19 quite accurate, is it?

20 A. No. What I meant, it's in the contract
21 bid item.

22 Q. Right. And because you are benefiting
23 from the ability to use some good fill dirt that
24 you suspect is there when you're estimating,
25 right?

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1 A. Correct.

2 Q. Then you can lower your bid because

3 that's actually a benefit for you doing the job,

4 right?

5 A. That would be correct.

6 Q. And that's the way the industry works,

7 right?

8 A. That is correct.

9 Q. But there is no agreement that you are

10 buying dirt or D.R. Horton is selling dirt to

11 you, correct?

12 A. That is correct.

13 Q. And when you went and loaded that dirt

14 up into these trucks, was D.R. Horton there?

15 A. They were probably on the site but --

16 Q. Were they there watching the dirt that's

17 moved, whether it be good, bad, or something

18 else?

19 A. No, sir.

20 Q. And did they know -- did you tell them

21 when you were going to take dirt off the site?

22 A. No, sir.

23 Q. Did you tell them how much dirt you were

24 going to take off the site other than the

25 general, original engineering plans?

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1 A. No, sir.

2 Q. Did you tell them who was going to be

3 taking the dirt off the site?

4 A. No, sir.

5 Q. Did you tell them who was going to be

6 loading dirt on the site?

7 A. No, sir.

8 Q. Did you direct -- or did D.R. Horton

9 direct you in the way that you would either

10 remove, haul, or pick up that dirt?

11 A. Absolutely not.

12 Q. Did they direct you in any way: Time,

13 location, purpose, transportation, delivery, any

14 of those things on that dirt?

15 A. No, sir.

16 Q. Is it possible they didn't even know it

17 was happening?

18 A. Probably possible.

19 Q. And didn't know where it was going.

20 A. No, sir.

21 Q. And didn't know what it was going to be

22 used for.

23 A. No, sir.

24 Q. Do you know who loaded the dirt onto

25 Alfredo's truck that morning?

1 A. No, sir.

2 Q. Would it have been an employee or a

3 subcontractor --

4 A. Let me clarify. I don't even know if it

5 came -- it could have been Hampton Lakes. We

6 were taking out of two different areas. And let

7 me be clear: The overburden was like 1,200 cubic

8 yards. We do mass projects involving millions of

9 yards of dirt. So this wasn't a lot. The

10 topsoil was like 15,000 yards. That's a lot.

11 So being truthfully clarified on this,

12 we're not talking an immense amount of dirt. And

13 I don't --

14 Q. To move off of Cypress Ridge?

15 A. That's correct. And I don't even know

16 that that came from Cypress Ridge.

17 Q. I think Alfredo is going to say it came

18 from Cypress Ridge based on an affidavit we have

19 from him.

20 A. Looking back at our records, we were

21 taking stuff out of Hampton Lakes, so I don't

22 recall.

23 Q. But my point is, if that dirt did come

24 from Cypress Ridge --

25 A. You-all had --

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1 Q. D.R. Horton wasn't selling you dump

2 loads of trucks?

3 A. No, he was not selling us dump loads of

4 trucks.

5 Q. You weren't getting paid for dump loads

6 of trucks. You weren't getting a check for dump

7 loads of trucks, right?

8 A. That is correct.

9 Q. And D.R. Horton did not direct oversee

10 any of that, right?

11 A. D.R. Horton would not care because they

12 had a contract in place, and I can state that

13 because, from all the projects we've done, we

14 submit our bid quantities, we submit what we're

15 doing, and that's pretty much it.

16 It's our responsibility -- that period

17 when you sign that contract whether you have

18 overburdens, whether you have topsoil leaving,

19 whether you have topsoil coming in, it's our

20 responsibility to make sure that happens, not the

21 developer, not the owner. They've given the

22 contract. We know the parameters. We have the

23 drawings. Period.

24 Q. When you were a project director or

25 superintendent for the big construction company,

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
JASPER COUNTY

DEPOSITION OF KENNETH TOSKY

MARK W. McGILTON,

Plaintiff,

Case No. 2021-CP-27-00069

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC. and LOTTY TRUCKING,
LLC f/k/a RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

DEPONENT: KENNETH TOSKY

DATE: April 19, 2024

TIME: 10:26 A.M.

LOCATION: SHELTON LAW FIRM
HILTON HEAD ISLAND, SOUTH CAROLINA

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A P P E A R A N C E S

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ON BEHALF OF D.R. HORTON, INC.:

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EXHIBIT	DESCRIPTION	PAGE
Exhibit No. 1*	April certificate of insurance with Builders Mutual and Kenneth Scott Builders	75
Exhibit No. 2*	May certificate of insurance with Builders Mutual and Kenneth Scott Builders	75
Exhibit No. 3	D.R. Horton's South Carolina independent contractor agreement with Kenneth Scott Builders	75

*Retained by Mr. Imhoff

KENNETH TOSKY,

having been first duly sworn, was examined and
testified as follows:

EXAMINATION

BY MR. IMHOFF:

Q. Mr. Tosky, my name is Jason Imhoff, and
I represent D.R. Horton in these -- I guess
they're cases that were ultimately brought by
Mr. McGilton.

D.R. Horton was not in the lawsuit when
you were deposed the first time, but we do have
the benefit of your deposition transcript so we
don't have to replot all that ground as I was
telling you before the deposition.

Have you ever -- other than that time,
have you ever had your deposition taken?

A. Yes, sir.

Q. How many times?

A. This will be the fourth time.

Q. Fourth time, all right. So you're
generally familiar with the deposition process in
South Carolina?

A. Yes, sir.

Q. All right. I have to say a couple of
things. One, if you have any questions, ask me.

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1 You can't ask your attorney or to phone a friend,
 2 that kind of thing.
 3 A. I understand.
 4 Q. If I can't handle it, then we'll talk
 5 and try to resolve whatever issue you have, okay?
 6 A. Understood.
 7 Q. Sometimes I ask bad questions or you're
 8 listening to something else or thinking about the
 9 last question. If you didn't hear my question or
 10 you don't understand it, please ask me to repeat
 11 it or rephrase it or explain it, and I'll be
 12 happy to do that, okay?
 13 A. Yes, sir.
 14 Q. If you don't do that, I'll assume that
 15 you understood and you're answering that
 16 question; is that fair?
 17 A. That is fair.
 18 Q. All right. Take a break anytime you
 19 want to. Comfort, you know, temperature or water
 20 or whatever, just let us know, okay?
 21 A. Understood.
 22 Q. All right. State your full name if you
 23 would, please.
 24 A. Full name?
 25 Q. Full name.

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1 A. Kenneth Scott Tosky.
 2 Q. And have you read your deposition in
 3 this case?
 4 A. I've summary reviewed it, yes, sir, but
 5 not recently.
 6 Q. I understand. Were you given an
 7 opportunity to read it and correct any
 8 information in it that was transcribed
 9 incorrectly or you may have misunderstood the
 10 question?
 11 A. Yes, sir.
 12 Q. You were provided that opportunity?
 13 A. Yes, sir.
 14 Q. Did you change anything?
 15 A. There was a couple items, and I don't
 16 recall what those were. It was minor details.
 17 Q. Other than those changes that you made,
 18 do you believe that your answers were honest and
 19 correct in that deposition?
 20 A. Yes, I do.
 21 Q. Let me go -- because I was late, I'm
 22 going to get sort of to the point of it, right to
 23 it, okay?
 24 A. Yes, sir.
 25 Q. You have an unlimited commercial

1 builder's license; is that right?
 2 A. That is correct.
 3 Q. And under that unlimited commercial
 4 license, that includes grading and utility work
 5 and that type of thing?
 6 A. That is correct.
 7 Q. So horizontal work?
 8 A. Horizontal and vertical.
 9 Q. Is there a -- and for D.R. Horton in
 10 Cypress Ridge, you were doing horizontal work,
 11 right?
 12 A. That is correct.
 13 Q. Do you know if D.R. Horton has a license
 14 to do that work?
 15 A. No, sir, I do not know.
 16 May I expand?
 17 Q. Yes, please.
 18 A. So we had priced their commercial
 19 building on the Cypress Ridge, phase 7, that we
 20 were performing the horizontal, and they came
 21 back and did it themselves. I believe they had a
 22 member on staff that had a license.
 23 Q. For vertical construction?
 24 A. For vertical.
 25 Q. And I --

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1 A. Which, in general contracting, whether
 2 you're unlimited or not, you can do horizontal or
 3 vertical.
 4 Q. That was one of my next questions. Do
 5 you need a specialty license or some type of
 6 specialty training or specialty oversight to do
 7 horizontal work?
 8 A. No, sir.
 9 Q. And I've already read your deposition.
 10 In your previous deposition, you said that D.R.
 11 Horton was the developer and owner; is that
 12 right?
 13 A. The developer and -- I don't know their
 14 specifics on the back end, but I would assume
 15 they were the owner.
 16 Q. And do you know the process of getting
 17 the horizontal work done on a raw piece of
 18 property?
 19 A. Yes, sir.
 20 Q. What is that process?
 21 A. Would that be in reference to this
 22 project or any project?
 23 Q. Let's go generally first.
 24 A. Generally. You go through the
 25 development permit process, which is usually

Page 25

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1 Q. Sure.

2 A. So D.R. Horton --

3 Q. Depends on what you're going to say.

4 Let's go off the record first.

5 A. Well, it's funny because we do a lot of
6 work for a lot of developers. D.R. Horton, our
7 personal vehicles, Kenneth Scott Builders, have
8 to have special license -- or special insurance
9 to drive on a project, ours, if it is a part of
10 what they require from my COI to them, period.

11 So that's what I want to say about that.
12 It's a very difficult process, and they make it a
13 difficult process for that reason.

14 Q. Who does?

15 A. The developer.

16 Q. D.R. Horton or any developer?

17 A. Any developer. It doesn't -- they're
18 more difficult than most, but me, as an employee
19 of Kenneth Scott Builders, as Kenneth Scott
20 Builders, I have to have a particular COI that
21 satisfies their contract, and it states it in the
22 contract.

23 Q. And is that the additional insured
24 provision and the policy amount provisions and
25 that type of thing?

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1 A. That is correct.

2 Q. Because I got here late, I didn't pull
3 this stuff up.

4 A. No problem.

5 Q. So we're going to take a break and then
6 I'll pull those things up but I don't want to
7 make you wait anymore.

8 A. No problem.

9 Q. But we'll go over that.

10 MR. IMHOFF: Do you mind if I get a
11 coffee?

12 THE WITNESS: No. Go ahead.

13 (Off-the-record discussion.)

14 Q. All right. When you were in the Army,
15 did you have a specialty?

16 A. I did.

17 Q. Was it crane operator?

18 A. 62 foxtrot, crane operator.

19 Q. Tell me what licenses either you or
20 Kenneth Scott Builders holds.

21 A. Unlimited GC in the state of South
22 Carolina, unlimited GC in the state of Georgia,
23 all local licenses -- and there's numerous. We
24 have them in Charleston, City of Charleston,
25 Beaufort County, Town of Hilton Head, City of

1 Hardeeville, Pooler. Those are the local

2 jurisdictional. But the power ones are for the
3 state of Georgia and state of South Carolina.

4 And I'm in the process of testing for my state of
5 Florida.

6 Q. So you're unlimited in both South
7 Carolina and Georgia?

8 A. That is correct.

9 Q. Do you have any -- as a commercial
10 builder; is that right?

11 A. Commercial, yes, sir, and residential.
12 It all falls under the same -- I can do
13 residential, commercial.

14 Q. You can do anything with your license;
15 is that right?

16 A. That is correct.

17 Q. You're not -- let me say it differently.
18 You're not prevented from any particular type of
19 construction work with your particular license?

20 A. As an unlimited, that is correct.

21 (Off-the-record discussion.)

22 Q. Do you have any specialty licenses in
23 addition to your unlimited, just because you've
24 obtained them over the years?

25 A. No, sir.

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1 Q. What kind of training and/or education
2 do you have in being a grading contractor or a
3 horizontal general contractor?

4 A. 27 years experience. And that started
5 in Maryland right out of the Army. I tried to
6 come out and be a crane operator, and all they
7 wanted to do was hire me as an oiler because it's
8 all union. So I jumped on a dump truck and drove
9 a dump truck for an Italian utility contractor up
10 there and just worked my way up and went through
11 the whole horizontal process.

12 Moved down here and went to work for
13 Malphrus Construction, the one that went out of
14 business, which was one of the largest
15 contractors in this -- in the southeast. I was a
16 project manager for them. And I had built a
17 couple houses prior to that, and I decided I
18 wanted to get back into the building. So it's
19 strictly experience, OSHA training. There's been
20 a lot of courses that I've taken, but most of
21 it's just personal knowledge of experience.

22 Q. Yeah. Sometimes that's overlooked. I
23 mean, on-the-job training and experience is
24 sometimes overlooked in lieu of going to classes
25 or having a degree.

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1 A. And they really don't teach you in
2 classes. You know, it's not -- I have an
3 architect that's one of my -- he's actually my
4 project manager, and what he learned in
5 architectural school from Clemson -- I pick on
6 Clemson because I'm an FSU fan, but he -- you
7 know, is not -- a lot of it's not applicable to
8 the actual situation. You have to go to work for
9 an architect and learn, the same as an attorney
10 or paralegal, whatever the situation.

11 Q. I haven't learned anything since law
12 school. They cover it all.

13 A. Understood.

14 Q. You said that you were a tow truck
15 operator in a past life.

16 A. Dump truck.

17 Q. Dump truck. You know what? When I
18 wrote some stuff last night, I put tow truck.

19 A. That's okay.

20 Q. At the time that you were driving, were
21 there federal and state requirements for the safe
22 operation of tow trucks?

23 A. Of dump trucks?

24 Q. See. Did it again. Dump trucks.

25 (Off-the-record discussion.)

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1 A. It's okay. So from a driver standpoint,
2 I had to have the proper licensing. I had to
3 do -- I didn't do the maintenance on the truck,
4 but I'd check oil, check brake lines, stuff like
5 that. That more, to me, and knowing what I know
6 now is more the responsibility of the actual
7 company that is supplying the truck or supplying
8 the situation, where they need to meet --

9 State of South Carolina is so difficult.
10 We have purchased a dump truck, and the DOT
11 requirements and inspections is -- you almost
12 have to hire a person to handle it. It's so
13 convoluted. Convoluted is a bad word. It is so
14 regimented, okay, with what you have to do.
15 There's companies out there that offer the
16 service that do it. That's how complicated it
17 is. So, in answer to your question, at that
18 time, I was just -- I was driving a truck for a
19 company.

20 Q. Right.

21 A. I didn't know what they were dealing
22 with, what their paperwork or whatever they had.
23 I know what I had to do as a dump truck driver.

24 Q. How long ago was that?

25 A. 27 years ago when I first started.

1 Q. And over that 27 years, are you
2 generally familiar with the requirements for dump
3 truck drivers, maintenance, safe operation,
4 insurance, that type of thing?

5 A. I would say somewhat. Once I graduated
6 past the dump truck 27 years ago and started --
7 I'd pull up to the job site, get off the dump
8 truck at lunchtime. While they're all at lunch,
9 I'd get on a piece of equipment and learn how to
10 run a piece of equipment. That's how I grew in
11 the industry.

12 There for a long period of time, I was
13 more of a manager of operations. I don't -- I
14 carry a class A license. I've never driven a
15 tractor-trailer except to do my test, okay? So I
16 have driven -- I drove a -- the last time I drove
17 a dump truck is when I bought that new one and
18 brought it down from Virginia, so -- and that was
19 eight months ago.

20 So, to be quite honest, I'm not familiar
21 with the -- it's not something I do every day.
22 If you ask me about an excavator, I can tell you
23 the rollers, the idlers, I can tell you the
24 grease fittings, everything on it, because that's
25 what we do every day.

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1 Q. Well, let me go back to 2017, 2018. Let
2 me back up.

3 A. Yes, sir, I'm sorry.

4 Q. So when you were working in Cypress
5 Ridge, was that about 2017, 2018?

6 A. That sounds right.

7 Q. Time period?

8 A. Yeah.

9 Q. And did Kenneth Scott Builders have any
10 of its own dump trucks?

11 A. No, sir.

12 Q. Did it have to hire dump truck companies
13 or dump trucks from outside companies?

14 A. Yes, sir.

15 Q. And when you would hire dump trucks or
16 frankly any other large equipment operator, what
17 is the procedure for, you know, due diligence and
18 vetting them to make sure that they're legal and
19 safe?

20 A. The due diligence -- excuse me. You
21 know, and I'm just referencing the time period.
22 You know, when we hire contractors, we generally
23 ask for a COI. And at the time of Cypress
24 Ridge -- and I'll refer to Alfredo Trucking
25 because that's what this is about.

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1 Q. Jacob AU Trucking?

2 A. Jacob AU Trucking, I'm sorry. Again
3 it's been a good period of time here. So prior
4 to that time, he had -- his company had done
5 hauling for us. So if you're referencing Cypress
6 Ridge in particular, I can't say that I requested
7 anything from him at that time.

8 Because, prior to that, he did have the
9 proper insurance. And I went over this in my
10 previous deposition. He brought on another dump
11 truck. He had a lapse in his insurance, and I
12 was not aware of that.

13 Q. Do you know -- and again, we can look if
14 you want to refer to the document and see the
15 document, okay?

16 A. Absolutely.

17 Q. Do you know if Kenneth Scott Builders
18 was the certificate holder on the certificate of
19 insurance?

20 A. On Alfredo -- or Jacob AU Trucking?

21 Q. Well, let me ask it two ways: One, yes,
22 on Jacob AU Trucking, but, two, do you require
23 that you be added as a certificate holder on
24 their certificate of insurance if you know what
25 that means?

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1 A. I understand exactly what that means.
2 In most -- we do now, from an educational curve,
3 okay? At the time, when we do a job for like --
4 let's just use D.R. Horton, when we do our COI,
5 it must list them as additional insured in that
6 bottom box with specific language.

7 Q. Right.

8 A. Okay. We were not doing that at that
9 time.

10 Q. Let me make a distinction for you, okay?
11 And I may be wrong about this, but as I
12 understand it, you can have a certificate holder
13 or you can have an additional insured endorsement
14 or you can have both.

15 The certificate holder, as I understand
16 it, tells the insurance company or the insurance
17 agency that if that insurance lapses or is
18 canceled or isn't paid that they then have to
19 tell the certificate holder, Hey, that
20 certificate of insurance that our client gave you
21 is no longer valid. Did you know that?

22 A. I did know that. As long as you're
23 listed as the additional insured.

24 Q. Okay. And that may be true.

25 A. It is true.

1 Q. I thought you could be a certificate

2 hold and not an additional insured but --

3 A. So, you know, this is one of the
4 problems we have with our insurance industry, and
5 now we have checks and balances that we do it
6 ourselves. So we have a date register when we
7 know theirs is coming up on expiration, and we
8 send out a notice. I don't rely on the insurance
9 company anymore, because sometimes you get
10 notices; sometimes you don't. And that's
11 general -- that's just what it is.

12 Q. So let me go back. So at the time that
13 you were doing -- that you had hired Jacob AU
14 Trucking and that you were doing work on Cypress
15 Ridge, you were not requiring your subcontractors
16 to add Kenneth Scott Builders as an additional
17 insured?

18 A. No, sir.

19 Q. And as far as you know, were you
20 requiring your subcontractors to identify you as
21 a certificate holder who would be notified if the
22 insurance lapsed or was canceled or not paid?

23 A. I don't recall that.

24 Q. What other types of things were you
25 doing either at the time of or before the Cypress

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1 Ridge project to vet any subcontractors that were
2 working for you but specifically dump trucks?

3 A. Usually our subcontractor rental
4 trucking was kind of done by word of mouth. So
5 you're saying vetting. I didn't really vet, as
6 we don't now -- when you say vet, two things. I
7 mean, we're doing a big project over in the city
8 of Hardeeville. Number one, they all have to
9 have a certificate of insurance and we have to be
10 listed as additional insured, period.

11 Q. Okay.

12 A. Can't drive for us. They cannot
13 subcontract trucking. Cannot do anything until
14 we have that. Hence experience.

15 Q. Sure.

16 A. So -- but to vet, I don't -- and here's
17 what I've learned. By buying a dump truck,
18 the -- I don't even know how people get through
19 the process without -- I mean, the DOT
20 regulations, the inspections, I mean, you get
21 pulled over if you don't have the proper sticker
22 that has to be updated every couple months. I
23 mean, it's rigorous. I wish they had been doing
24 this a while back, but that's what it is now.

25 So you say vetting. We don't vet

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1 A. No, sir.

2 Q. What's the next commercial carrier that
3 comes to a site?

4 A. The large one would probably be the
5 drywall truck. They deliver the drywall.

6 Q. Sure. So another material delivery.

7 A. Yeah. And we have intermittent
8 deliveries, insulation, have subcontractors in
9 and out. You know, there's always some --

10 Q. Shingles?

11 A. Shingles.

12 Q. Sure.

13 A. Whatever it is. There could be -- with
14 cabinets, countertops, trim trucks, I mean, you
15 could be looking at 45 deliveries per project.

16 Q. Is a general contractor required to
17 check the commercial driver's license status of
18 each one of those subcontractors or material
19 providers?

20 A. No, sir.

21 Q. Are you to check the maintenance records
22 for each one of those commercial carriers?

23 A. No, sir.

24 Q. Do you know if you're to check anything
25 related to insurance, qualification, or

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1 maintenance of the vehicles for any of the
2 commercial carriers that come onto your site?

3 A. Being specific about insurance, or are
4 we talking about COI or insurance of the actual
5 vehicle?

6 Q. I was actually doing the whole thing,
7 so, yes, insurance for the vehicle, proper
8 licensure for the driver, proper maintenance for
9 the vehicle. Is a general contractor required to
10 check any of those things in the state of South
11 Carolina?

12 A. Insurance only.

13 Q. You're required to make sure they have
14 insurance?

15 A. If they're working for us -- no, we're
16 not required to check anything. What we require
17 is the insurance.

18 Q. Now, is that company that has a
19 commercial vehicle required to make sure that
20 their driver is properly licensed?

21 A. Absolutely.

22 Q. Are they required to make sure that
23 the -- they have proper insurance on their driver
24 in that vehicle?

25 A. What I know now, yes, sir.

1 Q. And are they required to do proper
2 maintenance and upkeep on those vehicles?

3 A. Absolutely.

4 Q. And then are they also required to do
5 periodic inspections or have some interaction
6 with whoever the governing entity is?

7 A. DOT, yes, sir.

8 Q. So the people operating and owning those
9 vehicles have that obligation, legally, agree?

10 A. The subcontractor, yes, sir.

11 Q. You as a general contractor aren't aware
12 that the general contractor has that obligation
13 legally; is that correct?

14 A. That is correct. We do not have that
15 obligation.

16 Q. Does the owner/developer have the
17 obligation to check the general contractor's
18 subcontractors' commercial driver's license,
19 insurance, or maintenance history?

20 A. Absolutely not.

21 Q. Do you know how long Jacob AU Trucking
22 had been operating as a commercial entity?

23 A. No, sir.

24 Q. How did they come to you?

25 A. I don't remember off the top of my head.

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1 I want to -- I don't even want to guess. I think
2 it was Sandhill Station. We had a trucking
3 subcontractor in there, and we needed additional
4 trucks, and they recommended Jacob AU Trucking.
5 I think that's what happened.

6 And if it wasn't that particular job --
7 that's usually -- I'll give you an example. Exit
8 5, we needed, you know, 50 different trucking
9 companies a day. A lot of them were referred by
10 other truckers. You know, that's kind of how you
11 locate people.

12 Q. Who was your project manager/site
13 manager for the work that was going on on Cypress
14 Ridge?

15 A. Gabrielle Tosky, my daughter.

16 Q. And how often would she be on the site?

17 A. Every day.

18 Q. Every day? Was she on the Cypress Ridge
19 site on the day of the accident?

20 A. I'm sure she was.

21 Q. Have you asked her what was happening on
22 the site that day?

23 A. I don't recall asking her anything, no.

24 I think the only thing I had said that morning,
25 we needed a couple loads of dirt, and that was

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1 we had to get rid of out at Cypress, yes, sir.

2 Q. And you take -- because you had too much
3 good dirt, you were taking it off site?

4 A. We had too much good dirt, yes, sir.

5 Q. I'm going to get into some things that
6 you may not remember, okay?

7 A. Absolutely. Go ahead.

8 Q. Do you ask D.R. Horton if you could take
9 that dirt, or is it sort of built into your
10 contract price that you'll be able to take and
11 reuse fill dirt somewhere else?

12 A. It is -- when we do a bid on a project,
13 we do a fill and balance sheet. You'll have
14 spoil -- you'll have spoils on topsoil. You may
15 or may not have spoils on select fill. And per
16 that balance sheet, we know how much we have to
17 take off site. We know what we need to bring
18 on-site. That would be in any job in general.

19 Q. And let me -- I'm just going to break it
20 down, okay?

21 A. Absolutely.

22 Q. So when you do an estimate and you know
23 you have to bring in a bunch of fill dirt, you
24 know that you're going to have to pay for the
25 dirt potentially.

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1 A. That's correct.

2 Q. And the transportation and then putting
3 it on-site, right?

4 A. That is correct.

5 Q. So your estimate goes up, right?

6 A. That's correct.

7 Q. If you have to take bad dirt off a site,
8 same thing, you need to estimate in how long it's
9 going to get up, get it into the truck that you
10 have to hire, and then go potentially have a dump
11 fee somewhere because it's bad dirt?

12 A. That is correct.

13 Q. Right? Now, the opposite side of that
14 is you have to -- there's a bunch of good fill
15 dirt on a site that you know that you can utilize
16 and/or sell off site, right?

17 A. That is correct.

18 Q. And so if you do your calculations
19 correctly, then you can actually put in a
20 contingent amount of money or use you can get out
21 of that extra fill dirt, and you could actually
22 lower your bid, right?

23 A. That is correct.

24 Q. But that doesn't have anything to do
25 with D.R. Horton. That's your internal

1 estimating and your expectations, right?

2 A. That is correct.

3 Q. There has been an allegation in this
4 case that D.R. Horton sold you fill dirt. Is
5 that true?

6 A. That is not true.

7 Q. Did you ever buy fill dirt from D.R.
8 Horton?

9 A. No.

10 Q. Did you ever tell D.R. Horton
11 specifically that you were taking fill dirt off
12 the D.R. Horton site?

13 A. No, sir.

14 Q. It's just part of your work, right?

15 A. It's a part of our schedule of what we
16 have for cuts and fills, that is correct.

17 Q. And it's part of the original
18 engineering documents about what needs to either
19 come onto or be taken off the site, directed by
20 the engineer, right?

21 A. That is correct.

22 Q. So if there was dirt coming off of
23 Cypress Ridge, would D.R. Horton have known about
24 it?

25 A. They would not have known.

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1 MR. SHELTON: What did he just say?
2 They would not have known?

3 THE WITNESS: They would not have
4 known about it.

5 MR. SHELTON: Thank you.

6 Q. Let me ask you about certain industry
7 standard. When any of the work that you've done
8 or been around or commercial general contractors
9 that you've worked for, have you ever seen a
10 commercial general contractor look into the
11 licensure status or maintenance status of a
12 commercial carrier on their site?

13 A. No, sir.

14 Q. There's been an allegation in this case
15 that Jacob AU or Alfredo's trucks were on-site
16 overnight or broke down. What do you know about
17 that?

18 A. I do know that I saw his site -- his --
19 and I stated it in a deposition, that his dump
20 truck was at the site at Cypress Ridge overnight.
21 I do not know what the situation with his truck
22 is. That's not for me. I don't know his
23 maintenance issues. But I do know it was there
24 overnight.

25 Q. Do you know if it was broken down?

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1 But also, I want to add to that that he
2 was hysterical. When he called me on the phone,
3 he was literally crying. So I knew it was bad at
4 that moment, and I immediately got in my truck
5 and drove down there to see if there was anything
6 I could do. But that's what I recall.

7 Q. So I'll ask you a series of questions.

8 A. Absolutely.

9 Q. Based on your observations and your
10 conversations with him, did anything lead you to
11 believe that the maintenance of the truck caused
12 the accident or was partially responsible for
13 part of the accident?

14 A. I can't even comment on that. No, sir.

15 Q. Did he say anything to you, that the
16 brakes didn't work or the brakes locked up or
17 something was wrong with the truck?

18 A. Not that I recall.

19 Q. So based on your conversations and your
20 observations at the site, did you come away with
21 any opinion of how the accident had happened?

22 A. Not -- I mean, I could see if you looked
23 down and looked back up, you could have veered
24 off to the left. I have no idea. I don't --
25 when you looked at the accident, it was like,

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1 man, this is kind of weird because literally the
2 one truck was pushed into the tree, which means
3 he would have had to go across the line.

4 Q. Into oncoming traffic?

5 A. Into oncoming traffic and pushed the --
6 but, again, I'm not an investigator. I have no
7 idea. I wasn't in that driver seat. I don't
8 know what -- I mean, for all I know, I mean,
9 let's be realistic, my negative thoughts were,
10 you know, dude might have been texting. I don't
11 know. I have no idea -- you know, we're all
12 responsible when we get behind the wheel of a
13 vehicle to make sure we make good decisions.

14 Q. Sure.

15 A. So I don't know. All I know is what I
16 saw indicated to me that somehow that truck got
17 across that yellow line. How he did it or how he
18 got there, I have no clue.

19 Q. The office building that you were
20 building at 1223 May River Road, who were you
21 building that for?

22 A. It was Geoff Block. I'm trying to
23 remember the -- RB Squared. I don't remember the
24 name of it, I'm sorry.

25 MR. SHELTON: The contract was with

1 Geoff Block.

2 Q. I had heard that it was a Dollar General
3 or something like that.

4 A. There was a Downtown Deli. The Dollar
5 General, we did some renovation to the outside of
6 the building. And then the corner building,
7 1223, was an office building.

8 Q. Was the renovations to the Dollar
9 General separate from this work --

10 A. That is correct.

11 Q. -- for the office building?

12 A. That is correct.

13 Q. Have you done work -- or I'm sorry.

14 Had Kenneth Scott Builders done work for
15 regional or national tract home builders prior to
16 this accident?

17 A. Small repairs. Nothing of the magnitude
18 of this one. And it turned into magnitude
19 because of the building undercuts and so forth.
20 We had done site development jobs but nothing of
21 that magnitude.

22 Q. Who had you done site -- who had Kenneth
23 Scott Builders done site development work before
24 this accident?

25 A. Sandhill development, which was a

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1 commercial -- it wasn't a residential, but it was
2 a commercial development, which is right on the
3 other side of Bluffton across from the movie
4 theater.

5 Q. Any others?

6 A. At that time, we'd -- so we were more --
7 we did a lot of commercial buildings with the
8 parking lots, things like that. So, again, the
9 magnitude of what we did for Cypress Ridge at the
10 time was probably our largest.

11 Q. At the time that you were hired by D.R.
12 Horton, were you an unlimited commercial builder?

13 A. I'm trying to remember when I got that
14 license, because you have to go through -- I
15 don't think I was at that time. I think I was --
16 there's five different classes. I think we were
17 class 4. For a class 5, you have to have an
18 audited statement and go through the bonding
19 processes, which is now -- I don't think we were
20 at that time, but I could be incorrect.

21 Q. Is the only difference between class 4
22 and class 5 financial stability of the company?

23 A. Yes.

24 Q. Yeah.

25 A. And, really, from a standpoint -- so an

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1 topsoil, where you have spoils in dirt, whether
2 you have dirt coming in, that's all inclusive of
3 that contract.
4 I can't -- I don't remember the
5 overburden quantities. I know we had overburden
6 in topsoil, and we had overburden in select. And
7 it wasn't a lot, so you -- as you're sitting
8 there stating, are we stealing? We didn't steal
9 anything --

10 Q. And I'm --

11 A. -- that wasn't inclusive of the
12 contract.

13 Q. I don't want you to believe that I am
14 stating that you're stealing. I'm just asking
15 you whether you were stealing.

16 A. Absolutely not.

17 Q. I'm not accusing you of it. I want to
18 make sure you're aware of that.

19 A. Understood.

20 Q. Did your daughter -- is it Gabrielle?
21 Is that correct?

22 A. Gabrielle.

23 Q. Did she tell you anything since the
24 previous deposition that gave you the belief as
25 you testified to earlier today that the dirt that

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1 Jacob AU Trucking dumped on May River Road came
2 from Cypress Ridge?

3 A. No. She didn't -- she wasn't sure if
4 the truck had been loaded there. And, you
5 remember, now we're working on four different
6 parts of the site. If you've ever been to
7 Cypress Ridge, it extends a long way, so no.

8 Q. Would Jacob AU Trucking know where the
9 dirt came from?

10 A. I would assume he would.

11 Q. And would you have any reason to dispute
12 whatever Alfredo Uriostegui -- and that's
13 U-R-I-O-S-T-E-G-U-I.

14 A. I would say he just needs to provide the
15 tickets that show. Remember, we submitted to you
16 every ticket of everything.

17 Q. And we will get to that a little bit
18 later. And anytime that you, Kenneth Scott
19 Builders, brought dirt off the Cypress Ridge
20 site, it was purchased from D.R. Horton; is that
21 fair to say?

22 A. In the contract, yes.

23 Q. And Kenneth Scott Builders obviously
24 hired trucking companies, including Jacob AU
25 Trucking, to transport the dirt off of the

1 Cypress Ridge site?

2 A. That is correct.

3 Q. And you had testified previously that
4 Kenneth Scott Builders did work at Cypress Ridge
5 that was outside of your main contracts.

6 A. Under the change orders.

7 Q. Were there change orders --

8 A. Which became a part of the contract.

9 Q. On page 37 of your previous deposition,
10 you stated, During the large project, they had us
11 doing other smaller projects, like putting in a
12 fire road that wasn't related to that contract.

13 A. That is correct.

14 Q. Was that a change order, or was that
15 just a separate project?

16 A. That was a separate project.

17 Q. Were there other separate projects that
18 didn't necessarily have a contract related to
19 them you were performing?

20 A. There was a mailbox kiosk. There was a
21 couple other small things, yeah.

22 Q. What about a pond that had infilled? Do
23 you recall that project?

24 A. Pond that had infilled? Yes, sir,
25 behind the office building, yeah.

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1 Q. Did all those projects involve -- or did
2 any of those projects involve moving dirt?

3 A. We moved dirt on the fire road, did not
4 move any dirt for the kiosk, we did move some
5 dirt for the pond infill.

6 Q. And would you have used dump trucks in
7 those projects?

8 A. No, sir, not on that one.

9 Q. Would that just be moving dirt with
10 excavators, et cetera?

11 A. That is correct.

12 Q. Including the fire road?

13 A. The fire road, we used -- we actually
14 had stone hauled in by a subcontractor.

15 Q. But no haul-out on those projects to
16 your recollection?

17 A. Not that I recall.

18 Q. Could there have been haul-out?

19 A. No. I think we utilized the dirt that
20 we dug out for the actual fire road and built the
21 banks on each side of the fire road. Doesn't
22 mean -- we could have. I wasn't physically there
23 doing the work. I'm just assuming that's what
24 they did.

25 Q. Do you remember the truck that Jacob AU

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1 there. That had to have been the second load.
2 Now, did I physically watch him? No. But there
3 was two loads that weren't there, so that had to
4 be his second load.

5 Q. Well, the only time that you had seen
6 him there -- you only saw him at 1223 or 1227,
7 whichever one it was, May River Road --

8 A. Whatever it is.

9 Q. -- one time that day?

10 A. I did.

11 MR. SHELTON: Okay. That's all
12 I've got right now. Do you want to take a break
13 and convene?

14 MR. IMHOFF: Yeah, let's talk a
15 minute.

16 (A recess was taken.)

17 EXAMINATION

18 BY MR. IMHOFF:

19 Q. Mr. Tosky, I just have maybe 20 more
20 minutes of questions, and I'm going to be all
21 over the place, okay?

22 A. Okay.

23 Q. So you said the phrase overburden
24 earlier in regard to grading. What does that
25 mean?

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1 A. Overburden is an excess of material.

2 Q. Yeah. So you have more than you need?

3 A. More than you need.

4 Q. Can that be an excess of good material
5 or bad material?

6 A. Bad, good, it could be anything.

7 Q. Any dirt that you are -- do you know if
8 you took any bad or unusable dirt off the Cypress
9 Ridge site?

10 A. Absolutely, yeah. It was probably close
11 to 15,000 yards.

12 Q. And you used different dump trucks and
13 different companies to do that?

14 A. That is correct.

15 Q. Now, the dirt we're talking about that
16 was taken to 1223 May River Road, that is good
17 dirt; it's an asset essentially, correct?

18 A. That is correct.

19 Q. You were asked questions earlier if
20 you -- if D.R. Horton sold you that dirt. Do you
21 recall that?

22 A. I do.

23 Q. Now let's just clarify this because we
24 know what we were talking about, okay?

25 A. Right. Understood.

1 Q. Now, you didn't have an agreement or a
2 contract with D.R. Horton to take a dump truck or
3 two dump trucks of clean, usable fill dirt off
4 the site, right?

5 A. Absolutely not.

6 Q. They didn't -- they didn't watch you
7 load it up, and you didn't hand them a check or
8 cash for that dirt, right?

9 A. No, sir.

10 Q. There was no agreement that you were
11 going to take certain material, good, usable
12 material, off for some payment for D.R. Horton,
13 correct?

14 A. That is correct.

15 Q. The way the industry works is, when
16 you're estimating, you estimate if you need to
17 take off overburden, bad materials, and pay to
18 move them and also pay to put them on a site,
19 right?

20 A. That is correct.

21 Q. Versus good materials, which you also
22 have to move, but they're actually an asset that
23 you could either sell to another grading company,
24 you could put on another site that you're working
25 on so you don't have to go buy good fill dirt,

1 right?

2 A. That is correct.

3 Q. Or, in this case, because there's
4 multiple phases of Oyster Point, you could have
5 gone back to D.R. Horton and said, I have good
6 fill dirt. Would you like it? Would you need
7 it? Right?

8 A. That is correct.

9 Q. But the reason you wouldn't do that is
10 because then you wouldn't get the benefit of
11 using and/or selling that, correct?

12 A. In this situation, we were the last
13 phase.

14 Q. Is that right?

15 A. That is correct. So there was nowhere
16 to take it.

17 Q. So what I wanted to do is clarify your
18 answers that D.R. Horton sold you dirt isn't
19 quite accurate, is it?

20 A. No. What I meant, it's in the contract
21 bid item.

22 Q. Right. And because you are benefiting
23 from the ability to use some good fill dirt that
24 you suspect is there when you're estimating,
25 right?

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1 A. Correct.

2 Q. Then you can lower your bid because

3 that's actually a benefit for you doing the job,

4 right?

5 A. That would be correct.

6 Q. And that's the way the industry works,

7 right?

8 A. That is correct.

9 Q. But there is no agreement that you are

10 buying dirt or D.R. Horton is selling dirt to

11 you, correct?

12 A. That is correct.

13 Q. And when you went and loaded that dirt

14 up into these trucks, was D.R. Horton there?

15 A. They were probably on the site but --

16 Q. Were they there watching the dirt that's

17 moved, whether it be good, bad, or something

18 else?

19 A. No, sir.

20 Q. And did they know -- did you tell them

21 when you were going to take dirt off the site?

22 A. No, sir.

23 Q. Did you tell them how much dirt you were

24 going to take off the site other than the

25 general, original engineering plans?

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1 A. No, sir.

2 Q. Did you tell them who was going to be

3 taking the dirt off the site?

4 A. No, sir.

5 Q. Did you tell them who was going to be

6 loading dirt on the site?

7 A. No, sir.

8 Q. Did you direct -- or did D.R. Horton

9 direct you in the way that you would either

10 remove, haul, or pick up that dirt?

11 A. Absolutely not.

12 Q. Did they direct you in any way: Time,

13 location, purpose, transportation, delivery, any

14 of those things on that dirt?

15 A. No, sir.

16 Q. Is it possible they didn't even know it

17 was happening?

18 A. Probably possible.

19 Q. And didn't know where it was going.

20 A. No, sir.

21 Q. And didn't know what it was going to be

22 used for.

23 A. No, sir.

24 Q. Do you know who loaded the dirt onto

25 Alfredo's truck that morning?

1 A. No, sir.

2 Q. Would it have been an employee or a

3 subcontractor --

4 A. Let me clarify. I don't even know if it

5 came -- it could have been Hampton Lakes. We

6 were taking out of two different areas. And let

7 me be clear: The overburden was like 1,200 cubic

8 yards. We do mass projects involving millions of

9 yards of dirt. So this wasn't a lot. The

10 topsoil was like 15,000 yards. That's a lot.

11 So being truthfully clarified on this,

12 we're not talking an immense amount of dirt. And

13 I don't --

14 Q. To move off of Cypress Ridge?

15 A. That's correct. And I don't even know

16 that that came from Cypress Ridge.

17 Q. I think Alfredo is going to say it came

18 from Cypress Ridge based on an affidavit we have

19 from him.

20 A. Looking back at our records, we were

21 taking stuff out of Hampton Lakes, so I don't

22 recall.

23 Q. But my point is, if that dirt did come

24 from Cypress Ridge --

25 A. You-all had --

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1 Q. D.R. Horton wasn't selling you dump

2 loads of trucks?

3 A. No, he was not selling us dump loads of

4 trucks.

5 Q. You weren't getting paid for dump loads

6 of trucks. You weren't getting a check for dump

7 loads of trucks, right?

8 A. That is correct.

9 Q. And D.R. Horton did not direct oversee

10 any of that, right?

11 A. D.R. Horton would not care because they

12 had a contract in place, and I can state that

13 because, from all the projects we've done, we

14 submit our bid quantities, we submit what we're

15 doing, and that's pretty much it.

16 It's our responsibility -- that period

17 when you sign that contract whether you have

18 overburdens, whether you have topsoil leaving,

19 whether you have topsoil coming in, it's our

20 responsibility to make sure that happens, not the

21 developer, not the owner. They've given the

22 contract. We know the parameters. We have the

23 drawings. Period.

24 Q. When you were a project director or

25 superintendent for the big construction company,

MARK W. McGILTON vs 2018-CP-07-00607 ALFREDO URIOSTEGUI and JACOB-AU TF
2018-CP-07-00607 - KENNETH TOSKY

1 IN THE COURT OF COMMON PLEAS
2 FOURTEENTH JUDICIAL CIRCUIT
3 STATE OF SOUTH CAROLINA
4 COUNTY OF BEAUFORT

5
6 MARK W. MCGILTON,
7 Plaintiff,
8

9
10
11 vs.

CIVIL ACTION NUMBER
2018-CP-07-00607

12
13
14 ALFREDO URIOSTEGUI and JACOB-AU TRUCKING LLC,
15 and KENNETH SCOTT BUILDERS, INC.,

16 Defendants.
17 -----/

18 The deposition of KENNETH SCOTT TOSKY, a
19 witness in the above-entitled cause, taken
20 pursuant to Notice and agreement, before Ceil
21 Weser, Certified Court Reporter and Notary
22 Public, at The Nexsen Pruet Law Firm, 7 Arley
23 Way, Bluffton, South Carolina, on the 15th day
24 of September, 2021, commencing at or about the
25 hour of 10:40 a.m.



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1 I will have to get you the names on the
2 other one's. I don't recall. It has been a
3 while since we have had that site portion of the
4 work that we self-performed.
5 **Q Do you remember how many?**
6 A There were two others.
7 **Q So three total that were doing --**
8 A Three total equipment operators.
9 **Q And these would be employees that were**
10 **operating the equipment?**
11 A Yes, sir.
12 **Q Did those employees work for anyone**
13 **else?**
14 A No, sir.
15 **Q To your knowledge?**
16 A To my knowledge; and I will say that
17 two of them were fire fighters so they had their
18 shifts at the Fire Department. I did know they
19 were fire fighters.
20 **Q But to your knowledge none of the**
21 **equipment operators otherwise worked in the**
22 **construction industry?**
23 A Not that I am aware of.
24 **Q What is the nature of Kenneth Scott**
25 **Builders? What do you do?**

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1 **Q So would that include equipment?**
2 A That includes -- I don't recall. I
3 could see the paragraph, but I don't recall the
4 exact words for exactly what it said that is
5 included in that value. It is an audited
6 statement by an accountant.
7 **Q Who was your accountant that did that**
8 **statement for you? I am assuming one was done**
9 **for you.**
10 A It was done for us. It was a fellow on
11 Hilton Head and I don't recall his name. And
12 again I can get you the information, but I don't
13 recall.
14 **Q Is that the same accountant that you**
15 **use now?**
16 A No, sir.
17 **Q Who is the accountant you use now?**
18 A Troy Lowther L-o-w-t-h-e-r.
19 **Q And where does Troy Lowther work out**
20 **of?**
21 A Out of Ridgeland, South Carolina.
22 **Q Does he work for a company?**
23 A He does, and I am trying to remember
24 the company name. And I don't recall the
25 company name.

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1 A We are classified as a BD 5 general
2 contractor, which allows us to build any
3 vertical construction; any site work, which is
4 horizontal; renovations for residential;
5 renovations for commercial; new builds for
6 commercial; new builds for residential.
7 **Q You said BD 5?**
8 A BD 5 is unlimited, which allows us to
9 do any type of aboveground or below ground
10 construction.
11 **Q How long have you had that designation?**
12 A I would have to look that up. It took
13 me a while to get qualified for that
14 financially-wise; and I don't know what year
15 exactly that was.
16 **Q What are the qualifications for that**
17 **financial-wise?**
18 A Financially you have to be -- I don't
19 recall. I can give you a guess, but I can't
20 recall the exact numbers.
21 **Q Give me to the best of your**
22 **recollection.**
23 A I think it was a \$250,000 value of
24 construction or value of company without debt or
25 anything like that.

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1 **Q How long has he been your accountant?**
2 A Four years.
3 **Q When you had the audit done, did you**
4 **use your normal accountant?**
5 A I had to go a specialty. He wasn't
6 certified to do audited.
7 **Q And was this relatively recently that**
8 **you attained this certification, or was it**
9 **within the last ten years? Or the last five**
10 **years?**
11 A It was within the last five years.
12 **Q Did you have it in 2018?**
13 A Yes, sir.
14 **Q At the beginning of 2018?**
15 A Yes, sir.
16 **Q You are capable of doing any type of**
17 **construction? You were capable of doing any**
18 **type of construction in 2018, is that correct?**
19 A Yes, sir.
20 **Q What did you focus on in 2018? Let us**
21 **talk about the beginning of 2018.**
22 MR. BROWN: Objection to the form.
23 THE WITNESS: We focused on custom
24 homes. We focused on-site work, which
25 is horizontal construction; and we



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1 reason not to believe it.
2 BY MR. SHELTON:
3 Q So it is possible that Alfredo operated
4 equipment that you had rented at Cypress Ridge?
5 A It could be.
6 Q And then at 355, 896023: Hauled
7 on-site at Cypress Ridge.
8 The next invoice -- both invoices state
9 that, is that correct?
10 A That is correct.
11 Q And one is 8:00 to 4:30. The next is
12 8:00 to 5:00.
13 Then I am going to 356, and we have an
14 invoice that ends in 021 and an invoice that
15 ends in 020, and both of those indicate at least
16 in part: Hauled on-site at Cypress Ridge, is
17 that correct?
18 A That is correct.
19 Q On 357, 026, that is the last three
20 digits of the invoice state: Hauled on-site at
21 Cypress Ridge, 8:00 to 5:00, is that correct?
22 A That is correct.
23 Q And then 896, ending in 027, invoice
24 states: Hauled on-site moving dirt at Cypress
25 Ridge.

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1 Is that correct?
2 A Yes.
3 Q And then the last three invoices dated
4 March 8th, March 9th and March 7th all say:
5 On-site hauling dirt?
6 A Yes, sir.
7 Q So on-site hauling dirt, to be specific
8 that means he is at Cypress Ridge working all
9 day, is that fair to say?
10 A That is fair to say.
11 Q And does it appear that the last 14
12 invoices state: Hauled on-site at Cypress
13 Ridge?
14 A Yes, sir.
15 Q Did you ever see his truck overnight at
16 Cypress Ridge?
17 A Not personally.
18 Q But referring back earlier in your
19 deposition, I believe I recall that your
20 daughter referred to --
21 A That is correct.
22 Q That has happened in the past?
23 A That is correct.
24 Q And you do not know how many times?
25 A I do not know how many times.

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1 Is that correct?
2 A That is correct.
3 Q It has an indication it says: This
4 truck started late. I was fixing it.
5 A It does.
6 Q And truck number 702, do you have any
7 idea what that references?
8 A I am assuming the other truck that --
9 that the other trucking company that he brought
10 in to assist him. I don't know it for a fact.
11 I am assuming that is what it means.
12 Q And then 358, again truck number 701:
13 Hauled on-site moving dirt at Cypress Ridge.
14 Is that correct?
15 A Yes, sir.
16 Q 8:00 to 5:00?
17 A Yes, sir.
18 Q And then at the bottom of 358 the same?
19 A Yes, sir.
20 Q And then we are now at March 5, 2018:
21 Hauled on-site dirt to Cypress Ridge, 8:00 to
22 5:00.
23 March 6, 2018 -- if I didn't say 2018,
24 I want to correct the record, 2018. It says:
25 Hauled on-site at Cypress Ridge.

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1 Q Do you have any idea where Alfredo had
2 work done on his truck? That is a very poorly
3 worded question. Let me reword it.
4 A Yeah.
5 Q Do you have any knowledge as to where
6 Alfredo serviced his truck?
7 A I have no clue.
8 Q When his truck was broken down, do you
9 know the nature of those breakdowns?
10 A No, sir.
11 Q But you do know it happened more than
12 once?
13 A From what Gabby said, yes. I don't
14 know how many times, but I do from what she had
15 told me.
16 Q I notice there is no invoice from
17 March 13, 2018.
18 Do you know whether you paid him for
19 the load or the time that he worked that day?
20 A I don't know the answer to that.
21 Q It is true that he loaded dirt for you
22 that day, correct? Or unloaded dirt at 1227 May
23 River Road?
24 A Yes, sir.
25 Q I am about to go into another exhibit



STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

MARK W. MCGILTON,

Plaintiff,

vs.

CASE NO. 2018-CP-07-00607

ALFREDO URIOSTEGUI,
JACOB-AU TRUCKING, LLC,
and KENNETH SCOTT
BUILDERS, LLC,

Defendants.

DEPOSITION OF: MARK WILLIAM MCGILTON

DATE: September 17, 2019

TIME: 2:09 p.m.

LOCATION: Vaux Marscher Berglind, P.A.
1251 May River Road
Bluffton, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: TRISHA M. THOMAS

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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20

1 A. I have a couple, yes.

2 Q. How many?

3 A. Two.

4 Q. Okay. And what are their names?

5 A. Nick Holman and Kevin -- what's Kevin's
6 -- it's actually my ex's ex -- I mean it's my
7 girlfriend's ex, so -- Brigman.

8 Q. Brigman?

9 A. Yeah.

10 Q. Okay.

11 A. Kevin Brigman. He's been working with
12 me for a little while here.

13 Q. Okay. And what type of line of work is
14 FCC Home Improvements?

15 A. We do residential improvements, repairs
16 and stuff like that. Roof systems and windows and
17 decks and stuff like that, siding, flooring.

18 Q. Do you ever construct new homes from
19 start to finish?

20 A. No, ma'am.

21 Q. Okay. Do you ever do structural work?

22 A. On occasion. Depends on the project,
23 but typically no.

24 Q. Okay. And do you pay yourself a
25 salary?

31

1 approximately ten years.

2 Q. Okay. And you said you headed to
3 Savannah to get materials. Do you know what type
4 of materials they were?

5 A. Vinyl siding.

6 Q. Okay. And then you headed back to the
7 shop. Do you recall what -- you're more familiar
8 with the roads around here than I am, obviously.
9 Do you recall how you got back from Savannah to
10 here generally, to Bluffton?

11 A. How I drove?

12 Q. Let me rephrase that. You mentioned
13 this road, so this road being May River Road?

14 A. May River Road, yes, ma'am.

15 Q. Okay. And so how did you get onto May
16 River Road?

17 A. Yes, ma'am. Off of -- I was coming
18 from seven -- let's see. I took 95 to Exit 8, then
19 I drove -- I don't know the name of those roads,
20 but I drove by the fire -- the fireworks stores,
21 drove by there, and then I hit Main Street, and I
22 drove Main Street all the way to -- I guess that
23 would still be May River Road there on this side of
24 the rotary and then I headed toward Bluffton from
25 there.

1 Q. Okay. So is it accurate to say --
2 'cause you said you were going eastbound, is that
3 accurate to say that you were on May River Road,
4 like going into historic downtown Bluffton?

5 A. Yes, ma'am.

6 Q. Okay. And so the truck was going
7 westbound --

8 A. Yes, ma'am.

9 Q. -- so like crossing paths. Can you
10 tell me what type of car you were in?

11 A. Yes, ma'am. I was in a Chevrolet
12 Silverado. It was a -- what year was that truck?
13 2016, I think it was. Chevrolet Silverado.

14 Q. And was anyone in the car with you?

15 A. No, ma'am.

16 Q. And just before the accident happened,
17 do you remember anything about the moments prior?
18 Like do you recall if you were on the phone before
19 the accident happened or were listening to music,
20 anything like that?

21 A. No, ma'am. I was just riding, and I
22 was contemplating on getting my materials to the
23 guys. And I was following behind this smaller
24 vehicle and -- and then that was it. The truck
25 came into my lane, and I kind of saw it out of the

1 corner of my eye, and I turned my wheel to the
2 right at the very last second, but it was way too
3 late. The impact happened.

4 Q. Okay. And the truck that came into
5 your lane, do you recall what type of truck it was?

6 A. Yes, ma'am. It was a dump truck.

7 Q. Okay. And do you have any idea why the
8 truck was coming into your lane?

9 A. They never really determined it, so,
10 no, ma'am, I don't really know why.

11 Q. And do you know approximately how far
12 into your lane the truck came, like how many feet
13 over the center line?

14 A. All the way. He hit me and pushed me
15 off the road into an oak tree.

16 Q. So did he cross the center line and
17 come at you like head on in your lane?

18 A. Yes, ma'am.

19 Q. I'm just trying to understand all the
20 way to the best of your recollection 'cause
21 obviously we have the police report and whatnot.

22 A. As far as him all the way over in my
23 lane, I would say he probably hit me about halfway
24 into my lane, from what I would gather, what I
25 would think. And then he pushed me off the road at

[Print this page](#)**Board: Commercial Contractors****KENNETH SCOTT BUILDERS INC**

254 RED CEDAR ST STE 12
BLUFFTON, SC 29910-8967
843-548-3069

License number: 115797**License type:** GENERAL CONTRACTOR**Status:** ACTIVE**Expiration:** 10/31/2024**First Issuance Date:** 08/13/2010**Classification:**

Building-BD5

Qualified By: Financial Statement**President / Owner:** KENNETH S TOSKY[Click here for Classification definitions and licensee's contract dollar limit](#)**Supervised By****TOSKY KENNETH (CQG)**[File a Complaint against this licensee](#)**Board Public Action History:**[View Orders](#)[View Other License for this Person](#)

No Orders Found

ELECTRONICALLY FILED - 2024 Jun 13 7:35 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	FOURTEENTH JUDICIAL CIRCUIT
MARK W. MCGILTON,	CIVIL ACTION NO. 2021-CP-27-00069
Plaintiff,	
vs.	
1223 MAY RIVER ROAD, LLC, D.R. HORTON, INC., AND LOTTY TRUCKING, LLC F/K/A RAMOS TRUCKING, LLC,	PLAINTIFF’S MOTION FOR RULE TO SHOW CAUSE, TO STRIKE AND FOR CONTEMPT PER RULE 37(d), SCRCP, AGAINST D.R. HORTON, INC. FOR CONTINUING VIOLATIONS OF ORDERS DATED SEPT. 22, 2022, MARCH 5, 2024, AND JUNE 13, 2024
Defendants.	
1223 MAY RIVER ROAD, LLC,	
Third-Party Plaintiffs,	
vs.	
KENNETH SCOTT BUILDERS, LLC,	
Third-Party Defendants.	

PLEASE TAKE NOTICE THAT the Plaintiff, by and through the undersigned counsel, will move before the Court, on the tenth day after service hereof or at such other time as is designated by the Court, for an hearing on a Rule to Show Cause as to why the pleadings of D.R. Horton should not be stricken due to its continuing violations of the March 5, 2024 Order of Sanctions and Contempt, and for violations of the Order of this Court dated June 13, 2024.

BRIEF STATEMENT

On March 4, 2024, the Honorable Diane Goodstein sanctioned D.R. Horton, Inc., held it in Contempt, and Ordered that “[i]t may purge the contempt before trial by engaging in no more willful discovery violations. It shall strictly abide by time deadlines. It shall cooperate fully and

timely answer and respond to discovery requests. It shall cooperate fully with Plaintiff in scheduling and producing witnesses for depositions. It shall otherwise strictly comply with this court's September 22, 2022 Order and with this Order." (Mar. 5, 2024 Order Granting Pl.'s Mtn. to Compel, for Sanctions, and Holding D.R. Horton in Contempt at 7). "Also, I am providing D.R. Horton with a clear and explicit warning that upon a finding of any further discovery violations by any judge, that its pleadings will be subject to being struck." *Id.* (emphasis added).

On June 13, 2024, this court issued another order that granted D.R. Horton leave to disclose experts in the matter after D.R. Horton failed to comply with the previous scheduling order and failed to disclose experts within the timeframe set forth in the scheduling order. In its Order dated June 13, 2024, this court found that "[D.R. Horton] failed to comply with the scheduling order and has not shown good cause for such violation." (Jun. 13, 2024 Order at 1).

D.R. Horton has premised its defense on the basis that it was merely the owner or developer of the land subject to the project at issue and not the general contractor. It alleges that it had no control and held no duties over the acts of the alleged independent contractor who hired the uninsured and unmaintained dump truck that was involved in the collision at issue in this matter. However, material recently discovered by Plaintiff through a FOIA request (and not produced by D.R. Horton) shows that D.R. Horton was a general contractor of record for the project where the dirt was repeatedly excavated and removed from D.R. Horton's job site by the dump truck operator that was involved in the collision at issue in this case. Emails received through FOIA¹ show that D.R. Horton was intricately involved in the majority, if not all, planning, communications and

¹ The dump truck driver recently testified that he regularly performed work on and excavated dirt from the construction of the building pad its phase of development for what was the development of D.R. Horton's regional corporate office at the times leading up to and at the time of the accident. After reviewing discovery produced by D.R. Horton and finding no permit for the construction and no plans relating to the phase at issue, Plaintiff issued Freedom of Information Act requests to the Town seeking the relevant permits and plans. The returns showed D.R. Horton as the general contractor for the permit number that constitutes the "commercial phase" of development that included the construction of its regional headquarters, an RV and storage area, and the surrounding parking and spaces.

decisions involved between the Town of Bluffton and the project at issue. The amount of material withheld and not produced by D.R. Horton that is responsive to the Plaintiff's discovery requests is staggering, totaling thousands of pages, and is incredibly detrimental to D.R. Horton's defenses in this case. As general contractor, it held nondelegable duties over its jobsite and the subcontractors it was bound to supervise, including Kenneth Scott Builders, Inc. and Jacob AU Trucking, LLC.

Further, before this material was obtained by the Plaintiff through its FOIA request, D.R. Horton took the deposition of the Plaintiff's OSHA and safety compliance expert, insisting that it be taken before D.R. Horton's 30(b)(6) depositions. The newly discovered and undisclosed material will materially change the nature of Plaintiff's expert's testimony at trial and will subject the expert to unfair and inaccurate cross-examination at trial. In short, D.R. Horton's continued contempt of court and failure to comply with discovery requests has prejudiced Plaintiff and placed the Plaintiff in a position where it must review and analyze thousands of documents prior to the end of the discovery period of this case, which is quickly approaching, and has already prejudiced the Plaintiff relative to its expert's testimony. This is not the first time D.R. Horton has systematically failed to follow the orders of this court, and the SCRCP. It has failed to cure its contempt. It has ignored the warnings of Judge Goodstein's Order.²

The failure to produce the most important material in this case constitutes a grave violation of the court's previous Orders. Therefore, the Plaintiff moves for a hearing on a Rule to Show Cause as to why D.R. Horton's pleadings should not be stricken.

² Moreover, D.R. Horton has not produced its experts as ordered by this Court on June 14, 2024. It has failed to confirm the date for the deposition of its 30(b)(6) witnesses, it has named experts which are unavailable prior to the 30(b)(6) depositions and prior to the discovery deadline and/or has only provided extremely limited dates for D.R. Horton's experts.

LAW

The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court. *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987). In deciding on an appropriate sanction, the court should consider a sanction that will “serve to protect the rights of discovery provided by the Rules.” *Id.* (citing *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir.), *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970) (“[O]verleniency [in the imposition of sanctions] is to be avoided where it results in inadequate protection of discovery.”); C. Wright, *The Law of Federal Courts* § 90 at 596 (4th ed. 1983) (“Without adequate sanctions, the procedure for discovery would be ineffectual.”); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976) (dictum) (“[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”).

“Rule 37 expressly grants the trial court power to order judgment by default for either the violation of a court order, or, upon motion, for a party’s failure to respond to certain discovery requests.” *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997) (citing Rule 37(b)(2)(C)(d), SCRCP). While the sanction of striking a defendant’s answer is severe, South Carolina courts have done so when the situation necessitates the “harsh medicine” of default for discovery abuses. *Id.*, *see also McNair v. Fairfield Cnty*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008) (holding the circuit court did not abuse its discretion by striking the defendant's answer because the defendant failed to (1) produce documents requested during discovery, (2) coherently organize the documents it did produce, and (3) provide complete responses to interrogatories, and the court told defendant to correct the discovery issues several times and warned the defendant “it was inclined to strike [defendant's] answer.”). “However, severe

sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair*, 379 S.C. at 466, 665 S.E.2d at 832. If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment. *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198-199; 511 S.E.2d 716, 718-719 (Ct. App. 1999) (affirming trial court's order to strike and render default judgment where the record was full of multiple egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery). An order striking pleadings is an appropriate sanction when a Defendant fails to comply with multiple court orders and when a "clear and explicit warning of the consequences if the defendant failed to comply with the order of the Court" was rendered by the trial court. *See Id.* at 199, at 719.

ANALYSIS

In his initial discovery requests, served on July 22, 2021, the Plaintiff asked D.R. Horton to identify all communications between D.R. Horton, Inc. and Kenneth Scott Builders, Inc. relating to Cypress Ridge (¶'s Gen. Rog. No. 2). He asked D.R. Horton to "Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense of this case. (¶'s Stand. Rog. No. 2). Plaintiff asked D.R. Horton to identify all documents "which You have knowledge relating to this lawsuit." (¶'s Gen. Rog. No. 4).

Further, the Plaintiff requested a copy of any building permits, zoning permits, or other documents obtained by D.R. Horton to develop Cypress Ridge, located at 210 Hulston Landing Rd., Bluffton, SC 29909. (¶'s 1st RFP No. 11). The Plaintiff also requested "[c]opies of all documents identified, referred to, or used in your answers to Plaintiff's First Set of Interrogatories." (¶'s 1st RFP No. 1).

During the deposition of the driver of the dump truck involved in the collision in this matter, Mr. Alfredo Uriostegui, he testified that he regularly worked on a site in Cypress Ridge where D.R. Horton was building its regional office building. (Uriostegui Dep. 235:14-237:23). He testified that he loaded and removed dirt from the site where D.R. Horton was building its regional office building both across Hulston Landing Rd. to another phase of the Cypress Ridge development as “good dirt.” (Uriostegui Dep. 235:14-237:23). He testified that he removed dirt from the site where D.R. Horton was building its regional office building and hauled it off site for use at other construction sites (Uriostegui Dep. 235:14-237:23). He testified he regularly worked all day hauling dirt from the office building site to the townhome site at Cypress Ridge. (Uriostegui Dep. 184:23-185:3).

D.R. Horton has based its defense in this case on the premise that it is merely an owner of the development, and did not have a hand in the construction or act as a general contractor. (*See* Def. D.R. Horton, Inc.’s Mtn. for Summary Judgment as to Pl. Mark W. McGilton, and Def. D.R. Horton, Inc.’s Mtn. to Reconsider, Alter or Amend Order on its Mtn. for Summary Judgment). It recently took the deposition of the Plaintiff’s safety and compliance expert, highlighting the fact that D.R. Horton was purportedly merely an owner of the land and not a General Contractor. Plaintiff’s safety and compliance expert testified that D.R. Horton’s responsibilities over the land and development as owner and not acting as contractor would be very limited if existent at all.

Based upon the later deposition testimony of Alfredo Uriostegui, counsel for Mark McGilton searched for any permits or plans relating to what is known as the “Commercial” phase or Office/RV Lot phase of the Cypress Ridge development within material produced by D.R. Horton. While D.R. Horton produced invoices, payment requests from Kenneth Scott Builders, Inc. relating to the Office/RV Lot phase (showing that Kenneth Scott Builders invoiced D.R.

Horton over \$300,000.00 for work)³ D.R. Horton produced no permits or plans relating to the Office/RV lot phase. Plaintiff filed a Freedom of Information Act (FOIA) request for material relating to the Office/RV lot phase of development by D.R. Horton with the Town of Bluffton.

In response to the FOIA request, the Town of Bluffton produced:

1. a copy of the building permit for the regional office headquarters for D.R. Horton showing that D.R. Horton was both the applicant and the General Contractor for the Office and RV phase of Cypress Ridge (Exhibit 2);
2. Plans showing that plans for D.R. Horton's regional office and the R/V Lot phase were one of and the same (Exhibit 3);
3. Volumes of communications (hundreds if not thousands of pages) between D.R. Horton's 30(b)(6) deponents, the Town of Bluffton concerning the control, methods, permitting, and means of the development of Cypress Ridge, and scores of communications between Kenneth Scott Builders, Inc. and D.R. Horton's employees; and
4. Several notices of inspection and notices of violations relating to grading, surface and wastewater rules and regulations from the Town of Bluffton.

In summary, D.R. Horton was the general contractor of record for the very phase of work which was being completed by the Dump Truck Operator (as defined in Plaintiff's Complaint) when the Dump Truck Operator collided with the Plaintiff on his way back to Cypress Ridge to perform more work for D.R. Horton. D.R. Horton was the General Contractor over the phase of development from which the Dump Truck Operator mined dirt and regularly hauled loads of dirt off site. In other words, D.R. Horton was acting as General Contractor over the Dump Truck

³ Attached hereto as Exhibit 1.

Operator, having power, control and responsibility over it. It allowed an uninsured and unmaintained dump truck to operate on its construction site and keep its truck on its construction site for well over a year. D.R. Horton concealed these facts from the Plaintiffs. D.R. Horton failed to disclose these facts to the court in its motion for Summary Judgment.

D.R. Horton's failure to cooperate in discovery has deprived the Plaintiff of what is an "abiding maxim of the successful trial lawyer, like the motto of the Boy Scouts, is 'Be Prepared.'" *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987) (citing I. Younger, *The Art of Cross-Examination* 23 (A.B.A. Section of Litigation Monograph Series No. 1, 1976) ("The fourth commandment is that you must be prepared. On cross-examination, you should *never* ask a question to which you do not already know the answer.")). "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required." *Id.* As D.R. Horton has failed to produce in discovery the most basic of relevant documents, that is the permit for the construction of the site that is at-issue in this matter—the site from which the truck came from that caused the injuries that are at-issue in this matter, the Plaintiff has been highly prejudiced.

Despite being unable to fully review the volume of material received from the Plaintiff's recent FOIA requests to the Town of Bluffton, the Plaintiff is producing all material produced by the Town of Bluffton to D.R. Horton and all other Defendants contemporaneous with this motion. The Plaintiff notes that D.R. Horton already is in possession of all material furnished by the Town of Bluffton to the Plaintiff and D.R. Horton failed to produce the same.

For the reasons stated herein, the Plaintiff moves for a Rule to Show Cause to be issued against D.R. Horton, Inc., for it to explain to the Court why its pleading should not be stricken, and for any and all other relief the Court deems reasonable and appropriate.

The below certifies for the purposes of Rule 11, SCRCP, that consultation with opposing counsel prior to filing this motion would serve no useful purpose.

Respectfully submitted,

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

Benjamin T. Shelton, S.C. Bar No. 77207
S. Harrison Williams, S.C. Bar No. 102410
P.O. Box 21069
Hilton Head Island, South Carolina 29926
(843) 802-0087

ben@sheltonlawsc.com

harrison@sheltonlawsc.com

Attorneys for Plaintiff McGilton

Hilton Head Island, South Carolina
August 19, 2024



File Copy - Do Not Mail

EXHIBIT 1

G/L expr:05/13/18 W/C expr:05/13/18

Check Number

0577039

KENNETH SCOTT BUILDERS

Date

03/29/18

PO BOX 1590

DRH Inc. Controlled Disb Acct.

Stub 1 of 1

2016181

PO Numb	Invoice Number	Subdv Lot#	Lot Address	Cost Cde	Legal Desc	Gross	Deductions	Amount Paid

Job Name: Cypress Ridge - Commerical Site

Job Code: 515329050

Vendor: Kenneth Scott Builders

PO #: 200161 OF

KDC 000066

ITEM	Cost Code	DESCRIPTION	COST	03.04.18	Total Paid	Retainage	Balance Due
			TOTAL COST	Pay App #1			

PO	Cost Code	Description	Total Cost	Pay App #1	Total Paid	Retainage	Balance Due
200161 OF	20080	Rough Grade	\$ 48,643.66	\$37,500.00	\$37,500.00	\$3,750.00	\$ 11,143.66
200161 OF	20140	Erosion Control	\$ 19,261.12	\$4,290.00	\$4,290.00	\$429.00	\$ 14,971.12
200161 OF	21000	Sewer System	\$ 3,097.27	\$1,683.46	\$1,683.46	\$168.35	\$ 1,413.81
200161 OF	22000	Storm Drain	\$ 7,524.67	\$3,250.00	\$3,250.00	\$325.00	\$ 4,274.67
200161 OF	23000	Water System	\$ 25,063.91	\$4,840.01	\$4,840.01	\$484.00	\$ 20,223.90
200161 OF	24050	Paving	\$ 336,395.74	\$123,032.00	\$123,032.00	\$12,303.20	\$ 213,363.74
Total				\$174,595.47	\$174,595.47	\$17,459.55	\$265,390.90

Less Retainage

Total Amount Due

\$174,595.47

Approved for payment by:

JH Hiers	Attached
Tim Stone	Attached
Ashley Huddleston	Attached

On to pay ANH 3/22/18



Building Permit CNEW-11-17-12846

Issue Date: 05/03/2018

Parcel: R614 028 000 0916 0000

Parcel R614 028 000 0916 0000	Permit Type Com New	Heated Sq Ft 8,895	Unheated Sq Ft 2,122	Total Sq Ft 11,017
Address 30 SILVER LAKE RD BLUFFTON SC 29909	Lot	Unit Number 0	Building	# of Units 0
Place Name CYPRESS RIDGE	Total Sq Ft of Lot 22,145	Pervious 10,694	New Impervious 11,451	Value \$1,393,430.00
Construction Type V-B	Occupancy Business	Use Office Building	Change of Use	Existing Use
# Stories 2	Type Exterior hardie plank	Elevators 1	Sprinklered Yes	# Stories 2
# Bedrooms 0	Type Roofing metal	Fireplace 0	Existing Occupancy	Floodzone
# Bathrooms 4	Heat/Air Gas	Fire Alarm No	Sewage Type PSD	Total Res Rooms 0

APPLICANT: D R HORTON INC

ADDRESS: 209 ARGO CIR
OKATIE, SC 29909

BUSINESS PHONE: (843) 706-4037

OWNER: D R Horton Inc

ADDRESS: PO Box 3558
Bluffton, SC 29910

BUSINESS PHONE: (843) 540-2283

CONTRACTOR: D R Horton Inc

ADDRESS: PO Box 3558
Bluffton, SC 29910

BUSINESS PHONE: (843) 540-2283

ENGINEER:

ADDRESS:

BUSINESS PHONE:

ARCHITECT: Langley & Associates Architects

ADDRESS: 109 S Main ST
Greer, SC 29650

BUSINESS PHONE: (864) 968-0224

Description of Work: new office building for home sales

Acknowledgement

All work must comply with Town of Bluffton adopted codes and any conditions resulting from the review and approval of this permit. No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. An owner has a right to extend this period by entering into a contractual agreement for extended liability under Section 15-3-640 of the South Carolina state code. **Construction activity hours of operation are Mon. thru Sat. 7am to 7pm and Sun. 12pm to 7pm. Work outside these hours must be certified by the Town Manager or his designee to be necessary to address an emergency situation maybe exempt. Article III Sections 12-82 and 12-85 of the Muni Code.**

Mark Strange
PRINT NAME

Mark Strange
SIGNATURE

Agent
RELATIONSHIP

5/3/18
DATE

EXHIBIT 2



TOWN OF BLUFFTON
BUILDING PERMIT APPLICATION
COMMERCIAL MASTER APPLICATION



Growth Management Customer Service Center
 20 Bridge Street
 Bluffton, SC 29910
 (843)706-4522
www.townofbluffton.sc.gov
applicationfeedback@townofbluffton.com

Office Use Only		Permit Number: CNEW 11-17-12846		Date Received: 11/13/17	
Project Address:		30 Silver Lake Road			Lot #:
Subdivision: Cypress Ridge			Parcel ID: R614 028 000 0916 0000		
Property Owner			Job Site Contact		
Name: DR Horton			Name: Mark Strange		
Address: PO BOX 3558			Address:		
City/State/Zip: Bluffton, SC 29910			City/State/Zip:		
Phone: 843-706-4037			Office Phone: 843-706-4037		
Cell Phone:			Cell Phone: 843-368-9503		
Email Address:			Email Address: mstrange@drhorton.com		
Contractor			Design Professional		
Name: DR Horton			Name: Langley & Associates Architects		
Address: PO BOX 3558			Address: 109 South Main St.		
City/State/Zip: Bluffton SC. 29910			City/State/Zip: Greer, SC 29650		
Phone:			Phone: 864-968-0224		
Contractor License/Registration #: G114610			State License #: 98012		
Bluffton Business License #: 04-17-022208			Email Address: www.la-architects.com		
Permit Type					
☒ New ☐ Addition ☐ Remodel					
Permit Workclass					
☒ Structure	☐ Shell	☐ Tenant Upfit	☐ Accessory		
☐ Electrical	☐ HVAC	☐ Gas	☐ Plumbing		
☐ Irrigation	☐ Pool/spa	☐ Moving Permit	☐ Tent		
☐ Demo	☐ Construction Trailer	☐ Re-Roof	☐ Fence		
☐ Retaining Wall	☐ Water feature	☐ Fire Sprinkler System	☐ Fire Alarm System		
Num of Units: one			Total Square Footage: 11017		
Type of Construction (circle one): IA IB IIA IIB IIIA IIIB IV VA VB					
Value of Construction (include materials, labor, profit)					
Plumbing: \$ 23160		Gas: \$ 1200			
Electrical: \$ 143500		Building: \$ 1,145,402.00			
Heating/Air: \$ 80168		Total Value of Construction: \$ 1,393,430.00			



**TOWN OF BLUFFTON
BUILDING PERMIT APPLICATION
RESIDENTIAL MASTER APPLICATION**

Growth Management Customer Service Center
20 Bridge Street
Bluffton, SC 29910
(843) 706-4522
www.townofbluffton.sc.gov
applicationfeedback@townofbluffton.com

License Requirements

Please read carefully. This form is required at time of application.

Permit Number:

- *Individuals and entities involved in the construction, repair, or renovation of structures including mechanical construction are required to comply with licensing requirements of the State of South Carolina and the Town of Bluffton.*
- *Persons engaging in Business in the Town of Bluffton are required to have current Town Business Licenses.*
- *The contractor is aware that the sub-contractors, also known as independent contractors, which are hired by the contractor to perform services, are not employees. Sub-contractors are required to maintain a valid Town business license and state/local licenses or registrations as applicable when conducting business inside the town limits of Bluffton. This requirement also applies to individuals such as craftsmen or artisans not regularly employed by the contractor, but who are performing work on the job. Code enforcement inspectors will require proof of a current Town of Bluffton business license or proof of employment if an employee.*
- *No deductions shall be made on the permit application by a general or independent contractor for value of work performed by a subcontractor.*
- ***In no case** will a permanent service or final inspection (if there is not a permanent service inspection) be processed until all required documentation is submitted to the office.*

I, the undersigned have read and understand the above. I am the contractor in charge or authorized agent for the contractor in charge, or Owner.

Print: Mark Strange

Signature: Mark Strange ***Date:*** 11/02/17



**TOWN OF BLUFFTON
BUILDING PERMIT APPLICATION
RESIDENTIAL MASTER APPLICATION**

Growth Management Customer Service Center
20 Bridge Street
Bluffton, SC 29910
(843)706-4522
www.townofbluffton.sc.gov
applicationfeedback@townofbluffton.com

ELECTRONICALLY FILED - 2024 Aug 19 5:11 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069

Refuse Disposal Plan

You are required to dispose of all construction waste in accordance with related local, state, and federal regulations.

Permit Number:

Site Debris:

- 1. It shall be the responsibility of the permit holder to clean up and remove all construction debris as well as other related material or organic materials prior to receiving a final inspection approval.*
- 2. Waste shall be contained in such a manner as to prevent contamination of any adjacent property by any means.*

Hurricane Protection:

- 1. No permit holder shall allow construction related materials to remain loose or unsecured at a site from 24 hours after a hurricane watch has been issued until the hurricane watch/warning has been lifted. Materials shall be removed from the site or secured in such a manner as to minimize the danger of such materials causing damage to persons or property from weather emergencies.*
- 2. Failure to comply with this section will subject the permit holder to fines in accordance with the Town of Bluffton Municipal Code.*

Owner Name: D. R. Horton

Contractor: D. R. Horton

Location: Bluffton, SC

Solid Waste Containment Method: 10 Yard Metal Bins

Waste Pick-Up and Disposal Schedule: Multiple times per week

Disposal Location (Site): Waste Management-- Hickory Hill

Name of Party or Company Responsible for Removal: East Coast Construction Cleanup Inc.

Signature of Responsible Person Mark Strange ***Date:*** 11/02/17



August 20, 2024

Via Electronic Filing

Clerk of Court for the Fourteenth Judicial Circuit
Post Office Drawer 1128
Beaufort, South Carolina 29901

Re: Mark W. McGilton v. D.R. Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | Plaintiff's Motion for Rule to Show Cause, to Strike and for Contempt per Rule 27(d), SCRCPP, against D.R. Horton, Inc. for continuing violations of Orders dated September 22, 2022, March 5, 2024, and June 13, 2024 | Letter and Exhibit

Dear Madame Clerk,

Please find enclosed exhibit 3 to the Rule to Show Cause filed yesterday after 5:00pm in C/A no. 2021-CP-27-00069. The file size was too large to upload, and we are enclosing the first three pages of the CAD document to allow it to be entered into the e-filing system.

Please let me know if you have any questions or concerns.

With kind regards, I am

Respectfully yours,

/s/Benjamin T. Shelton

Benjamin T. Shelton, SC Bar No. 77207

EXHIBIT 3

SITE DEVELOPEMENT PLANS
OF
CYPRESS RIDGE
OFFICE BUILDING
BLUFFTON, SOUTH CAROLINA

PREPARED FOR:
D.R. HORTON, INC.
209 ARGO CIRCLE
OKATIE, SOUTH CAROLINA 29909

TM# R614 028 000 0916 0000

JULY 17, 2016
LAST REVISED: 07/07/17

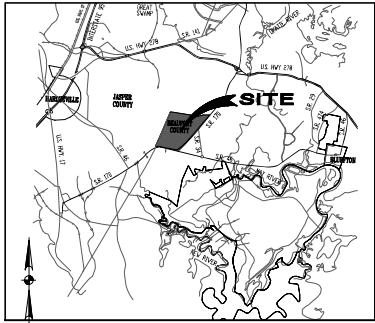
J-17008.13

PREPARED BY:



CYPRESS RIDGE
OFFICE BUILDING
BJWSA# 2016-063

SITE DATA TABLE - CYPRESS RIDGE OFFICE BUILDING	
TOTAL ACRES	10.4 AC
OPEN SPACE ACRES	~7.635 AC
BUILDING AREA	~1.765 AC



J-17008.13
LAST REVISED: 07/07/17
CYPRESS RIDGE
OFFICE BUILDING

SHEET LIST TABLE

Sheet Number	Sheet Title
COV	COVER SHEET
G0.1	GENERAL NOTES AND SHEET INDEX
G0.2	PHASING PLAN
G1.1	EXISTING CONDITIONS
G1.2	EXISTING CONDITIONS
G1.3	EXISTING CONDITIONS
C2.1	WATER AND SANITARY SEWER PLAN
C2.2	WATER AND SANITARY SEWER PLAN
C2.3	WATER AND SANITARY SEWER PLAN
C2.4	SANITARY SEWER PROFILE
C2.5	WATER AND SANITARY SEWER DETAILS
C2.6	WATER AND SANITARY SEWER DETAILS
C3.1	PAVING, GRADING, AND DRAINAGE PLAN
C3.2	PAVING, GRADING, AND DRAINAGE PLAN
C3.3	PAVING, GRADING, AND DRAINAGE PLAN
C3.4	ROAD PROFILES
C3.5	PAVING, GRADING, AND DRAINAGE DETAILS
C3.6	PAVING, GRADING, AND DRAINAGE DETAILS
C3.7	PAVING, GRADING, AND DRAINAGE DETAILS
C4.1	LAYOUT, SIGNAGE, AND MARKING PLAN
C4.2	LAYOUT, SIGNAGE, AND MARKING PLAN
C4.3	LAYOUT, SIGNAGE, AND MARKING PLAN
EC0.1	ES & PC - NOTES
EC0.2	ES & PC - NOTES
EC1.1	ES & PC - INITIAL PLAN & TREE REMOVAL
EC1.2	ES & PC - INITIAL PLAN & TREE REMOVAL
EC2.1	ES & PC - CONSTRUCTION PLAN
EC2.2	ES & PC - CONSTRUCTION PLAN
EC3.1	ES & PC - STABILIZATION PLAN
EC3.2	ES & PC - STABILIZATION PLAN
EC4.1	ES & PC - DETAILS
EC4.2	ES & PC - DETAILS



REVISION HISTORY			
REV. NO.	REVISION	BY	DATE
10	REVISED PER TOWN COMMENTS	WNS	07/07/17
9	REVISED PER TOWN COMMENTS	WNS	06/22/17
8	PAVED PER TOWN OF BLUFFTON REQUEST	WNS	05/24/17
7	REVISED FIRE HYDRANT LOCATION	WNS	5/7/17
6	REVISED PER TOWN OF BLUFFTON PERMIT REVISION	WNS	12/22/16
5	REVISED PER BJWSA COMMENTS	WNS	1/17/16
4	REVISED PER TOWN COMMENTS	MBA	7/24/16
3	ADDED LAGOON SUBGRADE DRAIN	WNS	7/12/16
2	REVISED PER TOWN COMMENTS	MBA	6-2-16
1	REVISED PER DCRM, BJWSA, AND TOWN COMMENTS	MBA	5-10-16

SUBMITTAL HISTORY	
TOWN OF BLUFFTON 2ND PERMIT REVISION	07/07/17
TOWN OF BLUFFTON FINAL	5/13/16
DCRM	5/13/16
TOWN OF BLUFFTON PRELIMINARY	1/16/16
SUBMITTED TO	DATE



Know what's below.
Call before you dig.

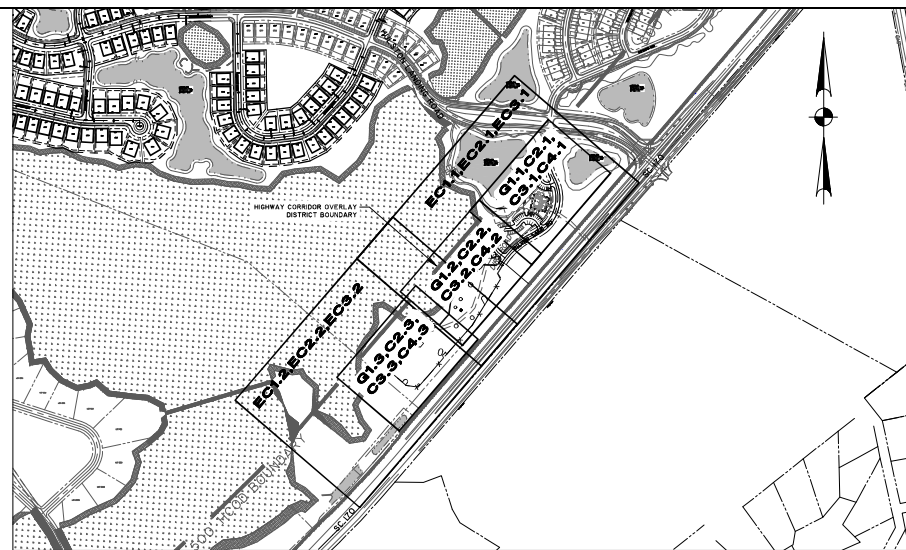
THOMAS & HUTTON
Engineering | Surveying | Planning | GIS | Consulting
50 Park of Commerce Way
Savannah, GA 31405
p.912.234.5500 f.912.234.2950
www.thomashutton.com

<u>DRAINAGE LEGEND</u>		
<u>DESCRIPTION</u>	<u>EXISTING</u>	<u>PROPOSED</u>
PIPE		
DITCH		
CURB INLET		
GRATE INLET		
JUNCTION BOX		
OUTLET STRUCTURE		

SEWER LEGEND		
DESCRIPTION	EXISTING	PROPOSED
GRAVITY PIPE	SS	
SINGLE SERVICE LATERAL	—	—
DOUBLE SERVICE LATERAL		
MANHOLE		
CLEANOUT		
FORCEMAIN	--- 10"FM --- 10"FM ---	--- 10"FM --- 10"FM ---
VALVE AND BOX		
FLUSH HYDRANT		
REDUCER		
BACKFLOW PREVENTOR		
CROSS		
TEE		
90° BEND - HORIZONTAL		
45° BEND - HORIZONTAL		
22-1/2° BEND - HORIZONTAL		
1/4" BEND - HORIZONTAL		
BEND - VERTICAL		
FLUG \ CAP		

WATER LEGEND		
DESCRIPTION	EXISTING	PROPOSED
WATER MAIN	————— 10" W —————	————— 10" W —————
SINGLE SERVICE LATERAL	—————	—————
DOUBLE SERVICE LATERAL		
VALVE AND BOX		
FIRE HYDRANT W/ VALVE & BOX		
FOST HYDRANT		
REDUCER		
BACKFLOW PREVENTOR		
CROSS		
TEE		
90° BEND - HORIZONTAL		
45° BEND - HORIZONTAL		
22-1/2° BEND - HORIZONTAL		
1-1/4" BEND - HORIZONTAL		
BEND - VERTICAL		
CAP		

ABBREVIATIONS					
HD	HIGH DENSITY POLYETHYLENE	JF	JUNCTION BOX	SDMH	STORM DRAINAGE MANHOLE
SOT	BOTTOM	LB	LINEAR FEET	SF	SQUARE FEET
CI	CURB INLET	MX	MAXIMUM	SS	SANITARY SEWER
CP	CORRODED PLASTIC PIPE	MAN	MANHOLE	TC	TOP OF CURB
DQ	DUCTILE IRON PIPE	MM	MANHOLE	TO	TOP OF UTTER
EL	ELEVATION	OC	ON CENTER	TP	TOP OF PAVEMENT
FW	FINISH GRADE	PO	POINT OF CURVE	TP	TOP OF WALK
FH	FORCE HYDRANT	PH	POST HYDRANT	TYP	TYPICAL
FM	FORCE MAIN (SANITARY SEWER)	PT	POINT OF TANGENT	W	WATER
FR	FINISH PAD	PVC	POLYVINYL CHLORIDE	W/	WITH
FR	FRAME	RCC	REINFORCED CONCRETE PIPE	WV	WATER VALVE
GR	GRATE INLET	RJ	RESTRAINED JOINT PIPE	YI	YARD INLET
GV	GATE VALVE	R/W	Right-of-Way		
INT	INTERSECTION	SD	STORM DRAINAGE		



OTHER UTILITIES LEGEND	
DESCRIPTION	EXISTING
NATURAL GAS	_____ UGG _____ UGG _____
TELEPHONE	_____ OHT _____ OHT _____
UNDERGROUND TELEPHONE	_____ UTL _____ UTL _____
ELECTRICITY	_____ OHP _____ OHP _____
UNDERGROUND ELECTRICITY	_____ UGP _____ UGP _____

GENERAL NOTES

- [illegible]

INDEX

SCALE: 1" = 300'

PREPARED FOR:
D.R. HORTON, INC.
209 ARGO CIRCLE
OKATIE, SOUTH CAROLINA 29909
(843) 473-5200

GENERAL INFORMATION

COUNTY	BLAUFORT	OWNER:	D.R. HORTON, INC.
TOWN	BLUFFTON		209 ARD CIRCLE
ZONING	CURRENT ZONING		OKATIE, SOUTH CAROLINA 29909 (843) 473-5200
		ENGINEER:	THOMAS & HUTTON
			50 PARK OF COMMERCE WAY SAVANNAH, GA 31405 (912) 234-5300
	<u>SURVEYOR:</u>		THOMAS & HUTTON
			50 PARK OF COMMERCE WAY SAVANNAH, GA 31405 (912) 234-5300
	<u>UTILITY:</u>	WATER AND SEWER	
		BLAUFORT JASPER WATER AND SEWER AUTHORITY	
		843-987-9250	
		ELECTRIC	
		PALMETTO ELECTRIC COOPERATIVE, INC	
		843-208-0512	
		TELEPHONE AND CABLE	
		HARGRAVE COMMUNICATIONS	
		843-80-6616	

[illegible]

THOMAS & HUTTON
Engineering | Surveying | Planning | GIS | Consulting

50 Park of Commerce Way
Savannah, GA 31405 • 912.234.5300

www.thomasandhutton.com

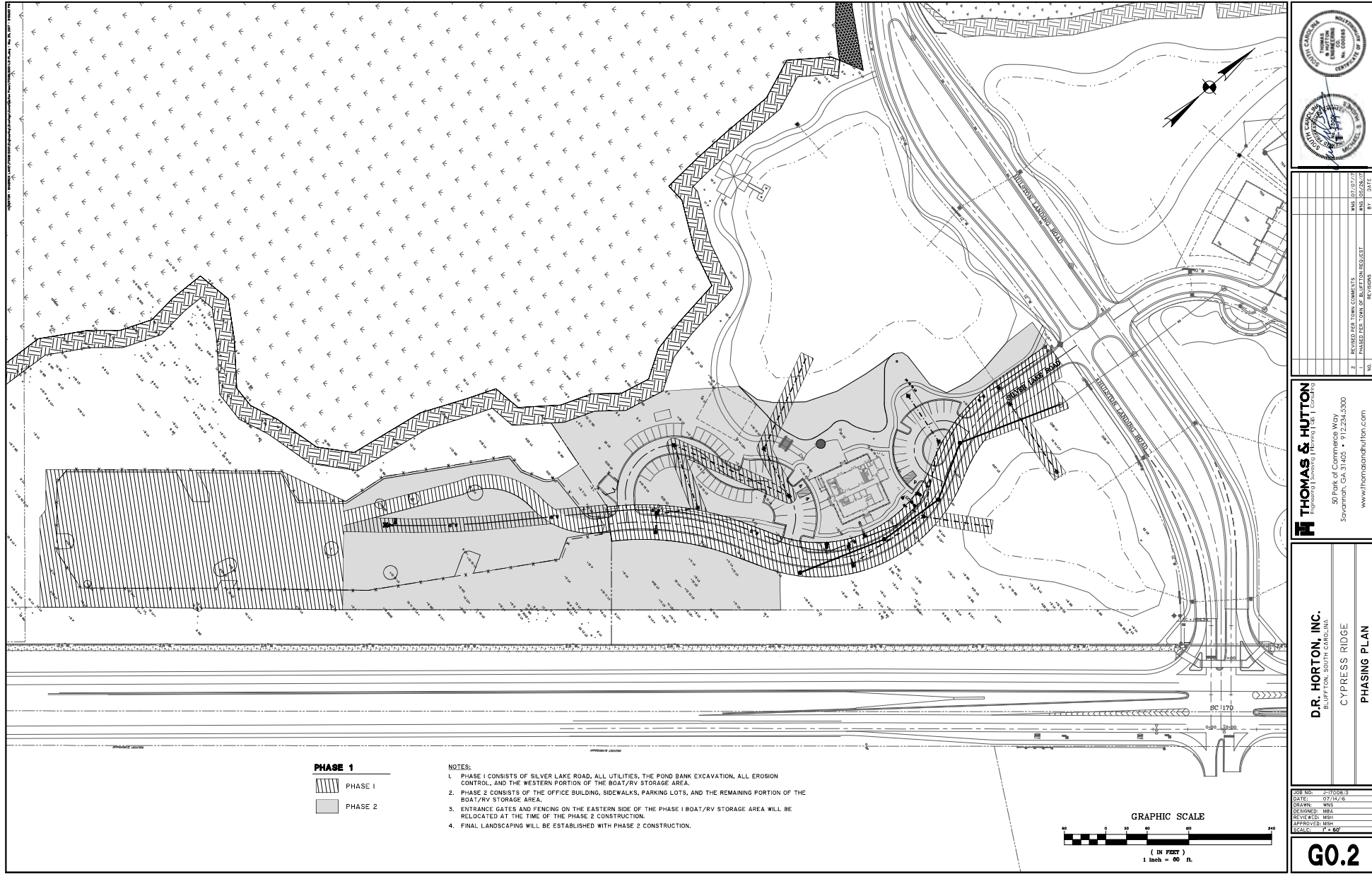
D.R. HORTON, INC.
BLUFFTON, SOUTH CAROLINA

CYPRESS RIDGE

GENERAL NOTES AND SHEET INDEX

JOB NO:	J-1700813
DATE:	07/14/16
DRAWN:	WNS
DESIGNED:	MBA
REVIEWED:	MSH
APPROVED:	MSH
SCALE:	1" = 100'

GO.1



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
	)	
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking,	)	
LLC f/k/a Ramos Trucking, LLC,	)	
	)	DEFENDANT D.R. HORTON, INC.'S
Defendants.	)	MOTION FOR COSTS AND
	)	SANCTIONS AGAINST PLAINTIFF
1223 May River Road, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	

TO: PLAINTIFF MARK W. MCGILTON AND HIS ATTORNEY, BENJAMIN T. SHELTON, ESQUIRE:

PLEASE TAKE NOTE THAT Defendant D.R. Horton, Inc. (“DR Horton”), by and through their undersigned counsel, will move before the Court, on the tenth day after service hereof or at such other time as is designated by the Court, for an Order assessing costs and sanctioning Plaintiff for discovery misconduct.

The Court verbally ordered depositions to proceed without delay and set trial for October (See Judge Bonds scheduling order **Exhibit 1**). Thereafter, DR Horton subpoenaed files from Plaintiff’s experts and set their depositions. To date, three of Plaintiff’s experts have been deposed—Michael Fryar, Andy Rowland, and Lindsay Moore.

Michael Fryar

Despite several weeks' notice of the deposition for an accident which occurred in 2018, Michael Fryar was not prepared for his deposition on August 19, 2024, and it was ended until he finalizes his investigation and report.

Lindsey Moore

Ms. Moore was served with a subpoena for her file on June 26, 2024, but did not respond to her documents subpoena until Friday, August 23, 2024. Mrs. Moore was subpoenaed to attend her deposition in person on Hilton Head Island on August 26th, 2024. On the morning of August 26th, 2024 Mr. Shelton sent an email that Mrs. Moore was attending her deposition via Zoom teleconference despite the notice. All other parties, including the court reporter, already traveled to Hilton Head Island. Mr. Shelton offered for her to drive to the deposition, but she would not arrive in time.

More concerning was Mrs. Moore's initial concealment of her file materials and true opinions on the case. Despite receiving a valid subpoena for her entire file, Mrs. Moore secretly created a "real report" for the case and concealed it throughout her deposition until she was specifically asked about the validity of her opinions. In fact, the morning prior to the deposition Mrs. Moore realized her report was erroneous and unsupported and created an updated report essentially halving Plaintiff's future medical damages which she repeatedly concealed.

For the foregoing reasons, Defendant requests costs, attorneys' fees, and sanctions; for the cost and the amount of time and expense to travel to Hilton Head Island for the deposition of Mrs. Moore and the cost to prepare and take the deposition of Mr. Fryar.

Therefore, Defendant DR Horton seeks sanctions congruent with the blatant discovery abuse displayed by Plaintiff, as authorized and contemplated pursuant to Rule 37(d), SCRCP,

and, for attorney's fees and costs, any and all other sanctions this Honorable Court finds just and proper. This motion is based on the pleadings in this case, the South Carolina Rules of Civil Procedure, relevant case law, and any briefs, memoranda of law, or affidavits as may be filed in support thereof.

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

Jason M. Imhoff (SC Bar # 69355)

John T. Crawford, Jr. (SC Bar # 69682)

325 West McBee Avenue, Suite 301

Greenville, South Carolina 29601

Telephone: (864) 242-4899

Facsimile: (864) 242-4844

imhoff@conlaw.com

crawford@conlaw.com

Counsel for Defendant D.R. Horton, Inc.

September 4, 2024
Greenville, South Carolina

EXHIBIT 1

ELECTRONICALLY FILED - 2024 Jun 13 1:48 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069
ELECTRONICALLY FILED - 2024 Sep 04 3:18 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

v.

**1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY
TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,**

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

v.

KENNETH SCOTT BUILDERS, LLC,
Third-Party Defendants.

**IN THE COURT OF GENERAL SESSIONS
FOURTEENTH JUDICIAL CIRCUIT**

CASE No(s): 2021CP2700069

ORDER

The court finds that the Defendant failed to comply with the scheduling order and has not shown good cause for such violation. The court rules:

- The Defendant is allowed to use their experts and must disclose them to the Plaintiff by Friday, June 14. The Defendant will provide a CV and a detailed outline of the experts' testimony.
- Depositions: Defendant will make the experts available to the Plaintiff at the time and place of the Plaintiff's choosing. If an agreement cannot be made, the court is to be immediately contacted.
- Discovery: All discovery will be complete by September 15, 2024.
- Mediation: The parties are to mediate the case by October 15, 2024. An insurance representative with full authority to settle the case must be present at the mediation. The Plaintiff is to pick the mediator and the date and time of mediation. The Defendant is responsible for the costs of mediation.

- If the Plaintiff is not ready for trial due to the recent delay caused by the Defendant, the court will consider granting a continuance.
- The case is set for a date certain trial on October 21, 2024, before Judge Hughston.



Jasper Common Pleas

Case Caption: Mark W. McGilton VS 1223 May River Road, Llc , defendant, et al
Case Number: 2021CP2700069
Type: Order/Form 4

So Ordered

s/ Robert Bonds, 2770

Electronically signed on 2024-06-13 11:21:40 page 3 of 3

ELECTRONICALLY FILED - 2024 Jun 13 1:48 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069
ELECTRONICALLY FILED - 2024 Sep 04 3:18 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

MARK W. MCGILTON,
Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069

**PLAINTIFF MARK W. MCGILTON'S
OFFER OF JUDGMENT**

**TO: JOHN T. CRAWFORD, JR., ESQ., AND JASON IMHOFF, ESQ., ATTORNEYS FOR
D.R. HORTON, INC.:**

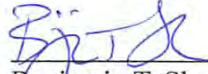
The Plaintiff, Mark W. McGilton, makes, pursuant to Rule 68(a), SCRPC, an OFFER OF JUDGMENT in favor of the Plaintiff against Defendant D.R. Horton, Inc., only, in the amount of Six Million and 00/100 (\$6,000,000.00) Dollars. Said amount is an offer to allow judgment to be taken against the Defendant D.R. Horton, Inc., only, and no other Defendants, immediately upon the acceptance of this offer.

I SO OFFER.

[Signature Page Follows]

Respectfully submitted,

SHELTON LAW FIRM, LLC



Benjamin T. Shelton, S.C. Bar No. 77207
S. Harrison Williams, S.C. Bar No. 102410
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ben@sheltonlawsc.com

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Hilton Head Island, South Carolina
October 3, 2024

BLUESTEIN THOMPSON SULLIVAN, LLC

John S. Nichols, S.C. Bar. No. 4210
1614 Taylor Street
Columbia, SC 29201
(803) 779-7599

john@bluesteinattorneys.com

Columbia, South Carolina
October 3, 2024

Attorneys for Plaintiff Mark W. McGilton

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069

**PLAINTIFF MARK W. MCGILTON'S
MEMORANDUM IN SUPPORT OF
MOTION FOR RULE TO SHOW
CAUSE, CONSOLIDATED
MEMORANDUM OF DISCOVERY
MOTIONS AGAINST DEFENDANT D.R.
HORTON, INC., and MEMORANDUM
IN OPPOSITION TO DEFENDANT D.R.
HORTON, INC.'S MOTION FOR COSTS
AND SANCTIONS AGAINST
PLAINTIFF**

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

**TO: JOHN T. CRAWFORD, JR., ESQ., AND JASON IMHOFF, ESQ., ATTORNEYS FOR
D.R. HORTON, INC.:**

Plaintiff Mark W. McGilton ("Plaintiff"), through his undersigned attorneys, hereby files this Memorandum in Support of Plaintiff's Motion for Rule to Show Cause, to Strike and for Contempt Per Rule 37(d), SCRPC, Against D.R. Horton, Inc. for Continuing Violations of Orders Dated Sept. 22, 2022, March 5, 2024, and June 13, 2024.

PREAMBLE OF AUTHORITY

"I am providing D.R. Horton with a clear and explicit warning that upon a finding of any further discovery violations by any judge, that its pleadings will be subject to being struck."

(Mar. 5, 2024 Order Granting Pl.'s Mtn. to Compel, for Sanctions, and Holding D.R. Horton in Contempt at 7).

OPENING SUMMARY

Defendant D.R. Horton, Inc. ("D.R. Horton") has shown nothing but contempt and disregard for the rules of discovery in this matter. Plaintiff first served its initial interrogatories and requests for production on D.R. Horton in July of 2021. Then, **three years later**, after a deposition wherein a fact witness testified about the development and building activities of D.R. Horton that are the subject of this matter, Plaintiff discovered that D.R. Horton failed to produce thousands of pages of documents that were responsive to Plaintiff's 2021 discovery requests, that the documents discovered through a FOIA request materially changed Plaintiff's expert's testimony, that the documents directly contradicted assertions and statements made by D.R. Horton in this case, and that D.R. Horton clearly meant to conceal these documents as they are detrimental to D.R. Horton's defense in this case. Further, as of the date of filing this memorandum ***D.R. Horton still has not produced the documents it has been hiding in this case.***

"An affirmative duty does exist to answer interrogatories and respond to requests to produce." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 83, 716 S.E.2d 877, 885 (2011). "Requests for discovery under Rules 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party." Rule 26(e), SCRCF.

TIMELINE OF DISCOVERY

- **July 22, 2021:** Plaintiff serves Interrogatories and Requests for Production on D.R. Horton.
- **September 3, 2021:** Plaintiff's counsel emails counsel for D.R. Horton inquiring as to when D.R. Horton will respond to the then past-due Plaintiff's discovery requests.
- **September 3, 2021:** Counsel for D.R. Horton requests an extension to respond to Plaintiff's discovery requests until September 15, 2021.
- **September 3, 2021:** Counsel for Plaintiff grants the extension request.
- **September 15, 2021:** D.R. Horton fails to respond to Plaintiff's discovery requests pursuant to the agreed-upon extension.
- **September 17, 2021:** Plaintiff sends D.R. Horton a Rule 11, SCRCp, consultation letter again asking for a response to Plaintiff's discovery requests and gives D.R. Horton until September 20, 2021 to respond.
- **September 30, 2021:** Counsel for D.R. Horton responds via email apologizing for not responding to Plaintiff's discovery request yet and stating "we are still trying to obtain the file from our client."
- **September 30, 2021:** Plaintiff's counsel asks counsel for D.R. Horton when they plan to respond to the discovery requests, but receives no response from D.R. Horton.
- **November 1, 2021:** Plaintiff's counsel follows up with counsel for D.R. Horton again regarding the lack of response to Plaintiff's discovery requests.
- **November 4, 2021:** Plaintiff files a Motion to Compel against D.R. Horton to compel the responses to Plaintiff's discovery requests.
- **July 15, 2022:** D.R. Horton serves incomplete responses to Plaintiff's discovery requests.
- **August 10, 2022:** Plaintiff sends D.R. Horton another Rule 11 letter regarding D.R. Horton's deficiencies in its discovery responses.
- **August 16, 2022:** D.R. Horton provides supplemental responses to Plaintiff's discovery requests, but the responses remain deficient.

- **August 17, 2022:** A hearing is held on Plaintiff's Motion to Compel wherein the parties agree to resolve the Motion with a consent order.
- **August 22, 2022:** Counsel for D.R. Horton requests search terms from Plaintiff so that they can further supplement their discovery responses to Plaintiff's requests.
- **September 20, 2022:** A Consent Order is filed wherein Plaintiff agreed to withdraw his Motion to Compel in exchange for D.R. Horton agreeing to "comply with Plaintiff's outstanding discovery requests, comply with continuing discovery obligation, and work in good faith with Plaintiff to resolve any further discovery disputes."
- **October 25, 2022:** Counsel for Plaintiff provides to D.R. Horton a list of search terms so D.R. Horton can search its files for the discoverable information.
- **November 8, 2022:** Counsel for D.R. Horton responds to the list of search terms claiming they are overly burdensome and requests a conference call to discuss the search terms.
- **November 14, 2022:** a conference call is held between counsel wherein D.R. Horton agrees to run certain searches for discoverable ESI.
- **February 14, 2023:** After being unable to get any response from D.R. Horton as to the results of its search with the proposed search terms that D.R. Horton requested, Plaintiff issues a notice for the Rule 30(b)(6), SCRCF, deposition of D.R. Horton.
- **October 17, 2023:** Counsel for Plaintiff files the Second Motion to Compel against D.R. Horton for its failure to cooperate in discovery, its failure to produce discovery pursuant to Plaintiff's discovery requests, and its failure to abide by orders of the court regarding discovery matters.
- **December 7, 2023:** The Court holds a hearing on Plaintiff's Motion to Compel, the Honorable Judge Diane S. Goodstein presides over the hearing.
- **March 5, 2024:** The Court issues an Order holding D.R. Horton in contempt of court, sanctioning D.R. Horton for repeated discovery violations, and warning D.R. Horton that "upon a finding of any further discovery violation *could result in pleadings being stricken.*"

(emphasis added). (Mar. 5, 2024 Order Granting Plaintiff's Motion to Compel, for Sanctions, and Holding D.R. Horton in Contempt at 7).

- **June 6, 2024:** After not complying with the scheduling order and failing to identify their experts by the scheduling order deadline, D.R. Horton files a Motion to Amend Scheduling Order.
- **June 10, 2024:** The Court (Honorable Robert Bonds) holds a hearing on D.R. Horton's Motion to Amend Scheduling Order.
- **June 13, 2024:** The Court issues an Order on D.R. Horton's Motion to Amend Scheduling Order, wherein the Court holds that "Defendant [D.R. Horton] failed to comply with the scheduling order and has not shown good cause for such violation." The Court also orders that D.R. Horton was to disclose their experts by June 14, 2024; that D.R. Horton is to make its experts available to be deposed at the time and place of Plaintiff's choosing; and the Court set other deadlines for the matter. (June 13, 2024 Order at 1).
- **August 19, 2024:** After discovering through FOIA request responses that D.R. Horton failed to produce thousands of pages of highly relevant documents, Plaintiff files the instant Motion requesting that the Court strike D.R. Horton's answer as the Court previously and expressly warned D.R. Horton would happen if it continued to abuse the discovery process.

ARGUMENT IN SUPPORT OF STRIKING D.R. HORTON'S ANSWER

On March 4, 2024, the Honorable Diane Goodstein sanctioned D.R. Horton, Inc., held it in Contempt, and Ordered that "[i]t may purge the contempt before trial by engaging in no more willful discovery violations. It shall strictly abide by time deadlines. It shall cooperate fully and timely answer and respond to discovery requests. It shall cooperate fully with Plaintiff in scheduling and producing witnesses for depositions. It shall otherwise strictly comply with this court's September 22, 2022 Order and with this Order." (Mar. 5, 2024 Order Granting Pl.'s Mtn. to Compel, for Sanctions, and Holding D.R. Horton in Contempt at 7). "Also, I am providing D.R.

Horton with a clear and explicit warning that upon a finding of any further discovery violations by any judge, that its pleadings will be subject to being struck.” *Id.* (emphasis added).

On June 13, 2024, Judge Bonds issued another order that granted D.R. Horton leave to disclose experts in the matter after D.R. Horton failed to comply with the previous scheduling order and failed to disclose experts within the timeframe set forth in the scheduling order. In its Order dated June 13, 2024, the court found that “[D.R. Horton] failed to comply with the scheduling order and has not shown good cause for such violation.” (Jun. 13, 2024 Order at 1).

I. *D.R. Horton is Hiding Evidence that is Detrimental to its Defense*

D.R. Horton has premised its defense to this action on the basis that it was merely the owner or developer of the land subject to the project at issue and not the general contractor. It alleges that it had no control and held no duties over the acts of the alleged independent contractor who hired the uninsured and unmaintained dump truck that was involved in the collision at issue in this matter. However, material recently discovered by Plaintiff through a FOIA request (and not produced by D.R. Horton) shows that D.R. Horton was a general contractor of record for the project where the dirt was repeatedly excavated and removed from D.R. Horton’s job site by the dump truck operator that was involved in the collision at issue in this case.

APPLICANT:	D R HORTON INC	ADDRESS:	209 ARGO CIR OKATIE, SC 29909
OWNER:	D R Horton Inc	ADDRESS:	PO Box 3558 Bluffton, SC 29910
CONTRACTOR:	D R Horton Inc	ADDRESS:	PO Box 3558 Bluffton, SC 29910
ENGINEER:		ADDRESS:	
ARCHITECT:	Langley & Associates Architects	ADDRESS:	109 S Main ST Greer, SC 29650
Description of Work: new office building for home sales			

(Ex. 2 to Plaintiff’s Motion).

Emails received through FOIA¹ show that D.R. Horton was intricately involved in the majority, if not all, planning, communications and decisions involved between the Town of Bluffton and the project at issue. The amount of material withheld and not produced by D.R. Horton that is responsive to the Plaintiff's discovery requests is staggering, totaling thousands of pages, and is incredibly detrimental to D.R. Horton's defenses in this case. As general contractor, it held nondelegable duties over its jobsite and the subcontractors it was bound to supervise, including Kenneth Scott Builders, Inc. and Jacob AU Trucking, LLC.

Further, before this material was obtained by the Plaintiff through its FOIA request, D.R. Horton took the deposition of the Plaintiff's OSHA and safety compliance expert, insisting that it be taken before D.R. Horton's 30(b)(6) depositions.

First, counsel for Plaintiff suggested that the deposition of Plaintiff's OSHA and safety compliance expert, Andy Rowland, be taken after D.R. Horton's 30(b)(6) deposition.

¹ The dump truck driver recently testified that he regularly performed work on and excavated dirt from the construction of the building pad phase of development for what was the development of D.R. Horton's regional corporate office at the times leading up to and at the time of the accident. After reviewing discovery produced by D.R. Horton and finding no permit for the construction and no plans relating to the phase at issue, Plaintiff issued Freedom of Information Act requests to the Town seeking the relevant permits and plans. The returns showed D.R. Horton as the general contractor for the permit number that constitutes the "commercial phase" of development that included the construction of its regional headquarters, an RV and storage area, and the surrounding parking and spaces.

RE: Mark McGilton v. DR Horton, Inc., 1223 May River Road, LLC, and Lotty Trucking LLC



Benjamin Shelton

To Jason Imhoff; John Crawford

Cc Cara Smith; Stephanie Simpson; Harrison Williams

Reply

Reply All

Forward



Tue 7/9/2024 3:53 PM

Hi Jason,

Thanks for getting back to me. I hope that you a good time out of the office.

We set mediation for September 20th. I believe we have provided and set dates for all our experts whom you want to depose. Here are a few more bullet-points for input:

- We haven't set the 30(b)(6) depositions or most of your expert depositions yet. We still need those dates. I can blind notice them with the understanding that we can modify to fit your/their schedule if it helps move the ball.
- Would you want to continue Andy Rowland's deposition until I take the 30(b)(6) and after Alfredo's depositions? Otherwise, I could see us getting a lot of answers to the extent of "it depends." I could get additional dates from him over the next few days and we could agree to set it after the 30(b)(6) and before your OSHA/Safety expert depositions.
- Michael Fryar's office has asked for his deposition to take place virtually. This will save cost of travel and time.
- Fryar's office also asked who is paying for the deposition time as well. I assume we are working under the standard rules—deposing party pays for expert time for travel and appearance at deposition. Please let me know if you have a different take.
- I would like a detailed outline for the expert opinions to help me determine whose depositions I need to take. Particularly the damage expert(s) and traffic investigation experts, which we provided full form written opinions or other written reports, videos and summaries relating to their opinions.

Best regards,

Ben

Instead of agreeing, counsel for D.R. Horton objected and said that Mr. Rowland has to be deposed first.

RE: Mark McGilton v. DR Horton, Inc., 1223 May River Road, LLC, and Lotty Trucking LLC



Jason Imhoff <jimhoff@conlaw.com>

To: Benjamin Shelton; John Crawford

Cc: Cara Smith; Stephanie Simpson; Harrison Williams

Reply Reply All Forward

Tue 7/9/2024 4:05 PM

You replied to this message on 7/15/2024 12:00 PM.

Cara- can you reach out to our experts and get dates and run them by Ben and Harrison please? Ben – if you want certain dates please ask.

I need Rowland's depo asap to prepare my witnesses and experts. I don't know how else to do that.

I would like all depositions in person, if possible. I may be convinced to change Fryar to zoom but I'm not ready to make that decision yet.

Costs – yes – standard rules. DRH will be responsible for your experts' time in the deposition and vice versa.

I'll get with my experts on the traffic and damages.

Dr. Alford isn't really a "damages" expert. He's a statistician/mathematician. He's just checking math – not testifying about your guys costs or injuries. Check the plaintiffs listserv if that still exists. He does a lot of present value stuff for the plaintiffs' bar.

You will want to take Steve Moore's deposition. He'll be closest to the standard of care/independent contractor stuff.

You will want to take one of the exponent guys' deposition. It may be that one of those guys ends up testifying for both. I'll let you know.



Jason Imhoff
Of Counsel
KENISON, DUDLEY & CRAWFORD, LLC
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Greenville, SC 29601
Email: jimhoff@conlaw.com
Direct: (864) 501-3208
Website: www.conlaw.com

This plan, on behalf of counsel for D.R. Horton, was seemingly so that D.R. Horton could elicit favorable testimony from Plaintiff's OSHA and safety compliance expert because D.R. Horton knew it was concealing the evidence that D.R. Horton was the general contractor on the at-issue project and not simply the owner. Thus, D.R. Horton's defense that it held no responsibility over the at-fault parties is without merit. *See, e.g., Rock Hill Telephone Co. v. Globe Communications*, 363 S.C. 385, 390-391, 611 S.E.2d 235, 238 (2005) ("[a] person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains liable for that breach. It actually is the

liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor.”).

During Mr. Rowland’s deposition, counsel for D.R. Horton elicited the following testimony from Mr. Rowland:

11 Q. Okay. In this case, in your analysis of
12 this case, what is D.R. Horton? Is it an owner,
13 developer, general contractor, engineer, what are
14 they in this case?

15 A. I would say that that -- who is in what
16 role against all the tiers of this is one of the
17 most taxing questions in the whole case. We
18 know -- if you -- if you asked me who is
19 D.R. Horton, I would say they're a developer. I
20 also know just from general experience that they
21 typically would hire a GC, a builder to build
22 individual houses, and that they might have
23 multiple ones of those in any given development.
24 So I -- I can't say that they acted as the
25 general contractor. In my interpretation of it,

(Rowland Dep. 71:11-25, July 16, 2024)².

D.R. Horton elicited the testimony while knowing that D.R. Horton had filled out a permit application and affirmatively stated that D.R. Horton was the general contractor for the permitted

² Attached hereto as Exhibit 1.

work, all while hiding that information and documentation from Plaintiff so as to damage the testimony of Plaintiff's expert and ultimately prejudice Plaintiff's case against D.R. Horton.

The newly discovered and undisclosed material will materially change the nature of Plaintiff's expert's testimony at trial and will subject the expert to unfair and inaccurate cross-examination at trial. This is an act of further discovery abuse by D.R. Horton which should cause this Court to strike D.R. Horton's pleadings.

II. D.R. Horton's Discovery Abuse During Depositions

D.R. Horton's discovery abuse conduct is not limited to hiding and failing to disclose documents. This abusive conduct also occurs in depositions by trying to delay and derail the questioning of witnesses. Plaintiff noticed the deposition of Plaintiff's treating physician, Dr. Hsu. The deposition notice clearly stated that the deposition would be *de bene esse*, would be held in person, and that the deponent had a very small and strict amount of time to be deposed due to his obligations as an orthopedic surgeon. Instead of attending the deposition and participating in good faith, D.R. Horton's counsel attended the deposition remotely, appeared late, and soon after testimony began and while Plaintiff's counsel was asking expert qualification questions, D.R. Horton's counsel raised an objection, and falsely stated on the record that D.R. Horton had no notice that the deposition was for the purpose of trial and had no notice that the deposition was to be held in person. The notices of Dr. Hsu's deposition, however, explicitly contradict D.R. Horton's counsel's statement:

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., and LOTTY TRUCKING,
LLC f/k/a RAMOS TRUCKING, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069

**PLAINTIFF'S NOTICE OF DE BENE
ESSE, VIDEOTAPED DEPOSITION OF
JOSEPH R. HSU, MD,
for the purposes of Rules
30(h) and 32, SCRCP**

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

Plaintiff served D.R. Horton with the notice of Dr. Hsu's deposition on July 30, 2024, for the deposition that was scheduled for and held on September 6, 2024.³ D.R. Horton was clearly aware that the deposition of Dr. Hsu was for the purpose of trial as early as July 30, 2024, as D.R. Horton itself cross noticed the *de bene esse* deposition of Dr. Hsu.⁴

³ Plaintiff's Notice of Deposition of Dr. Hsu is attached hereto as Exhibit 2.

⁴ D.R. Horton's Notice of Deposition of Dr. Hsu is attached hereto as Exhibit 3.

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2023-CP-27-00069

**DEFENDANT D.R. HORTON, INC.'S
CROSS NOTICE OF DE BENE ESSE,
VIDEOTAPED DEPOSITION OF
JOSEPH R. HSU, M.D.**

Yet, counsel for D.R. Horton made the following statement during the deposition:

18	MR. IMHOFF: Mr. Shelton and I have just
19	had a discussion off the record about
20	this being a trial -- a video for use at
21	trial, or de bene esse deposition, which
22	I don't think exists anymore, but for use
23	at trial anyway. We noticed Dr. Hsu's
24	deposition. We think we have a right to
25	discovery deposition. I asked Ben this

9/6/2024

Joseph Robert Hsu, M.D.
McGilton vs. 1223 May River Road, LLC, et al.

9

1 morning via email how we were going to
2 handle that, asked if he wanted to go
3 first. He said yes. I didn't realize he
4 was going to prevent me from taking a
5 discovery deposition of this gentleman.
6 His office did, in fact, set this up
7 because they've been communicating with
8 Dr. Hsu's office. However, I did not
9 know that was intended to not let us take
10 a discovery deposition.

11 So I'm putting on the record that
12 unless I'm allowed to at least ask this
13 doctor some discovery questions, that
14 this not be allowed to be used at trial,
15 and/or parts that we select to object to
16 be looked at by the Court before it's
17 allowed for trial at the very least.

18 Again, I will ask Mr. Shelton on the
19 record, since we both noticed it for 9
20 a.m. this morning, to allow me to go
21 forward with the discovery deposition.

(Hsu Dep. 8:18-9:21 Sept. 6, 2024).⁵

This abusive conduct was clearly intended to limit Plaintiff's counsel's time to question the deponent, to try and threaten the Plaintiff with regard to having the deposition unavailable to be used at trial, and to try and improperly exclude the testimony of Plaintiff's treating physician.

⁵ Attached hereto as Exhibit 4.

It is clear that D.R. Horton's counsel was well aware that the deposition was for the purpose of trial—because D.R. Horton's counsel himself noticed the deposition for the purpose of trial, and for D.R. Horton's counsel to stop the deposition to claim he was never informed and then to threaten to exclude the deposition testimony from being used at trial was for no other purpose than delay and amounts to discovery abuse.

D.R. Horton's continued contempt of this court and failure to comply with discovery requests has prejudiced Plaintiff and placed the Plaintiff in a position where it must review and analyze thousands of additional documents prior to the end of the discovery period of this case, which is quickly approaching, has already prejudiced the Plaintiff relative to its expert's testimony, and has prejudiced Plaintiff when Plaintiff is simply trying to take the deposition of a fact witness and make it convenient for a treating physician to be able to avoid the burden of attending trial far away from his practice by notifying all parties the deposition was for the purpose of trial. This is on top of the fact that counsel for D.R. Horton represented to this Court that D.R. Horton was not challenging Plaintiff's damages in this case—D.R. Horton was only challenging liability—so the deposition of Plaintiff's treating physician should be of no consequence to D.R. Horton.⁶

This is not the first time D.R. Horton has systematically failed to follow the orders of this Court, and the mandates of the SCRCF. It has failed to cure its contempt. It has ignored the warnings of Judge Goodstein's Order.⁷ The failure to produce the most important material in this

⁶ Counsel for D.R. Horton made this statement to Judge Bonds during a status conference with His Honor.

⁷ Moreover, D.R. Horton has not produced its experts as ordered by this Court on June 14, 2024. It has failed to provide "a detailed outline" of its expert's opinions as required by Judge Bonds' June 13, 2024 Order. Plaintiff's counsel sent Rule 11 correspondence asking that D.R. Horton comply with the Order by providing a detailed outline of its experts' testimony and D.R. Horton has failed to do so to date. D.R. Horton also failed to confirm the date for the deposition of its 30(b)(6) witnesses, it has named experts which are unavailable prior to the 30(b)(6) depositions and prior to the previous discovery deadline in this case and/or has only provided extremely limited dates for D.R. Horton's experts, despite Judge Bonds Ordering that D.R. Horton produce their experts at a the time and place of Plaintiff's counsel's choosing.

case constitutes a grave violation of this Court's previous orders, and the impeding of the discovery process in the case through the delay of witness depositions constitutes further serious violations of this Court's previous orders and constitutes violations of the South Carolina Rules of Civil Procedure. As shown in the timeline above, D.R. Horton's contempt and willful failure to comply with the South Carolina Rules of Civil Procedure is part of a strategy to cause delay and to obstruct the Plaintiff from obtaining the truth. The subterfuge employed by hiding evidence from the Plaintiff and the court, and in false statements made by D.R. Horton's counsel on the record in attempt to derail the discovery process should have no place in the South Carolina court system.

III. *D.R. Horton's Threats and Discovery Abuse Through Frivolous Motions*

On September 4, 2024, D.R. Horton filed its Motion for Costs and Sanctions Against Plaintiff ("D.R. Horton Motion") which seeks relief from the court for essentially three alleged acts of discovery abuse: (1) that Plaintiff's expert Michael Fryar was not prepared to be deposed, (2) that Plaintiff's expert Lindsey Moore appeared via Zoom for her deposition and not in person, and (3) that Plaintiff's expert Lindsey Moore had an alleged secret expert report. However, what is not presented to the Court in the D.R. Horton Motion is what the purpose of the motion really is—a follow up to a threat made by counsel for D.R. Horton to counsel for the Plaintiff. The D.R. Horton motion is completely without merit and is frivolous, is made for a purpose other than a genuine dispute before the court and is further evidence of D.R. Horton's abusive discovery practices in this matter.

On July 18, 2024, a fact witness in this case was deposed. At the conclusion of the deposition, counsel for D.R. Horton requested to speak with counsel for the Plaintiff privately. During this off the record discussion, counsel for D.R. Horton threatened counsel for the Plaintiff that if his client did not accept a settlement offer of \$50,000 that the case was going to get "nasty"

and that D.R. Horton was going to get counsel for the Plaintiff sanctioned. (*See* Aff. of Benjamin Shelton attached hereto as Exhibit 5). The D.R. Horton Motion is nothing more than D.R. Horton following through on its baseless and unethical threat.

To demonstrate as much, the D.R. Horton Motion is completely without merit. As to the allegations regarding the deposition of Michael Fryer, Plaintiff sent to D.R. Horton Mr. Fryar's expert report on May 24, 2024. The report stated that his opinion was preliminary.⁸

InQuis

PRELIMINARY VOCATIONAL REHABILITATION ASSESSMENT & EARNING CAPACITY ANALYSIS

DATE: 05/22/2024

EVALUEE: Mr. Mark McGilton

ADDRESS: Beaufort, South Carolina

COUNTY: Beaufort

DATE OF MVC: 03/13/2018

DATE OF BIRTH: 01/11/1966

CURRENT AGE: 58 years

Thus, D.R. Horton knew when it requested to depose Mr. Fryar⁹ and on the day of Mr. Fryar's deposition that Mr. Fryar's opinion was preliminary because one of the Plaintiff's treating physicians had not given the Plaintiff an ability to return-to-work rating, and, therefore, Mr. Fryar could not finalize his opinion. D.R. Horton did not question Mr. Fryar about certain scenarios wherein if a certain rating was given what his opinion would be. Instead, D.R. Horton ended the deposition and left it open, which Plaintiff consented to do without question.

⁸ The First Page of Mr. Fryar's Report is attached hereto as Exhibit 6.

⁹ D.R. Horton had Mr. Fryar's preliminary report for two months before Mr. Fryar was deposed.

11 MR. IMHOFF: All right. For the
12 record, we just had an off-the-record discussion
13 about Mr. Fryar's preliminary report. And what
14 he shared with us is he needs some medical
15 information from treating physicians of
16 Mr. McGilton to have a final report. And after
17 our off-the-record discussion or during our
18 off-the-record discussion, we -- we all agreed
19 and stipulated that it would make more sense that
20 Mr. Fryar gets that information, develops his
21 final opinions, and we complete his deposition
22 after he gets whatever the information is that he
23 needs, whether it come by testimony, deposition,
24 report, or -- or otherwise.

(Fryar Dep. 22:11-24, July 19, 2024).¹⁰

Now, D.R. Horton's real intention is made clear—that D.R. Horton is using what is a normal result in a case such as this, an expert waiting on more information, to try and fabricate a reason for this Court to sanction the Plaintiff and to distract from the egregious discovery abuse by D.R. Horton in a last ditch effort by D.R. Horton to try and avoid having its pleading struck—as this Court has already warned D.R. Horton it would do if they kept abusing the discovery process and the South Carolina Rules of Civil Procedure.

¹⁰ Attached hereto as Exhibit 7.

As to the allegations regarding Lindsay Moore, D.R. Horton contends that Plaintiff should be sanctioned because Ms. Moore did not attend her deposition in person. What counsel for D.R. Horton omits in the D.R. Horton Motion is that counsel for D.R. Horton consented to Ms. Moore not attending the deposition in person. As the court can see in the below and attached email, once Plaintiff's counsel realized that he made a mistake and that Ms. Moore was to attend in person, he offered to counsel for D.R. Horton to have Ms. Moore drive from Charleston to Hilton Head to attend the deposition in person with the caveat that the deposition would start about thirty minutes late. Instead, counsel for D.R. Horton instructed that he would proceed via Zoom with the deposition.

Re: REALTIME / ZOOM EXHIBIT UPLOAD & DOWNLOAD LINKS - Mark W. McGilton v. D.R. Ho...



Jason Imhoff <jimhoff@conlaw.com>

To: Benjamin Shelton

Cc: Cara Smith

Reply Reply All Forward ...

Mon 8/26/2024 8:21 AM

Don't have her drive down. We have a 2 pm today and I don't want to wait for her.

On Aug 26, 2024, at 8:15 AM, Benjamin Shelton <ben@sheltonlawsc.com> wrote:

I get it. Our emails just crossed. Please let me know if you'd like her to come down. She could be here by 10:30 or 10:45.

From: Jason Imhoff <jimhoff@conlaw.com>

Sent: Monday, August 26, 2024 8:11 AM

To: Benjamin Shelton <ben@sheltonlawsc.com>

Cc: Cara Smith <smith@conlaw.com>

Subject: Re: REALTIME / ZOOM EXHIBIT UPLOAD & DOWNLOAD LINKS - Mark W. McGilton v. D.R. Horton, et al.

We'll do it by zoom but I'll reserve my right to see her in person. I need to do these depositions in person unless we agree other wise.

On Aug 26, 2024, at 8:06 AM, Benjamin Shelton <ben@sheltonlawsc.com> wrote:

She's in Charleston. I can call her and ask her to down here but it would start a little late. Please give me a call if you would like – (843) 295-0915

Further, counsel for D.R. Horton attended the deposition via Zoom as well and did not present in person at Plaintiff's counsel's office as he now complains of Ms. Moore for not doing. This behavior by counsel for D.R. Horton is also contradictory to his complaints about the Plaintiff in Dr. Hsu's deposition—that counsel for D.R. Horton was not told by the Plaintiff that the deposition was to be in person and instead he thought it was by Zoom. This shows what counsel for D.R. Horton's conduct really is—an attempt to try and distract this Court from the true issue -- D.R. Horton's egregious discovery abuse -- by fabricating alleged misdeeds by Plaintiff's counsel in this matter. This is nothing more than further discovery abuse by D.R. Horton, and this conduct by D.R. Horton is clearly not in strict compliance with the South Carolina Rules of Civil Procedure, which Judge Goodstein ordered of D.R. Horton.

Therefore, I hold D.R. Horton in contempt of court for its willful and repeated discovery violations in this matter. D.R. Horton may purge the contempt before trial by engaging in no more willful discovery violations. It shall strictly abide by time deadlines. It shall fully and timely answer and respond to discovery requests. It shall cooperate fully with Plaintiff in scheduling and producing witnesses for depositions. It shall otherwise strictly comply with this court's September 22, 2022 Order and with this Order.

(Mar. 5, 2024 Order Granting Pl.'s Mtn. to Compel, for Sanctions, and Holding D.R. Horton in Contempt at 7).

Additionally, D.R. Horton's allegation that Ms. Moore concealed her opinions in the case is completely without merit. D.R. Horton is trying to take what is normal in the field of life care planning—an answer of “it depends”—and twist that testimony into an alleged devious act on the part of an expert, an argument that is frivolous, without merit, and is a further abuse of the discovery process in this case.

Ms. Moore is a life care planner. She is retained in cases where a party has suffered catastrophic injuries and she opines and testifies as to the cost of the long term care of the injured

party. (Moore Dep. 34:18-35:10, Aug. 26, 2024).¹¹ Ms. Moore was questioned by counsel for D.R. Horton extensively about each cost item in her report, why it was there, and what the supporting evidence was. During Ms. Moore's deposition, she testified that she had a further draft report that removed some of the cost items from her first draft report because she had not yet had follow up conversations with certain of Plaintiff's treating physicians as to the specific need for those items and instead some items were included in the first draft report based on her expert opinion and her experience that those items would likely be included in a final report. (Moore Dep. 35:11-46:8). Instead of trying to clarify her position, counsel for D.R. Horton, again, tried to derail the deposition and claimed that Ms. Moore was not prepared. (Moore Dep. 46:17-49:22).

Counsel for the Plaintiff then questioned Ms. Moore about how her reports work, that sometimes items in her reports are "to be determined" because it is just that, it must be later determined if a patient wants to receive certain treatment in the future. (Moore Dep. 50:5-51:10). For example, it is up to the Plaintiff in this case if he wants the hardware in his femur removed in the future if it starts to bother him and cause him pain. This is not something that is known now, nor can the Plaintiff, Ms. Moore, or his treating physicians know at the time of Ms. Moore's deposition if the Plaintiff will develop enough pain in the future due to the hardware in his femur that the Plaintiff will elect to undergo surgery and have the hardware removed. This is treatment that the Plaintiff is entitled to, but that it is in the Plaintiff's discretion if he wants to pursue the treatment years in the future. (Moore Dep. 59:18-61:1).

It is this methodology of life care planning, what is normal in thousands of personal injury cases, that D.R. Horton wants to twist into an alleged secretive plot by the Plaintiff's counsel to conceal certain future medical expenses. This is simply not true. What is true is that D.R. Horton

¹¹ Attached hereto as Exhibit 8.

is using the D.R. Horton Motion to obfuscate its own egregious discovery abuse conduct in this case and to try at the final hour to avoid what this Court has warned D.R. Horton its fate would be if it continued this abusive conduct—the striking of its pleadings and a finding of default against D.R. Horton, which is the reasonable and appropriate sanction against D.R. Horton in this case.

LAW

The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court. *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987). In deciding on an appropriate sanction, the court should consider a sanction that will “serve to protect the rights of discovery provided by the Rules.” *Id.* (citing *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir.), *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970) (“[O]verleniency [in the imposition of sanctions] is to be avoided where it results in inadequate protection of discovery.”); C. Wright, *The Law of Federal Courts* § 90 at 596 (4th ed. 1983) (“Without adequate sanctions, the procedure for discovery would be ineffectual.”); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976) (dictum) (“[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”).

“Rule 37 expressly grants the trial court power to order judgment by default for either the violation of a court order, or, upon motion, for a party’s failure to respond to certain discovery requests.” *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997) (citing Rule 37(b)(2)(C)(d), SCRCP). *See, also, Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003) (“[p]ursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may ‘make such orders in regard to the failure as are just,’ including an order dismissing the action or proceeding, or any

part thereof.”). While the sanction of striking a defendant’s answer is severe, South Carolina courts have done so when the situation necessitates the “harsh medicine” of default for discovery abuses. *Id.*, see also *McNair v. Fairfield Cnty*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008) (holding the circuit court did not abuse its discretion by striking the defendant’s answer because the defendant failed to (1) produce documents requested during discovery, (2) coherently organize the documents it did produce, and (3) provide complete responses to interrogatories, and the court told defendant to correct the discovery issues several times and warned the defendant “it was inclined to strike [defendant’s] answer.”). “However, severe sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party’s rights.” *McNair*, 379 S.C. at 466, 665 S.E.2d at 832. If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment. *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198-199, 511 S.E.2d 716, 718-719 (Ct. App. 1999) (affirming trial court’s order to strike and render default judgment where the record was full of multiple egregious discovery abuses that blocked the opposing party’s attempts to conduct meaningful discovery). An order striking pleadings is an appropriate sanction when a Defendant fails to comply with multiple court orders and when a “clear and explicit warning of the consequences if the defendant failed to comply with the order of the Court” was rendered by the trial court. *See Id.* at 199, at 719.

ANALYSIS

In his initial discovery requests, served on July 22, 2021, the Plaintiff asked D.R. Horton to identify all communications between D.R. Horton, Inc. and Kenneth Scott Builders, Inc. relating

to Cypress Ridge. (Plaintiff's Gen. Rog. No. 2).¹² He asked D.R. Horton to "Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense of this case." (§'s Stand. Rog. No. 2). Plaintiff asked D.R. Horton to identify all documents "which You have knowledge relating to this lawsuit." (§'s Gen. Rog. No. 4).

Further, the Plaintiff requested a copy of any building permits, zoning permits, or other documents obtained by D.R. Horton to develop Cypress Ridge, located at 210 Hulston Landing Rd., Bluffton, SC 29909. (§'s 1st RFP No. 11). The Plaintiff also requested "[c]opies of all documents identified, referred to, or used in your answers to Plaintiff's First Set of Interrogatories." (§'s 1st RFP No. 1).¹³

In his deposition, Mr. Alfredo Uriostegui, the driver of the dump truck involved in the collision in this matter, testified that he regularly worked on a site in Cypress Ridge where D.R. Horton was building its regional office building. (Uriostegui Dep. 235:14-237:23).¹⁴ He testified that he loaded and removed dirt from the site where D.R. Horton was building its regional office building both across Hulston Landing Rd. to another phase of the Cypress Ridge development as "good dirt." (Uriostegui Dep. 235:14-237:23). He testified that he removed dirt from the site where D.R. Horton was building its regional office building and hauled it off site for use at other construction sites (Uriostegui Dep. 235:14-237:23). He testified he regularly worked all day hauling dirt from the office building site to the townhome site at Cypress Ridge. (Uriostegui Dep. 184:23-185:3).

D.R. Horton has based its defense in this case on the premise that it is merely an owner of the development, and did not have a hand in the construction or act as a general contractor. (*See*

¹² Attached Hereto as Exhibit 9.

¹³ Attached Hereto as Exhibit 10.

¹⁴ Attached hereto as Exhibit 11.

Def. D.R. Horton, Inc.'s Mtn. for Summary Judgment as to Pl. Mark W. McGilton, and Def. D.R. Horton, Inc.'s Mtn. to Reconsider, Alter or Amend Order on its Mtn. for Summary Judgment). It recently took the deposition of the Plaintiff's safety and compliance expert, highlighting the fact that D.R. Horton was purportedly merely an owner of the land and not a General Contractor. Plaintiff's safety and compliance expert testified that D.R. Horton's responsibilities over the land and development as owner and not acting as contractor would be very limited if existent at all.

Based upon the later deposition testimony of Alfredo Uriostegui, counsel for Plaintiff Mark McGilton searched for any permits or plans relating to what is known as the "Commercial" phase or Office/RV Lot phase of the Cypress Ridge development within material produced by D.R. Horton. While D.R. Horton produced invoices, payment requests from Kenneth Scott Builders, Inc. relating to the Office/RV Lot phase (showing that Kenneth Scott Builders invoiced D.R. Horton over \$300,000.00 for work relating to the commercial phase of development within months of the accident at issue) and while D.R. Horton did produce plans for "Phase 7" of the Cypress Ridge Development, D.R. Horton produced no permits or plans relating to the Office/RV lot phase despite the Dump Truck Operator performing extensive work on that project. Plaintiff filed a Freedom of Information Act (FOIA) request for material relating to the Office/RV lot phase of development by D.R. Horton with the Town of Bluffton.

In response to the FOIA request, the Town of Bluffton produced a multitude of material, including:

1. a copy of the building permit for the regional office headquarters for D.R. Horton showing that D.R. Horton was both the applicant and the General Contractor for the Office and RV phase of Cypress Ridge;

APPLICANT:	D R HORTON INC	ADDRESS:	209 ARGO CIR OKATIE, SC 29909
OWNER:	D R Horton Inc	ADDRESS:	PO Box 3558 Bluffton, SC 29910
CONTRACTOR:	D R Horton Inc	ADDRESS:	PO Box 3558 Bluffton, SC 29910
ENGINEER:		ADDRESS:	
ARCHITECT:	Langley & Associates Architects	ADDRESS:	109 S Main ST Greer, SC 29650
Description of Work: new office building for home sales			

(Ex. 2 to Plaintiff's Motion).

2. Plans showing that plans for D.R. Horton's regional office and the R/V Lot phase were one and the same (Exhibit 3 to Plaintiff's Motion);
3. Volumes of communications (hundreds if not thousands of pages) between D.R. Horton's 30(b)(6) deponents, the Town of Bluffton concerning the control, methods, permitting, and means of the development of Cypress Ridge, and several communications between Kenneth Scott Builders, Inc. and D.R. Horton's employees; and
4. Several notices of inspection and notices of violations sent to D.R. Horton's 30(b)(6) deponents relating to grading, surface and wastewater rules and regulations from the Town of Bluffton.

In summary, D.R. Horton was the general contractor of record for the very phase of work which was being completed by the Dump Truck Operator (as defined in Plaintiff's Complaint) when the Dump Truck Operator collided with the Plaintiff on his way back to Cypress Ridge to perform more work for D.R. Horton. D.R. Horton was the General Contractor over the phase of development from which the Dump Truck Operator mined dirt and regularly hauled loads of dirt off site. In other words, D.R. Horton was acting as General Contractor over the Dump Truck Operator, having power, control and responsibility over it. It allowed an uninsured and

unmaintained dump truck to operate on its construction site and the Operator to keep its truck on its construction site for well over a year. D.R. Horton concealed these facts from the Plaintiffs. D.R. Horton failed to disclose these facts to the court in its motion for Summary Judgment.

D.R. Horton's failure to cooperate in discovery has deprived the Plaintiff of what is an "abiding maxim of the successful trial lawyer, like the motto of the Boy Scouts, is 'Be Prepared.'" *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987) (citing I. Younger, *The Art of Cross-Examination* 23 (A.B.A. Section of Litigation Monograph Series No. 1, 1976) ("The fourth commandment is that you must be prepared. On cross-examination, you should *never* ask a question to which you do not already know the answer.")). "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required." *Id.* As D.R. Horton has failed to produce in discovery the most basic of relevant documents, that is the permit for the construction of the site that is at-issue in this matter—the site from which the truck came from that caused the injuries that are at-issue in this matter, the Plaintiff has been highly prejudiced.

The Plaintiff notes that D.R. Horton already is in possession of all material furnished by the Town of Bluffton to the Plaintiff and D.R. Horton failed to produce the same—and still has not produced the same ***for over three years after Plaintiff requested D.R. Horton produce these documents***. D.R. Horton has persistently shown disdain for the Court's authority through its repeated failure to abide by this Court's orders which justifies the "harsh medicine" of striking D.R. Horton's pleadings. *Compare Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (Supreme Court affirmed striking pleadings as sanction for party's "failure to comply with the various orders of the court" regarding discovery, which the Supreme Court agreed

was “willful and deliberate and caused unnecessary delay of [the] case and prejudice to the Respondents.”)

For the reasons stated herein, the Plaintiff moves for a Rule to Show Cause to be issued against D.R. Horton, Inc., for it to explain to the Court why its pleading should not be stricken, for the Court to strike D.R. Horton’s Answer, and for any and all other relief the Court deems reasonable and appropriate.

Respectfully submitted,

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

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Attorneys for Plaintiff McGilton

Hilton Head Island, South Carolina
October 14, 2024

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
JASPER COUNTY

DEPOSITION OF
THEODORE "ANDY" ROWLAND
JULY 16, 2024

MARK W. MCGILTON,

Plaintiff,

vs. CASE NO. 2023-CP-27-00069

1223 MAY RIVER ROAD, LLC,
D.R. HORTON, INC., and
LOTTY TRUCKING, LLC f/k/a RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

TIME: 10:07 A.M.

LOCATION: SHELTON LAW FIRM
HILTON HEAD, SOUTH CAROLINA

REPORTED BY: KELLY B. BAEKELANDT, RPR,
CSR (GA)
CLARK BOLEN
CHARLESTON, SC 29405
843-762-6294
WWW.CLARKBOLEN.COM

1 Q. Okay. So do you have to pull a permit
2 to do grading work on a multi-lot development?

3 A. Yes. Yes. You have to have a permit,
4 yes.

5 Q. Okay. And to pull a permit, do you have
6 to have a grading license?

7 A. That I don't know the answer to.

8 Q. Okay. Do you know if D.R. Horton has a
9 grading license?

10 A. I don't know that either.

11 Q. Okay. In this case, in your analysis of
12 this case, what is D.R. Horton? Is it an owner,
13 developer, general contractor, engineer, what are
14 they in this case?

15 A. I would say that that -- who is in what
16 role against all the tiers of this is one of the
17 most taxing questions in the whole case. We
18 know -- if you -- if you asked me who is
19 D.R. Horton, I would say they're a developer. I
20 also know just from general experience that they
21 typically would hire a GC, a builder to build
22 individual houses, and that they might have
23 multiple ones of those in any given development.
24 So I -- I can't say that they acted as the
25 general contractor. In my interpretation of it,

CERTIFICATE OF REPORTER
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

I, KELLY B. BAEKELANDT, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal on July 25, 2024, at Bluffton, Beaufort County, South Carolina.

KELLY B. BAEKELANDT
REGISTERED PROFESSIONAL REPORTER
RPR, CSR (Georgia)
My Commission expires
June 16, 2026

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., and LOTTY TRUCKING,
LLC f/k/a RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069

**PLAINTIFF'S NOTICE OF DE BENE
ESSE, VIDEOTAPED DEPOSITION OF
JOSEPH R. HSU, MD,
for the purposes of Rules
30(h) and 32, SCRCP**

TO: JOSEPH R. HSU, MD AND ALL ATTORNEYS OF RECORD:

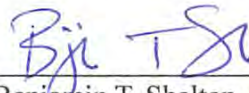
YOU WILL PLEASE TAKE NOTICE that the undersigned intends to and will take your *de bene esse* deposition, pursuant to Rule 30 of the *South Carolina Rules of Civil Procedure*, **beginning at 9:00 a.m. EST., on the 6th day of September 2024, located at 1025 Morehead Medical Drive, Ste. 300, Charlotte, NC 28204** upon oral, or via videoconference, examination before a Notary Public or some other official authorized by law to take depositions in the State of South Carolina. The deposition will continue from day to day until complete.

Pursuant to Rule 30(h), SCRCP, the deposition will be recorded by videotape and may be published at trial pursuant to Rule 32, SCRCP.

Pursuant to SCRCP 30(j)(8), Plaintiff's counsel anticipates that all documents produced through discovery in this litigation may be shown to the deponent and marked as exhibits during the deposition. You are notified to appear and take part in such examination as you may be advised, and as shall be fit and proper.

The deposition is being taken for pretrial discovery, for use at trial, and for such other purposes as may be permitted by law.

SHELTON LAW FIRM, LLC



Benjamin T. Shelton, SC Bar No. 77207
S. Harrison Williams, SC Bar No. 102410
1000 William Hilton Parkway, Ste. E6
(P.O. Box 21069)
Hilton Head Island, SC 29928 (29925)
(843) 802-0087
ben@sheltonlawsc.com
harrison@sheltonlawsc.com
Attorneys for Plaintiff

Hilton Head Island, South Carolina
July 10, 2024

CERTIFICATE OF SERVICE

This is to certify that I, Brooklyn West, paralegal with Shelton Law Firm, LLC have this 10th day of July 2024, served a true and correct copy of the foregoing **PLAINTIFF'S NOTICE OF DE BENE ESSE, VIDEOTAPED DEPOSITION OF JOSPEH R. HSU, MD**, by depositing the same in the United States mail with sufficient postage thereon to assure delivery and via email to all parties as follows:

JOSEPH R. HSU, MD

1025 Morehead Medical Drive, Ste. 300
Charlotte, NC 28204

KENISON, DUDLEY & CRAWFORD, LLC

Jason M. Imhoff, Esquire

imhoff@conlaw.com

John T. Crawford, Esquire

crawford@conlaw.com

Kimila L. Wooten, Esquire

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325 W. McBee Avenue, Ste. 301

Greenville, South Carolina 29601

Attorneys for Defendant D.R. Horton Inc.

and on behalf of Dr. Charles L. Alford

LAW OFFICE OF DARRELL THOMAS JOHNSON, JR., LLC

Warren P. Johnson, Esquire

wpj@johnsonlawoffice.com

P.O. Box 1125

Hardeeville, South Carolina 29927

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1156 King Street

Charleston, South Carolina 29403

Attorneys for Third-Party Defendant Kenneth Scott Builders, LLC



Brooklyn West

Hilton Head Island, South Carolina
July 10, 2024

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2023-CP-27-00069**DEFENDANT D.R. HORTON, INC.'S
CROSS NOTICE OF DE BENE ESSE,
VIDEOTAPED DEPOSITION OF
JOSEPH R. HSU, M.D.****TO: JOSEPH R. HSU, M.D. AND COUNSEL OF RECORD FOR ALL PARTIES:**

YOU WILL PLEASE TAKE THAT, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, the undersigned attorney for Defendant D.R. Horton, Inc. will take the following person's *de bene esse* deposition on the date and the time and place appointed below, upon oral examination before a Notary Public or some other officer authorized by law to take depositions pursuant to Rules 26 of the South Carolina Rules of Civil Procedure, at which time you are notified to appear and take such part as you may be advised and as shall be fit and proper:

<u>DEPONENT</u>	<u>DATE</u>	<u>TIME</u>	<u>PLACE</u>
Joseph R. Hsu, MD	September 6, 2024	9:00 a.m.	1025 Morehead Medical Dr., Ste. 300 Charlotte, NC 28204

YOU WILL PLEASE TAKE FURTHER NOTICE that the oral examination will continue from day to day until completed and that these depositions are being taken for the purpose of discovery, for use at trial and for all other purposes as permitted under the rules of this Court and all applicable statutes and laws.

Pursuant to Rule 30(h), SCRCP, the deposition will be recorded by videotape and may be published at trial pursuant to Rule 32, SCRCP.

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

Jason M. Imhoff (SC Bar # 69355)

325 West McBee Avenue, Ste. 301

Greenville, South Carolina 29601

Telephone: (864) 242-4899

Facsimile: (864) 242-4844

imhoff@conlaw.com

Counsel for Defendant D.R. Horton, Inc.

July 16, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking,	)	
LLC f/k/a Ramos Trucking, LLC,	)	
	)	
Defendants.	)	CERTIFICATE OF SERVICE
	)	
1223 May River Road, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	

The undersigned, Cara Smith, of the law offices of Kenison, Dudley & Crawford, LLC for the Defendant D.R. Horton, Inc., do hereby certify that I have served the below listed **DEFENDANT D.R. HORTON, INC.'S CROSS NOTICE OF DE BENE ESSE, VIDEOTAPED DEPOSITION OF JOSEPH R. HSU, M.D.** upon counsel of record *via email* in this action this 16th day of July, 2024.

Benjamin T. Shelton Stephen Harrison Williams Shelton Law Firm, LLC P.O. Box 21069 Hilton Head Island, SC 29925 ben@sheltonlawsc.com harrison@sheltonlawsc.com <i>Counsel for Plaintiff</i>	Warren P. Johnson Darrell T. Johnson, Jr. Joshua R. Fester Law Office of Darrell Thomas Johnson, Jr., LLC 300 Main Street Hardeeville, SC 29927 Tdjohnson1@johnsonslawoffice.com wpj@johnsonslawoffice.com jfester@johnsonslawoffice.com <i>Counsel for Defendant Lotty Trucking, LLC f/k/a Ramos Trucking, LLC</i>
Kevin W. Mims W. Chase McNair Luzuriaga Mims, LLP	

50 Immigration Street, Suite 200 Charleston, SC 29403 kmims@lmlawllp.com cmcnair@lmlawllp.com <i>Counsel for Third-Party Defendant Kenneth Scott Builders, LLC</i>	

KENISON, DUDLEY & CRAWFORD, LLC

s/Stephanie S. Simpson
Stephanie S. Simpson

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
Case Number: 2024-CP-27-00069

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC;
D.R. HORTON, INC.; and
LOTTY TRUCKING, LLC f/k/a
RAMOS TRUCKING, LLC,

Defendants,

D.R. HORTON, INC.,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, INC.,

Third-Party Defendant.

VIDEO DEPOSITION
of
JOSEPH ROBERT HSU, M.D.

Friday, September 6, 2024
At Charlotte, North Carolina
Reporter: Michael T. Westmoreland, CVR



1 minute, please.

2 MR. SHELTON: You're going to interrupt
3 right --

4 MR. IMHOFF: Yes, please.

5 MR. SHELTON: Okay. Let's go off record.

6 VIDEOGRAPHER: All right. In agreeance
7 to go off record?

8 COURT REPORTER: Mr. Imhoff?

9 VIDEOGRAPHER: Mr. Imhoff, are you in
10 agreeance to go off record?

11 MR. IMHOFF: Yes.

12 VIDEOGRAPHER: We are going off the
13 record at 9:15 a.m.

14 (WHEREUPON, there was a discussion off
15 the record which was not reported.)

16 VIDEOGRAPHER: We are going back on the
17 record at 9:18 a.m.

18 MR. IMHOFF: Mr. Shelton and I have just
19 had a discussion off the record about
20 this being a trial -- a video for use at
21 trial, or de bene esse deposition, which
22 I don't think exists anymore, but for use
23 at trial anyway. We noticed Dr. Hsu's
24 deposition. We think we have a right to
25 discovery deposition. I asked Ben this



1 morning via email how we were going to
2 handle that, asked if he wanted to go
3 first. He said yes. I didn't realize he
4 was going to prevent me from taking a
5 discovery deposition of this gentleman.
6 His office did, in fact, set this up
7 because they've been communicating with
8 Dr. Hsu's office. However, I did not
9 know that was intended to not let us take
10 a discovery deposition.

11 So I'm putting on the record that
12 unless I'm allowed to at least ask this
13 doctor some discovery questions, that
14 this not be allowed to be used at trial,
15 and/or parts that we select to object to
16 be looked at by the Court before it's
17 allowed for trial at the very least.

18 Again, I will ask Mr. Shelton on the
19 record, since we both noticed it for 9
20 a.m. this morning, to allow me to go
21 forward with the discovery deposition.
22 MR. SHELTON: On the record, my firm
23 arranged for this deposition at nine
24 o'clock. It sent a deposition notice for
25 this date at nine o'clock, de bene esse,



STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

C E R T I F I C A T E

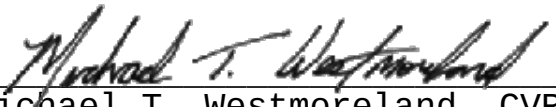
I, Michael T. Westmoreland, CVR, Certified Verbatim Reporter and Notary Public, do hereby certify that JOSEPH ROBERT HSU, M.D., was duly sworn by me prior to the taking of the Deposition; that said Deposition was taken and transcribed under my supervision; and that the foregoing 87 pages are a true and accurate transcription of the testimony of the said deponent.

I further certify that review and signing of the transcript by the witness was not waived.

I further certify that the persons were present as stated.

I further certify that I am not of counsel for or in the employment of any of the parties to this action.

IN WITNESS WHEREOF, I have hereunto subscribed my name, this the 26th day of September 2024.


Michael T. Westmoreland, CVR
Certified Verbatim Reporter
Notary Public No. 19971600081



**PRELIMINARY VOCATIONAL REHABILITATION ASSESSMENT & EARNING
CAPACITY ANALYSIS**

DATE: 05/22/2024
EVALUEE: Mr. Mark McGilton
ADDRESS: Beaufort, South Carolina
COUNTY: Beaufort

DATE OF MVC: 03/13/2018
DATE OF BIRTH: 01/11/1966
CURRENT AGE: 58 years

REFERRAL

The file was received for the completion of a vocational rehabilitation assessment and earning capacity analysis. An initial assessment was completed with Mr. Mark McGilton via Zoom on 03/11/2024. Signed informed consent for the assessment process was obtained from Mr. McGilton.

RECORDS REVIEWED

The following records were reviewed:

- Atrium Health
- Memorial Health
- Paul Mitchell Pain Management, PA
- Capital Anesthesia
- Atlanta Radiology Associates, LLC
- Global Family Medicine
- Horizon Rehabilitation and Sports Medicine
- Moore Medical Consulting, LLC
- Tax Records, 2008-2011, 2013 & 2015-2020
- Deposition – Mr. Mark McGilton, 04/18/2024

TREATMENT SUMMARY *(After 03/13/2018 MVC)*

Based upon the treatment records reviewed, Mr. McGilton was transported via air to Memorial Health for emergent trauma care secondary to a 03/13/2018 motor vehicle collision (MVC). The Emergency Department's (ED) documentation included that Mr. McGilton had a prolonged extraction from his vehicle, and was in acute and severe distress during his transport and at the point of arrival. Mr. McGilton required intubation and a period of care within the Intensive Care Unit (ICU) of the hospital. Diagnoses outlined by the Trauma Team for Mr. McGilton included the following after the 2018 MVC:

- Acute Blood Loss Anemia
- Respiratory Failure After Trauma
- Transaminitis
- Hypoalbuminemia
- Hypocalcemia

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
JASPER COUNTY

DEPOSITION OF
MICHAEL ALLEN FRYAR
JULY 19, 2024

MARK W. MCGILTON,

Plaintiff,

vs.

CASE NO. 2023-CP-27-00069

1223 MAY RIVER ROAD, LLC,
D.R. HORTON, INC., and
LOTTY TRUCKING, LLC f/k/a RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

TIME: 10:02 A.M.

LOCATION: VIA VIDEOCONFERENCE

REPORTED BY: KELLY B. BAEKELANDT, RPR,
CSR (GA)
CLARK BOLEN
CHARLESTON, SC 29405
843-762-6294
WWW.CLARKBOLEN.COM

1 Q. Have you spoken with him other than that
2 time?

3 A. No, I haven't. I'm waiting to see
4 what -- I am going to do a follow-up once I have
5 the work guidelines from the physician, so
6 there's really nothing more I can do until I have
7 that.

8 MR. IMHOFF: Let's go off the
9 record just for a minute.

10 (Off-the-record conference.)

11 MR. IMHOFF: All right. For the
12 record, we just had an off-the-record discussion
13 about Mr. Fryar's preliminary report. And what
14 he shared with us is he needs some medical
15 information from treating physicians of
16 Mr. McGilton to have a final report. And after
17 our off-the-record discussion or during our
18 off-the-record discussion, we -- we all agreed
19 and stipulated that it would make more sense that
20 Mr. Fryar gets that information, develops his
21 final opinions, and we complete his deposition
22 after he gets whatever the information is that he
23 needs, whether it come by testimony, deposition,
24 report, or -- or otherwise.

25 Is that correct, Mr. Shelton?

CERTIFICATE OF REPORTER
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

I, KELLY B. BAEKELANDT, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal on July 26, 2024, at Bluffton, Beaufort County, South Carolina.

KELLY B. BAEKELANDT
REGISTERED PROFESSIONAL REPORTER
RPR, CSR (Georgia)
My Commission expires
June 16, 2026

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 JASPER COUNTY

4 DEPOSITION OF LINDSAY MOORE
5 VOLUME I
6 AUGUST 26, 2024

7 MARK W. MCGILTON,

8 Plaintiff,

9 vs. CASE NO. 2023-CP-27-00069

10 1223 MAY RIVER ROAD, LLC, D.R. HORTON, INC., AND
11 LOTTY TRUCKING, LLC f/k/a RAMOS TRUCKING, LLC,

12 Defendants.
13

14 1223 MAY RIVER ROAD, LLC,
15

16 Third-Party Plaintiff,
17

18 vs.

19 KENNETH SCOTT BUILDERS, LLC,
20

21 Third-Party Defendant.
22

1 Answer the question.

2 A. Sure. So according to the methodology
3 of life care planners, we utilize charged rates;
4 however, I will tell you that each of these
5 resources are a combination of all the things
6 that you just stated: Medicare, Medicaid,
7 negotiated rates, charged rates. They are not
8 solely charged rates only to imply that they
9 might be, as you were trying to say, multiple
10 times higher than what's actually the market
11 value of that service.

12 It is a compilation of all of that data.
13 And actually, majority is probably more paid
14 rates involved in that data than there are
15 charged rates. But it is -- it's all-inclusive.

16 Q. What is your role as a life care
17 planner?

18 A. My role is to work with individuals who
19 have been injured, had a catastrophic injury, or
20 maybe in some cases have chronic medical
21 conditions to understand how those specific
22 injuries impact their life, how it's made -- has
23 changed their quality of life or their ability to
24 interact in their environment and to work with
25 their treatment team to understand what medical

1 needs they have in the future.

2 And ultimately, my goal is to cost those
3 medical needs and educate the parties involved on
4 what items are necessary and what the costs of
5 those medical treatments or future treatment is
6 likely to be.

7 Q. So you're trying to put together a
8 future cost of medical bills for these folks. Is
9 that a --

10 A. Essentially.

11 Q. I mean, I don't want to take off from
12 what you said. But for my own information --
13 okay. Let's do this. Which of these projected
14 evaluations are to be determined, if you don't
15 mind?

16 A. Yeah, not a problem. The physical
17 therapy evaluation is the only one under the
18 evaluation category that is.

19 Q. The second one is therapeutic
20 modalities, physical therapy visits. Is this
21 also to be determined?

22 A. Yes. Yes, I would say so.

23 Q. And that's -- you need to talk to
24 Dr. Hsu again?

25 A. Yes. That would be -- yes. That would

1 be helpful for him to outline if he believes that
2 intermittent therapy is reasonable. I mean, I
3 would certainly just note based on my education
4 and training that I absolutely think this reason
5 is -- excuse me -- this item is reasonable. But
6 my opinion will be based on Dr. Hsu's or
7 Dr. Mitchell's final comments regarding that on
8 this particular case or on any case.

9 Q. So are all of your projected medical
10 care based on either Dr. Hsu or Dr. Mitchell?

11 A. Yes. When we're ready to testify at
12 trial in this case, absolutely. Everything is
13 going to be supported from the physician if it's
14 in my report. And then I am, again, applying the
15 appropriate CPT code and the total cost and using
16 my education and experience to make sure we're
17 kind of asking the appropriate categories of care
18 and treatment to consider what a patient may need
19 over their lifetime.

20 Q. And so I know that Doctor -- we've
21 already seen Dr. Mitchell's and Dr. Hsu's
22 recommendations that they signed.

23 A. Yes.

24 Q. And so my question is, the first two
25 were put in here by you without them recommending

1 it based on your experience and education. Are
2 there any more that you put in that they did not
3 put in their reports or tell you to put in?

4 A. Yes, there are.

5 Q. So we've got the first two. Let's go
6 under diagnostic testing. Any in there that are
7 to be determined?

8 A. Yes. The x-ray imaging for the hip and
9 right ankle, I have not, again, had -- been able
10 to reach Dr. Hsu in a follow-up conversation to
11 elaborate on those needs. So right now, they
12 would be to be determined as well.

13 Q. So that's the first two there. And is
14 the CT of lower extremity and urine drug screen
15 recommended by one of these physicians?

16 A. Yes. The CT of the lower extremity has
17 been recommended by Dr. Hsu if he continues to
18 have persistent pain and needs -- wants to
19 further address it in his left femur area or
20 thigh. And the urine drug screen is supported by
21 Dr. Mitchell six times per year.

22 Q. Gotcha. So that one -- the fourth one
23 has Paul Mitchell pain management as your
24 reference. The third one, the CT of the lower
25 extremity, does not. Would you typically put the

1 medical provider's information in that column?

2 A. I mean, if I have a medical record or
3 billing information where a person is currently
4 receiving care or treatment and a billing
5 document that I can accurately interpret, then I
6 would certainly utilize that. So that's why you
7 see the first resource would be his own costing.
8 And then the third -- I use three resources for
9 every item, and I use a consistent method of how
10 I -- the order of those. And so that's why you
11 see the third resource dropped off, because I
12 utilized his own billing for one of the items.

13 Q. I know, but I'm talking about CT of
14 lower extremity. Where did that come from?

15 A. I mean, it's similar to all the other
16 items. I mean, it has an appropriate CPT code.
17 And then I researched that within the resources I
18 have available to produce a range of the cost for
19 that item.

20 Q. Let me clarify my question. So has a
21 physician recommended this in their signed
22 recommendation report since that you put it on
23 here and it's not to be determined?

24 A. I mean, Dr. Hsu has recommended it, and
25 he said -- just to make sure we're kind of very

1 clear on exactly how he stated it -- that he
2 would need a CT of his lower extremity for
3 further characterization if he continues to have
4 thigh pain.

5 Q. Does he continue to have thigh pain?

6 A. Yes. He has thigh pain. But at this
7 point, the thigh pain has not risen to the level
8 that he is electing to have further imaging
9 studies at this time.

10 Q. The next one is pain management office
11 visits. And you say that comes from Dr. Paul
12 Mitchell?

13 A. That's right.

14 Q. The next, orthopedic surgeon visits, 10
15 to 15 over a lifetime. And I don't see a
16 reference. Where did this come from?

17 A. Yes. Again, that would be something I
18 would like for further clarification on the
19 frequency of that item from Dr. Hsu.

20 Q. The next one is medications.

21 A. Yes.

22 Q. And help me, how long is this for?

23 A. I mean, that's indefinitely.

24 Q. Oxycodone, 10 milligrams for the rest of
25 his life?

1 A. Yes.

2 Q. Do you prescribe oxycodone in the
3 emergency room?

4 A. Yes, I do.

5 Q. Are there limitations on how much you
6 can prescribe or when you can prescribe it?

7 A. Yes. I mean, certainly there's many
8 rules and regulations related to the use of
9 narcotics. In my particular case, I am -- my
10 scope is emergency room medicine. So I'm only
11 able to write an acute course of this medication,
12 so a certain number of days for the medication.
13 I am not a pain management provider -- a
14 long-term pain management provider. And they're
15 under different regulations. But either way,
16 yes, I can prescribe this medication. Yes, there
17 are rules and regulations and state guidelines in
18 how to do so.

19 Q. Let me ask you this. Would you, as a
20 physician assistant, prescribe oxycodone for the
21 rest of a patient's life?

22 A. I mean, again, my background is not pain
23 management and actively treating. I'm not -- I
24 haven't been asked to evaluate this case in
25 manner of that and whether he should be on that

1 medication. What I can tell you and testify to
2 is in his individual case, he has received
3 consistent treatment from his provider within the
4 scope that is appropriate based on all of the
5 regulations. And his provider is the one that is
6 recommending this moving forward. So I would
7 defer specific questions if you're interested in
8 that to him, the doctor who is actually managing
9 and writing those medications for him.

10 Q. Okay.

11 A. But they are under the appropriate
12 guidelines. I can tell you that at this time.
13 And it's been consistent.

14 Q. The future medical intervention, are any
15 of these to be determined? Well, I guess there's
16 only one of them, RFA ankle in office.

17 A. Right, yes. Radiofrequency ablation,
18 that has been offered and discussed by
19 Dr. Mitchell. And the frequency -- Dr. Mitchell
20 noted that it can be repeated one time every six
21 months; however, I will say again for this item I
22 would put it as to be determined from the sense
23 that at this time Mr. McGilton has not proceeded
24 with that, and it would be included if he does
25 proceed with it and it's successful.

1 Q. Do you know when the accident was?

2 A. Yes. March of 2018.

3 Q. And so this patient has lived with this
4 for six years; is that right?

5 A. Yes.

6 Q. And can you support this future medical
7 intervention and potential surgical intervention
8 on your own after six years of not getting it, or
9 would you have to rely on Dr. Hsu?

10 A. Well, the radiofrequency ablation would
11 be under the scope of Dr. Mitchell as pain
12 management provider. And the hardware removal
13 would be from Dr. Hsu as an orthopedic surgeon.
14 I mean, of course, as we've stated throughout, I
15 mean, I would defer to his own providers as far
16 as what they believe is reasonable to occur in
17 the future.

18 I mean, he has had an extensive history
19 of original injuries as well as follow-up kind of
20 surgeries that were necessary based on the
21 original injury themselves. So I mean, it's not
22 surprising that six years out he still has future
23 medical needs or potential needs related to the
24 original injuries he sustained.

25 Q. Has Dr. Hsu indicated that he believes

1 there's a likelihood to a reasonable degree of
2 medical certainty that these surgical
3 interventions -- hardware removal of femur, et
4 cetera -- are going to occur such that you feel
5 confident putting them in your report?

6 A. Sure. I absolutely feel confident in
7 relaying the information that Dr. Hsu provided to
8 me, which I will state to you, which is that
9 the -- he may require a hardware removal in the
10 future if his hardware is bothersome to him,
11 which is why you see it listed out as a potential
12 surgical intervention.

13 And then I would further elaborate based
14 on my conversation with Dr. Hsu that the goal
15 would not be to remove hardware unless you need
16 to; however, in some individuals, particularly
17 those like Mr. McGilton where he's a smaller
18 individual and his hardware is more prominent.
19 In that particular population, it can be more
20 bothersome and have an increased influence of
21 requiring removal. But still, even given that
22 information, again, it's a potential to occur at
23 this time, and it's not something that I would
24 say is a higher probability. But it's certainly
25 recognized and a possibility, especially given

1 his body habitus.

2 Q. You said a higher probability. So I
3 asked to a reasonable degree of medical
4 certainty. Do you have something that gives you
5 a reasonable degree of medical certainty that
6 this work is going to be done by Mr. McGilton
7 after six years?

8 A. So again, I mean, the six years is kind
9 of -- I mean, if -- at any point if hardware is
10 bothersome and is necessary to be removed, it can
11 be. So six years is kind of irrelevant to the
12 conversation. I mean, it would be appropriate at
13 six years or any years whenever it's bothersome
14 to him.

15 As far as -- again, I break out the
16 reports based on my understanding of how the
17 physician has made the recommendation. And to be
18 clear, it -- in my opinion, the way that Dr. Hsu
19 approached this item is that it was not more
20 likely than not, or in other words, it was not
21 greater than a 50 percent chance that this would
22 occur. But that doesn't particularly mean it's
23 not reasonably certain to occur. I would defer
24 to Dr. Hsu specifically on that language.

25 I am simply breaking out the report

1 based on my understanding of the conversation so
2 that I can be transparent with the jury and in
3 providing this information, which in this case, I
4 would say less than 50 percent likelihood to
5 occur but a possibility. And therefore, it's
6 costed to show what that treatment would be.

7 Q. So the next page, which I believe is
8 page 3, it looks like it's all related to that
9 same procedure, the hardware removal of the
10 femur; is that correct?

11 A. Yes, that's right.

12 Q. And so your testimony on the third page
13 is essentially the same as you testified about on
14 the second page, the potential surgical
15 intervention hardware removal of femur isn't
16 greater than 50 percent likely; is that right?

17 A. Yes. I would agree with that.

18 Q. Oh, shoot. The fourth page is the same
19 thing; is that right?

20 A. It's a continuation of surgical costs,
21 yes.

22 Q. Okay. When's the last time this was
23 updated?

24 A. So I have an updated document right now
25 that is in draft if you want to see the total

1 based on the comments I just stated; however, I
2 would like to -- I mean, I can show it to you now
3 in a draft status. But what I would do is after
4 the deposition, finalize the numbers so that you
5 have the final number based on what the doctors
6 testified to. But if you want to see it, I don't
7 have a problem showing you the total numbers as
8 where they are.

9 Q. Well, let's do this. It's been almost
10 an hour. Let's take a break for a minute. But
11 I'm going to ask the court reporter -- I'm going
12 to talk to the lawyers for a minute.

13 Can you put Ms. Moore in a different
14 room so we can talk without her?

15 (Off-the-record discussion.)

16 (Witness exited Zoom room.)

17 MR. IMHOFF: Ben, she's not ready.

18 MR. SHELTON: The issue is -- on
19 the record is that you're taking a deposition of
20 someone who is -- this is very standard with life
21 care planners. I don't know if you've taken a
22 deposition of a life care planner in awhile, but
23 so much of it is dependent upon what both the
24 witness testifies to as to -- if you look at
25 these needs, it's up to Mr. McGilton if you look

1 at Dr. Hsu's recommendation as to whether he says
2 he wants it or not.

3 And then if you look at -- if you take
4 Dr. Hsu's deposition, then he'll specify with
5 more specificity -- he'll have more specificity
6 as to what the final findings are, and she can
7 rely on that. But if you want to take her
8 deposition later, I'm not going to fight you on
9 it. I'm just stating that this is very standard.

10 MR. IMHOFF: Well, it's not. She
11 specifically said she has been able to follow up
12 with Dr. Hsu to determine whether these things
13 are more reasonable than not. And the case --
14 the case is years and years and years old. It's
15 been four years since the accident. The
16 deposition has been set for a while. I was
17 supposed to drive down here to take this
18 deposition, but she is telling me she has not
19 talked to one of his medical care providers in
20 about -- to me, it looks like 90 percent of this
21 is dependent on those medical providers talking
22 to her before I take their deposition.

23 MR. SHELTON: Well, she's spoken to
24 Dr. Hsu and she has a recommendation from
25 Dr. Hsu. And we're taking Dr. Hsu's deposition

1 next week.

2 MR. IMHOFF: All right. Let's take
3 a break.

4 (A recess was taken.)

5 (Witness enters Zoom room.)

6 Q. Ms. Moore, it sounds like you need some
7 more information to finish your report and have a
8 final report; is that right?

9 A. I mean, no. I can have a final report
10 at this time. I've spoken to both of the
11 providers. But I would say for clarity I would
12 produce to you an updated report, because I had
13 some items in there that I need to have off until
14 I had any additional information. And then if
15 the providers supported or wanted those items to
16 be in the plan, I would be adding those back in.
17 So I do have information to finalize my opinions
18 at this time. But then if they think that those
19 items are necessary, obviously they would be put
20 back in.

21 Q. They're in right now, right?

22 A. That was -- like unintentionally. So
23 that's why I just said I could easily send you a
24 report that should have those numbers out.

25 Q. So as of this morning in subpoena

1 response to be here for your deposition, you have
2 not given me the report that you would call final
3 today; is that right?

4 A. I can give it to you right now, but
5 that's -- I mean, yes, that's true.

6 MR. IMHOFF: All right, Ben, we're
7 going to end this deposition. We're going to
8 reserve our right to reset it once we get a final
9 report. And we'll just -- I guess we'll talk to
10 the judge about that this afternoon too.

11 Ryan, do you got anything you want to
12 say on that?

13 MR. CONNER: I mean, I've got no
14 comments right now. We'll see what the judge has
15 to say.

16 MR. SHELTON: And I'll just
17 comment, first of all, that I believe it was
18 represented to the Court earlier that damages
19 weren't being disputed, one. And then secondly,
20 I would like to ask Lindsay -- Ms. Moore a couple
21 questions if that's okay with you before we end
22 this.

23 MR. IMHOFF: Are you asking her, or
24 are you asking me?

25 MR. SHELTON: Yeah, I'm going to

1 ask her a couple questions.

2 THE WITNESS: Okay. Go ahead.

3 EXAMINATION

4 BY MR. SHELTON:

5 Q. So, Ms. Moore, is it common to have some
6 items on a health care plan or cost projection
7 that are fairly -- that are left open until
8 essentially the time of trial or the time that
9 the witness testifies whether the witness -- or
10 the patient needs the work done or not?

11 A. I mean, yes, I would say that's not
12 uncommon. My -- I have testified and will
13 continue to do so that my opinion is going to be
14 based on the physician's opinion on whether those
15 items are necessary and on the individual's
16 opinion on whether he wants to proceed with that
17 surgery or it's likely.

18 But I would say that all of the items
19 and the cost of each of those items have been
20 shown and are costed here. The only thing we're
21 in -- that's unknown at this time is really like
22 the frequency of some of those items. And again,
23 as I stated before, unintentionally, I left some
24 of those items in. And I could have had some
25 more clarity and not included those in the

1 report. I can send them to you at this moment.

2 But it doesn't change anything. All of
3 the items are costed. All of the -- the only
4 thing we're talking about is the frequency. And
5 I'll, again, stay with my testimony before. It
6 will be based on if the physicians testify on the
7 frequency or need for those items. All we're
8 talking about is the final number. And I'm
9 offering to show you the number without those
10 items in it at this time.

11 Q. So for example, like if Mr. McGilton --
12 first of all, I believe Dr. Mitchell has
13 recommended ablation therapy would be beneficial
14 for Mr. McGilton, correct?

15 A. Yes. He absolutely has recommended
16 that, and that's true. But as we know at this
17 time, Mr. McGilton is not pursuing it. But that
18 doesn't mean that will be his opinion
19 indefinitely, as I have asked him that question.

20 Q. And that's Mr. McGilton's decision,
21 correct?

22 A. Yes. He's 100 percent a candidate for
23 it from my understanding. And based on my
24 conversation with Dr. Mitchell, it's his decision
25 on whether he wants to pursue it or not.

1 taken out?

2 A. Yes. The total cost of that item, yes,
3 would not be included in the final report as of
4 right now, today.

5 Q. Have you shared the report with us that
6 you would -- that you can testify about today and
7 will you, please?

8 MR. SHELTON: She's offered two or
9 three, four times.

10 A. Yes, absolutely.

11 MR. IMHOFF: I know that. I'm
12 asking her to do it now.

13 THE WITNESS: Sure, absolutely. I
14 can do that. I'm going to do it the same way we
15 did with my CV. I will drop it in your subpoena
16 link and on the Zoom. Okay?

17 All right. It should be in both places.

18 Q. Okay. It will take a second for my
19 paralegal to get it to me a little bit, but I
20 think my memory was that the potential surgical
21 intervention of hardware removal of femur is also
22 to be determined and it shouldn't be in here or
23 was unintentionally put in here for today's
24 deposition. I'm not saying it won't change or a
25 doctor won't say yes. But as of today, it

1 unintentionally shouldn't be in here, right?

2 A. For the femur removal?

3 Q. Right.

4 A. No. I disagree with that. I absolutely
5 would have included it, just like I have in the
6 report once you get a chance to see it. I'd be
7 happy to explain every single item to you. But
8 what I did is show you that as a potential
9 option, which is exactly how Dr. Hsu has noted
10 it. And so no, that would -- I would still keep
11 that in there, but I would also show you the cost
12 without that potential surgery.

13 Q. Because either Mr. McGilton needs to opt
14 for it or Dr. Hsu has to say it's necessary and
15 it's reasonable or most --

16 A. Yes.

17 Q. -- most likely?

18 A. Yes. But it's absolutely appropriate
19 and consistent with life care planning
20 methodology based on the fact that Dr. Hsu has
21 elaborated on it and stated that it's a potential
22 for me to show you or the jury the cost of it.
23 And that's what I've done. But I'm not including
24 it as a certainty. I'm including it as a
25 potential in the same wording and way that

1 Dr. Hsu has noted.

2 Q. Okay.

3 A. But this report should clarify and show
4 you exactly the costs that I would testify to at
5 this time and based on the support I have for
6 this case right now.

7 Q. Okay. I'm going to end your deposition
8 now and reserve the right to reopen it when you
9 complete your report.

10 A. So again, my report is final, just to
11 note to you right now. My report is final of
12 what I just sent to you. It would be updated or
13 changed if there's additional information
14 provided in the depositions. But with no
15 additional information provided in the
16 depositions, my report is unchanged from what I
17 just sent you.

18 Q. Which did you send me? Did you send me
19 the resources, or did you send me the new life
20 care plan?

21 A. I sent you the new report. The new
22 final report for the life care plan.

23 Q. All right. Let me make sure that we're
24 both on the same page here. Okay?

25 A. Yes. Just because I don't want you to

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF CHARLESTON

4 I, MacKenzie Allen, Court Reporter
5 and Notary Public for the State of South Carolina
6 at Large, do hereby certify that the witness in
7 the foregoing deposition was by me duly sworn to
8 testify to the truth, the whole truth and nothing
9 but the truth in the within-entitled cause; that
10 said deposition was taken at the time and
11 location therein stated; that the testimony of
12 the witness and all objections made at the time
13 of the examination were recorded stenographically
14 by me and were thereafter transcribed by
15 computer-aided transcription; that the foregoing
16 is a full, complete and true record of the
17 testimony of the witness and of all objections
18 made at the time of the examination; and that the
19 witness was given an opportunity to read and
20 correct said deposition and to subscribe the
21 same.

22 Should the signature of the witness
23 not be affixed to the deposition, the witness
24 shall not have availed himself/herself of the
25 opportunity to sign or the signature has been
waived.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal on September 11, 2024,
at Charleston, Charleston County, South Carolina.

20 MACKENZIE ALLEN

21 My commission expires
22 August 30, 2029

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-27-00069

AFFIDAVIT OF BENJAMIN T. SHELTON

1. My name is Benjamin ("Ben") T. Shelton. I have been licensed to practice law in South Carolina since November 2008 and currently practice law with the Shelton Law Firm, LLC in the Town of Hilton Head Island in Beaufort County, South Carolina.

2. I am an attorney for the Plaintiff Mark W. McGilton in the above captioned matter.

3. On behalf of Mark W. McGilton, I noticed and held the deposition of Mr. Alfredo Uriostegui, the driver of the dump involved in the motor vehicle collision that is at issue in this litigation, on July 18, 2024.

4. Mr. Uriostegui's deposition was intensive, involving the review of extensive records and a detailed timeline.

5. During an early break in the deposition, Jason Imhoff, Esq. counsel for D.R. Horton asked to speak with me privately and I invited him into my personal office.

6. In my office, Mr. Imhoff threatened that his client was going to seek sanctions against me personally, that it was going to get "nasty", that "it's coming", stated that a recent letter that he composed in response to a Rule 11 letter which I had sent to him was "just the beginning," and coupled these threats with a demand that my client take \$50,000.00 to settle the case by the end of the day.

7. I responded by asking how D.R. Horton intended to seek sanctions against me, and Mr. Imhoff did not supply a responsive answer.

8. I never had been personally threatened by another attorney on behalf of a client before this instance. This chain of events forced me to consult with my client during the course of a deposition of a major fact witness in this case and distracted my efforts and attention during the course of this important deposition.

9. At the end of the July 18, 2024 deposition, I accompanied Mr. Imhoff outside my office, and he again told me that D.R. Horton had directed him to seek sanctions against me, stated that it was going to "get nasty", that "it's coming", and reiterated that the settlement offer was only good through the end of the day.

10. After July 18, 2024, D.R. Horton filed no sanctions motions despite Mr. Imhoff's threats.

11. However, after Mr. McGilton filed his Rule to Show Cause on August 19, 2024, only then did D.R. Horton file a sanctions motion.

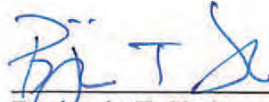
12. The allegations contained in D.R. Horton's sanctions motion may be facially disproved and appear frivolous.

13. For example, D.R. Horton claims that Michael Fryar, Mr. McGilton's vocational expert, was not prepared for his deposition because he testified that his report was not final. However, the report produced in discovery specifically stated that it was preliminary. D.R. Horton noticed his deposition before his report was final. Further, the deposition was a discovery deposition and not a deposition for use at trial.

14. D.R. Horton alleges that Lindsay Moore, Mr. McGilton's expert in life care planning, failed to appear in person for her deposition when counsel for D.R. Horton, Mr. Imhoff, specifically allowed her to appear by Zoom and not in person in writing on the morning of the deposition. Further, D.R. Horton alleges Ms. Moore had a "secret" written opinion when in fact Ms. Moore reserved the right to amend her life care plan in her written plan, and disclosed at her deposition that she was removing certain items from her life care plan until further specificity was received from treating physicians. She repeatedly offered to show Mr. Imhoff the amended life care plan with those items removed and uploaded the information to the Zoom portal, and testified that she *removed* line items from her life care plan which she included as "Potential Surgical Intervention" in her life care plan. Ms. Moore's deposition was a discovery deposition and it facilitated exactly that: discovery and the identification of issues. Mr. Imhoff asked to keep her deposition open and I did not object.

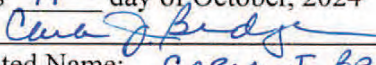
15. Thus, D.R. Horton's Motion for Sanctions is frivolous. It appears to constitute the culmination of Mr. Imhoff's threats to sanction myself and my client made during the course of the deposition of Alfredo Uriostegui. It also appears to be in retaliation to the valid Rule to Show

Cause Mr. McGilton filed due to D.R. Horton's continued, and blatant, disregard of prior court orders regarding discovery.



Benjamin T. Shelton, S.C. Bar No. 77207
1000 William Hilton Parkway
Suite E-6
(P.O. Box 21069)
Hilton Head Island, South Carolina 29926 (29925)
(843) 802-0087
ben@sheltonlawsc.com

Sworn to and subscribed before me
This 14th day of October, 2024


Printed Name: CARLA J. BRUNDAGE

Notary Public for the State of South Carolina

My Commission Expires: 3-17-33



STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-27-00069

Mark W. McGilton,)
)
Plaintiff,)

v.)

1223 May River Road, LLC;)
D.R. Horton, Inc.; and Lotty Trucking, LLC)
f/k/a Ramos Trucking, LLC,)
Defendants.)

AFFIDAVIT OF JOHN CRAWFORD

1223 May River Road, LLC,)
)
Third-Party Plaintiff,)

v.)

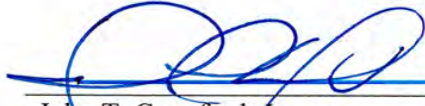
Kenneth Scott Builders, Inc.,)
)
Third-Party Defendant.)

1. My name is John T. Crawford, Jr. I have been licensed to practice law in South Carolina since November of 2001.
2. I along with Jason Imhoff and other attorneys at Kenison, Dudley & Crawford, LLC represent Defendant D.R. Horton in the present matter.
3. This affidavit is provided in support of D.R. Horton's opposition to Plaintiff's Motion For Rule To Show Cause ("Motion") which alleges that D.R. Horton willfully failed and refused to provide emails and various other communications.
4. As detailed in Plaintiff's Motion, On August 22, 2022, after having reached a Consent Order related to discovery, Mr. Imhoff reached out to Mr. Shelton and proposed various

ESI search terms to use in identifying emails and other correspondence. Those terms included key parties to the litigation. **See Exhibit A at page 6.** Further in the email Mr. Shelton was requested to, “please check to see if we owe you anything else?”

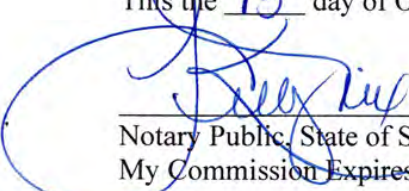
5. In response, on October 25, 2022, Mr. Shelton responded with a list of thirty-nine (“39”) search terms that included but were not limited to generic terms such as, “Top soil”, “Grade”, “Broke*”, “Haul*”, “Fill” and “Dirt”. **See Exhibit A at pages 1-2.**
6. On November 8, 2022, Mr. Imhoff responded suggesting a conference call to discuss concerns with the requested ESI terms. **See Exhibit B.**
7. After various scheduling emails, I attended a conference call with Mr. Shelton on April 4, 2023 where we discussed the issues with the proposed ESI terms and agreed to a deposition of Jared O’Sako, the D.R. Horton employee most involved with the project at issue, so that Mr. Shelton could obtain an understanding on how electronic documents were kept and also determine what items would be requested moving forward. **See Exhibit C.**
8. At Mr. O’Sako’s deposition, the parties reached an agreement where D.R. Horton would supplement discovery responses by, among other things, providing a file “tree” of the filing system discussed by Mr. Osaka. **See Exhibit D at page 1.**
9. After reviewing the referenced file and “tree” I advised that the entire land development file for Cypress Ridge contains 400+ items including subfolders with documents that date back to 2012. **See Exhibit E at page 1.** As a result, the parties agreed to D.R. Horton providing a mapping for Phase 7. **See Exhibit E at page 1.**
10. On August 11, 2023, I provided Mr. Shelton with a “tree” of the Phase 7 folder and after reviewing the “tree” Mr. Shelton requested all documents contained in the Phase 7 folder. **Exhibit F** with attached copy of the screenshot of the folder content.

11. After reviewing the folder and determining that sensitive information was contained in the requested production, the parties reached a confidentiality agreement and the entire content of the Phase 7 folder was produced to Mr. Shelton on December 6, 2023. **See Exhibit G.**
12. Thereafter, Mr. Shelton did not raise any issues with the production until June 24, 2024 when he requested that the D.R. Horton's discovery responses be immediately supplemented to provide a "Table of Contents" for the materials that were produced on December 6, 2023. **See Exhibit H,** "collectively" June 24, 2024, correspondence from Mr. Shelton at page 2 and D.R. Horton's response on June 27, 2024. No other deficiencies were identified related to D.R. discovery responses with the exception of an unrelated issue raised regarding deposition topics and expert witnesses identification.
13. Nonetheless, D.R. Horton agreed to produce the requested "Table of Contents" information on July 9, 2024. **See Exhibit I.**
14. The parties have never reached an agreement on ESI search terms and after the Phase 7 documents were provided, Plaintiff has not raised any questions related to those search terms and any related emails.



 John T. Crawford, Jr.
 SC Bar #69682
 Kenison, Dudley & Crawford, LLC
 325 W McBee Avenue, Suite 301
 Greenville, SC 29601

SWORN to and subscribed before me
 This the 15 day of October, 2024.



 Notary Public, State of South Carolina
 My Commission Expires: 8/28/2025

EXHIBIT A

John Crawford

From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Tuesday, October 25, 2022 8:50 AM
To: Stephanie Simpson; Jason Imhoff; Brooklyn Valentine
Cc: Harrison Williams; Kathryn Harden; Amanda Hammond; John Crawford
Subject: RE: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069
Attachments: Rule 11 Ltr to DRH.final.pdf

Importance: High

Hi Stephanie and Jason,

Thank you for helping get the order filed. I thought I had sent the below email and had a reminder set to follow-up with you on search terms and discovery. Then, I looked at my mailbox and see that this email (originally sent Oct. 4) was in a draft form. Anyway:

Following up on key words/search terms.

I think we will need to expand the scope of the list. Here is our proposal:

Kenneth Scott Builders
 Kenneth Scott
 Mar River 1223
 Kenneth Tosky
 Ken Tosky
 Kenneth S Tosky
 Ken S Tosky
 Cypress Ridge
 Jacob AU Trucking
 Ramos Trucking
 2016181
 P.O. Box 1590
 515429014
 515329050
 7B
 Haul off
 Haul in
 Supervision
 Top soil
 Dump truck
 Dump trucks
 Wooden wheel lane
 Boat & RV
 Boat and RV
 Phase 7
 Hampton Lake
 Accident
 Crash

Wreck
 Grade
 Grading
 Broke*
 Haul*
 May River Road
 Alfredo
 Uriostegui
 Mill Creek
 Fill
 Dirt

As for discovery responses, I am attaching the Rule 11 letter we previously sent. Further, I don't think we have received the actual bid by Kenneth Scott Builders for any of the work involved at Cypress Ridge, other bids and proposals by Kenneth Scott Builders to DR Horton, or bids by other contractors for the work performed by Kenneth Scott Builders before they "won" the bid.

Emails and communications are very thin or outright missing. While your answers and responses were supplemented, no new material was provided and it is clear that DR Horton has not produced a full set of records relating to Cypress Ridge and/or Kenneth Scott Builders.

I am happy to have a conference and prepare a more detailed follow-up deficiency letter. Please circle back with your responses to the search terms, which may go a long way toward resolving outstanding discovery issues once they are run.

Apologies for the delay—it was on me this time due to the email error.

Ben

From: Benjamin Shelton

Sent: Tuesday, September 13, 2022 2:59 PM

To: Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; Kathryn Harden <harden@conlaw.com>; Amanda Hammond <Hammond@conlaw.com>; John Crawford <crawford@conlaw.com>; Ruparelia, Roopal <rruparelia@hsblawfirm.com>

Subject: RE: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069

Stephanie and Jason,

Any comment on this. I would like to file no later than Thursday. We are reviewing the search terms you suggested and will have input for you by the end of the week.



SHELTON LAW FIRM

Benjamin T. Shelton

ben@sheltonlawsc.com

office | 843-802-0087

mobile | 843-295-0915

fax | 843-459-7908

From: Benjamin Shelton

Sent: Friday, September 2, 2022 10:46 AM

To: 'Stephanie Simpson' <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; Kathryn Harden <harden@conlaw.com>; Amanda Hammond <Hammond@conlaw.com>; John Crawford <crawford@conlaw.com>; Ruparelia, Roopal <rruparelia@hsblawfirm.com>

Subject: RE: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069

Stephanie,

See attached draft of a proposed Order resolving our motions, attached. Please confirm you approve, and we can submit it for filing. Also, we assumed that a Form 4 order dismissing 1223 May River Road would be fine. I plan to inform Judge Price of the same by email when we file this order.

I cc'd Roopal, above.

Ben



SHELTON LAW FIRM

Benjamin T. Shelton

ben@sheltonlawsc.com

office | 843-802-0087

mobile | 843-295-0915

fax | 843-459-7908

From: Stephanie Simpson <simpson@conlaw.com>

Sent: Wednesday, August 31, 2022 1:58 PM

To: Benjamin Shelton <ben@sheltonlawsc.com>; Jason Imhoff <jimhoff@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; Kathryn Harden <harden@conlaw.com>; Amanda Hammond <Hammond@conlaw.com>; John Crawford <crawford@conlaw.com>

Subject: RE: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069

Ben/Harrison,

No problem! We just want to keep it on our radar, so Kathryn and Amanda can get you responses.

I appreciate your time!

With kind regards,



Stephanie Shell Simpson

KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Email: simpson@conlaw.com
Main: (864) 242-4899
Website: www.conlaw.com

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From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Wednesday, August 31, 2022 1:33 PM
To: Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>
Cc: Harrison Williams <harrison@sheltonlawsc.com>; Kathryn Harden <harden@conlaw.com>; Amanda Hammond <Hammond@conlaw.com>; John Crawford <crawford@conlaw.com>
Subject: Re: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069

Hi Stephanie, we have a draft ready that I need to review. I'll have it to you tomorrow.

Sent from a mobile device

From: Stephanie Simpson <simpson@conlaw.com>
Sent: Wednesday, August 31, 2022 1:17:11 PM
To: Benjamin Shelton <ben@sheltonlawsc.com>; Jason Imhoff <jimhoff@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>
Cc: Harrison Williams <harrison@sheltonlawsc.com>; Kathryn Harden <harden@conlaw.com>; Amanda Hammond <Hammond@conlaw.com>; John Crawford <crawford@conlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069

Ben,

We just filed the proposed Order granting D.R. Horton's Motion to Amend per Judge Price.

I am following up on the previous emails below regarding a list of proposed search terms for the ESI search and proposed Orders. We want to make sure this doesn't fall off our radar.

Please let us know if you need anything further from us at this time.

With kind regards,



Stephanie Shell Simpson

KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601

Email: simpson@conlaw.com
Main: (864) 242-4899
Website: www.conlaw.com

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From: Benjamin Shelton <ben@sheltonlawsc.com>

Sent: Monday, August 22, 2022 6:23 PM

To: Jason Imhoff <jimhoff@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; Stephanie Simpson <simpson@conlaw.com>; Kathryn Harden <harden@conlaw.com>; Amanda Hammond <Hammond@conlaw.com>; John Crawford <crawford@conlaw.com>

Subject: RE: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069

Hi Jason,

Thanks. Likewise. Yes; we will work on the orders and try to get them to you by Wednesday.

I think more search terms would be appropriate. I will aim to get a proposed list to you by the end of the week.

Ben



SHELTON LAW FIRM

Benjamin T. Shelton

ben@sheltonlawsc.com

office | 843-802-0087

mobile | 843-295-0915

fax | 843-459-7908

From: Jason Imhoff <jimhoff@conlaw.com>

Sent: Monday, August 22, 2022 1:51 PM

To: Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Benjamin Shelton <ben@sheltonlawsc.com>; Harrison Williams <harrison@sheltonlawsc.com>; Stephanie Simpson <simpson@conlaw.com>; Kathryn Harden <harden@conlaw.com>; Amanda Hammond <Hammond@conlaw.com>; John Crawford <crawford@conlaw.com>

Subject: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069

Ben,

I'm glad we could get those motions worked out last week. Are you preparing any Orders?

Also, you indicated you thought you were missing e-mails and correspondence. At this point all emails would be archived and we'd need to do an ESI search through corporate. Did you have a list of terms you'd like us to search?

I was thinking:
Kenneth Scott Builders
Mar River 1223
Kenneth Tosky
Cypress Ridge

Can you think of any other terms?

Also, will you please check to see if we owe you anything else?

Kathryn and Amanda, copied, will help get those responses to you.



Jason Imhoff
Of Counsel
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Email: imhoff@conlaw.com
Direct: (864) 501-3208
Website: www.conlaw.com

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From: Brooklyn Valentine <brooklyn@sheltonlawsc.com>
Sent: Friday, May 27, 2022 12:09 PM
To: Jason Imhoff <jimhoff@conlaw.com>
Cc: Benjamin Shelton <ben@sheltonlawsc.com>; Harrison Williams <harrison@sheltonlawsc.com>; Stephanie Simpson <simpson@conlaw.com>
Subject: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069 | Discovery Requests

Dear Mr. Imhoff, Esq.,

I hope this e-mail finds you well. Attached for service upon you by e-mail is a copy of Plaintiff's First Requests for Admission regarding the above-referenced matter. A hard copy is being placed in the mail today.

Please let us know if you have any questions or concerns.

With kindest regards,



SHELTON LAW FIRM

Paralegal

phone | 843-802-0087
fax | 843-459-7908
email | brooklyn@sheltonlawsc.com
web | www.sheltonlawsc.com

PROSPECTIVE CLIENTS: NO ATTORNEY-CLIENT ENGAGEMENT IS CREATED

ELECTRONICALLY FILED - 2022 Oct 15 10:02 AM - JASPER - COMMON PLEAS - CASE#2021CP2700069

EXHIBIT B

John Crawford

From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Wednesday, November 9, 2022 7:36 AM
To: Jason Imhoff; Stephanie Simpson; Brooklyn Valentine
Cc: Harrison Williams; Kathryn Harden; Amanda Hammond; John Crawford
Subject: Re: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069

Hi Jason, I am jammed up today and tomorrow but could speak Friday morning.

Sent from a mobile device

From: Jason Imhoff <jimhoff@conlaw.com>
Sent: Tuesday, November 8, 2022 5:55:35 PM
To: Benjamin Shelton <ben@sheltonlawsc.com>; Stephanie Simpson <simpson@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>
Cc: Harrison Williams <harrison@sheltonlawsc.com>; Kathryn Harden <harden@conlaw.com>; Amanda Hammond <Hammond@conlaw.com>; John Crawford <crawford@conlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc. | Civil Action No. 2021-CP-27-00069

Ben,

I think we need to have a conference call with John about the ESI. Those terms have to be restricted by the project name i.e. cypress ridge or you'll get 1 billion hits for "haul off" "supervision" etc.. I don't think that list is practical BUT John is the expert and you two could probably work through it.

I looked through your Rule 11 letter and I don't believe we owe you anything but 1 name; Jared O'Saka. He was the land development guy who worked that development.

I will check with Jared again on the "bid" and other non winning "bids" but from my prior experience D.R. Horton doesn't work in the formal, written bid process you're probably envisioning. Its all computer based with vendor-partners from my previous experience. However, that may be something that gets snagged in the ESI search.

I'll follow up with DRH about other records, but again, from my experience there isn't going to be much as this stage of a development.

Can you talk Wednesday – Friday this week?



Jason Imhoff
 Of Counsel
 KENISON, DUDLEY & CRAWFORD, LLC
 704 East McBee Avenue
 Greenville, SC 29601
 Email: jimhoff@conlaw.com
 Direct: (864) 501-3208
 Website: www.conlaw.com

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EXHIBIT C

John Crawford

From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Tuesday, April 4, 2023 10:13 AM
To: John Crawford; Jason Imhoff
Cc: Stephanie Simpson; Kelly Nix; Cara Smith
Subject: Re: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Thanks, I'll call when I get back into the office.

Sent from a mobile device

From: John Crawford <crawford@conlaw.com>
Sent: Tuesday, April 4, 2023 9:56:00 AM
To: Benjamin Shelton <ben@sheltonlawsc.com>; Jason Imhoff <jimhoff@conlaw.com>
Cc: Stephanie Simpson <simpson@conlaw.com>; Kelly Nix <nix@conlaw.com>; Cara Smith <smith@conlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Hey Ben, that'll be fine. I'm free until 11 and then free again anytime after 1:30.

From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Tuesday, April 4, 2023 9:55 AM
To: John Crawford <crawford@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>
Cc: Stephanie Simpson <simpson@conlaw.com>; Kelly Nix <nix@conlaw.com>; Cara Smith <smith@conlaw.com>
Subject: Re: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Hi John, I am just getting out of a doctor's appointment and might be a bit late. I'll call your cell when I'm out if that's okay.

Sent from a mobile device

From: John Crawford <crawford@conlaw.com>
Sent: Saturday, April 1, 2023 1:48:57 PM
To: Benjamin Shelton <ben@sheltonlawsc.com>; Jason Imhoff <jimhoff@conlaw.com>
Cc: Stephanie Simpson <simpson@conlaw.com>; Kelly Nix <nix@conlaw.com>; Cara Smith <smith@conlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Ben,

Jason is in depositions next week, but I'll call you on Tuesday at 10 a.m.

Thanks,
 John



John T. Crawford, Jr.
Managing Member
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Email: crawford@conlaw.com
Main: (864) 242-4899
Website: www.conlaw.com

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From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Saturday, April 1, 2023 1:47 PM
To: Jason Imhoff <jimhoff@conlaw.com>; John Crawford <crawford@conlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.
Importance: High

Jason and John,

I am in the office on Monday and available from 8am to 10am and 10:30am to 1:30pm, and 3pm to 5:30pm. I am available Tuesday after 10am. Please let me know of a time that works for you.

Ben



SHELTON LAW FIRM

Benjamin T. Shelton
ben@sheltonlawsc.com
office | 843-802-0087
mobile | 843-295-0915
fax | 843-459-7908

From: Benjamin Shelton
Sent: Friday, March 24, 2023 4:28 PM
To: Jason Imhoff <jimhoff@conlaw.com>; John Crawford <crawford@conlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Hi John,

I just tried you back. Your mailbox is full too.

I'm stepping out of the office for the rest of the day—please feel free to call my cell again and if we don't catch each other, let's touch base on Monday.

Ben



SHELTON LAW FIRM

Benjamin T. Shelton
ben@sheltonlawsc.com
office | 843-802-0087
mobile | 843-295-0915
fax | 843-459-7908

From: Jason Imhoff <jimhoff@conlaw.com>
Sent: Friday, March 24, 2023 2:06 PM
To: Benjamin Shelton <ben@sheltonlawsc.com>; John Crawford <crawford@conlaw.com>
Subject: FW: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Call his cell 864-230-3943



Jason Imhoff
Of Counsel
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Email: imhoff@conlaw.com
Direct: (864) 501-3208
Website: www.conlaw.com

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From: Jason Imhoff
Sent: Friday, March 24, 2023 2:04 PM
To: Benjamin Shelton <ben@sheltonlawsc.com>; Stephanie Simpson <simpson@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>; John Crawford <crawford@conlaw.com>
Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@ycrlaw.com>; Brown, Stephen L. <sbrown@ycrlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Ben,

John Crawford tried to call and said your voicemail is full. Can you give him a call back please?

EXHIBIT D

John Crawford

From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Monday, July 17, 2023 3:12 PM
To: John Crawford; Brooklyn Valentine
Cc: Harrison Williams; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen; Brown, Stephen L.; Stephanie Simpson; Jason Imhoff
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Importance: High

John—

I hope that you are doing well. I am following up with our discussion we had after Mr. Osaka's deposition concerning supplementing discovery responses by DR Horton. We had agreed that you would look into providing Plaintiff with a file "tree" of the filing system discussed by Mr. Osaka, and also providing the entire project files for projects involving Kenneth Scott Builders (and not just files that are specifically named or reference Kenneth Scott Builders or Ken Tosky, etc.). It has been well over a month.

Please let me know where we stand on these issues. I need this material to review to determine what other material may be available and missing, and well before DR Horton's 30(b)(6) deposition.

Best regards,

Ben



SHELTON LAW FIRM

Benjamin T. Shelton
ben@sheltonlawsc.com
 office | 843-802-0087
 mobile | 843-295-0915
 fax | 843-459-7908

From: John Crawford <crawford@conlaw.com>
Sent: Wednesday, April 5, 2023 6:07 PM
To: Brooklyn Valentine <brooklyn@sheltonlawsc.com>
Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@yclaw.com>; Brown, Stephen L. <sbrown@yclaw.com>; Benjamin Shelton <ben@sheltonlawsc.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Thanks, Brooklyn. I'll check with Jason and Jared on availability for those dates.

John



John T. Crawford, Jr.
 Managing Member
 KENISON, DUDLEY & CRAWFORD, LLC
 704 East McBee Avenue
 Greenville, SC 29601
 Email: crawford@conlaw.com
 Main: (864) 242-4899
 Website: www.conlaw.com

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From: Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Sent: Wednesday, April 5, 2023 2:21 PM

To: John Crawford <crawford@conlaw.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@ycrlaw.com>; Brown, Stephen L. <sbrown@ycrlaw.com>; Benjamin Shelton <ben@sheltonlawsc.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>

Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Dear Mr. Crawford,

Ben is available June 12, 13, 14, 15, 26, 27, 28, and 29, and July 10, 11, 12, 13, and 14.

Please let us know if any of those dates work for you.

With kind regards,



SHELTON LAW FIRM

BROOKLYN VALENTINE WEST

Paralegal

Shelton Law Firm, LLC
 10 Hospital Center Commons, Suite 400
 (Mailing: P.O. Box 21069)
 Hilton Head Island, SC 29926 (29925)

phone | 843-802-0087
 fax | 843-459-7908
 email | brooklyn@sheltonlawsc.com
 web | www.sheltonlawsc.com

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EXHIBIT E

John Crawford

From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Thursday, August 3, 2023 10:22 AM
To: John Crawford; Brooklyn Valentine
Cc: Harrison Williams; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen; Brown, Stephen L.; Stephanie Simpson; Jason Imhoff; Kelly Nix; Cara Smith
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

John,

Yes—thank you, that is reasonable. I look forward to receiving the “map” of folders by the end of the week please.

Ben



SHELTON LAW FIRM

Benjamin T. Shelton
ben@sheltonlawsc.com
 office | 843-802-0087
 mobile | 843-295-0915
 fax | 843-459-7908

From: John Crawford <crawford@conlaw.com>
Sent: Thursday, August 3, 2023 10:19 AM
To: Benjamin Shelton <ben@sheltonlawsc.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>
Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@yclaw.com>; Brown, Stephen L. <sbrown@yclaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; Kelly Nix <nix@conlaw.com>; Cara Smith <smith@conlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Ben, just wanted to give you an update on this. We have the land development file, but it contains 400+ items including folders with additional sub folders. Additionally, these docs go back to 2012.

Based on the issues raised, it would seem more efficient to get you over mapping for Phase 7 and then start from there. Is that agreeable?

Thanks,
 John



John T. Crawford, Jr.
 Managing Member
 KENISON, DUDLEY & CRAWFORD, LLC
 704 East McBee Avenue
 Greenville, SC 29601
 Email: crawford@conlaw.com
 Main: (864) 242-4899
 Website: www.conlaw.com

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From: Benjamin Shelton <ben@sheltonlawsc.com>

Sent: Friday, July 21, 2023 10:31 AM

To: John Crawford <crawford@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@ycrlaw.com>; Brown, Stephen L. <sbrown@ycrlaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; Kelly Nix <nix@conlaw.com>; Cara Smith <smith@conlaw.com>

Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Sounds good. It was a nice, whirlwind trip. Will have to go back again for a bit longer. Thank you!

Ben



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Benjamin T. Shelton

ben@sheltonlawsc.com

office | 843-802-0087

mobile | 843-295-0915

fax | 843-459-7908

From: John Crawford <crawford@conlaw.com>

Sent: Friday, July 21, 2023 10:28 AM

To: Benjamin Shelton <ben@sheltonlawsc.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@ycrlaw.com>; Brown, Stephen L. <sbrown@ycrlaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; Kelly Nix <nix@conlaw.com>; Cara Smith <smith@conlaw.com>

Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Hey Ben,

Thanks for the follow up and hope your trip went well!

I'll follow up with Jared and will get the info over to you by next week.

Thanks,
John

From: Benjamin Shelton <ben@sheltonlawsc.com>

Sent: Friday, July 21, 2023 10:24 AM

To: John Crawford <crawford@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@ycrlaw.com>; Brown, Stephen L. <sbrown@ycrlaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>

Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Hi John,

Following up on this. Hope all is well—

Ben



SHELTON LAW FIRM

Benjamin T. Shelton

ben@sheltonlawsc.com

office | 843-802-0087

mobile | 843-295-0915

fax | 843-459-7908

From: Benjamin Shelton

Sent: Monday, July 17, 2023 3:12 PM

To: John Crawford <crawford@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@ycrlaw.com>; Brown, Stephen L. <sbrown@ycrlaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>

Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Importance: High

John—

I hope that you are doing well. I am following up with our discussion we had after Mr. Osaka's deposition concerning supplementing discovery responses by DR Horton. We had agreed that you would look into providing Plaintiff with a file "tree" of the filing system discussed by Mr. Osaka, and also providing the entire project files for projects involving Kenneth Scott Builders (and not just files that are specifically named or reference Kenneth Scott Builders or Ken Tosky, etc.). It has been well over a month.

Please let me know where we stand on these issues. I need this material to review to determine what other material may be available and missing, and well before DR Horton's 30(b)(6) deposition.

EXHIBIT F

John Crawford

From: John Crawford
Sent: Friday, August 11, 2023 3:59 PM
To: Benjamin Shelton; Brooklyn Valentine
Cc: Harrison Williams; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen; Brown, Stephen L.; Stephanie Simpson; Jason Imhoff; Kelly Nix; Cara Smith
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.
Attachments: Phase 7 Map.pdf

Ben,

The Phase 7 folder did not have any subfolders, however attached is a screen shot of the files contained in that folder. Let me know what you would like to review.

Thanks,
 John



John T. Crawford, Jr.
 Managing Member
 KENISON, DUDLEY & CRAWFORD, LLC
 704 East McBee Avenue
 Greenville, SC 29601
 Email: crawford@conlaw.com
 Main: (864) 242-4899
 Website: www.conlaw.com

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From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Thursday, August 3, 2023 10:22 AM
To: John Crawford <crawford@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>
Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@yclaw.com>; Brown, Stephen L. <sbrown@yclaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; Kelly Nix <nix@conlaw.com>; Cara Smith <smith@conlaw.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

John,

Yes—thank you, that is reasonable. I look forward to receiving the “map” of folders by the end of the week please.

Ben



SHELTON LAW FIRM

Benjamin T. Shelton

ben@sheltonlawsc.com

office | 843-802-0087

mobile | 843-295-0915

fax | 843-459-7908

From: John Crawford <crawford@conlaw.com>

Sent: Thursday, August 3, 2023 10:19 AM

To: Benjamin Shelton <ben@sheltonlawsc.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@ycrlaw.com>; Brown, Stephen L. <sbrown@ycrlaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; Kelly Nix <nix@conlaw.com>; Cara Smith <smith@conlaw.com>

Subject: RE: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 | 30(b)(6) Deposition of D.R. Horton, Inc.

Ben, just wanted to give you an update on this. We have the land development file, but it contains 400+ items including folders with additional sub folders. Additionally, these docs go back to 2012.

Based on the issues raised, it would seem more efficient to get you over mapping for Phase 7 and then start from there. Is that agreeable?

Thanks,
John



John T. Crawford, Jr.

Managing Member

KENISON, DUDLEY & CRAWFORD, LLC

704 East McBee Avenue

Greenville, SC 29601

Email: crawford@conlaw.com

Main: (864) 242-4899

Website: www.conlaw.com

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From: Benjamin Shelton <ben@sheltonlawsc.com>

Sent: Friday, July 21, 2023 10:31 AM

To: John Crawford <crawford@conlaw.com>; Brooklyn Valentine <brooklyn@sheltonlawsc.com>

Cc: Harrison Williams <harrison@sheltonlawsc.com>; wpj@johnsonslawoffice.com; Griffith, Jr., Stephen <sgriffith@ycrlaw.com>; Brown, Stephen L. <sbrown@ycrlaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>; Kelly Nix <nix@conlaw.com>; Cara Smith <smith@conlaw.com>

NAME	UPDATED ↓	SIZE	⋮
 Plans MC Phase 7 17008.12 6-30-15....	Aug 3, 2023 by Cara Smith	11.7 MB	
 Plans Phase 7 17008.12 8-10-15.pdf	Aug 3, 2023 by Cara Smith	12 MB	
 Cypress Ridge Phase 7 Site Plan.pdf	Aug 3, 2023 by Cara Smith	22.7 MB	
 Temporary CofC Cypress Ridge Phase...	Aug 3, 2023 by Cara Smith	105 KB	
 Spending Approval 6 and 7.msg	Aug 3, 2023 by Cara Smith	93.5 KB	
 Proposal 2-26-13 Cypress Ridge Phas...	Aug 3, 2023 by Cara Smith	88.9 KB	
 PO Request - MC Common Area - LA...	Aug 3, 2023 by Cara Smith	28.5 KB	

	Pages from Cypress Ridge Phase 7 Sit...	Aug 3, 2023 by Cara Smith	1.5 MB
	PO Request - MC 7A - LATHER.xlsx	Aug 3, 2023 by Cara Smith	28.5 KB
	Mill Creek Phase 7 Work Proposal.xls	Aug 3, 2023 by Cara Smith	37 KB
	Lather Phase 7A 7B Bid to DRH Break...	Aug 3, 2023 by Cara Smith	22.7 KB
	Cypress Ridge Phase 7 Version 8 1 LA...	Aug 3, 2023 by Cara Smith	2.4 MB
	Gross_Profit_by_Lot backlog PH7 06-...	Aug 3, 2023 by Cara Smith	13.3 KB
	Hiers Construction 03 31 15 Proposal...	Aug 3, 2023 by Cara Smith	68.9 KB

	Lather Phase 7 Bid to DRH off origina...	Aug 3, 2023 by Cara Smith	17.5 KB
	Dustcom Cypress Ridge Ph 7 Proposa...	Aug 3, 2023 by Cara Smith	16 KB
	FW (HH) Cypress Ridge Mill Creek Ph...	Aug 3, 2023 by Cara Smith	67 KB
	Dustcom - Cypress Ridge Ph 7 Propos...	Aug 3, 2023 by Cara Smith	15.8 KB
	Cypress Ridge Phase 7 Version 8 1 LA...	Aug 3, 2023 by Cara Smith	2.4 MB
	Deepwater billing for 7B Common.pdf	Aug 3, 2023 by Cara Smith	413 KB
	Dustcom Cypress Ridge Ph 7 Proposa...	Aug 3, 2023 by Cara Smith	16 KB

	Deepwater work completed at 7B Co...	Aug 3, 2023 by Cara Smith	166.3 KB
	Cypress Ridge Phase 7 Version 8 1 LA...	Aug 3, 2023 by Cara Smith	2.4 MB
	Cypress Ridge Phase 7 Version 8 1 LA...	Aug 3, 2023 by Cara Smith	2.4 MB
	Cypress Ridge Phase 7 Version 8 1 LA...	Aug 3, 2023 by Cara Smith	2.3 MB
	Cypress Ridge Ph 7B Spend LAP.xlsm	Aug 3, 2023 by Cara Smith	2.3 MB
	Cypress Ridge Ph 7B Spend LAP 5-19...	Aug 3, 2023 by Cara Smith	2.3 MB
	Cypress Ridge Ph 7B Spend LAP 6-01...	Aug 3, 2023 by Cara Smith	2.3 MB

	Cypress Ridge Phase 7 Budget Increa...	Aug 3, 2023 by Cara Smith	369.2 KB
	Cypress Ridge 7B, Common Bids.pdf	Aug 3, 2023 by Cara Smith	992.7 KB
	Copy of Budget Mill Creek Phase 7B ...	Aug 3, 2023 by Cara Smith	64.1 KB
	Budget Mill Creek Phase 7B 5-2-17.xl...	Aug 3, 2023 by Cara Smith	64 KB
	Budget Mill Creek PH7 - 8-5-15.xlsx	Aug 3, 2023 by Cara Smith	62.6 KB
	Budget Increase Worksheet Cypress ...	Aug 3, 2023 by Cara Smith	82.9 KB



BJWSA Phase 7B Utility Warranty Bo...

Aug 3, 2023 by Cara Smith

41.5 KB



BJWSA Phase 7A Utility Warranty Bo...

Aug 3, 2023 by Cara



5 unit town home.pdf

Aug 3, 2023 by Cara Smith

1.9 MB



BJWSA Capacity commitment.pdf

Aug 3, 2023 by Cara Smith

222.7 KB



Atlas Surveying - DRH-MILL CREEK 7...

Aug 3, 2023 by Cara Smith

74.5 KB



4 unit town home.pdf

Aug 3, 2023 by Cara Smith

1.9 MB



3 unit town home.pdf

Aug 3, 2023 by Cara Smith

2.4 MB



7A Performance Bond Request - Redu...

Aug 3, 2023 by Cara Smith

41 KB



17008.1200 - PGD Construction Plan...

Aug 3, 2023 by Cara



EXHIBIT G

John Crawford

From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Wednesday, December 6, 2023 11:53 AM
To: John Crawford; Cara Smith; Harrison Williams
Cc: Kelly Nix; Stephanie Simpson; Jason Imhoff
Subject: RE: Mark W. McGilton v. D.R. Horton, Inc.

Hi John,

Unfortunately, I don't think so. This is a pattern for your client (this is not about you), where I am forced to file motions to compel to get any response. We agreed to a confidentiality order months ago, and we get a form proposed order a week before the hearing, weeks after the motion is filed. Also, the material sought is from initial discovery requests and relates to a previous order that we resolved by consent where your client agreed to provide outstanding responsive discovery.

Best regards,

Ben



SHELTON LAW FIRM

Benjamin T. Shelton
ben@sheltonlawsc.com
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 mobile | 843-295-0915
 fax | 843-459-7908

From: John Crawford <crawford@conlaw.com>
Sent: Wednesday, December 6, 2023 11:13 AM
To: Benjamin Shelton <ben@sheltonlawsc.com>; Cara Smith <smith@conlaw.com>; Harrison Williams <harrison@sheltonlawsc.com>
Cc: Kelly Nix <nix@conlaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>
Subject: RE: Mark W. McGilton v. D.R. Horton, Inc.

Ben, can we enter into a consent order to avoid the hearing, now that we have the confidentiality agreement? Thanks.

From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Wednesday, December 6, 2023 9:39 AM
To: Cara Smith <smith@conlaw.com>; Harrison Williams <harrison@sheltonlawsc.com>
Cc: John Crawford <crawford@conlaw.com>; Kelly Nix <nix@conlaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>
Subject: RE: Mark W. McGilton v. D.R. Horton, Inc.

Good morning, Cara. The Confidentiality Order is approved here—please feel free to add my e-signature and submit. There are a few typos missing a space between words that show on the PDF that you might want to correct (perhaps they don't exist in Word?).

We still intend to move forward with tomorrow's hearing, however. Please let me know if you have any questions.

Best regards,

Ben



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mobile | 843-295-0915

fax | 843-459-7908

From: Cara Smith <smith@conlaw.com>

Sent: Friday, December 1, 2023 5:15 PM

To: Benjamin Shelton <ben@sheltonlawsc.com>; Harrison Williams <harrison@sheltonlawsc.com>

Cc: John Crawford <crawford@conlaw.com>; Kelly Nix <nix@conlaw.com>; Stephanie Simpson <simpson@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>

Subject: Mark W. McGilton v. D.R. Horton, Inc.

Good evening,

Our firm has finished reviewing D.R. Horton, Inc.'s document production in the above-referenced matter, and has marked all applicable documents as confidential. As such, please let us know if we have your consent to e-file this Proposed Consent Confidentiality Order and sign on your behalf. We greatly appreciate your time and assistance.

With kindest regards,



Cara Smith

Paralegal

KENISON, DUDLEY & CRAWFORD, LLC

704 East McBee Avenue

Greenville, SC 29601

Email: smith@conlaw.com

Direct Dial: (864) 501-3154

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EXHIBIT H

June 24, 2024

Via email only

KENSON, DUDLEY, & CRAWFORD, LLC

Jason Imhoff, Esq.

jimhoff@conlatw.com

John Crawford, Esq.

crawford@conlatw.com

Kim Wooten, Esq.

wooten@conlaw.com

***Re: Mark McGilton v. DR Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 |
Rule 11 Letter re Supplemental Discovery and General Discovery Obligations***

Dear Jason, John and Kim –

I am writing to address D.R. Horton's (hereinafter, "D.R. Horton" or "DRH") failure to organize, identify, or explain the tranche of documents that was produced on December 6, 2023, to Plaintiff, Mark W. McGilton (hereinafter, "Plaintiff" or "McGilton"), for failure to supplement answers to Plaintiff's interrogatories, failure to provide dates for 30(b)(6) witnesses, failure to respond to inquiries regarding authority to accept service of its identified experts, and for its failure to provide a detailed outline of D.R. Horton's experts' testimony as required by the Court's recent Order.

On October 17, 2023, Plaintiff's counsel filed a Motion to Compel against D.R. Horton requiring that they respond to outstanding supplemental discovery requests.

On December 6, 2023, D.R. Horton provided Plaintiff with a tranche of material that lacked a Table of Contents, identification, or an explanation as to what was being produced. Further, D.R. Horton failed to supplement their answers to interrogatories at that time or any time thereafter relative to the December 6, 2023 production.

On December 7, 2023, the court heard McGilton's renewed Motion to Compel, for Sanctions, and Rule to Show Cause as to D.R. Horton's failure to answer discovery responses, failure to timely supplement discovery responses, and failure to abide by the court's September 22, 2022 Consent Order requiring D.R. Horton to "comply with Plaintiff's outstanding discovery requests, comply with continuing discovery obligations,

BENJAMIN T. SHELTON
SHELTON LAW FIRM, LLC, a South Carolina limited liability company
PO BOX 21069
HILTON HEAD ISLAND, SC 29925

ben@sheltonlawsc.com
(843) 802-0087

RULE 11 LETTER TO DR HORTON – June 24, 2024

and work in good faith with Plaintiff to resolve any further discovery disputes.” The Court granted Plaintiff’s Motion to Compel, and found D.R. Horton in contempt of court regarding their failure to abide by the previous order, and sanctioned D.R. Horton for their discovery abuses.

On June 10, 2024, the court heard D.R. Horton’s Motion to Amend Scheduling Order and held a status conference on June 11, 2024 as to D.R. Horton’s Motion to Amend Scheduling Order. In its Order dated June 16, 2024, the court found that the “Defendants failed to comply with the scheduling order and has not shown good cause for such violation. The court ruled that the Defendant is allowed to use their experts and must disclose them to the Plaintiff by Friday, June 14. The Defendant will provide a CV and a detailed outline of the experts’ testimony.”

Requests Pursuant to Rule 11, SCRCF

We request that your client immediately supplement their answers to the interrogatories, and explain by way of a Table of Contents, or some other method, the nature of the material that was produced on December 6, 2023. Please provide this firm with supplemental discovery responses immediately. We reserve the right to file a motion to compel same.

Next, we have produced a list of expected questions and topics for D.R. Horton’s 30(b)(6) witnesses. After consultation, we sent an email further identifying general topics and asked that D.R. Horton provide dates for 30(b)(6) depositions. To date, we have not received any proposed dates or the identity of 30(b)(6) witnesses from D.R. Horton. Please provide dates for your client’s 30(b)(6) witnesses availability immediately.

Also, after receiving the identity of D.R. Horton’s expert witnesses on Friday, June 14, 2024, we reached out to your office on no less than three occasions to determine whether your office would accept service of subpoenas for the experts D.R. Horton identified. To date, we have not received a response from your office. We will serve the subpoenas directly upon the identified experts.

Finally, we have reviewed D.R. Horton’s supplemental discovery responses dated June 14, 2024 where they identified experts that they intend to use at the trial of the matter. However, D.R. Horton failed to provide a “detailed outline of the experts’ testimony” as required by the Court’s June 13, 2024 Order. Please provide a detailed

RULE 11 LETTER TO DR HORTON – June 24, 2024

outline of the expert testimony for each expert that your client intends to use at trial, immediately.

This letter is our Rule 11, SCRCF, consultation relating to the above requests. Please know that this letter does not identify all deficiencies related to DRH's discovery responses and production. My client does not waive any argument to identify and demand answers and more thorough responses to other deficiencies in the future. Please let us know if you have any questions.

With kind regards, I am

Most Sincerely Yours,

SHELTON LAW FIRM, LLC

s/Benjamin T. Shelton

Attorney at Law

SC Bar No. 77207

cc: All counsel of record



**KENISON, DUDLEY
& CRAWFORD, LLC**
ATTORNEYS AT LAW

Jason M. Imhoff
Of Counsel
Licensed in SC
325 West McBee Avenue, Ste.
301
Greenville, SC 29601
864.242.4899
jimhoff@conlaw.com

June 27, 2024

VIA ELECTRONIC MAIL – ben@sheltonlawsc.com

Benjamin T. Shelton, Esquire
Shelton Law Firm, LLC
P.O. Box 21069
Hilton Head Island, SC 29925

***Re: Mark W. McGilton v. D.R. Horton, Inc., et al,
Jasper County Court of Common Pleas, CA No. 2021-CP-27-00069***

Dear Ben:

As an initial matter, we were disappointed to receive your Rule 11 letter dated June 24, 2024, as we had been able to work together before May of this year. It appears your letter has one purpose: to posture in an attempt to win the case through motions to compel and sanctions. We disagree with both the tactic and the opinions in your letter.

We do not believe your letter complies with Rule 11 for the following reasons and we are unsure what supplemental discovery you are requesting.

Discovery

This is a car wreck case that may, if your legal analysis is correct, require some discovery into the hiring practices and history of D.R. Horton related to hiring KSB for this project. All of that information has been provided and more. In fact, after the most recent discovery production in December of last year you wrote:

“We are still reviewing the material that was provided on December 6, 2023 and will reach out with any issues, concerns or questions regarding it separately.”

We did not hear from you until this letter dated June 24, 2024. In yesterday’s letter you even reiterate that “this letter does not identify all deficiencies related to DRH’s discovery responses and production.” In fact, your letter does not ask for any further documents or substantive information at all.

June 27, 2024
Page | 2

Additionally, you represented to the Court during at least two motions for sanctions in 2024 that all discovery materials have been provided.

Based on the above, it appears that you had no complaint with the substance of our discovery production. Instead, it appears you are asking us to identify and explain the documents that you have been reviewing since December - after multiple hearings, depositions, and mediation.

Frankly, we are not sure what you want if you do not know the documents you have had for almost 8 months. We ask that you supplement your request with specific requests or required documents.

Experts

We are in the process of providing dates. Your letter arrived essentially one week after the order. In the meantime, my paralegal Stephanie has both resigned and become ill. (Please copy Cara above in the future) If you would prefer, please give us dates and we will get with the experts to schedule.

As regarding the authority to accept service (please see paralegal issues above) – we are unaware of any rule requiring us to voluntarily accept service for experts such that it would be the basis for a discovery violation or motion to compel. However, as a practical matter, we almost always accept service for depositions if we schedule them. We do not typically accept service of subpoenas for expert records for two reasons (1) we do not represent the expert related to subpoenas; and (2) I personally believe it is improper for an attorney to intervene between a party and a witness.

Once we have agreed on dates, we will accept the deposition subpoena (excluding duces tecum) and provide you with the experts' files through discovery. If you want to subpoena the experts directly, we cannot help with that.

Finally, we have complied with the Court's June order. We produced the names of our experts, their CV, and a summary of their opinions – which are more informative than Plaintiff's. Despite that, frankly, our experts have some opinions based on "guessing" – but without more information from you – especially related to Mr. Rowland's expected testimony – they are admittedly, to some degree, rebuttal experts. If you will provide a comprehensive outline of your experts' opinions, I will provide them to our experts to determine if they agree or have contrary opinions.

DRH 30(b)(6)

We have identified 3 designees in response to your draft 30(b)(6) notice and attached topics list. I understand that scheduling those depositions is now in process. Please let me know if you have further issues on this front.

June 27, 2024
Page | 3

Ben, as an aside, we worked together well for several years; however, we cannot ignore that you set us up, admitted it was intentional, and then attempted to get an order that this firm committed malpractice. Although we suspected you were trying to hide your experts' opinions so that we would be unprepared to rebut them, our suspicions were confirmed when you admitted the expert summaries were intentionally ambiguous to myself and John Crawford at mediation. If you would like to have a professional and cooperative relationship with us or this firm, you may need to consider addressing that.

This letter seems to be the same type of tactic.

If you want to work together then let's get through this. If you want to litigate this wreck case through threats, accusations, and sleight of hand, we can deal with that too.

Sincerely,

KENISON, DUDLEY & CRAWFORD, LLC

Jason M. Imhoff

Jason M. Imhoff

EXHIBIT I

John Crawford

From: Jason Imhoff
Sent: Tuesday, July 9, 2024 3:24 PM
To: Benjamin Shelton; John Crawford
Cc: Cara Smith; Stephanie Simpson
Subject: RE: Mark McGilton v. DR Horton, Inc., 1223 May River Road, LLC, and Lotty Trucking LLC

Ben –

I hope the depositions and mediation have been scheduled while I was gone. If there are still issues scheduling please let me know.

Cara/Stehanie are trying to label the document production in a way that is helpful. I think you'll have that this week.

I can set meetings with my experts and ask them to further explain their opinions, but again, the vast majority of their opinions will be based upon you experts' opinions and the summary language mirrors those opinions. If you want me to do that I will attempt it.



Jason Imhoff
 Of Counsel
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 Website: www.conlaw.com

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From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Tuesday, July 2, 2024 9:21 AM
To: John Crawford <crawford@conlaw.com>; Jason Imhoff <jimhoff@conlaw.com>
Cc: Cara Smith <smith@conlaw.com>; Harrison Williams <harrison@sheltonlawsc.com>; Kim Wooten <wooten@conlaw.com>; wpj@johnsonslawoffice.com; kmims@lmlawllp.com; William C. McNair (<cmcnair@lmlawllp.com> <cmcnair@lmlawllp.com>; hgrooms@lmlawllp.com; rconner@lmlawllp.com; Andrea S Tata <atata@lmlawllp.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., 1223 May River Road, LLC, and Lotty Trucking LLC

Thanks, John.

Ben

From: John Crawford <crawford@conlaw.com>
Sent: Tuesday, July 2, 2024 7:30 AM
To: Benjamin Shelton <ben@sheltonlawsc.com>; Jason Imhoff <jimhoff@conlaw.com>
Cc: Cara Smith <smith@conlaw.com>; Harrison Williams <harrison@sheltonlawsc.com>; Kim Wooten <wooten@conlaw.com>; wpj@johnsonslawoffice.com; kmims@lmlawllp.com; William C. McNair <cmcnair@lmlawllp.com> <cmcnair@lmlawllp.com>; hgrooms@lmlawllp.com; rconner@lmlawllp.com; Andrea S Tata <atata@lmlawllp.com>
Subject: RE: Mark McGilton v. DR Horton, Inc., 1223 May River Road, LLC, and Lotty Trucking LLC

Ben,

Jason has been on vacation since last Friday and will return on Monday. We'll have you a response on the 8th.

Thanks,
 John



John T. Crawford, Jr.
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 Greenville, SC 29601
 Email: crawford@conlaw.com
 Main: (864) 242-4899
 Website: www.conlaw.com

****PLEASE NOTE THAT, AS OF FEBRUARY 16, 2024, OUR GREENVILLE OFFICE IS NOW LOCATED AT 325 W. MCBEE AVENUE, SUITE 301, GREENVILLE, SC 29601.****

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From: Benjamin Shelton <ben@sheltonlawsc.com>
Sent: Saturday, June 29, 2024 4:01 PM
To: Jason Imhoff <jimhoff@conlaw.com>
Cc: John Crawford <crawford@conlaw.com>; Cara Smith <smith@conlaw.com>; Benjamin Shelton <ben@sheltonlawsc.com>; Harrison Williams <harrison@sheltonlawsc.com>; Kim Wooten <wooten@conlaw.com>; wpj@johnsonslawoffice.com; kmims@lmlawllp.com; William C. McNair <cmcnair@lmlawllp.com> <cmcnair@lmlawllp.com>; hgrooms@lmlawllp.com; rconner@lmlawllp.com; Andrea S Tata <atata@lmlawllp.com>
Subject: Mark McGilton v. DR Horton, Inc., 1223 May River Road, LLC, and Lotty Trucking LLC

Jason,

Please see attached.

Please feel free to give me a call to discuss.

Best regards,

Ben



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WE ARE MOVING! Come see us at the Village at Wexford after July 1, 2024--

Shelton Law Firm, LLC

1000 William Hilton Parkway

Suite E-6

Hilton Head Island, SC 29928

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
	)	
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	DEFENDANT D.R. HORTON, INC.’S
D.R. Horton, Inc.; and Lotty Trucking,	)	MEMORANDUM IN OPPOSITION TO
LLC f/k/a Ramos Trucking, LLC,	)	PLAINTIFF’S MOTION FOR RULE TO
	)	SHOW CAUSE TO STRIKE, AND FOR
Defendants.	)	CONTEMPT PER RULE 37(D), SCRPC,
	)	AGAINST D.R. HORTON, INC. FOR
1223 May River Road, LLC,	)	CONTINUING VIOLATIONS OF
	)	ORDERS DATED SEPT. 22, 2022,
Third-Party Plaintiff,	)	MARCH 5, 2022, AND JUNE 13, 2024
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
<u>Third-Party Defendant.</u>	)	

TO: PLAINTIFF MARK W. MCGILTON AND HIS ATTORNEY, BENJAMIN T. SHELTON, ESQUIRE:

Defendant D.R. Horton, Inc. (“DR Horton”), by and through the undersigned counsel, hereby submits this memorandum in opposition to Plaintiff’s Motion for Rule to Show Cause, to Strike, and for Contempt per Rule 37(d), SCRPC, Against D.R. Horton, Inc. for Continuing Violations of Orders Dated Sept. 22, 2022, March 5, 2022, and June 13, 2024 (the “Motion”).

INTRODUCTION

While Plaintiff attempts to complicate this matter with imaginative theories of D.R. Horton’s intent in litigating this matter, the issue in front of the Court on this Motion is a simple discovery dispute. Plaintiff requests this Court strike D.R. Horton’s answer as a sanction for its conduct in discovery. Plaintiff’s recitation of the context and facts surrounding this dispute is an

thinly veiled attempt to seek an extreme remedy that is unjustifiable under an objective view of the facts. As fully explained herein, Plaintiff's Motion and request to strike D.R. Horton's answer should be DENIED.

BACKGROUND

This case arises from a motor vehicle accident that occurred in Bluffton, South Carolina in May of 2018. *See generally*, Compl. The accident occurred when Mr. Uristegui, doing business through his company, Jacob-Au Trucking, LLC ("Jacob-Au Trucking"), and driving a company-owned dump truck crossed the center line and collided with Plaintiff. Compl. ¶ 2. The dump truck was maintained by Lotty Trucking, LLC ("Lotty"). Compl. ¶ 3. Jacob-Au Trucking was hired as a subcontractor by Kenneth Scott Builders, Inc. ("KSB") to work on two separate and distinct jobs. Compl. ¶¶ 7, 8. One, a project located at 1223 May River Road, unrelated to Cypress Ridge and D.R. Horton. The other, predominating consisted of the horizontal construction portion of Cypress Ridge Phase 7¹, along with an RV section and office building, where D.R. Horton hired KSB as the sitework general contractor to clear, grade, and install water and sewage in those areas of the Cypress Ridge subdivision. *See* O'Sako Aff. ¶ 11, attached hereto as **Exhibit A**.

Plaintiff alleges that D.R. Horton is liable for the actions of its sitework general contractor's subcontractor, of whom D.R. Horton had no knowledge of or control over. Plaintiff's allegations against D.R. Horton are at odds with testimony from the at-fault driver stating that he was leaving the 1223 May River Road Project at the time of the accident. Uriostegui Depo. 232:4-7, attached hereto as **Exhibit B**.

¹ Cypress Ridge is a subdivision located in Bluffton, South Carolina that includes over 1400 homes, commercial areas, and various amenities. Ex. A, ¶¶ 5,7. Cypress Ridge spans 1412 acres and has been developed over fifteen years through nineteen phases. Ex. A, ¶ 7.

While D.R. Horton does not seek to litigate the issue of liability in this brief, the legal analysis related to Plaintiff's allegations provides important context as to what may be relevant in this matter. As a general rule, the principal is not vicariously liable for the negligent acts of an independent contractor. *Ruh v. Metal Recycling Servs., LLC*, 436 F. Supp. 3d 844, 845 (D.S.C. 2020). There can be no recovery against the principal unless the plaintiff separately proves the negligence of the principal in selecting that particular independent contractor and that the principal's negligence was a proximate cause of the alleged injuries. *Id.* The features to consider when determining negligent selection of an independent contractor are (1) that the defendant principal did not exercise reasonable care; (2) the risk of physical harm unless done skillfully and carefully; (3) selecting a competent and careful contractor; and (4) the negligence of the principal was a proximate cause of the physical harm. *Id.* Here, testimony refutes that the accident was related to any D.R. Horton project. Even still, D.R. Horton used reasonable care in selecting KSB to perform the site work on of the Cypress Ridge project, and did not have any involvement with the at fault driver or his company, absolving D.R. Horton of liability. O'Sako Dep. 42:22-43:24, attached hereto as **Exhibit C**. While Plaintiff attempts to reach through multiple subcontracts to pin liability of D.R. Horton, D.R. Horton maintains that it never acted as the general contractor on the sitework portion of Cypress Ridge. *See* Ex. A, ¶ 10.

With his far-fetched theory of liability, Plaintiff has resorted to disingenuous arguments and conspiracy theories as a path to victory. Plaintiff approaches the Court on this Motion alleging that D.R. Horton willfully failed and refused to provide certain documents and communications. Plaintiff's argument is shaded with Plaintiff's counsel's personal feelings towards counsel for D.R. Horton that have no bearing on the simple discovery dispute before the Court, and requests that the Court strike D.R. Horton's answer based on Plaintiff's discovery of a document produced in a

FOIA response that is (1) outside of the scope of documents agreed upon by the parties; (2) irrelevant to the accident and the sitework involved; and (3) in no way prejudicial to Plaintiff's case.

In an effort to clarify the history of discovery in this matter, free of argumentative and erroneous facts, D.R. Horton sets forth the below timeline of the relevant communications with counsel.

April 4, 2023	Following a consent order resolving Plaintiff's First Motion to Compel, Parties attend conference call to discuss entering agreement to narrow discovery to relevant documents related to Cypress Ridge.
August 11, 2023	D.R. Horton provides a breakdown of the contents of the Cypress Ridge Phase 7 land development file to confirm the contents would provide what Plaintiff was seeking.
December 6, 2023	D.R. Horton provides Cypress Ridge Phase 7 land development file as agreed.
March 4, 2024	D.R. Horton requests dates for the depositions of Plaintiff, Ken Trotsky, the at-fault driver, and Jacob-Au Trucking. Plaintiff responds with limited dates and request 30(b)(6) of D.R. Horton.
May 21, 2024	Plaintiff again requests 30(b)(6) of D.R. Horton but does not provide dates or topic.
May 24, 2024	Plaintiff provides preliminary expert reports; D.R. Horton requests dates for Plaintiff's experts' depositions.
May 31, 2024	D.R. Horton requests 30(b)(6) topics for D.R. Horton.
June 3, 2024	Plaintiff provides 30(b)(6) topic list including 105 topics.
June 4, 2024	D.R. Horton follows up regarding scheduling depositions.
June 6-7, 2024	Parties discuss narrowing lengthy 30(b)(6) topic list.
June 11, 2024	Plaintiff provides amended list of 30(b)(6) topics.
June 12, 2024	D.R. Horton notices the deposition of Andy Rowland.
June 13, 2024	Court issues order amended scheduling order and requiring D.R. Horton to disclose experts by June 14, 2024 and make them available for deposition.
June 14, 2024	D.R. Horton sends supplemental discovery responses, including expert disclosures.
June 24, 2024	Plaintiff sends Rule 11 letter requesting index of production.
June 26, 2024	D.R. Horton notices the depositions of Lindsay Moore, Michael Fryar, and David Hill.
June 27, 2024	D.R. Horton sends letter in response to Plaintiff's Rule 11 letter.
July 3, 2024, July 11, 2023	D.R. Horton repeatedly requests Andy Rowland's file in advance of his deposition scheduled for July 16, 2024.
July 12, 2024	Plaintiff provides Michael Fryar and Andy Rowland's expert files.

July 16, 2024	Deposition of Andy Rowland; Plaintiff provides additional contents of Rowland's file not previously produced.
July 17, 2024	D.R. Horton provides categorized and indexed production.
July 19, 2024	Deposition of Michael Fryar; Plaintiff provides additional contents of Fryar's file not previously produced.
August 19, 2024	Plaintiff supplements production with partial FOIA response from Town of Bluffton.
August 20, 2024	Plaintiff files this Motion for Rule to Show Cause.
August 26, 2024	Deposition of Lindsay Moore; Moore indicates she has not produced entire file.
August 27, 2024	Plaintiff requests that the matter be continued from the October trial roster.
September 3, 2024	Plaintiff informs D.R. Horton that it will not be taking D.R. Horton's 30(b)(6) or Steve Moore's deposition.
September 4, 2024	After repeated follow ups, Plaintiff supplements production with remaining FOIA response documents.

Plaintiff, after pushing out trial, delaying depositions, producing unprepared witnesses, and failing to communicate his discovery concerns to D.R. Horton, now requests the Court to impose severe and unwarranted sanctions against D.R. Horton.

LEGAL STANDARD

Sanctions are an extraordinary remedy that should not be administered lightly. *See Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996). "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011). "The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997). Striking a pleading is "harsh medicine that should not be administered lightly." *Id.* Accordingly, the Court must find a heightened level of misconduct. *Id.* "Before invoking this severe remedy, the trial court

must determine that there is some element of **bad faith, willfulness, or gross indifference** to the rights of other litigants." *Id.*

ARGUMENT

Plaintiff argues that D.R. Horton has failed to comply with the Court's orders, willfully withheld documents, and acted in bad faith. This argument is disingenuous at best. In fact, D.R. Horton has produced documents as agreed upon by the Parties and acted in good faith both in depositions and in other motion filings. Even if Plaintiff's unfounded accusations were true, striking D.R. Horton's answer is not a reasonable sanction aimed at the specific alleged misconduct of the case as required.

Prior to addressing the substance of Plaintiff's arguments, D.R. Horton would note for the record that Plaintiff made no attempt to resolve this dispute prior to or following the filing of this Motion. Imhoff Aff. ¶ 23, attached hereto as **Exhibit D**; *see generally*, Rule 11, SCRCF.

a. D.R Horton has produced the relevant documents mutually agreed upon between the Parties.

The crux of Plaintiff's argument for sanctions against D.R. Horton is that D.R Horton failed to produce certain documents and communications in response to Plaintiff's discovery requests. Contrary to Plaintiff's faulty memory regarding the agreements between the Parties, D.R. Horton produced documents pursuant to a mutual agreement. As explained above, the Parties agreed to D.R. Horton providing its land development file for Cypress Ridge Phase 7 to narrow the pool of documents from a fifteen-year, multi-phase project. *See* Crawford Aff. and Exhibits, filed October 15, 2024. D.R. Horton produced this file December of 2023. Crawford Aff. ¶ 11. For more than six months after receiving the documents, Plaintiff raised no issues with the contents of the

production, the need for additional documents, or concerns regarding missing communications. *Id.* at ¶ 12. Even after D.R. Horton provided a table of contents for the production per Plaintiff's request, Plaintiff did not identify any deficiencies with the contents of the production. *Id.* At any point, if Plaintiff felt he was missing pertinent and relevant information that was outside of the scope of the agreement between the Parties, Plaintiff's counsel could have contacted counsel for D.R. Horton regarding the deficiency. He did not.

Put simply, D.R. Horton produced the documents contained within the files the Parties mutually agreed for D.R. Horton to produce. To the extent certain documents or communications were not part of those files, such documents were not flagged by either party as needing to be produced **throughout the course of almost a year**. Plaintiff, particularly after D.R. Horton produced a table of contents, could have easily seen what was contained in the production. Plaintiff could have notified D.R. Horton at any time prior to filing this Motion that he believed certain documents were not included in the agreed upon production. **Until Plaintiff filed this Motion, it was D.R. Horton's understanding that its production based on the agreement was sufficient pursuant to the agreement between the parties.** Under these facts, Plaintiff's request that the Court sanction D.R. Horton for willfully failing to produce documents or withholding documents in bad faith when D.R. Horton understood it had acted in accordance with a discovery agreement is absurd.

Instead of requesting that D.R. Horton supplement its production, suggesting reasonable search terms, or communicating with D.R. Horton regarding the production whatsoever, Plaintiff waited until he received a FOIA response from the Town of Bluffton to play a game of "gotcha." What Plaintiff fails to mention to the Court is that its FOIA request to the Town of Bluffton requested documents for the entirety of the Cypress Ridge project, not just the phase at issue in

this litigation. To compare the response to a request for fifteen years' worth of project documents on a large scale, mixed-use development project to the file of a single phase is duplicitous. Plaintiff has admittedly not reviewed the entirety of the Town of Bluffton FOIA response but claims that the information therein is relevant and responsive. D.R. Horton would submit to the Court that is not the case. The majority of the documents contained in the FOIA response are entirely unrelated to Cypress Ridge Phase 7. Even those related to Cypress Ridge Phase 7, such as emails, are not necessarily documents that would be contained in the land development file. Plaintiff now complains of having to sort through "thousands of documents," which was the exact thing the agreement between the Parties sought to alleviate.

This is not a construction case regarding the entirety of the Cypress Ridge project. This is a motor vehicle accident case where Plaintiff alleges that the at-fault driver may have at some point performed work on the site development of Cypress Ridge. Documents and communications outside of the areas at issue are entirely irrelevant to the matter at hand. To require D.R. Horton to produce all documents for the entirety of the project would be unreasonable, unduly burdensome, and not related to the needs of the case. What is relevant to this matter, by Plaintiff's own admission, is D.R. Horton's role in Cypress Ridge and the at-fault driver's relation to same.

As to the one permit document from the FOIA response Plaintiff relies on in its Motion to support its theory of D.R. Horton's "bad faith," Plaintiff misunderstands the construction process and the meaning of that document. The permit is for the vertical construction of an office building at Cypress Ridge and is entirely unrelated to Cypress Ridge Phase 7 or the sitework at Cypress Ridge. Ex. A, ¶ 12. Because the permit is unrelated to the Cypress Ridge Phase 7, it would not have been in the Cypress Ridge Phase 7 land development file that the Parties mutually agreed for D.R. Horton to produce. *Id.* at ¶ 14. The permit is entirely irrelevant to the phase and site

development that the at-fault driver may have been involved in. To sanction D.R. Horton for failure to produce irrelevant documents is unreasonable.

b. D.R. Horton did not engage in any “abusive” conduct during depositions.

In an attempt to prop up his Motion based on D.R. Horton’s document production; Plaintiff takes to accusations of improper conduct by D.R. Horton at depositions in this matter. These accusations are based on the deposition of Dr. Hsu and do not accurately represent the facts surrounding the deposition.

The Hsu deposition was originally noticed by Plaintiff. Plaintiff’s notice specifically states that the “deposition is being taken for pretrial discovery, for use at trial, and for such other purposes as may be permitted by law.” *See* Ex. 2 to Plaintiff’s Memorandum in Support of the Motion. D.R. Horton subsequently cross-noticed, stating therein that the deposition was “being taken for the purpose of discovery.” *See* Ex. 3 to Plaintiff’s Memorandum in Support of the Motion. On the day of the deposition, Plaintiff’s counsel informed counsel for D.R. Horton that D.R. Horton would not be allowed a discovery deposition, and that Plaintiff would be going first, allowing Defendant only any remaining time. Ex. D, ¶¶ 17, 18. Accordingly, counsel for D.R. Horton preserved his valid objection on the record. *Id.* Only now does Plaintiff seek to twist these simple facts in his favor. The Hsu deposition, if anything, showcases Plaintiff’s lack of cooperation in the discovery of this matter.

Plaintiff spends his brief listing accusations against counsel for D.R. Horton while failing to address his own misconduct throughout the discovery and depositions in this matter. As shown on the timeline set forth herein, Plaintiff repeatedly produced documents in an untimely fashion on the day of deposition and failed to produce the entirety of his expert’s files on multiple

occasions. This is fully discussed within the D.R. Horton's Motion for Costs and Sanctions and supporting memorandum.

Plaintiff also vaguely mentions D.R. Horton's failure to produce its experts and 30(b)(6) witness for deposition. D.R. Horton has worked with Plaintiff for months attempting to narrow the 30(b)(6) topics to a reasonable list and schedule it. Most recently, Plaintiff indicated that he was not available for the 30(b)(6) deposition and cancelled all scheduled depositions.

Plaintiff's request for the Court to consider these baseless accusations in considering whether to sanction or to what degree to sanction D.R. Horton is improper.

c. D.R. Horton's Motion for Costs and Sanctions is not frivolous.

Plaintiff argues in its briefing that D.R. Horton's Motion for Costs and Sanctions is frivolous, without merit, and evidence of D.R. Horton's "abusive discovery practices." That is simply not the case. Plaintiff's claims that D.R. Horton's Motion for Costs and Sanctions was "D.R. Horton following through on its baseless and unethical threat" is a misrepresentation of conversations between counsel for the Parties. D.R. Horton was not threatening Plaintiff with a motion for sanctions. *See* Ex. D, ¶¶ 10-14. Instead, DRH was making a reasonable settlement offer considering deposition testimony by the at-fault driver and trying to discourage Plaintiff's counsel from continuing to engage in "discovery games." *Id.*

As fully explained in D.R. Horton's Memorandum in Support of Motion for Costs and Sanctions, the arguments of which are fully incorporated herein by reference, D.R. Horton's Motion for Costs and Sanctions is well supported by the record. Plaintiff's attempt to use D.R. Horton's proper use of court procedure as support in his argument to sanction D.R. Horton is unfounded.

d. Plaintiff has not been prejudiced.

Plaintiff argues he has been prejudiced by the conduct he accuses D.R. Horton of engaging in. While D.R. Horton disputes the colorful allegations presented by Plaintiff as explained herein, D.R. Horton maintains that even the conduct alleged in no way prejudices Plaintiff's case. Plaintiff claims he was prejudiced by D.R. Horton's failure to produce "the permit for the construction of the site that is at-issue in this matter." That allegation is based entirely on Plaintiff's fundamental misunderstanding on large-scale construction project. As previously mentioned, the permit is for the vertical construction of an office building at Cypress Ridge and is entirely unrelated to Cypress Ridge Phase 7 or the sitework at issue. Ex. A, ¶ 12. The existence of the permit so heavily relied on by Plaintiff in its argument and accusations is simply a misrepresentation and a misunderstanding of the project in question. While D.R. Horton appreciates Plaintiff's advocacy towards a means of recovery in this matter, Plaintiff's attempt to suggest that D.R. Horton is liable by classifying D.R. Horton as the general contractor for the work at issue is not factually or legally sound.

There is no prejudice to Plaintiff. The permit at issue and the allegations by Plaintiff will not change the opinions of experts in the matter. The deposition disputes have had no impact of Plaintiff's ability to conduct depositions. This case is not on a trial roster due only to Plaintiff's unpreparedness and request for continuance. And, to the extent the Court feels it necessary for D.R. Horton to produce additional documents, Plaintiff has ample time to review them and prepare to present his case of liability for a motor vehicle accident against an uninvolved homebuilder to a jury. D.R. Horton is not responsible for, nor should it be sanctioned for, facts and law unfavorable to Plaintiff.

e. An order striking D.R. Horton's answer is not the appropriate sanction.

Because Plaintiff has presented no facts to support its allegations of “discovery abuse” outside of baseless accusations and fundamental misunderstanding of construction documents, D.R. should not be sanctioned. In the event that the Court believes D.R. Horton should be sanctioned, striking D.R. Horton’s answer is not an appropriate or reasonable sanction.

South Carolina law requires that a sanction be reasonable and in line with the necessities of the situation. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997). The Court must consider the nature of the discovery, the posture of the case, willfulness, and degree of prejudice when determining the appropriateness of a sanction. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011). Plaintiff’s request that the Court strike D.R. Horton’s answer is unreasonable under the facts. To invoke such a severe remedy, the Court must find an element of **bad faith, willfulness, or gross indifference**. *Id.* No such elements can be found in this matter.

As fully explained herein, D.R. Horton has not acted in bad faith. D.R. Horton’s actions in discovery have been in line with agreements between the Parties and reasonable under the circumstances. Plaintiff can show no prejudice it has experienced at the hands of D.R. Horton. The case is not up for trial, and depositions either remain to be taken or have been left open.

If Plaintiff’s intent were to collect information relevant to his case, he would be requesting the documents he believes exist to support his remote theory of liability. That is not the case here. Plaintiff has instead taken to unfounded accusations and unreasonable requests to this Court in order to obtain a favorable result in a situation where the facts and the law are not on his side. For the Court to enforce such a severe and unreasonable sanction as striking D.R. Horton’s answer would be improper.

CONCLUSION

D.R. Horton has not engaged in any “abusive discovery practices” as alleged by Plaintiff. Instead, D.R. Horton has produced agreed upon documents, actively participated in discovery, and made every attempt to move this case forward. To sanction D.R. Horton, particularly in such an extreme manner as to strike its pleading, is unreasonable and improper. Accordingly, Plaintiff’s Motion and request to strike D.R. Horton’s answer should be DENIED.

KENISON, DUDLEY & CRAWFORD, LLC

s/ John T. Crawford, Jr. _____

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Counsel for Defendant D.R. Horton, Inc.

October 16, 2024
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-27-00069

Mark W. McGilton,

Plaintiff,

v.

1223 May River Road, LLC;
D.R. Horton, Inc.; and Lotty Trucking, LLC
f/k/a Ramos Trucking, LLC,

Defendants.

AFFIDAVIT OF JARED O'SAKO

1223 May River Road, LLC,

Third-Party Plaintiff,

v.

Kenneth Scott Builders, Inc.,

Third-Party Defendant.

PERSONALLY APPEARED BEFORE ME, Jared O'Sako, who, being first duly sworn,
deposes and avers the following:

1. My name is Jared O'Sako. I am a citizen and resident of Effingham County, Georgia. I am over the age of eighteen (18) and have personal knowledge of the matters stated herein.

2. I currently work as a Land Development Manager for D.R. Horton, Inc. for the Hilton Head/Savannah Region. I have worked for D.R. Horton, Inc. since February of 2013.

3. In my role as Land Development Manager, I oversee the horizontal development and work with engineers to permit projects, bid them out, award bids to general contractors and

ultimately turn the project over to the vertical team at completion.

4. I have been involved in various D.R. Horton, Inc. subdivision builds along Coastal South Carolina.

5. I am informed that this lawsuit concerns the Cypress Ridge Subdivision located in Bluffton, South Carolina. ("Cypress Ridge").

6. I have knowledge of the development of Cypress Ridge by D.R. Horton, Inc.

7. Cypress Ridge is an over 1400 home subdivision that has been developed in nineteen phases over a 15-year period. The subdivision spans 1412 acres and includes various amenities, residential and commercial areas.

8. D.R. Horton is a residential builder holding a residential builders license with S.C. Labor, Licensing and Regulation ("SC LLR").

9. Additionally, D.R. Horton also holds a general contractor's license for commercial building construction. Based on my interpretation of the licensing statute, D.R. Horton's license does not allow for site development, nor is it used for site development.

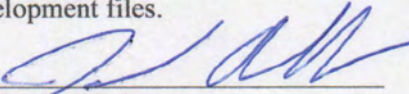
10. While D.R. Horton is the contractor for the vertical construction of buildings and homes at Cypress Ridge, it is not the general contractor for the sitework portion of the project.

11. D.R. Horton as the owner of the Cypress Ridge development contracted with Kenneth Scott Builders ("KSB") as general contractor to construct the sitework for Phase 7 which contains approximately 93 townhomes. The scope of that work contained among other things clearing and grading the site and the installation of sewer, water and paving.

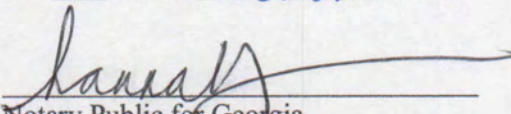
12. I have reviewed the permit that has been provided by plaintiff in this matter. See Exhibit A. That permit is for the construction of the vertical portion of the office building at Cypress Ridge and has nothing to do with the sitework that D.R. Horton contracted with KSB to perform and is not related to the Phase 7 portion of work.

13. I am familiar with the land development files for Cypress Ridge and how they are maintained.

14. Because that permit is related to the vertical construction, and it is not a document that I would have kept or maintained in the land development files.


Jared O'Sako

Sworn to and subscribed in my presence
this 16 day of October, 2024.


Notary Public for Georgia
My Commission Expires: 7-16-2028



MARK W. McGILTON vs 1223 May River Road, LLC
2021-CP-27-00069 - ALFREDO URIOSTEGUI

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1 Q And you don't know whether it was your
2 second or your first?

3 A No, I wouldn't know that.

4 Q So you took this route, and then you
5 took a right from 1223 May River Road, and you
6 were headed back toward Cypress Ridge at the
7 time of the accident, correct?

8 A Correct.

9 Q And can you show on this map, do you
10 have any idea approximately where the accident
11 happened?

12 A No, not really.

13 Can you Zoom it in?

14 Q Yes, I can.

15 A Oh, yeah, well, I am guiding myself by
16 the Buckwalter.

17 Q I can move it for you. One second.

18 A This will be Buckwalter. So I will say
19 somewhere between this right there.

20 Q Somewhere right here?

21 A Yes, somewhere right there.

22 Q All right, thanks. I am going back to
23 the Google Maps. I also just some Google
24 searches. Can you recognize where this is by
25 chance?



1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 don't -- we don't do that.

3 Q What is -- do you have knowledge of
4 what the construction manager does?

5 A The construction manager is over the
6 superintendents who build the homes.

7 Q So that's related to the vertical
8 construction and not the horizontal
9 construction. Is that fair to say?

10 A Correct.

11 Q Is there anyone that is -- has a role
12 similar to construction manager relative to
13 horizontal construction other than you?

14 A Sean O'Toole.

15 Q So would -- did you oversee the
16 horizontal construction projects at Cypress
17 Ridge?

18 A Yes.

19 Q And did you assist in the hiring of
20 contractors for work at Cypress Ridge?

21 A Yes.

22 Q Is there a process that you follow when
23 selecting, engaging contractors during that
24 timeframe at Cypress Ridge, that timeframe being
25 2016 to 2018?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Yes.

3 Q Can you describe that process?

4 A The process would be --

5 On the actual selection of the
6 contractor?

7 Q Correct. Selection and ultimate
8 hiring.

9 A Okay. The process is you bid it out,
10 review, compare bids. Review, compare
11 schedules. Because oftentimes, we just ask them
12 to turn in your bid and then turn in what your
13 timeline for you building the project.

14 We -- oftentimes, we don't set the --
15 we don't set the deadline. They set -- they set
16 the deadline. They tell us what they can do.
17 And so they provide us with a schedule.

18 And then, based on -- I guess the next
19 thing would be their history with the different
20 groups that I have a relationship with,
21 including the engineers, and their past
22 performance, whether they be recommended; or
23 current work load, their ability to perform the
24 work.

25 Q What qualities are you looking for in a

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-27-00069

Mark W. McGilton,

Plaintiff,

v.

1223 May River Road, LLC;
D.R. Horton, Inc.; and Lotty Trucking, LLC
f/k/a Ramos Trucking, LLC,

Defendants.

AFFIDAVIT OF JASON M. IMHOFF

1223 May River Road, LLC,

Third-Party Plaintiff,

v.

Kenneth Scott Builders, Inc.,

Third-Party Defendant.

1. My name is Jason Imhoff and I have been licensed to practice law in South Carolina since 2001.
2. I along with John Crawford and other attorneys at Kenison, Dudley & Crawford, LLC represent Defendant D.R. Horton in the present matter.
3. This affidavit is provided in rebuttal to Ben Shelton's affidavit and allegations.
4. There are too many wild accusations, and frankly, baseless and absurd allegations to respond to; however, these included points may be helpful to the court.
5. I have practiced law for 23 years and make it a policy not to bring motions to compel or sanctions and resolve disagreements to the court unless absolutely necessary.

6. I have never threatened someone with sanctions to resolve a case or obtain a favorable settlement and I did not do so in this case.
7. My personal philosophy and practice are that while we can aggressively advocate for our clients we should do so ethically, work through disagreements, and treat each other fairly and honestly.
8. It was, and is my opinion, that Mr. McGilton's case began to fall apart in the spring of 2024 when we had reasonable and well received arguments on D.R. Horton's Motion for Summary Judgment in front of Judge Bonds. These arguments were based on lack of prior precedence and the novel nature of this case. Mr. Shelton had also let the most culpable party out of the case based upon the law he was arguing.
9. Thereafter, it became clear that Plaintiffs were changing their strategy from proving facts and liability to playing games of "gotcha".

Settlement Offer and Threat of Sanctions

10. During the deposition on July 18, 2024 of Mr. Urestegui, Mr. Urestegui testified that he was working for Kenneth Scott Builders who was working for 1223 May River Road, LLC, on the day of the accident and was not working for D.R Horton. He also testified that he only left the D.R. Horton site one time with his dump truck. At a break, I requested and received authority from D.R. Horton to renew a settlement offer, which I did. Mr. Shelton rejected the offer and told me to "stay tuned" or "wait for the rest" as he was going to resolve that testimony with documents later in the deposition. The discussion was less than two minutes and did not affect the deposition in any manner.

11. After the deposition as I was leaving, I ran into Mr. Shelton outside. I told Mr. Shelton that the offer was still on the table. Mr. Shelton and I had a normal, typical disagreement about how the deposition went and clearly disagreed. During that discussion, Mr. Shelton grew very heated. Mr. Connor walked by and can confirm the location and maybe some of the exchange, especially that the day and case was not going well for Mr. McGilton.
12. Also, during that discussion, I again expressed my frustration with Mr. Shelton's perceived antics and "gotcha" strategy. Mr. Shelton failed to include in his affidavit that I told him I don't like discovery disputes, playing gotcha, and misrepresentations as we believed we had witnessed from him. I specifically requested that we get along, play fairly, and litigate the case on the merits of the case and novel issue of law. (which I personally find interesting) I told him we had informed our client of our perception of his behavior, and they were growing frustrated. I shared my opinion that if he kept up with that strategy, I was certain my client would make us start filing motions for sanctions based on his continuing conduct. He took it as a threat. I specifically told him it wasn't a threat, but my client wasn't going to continue turning the other cheek if he continued with this strategy. It was not a "threatening" conversation or any different than any other post deposition conversation I've had with opposing counsel except that it was probably bad timing considering Mr. Shelton's anger and frustration. It also was not in furtherance of settlement but rather a recommendation that we clean up the nonsense in this case or we'd end up with more – as we have.
13. The veracity of these statements can be compared to our June 27th, 2024 letter in which we again plead with Mr. Shelton to try the case on the merits. There was no threat other than

if he continued the “gotcha” games we would be compelled to file legitimate motions in turn, which, again, we try to avoid.

14. Our position can further be verified by the timing. According to Mr. Shelton we threatened to file frivolous sanctions motions against him personally if he didn’t accept the settlement offer. However, Mr. Shelton rejected the offer that day, July 8, 2024, and no sanctions motion was filed. In fact, no sanctions motion was filed until Mr. Shelton filed a surprise motion to strike D.R Horton’s pleadings on August 19, 2024 without consultation with defendants, without an understanding of the actual meaning of the document, and without acknowledging that the documents he received were the document he specifically negotiated for and had for 8-10 months.
15. Mr. Shelton’s sanctionable behavior continued as set forth below and he continued to prevent depositions, provided subpoena responses at the last minute and produced unprepared experts. (See brief in support of motion for sanctions)
16. Instances of this behavior include, but are not limited to:
 - a. Mr. Shelton admitted to myself and Mr. Crawford that he had intentionally hidden his experts’ opinions so D.R. Horton would not designate rebuttal experts.
 - b. Mr. Shelton’s written and oral representations regarding his experts’ opinions, especially at the hearing on the motion for summary judgement and in his brief, were misrepresented to overcome Summary Judgment.
 - c. Mr. Shelton told me he was only attending depositions via Zoom, and I should do the same, and then would show up in person.
 - d. Mr. Shelton would not produce his experts’ subpoena reports prior to depositions until the day or hours before their depositions.

- e. Mr. Shelton presented experts which had been retained for years with only “preliminary opinions” despite trial and a discovery deadline within 60 days away.
- f. Mr. Shelton scheduled Dr. Hsu’s deposition with only enough time for his questions and intentionally took every minute of that time.

Dr. Hsu’s Deposition

- 17. Ben Shelton told me explicitly that he was going to take all depositions via Zoom and asked that I consider attending to save on time and costs. Instead, Mr. Shelton, without any communication or consultation with defense counsel scheduled the deposition of Dr. Hsu in person with only enough time preserved for him to complete his video deposition with no time for Defendants. The disagreement about who would go first, whether a discovery deposition was necessary, how much time was allotted all took less than five minutes. I preserved my objections on the record as I have done for 23 years.
- 18. Ultimately, the deposition proceeded, Mr. Shelton was able to ask ALL of his questions but, as planned, there was no time left for Defendants. However, by consent, all parties agreed that the deposition would be rescheduled, a discovery deposition would occur first and then the video deposition would complete. There was no delay, prejudice, motion, or other fallout from that deposition and ultimately the parties resolved it themselves as we should.

D.R. Horton’s Motion for Sanctions

- 19. As stated above, Mr. Fryar appeared at his deposition on July 19, 2024 with a “preliminary report”, seven (7) years after the accident. Mr. Fryar was retained on February 23, 2024. The discovery deadline was September 15, 2024. Mr. Shelton was producing

experts for deposition who had not completed their opinions seven years after the accident and less than one month away from the discovery deadline.

20. On June 25, 2024, we subpoenaed the file of Plaintiff expert Lindsay Moore. We received a password protected file on August 23, 2024 but could not open it until Monday morning, August 26, 2024, without assistance from Ms. Moore. Again, Plaintiff's late production.
21. When I inquired if I had Ms. Moore's entire file she replied in the affirmative. She then, quite accidentally, revealed that her report was not truthful or supported, it was twice the amount she could verify or testify to at trial, and she had realized her issue that morning and created a second "real" report that she neither produced nor revealed until questioning proceeded.

Plaintiff's Motion for Sanctions

22. I did not "hide" evidence, craft a strategy to trick Mr. Rowland, or convince Mr. Rowland to believe D.R Horton was something other than a "developer". In fact, it was Mr. Rowland, who was specifically hired to find D.R. Horton liable, who chose that description. (See Exhibit A)
23. Mr. Shelton made no attempts to consult prior to the filing of the motion or since.

Jason M. Imhoff (SC Bar # 69355)
Kenison, Dudley & Crawford, LLC
325 W McBee Avenue, Suite 301
Greenville, SC 29601

SWORN to and subscribed before me
This the 11th day of October, 2024.

Onyx Hall
Notary Public, State of South Carolina
My Commission Expires: 07-26-2033



1 Q. Okay. So do you have to pull a permit
2 to do grading work on a multi-lot development?

3 A. Yes. Yes. You have to have a permit,
4 yes.

5 Q. Okay. And to pull a permit, do you have
6 to have a grading license?

7 A. That I don't know the answer to.

8 Q. Okay. Do you know if D.R. Horton has a
9 grading license?

10 A. I don't know that either.

11 Q. Okay. In this case, in your analysis of
12 this case, what is D.R. Horton? Is it an owner,
13 developer, general contractor, engineer, what are
14 they in this case?

15 A. I would say that that -- who is in what
16 role against all the tiers of this is one of the
17 most taxing questions in the whole case. We
18 know -- if you -- if you asked me who is
19 D.R. Horton, I would say they're a developer. I
20 also know just from general experience that they
21 typically would hire a GC, a builder to build
22 individual houses, and that they might have
23 multiple ones of those in any given development.
24 So I -- I can't say that they acted as the
25 general contractor. In my interpretation of it,