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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No.: 2024-001996

Raghu Athimoolam and Irene Athimoolam,.....Respondents,

v.

Meritage Homes of South Carolina, Inc.....Appellant.

RECORD ON APPEAL
VOLUME I

---

s/David S. Cobb
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ATTORNEYS FOR APPELLANT

April 23, 2025

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ELECTRONICALLY FILED - 2017 Aug 30 11:58 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)))	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, -vs- Meritage Homes of South Carolina, Inc., Defendant.	)))))))))	**CONSENT ORDER STAYING CASE AND COMPELLING ARBITRATION** C.A. No. 2017-CP-04-00376

Defendant Meritage Homes of South Carolina, Inc. moved this Court for an Order staying this litigation and compelling arbitration. For the reasons below, and with the consent of all parties, this Court grants Defendant's motion to stay this litigation and to compel arbitration.

Plaintiffs entered into an agreement with Defendant to build a home located in Easley, South Carolina ("Agreement"). The Agreement contains an arbitration provision, under which Plaintiffs agreed to binding arbitration. Plaintiffs filed suit in this Court, and Defendant moved to stay this action and compel arbitration pursuant to the terms of the Agreement and the Federal Arbitration Act ("FAA"). The parties have conferred, and Plaintiffs agree that this action should be stay and arbitration compelled pursuant to the terms of the Agreement and the FAA.

NOW, THEREFORE, on motion of the undersigned counsel for Defendant, by and with the consent of the undersigned counsel for the Plaintiffs,

IT IS HEREBY ORDERED that Defendant's motion to stay and to compel arbitration is granted.

IT IS FURTHER ORDERED that Plaintiffs and Defendant shall proceed to binding arbitration.

IT IS FURTHER ORDERED that the within matter as to Defendant is hereby stayed pending arbitration between the Plaintiff and Defendant.

AND IT IS SO ORDERED.

JUDGE, TENTH JUDICIAL CIRCUIT

Anderson, SC

August _____, 2017

s/ Robert T. Lyles
Robert T. Lyles (#10299)
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Attorneys for Plaintiff

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Attorneys for Defendant

ELECTRONICALLY FILED - 2017 Aug 30 11:58 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

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Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Stay

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

ELECTRONICALLY FILED - 2020 Feb 11 11:33 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Docket No.: 2017-CP-04-376
	)	
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CONSENT ORDER ALLOWING ANSWER AND THIRD-PARTY COMPLAINT**
	)	
MERITAGE HOMES OF SOUTH CAROLINA, INC.,	)	
	)	
Defendant.	)	
	)	

This construction lawsuit concerns Plaintiffs' home. An August 30, 2017 Consent Order stayed the litigation and compelled arbitration. Since that time, it has become necessary for Defendant to file a Third-Party Complaint against various subcontractors and vendors who worked on the construction and/or provided services, materials, or labor. Accordingly, the parties agree to lift the stay to allow the attached "Answer and Third-Party Complaint" to be filed and served. Each Third-Party Defendant has a written contract with Meritage that requires them to participate with the arbitration currently ordered in the original lawsuit. Therefore, based upon the parties' agreement, this Court lifts the stay previously entered to allow the filing and service of the "Answer and Third-Party Complaint."

February ___, 2020

Anderson, South Carolina

_____
Chief Administrative Judge

WE MOVE AND CONSENT:

s/ Robert T. Lyles
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Charleston, SC 29402
(843) 577-7730
rtl@lylesfirm.com
ATTORNEYS FOR PLAINTIFFS

s/ David S. Cobb
PO Box 22129
Charleston, SC 29413
(843) 576-2803
dcobb@turnerpadget.com
ATTORNEY FOR DEFENDANT

ELECTRONICALLY FILED - 2020 Feb 11 11:33 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Amend

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

ELECTRONICALLY FILED - 2024 Sep 05 3:59 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP0400376

Raghu Athimoolam et al
PLAINTIFF(S)

Meritage Homes Of South Carolina Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

This matter came before the Court upon Defendant's Motion to Vacate the January 23, 2024 Arbitration Award and Motion to Reinstate the October Arbitration Award. The Court notes that the modified award differed significantly from the original arbitration award. After consideration of applicable law, namely Pittman Mortg. Co., Inc. v. Edwards, 327 S.C. 72, 76 (1997) and South Carolina Code § 15-48-100, this matter is REMANDED so that the Arbitrator can set forth specific findings of legal and factual error that were corrected to ensure that the interests of all parties were protected. The Order, as written, makes it difficult for the Court to evaluate whether the modifications to the initial Order were done outside the scope of the relevant statutory and case law.

ORDER INFORMATION

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

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/05/2024 .

Gutter Cutters, Inc.
GGG Construction, LLC
Down To Earth Grading, LLC
Advantaclean Of The Upstate
DRC Investment, LLC
84 Lumber Company, LP
DRC Investment, LLC
SDR Restoration And Construction, LLC
Advantaclean Of The Upstate
Jony Munoz
Jose Gonzalez
Star Builders, Inc.
Sealing Agents Waterproofing, Inc.
Lopez Masonry, Llc
Miguel Angeles

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

ELECTRONICALLY FILED - 2024 Sep 05 3:59 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

ELECTRONICALLY FILED - 2024 Sep 05 3:59 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Electronic Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

FORM 4

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

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2017-CP-04-00376

Raghu Athimoolam and Irene Athimoolam
PLAINTIFF(S)

Meritage Homes of South Carolina, Inc.
DEFENDANT(S)

Submitted By: **Address:**	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

Circuit Court Judge	2752 Judge Code	Date

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

_____
_____
_____
ATTORNEY(S) FOR THE PLAINTIFF(S)

_____
_____
_____
ATTORNEY(S) FOR THE DEFENDANT(S)

_____
CLERK OF COURT

Court Reporter: _____

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT Civil Action No: 2017-CP-04-00376 **ORDER**

This matter came before the Court upon Defendant's Motion to Vacate the January 23, 2024 Arbitration Award and Motion to Reinstate the October Arbitration Award. Ms. Rebecca Laffitte ("Arbitrator") served as the arbitrator in the above matter in September of 2023. The Arbitrator prepared an Order on October 4, 2023 for an amount of Fifty-One Thousand Four Hundred Thirteen and 88/100 Dollars ($51,413.88). The October 4, 2023 Order was sent to all parties but was not filed. Subsequently, Plaintiffs filed a Motion to Reconsider with the Arbitrator. After review, the Arbitrator entered an award on January 23, 2024 for Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100 Dollars ($320,917.63). Defendant then filed a Motion to Vacate the January 23, 2024 Arbitration Award and to Reinstate the October Arbitration Award, which was heard before this Court. In its subject Motions, Defendant alleged that the Arbitrator improperly changed her award.

This Court issued a Form 4 on the matter on September 5, 2024, noting that the modified award differed significantly from the original arbitration award. As written, the January 23, 2024

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

Order made it difficult for the Court to ascertain why the Arbitrator changed her award. This Court remanded the matter so that the Arbitrator could set forth specific findings of legal and factual error, consistent with relevant statutory and case law, that were corrected to ensure that the interests of all parties were protected. The Court also noted that it was difficult to evaluate whether the modifications to the October 2023 Order were done outside the scope of relevant authority.

After receiving this Court's Order, the Arbitrator sent a letter to the Court, via email, explaining why the award was changed. In part, the Arbitrator stated the following:

> I served as the arbitrator in the above matter in September 2023. Although an Order was prepared in November 2023, it was not filed but provided to counsel for all parties. Thereafter, counsel for the Athimoolams filed a Motion to Reconsider, after which counsel for Meritage Homes submitted a reply brief. I then requested a conference call with all counsel given my belief that I had inadvertently misapplied the law to evidence and testimony of the expert witnesses who testified at the arbitration. This call was held on November 17, at which time I requested additional information for clarification and consideration. Additional documentation, opinions, and objections were received from all counsel.
>
> Letter from Ms. Rebecca Laffitte dated October 3, 2024 [**EXHIBIT 1**]

The Court finds that this was a factual/evidentiary error, not the type of error that would have triggered the statute. The Court notes that the Arbitrator prepared an Order in November; however, the subject Order was not filed—rather, the Arbitrator provided a copy of the Order for all parties. The Arbitrator held the record open and allowed additional evidence to be presented. After conferring with the parties and considering additional evidence that was not originally presented, the Arbitrator then officially filed the final award on January 23, 2024. Because of the deference given to arbitrators and the fact that an official award was not filed in November, the Court is limited in its review of the award.

South Carolina law states that an arbitrator can change an award; however, the situations in which an award can be changed are limited. The arbitrator may change an

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

award on the application of a party where (1) there is an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award, (2) the award is imperfect in a matter of form, not affecting the merits of the controversy, or (3) for the purpose of clarifying the award. *See* S.C. Code Ann. § 15-48-100 (2005). Based on the explanation of the arbitrator, none of the subject statutory grounds are met.

Additionally, the Circuit Court is limited in its review of an arbitrator's award. The Court is only able to modify an arbitrator's award where:

> (1) [t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) [t]he arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) [t]he award is imperfect in a matter of form, not affecting the merits of the controversy.
>
> S.C. Code Ann. § 15-48-140 (2005).

Similarly, the ability of a court to vacate an award is limited as well. The Court is only allowed to vacate an arbitrator's award when:

> (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection . . . ."
>
> S.C. Code Ann. § 15-48-130 (2005).

The Court is restrained from vacating or restricting the award.

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

The vital question is now whether an arbitrator can revisit an award before an official filing has been made. "[T]he scope of judicial review for an arbitrator's decision 'is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all . . .' *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007). "The 'widely recognized' policy 'to encourage the use of arbitration' required this limited scope of judicial review." *UBS Fin. Servs., Inc., v. Padussis*, 842 F.3d 36, 339 (4th Cir. 2016). Most importantly, "courts defer to the [arbitrator] both on the merits of the final decision and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its final disposition'." *Group III Mgmt. v. Suncrete of Carolina, Inc.,* 425 S.C. 141, 819 S.E.2d 781 (Ct. App. 218) (quoting *UBS Fin. Servs.,* Inc, 842 F.3d 336, 339 (4th Cir. 2016)).

This Court finds that the arbitrator assumes the same role that a judge in a bench trial would assume having the right to reconsider his or her decision based on application of either party and presentation of evidence. Additionally, this Court finds that the arbitrator in this case was well within her rights to reconsider her opinion before the official award was filed in January 2024. While there is a great variance between the original amount and the amended amount, the Court must give deference to the decision of the arbitrator. This is purely a factual determination and does not fall within the scenarios in which a Circuit court can either modify or vacate an arbitration award.

Accordingly, Defendant's Motion to Vacate the January 23, 2024 Arbitration Award and Motion to Reinstate the October Arbitration Award is DENIED.

AND IT IS SO ORDERED.

R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Anderson, South Carolina
October ____, 2024

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

ROBINSON GRAY
Litigation + Business

REBECCA LAFFITTE
DIRECT 803 231.7831 DIRECT FAX 803 231.7881
rlaffitte@robinsongray.com

October 3, 2024

VIA E-MAIL

The Honorable R. Scott Sprouse
Circuit Court Judge
Tenth Judicial Circuit
Post Office Box 1277
Walhalla, South Carolina 29691

RE: Raghu Athimoolam and Irene Athimoolam v. Meritage Homes of South Carolina, Inc.
Civil Action No.: 2017-CP-04-00376
Our File No.: 5160/5753

Dear Judge Sprouse:

I served as the arbitrator in the above matter in September 2023. Although an Order was prepared in November 2023, it was not filed but provided to counsel for all parties. Thereafter, counsel for the Athimoolams filed a Motion to Reconsider, after which counsel for Meritage Homes submitted a reply brief. I then requested a conference call with all counsel given my belief that I had inadvertently misapplied the law to evidence and testimony of the expert witnesses who testified at the arbitration. This call was held on November 17, at which time I requested additional information for clarification and consideration. Additional documentation, opinions and objections were received from all counsel.

The Order was submitted on January 19, 2024, and filed on January 23, 2024. All counsel filed motions requesting a review by this Honorable Court.

To ensure that I prepare the appropriate response to your recent Form 4 Order (enclosed), would it be possible to have a conference call with you and all attorneys so that I can better understand the specifics of your request?

I regret any issues that I have caused and created for you, the attorneys, and parties, as this was not my intent. I look forward to hearing from you and appreciate further guidance from you on this matter.

ELECTRONICALLY FILED - 2024 Oct 25 3:52 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376



Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

ELECTRONICALLY FILED - 2024 Nov 06 10:45 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

FORM 4

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

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2017-CP-04-376

Raghu Athimoolam and Irene Athimoolam
PLAINTIFF(S)

Meritage Homes of South Carolina, Inc.
DEFENDANT(S)

Submitted By: **Address:**		Attorney for : □ Plaintiff □ Defendant or □ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. □ See Page 2 for additional information.

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

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

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

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

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

Defendant moves for reconsideration on the grounds that the Arbitrator lacked authority to modify the award and that the Court was mandated to vacate the January 23, 2024 award. Defendant relies on Smith v. Transport Workers Union of America, AFL-CIO Air Transport Local 556, 374 F.3d 372 (5th Cir. 2004). The Court notes that the Fifth Circuit case is distinguishable from the present case because the arbitration agreement in Smith specifically restricted the authority of the arbitrators to amend or correct their award in the arbitration agreement. Defendant further alleges that the relevant statutory law does not require an arbitration award to be filed with any Clerk or Clerk of Court for the award to be considered an official arbitration award. The Court finds there was not finality on the October 4, 2023 Award. Defendant additionally states that this Court has the power to vacate the January 23, 2024 Award. Although the Court has power to vacate an arbitration award in limited circumstances, none of the circumstances are present here. Finally, Defendant alleges that the Court did not address the issue of the confidential settlements. The Arbitrator expressly stated in her Order that she gave the confidential settlements no consideration. Therefore, the Court finds no evidence improper consideration was given to the confidential settlement.

Accordingly, Defendant's Motion for Reconsideration, pursuant to Rule 59(e), is DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

_____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

_____

_____

_____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

_____	2752	_____
Circuit Court Judge	Judge Code	Date

ELECTRONICALLY FILED - 2024 Nov 06 10:45 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

_____

CLERK OF COURT

Court Reporter: _____

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ELECTRONICALLY FILED - 2024 Nov 06 10:45 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

ELECTRONICALLY FILED - 2024 Nov 06 10:45 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

ELECTRONICALLY FILED - 2017 Feb 24 2:41 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE No.: 2017-CP-04-_____
	)	
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,	)	
	)	
Plaintiffs,	)	
	)	**SUMMONS**
v.	)	(Jury Trial Demanded)
	)	
MERITAGE HOMES CORPORATION	)	
	)	
Defendant.	)	
	)	

TO: THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscribers at their offices, Lyles & Lyles, LLC, 342 East Bay Street, Charleston, South Carolina 29401, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and will seek a default judgment against you.

s/ Robert T. Lyles

Robert T. Lyles, Esq. (SC Bar No. 10299)
LYLES & LYLES, LLC
342 East Bay Street
Charleston, SC 29401
T: (843) 577-7730
F: (843) 577-7172
rtl@lylesfirm.com

ATTORNEYS FOR THE PLAINTIFFS

CHARLESTON, SC

February 24, 2017

ELECTRONICALLY FILED - 2017 Feb 24 2:41 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE No.: 2017-CP-04-_____
	)	
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,	)	
	)	
Plaintiffs,	)	
	)	**COMPLAINT**
v.	)	(Jury Trial Demanded)
	)	
MERITAGE HOMES CORPORATION	)	
	)	
Defendant.	)	
	)	

TO: THE ABOVE-NAMED DEFENDANTS:

COMES NOW, Plaintiffs Raghu and Irene Athimoolam, by and through their undersigned attorneys, and hereby complains and alleges unto this Honorable Court as follows:

GENERAL ALLEGATIONS

1. Raghu and Irene Athimoolam (hereinafter as "Plaintiffs") are the owners of a residence located at 116 Ariel Way, Easley, South Carolina 29642 (hereinafter as "the Project"). The residence is in Anderson County, South Carolina.

2. Defendant Meritage Homes Corporation (hereinafter as "Meritage Homes") was, at all times complained of herein, licensed contractor(s) performing work in Anderson County, South Carolina.

3. Jurisdiction and venue are proper in the Circuit Court for Anderson County, South Carolina.

4. Meritage Homes acted as the general contractor(s) for the original construction of the Project and performed certain repairs to the Project.

ELECTRONICALLY FILED - 2017 Feb 24 2:41 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

5. Plaintiffs have discovered deficiencies in the design, construction, and repairs of the Project, including but not limited to, the following:

a. Severe and pervasive water intrusion into the Project;

b. Premature degradation of components, materials and finishes at the Project;

c. Structural deficiencies;

d. The presence of mold and mildew; and

e. Latent and previously undiscoverable deficiencies, decay and rot and other damage to tangible property including, but not limited to, components, materials and finishes of the Project.

6. Upon information and belief, the above referenced problems, and any subsequently discovered problems of a similar nature, are a direct and proximate result of the negligence and gross negligence of the Defendant(s) with respect to the design, construction, installation and/or repairs of the Project.

7. As a direct and proximate result of the negligence and gross negligence of Defendant(s), the Plaintiffs have incurred, and will continue to incur, substantial damages related to the investigation and analysis of the Project; the development of a repair design; the costs and expenses associated with a repair of the Project; the loss of use of the Project, losses associated with being able to market or sell the Project; and a diminution in value of the Project.

8. Plaintiffs have demanded that Defendant(s) investigate and repair conditions at the Project but Defendant(s) have failed and refused to investigate or repair the Project.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence)

9. Plaintiffs reassert and reallege the allegations in the above Paragraphs 1 through 9 as if stated herein verbatim.

ELECTRONICALLY FILED - 2017 Feb 24 2:41 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

10. The Defendant(s), by virtue of its role in the design and construction/repair and/or supervision of construction/repair of the above referenced Project, owed a duty to Plaintiffs to accomplish such in accordance with all applicable codes and applicable industry work standards, and to conform such work to the design documents and/or manufacturer's literature.

11. Defendant breached his duties to Plaintiffs in one or more of the following particulars:

a. In failing to comply with applicable codes, industry or manufacturing standards or the applicable standard of care;

b. In failing to properly select, schedule, and/or supervise its employees or subcontractors;

c. In failing to properly select and/or install components and materials at Project;

d. In failing to adequately or properly repair the Project;

e. In misrepresenting the nature of problems at the Project and the completeness of repairs done to the Project; and

f. For negligent, willful and intentional failure to repair known defects and concealing said defects from Plaintiff.

12. The negligence, gross negligence, willfulness, wantonness, and recklessness of the Defendant directly and proximately resulted in physical injury to tangible property and/or the work of others, including but not limited to, water damage to windows, doors, siding, roofing, floors, masonry, soffits, soffit vents and/or the structure adjacent to these items, caused by the continuous and repeated exposure to substantially the same harmful conditions and the damages set forth above. Defendants' conduct also proximately caused Plaintiffs to lose the use of the Project and has rendered the Project uninhabitable, all at great cost and expense to the Plaintiffs. Plaintiffs are entitled to recovery for those damages, together with punitive damages, in an amount determined by the trier of fact.

ELECTRONICALLY FILED - 2017 Feb 24 2:41 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranty of Service)

13. Plaintiffs reassert and reallege the allegations in the above Paragraphs 1 through 13 as if stated herein verbatim.

14. The conduct and failure of the Defendant(s) constitutes a breach of the implied warranty of service.

15. As a direct and proximate result of such breach, Plaintiffs have suffered damages as set forth above.

FOR A THIRD CAUSE OF ACTION
(Breach of the Implied Warranty of Habitability)

16. Plaintiffs reassert and reallege the allegations in the above Paragraphs 1 through 16 as if stated herein verbatim.

17. The defects in the Project, referenced above, constitute a breach of the applicable implied warranty of habitability, which arose upon Defendant's sale of the Project to Plaintiffs.

18. As a direct and proximate result of such breach, Plaintiffs have suffered damages as set forth above.

WHEREFORE, having fully stated its Complaint herein against the above-named Defendant(s), Plaintiffs pray for judgment in such amounts as may be proven at trial, including actual and punitive damages, against the Defendant(s) on its cause of action, for the costs of this action, including attorney's fees and prejudgment interest, and for such other relief as the Court deems just and proper.

[SIGNATURE PAGE TO FOLLOW]

ELECTRONICALLY FILED - 2017 Feb 24 2:41 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

s/ Robert T. Lyles

Robert T. Lyles, Esq. (SC Bar No. 10299)
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ATTORNEYS FOR THE PLAINTIFFS

CHARLESTON, SC

February 24, 2017

ELECTRONICALLY FILED - 2017 Mar 03 2:14 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON RAGHU ATHIMOOLAM AND IRENE ATHIMOOLAM, Plaintiffs, vs. MERITAGE HOMES OF SOUTH CAROLINA, INC. Defendant.	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT CASE NUMBER: 2017-CP-04-00376 **FIRST AMENDED SUMMONS** (Jury Trial Demanded)

TO: THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscribers at their offices, Lyles & Lyles, LLC, 342 East Bay Street, Charleston, South Carolina 29401, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and will seek a default judgment against you.

s/Robert T. Lyles, Jr.
Robert T. Lyles, Jr. (SC Bar No. 10299)
LYLES & LYLES, LLC
342 East Bay Street
Charleston, S.C. 29401
843-577-7730
rtl@lylesfirm.com

ATTORNEYS FOR THE PLAINTIFFS

CHARLESTON, SC

March 3, 2017

ELECTRONICALLY FILED - 2017 Mar 03 2:14 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
RAGHU ATHIMOOLAM AND IRENE ATHIMOOLAM, Plaintiffs, vs. MERITAGE HOMES OF SOUTH CAROLINA, INC. Defendant.	CASE NUMBER: 2017-CP-04-00376 **FIRST AMENDED COMPLAINT** (Jury Trial Demanded)

TO: THE ABOVE-NAMED DEFENDANTS:

COMES NOW, Plaintiffs Raghu and Irene Athimoolam, by and through their undersigned attorneys, and hereby complains and alleges unto this Honorable Court as follows:

GENERAL ALLEGATIONS

1. Raghu and Irene Athimoolam (hereinafter as "Plaintiffs") are the owners of a residence located at 116 Ariel Way, Easley, South Carolina 29642 (hereinafter as "the Project"). The residence is in Anderson County, South Carolina.

2. Defendant Meritage Homes Of South Carolina, Inc. (hereinafter as "Meritage Homes") is an Arizona Corporation conducting business in Anderson County, State of South Carolina.

3. Meritage Homes, at all times complained of herein, is the developer and seller of the project and served as the licensed contractor(s) performing work at the Project. See **Exhibit 1**.

4. Jurisdiction and venue are proper in the Circuit Court for Anderson County, South Carolina.

ELECTRONICALLY FILED - 2017 Mar 03 2:14 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

5. Meritage Homes acted as the general contractor(s) for the original construction of the Project and performed certain repairs to the Project.

6. Plaintiffs have discovered deficiencies in the design, construction, and repairs of the Project, including but not limited to, the following:

a. Severe and pervasive water intrusion into the Project;

b. Premature degradation of components, materials and finishes at the Project;

c. Structural deficiencies;

d. The presence of mold and mildew; and

e. Latent and previously undiscoverable deficiencies, decay and rot and other damage to tangible property including, but not limited to, components, materials and finishes of the Project.

7. Upon information and belief, the above referenced problems, and any subsequently discovered problems of a similar nature, are a direct and proximate result of the negligence and gross negligence of the Defendant(s) with respect to the design, construction, installation and/or repairs of the Project.

8. As a direct and proximate result of the negligence and gross negligence of Defendant(s), the Plaintiffs have incurred, and will continue to incur, substantial damages related to the investigation and analysis of the Project; the development of a repair design; the costs and expenses associated with a repair of the Project; the loss of use of the Project, losses associated with being able to market or sell the Project; and a diminution in value of the Project.

9. Plaintiffs have demanded that Defendant(s) investigate and repair conditions at the Project but Defendant(s) have failed and refused to investigate or repair the Project.

ELECTRONICALLY FILED - 2017 Mar 03 2:14 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence)

10. Plaintiffs reassert and reallege the allegations in the above Paragraphs 1 through 9 as if stated herein verbatim.

11. The Defendant(s), by virtue of its role in the design and construction/repair and/or supervision of construction/repair of the above referenced Project, owed a duty to Plaintiffs to accomplish such in accordance with all applicable codes and applicable industry work standards, and to conform such work to the design documents and/or manufacturer's literature.

12. Defendant breached his duties to Plaintiffs in one or more of the following particulars:

a. In failing to comply with applicable codes, industry or manufacturing standards or the applicable standard of care;

b. In failing to properly select, schedule, and/or supervise its employees or subcontractors;

c. In failing to properly select and/or install components and materials at Project;

d. In failing to adequately or properly repair the Project;

e. In misrepresenting the nature of problems at the Project and the completeness of repairs done to the Project; and

f. For negligent, willful and intentional failure to repair known defects and concealing said defects from Plaintiff.

13. The negligence, gross negligence, willfulness, wantonness, and recklessness of the Defendant directly and proximately resulted in physical injury to tangible property and/or the work of others, including but not limited to, water damage to windows, doors, siding, roofing, floors, masonry, soffits, soffit vents and/or the structure adjacent to these items, caused by the continuous and repeated exposure to substantially the same harmful conditions and the damages

ELECTRONICALLY FILED - 2017 Mar 03 2:14 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

set forth above. Defendants' conduct also proximately caused Plaintiffs to lose the use of the Project and has rendered the Project uninhabitable, all at great cost and expense to the Plaintiffs. Plaintiffs are entitled to recovery for those damages, together with punitive damages, in an amount determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranty of Service)

14. Plaintiffs reassert and reallege the allegations in the above Paragraphs 1 through 13 as if stated herein verbatim.

15. The conduct and failure of the Defendant(s) constitutes a breach of the implied warranty of service.

16. As a direct and proximate result of such breach, Plaintiffs have suffered damages as set forth above.

FOR A THIRD CAUSE OF ACTION
(Breach of the Implied Warranty of Habitability)

17. Plaintiffs reassert and reallege the allegations in the above Paragraphs 1 through 16 as if stated herein verbatim.

18. The defects in the Project, referenced above, constitute a breach of the applicable implied warranty of habitability, which arose upon Defendant's sale of the Project to Plaintiffs.

19. As a direct and proximate result of such breach, Plaintiffs have suffered damages as set forth above.

WHEREFORE, having fully stated its Complaint herein against the above-named Defendant(s), Plaintiffs pray for judgment in such amounts as may be proven at trial, including actual and punitive damages, against the Defendant(s) on its cause of action, for the costs of this

action, including attorney's fees and prejudgment interest, and for such other relief as the Court deems just and proper.

s/Robert T. Lyles, Jr.
Robert T. Lyles, Jr. (SC Bar No. 10299)
LYLES & LYLES, LLC
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Charleston, S.C. 29401
843-577-7730
rtl@lylesfirm.com

ATTORNEYS FOR THE PLAINTIFFS

CHARLESTON, SC

March 3, 2017

ELECTRONICALLY FILED - 2017 Mar 03 2:14 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

ELECTRONICALLY FILED - 2017 Apr 06 10:25 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	
	)	C.A. No. 2017-CP-04-00376
Raghu Athimoolam and Irene Athimoolam,	)	
	)	
Plaintiffs,	)	
	)	**DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY THIS ACTION**
-vs-	)	
	)	
Meritage Homes of South Carolina, Inc.,	)	
	)	
Defendant.	)	

Pursuant to the Federal Arbitration Act ("FAA"), Defendant Meritage Homes of South Carolina, Inc. ("Meritage") hereby moves this Court for an Order compelling arbitration and staying this action. 9 U.S.C. §§ 1-16.

FACTS

Plaintiffs Raghu and Irene Athimoolam ("Plaintiffs" individually and collectively) entered into a new home purchase agreement with Meritage ("Agreement").[1] Pursuant to the Agreement, Meritage built a new home for Plaintiffs at 116 Ariel Way, Easley, South Carolina ("Project"). Section 16 of the Agreement, entitled "Disputes and Remedies," provides that "any dispute, claim, or controversy . . . shall be determined by binding arbitration," and "not by or in any court of law or equity." (Agreement, D.iii.). The Agreement also provides the following notice to the buyer concerning arbitration:

> **NOTICE: BY INITIALING THE SPACE PROVIDED BELOW, YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE CONTRACT AND/OR THE WARRANTY AGREEMENT DECIDED BY BINDING NEUTRAL ARBITRATION AS PROVIDED BY THIS**

[1] A fully executed copy of the Agreement is attached hereto as **Exhibit 1**.

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> **AGREEMENT AND THE FEDERAL ARBITRATION ACT. TO THE GREATEST EXTENT NOT CONTRARY TO STATE LAW, YOU ARE WAIVING AND GIVING UP ANY RIGHTS YOU MAY HAVE TO HAVE ANY CLAIM OR DISPUTE LITIGATED BY A COURT OR BY JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE WAIVING AND GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL EXCEPT TO THE LIMITED EXTENT PROVIDED IN THIS AGREEMENT. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF APPLICABLE FEDERAL AND STATE LAW. YOUR AGREEMENT TO THIS BINDING NEUTRAL ARBITRATION PROVISION IS VOLUNTARY. I/WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT ALL CLAIMS AND DISPUTES TO BINDING NEUTRAL ARBITRATION IN ACCORDANCE HEREWITH.**

(Agreement, D.iii.). Plaintiff Raghu Athimoolam initialed this section.

On March 3, 2017, Plaintiffs filed the present lawsuit against Meritage, alleging damages arising out of purported construction defects to the Project.

ARGUMENT

Under the Agreement, Plaintiffs agreed that "any dispute, claim, or controversy . . . shall be determined by binding arbitration." (Agreement, D.iii.). Pursuant to the FAA, this arbitration agreement is valid, irrevocable, and enforceable. 9 U.S.C.A. § 2. Therefore, arbitration should be compelled and this action should be stayed.

Scope and Purpose of the Federal Arbitration Act

"The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The FAA reflects this policy, and provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by

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> arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2. "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Id.* "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should **only** be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118-19 (emphasis added).

The Arbitration Agreement Is Valid and Enforceable Under the FAA

The Agreement contains an arbitration provision that covers this dispute. (Agreement, D.iii.). This arbitration provision is valid and enforceable under the FAA as the Project clearly evidences a transaction involving commerce. *Nunez v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001) (noting that the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction). *See also Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 123, 747 S.E.2d 461, 465 (2013) (noting that the FAA's scope is as extensive as Congress's power under the Commerce Clause, and reversing the lower court for not considering "all three broad categories of activity within the purview of Congress's commerce power—use of the channels of interstate commerce; regulation of persons, things or instrumentalities in interstate commerce; and regulation of activities having a substantial relation to interstate commerce."). The Agreement clearly evidences a transaction

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involving commerce. Meritage is an Arizona corporation constructing residences in South Carolina. There is no question that Meritage would and did hire subcontractors from outside South Carolina to build the residence for Plaintiffs, including but not limited to subcontractors located in Georgia, Minnesota, Pennsylvania, and Tennessee.[2] There is no question that Meritage and/or these subcontractors would and did furnish labor, materials, tools, equipment, and supplies from outside South Carolina. Therefore, the FAA applies, and Plaintiffs are bound to arbitrate this dispute.

CONCLUSION

Pursuant to the FAA, Plaintiffs' claims against Meritage must be arbitrated. Consequently, Meritage respectfully requests this Court compel arbitration and stay this action.

s/ Jason D. Maertens
Kurt M. Rozelsky (#6856)
Jason D. Maertens (#73583)
Smith Moore Leatherwood LLP
2 West Washington Street, Suite 1100 (29601)
Post Office Box 87
Greenville, SC 29602
(864) 751-7600
(864) 751-7800 (fax)
kurt.rozelsky@smithmoorelaw.com
jason.maertens@smithmoorelaw.com

Attorneys for Defendant

April 6, 2017

[2] Because the subcontracts are numerous and voluminous, they will not be filed with this motion but can be made available upon request. Meritage also reserves the right to provide such subcontracts and/or related documents, in whole or in part, to the Court.

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Exhibit 1

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Community: Airy Springs
Tract (Map No.): Plat Book S2107Page 00004
County Anderson
Phase/Block: 0001
Lot/Unit No.: 0036
Buyer(s):Raghu Athimoolam

THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT AND IF THE FEDERAL ARBITRATIOIN ACT IS INAPPLICABLE, THE UNIFORM ARBITRATION ACT SECTION 15-48-10, ET.SEQ., CODE OF LAWS OF SOUTH CAROLINA 1976, AS AMENDED.

MERITAGE HOMES

NEW HOME PURCHASE AGREEMENT
(SOUTH CAROLINA SINGLE-FAMILY HOME – GREENVILLE DIVISION)

THIS NEW HOME PURCHASE AGREEMENT (this "**Agreement**") is entered into by and between MERITAGE HOMES OF SOUTH CAROLINA, INC., an Arizona corporation ("**Meritage**"), and the undersigned buyer(s) (collectively, "**Buyer**"), as of the "Agreement Date" (as defined in Section 20 below). This Agreement, together with the Selection Order (as the same may be updated from time to time in accordance with this Agreement, the "**Selection Order**") and schedules attached to this Agreement and any addenda to this Agreement that may at any time be executed by Buyer, all as and to the extent accepted and executed by Meritage in accordance with this Agreement, collectively, constitute a purchase agreement between Meritage and Buyer (collectively, the "**Contract**").

1. **Purchase and Sale.** Subject to and upon the terms and conditions of the Contract, Meritage agrees to sell and Buyer agrees to purchase the lot identified on the Selection Order (the "Lot"), together with a residential dwelling and any related improvements (collectively, the "**Lot Improvements**") that have been constructed thereon or will be constructed thereon substantially in accordance with the home plan and elevation (the "**Plan**") identified on the Selection Order. The Lot and the Lot Improvements, collectively, are referred to in the Contract as the "**Home.**"

2. **Selection Order; Buyer's Information Schedule.** The Selection Order identifies the Home to which the Contract applies, including the Lot, the Plan, the community in which the Lot is located (the "**Community**"), the base price ("**Base Price**") and any and all options, upgrades, discounts, incentives, credits, promotion amounts, and other amounts comprising the total purchase price of the Home (the "**Purchase Price**"), and the deposit amounts and other terms of this transaction, and any references to any of those items in the Contract shall be deemed to refer to the applicable information set forth in the Selection Order. The Plan is on file in the office of Meritage and is available for review by Buyer during Meritage's normal business hours. Buyer's contact information is set forth on Schedule 1 to this Agreement ("**Buyer's Information Schedule**"). Buyer represents and warrants to Meritage that all information contained in the Selection Order and Buyer's Information Schedule are accurate in all respects and may be relied upon by Meritage for all purposes related to the Contract.

3. **Escrow.** The transaction contemplated by the Contract will be accommodated through an escrow (the "**Escrow**") established with the entity appointed as escrow agent on the Selection Order (the "**Escrow Agent**"). Buyer acknowledges that Buyer has the right (in Buyer's sole discretion), at the time Buyer enters into this Agreement, to designate the title insurance company, title agency, and/or law firm, as applicable, to act as the Escrow Agent under the Contract so long as such entity is experienced in performing and qualified to perform the duties of Escrow Agent under the Contract and such entity has an office open during customary business hours in the same municipality as the Meritage office designated at the end of this Agreement. Buyer does not have the right to change the identity of the Escrow Agent identified on the Selection Order once this Agreement has been accepted by Meritage.

ELECTRONICALLY FILED - 2017 Apr 06 10:25 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

4. **Purchase Price.**

A. **Payment of Purchase Price.** The Purchase Price will be paid by Buyer as follows:

i. **Initial Deposit.** Buyer will pay an initial earnest money deposit in the amount shown on the Selection Order (the "**Initial Deposit**"), in U.S. funds, directly to Meritage outside of Escrow concurrently with Buyer's execution of this Agreement. Notwithstanding the foregoing, if Buyer's financing will consist of a VA loan (as and solely to the extent specified in any Financing Addendum executed by Buyer and Meritage in accordance with Section 5.B below), or if specifically provided otherwise in the Contract, the Initial Deposit will be paid directly into Escrow rather than directly to Meritage. Buyer acknowledges and agrees that neither acceptance nor deposit or negotiation of the Initial Deposit by Meritage constitutes or guarantees acceptance of the Contract by Meritage, nor does it constitute a reservation or an option to purchase the Home.

ii. **Additional Deposit (if applicable).** If one or more additional earnest money deposits are shown on the Selection Order (collectively, the "**Additional Deposit**"), then Buyer will pay the entire amount of any such Additional Deposit, in U.S. funds, directly to Meritage outside of Escrow on or before the date(s) set forth in and required under the Selection Order. Notwithstanding the foregoing, if Buyer's financing will consist of a VA loan (as and solely to the extent addressed in any Financing Addendum executed by Buyer and Meritage in accordance with Section 5.B below), or if specifically provided otherwise in the Contract, the Additional Deposit will be paid directly into Escrow rather than directly to Meritage.

iii. **Balance.** The balance of the Purchase Price will be paid by Buyer at "Closing" (as defined in Section 10 below) in immediately available U.S. funds.

B. **Earnest Money.** The Initial Deposit, the Additional Deposit, as applicable, all "Option Deposits" (as defined in Section 6.E below), and all other deposits, once paid, collectively, constitute the "**Earnest Money**" under the Contract. Buyer acknowledges that Meritage may receive certain financial benefits as a result of the Earnest Money being delivered directly to Meritage and Meritage will not have any obligation to share with Buyer, or account to Buyer for the value of, any such benefits. **Buyer is advised that, except as specifically provided above with respect to transactions involving VA loans or as specifically provided otherwise in the Contract, the Earnest Money will not be placed in a neutral escrow, but will be paid directly to Meritage. This means that Buyer assumes the risk of losing such money if Meritage is unable or unwilling to perform under the terms of the Contract.**

Buyer's Initials: _____/_____/_____/_____

C. **Home Pricing; Site Premiums.** Meritage makes no representation, warranty, or guaranty regarding the future value of the Home. Buyer acknowledges that real property values fluctuate based upon market conditions that are outside the control of Meritage, and that Meritage is not responsible or liable for the impact of such changes, and Buyer hereby expressly agrees not to seek any right or remedy against Meritage at any time due to such changes. Buyer further acknowledges that Meritage is free to sell other homes in the Community or elsewhere at such prices as Meritage may determine from time-to-time, whether or not such homes are similar to the Home in any way, and Meritage does not have any obligation or liability to Buyer with respect to such prices, and Buyer hereby expressly agrees not to seek any right or remedy against Meritage at any time as a result of such sales, whether or not the prices for such other homes are more or less than the Purchase Price paid by Buyer for the Home. Buyer also acknowledges that premiums for home sites (if any) vary and are subjective in nature, and are determined based on the particular attributes of each home site, as evaluated from time-to-time by Meritage. Considerations that affect home site premiums include, but are not limited to, lot location, lot size, lot dimensions and shape, the elevation of the lot, surrounding development, fences, walls, privacy, and proximity to amenities, commercial areas, and natural features. Buyer acknowledges that the characteristics that may make a home site unique may change over time, and the home site may become more or less desirable because of such changes. Buyer understands that Meritage is not responsible or liable for the impact of such changes, and Buyer hereby expressly agrees not to seek recovery of any home site premium or pursue any other right or remedy against Meritage at any time due to such changes.

ELECTRONICALLY FILED - 2017 Apr 06 10:25 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

5. **Funding of Purchase Price.**

A. **Cash Purchase.** If Buyer intends to purchase the Home for all cash (rather than financing any portion of the Purchase Price), then concurrently with the execution of this Agreement Buyer will execute a separate written Cash Purchase Addendum (the "**Cash Purchase Addendum**"), and if accepted by Meritage in accordance with this Agreement, the Cash Purchase Addendum will govern certain terms and conditions regarding Buyer's cash purchase that are set forth in such addendum, including, without limitation, the amount and timing of Buyer's cash installment payments.

B. **Financing.** In the event that Buyer desires to obtain a mortgage loan to pay all or any portion of the Purchase Price, then concurrently with the execution of this Agreement Buyer will execute a separate written Financing Addendum (the "**Financing Addendum**"), and if accepted by Meritage in accordance with this Agreement, the Financing Addendum will govern certain terms and conditions regarding Buyer's financing of any portion of the Purchase Price that are set forth in such addendum.

C. **Contingency.** Buyer understands and acknowledges that Buyer's obligations under the Contract are not contingent upon any matter and/or event whatsoever unless Buyer executes, concurrently with this Agreement, and Meritage accepts: (i) a Financing Addendum pursuant to Section 5.B above, and/or (ii) a separate written Contingency Addendum (the "**Contingency Addendum**"), if Buyer desires that Buyer's obligation to purchase the Home be made contingent upon any other matter or event not set forth in an executed Financing Addendum, which Contingency Addendum will govern all terms, provisions, and conditions regarding such contingency. Except as specifically set forth in a Financing Addendum and/or Contingency Addendum executed by Buyer and Meritage concurrently with the execution of this Agreement, Buyer represents and warrants that the Contract (and any financing to be obtained by Buyer pursuant to Section 5.B above) is not and will not be subject to or contingent upon any matter or event whatsoever, including, without limitation, Buyer's sale, rental, or other disposition of any existing residence or other property, and Buyer acknowledges and agrees that any failure of Buyer to close or to obtain any financing pursuant to any Financing Addendum because Buyer has not sold, rented, or otherwise disposed of an existing home (or the failure of any other contingency) will constitute a default by Buyer, in which event the remedies for default provided for in this Agreement will apply.

Buyer's Initials: RA / / / /

6. **Standard Selections; Custom Selections and Options; Model Features; and Option Deposits.**

A. **Showcase Home.** For any Home with respect to which construction has already commenced or is substantially complete as of the Agreement Date (a "**Showcase Home**"), to the extent any "Structural and Landscape Selections" and "Design Selections and Options" (as those terms are defined in part B of this Section 6, and which are referred to in this Agreement, collectively, as the "**Standard Selections**") have not yet been made for the Home, **Buyer must make any and all of such Standard Selections within seven (7) days following the Agreement Date** or Meritage shall have the right, in its sole discretion, to terminate the Contract or to make any such Standard Selections for and on behalf of Buyer. In the event that any of such Standard Selections have already been made as of the Agreement Date, then Buyer agrees to accept the Showcase Home with all previously-made Standard Selections. Buyer understands that except as specifically provided above (as and to the extent applicable), any request for selections and/or options of any kind to a Showcase Home, or deletions/changes to selections and/or options already made with respect to a Showcase Home, are deemed to be requests for "Custom Selections and Options" that are subject to the terms and conditions set forth in part C of this Section 6.

B. **Non-Showcase Home.** With respect to a Home other than a Showcase Home, the following terms, conditions, timing, and procedures shall govern the selection of Standard Selections, and Buyer must fully and timely comply therewith:

i. **Standard Selections - Schedule and Process.**

(a) **Structural and Landscape Selections.** Concurrently with the execution of this Agreement, Buyer has made certain structural and landscape selections for the Home as set forth in the initial Selection Order (collectively, "**Structural and Landscape Selections**"), which may have included: extended garages, selection of a den (in lieu of a bedroom), bay windows, decks, patios, and any other selections affecting the structural elements of the Home, and the base front-yard landscaping for the Home. Buyer cannot change any of Buyer's Structural and Landscape Selections unless Meritage elects to allow such changes in its sole and absolute discretion, and any requests by Buyer to make any such changes shall be deemed requests by Buyer for Custom

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Selections and Options pursuant to Section 6.C below. Buyer acknowledges that all rights, obligations, and procedures relating to the installation of landscaping on the Lot shall be governed by and must fully comply with any requirements of any applicable governmental authorities, any recorded covenants, conditions, and restrictions affecting the Lot, and any and all rules, regulations, and architectural and/or landscaping guidelines imposed in connection therewith. Buyer further acknowledges that neither Buyer nor any agent or designee of Buyer may install any landscaping on the Lot unless and until Buyer pays the entire Purchase Price for the Home at the Closing.

(b) **Design Selections and Options.** Buyer also will be entitled to make certain design selections ("**Design Selections and Options**") from any additional options (other than Structural and Landscape Selections) made available by Meritage with respect to the Home, which may include floor coverings, cabinets, countertops, doors, appliances, light fixtures, plumbing fixtures, window coverings, interior paint colors, and other interior features and options. The Design Selections and Options must be made by Buyer at the design studio designated in the Selection Order (the "**Design Studio**"). At the Design Studio, Buyer may (i) select materials, finishes, and options that are then offered by Meritage for the Home at no extra charge ("**Standard Design Selections**"); and (ii) request any extra and upgraded Design Selections and Options then offered by Meritage for the Home (the "**Design Options**"), if any. In order to minimize delays and maximize efficiencies in the construction process, **Buyer agrees to make all Design Selections and Options for the Home within fourteen (14) days after the Agreement Date** (the "**Design Selection Period**"). Should Buyer fail to make all of Buyer's Design Selections and Options within the Design Selection Period, Meritage may either: (i) make such Design Selections and Options within its sole discretion, in which event Meritage's chosen Design Selections and Options shall be final; (ii) await Buyer's designation of Buyer's Design Selections and Options, in which event the Purchase Price shall be increased by an amount equal to two hundred fifty dollars ($250.00) for each day that Buyer delays in making the Design Selections and Options after expiration of the Design Selection Period; or (iii) cancel the Contract and retain the Earnest Money theretofore paid by Buyer as liquidated damages for Buyer's breach of the Contract. Accordingly, Meritage strongly urges Buyer to **contact the Design Studio within two (2) days after the Agreement Date** to initiate appointments.

(c) **Changes to Design Selections and Options.** Once Buyer has timely selected Buyer's Design Selections and Options during the Design Selection Period, if Buyer thereafter desires to change or delete any of such selected Design Selections and Options prior to the expiration of the Design Selection Period, then in recognition of the additional cost Meritage will incur in processing such change, Buyer may only change or delete any such selections by paying to Meritage, at the time of each change or deletion, a non-refundable fee in the amount of two hundred fifty dollars ($250.00) for each such change or deletion, which fee will not be applicable to any portion of the Purchase Price (including, but not limited to, any Option Deposit or any cost of the applicable selection/option) and will be deemed fully earned by Meritage upon receipt. Once the Design Selection Period has expired, Buyer shall not be entitled to select or make changes to any Design Selections and Options.

ii. **Additional Selection Guidelines and Restrictions.** Available Design Options and the prices for Design Options allowed by Meritage are determined by Meritage, in its sole discretion, and are subject to change at the discretion of Meritage. Buyer understands that Meritage shall have no obligation to make any changes or upgrades to the Home other than the Standard Design Selections and Design Options Meritage then makes available for the Home that are set forth in an updated Selection Order executed by Buyer and Meritage. Meritage reserves the right at any time to change, modify, or eliminate any Design Options (and/or the pricing therefor) at any time made available for any homes within the Community. If any items selected by Buyer become unavailable or are determined to not be available within time periods necessary to avoid delays in completing construction of the Home, Buyer shall, within seven (7) days after written notice thereof from Meritage, select any replacement item(s) necessary to replace the unavailable item(s) and if Buyer fails to do so, Meritage may make such selections on Buyer's behalf and Buyer shall be bound thereby. If selections made by Buyer and approved by Meritage result in the need for an upgrade to the electrical panel, equipment, or facilities for the Home, Meritage is authorized to install such upgraded panel, equipment, and facilities and make such changes, whereupon the Purchase Price will be increased by Meritage's charge for such upgraded panel, equipment, and facilities, and any related changes. Buyer understands that an appraiser may not give full or any value to Standard Selections and, consequently, Buyer should be prepared to pay cash for any such items that will not be funded from loan proceeds should they not receive full value in the appraisal.

C. **Custom Selections and Options.** At Meritage's sole discretion, Meritage may consider including the following (collectively, "**Custom Selections and Options**") items in the Home or on the Lot if requested by

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Buyer; custom options, non-standard colors and selections, custom or non-standard landscaping, window coverings, and/or any other options and/or selections not offered by Meritage with respect to the Home, or options or selections of any kind requested after the applicable time period set forth above (including, without limitation, Structural and Landscape Selections and/or Design Selections and Options requested after start of construction of the Home), but excluding any request to allow Buyer to build a pool and/or spa, which request must be made on a separate "Pool Addendum" (defined in Section 7.E below). As a condition to Meritage considering and pricing any Custom Selections and Options, Buyer must first pay to Meritage a non-refundable estimating fee of two hundred fifty dollars ($250.00) for each individual Custom Selections and Options item before Meritage considers each such request. This fee does NOT constitute any commitment by Meritage to approve or make available to Buyer the requested Custom Selections and Options item. Instead, the fee is paid, and deemed earned by Meritage upon receipt, in consideration of Meritage evaluating the request therefor and obtaining information it deems relevant for evaluating such request. If, and only if, any Custom Selections and Options item is approved by Meritage and is purchased by Buyer, the estimating fee for that particular item will be credited to the price of that item at, and solely upon, Closing. Once Meritage has reviewed any request from Buyer for any Custom Selections and Options, Meritage will advise Buyer in writing whether or not Meritage is willing to provide such Custom Selections and Options and, if so, the price thereof and the time deadline for Buyer to execute an updated Selection Order providing for such Custom Selections and Options. Buyer acknowledges that if any Custom Selections and Options item causes a delay in the construction of the Home, Meritage may include in the price thereof a fee of not less than two hundred fifty dollars ($250.00) for each day of such delay, as conclusively determined by Meritage. Any approved Custom Selections and Options must be itemized on an updated Selection Order that is executed by Buyer and also is accepted and executed by Meritage. In the event that Meritage does not accept and execute an updated Selection Order for any requested Custom Selections and Options, Meritage shall be deemed to have denied Buyer's request for such Custom Selections and Options. Buyer acknowledges and agrees that Meritage's disapproval of any Custom Selections and Options shall not affect Buyer's obligations under the Contract. Buyer understands that an appraiser may not give full or any value to Custom Selections and Options and, consequently, Buyer should be prepared to pay cash for such items that will not be funded from loan proceeds should they not receive full value in the appraisal.

D. **Model and Promotional Features.** Buyer is aware that any model home and promotional material that Buyer may have viewed prior to execution of the Contract may contain extra design features, decorations, floor coverings, decorative light fixtures, custom paint and wall coverings, window treatments, landscaping, pool, spa, sound and alarm systems, furnishings, appliances, and other designer/decorator features and amenities that are not included as part of the Home, and that there are items shown in models that are decorator items and/or that display design elements or upgrades that may not be available for homes in the Community and/or for the Home selected by Buyer. Buyer acknowledges that Meritage's sales associate has reviewed with Buyer the included features for the Home, and Buyer understands that in order to incorporate any Design Options shown in any model or brochures (provided Meritage makes such Design Options available for incorporation into the Home), an updated Selection Order setting forth the Design Options added and adjusting the Purchase Price accordingly must be executed by Buyer and accepted by Meritage. Further, Buyer understands that models, pricing, and features may vary from community to community, that Meritage may offer many of Meritage's models at several different communities, and that each model has features, code requirements, materials, association guidelines, aesthetics, landscaping, and a host of other factors that may vary from one community to another and/or over time. Buyer may view models at different communities in order to examine the floor plan, use of space, approximate size of rooms, and traffic pattern of the model, but Buyer acknowledges that such floor plans and features may not be available in the Community. Further, Buyer is advised that Meritage's sales associates in one community may not have specific information regarding features available in another community. From time to time, Meritage may make available a Standard Selection or upgrade that was not offered to Buyer, and Meritage shall have no obligation to offer such added Standard Selection or upgrades to Buyer.

E. **Selections and Options Deposit Requirements.** Upon Buyer's execution of an updated Selection Order confirming that any Standard Selections and/or Custom Selections and Options will be included in the Home, Buyer agrees to pay an additional deposit (the "**Option Deposit**"), in U.S. funds, directly to Meritage outside of Escrow on or before the date(s) set forth in and required under such updated Selection Order, in the following amount:

i. **Standard Design Selections.** To the extent that Buyer makes only Standard Design Selections for which no additional amount is due, no Option Deposit is required.

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ii. **Standard Upgrades.** To the extent that Buyer makes any Standard Selections for which an additional charge is reflected on the Selection Order therefor (the "**Upgrade Charge**"), Buyer will pay an Option Deposit to Meritage as follows:

(a) If the Upgrade Charge equals ten percent (10%) or less of the base price of the Home reflected on the Selection Order, then the Option Deposit shall be the amount specified on the updated Selection Order with respect to such Standard Selections, if any.

(b) If the Upgrade Charge equals more than ten percent (10%) but less than fifteen percent (15%) of the base price of the Home reflected on the Selection Order, then the Option Deposit shall be the greater of: (i) the amount specified on the updated Selection Order with respect to such Standard Selections, if any; or (ii) twenty-five percent (25%) of the portion of the Upgrade Charge that exceeds ten percent (10%) of the base price of the Home. Buyer acknowledges that this paragraph will control over any contrary amount set forth in any updated Selection Order.

(c) If the Upgrade Charge equals fifteen percent (15%) or more, but less than twenty percent (20%) of the base price of the Home reflected on the Selection Order, then the Option Deposit shall be the greater of: (i) the amount specified on the updated Selection Order with respect to such Standard Selections, if any; or (ii) the sum of (A) twenty-five percent (25%) of the portion of the Upgrade Charge that exceeds ten percent (10%) of the base price of the Home, but is less than fifteen percent (15%) of the base price of the Home; plus (B) fifty percent (50%) of the portion of the Upgrade Charge that equals or exceeds fifteen percent (15%) of the base price of the Home. Buyer acknowledges that this paragraph will control over any contrary amount set forth in any updated Selection Order.

(d) If the Upgrade Charge equals twenty percent (20%) or more of the base price of the Home reflected on the Selection Order, then the Option Deposit shall be the greater of: (i) the amount specified on the updated Selection Order with respect to such Standard Selections, if any; or (ii) the sum of (A) twenty-five percent (25%) of the portion of the Upgrade Charge that exceeds ten percent (10%) of the base price of the Home, but is less than fifteen percent (15%) of the base price of the Home; plus (B) fifty percent (50%) of the portion of the Upgrade Charge that equals or exceeds fifteen percent (15%) of the base price of the Home, but is less than twenty percent (20%) of the base price of the Home; plus (C) one hundred percent (100%) of the portion of the Upgrade Charge that equals or exceeds twenty percent (20%) of the base price of the Home. Buyer acknowledges that this paragraph will control over any contrary amount set forth in any updated Selection Order. Notwithstanding the foregoing, Meritage may, at its sole discretion, designate certain items (such as finished basements or municipal-required enhancements) as standard Design Selections for which the Upgrade Charge therefor is to be included in the base price of the Home for purposes of calculating the Option Deposit, in which event the Option Deposit therefor, if any, will be as provided in the applicable Selection Order (without regards to the minimums stated above). Any such designation will be applicable solely to the extent explicitly provided in a Selection Order.

iii. **Custom Selections and Options.** To the extent that Buyer makes any Custom Selections and Options, Buyer will pay an Option Deposit to Meritage equal to the greater of: (a) the amount specified on the updated Selection Order with respect to such Custom Selections and Options, if any; or (b) fifty percent (50%) of the Upgrade Charge.

In NO event will any incentives that may be offered by Meritage to Buyer in connection with the purchase of the Home reduce the amount of the Option Deposit required in this Agreement. Buyer acknowledges and agrees that Buyer's Standard Selections and any Custom Selections and Options will not be released to construction, and Meritage will be deemed to have not accepted any updated Selection Order related thereto, unless and until the applicable Option Deposit has been paid in full. **Buyer further acknowledges and agrees that, except as specifically provided otherwise in Section 16(c) below, the Option Deposit will be non-refundable to Buyer once Meritage has accepted the applicable updated Selection Order with respect thereto.**

F. **FHA and VA Loans.** If Buyer has elected to finance the purchase of the Home with FHA or VA financing, the total amount of Standard Selections and/or Custom Selections and Options, collectively, may NOT exceed twenty percent (20%) of the base price of the Home reflected on the Selection Order, and in the event that Buyer makes selections that exceed twenty percent (20%) of the base price of the Home reflected on the Selection Order, Meritage will have the unilateral right at any time prior to Closing to omit from the Home and Selection Order such selections/options as it determines, in its sole discretion, are necessary to be omitted so that the total of

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Buyer's selections/options do not exceed twenty percent (20%) of the base price of the Home reflected on the Selection Order.

7. **Lot Improvements.**

A. **Construction of Lot Improvements.** All material and labor to construct the Lot Improvements will be supplied by trade contractors and/or suppliers selected by Meritage in its sole and absolute discretion. Meritage will endeavor to cause the Lot Improvements to be constructed in substantial conformance with the Plan. Nevertheless, due to the nature of construction, Buyer understands and acknowledges that deviations and variations from the Plan may exist in the Home, including, without limitation: (i) substitution by Meritage of materials and equipment of substantially equal or better quality; (ii) minor style, lot orientation, and color changes; (iii) minor variances in square footage of the Home and in room and space dimensions, and in window, door, utility outlet, and other improvement locations; (iv) changes in the Plan as may be required by any state, federal, county, or local governmental authority in order to accommodate selections and/or options requested by Buyer and approved by Meritage; and (v) value engineering and field changes. Buyer acknowledges that renderings, floor plans, and other drawings shown in the sales office for the Community and in sales brochures and other advertising material may not be drawn to scale. The Lot Improvements may contain unique characteristics, such as but not limited to: electronic transformers, catch basins, utility boxes, lines, and/or meters, wastewater pumps, and/or similar improvements, the location of which will be determined by Meritage in its sole discretion. Meritage may construct the Home with a floor plan that is the reverse of the model floor plan. Meritage shall have the right to make such changes to the Home and/or to make deviations from the Plan and in materials and locations as Meritage deems appropriate in order to construct the Home in accordance with applicable building codes, practices, and requirements. Upon Completion of the Lot Improvements in accordance with Section 7.B below, Buyer's refusal to accept the Lot Improvements as constructed shall constitute a material default by Buyer under the Contract. By acquiring title to the Home at Closing, Buyer shall be deemed to have agreed to accept the Home as constructed and subject to all changes and deviations that may exist from the Plan, and Buyer shall be deemed to have waived any and all rights and claims against Meritage with respect to any such changes and deviations, except to the extent such changes and deviations are conclusively determined to cause structural deficiencies in the Home.

B. **Completion of Construction.** Buyer acknowledges that normal construction schedules may be affected by processing delays and inspections of applicable governmental authorities, weather conditions, the availability of materials and qualified trade contractors, and other factors outside of Meritage's control and, therefore, Meritage does not and cannot guarantee a completion date and Meritage cannot be held responsible for estimated completion dates that Buyer may, at any time, receive from Meritage or any of its agents, employees, trade contractors, or suppliers. So long as Buyer has complied with all of Buyer's obligations under the Contract, Meritage will make reasonable efforts to initiate construction of the Lot Improvements within thirty (30) days of the later to occur of: (i) the date on which Buyer supplies Meritage with evidence of Buyer's Loan Approval (as such terms is defined in the Financing Addendum) and the satisfaction of any and all conditions and contingencies to which such Loan Approval is subject, as applicable, as well as any other conditions and contingencies set forth in any addendum constituting a part of the Contract; (ii) the date Buyer completes Buyer's Standard Selections and delivers a Selection Order to Meritage, executed by Buyer and reflecting all of the Standard Selections made by Buyer (subject to acceptance by Meritage); and (iii) the date a building permit is obtained for the Lot Improvements; and Meritage thereafter will proceed with the construction of the Lot Improvements with reasonable diligence. Meritage agrees to complete construction of the Lot Improvements in the manner specified in the Contract by a date not later than two (2) years from the date Buyer signs this Agreement, subject, however, to delays caused by matters that are legally recognized as defenses to contract actions in the jurisdiction where the Lot Improvements are being constructed, including, but not limited to, delays caused by matters that are beyond the control of Meritage, such as fire, flood, and labor or material shortages. "**Completion**" of the Lot Improvements shall be deemed to occur upon the issuance of a certificate of occupancy (or other similar document customary in the market in which the Home is located indicating that the Lot Improvements are habitable and able to be occupied) with respect to the Lot Improvements by the city, town, county, or other applicable governmental authority in which the Home is located, or other applicable inspection customary in the market in which the Home is located, which certificate (or similar document or inspection), once issued, shall be deemed to confirm that the Lot Improvements are completed and built in substantial conformance with the Plan and applicable codes.

C. **Home Placement.** The Lot Improvements will be situated and oriented on the Lot by Meritage (in its sole discretion) depending on setbacks, easements, other restrictions of record, requirements of governmental

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authorities, physical conditions on or adjacent to the Lot, and normal construction practices. In the event that the Lot Improvements will not fit on the Lot or are otherwise not allowed due to any declaration, covenant, condition, or restriction affecting the Lot and/or municipal or other applicable requirements, Meritage will notify Buyer, whereupon: (i) the Contract shall be terminated and all Earnest Money returned to Buyer, in which event the parties will be released from all further liability or obligation under the Contract; or (ii) if Buyer has satisfied any financing or other contingency and is not then in default under the Contract, Buyer may choose another type of home for such Lot and execute an updated Selection Order with respect thereto at the then current prices for such type of home; or (iii) if Buyer has satisfied any financing or other contingency and is not then in default under the Contract, Buyer may choose another lot and execute a new agreement for the purchase thereof and a residence thereon at the then current prices for such lot and home, in which case Buyer's Earnest Money will be applied to the new lot. Buyer is hereby advised that elevation heights of the yards and floor of the Home and that of adjoining lots may vary, and elevation differences from one lot to the next within the Community can cause yard wall heights to change. Buyer is further advised to review all title documents for the Lot and to make itself aware of the boundaries of the Lot, setbacks affecting the Home, and all drainage and/or utility easements and other matters of record, if any, that affect the Home. Neither Meritage nor any of its agents, representatives, or employees is authorized to make any representation to Buyer about such matters, and any such representation is hereby expressly disclaimed.

D. **No Buyer Access to / Work on Home Prior to Closing.** Due to insurance requirements and for Buyer's safety, Buyer and Buyer's agents, guests, and invitees shall not enter upon the Lot prior to Closing unless accompanied by one of Meritage's sales associates for the Community. In addition, Buyer shall not, prior to Closing: (i) cause any personal property, including, but not limited to, furniture and fixtures, to be stored, located, or otherwise placed on or in the Lot or Home, and/or (ii) except as may be specifically provided in a Pool Addendum (defined in part E of this Section 7), provide materials, trade contractors, or supplies to or for the Home, or work on or make modifications to the Home. Buyer shall not in any event interrupt or interfere with the construction of the Lot Improvements or otherwise prevent, deter, or hinder Meritage, its employees, agents, and subcontractors, from performing any obligation under the Contract. Buyer further agrees not to interfere with or interrupt any workers otherwise in the Community, and not to enter onto any other lot or other property of Meritage in the Community. To the extent that Meritage permits Buyer on the Lot prior to Closing, Buyer shall comply with all applicable laws and standards that may require anyone on a construction site to wear protective clothing and safety devices, including, but not limited to, hard hats and safety glasses. Buyer assumes the risk of injury and loss that may result from any entrance on the Lot by any of Buyer and Buyer's agents, guests, and invitees prior to Closing, and Meritage shall have no responsibility or liability for any injury or loss resulting from or occurring during any entrance by any of Buyer and Buyer's agents, guests, or invitees onto any construction area within the Community, including the Home. Furthermore, the Warranty on any part of the Home affected in any way by any such entrance and/or from any work and/or modifications to the Home by or on behalf of Buyer prior to Closing shall be deemed void, and Buyer shall indemnify and hold Meritage harmless for, from, and against any and all loss, damages, claims, demands, obligations, costs, liability, or responsibility (including, without limitation, all attorneys' fees and costs incurred by Meritage) resulting in any way from any such entrance or from any work and/or modifications to the Home by or on behalf of Buyer prior to Closing. Buyer's obligations in the immediately preceding sentence will survive the termination of the Contract and/or the Closing. Any communication by or on behalf of Buyer regarding construction of the Lot Improvements must be made solely through Meritage's sales associate for the Community (who may schedule an appointment with the appropriate construction supervisor as deemed necessary by such sales associate), and Buyer shall not make any direct contact with any workers, suppliers, superintendents, contractors, or subcontractors of Meritage, or any of their respective employees. Any violation of any of the restrictions set forth in this Section by Buyer will constitute a material default under the Contract.

Buyer's Initials: DS RA / / / /

E. **Pool.** If Buyer desires to commence construction of a pool and/or spa and any related improvements (collectively, a "Pool") on the Lot prior to Closing, then Buyer must execute a separate written Buyer Installed Swimming Pool Addendum (the "Pool Addendum") that will govern all terms, provisions, and conditions regarding Buyer's ability to contract with a third-party pool builder (the "Pool Builder") to construct such Pool, including, without limitation, the requirement that Buyer pay to Meritage a "Pool Deposit" in accordance with the Pool Addendum. Meritage will be free to accept or reject any requested Pool Addendum at its sole discretion and for any or no reason, and such decision shall be independent of Meritage's acceptance of this Agreement and the balance of the Contract, which means that Meritage's acceptance of the Pool Addendum is NOT a contingency to Buyer's obligations under the Contract. Similarly, notwithstanding anything contained in the Contract to the

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contrary, completion of the Pool and any related improvements is NOT a contingency to Buyer's obligations to proceed with Closing or otherwise under the Contract, which means that the Pool need not be completed prior to the Closing or any other time as a condition to Buyer's performance of any of Buyer's obligations under the Contract.

F. **Termites.** At Closing, Meritage will deliver to Buyer a certificate from the pest control company that applied the termite treatment for the Home. Buyer understands that current governmental regulations limit the types and concentrations of chemicals and methods of application that can be used in attempting to prevent or eradicate termites and, consequently, termites may appear following Closing. If, within the time period specified in the certificate from the applicable pest control company, Buyer notifies the pest control company that any areas of the Home have become infested with termites, the pest control company will be obligated to re-treat such areas of the Home. Buyer acknowledges and agrees that in no event will Buyer make any claims against Meritage, and in no event will Meritage have any liability to Buyer or any occupants of the Home, for any losses, costs, damages, and expenses arising in connection with the existence of termites in or around the Home.

Buyer's Initials: RA / / / /

G. **Home Buyer Disclosures.** Buyer acknowledges that Schedule 3 to this Agreement contains various disclosures and Buyer acknowledgments. Meritage has advised Buyer to review carefully all of such disclosures and acknowledgments. **Buyer's execution of this Agreement will evidence Buyer's understanding of and agreement to such disclosures and acknowledgments, and Buyer hereby waives any rights or remedies Buyer may otherwise have now or in the future against Meritage with respect to the matters set forth in Schedule 3 to this Agreement.** In addition, concurrently with the execution of this Agreement, Buyer will execute a Community Disclosure Addendum that contains important information about the Home and the Community, and **Buyer acknowledges that Buyer has been advised to carefully read the entire Community Disclosure Addendum prior to executing this Agreement and the balance of the Contract.**

Buyer's Initials: RA / / / /

8. **New Home Orientation.** Between the substantial completion of the Home and the Closing, Meritage will perform a Buyer orientation and inspection of the Home, at which time Meritage will review and demonstrate the features and operations of the Home (the "**New Home Orientation**"). Meritage will use reasonable efforts to provide Buyer with at least seven (7) days' notice of the New Home Orientation. If, at any time, Buyer elects to designate an individual to act as Buyer's representative and agent (Buyer's "**Designated Representative**") in connection with the New Home Orientation, Buyer and Meritage will execute a separate written Designated Representative Addendum (the "**Designated Representative Addendum**"). Only Buyer or Buyer's Designated Representative may attend the New Home Orientation. If, during the New Home Orientation, any deficiencies or incomplete work or items are noted in the Home, then Buyer (or Buyer's Designated Representative) and Meritage may compile a written list of any and all such deficiencies and incomplete work and items (the "**Punch List**"). Meritage shall have no responsibility or liability to make any repairs or replacements resulting from damage to the Home caused by any of Buyer and Buyer's movers, employees, representatives, invitees, contractors, designees, or any other occupants of the Home, and any damages or defects not specifically identified on the Punch List prior to Closing shall be conclusively deemed to have been caused by Buyer and/or Buyer's movers, employees, representatives, invitees, contractors, designees, and/or any other occupants of the Home, and Meritage will have no responsibility to repair, replace, or otherwise remedy such items. So long as Completion of the Lot Improvements has occurred in accordance with the last sentence of Section 7.B above, any claims by Buyer regarding deficiencies and incomplete work and items in the Home (except to the extent of deviations from the Plan that are conclusively determined to cause structural deficiencies in the Home) shall not entitle Buyer to cancel the Contract, delay the Closing, withhold funds at Closing, or seek any other recourse against Meritage. Further, if the parties are unable to schedule the New Home Orientation prior to the date specified by Meritage for Closing, Buyer must nonetheless proceed with Closing, and in any such event Buyer shall not be entitled to cancel the Contract, delay the Closing, withhold funds at Closing, or seek any other recourse against Meritage due to the failure or inability to conduct a New Home Orientation prior to Closing. If Buyer or Buyer's Designated Representative (if applicable) fails to attend a scheduled New Home Orientation, Meritage may conduct the inspection itself and prepare a Punch List, which shall be deemed conclusive and binding on Buyer, and Meritage shall have no obligation to demonstrate the features and operation of the Home to Buyer.

9. **Utilities.** Buyer, at Buyer's own expense, shall arrange for utilities for the Home to be turned on and placed in Buyer's name immediately following the Closing, and any delays incurred in scheduling such utilities to be

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turned on and placed in Buyer's name shall not permit Buyer to delay the Closing. Notwithstanding the foregoing, Meritage may, but shall have no obligation to, turn on the utilities for the Home on Buyer's behalf. In such event, Meritage will subsequently have no obligation or liability to maintain or pay for such utilities once they have been turned on.

10. **Closing.** The closing of this transaction (the "**Closing**") shall occur following Completion of the Lot Improvements (as determined in accordance with the last sentence of Section 7.B above) on a date to be specified in a notice provided by Meritage to Buyer ("**Closing Date Notification**"). Buyer acknowledges and agrees that Meritage has the right, in its sole discretion, to schedule the date, time, and place for the Closing, and that Buyer is obligated to close on such date. Meritage shall provide Buyer with the Closing Date Notification at least ten (10) calendar days prior to the date Meritage designates as the date for Closing. Under no circumstances will Meritage be responsible for temporary housing, furniture storage, moving expenses, or other costs, fees, or expenses related in any way to the timing of the Completion of the Lot Improvements, the New Home Orientation, and/or the Closing. In the event Escrow Agent is closed for business on the day specified for Closing, the Closing shall occur on the next day Escrow Agent is open for business. It will not be necessary that Buyer be present at the Closing; provided, however, that if Buyer cannot or elects not to be present for Closing, Buyer must, prior to the date specified by Meritage for the Closing, execute all documents and instruments and make all payments as are necessary to facilitate the timely occurrence of the Closing. Meritage shall have no responsibility for, and Buyer shall pay for: all title, recording, closing, and escrow fees, costs, premiums, and charges relating to this transaction and any fees, costs, and charges related to any financing obtained by Buyer for this transaction, including, without limitation, those identified in the Financing Addendum. All taxes, special assessments, and regular assessments affecting the Home shall be prorated as of the Closing on a calendar year basis (including, without limitation, any homeowners' or condominium association and similar assessments affecting the Home other than fees related to the transfer of the Home, which are to be paid by Buyer at Closing). At or before the Closing, Buyer shall deposit with Escrow Agent or Meritage: (i) the balance of the Purchase Price due and payable to Meritage; (ii) an amount equal to all closing costs and additional costs or expenses payable by Buyer pursuant to the Contract; (iii) a sum equal to any assessments in connection with the transfer of the Home to Buyer and any other amounts due and payable to any homeowners', condominium, or similar association as required pursuant to any recorded declarations, covenants, conditions, and/or restrictions affecting the Home; and (iv) all documents and instruments necessary to effectuate the transaction contemplated in the Contract. All amounts payable by Buyer at Closing shall be paid by electronic transfer or other form of immediately available funds from a licensed bank or other financial institution acceptable to Meritage and Escrow Agent. Possession of the Home shall be given to Buyer only after Closing occurs. The Closing shall be deemed to have occurred once Meritage has received all monies due it under the Contract.

11. **Title.**

A. **Conveyance.** Title to the Home shall be conveyed by Meritage to Buyer at Closing by special warranty deed, free and clear of liens, encumbrances, and exceptions except: (i) any declarations, covenants, conditions, and/or restrictions affecting the Home; (ii) any existing easements and rights-of-way for roadways, drainage areas, canals, ditches, open areas, laterals, and public utilities; (iii) taxes, special assessments, and community facility assessments (if applicable) that are not delinquent; (iv) matters shown on the plat for the Community; (v) matters that a survey would show; (vi) all applicable zoning and building code requirements and any other governmental and quasi-governmental requirements; (vii) any outstanding mineral or royalty interests; (viii) any matters of record that do not materially and adversely affect the marketability of the Lot; (ix) any matters disclosed in any schedule to this Agreement or any portion of the Contract, or otherwise in connection with the Contract; and (x) any other matters set forth in any title insurance commitment or title report or opinion obtained by Buyer to the extent that Buyer does not object thereto within the time period specified in this Agreement (as applicable). Buyer acknowledges that Meritage may not yet own the Lot as of the Agreement Date. If Meritage, through no fault of its own, is unable to obtain title to the Lot or deliver marketable title to the Lot to Buyer as of the date scheduled for Closing, Meritage shall have the right to cancel the Contract, whereupon the Earnest Money shall be returned to Buyer and the parties shall have no further rights, obligations, liabilities, or remedies under the Contract (except for those that specifically survive such cancellation).

B. **Vesting.** Subject to the restrictions on Buyer's assignment of the Contract, title to the Home will be conveyed to Buyer at Closing pursuant to Buyer's written vesting instructions provided to Escrow Agent and Meritage at least five (5) days before Closing. Buyer's failure to provide any such instruction at least five (5) days before Closing shall be conclusively deemed an irrevocable election by Buyer to take title to the Home in the

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manner that Buyer is identified in this Agreement. The manner of taking title to the Home can have significant legal and tax consequences, and Buyer is advised to consult a professional for advice. Neither Meritage nor any of its agents, representatives, or employees is authorized to advise Buyer about such matters, and any such advice is hereby expressly disclaimed.

12. **Destruction of Home.** Meritage shall bear the risk of loss to the Home until Closing, at which time such risk shall pass to Buyer. If all or a substantial portion of the Home is damaged or destroyed before Closing, Meritage, at Meritage's sole election, may: (i) terminate the Contract by notifying Buyer, in which event the Earnest Money will be refunded to Buyer; or (ii) repair such damage, in which event the Contract shall remain in full force and effect and the Closing may be extended by Meritage for a reasonable period to allow Meritage the opportunity to repair such damage and complete construction of the Lot Improvements.

13. **Meritage's Limited Warranty.**

A. **Meritage's Warranty Agreement.** At the Closing, Meritage shall provide Buyer with the Meritage Homes New Home Warranty & Protection Plan, which shall constitute the only warranty to be provided by Meritage to Buyer with respect to the Home (the "**Warranty**"). The Warranty is set forth in the Warranty Information section of Meritage's "Making Ownership Easy" homeowner's manual (the "**Warranty Agreement**"), which is incorporated in this Agreement by this reference and which shall constitute a part of the Contract. Buyer acknowledges having received and reviewed an unexecuted sample of the Warranty Agreement. Buyer understands and agrees that: (i) Buyer will refer solely to the Warranty Agreement for all terms, conditions, rights, remedies, and other provisions of the Warranty; and (ii) the only rights and remedies Buyer and any successor owner of the Home shall have with respect to any actual or alleged construction defects in the Home shall be those specifically set forth in the Warranty Agreement, and Buyer shall have the sole affirmative obligation to notify any prospective purchaser thereof. Buyer further acknowledges and agrees that, from time-to-time, Meritage may make changes to the Meritage Homes New Home Warranty & Protection Plan it offers to homebuyers generally, and that the Warranty Agreement applicable to Buyer shall be the Warranty Agreement as set forth and in effect at the Closing, notwithstanding any subsequent modifications that Meritage may make to the Meritage Homes New Home Warranty & Protection Plan generally and/or for other purchasers of homes from Meritage. **BUYER ACKNOWLEDGES AND AGREES THAT, ANY OTHER PROVISION OF THE CONTRACT OR THE WARRANTY NOTWITHSTANDING, EXCEPT AS SPECIFICALLY SET FORTH IN THE CONTRACT, MERITAGE HAS NOT MADE, DOES NOT MAKE, AND SPECIFICALLY NEGATES AND DISCLAIMS, AND BUYER HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, ANY AND ALL REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS, AND/OR GUARANTEES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT, OR FUTURE, OF, AS TO, CONCERNING, AND/OR WITH RESPECT TO THE HOME. SUBJECT TO THE FOREGOING, NO EXPRESS WARRANTY IS MADE BY: (A) ANY AFFIRMATION OF FACT OR PROMISE THAT THE HOME OR ANY RIGHT OR USE RELATED THERETO WILL CONFORM TO THE AFFIRMATION OF FACT OR PROMISE MADE; (B) THE DISPLAY OF ANY MODEL OR THE DEPICTION OF ANY PHYSICAL CHARACTERISTICS OF THE LOT IMPROVEMENTS OR THE COMMUNITY, INCLUDING THE PLAN OR ANY OTHER PLANS OR SPECIFICATIONS; (C) ANY DESCRIPTION OF THE REAL ESTATE COMPRISING OR CONTEMPLATED TO COMPRISE THE COMMUNITY OR OF THE UNITS OR AMENITIES CONTEMPLATED TO BE A PART OF THE COMMUNITY, INCLUDING PLOTS, PLATS, OR SURVEYS; AND (D) ANY REPRESENTATION MADE BY ANY AGENT OF MERITAGE THAT BUYER MAY PUT ANY OF THE HOME TO A SPECIFIED USE, OTHER THAN RESIDENTIAL. TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, ALL IMPLIED WARRANTIES (INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, HABITABILITY, AND/OR WORKMANSHIP) ARE HEREBY DISCLAIMED AND EXCLUDED BY MERITAGE, AND EXPRESSLY WAIVED BY BUYER. BUYER EXPRESSLY ACKNOWLEDGES THAT THE WARRANTY PROVIDED TO BUYER AT CLOSING WILL IN NO EVENT EXTEND TO ANY CONSUMER PRODUCT, APPLIANCE, AIR CONDITIONING UNIT, FURNACE, WATER HEATER, SOLAR SYSTEM, OR OTHER EQUIPMENT INCLUDED IN THE HOME ("CONSUMER PRODUCT") IF A WARRANTY IS OR HAS AT ANY TIME BEEN PROVIDED BY THE MANUFACTURER OF THE CONSUMER PRODUCT. BUYER FURTHER WAIVES ANY RIGHT TO RECOVER FOR ANY SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY, AND PUNITIVE DAMAGES SUFFERED AS A**

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RESULT OF ANY DEFECTIVE MATERIALS OR WORKMANSHIP (EVEN IF SUCH DAMAGES ARE FORESEEABLE, AND WHETHER OR NOT BUYER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES). BUYER ACKNOWLEDGES THAT THIS SECTION CONSTITUTES AN INTEGRAL PART OF THE BASIS OF THE BARGAIN BETWEEN BUYER AND MERITAGE SET FORTH IN THE CONTRACT AND A MATERIAL CONSIDERATION FOR MERITAGE ACCEPTING THE CONTRACT, AND MERITAGE WOULD NOT HAVE ACCEPTED THE CONTRACT AND AGREED TO SELL THE HOME TO BUYER WITHOUT THE LIMITATIONS AND PROVISIONS PROVIDED IN THIS SECTION.

DS RA / / / Buyer's Initials:

B. **FHA/VA/USDA Financed Purchases.** Notwithstanding the foregoing regarding the Warranty being the only warranty with respect to the Home, in the event that Buyer actually finances the purchase of the Home with FHA Financing, VA Financing, or USDA Financing, Buyer also will be provided with a warranty intended to satisfy the warranty requirements specified by such agency (the "**Additional Warranty**"). Although Buyer will have the right to request warranty performance under the Additional Warranty, in addition to the Warranty, Buyer may not collect twice for the same issue, and amounts paid or expended for warranty performance under either the Additional Warranty or the Warranty will reduce the limit of liability remaining under both warranties. To the greatest extent allowed under applicable law, all disclaimers, limitations of liability, and waivers contained in the Contract and/or the Warranty also shall be applicable to the Additional Warranty, and Buyer will be required to comply with all terms and conditions to obtaining warranty performance specified in the Contract and/or the Warranty in obtaining warranty performance under the Additional Warranty. Accordingly, in the event that Buyer believes that ANY warranty service is needed, Buyer needs to follow the procedures for obtaining warranty service set forth in the Warranty Agreement in order to prevent delays in obtaining warranty service or other warranty service issues.

14. **Notices.** All notices to be given by either party to the other shall: (i) be in writing; (ii) be effective on the earlier of the day of personal delivery thereof to the party to whom directed, or upon receipt of a facsimile transmission (as evidenced by the automatic, successful transmission, confirmation page), or one (1) day following the date of deposit thereof with delivery charges prepaid with a national delivery service for overnight delivery, or two (2) days following the day of deposit in the United States mail, registered or certified and with postage prepaid, return receipt requested; and (iii) be addressed to the party to receive the notice at the mailing address and/or facsimile number set forth in the Buyer Information Sheet, in the case of Buyer, or to the mailing address and/or facsimile number for Meritage set forth at the end of this Agreement, in the case of Meritage, or at such other mailing address or facsimile number as may be indicated by Meritage by written notice to Buyer given in accordance with this Section. In addition, notice may be given to Buyer by, and shall be effective upon, email to the email address set forth in the Buyer Information Sheet. **No notice to Meritage of any alleged breach, default, dispute, or claim under the Contract or otherwise relating in any way to the transaction contemplated in the Contract or the construction or acquisition of the Home, or otherwise with respect to the Home, shall be effective unless and until a copy thereof has also been delivered to Meritage Homes and addressed as follows: "Meritage Homes, 8800 East Raintree Drive, Suite 300, Scottsdale, Arizona 85260, Attention: General Counsel - THIS NOTICE MAY REQUIRE IMMEDIATE ATTENTION."** The inability to deliver notices because of a changed address of which no notice was given or rejection or other refusal to accept any notice shall be deemed to be the receipt of the notice as of the date of such inability to deliver or rejection or refusal to accept.

15. **Amendments.** The Contract may be amended or modified only by a written addendum and/or updated Selection Order signed by Buyer and any Authorized Officer of Meritage. Notwithstanding the foregoing, if Buyer consists of a husband and wife or otherwise consists of more than one person, the signature of only one of such individuals comprising Buyer shall be required to enter into any addendum, updated Selection Order, or other modification to the Contract for the purposes of purchasing options, making selections, and/or providing for modifications to the Home, and each individual comprising Buyer hereby grants all other individuals comprising Buyer an irrevocable special power of attorney (coupled with an interest) to enter into such addendum, updated Selection Order, and other modifications to the Contract, and any such addendum, updated Selection Order, and other modifications executed by one of the individuals comprising Buyer shall be binding upon all individuals comprising Buyer and, once signed by an Authorized Officer of Meritage, such instrument(s) shall effectively amend the Contract.

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16. **Disputes and Remedies.**

A. **Meritage's Right to Cancel if Pre-Closing Dispute Arises.** Notwithstanding any provision contained in the Contract, if, prior to the Closing, ANY dispute (whether or not Buyer is in default under the Contract) arises between Meritage and Buyer with respect to the Home or the Contract, and Meritage, in its sole and absolute discretion, determines that such pre-Closing dispute is unable to be resolved on terms acceptable to Meritage, then in addition to any other rights and remedies available to Meritage under the Contract, Meritage shall have the unilateral right to elect to cancel the Contract by providing written notice thereof to Buyer and Escrow Agent, in which event all Earnest Money other than Option Deposits (which shall be retained by Meritage) shall be returned to Buyer and the parties shall have no further rights or obligations under the Contract (except for those that specifically survive such cancellation). Buyer acknowledges that prior to the Closing, Buyer's rights under the Contract are executory only and may be cancelled by Meritage in accordance with this Section.

B. **Meritage's Remedies for Pre-Closing Default.** In the event Buyer fails to fully and timely comply with any term or provision of the Contract prior to the Closing, or if Buyer advises Meritage in writing or orally that Buyer does not intend to or will not fully perform any provision of the Contract prior to the Closing, Meritage shall have the right to cancel the Contract and retain, as liquidated damages and not as a penalty, an amount equal to the sum of the Earnest Money and all other deposits and payments of any kind paid by Buyer. Buyer hereby acknowledges that because Meritage has taken the Lot off the market for Buyer, spent money on sales, advertising, promotion, and construction, and has incurred other costs incident to the sale contemplated by the Contract, any default by Buyer will damage Meritage. Buyer further acknowledges and agrees that the amount of the damages suffered or incurred by Meritage as a result of a pre-Closing default by Buyer under the Contract would be extremely difficult and/or impractical to ascertain, and that the liquidated damage amount described above constitutes a reasonable estimate of such damages. Such liquidated damages are in addition to, and shall not limit any obligation of Buyer in the Contract to, indemnify and/or hold Meritage harmless, and/or any other obligation of Buyer that survives the cancellation of the Contract. In addition, in the event Buyer fails to timely perform Buyer's obligations at Closing and Meritage does not cancel the Contract as a result thereof, Meritage shall have the right to charge Buyer a late fee in an amount equal to the greater of: (A) interest on the unpaid portion of the Purchase Price at the rate of fifteen percent (15%) per annum; or (B) two hundred fifty dollars ($250.00) for each calendar day from the date of the scheduled Closing until the date Buyer fully performs Buyer's obligations under the Contract; but in either case, not more than the maximum amount permitted under applicable law. Such late fee shall be an additional cost payable by Buyer at Closing and shall be in addition to Meritage's other rights and remedies under the Contract. Such late fee shall not be applicable where prohibited by applicable federal or state laws or regulations.

C. **Buyer's Remedies for Pre-Closing Default.** SUBJECT TO THE TERMS AND PROVISIONS OF SECTION 11.A ABOVE REGARDING ANY INABILITY OF MERITAGE TO DELIVER MARKETABLE TITLE, IF MERITAGE OTHERWISE FAILS TO SUBSTANTIALLY COMPLY WITH THE TERMS AND CONDITIONS OF THE CONTRACT PRIOR TO THE CLOSING, BUYER SHALL DELIVER TO ESCROW AGENT AND MERITAGE A WRITTEN NOTICE DETAILING THE PRE-CLOSING DEFAULT OF MERITAGE. MERITAGE SHALL HAVE TWENTY (20) DAYS FROM THE RECEIPT OF SUCH NOTICE IN WHICH TO REMEDY THE PRE-CLOSING DEFAULT, EXCEPT THAT IF THE REQUIRED PERFORMANCE CANNOT REASONABLY BE COMPLETED BY MERITAGE WITHIN SUCH 20-DAY PERIOD, THEN MERITAGE SHALL HAVE A REASONABLE PERIOD OF TIME WITHIN WHICH TO REMEDY THE PRE-CLOSING DEFAULT. IF MERITAGE DOES NOT REMEDY THE PRE-CLOSING DEFAULT WITHIN THE TIME PROVIDED IN THE IMMEDIATELY PRECEDING SENTENCE, BUYER, AS BUYER'S SOLE AND EXCLUSIVE REMEDY, MAY EITHER: (I) CANCEL THE CONTRACT AND RECEIVE A REFUND OF THE EARNEST MONEY; OR (II) PURSUE SPECIFIC PERFORMANCE OF THE CONTRACT, AND BUYER HEREBY EXPRESSLY WAIVES ANY OTHER RIGHTS AND REMEDIES BUYER MAY HAVE AT LAW OR IN EQUITY WITH RESPECT TO SUCH DEFAULT. BUYER ACKNOWLEDGES THAT THE PROVISIONS OF THIS PARAGRAPH ONLY APPLY TO PRE-CLOSING DISPUTES/DEFAULTS BETWEEN THE PARTIES AND, THEREFORE, SUCH PROVISIONS ARE NOT AND WILL NOT BE APPLICABLE TO ANY ALLEGED CONSTRUCTION DEFECTS OR DEFICIENCIES WITH RESPECT TO THE HOME OR ANY DISPUTE OR CLAIM RELATED TO THE WARRANTY OR THE WARRANTY AGREEMENT (AND/OR THE ADDITIONAL WARRANTY, AS APPLICABLE), OR ANY OTHER DISPUTE OR CLAIM ARISING AFTER CLOSING, BECAUSE THE PARTIES' RIGHTS AND REMEDIES WITH RESPECT TO SUCH MATTERS WILL BE ADDRESSED IN ACCORDANCE WITH THE TERMS AND

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PROVISIONS APPLICABLE THERETO IN THE CONTRACT. TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, BUYER HEREBY WAIVES THE RIGHT TO PURSUE AN ACTION AGAINST MERITAGE FOR ANY MONETARY DAMAGES OF ANY NATURE FOR ANY PRE-CLOSING DEFAULT, INCLUDING, WITHOUT LIMITATION, ACTUAL, SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY, AND PUNITIVE DAMAGES.

Buyer's Initials: RA / / / /

D. **Resolution of Post-Closing Disputes.**

i. **Meritage's Right to Repair under State Law.** Meritage expressly reserves all rights to notice and an opportunity to repair any alleged defect(s) with the Home under the Warranty Agreement. Accordingly, as an absolute prerequisite to Buyer commencing any claim against Meritage with respect to any alleged construction defects or deficiencies with respect to the Home, Buyer must first provide Meritage with timely notice and an opportunity to repair any alleged defect(s) in accordance with the Warranty Agreement.

ii. **Meritage's Repurchase Right After Closing.** Although Meritage intends that any alleged construction defects or deficiencies will be addressed in accordance with the Warranty Agreement (and/or the Additional Warranty, as applicable), in the event that Buyer initiates any claim or action against Meritage with respect to any actual or alleged construction defects or deficiencies with respect to the Home following the Closing, Meritage shall have the right and option (but not the obligation), in Meritage's sole discretion, to repurchase the Home from Buyer for an amount equal to the sum of the following less any amounts that may have been paid to Buyer under the Warranty or any other homeowner's warranty in connection with the alleged defect or deficiency: (a) the Purchase Price; (b) the value of any documented improvements made to the Home by third party contractors or decorators after the Closing that add ascertainable value to the Home; (c) Buyer's reasonable moving costs; and (d) any customary closing costs paid by Buyer in connection with the purchase of another comparable home within 90 days after the closing of the repurchase of the Home pursuant to this Section. The close of escrow for such repurchase transaction shall occur within 45 days of the date Meritage provides Buyer with written notice of Meritage's intent to exercise such repurchase rights. Title to the Home shall be reconveyed to Meritage free and clear of all monetary liens and encumbrances, and subject only to such other non-financial title matters as existed on the date of the Closing of Buyer's purchase of the Home from Meritage. All closing costs related to the repurchase of the Home by Meritage shall be paid by Meritage. The exercise by Meritage of the repurchase rights provided in this Section shall, to the fullest extent permitted under applicable law, constitute the full and final satisfaction of all claims and actions relating in any way to the Home, including, without limitation, claims relating to any actual or alleged defects and any other claims under the Contract and/or the Warranty Agreement. In the event of such repurchase of the Home by Meritage, Buyer shall promptly execute and deliver any notice of dismissal and/or other documents that may be necessary or appropriate to confirm or evidence such satisfaction.

iii. **Binding Neutral Arbitration.** Buyer and Meritage hereby agree that from and after the Closing, any dispute, claim, or controversy between them and/or any of their respective successors in interest shall be determined by binding arbitration, as provided by the Federal Arbitration Act (9 U.S.C. Section 1 et seq.) and in accordance with the terms and conditions of this Agreement, and not by or in a court of law or equity. For purposes of this paragraph, "dispute, claim, or controversy" shall include any and all disputes, claims, or controversies of any type or nature whatsoever involving Buyer (and/or any successor to Buyer) and Meritage, including, but not limited to: (a) those arising from or involving the condition of the Home and/or Meritage's construction of the Home; (b) those arising from or related in any way to this Agreement or the Warranty Agreement; and (c) those relating to any claim for personal injury or property damage allegedly sustained by Buyer. Any determination of the scope and applicability of the agreement to arbitrate, however, shall be made solely by a federal court in the state in which the Home is located.

NOTICE: BY INITIALING THE SPACE PROVIDED BELOW, YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE CONTRACT AND/OR THE WARRANTY AGREEMENT DECIDED BY BINDING NEUTRAL ARBITRATION AS PROVIDED BY THIS AGREEMENT AND THE FEDERAL ARBITRATION ACT. TO THE GREATEST EXTENT NOT CONTRARY TO STATE LAW, YOU ARE WAIVING AND GIVING UP ANY RIGHTS YOU MAY HAVE TO HAVE ANY CLAIM OR DISPUTE LITIGATED BY A COURT OR BY JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE WAIVING AND GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL EXCEPT TO THE LIMITED EXTENT PROVIDED IN THIS AGREEMENT. IF YOU REFUSE TO SUBMIT TO

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ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF APPLICABLE FEDERAL AND STATE LAW. YOUR AGREEMENT TO THIS BINDING NEUTRAL ARBITRATION PROVISION IS VOLUNTARY. I/WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT ALL CLAIMS AND DISPUTES TO BINDING NEUTRAL ARBITRATION IN ACCORDANCE HEREWITH.

Buyer's Initials: RA / / / /

iv. **Rules for Binding Neutral Arbitration.** Subject to the limitations set forth in this Agreement, the arbitration shall be administered by Judicial Arbitration and Mediation Services ("JAMS") pursuant to its Arbitration Rules and Comprehensive Procedures, including, but not limited to, the expedited procedures of JAMS Rule 16 and the JAMS Optional Arbitration Appeal Procedure, and in accordance with the Expedited Procedures in those Rules. Nothing in this Agreement, however, shall preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(a) **Demand for Arbitration.** Any demand for arbitration pursuant to this Section shall be in writing and delivered by certified mail, return receipt requested to the address specified in Section 14 of this Agreement, within the applicable statute of limitations period. **Note that pursuant to such Section, a copy of any demand made for arbitration to Meritage must be provided to Meritage Homes, 8800 East Raintree Drive, Suite 300, Scottsdale, Arizona 85260, Attention: General Counsel – THIS NOTICE MAY REQUIRE IMMEDIATE ATTENTION.** Any disputes regarding the sufficiency and timeliness of any demand for arbitration shall be resolved by the "Arbitrator" (as defined in Section 16.D.iv.(b) below). In order to constitute a valid demand for arbitration, the party demanding arbitration shall include all of the following in the written demand for arbitration: (i) a detailed description of the claim or dispute; (ii) the date upon which the condition which is the subject of the claim or dispute first arose; (iii) the names, work locations, and telephone numbers of any individuals with knowledge of the dispute; and (iv) the relief requested.

(b) **Appointment of Arbitrator.** A neutral arbitrator, (the "**Arbitrator**") shall be selected by mutual agreement of the parties. Unless Buyer and Meritage agree otherwise, the Arbitrator shall be an attorney licensed and in good standing to practice in the state in which the Home is located or a retired federal or state judge who presided in the state in which the Home is located. The arbitration proceedings shall take place at a location within forty-five (45) miles from both the Home and Meritage's nearest Division office, unless both Meritage and Buyer agree otherwise in writing. In the event Buyer and Meritage are unable to agree upon an Arbitrator, either party may declare an impasse and apply to a court of competent jurisdiction in the state in which the Home is located within ten (10) days thereafter to appoint an Arbitrator, who shall act under this Agreement with the same force and effect as if Buyer and Meritage had selected the Arbitrator by mutual agreement.

(c) **Fees and Costs.** Except as required otherwise by this Agreement or the laws of the state in which the Home is located, Buyer and Meritage shall share equally in advancing JAMS and Arbitrator fees and costs required, and each party shall bear its own attorneys' fees and costs. This provision notwithstanding, the prevailing party shall be awarded its reasonable attorneys' fees and costs to the greatest extent not otherwise contrary to state law in any litigation to enforce or compel arbitration in accordance with this Section.

(d) **Discovery and Hearing Limitations.** By entering into this Agreement, both Buyer and Meritage acknowledge and agree that one of the goals of arbitration in accordance with this Section is to create an informal process (as contrasted with proceeding in Court) to quickly and efficiently resolve their disputes with minimal cost and expense. With this objective in mind, both Buyer and Meritage agree to the following limitations and parameters:

(1) All discovery will close no later than one hundred fifty (150) days following appointment of the Arbitrator;

(2) If the claim or dispute arises from an alleged construction defect, Meritage shall be entitled reasonable access to the Home to conduct reasonable inspections and destructive testing;

(3) Each party shall be limited to no more than thirty (30) written interrogatories;

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(4) Each party shall be limited to no more than thirty (30) document requests;

(5) Each party shall be limited to three (3) depositions of non-expert witnesses and each party's depositions are to consume not more than a total of fifteen (15) hours, with no speaking objections at the depositions except to preserve privilege;

(6) All expert witnesses shall be identified in writing within sixty (60) days after the appointment of the Arbitrator and be made reasonably available for deposition within the discovery period above;

(7) The evidentiary hearing on the merits ("**Hearing**") shall commence within one hundred eighty (180) days following appointment of the Arbitrator;

(8) Upon the request of either party, the Arbitrator shall conduct a site visit;

(9) At the Hearing, each party shall have no more than two (2) days for presentation of direct evidence and for cross examination, exclusive of a site visit and reasonable opening and closing remarks; and

(10) The Arbitrator shall issue a reasoned written decision, including findings of fact and conclusions of law, within thirty (30) days following the close of the Hearing, or within thirty (30) days after service of post-hearing briefs if the Arbitrator directs the service of such briefs.

Notwithstanding the foregoing, for good cause shown, upon written request of either party the Arbitrator may modify these limitations and parameters as equitable. In doing so, however, the Arbitrator shall remain mindful of the parties' objectives to resolve their dispute(s) quickly and efficiently, with minimal cost and expense. Failure to meet any of the foregoing deadlines will not render the award invalid, unenforceable, or subject to being vacated; however, the Arbitrator may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines.

(e) **Appellate Procedures.** Buyer and Meritage hereby adopt and agree to implement the JAMS Optional Arbitration Appeal Procedure with respect to any final award in excess of $100,000, subject to the following limitations and parameters:

(1) There shall be one (1) neutral Appeal Arbitrator unless either party elects, prior to the selection of an Appeal Arbitrator, to have the appeal heard by a panel of three (3) Appeal Arbitrators. In the event a party elects the appointment of a panel of three (3) arbitrators, the requesting party shall be responsible for the cost and expense of the additional two (2) Appeal Arbitrators. Each Appeal Arbitrator shall have experience as a judge on an appellate court in the state in which the Home is located.

(2) Except as provided otherwise in this Agreement, the parties shall equally share the JAMS and Appeal Arbitrator fees and costs of the Appeal;

(3) The party requesting the appeal shall be responsible, at its sole cost and expense, for providing a certified copy of the hearing transcript and all documentary evidence to the Appeal Arbitrator and the non- requesting party. In the event both parties request the appeal, these costs and expenses shall be equally shared.

(f) **Participation by Other Parties.** Meritage may elect to have all other parties it deems necessary and/or proper included as parties to the arbitration, including, but not limited to, any subcontractors, vendors, manufactures, professionals, and/or others who provided materials, labor, and/or professional services pertaining to the Home. Meritage's failure to add such parties shall in no manner be construed as a waiver of any claims against any such third parties.

(g) **Applicable State Law.** The Arbitrator shall apply the substantive law of the state in which the Home is located to resolve the claims made, without regard to conflict or choice of law rules. Nevertheless, the Arbitrator need not strictly comply with the applicable Rules of Evidence in such state with the sole exception of those regarding the protection of privileged attorney work product and attorney-client

Lot: 0036 Buyer: Athimoolam Buyer's Initials: RA DS / / / /

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communications. Notwithstanding the foregoing provision with respect to applicable substantive law, any arbitration conducted pursuant to the terms of this Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. Section 1 et seq.).

(h) **Class/Collective Action Waiver.** Buyer and Meritage acknowledge and agree that there shall be no right or authority for any dispute or claim to be brought, heard, or arbitrated pursuant to collective action or in a representative capacity on behalf of a class, the community in which the Home is located, or the general public. In the event any party makes a claim in any forum contrary to this provision, the other party shall have the right to seek enforcement of this Class/Collective Action Waiver under the Federal Arbitration Act and seek dismissal of such class or collective action or claim. Moreover, notwithstanding any other provision of the Contract, any claim that all or part of this Class/Collective Action Waiver is unenforceable, void, or voidable may be determined only by a court of competent jurisdiction and not by an Arbitrator or Appeal Arbitrator.

(i) **Confidentiality.** The parties shall maintain the confidential nature of the arbitration and the award, including the Hearing, except as may be necessary to prepare for or conduct the hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision.

(j) **Damages.** The arbitrator(s) may award only those actual damages actually incurred by a party as a direct result of the claims, and may not award punitive or exemplary damages or any incidental, indirect, or consequential damages, including damages for lost profit, except where expressly permitted by statute, and the parties waive any right to recover any such damages.

E. **Severability.** A determination that any portion of this Section 16 is invalid or unenforceable shall not affect the enforceability of the remaining provisions of this Section 16.

F. **Waiver of Trial by Jury. IN ADDITION TO, AND WITHOUT WAIVING ANY PROVISION OF THE BALANCE OF THIS SECTION 16, BUYER, TO THE FULLEST EXTENT ALLOWED UNDER APPLICABLE LAW, HEREBY KNOWINGLY, VOLUNTARILY, IRREVOCABLY AND UNCONDITIONALLY WAIVES BUYER'S RIGHT TO TRIAL BY JURY IN ANY ACTION, LEGAL PROCEEDING, CLAIM, OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT, OR OTHERWISE) BETWEEN MERITAGE AND BUYER AND IN ANY MATTERS ARISING OUT OF OR CONNECTED IN ANY WAY WITH THE CONTRACT, AND ALL SUCH MATTERS SHALL BE HEARD BEFORE A JUDGE AND NOT A JUDGE AND NOT A JURY.**

Buyer's DS KA / / / Initials: / / /

G. **Waiver of Subrogation.** From and after Closing, Buyer shall secure and maintain insurance covering risk of loss and damage to the Home. Each of Buyer and Meritage hereby releases the other from any claims with respect to any casualty loss to the Home, or other damage to the Home, that could be insured against under the terms of standard fire and extended coverage insurance policies, regardless of the cause or origin, and mutually agree that their respective insurance companies shall have no right of subrogation against the other party on account of any such loss and each party agrees that it will request its insurance carrier to include in its policies such a clause or endorsement. Nothing in this paragraph shall be deemed to modify or otherwise affect releases of either party from liability contained elsewhere in this Agreement.

17. **State Specific Provisions.**

A. **Title Opinion and Insurance.** Buyer acknowledges that Meritage has not, directly or indirectly, required Buyer to purchase either an owner's or lender's title insurance policy from any particular insurer or agency, or at all, as a condition of the Contract. In the event that Buyer desires to obtain a title opinion and/or title insurance with respect to the Lot or otherwise to review matters affecting title to the Lot, then as soon as possible after the Agreement Date, Buyer shall cause the Escrow Agent to provide to Buyer such opinion and/or a commitment for a title insurance policy, and to deliver a copy thereof to Meritage. Buyer shall be deemed to have approved such title commitment (and, if Buyer elects to acquire a title policy, to agree to accept at or after Closing a title policy consistent with that title opinion and/or commitment, and subject to the matters identified as exceptions therein and matters described in Section 11.A above) unless Buyer delivers to Meritage and Escrow Agent a written notice of objection thereto that provides a specific, detailed itemization of each and every basis for such objection (a "**Title Objection Notice**") on or before the earlier to occur of: (i) five (5) days after Buyer's receipt of the title

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opinion/commitment; or (ii) fourteen (14) days following the Agreement Date; or (iii) the Closing date specified by Meritage in the Closing Date Notification; provided that Buyer may only provide a Title Objection Notice with respect to title exceptions shown on the title commitment that satisfy all of the following conditions: (A) such exceptions are not described in Section 11.A above; and (B) such exceptions are not customary; and (C) such exceptions have a material adverse effect on the value of the Home. If Buyer timely provides a valid Title Objection Notice, Meritage (in its sole discretion) may cancel the Contract or attempt to cause the title insurer to delete or endorse over the title matters identified in the Title Objection Notice. If Meritage fails to cause the title insurer to agree to delete or endorse over such title matters within thirty (30) days after receipt of a valid Title Objection Notice, Buyer may cancel the Contract by delivering written notice thereof to Meritage and Escrow Agent within thirty-five (35) days after delivery of a Title Objection Notice to Meritage, in which event the Earnest Money shall be returned to Buyer. If Buyer fails to cancel the Contract timely, then Buyer shall be conclusively deemed to have waived all such title objections. Buyer acknowledges that in no event will Meritage be obligated to obtain and/or deliver any so-called "long-form" of lien affidavit or other affidavit executed by any of Meritage's subcontractors and/or material suppliers in connection with any title opinion and/or insurance sought by Buyer, and Buyer consents to any exceptions related thereto other than as a result of liens actually recorded in the public records of the county in which the Home is located by such subcontracts and/or material suppliers.

B. **Brokerage Disclosure.** Buyer acknowledges that Meritage may be a licensed South Carolina real estate broker and/or may employ licensed South Carolina real estate broker(s), none of whom represents Buyer. Meritage will only pay a co-brokerage fee or commission to a licensed South Carolina broker that represents Buyer from the inception of Buyer's dealings with Meritage (the "**Buyer's Broker**"), and only if such Buyer's Broker is identified as the Buyer's Broker below Buyer's signature on this Agreement and in the separate written Broker Registration and Commission Addendum required to be executed and delivered by Buyer's Broker to Meritage concurrently with the execution of this Agreement. If no such Buyer's Broker is identified and/or no such Broker Registration and Commission Addendum is accepted and executed by Meritage in the same manner specified for acceptance and execution of this Agreement, Meritage shall have no responsibility or liability to pay any co-brokerage fee in connection with the Contract and/or Buyer's purchase of the Home. Buyer represents and warrants to Meritage that Buyer has not dealt with any agents, brokers, salespersons, finders, or other persons in connection with the Contract and/or Buyer's purchase of the Home except as expressly disclosed as the Buyer's Broker below Buyer's signature on this Agreement and in the Broker Registration and Commission Addendum, if applicable, and Buyer shall indemnify and hold Meritage harmless for, from, and against any and all loss, damages, claims, demands, obligations, costs, liability, expenses, and responsibility (including, without limitation, all attorneys' fees and costs incurred by Meritage) resulting in any way from any breach of such representation by Buyer, which obligations will survive the termination of the Contract and/or the Closing.

C. Megan's Law Disclosure. Meritage discloses as follows:

> Notice: Pursuant to applicable law, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the South Carolina Law Enforcement Division at www.icrimewatch.net/index.php?AgencyID=54575&disc. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP code in which the offender resides.

Meritage has not and will not check for any offenders in this area. Should you wish to check for offenders in the area in or around the Home that is of concern to you, please refer to the Internet Web site identified in the preceding paragraph.

D. In the event the Home is affected by the provisions of the South Carolina Coastal Tidelands & Wetlands Act (Section 48-39-10, et.seq., South Carolina Code of Laws), an Addendum will be attached to this Agreement incorporating the required disclosures at Buyer's expense.

E. **Closing.** Notwithstanding anything to the contrary in Section 10, The Buyer shall be responsible for excise stamp taxes applicable to the deed pursuant to Section 12-24-20, South Carolina Code of Laws. Additionally, Buyer shall be responsible for applying for any applicable property tax exemptions and/or reductions available to property owners in South Carolina.

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F. **Earnest Money.** Buyer acknowledges that Meritage intends to use the Earnest Money for construction of the Home.

G.

18. **Miscellaneous.**

A. **Attorneys' Fees.** In the event Meritage retains the services of one or more attorneys to enforce or protect its rights or remedies under the Contract, and whether or not an action or claim is filed, Meritage shall be entitled to recover from Buyer all legal fees and all other costs, including court costs, incurred by Meritage in connection therewith.

B. **No Assignment.** Buyer may not sell, assign, hypothecate, or otherwise transfer any of Buyer's rights under the Contract, voluntarily, involuntarily, or by operation of law (collectively, "**Transfer**"), without the prior written consent of Meritage, which may be withheld in Meritage's sole discretion. If Buyer attempts to Transfer any of Buyer's interest under the Contract or if Buyer enters into another escrow for the concurrent resale of the Home, Buyer shall be in default under the Contract. Escrow Agent is instructed not to assist or participate in any way in the consummation of any so-called "**double-escrow**" initiated by Buyer. Subject to the foregoing prohibition, the Contract shall inure to the benefit of and bind the parties hereto and their heirs, executors, representatives, administrators, successors, and assigns. Notwithstanding the foregoing, in the event of the death of any individual comprising Buyer, Meritage shall, in its sole and absolute discretion, have the right to cancel the Contract, in which event the Earnest Money shall be returned to Buyer, less the price of any Structural and Landscape Selections, Design Selections and Options, and Custom Selections and Options that have been ordered, contracted for, or implemented by Meritage and that, in Meritage's sole discretion, do not add value to the Home equal to or greater than the price of such item.

C. **Non-Waiver.** Nothing contained in the Contract shall in any way be construed to prevent Meritage from waiving or modifying any conditions or requirements contained in the Contract, provided that any such waiver or modification shall not be effective except for the instance and circumstances particularly specified, and unless set forth, in a writing executed by an Authorized Officer of Meritage, and provided further that any such waiver and/or modification shall be at Meritage's sole discretion and Meritage shall have no obligation to agree to any such waiver and/or modification. Any failure or delay of Meritage to enforce any provision of the Contract shall not be construed as modifying in any way the terms of the Contract or as waiving Meritage's rights to enforce the provisions of the Contract. No waiver of any of Meritage's rights under the Contract in a particular instance shall preclude Meritage's subsequent exercise of its rights under the Contract.

D. **Governing Law and Venue.** The Contract and the rights of the parties under the Contract shall be governed by the laws of the state in which the Home is located. Subject to and without waiving any provision of the Contract relating to the resolution of disputes, including, without limitation, Section 16 of this Agreement, any action to enforce the Contract shall be brought in the state or federal court in the county in which the Home is located and each of Buyer and Meritage hereby consents to those courts exercising personal jurisdiction over it. Buyer certifies that Buyer is, of Buyer's own volition, executing the Contract while in the state in which the Home is located. The Contract shall not be more strictly construed against one party by virtue of the fact that it may have been physically prepared by one party or by its attorneys, because both parties (and their respective attorneys, where applicable) have participated and/or had the opportunity to participate in the negotiation of the Contract.

E. **Captions.** The captions in the Contract are for convenience of reference only and in no way define, describe, extend, or limit the scope or the intent of the Contract or any provisions hereof.

F. **Time is of the Essence.** Time is of the essence of the Contract and every term and provision of the Contract.

G. **Severability.** In the event any term, condition, or provision of the Contract is declared illegal, invalid, or unenforceable for any reason, the remaining terms, conditions, and provisions shall remain in full force and effect and shall in no way be invalidated, impaired, or affected thereby.

H. **Counterparts.** The Contract, and any addendum constituting a part of the Contract, may be executed in two or more counterparts, each of which shall be deemed an original, and all of which, taken together, shall constitute and be taken as one and the same instrument.

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I. **Survival.** All representations, releases, discharges, agreements or other obligations to defend, hold harmless, and/or indemnify, dispute resolution provisions, and covenants or agreements of Buyer that are set forth in the Contract and that contemplate performance that may occur after termination of the Contract and/or the Closing will survive any termination of the Contract and/or the Closing. Without limiting the generality of the foregoing, or the survival of any other express provisions to similar effect, the terms and conditions contained in the Schedules to this Agreement will survive the termination of the Contract and/or the Closing.

J. **No Right to Buyer's Lien; Recording.** Neither the Contract, the rights of Buyer under the Contract, nor any Earnest Money shall constitute a lien upon the Home or any portion thereof. Buyer shall not record in any public records any portion of the Contract, nor any notice thereof, nor any Notice of Lis Pendens in respect to the Home. Any such recording shall constitute a wrongful lien and shall be a material default by Buyer under the Contract.

K. **English Language Comprehension.** Buyer represents that Buyer fully comprehends and understands English and all terms, provisions, and conditions of the Contract or, if such is not the case, that competent and effective language assistance has been obtained by Buyer, prior to Buyer's signing the Contract, and Buyer assumes full responsibility for language interpretation and agrees to abide by all terms, conditions, and provisions of the Contract and waives any defense thereto in any way relating to the fact that the Contract is written in English.

L. **Marketing.** Buyer agrees that Meritage may use exterior and/or interior photos of the Home in promotional and advertising materials from and after Closing without restriction.

M. **Joint Obligations.** If Buyer is comprised of more than one person and/or entity, then all of the persons and entities comprising Buyer shall be jointly and severally liable for the performance and/or satisfaction of Buyer's obligations under the Contract.

N. **Legal and Other Review. Buyer understands that the Contract consists of important legally binding provisions with serious consequences. Buyer represents and warrants that Buyer has had full and fair opportunity to consult with legal counsel of Buyer's own choosing and/or a real estate agent of Buyer's own choosing concerning the Contract and the transaction provided for in the Contract and, voluntarily, knowingly, and without reservation has executed the Contract.**

O. **Third Party Business Providers.** Buyer acknowledges that Meritage has, or may establish from time to time, business, marketing referral, and/or alliance relationships with various third party service and/or product providers, including, without limitation: providers of telecommunications, cable/satellite TV, internet services, alarm companies, pest control services, and/or other home-related services. By signing this Agreement, Buyer authorizes Meritage to share with such providers Buyer's first and last names (or entity name, as applicable), mailing address, and telephone numbers provided by Buyer to Meritage. Except as specifically provided otherwise in the Contract, if applicable, Buyer is under no obligation to accept any offers for services, products, and/or promotions from any such providers, and is free to decline all such offers and promotions. Further, Buyer may notify any such provider(s) at any time that Buyer requests that such provider(s) not call or contact Buyer. If Buyer chooses to purchase any of the services and/or products offered by such provider(s), Buyer acknowledges that all matters related to such services and/or products are the sole and absolute responsibility of such provider(s), including without limitation, all installation, service, repair, maintenance, warranty, corrective actions, and/or other actions arising out of or related in any way to the products or services provided by such provider(s), and Buyer agrees that Meritage has no, and will have no, obligation, responsibility, or liability whatsoever with respect to any of such matters. Meritage may or may not receive monetary and/or non-monetary consideration and compensation from any of these provider(s) for providing Buyer's information as provided above.

P. **Buyer's OFAC Representations and Acknowledgment.** Buyer represents and warrants to Meritage that Buyer is not, and to the extent that Buyer is not a natural person, none of Buyer's constituents or affiliates is: (i) identified on the OFAC List (as defined below in this paragraph) or on the Annex to, or is otherwise subject to the provisions of, the Executive Order (as defined below in this paragraph); (ii) a person or entity with whom a citizen of the United States is prohibited to engage in transactions by any trade embargo, economic sanction, or other prohibition of U.S. law, rule, regulation, or Executive Order of the President of the United States; (iii) owned or controlled by, or acting for or on behalf of, any person or entity that is listed on the OFAC List or on the Annex to, or is otherwise subject to the provisions of, the Executive Order; (iv) a person or entity with whom Meritage is prohibited from dealing or otherwise engaging in any transaction by any terrorism or money laundering

Lot: 0036 Buyer: Athimoolam Buyer's Initials: DS RA / / / /

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law, including, but not limited to, the Executive Order and the Patriot Act; (v) a person or entity who commits, threatens or conspires to commit, or supports "terrorism," as defined in the Executive Order; or (vii) a person or entity who is affiliated with any person or entity listed above. As used in the Contract, the term (A) "**OFAC List**" means the list of specially designated nationals and blocked persons subject to financial sanctions that is maintained by the U.S. Treasury Department, Office of Foreign Assets Control ("**OFAC**"), and any other similar list maintained by OFAC pursuant to any law, rule, regulation, or Executive Order of the President of the United States, including, without limitation, trade embargo, economic sanctions, or other prohibitions imposed by Executive Order of the President of the United States; and (B) "**Executive Order**" means Executive Order No. 13224 on Terrorist Financing, effective September 24, 2001, and relating to Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, as amended or modified from time to time. Buyer covenants and agrees that all of the foregoing representations will remain true and correct at all times prior to and as of the Closing. Buyer acknowledges that any breach of any of the foregoing representations will constitute a material default under the Contract. Buyer hereby authorizes Meritage to conduct any and all inquiries and other diligence deemed necessary or desirable by Meritage to confirm the foregoing representations of Buyer, and Buyer waives any and all claims against Meritage arising in any way, directly or indirectly, as a result of any such inquiries.

19. **Entire Agreement. Meritage wishes to avoid any misunderstanding concerning the purchase of the Home. It is the policy of Meritage not to enter into any oral agreement or to ask any Buyer to rely on any oral representations concerning the Home, the Community, or the surrounding area. As a result, the entire agreement between Buyer and Meritage must be in writing and, therefore, Buyer must write in the spaces provided below ANY understandings, representations, warranties, guaranties, or promises that are not set out in the Contract but that have been made by Meritage or its purported agents or employees and upon which Buyer is relying in making this purchase, and if there are none, Buyer shall so indicate by writing the word "NONE":** NONE

Buyer's failure to write anything in the space above shall be conclusively deemed Buyer's affirmation that "NONE" is applicable thereto. To induce Meritage to accept the Contract, and as material consideration to Meritage, Buyer hereby acknowledges that: (i) there are no understandings, representations, warranties, guarantees, or promises of any kind that have been made to induce Buyer to execute the Contract or to acquire the Home except as specifically set forth in the Contract, and the Contract supersedes any and all prior understandings and agreements between the parties; (ii) all advertising materials are superseded by the Contract; (iii) the Contract sets forth in full the entire agreement between the parties; (iv) Buyer has not relied on any oral agreement, statement, or representation that is not expressly set forth in the Contract; and (v) no person on behalf of Meritage is authorized to make any future oral agreement upon which Buyer may rely to cancel, change, or modify any portion of the Contract.

Buyer's Initials: _____/_____/_____/_____

20. Execution of this Agreement by Buyer constitutes an offer to purchase the Home. The Contract shall be deemed accepted by and binding upon Meritage only if and when it is executed by an authorized officer of Meritage (an "**Authorized Officer**"), and the execution or acceptance of the Contract by any salesperson, broker, agent, or employee of Meritage other than an Authorized Officer of Meritage shall NOT be binding upon Meritage. Unless the Contract is accepted by Meritage within thirty (30) days after being executed and delivered to Meritage by Buyer, this offer shall be deemed revoked and the Initial Deposit shall be returned to Buyer. The "**Agreement Date**" shall be the date of acceptance of this Agreement by an Authorized Officer. Unless and until the Contract has been accepted by Meritage and Meritage has delivered a fully executed copy of this Agreement to Buyer, Meritage shall be free to accept ANY other offer for the Home and/or Lot without any liability to Buyer as a result thereof. Buyer acknowledges and agrees that Buyer's offer and Buyer's execution of this Agreement does not constitute a reservation or an option to purchase the Home.

|AGREEMENT CONTINUES ON FOLLOWING PAGES|

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THIS IS A LEGALLY BINDING CONTRACT. READ IT CAREFULLY BEFORE SIGNING.

BUYER:

DocuSigned by:
Raglee Athimoolam 4/10/2015
Signature 0725415... Date

Signature Date

Signature Date

Signature Date

Signature Date

Name and Address of Buyer's Broker/Agent: _____

Co-Broker Commission:0 (See Broker Registration & Commission Addendum for details)

RECEIVED (But Not Accepted), AND RECEIPT OF THE INITIAL DEPOSIT ACKNOWLEDGED:

By: Janice Horne Janice Horne 4/10/15
Meritage's Sales Associate Date

THIS AGREEMENT SHALL NOT BE EFFECTIVE UNLESS AND UNTIL IT IS ACCEPTED BY MERITAGE, WHICH SHALL OCCUR ONLY IF THE FOLLOWING IS FULLY SIGNED AND COMPLETED.

MERITAGE'S ACCEPTANCE:

MERITAGE HOMES OF SOUTH CAROLINA, INC.,
an Arizona corporation

By: _____

Its: Division President
(must be a Division President, Division Finance Department Head, or Corporate Officer)

Date: 4/10/15

Meritage address:

Meritage Homes of South Carolina, Inc.
P.O. Box 1097
Douglasville, GA 30133
Fax No.: 770.947.4026

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	IN THE COURT OF COMMON PLEAS Docket No.: 2017-CP-04-376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	**THIRD-PARTY SUMMONS**
MERITAGE HOMES OF SOUTH CAROLINA, INC., Third-Party Plaintiff, v. 84 LUMBER COMPANY, LP; DRC INVESTMENT, LLC d/b/a ADVANTACLEAN OF THE UPSTATE; DOWN TO EARTH GRADING, LLC; GGG CONSTRUCTION, LLC; GUTTER CUTTERS, INC.; HH CONTRACTING, LLC; HARBIN COMPANY, LLC; M7M FOUNDATIONS, LLC; METRO GARAGE DOOR, INC.; SANDLAPPER CONCRETE, LLC; SDR RESTORATION AND CONSTRUCTION, LLC; SEALING AGENTS WATERPROOFING, INC.; and STAR BUILDERS, INC., Third-Party Defendants.	

TO THIRD-PARTY DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Third-Party Complaint in this lawsuit, a copy of which is served upon you, and to serve a copy of your Answer to this Third-Party Complaint upon the subscriber at 40 Calhoun Street, Suite 200, Charleston, South Carolina 29401 within thirty days after service, exclusive of the day of such service. If you fail to answer the Third-Party Complaint, judgment by default will be rendered against you for the relief demanded.

TURNER PADGET

s/David S. Cobb
David S. Cobb (Bar Number 66569)
Post Office Box 22129
Charleston, South Carolina 29413-2129
Direct: (843) 576-2803
Fax: (843) 577-1629
dcobb@turnerpadget.com

Charleston, South Carolina

February 11, 2020

ATTORNEYS FOR DEFENDANT/
THIRD-PARTY PLAINTIFF

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ELECTRONICALLY FILED - 2020 Feb 11 12:05 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	IN THE COURT OF COMMON PLEAS Docket No.: 2017-CP-04-376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	**ANSWER TO AMENDED COMPLAINT AND THIRD-PARTY COMPLAINT**
MERITAGE HOMES OF SOUTH CAROLINA, INC., Third-Party Plaintiff, v. 84 LUMBER COMPANY, LP; DRC INVESTMENT, LLC d/b/a ADVANTACLEAN OF THE UPSTATE; DOWN TO EARTH GRADING, LLC; GGG CONSTRUCTION, LLC; GUTTER CUTTERS, INC.; HH CONTRACTING, LLC; HARBIN COMPANY, LLC; M7M FOUNDATIONS, LLC; METRO GARAGE DOOR, INC.; SANDLAPPER CONCRETE, LLC; SDR RESTORATION AND CONSTRUCTION, LLC; SEALING AGENTS WATERPROOFING, INC.; and STAR BUILDERS, INC., Third-Party Defendants.	

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Defendant answers the First Amended Complaint, files the Third-Party Complaint, and respectfully shows upon this Court:

FOR A FIRST DEFENSE

1. Except as specifically admitted, qualified, or explained, Defendant denies the allegations and demands strict proof of each allegation.

2. Defendant admits the allegations of Paragraphs 1-3.

3. Defendant admits only so much of the allegations of Paragraph 4 as allege a civil lawsuit may be filed with the Anderson County Court of Common Pleas; however, this lawsuit is subject to binding arbitration.

4. Defendant admits only so much of the allegations of Paragraphs 5-9 as allege Defendant was the general contractor.

5. Paragraph 10 does not require a response.

6. Paragraph 11 is a statement of law, to which no response is required.

7. Defendant denies the allegations of Paragraphs 12-13.

8. Paragraph 14 does not require a response.

9. Defendant denies the allegations of Paragraphs 15-16.

10. Paragraph 17 does not require a response.

11. Defendant denies the allegations of Paragraphs 18-19.

AS AN ADDITIONAL DEFENSE
(Comparative Negligence)

12. FURTHER ANSWERING, any injury and damage sustained by Plaintiffs may have been caused by the negligence or willfulness of Plaintiffs, combining, concurring, and contributing with the negligence or willfulness, if any, by others. Because Plaintiffs' negligence or willfulness may be greater than the alleged negligence or willfulness of one or more adverse parties, Plaintiffs may be barred from recovery.

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AS AN ADDITIONAL DEFENSE
(Comparative Negligence)

13. FURTHER ANSWERING, any injury and damage sustained by Plaintiffs may have been caused by the negligence or willfulness of Plaintiffs, combining, concurring, and contributing with the negligence or willfulness, if any, by others. Therefore, the Court should reduce any recovery awarded to Plaintiffs for the alleged injuries and damage based upon the percentage of negligence or willfulness attributed to Plaintiffs.

AS AN ADDITIONAL DEFENSE
(Punitive Damages)

14. FURTHER ANSWERING, any award of punitive damages would violate the constitutional safeguards provided by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution because the determination of punitive damages does not bear any reasonable relationship to the amount of actual damages, if any, suffered by or awarded. Further, this party pleads the recovery limits of S.C. Code Ann. §15-32-530 and any other limitation on punitive damages allowed by Federal or State law.

AS AN ADDITIONAL DEFENSE
(Reservation of Rights)

15. FURTHER ANSWERING, Defendant has not had an opportunity to conduct a sufficient investigation or engage in adequate discovery about the allegations of this lawsuit. Defendant gives notice of the intent to assert any further affirmative defenses that any investigation supports, including, but not limited to, defenses that the action is barred in whole or in part by any applicable statute, contract, release, covenant, or the doctrine of laches. Thus, Defendant reserves the right to amend this pleading to assert any such defenses.

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AS AN ADDITIONAL DEFENSE
(Third Party)

16. FURTHER ANSWERING, any injury or damage sustained was due to and caused by the negligence, gross negligence, willfulness, wantonness, or carelessness on the part of some third party over whom Defendant had or has no authority or control.

AS AN ADDITIONAL DEFENSE
(Failure to State a Claim)

17. FURTHER ANSWERING, the allegations of the First Amended Complaint do not state facts sufficient to constitute a cause of action, and this Court should dismiss the lawsuit.

AS AN ADDITIONAL DEFENSE
(Arbitration)

18. FURTHER ANSWERING, this Court must say this lawsuit and compel arbitration pursuant to the Federal Arbitration Act and South Carolina law.

AS AN ADDITIONAL DEFENSE
AND AS A THIRD-PARTY COMPLAINT

Defendant/Third-Party Plaintiff files this Third-Party Complaint and alleges:

1. Plaintiffs allege various issues arising from the construction of their home and filed suit in the Court of Common Pleas in Anderson County, South Carolina.

2. After filing the lawsuit, Plaintiffs identified alleged deficiencies with the construction of their home, including water intrusion and breaches with the building envelope and other elements of construction. Further, Plaintiffs alleged resulting damages from these construction deficiencies and from the work performed and omitted by Subcontractors.

3. Meritage was the general contractor for the construction of the home,

but did not self-perform any of the work. All work on the home was performed by subcontractors.

4. Meritage denies the allegations of the First Amended Complaint, but in the event that Plaintiffs are successful in proving their claims, Meritage alleges that all work was completed by Subcontractors as described more specifically below.

5. 84 Lumber Company, LP is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including providing framing and roofer materials and/or labor to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, 84 Lumber Company, LP is liable to Meritage.

6. DRC Investment, LLC d/b/a Advantaclean is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including providing basement and attic remediation to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that the Keeners establish this claim, DRC Investment, LLC d/b/a Advantaclean is liable to Meritage and the Keeners.

7. Down to Earth Grading, LLC is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including providing lot clearing and grading final grading to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, Down to Earth Grading, LLC is liable to Meritage.

8. GGG Construction, LLC is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including providing the concrete slabs and driveways to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, GGG Construction, LLC is liable to Meritage.

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9. Gutter Cutters, Inc. is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including providing gutters and downspouts to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, Gutter Cutters, Inc. is liable to Meritage.

10. HH Contracting, LLC is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including providing framing labor to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, HH Contracting, LLC is liable to Meritage.

11. Harbin Company, LLC is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including installing all stone, brick, and block to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, Harbin Company, LLC is liable to Meritage.

12. M&M Foundations, LLC is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including installing concrete basement walls and foundations to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, M&M Foundations, LLC is liable to Meritage.

13. Metro Garage Door, Inc. Down to Earth Grading, LLC is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including supplying and installing the garage doors to the home. Plaintiffs alleged deficiencies in this work,

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which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, Metro Garage Door, Inc. is liable to Meritage.

14. Sandlapper Concrete, LLC is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including providing concrete and installing the basement footings and walls to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, Sandlapper Concrete, LLC is liable to Meritage.

15. SDR Restoration and Construction, LLC is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including installing the siding and certain metal flashings to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, SDR Restoration and Construction, LLC is liable to Meritage.

16. Sealing Agents Waterproofing, Inc. is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including installing the weather resistant barrier and interior basement waterproofing to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, Sealing Agents Waterproofing, Inc. is liable to Meritage.

17. Star Builders, Inc. is a corporation organized and existing under the laws of one of the states of the United States that engaged in substantial business in South Carolina, including framing the deck and component parts to the home. Plaintiffs alleged deficiencies in this work, which Plaintiff alleged has resulted in damages to the home. To the extent that Plaintiffs establish this claim, Star Builders, Inc. is liable to Meritage.

18. Each Subcontractor's contract with Meritage requires binding arbitration.

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CLAIM I: BREACH OF CONTRACT

19. Meritage re-alleges the foregoing paragraphs as if set forth verbatim.

20. Third-Party Defendants (collectively referred to as "the Subcontractors"), entered into agreements containing provisions requiring them to perform their respective work and provide their respective materials in accordance with the applicable contracts, plans and specifications, industry standards, manufacturer's installation instructions, and applicable building codes.

21. Based on the allegations of Plaintiffs' First Amended Complaint, Plaintiffs contend that the Subcontractors failed to do so.

22. The Subcontractors' failure to do so constitutes a breach of each's contract with Meritage.

23. Based on the allegations by Plaintiffs, and without admitting the veracity of those allegations, if Plaintiffs are successful, the Subcontractors have breached their contracts, and Meritage is entitled to recover from the Subcontractors for any and all costs, damages, settlements, judgments, expenses, or fees, including attorney's fees, incurred by Meritage on account of Plaintiffs' allegations.

24. Meritage is entitled to recover from the Subcontractors for the injuries, damages, and losses Meritage suffers as a result of these breaches, including for any amounts it must pay to Plaintiffs if successful on their claims and any amounts it incurs in defending against these claims, including attorney's fees.

CLAIMS II: CONTRACTUAL INDEMNIFICATION

25. Meritage re-alleges the foregoing paragraphs as if set forth verbatim.

26. Each of the Subcontractors' contracts requires the Subcontractors to indemnify, defend and hold Meritage harmless "for, from and against any and all Claims..., regardless of whether or not the Claim is caused in part by an Indemnitee..." The contracts also call for Meritage to be an "Additional Insured" under the applicable insurance policy procured by each Subcontractor.

27. As a result of Plaintiffs' claims against Meritage as to each of the

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Subcontractors' respective scopes of work, each of the Subcontractors owes Meritage a duties of defense and indemnification.

28. Meritage is entitled to recover from the Subcontractors for the injuries, damages, and losses Meritage suffers, including for any amounts it must pay to Plaintiffs if successful on their claims and any amounts it incurs in defending against these claims, including attorney's fees.

CLAIM III: BREACH OF WARRANTY

29. Meritage re-alleges the foregoing paragraphs as if set forth verbatim.

30. The Subcontractors had an obligation to perform their work pursuant to an implied warranty of workmanlike service as imposed by South Carolina law.

31. Based on the allegations by Plaintiffs, and without admitting the veracity of the allegations, if Plaintiffs are successful, the Subcontractors would have breached this implied warranty, causing injury, loss, or special damages to Meritage for which the Subcontractors are responsible.

32. Meritage is entitled to recover from the Subcontractors for the injuries, damages, and losses Meritage has suffered as a result of these breaches, including for any amounts it must pay to Plaintiffs if successful on their claims and any amounts it incurs in defending against these claims, including attorney's fees.

CLAIM IV: EQUITABLE INDEMNIFICATION

33. Meritage re-alleges the foregoing paragraphs as if set forth verbatim.

34. A special relationship existed between Meritage and the Subcontractors as a result of the relationship of General Contractor and Subcontractor on Plaintiffs' property.

35. Based on the allegations, and without admitting the veracity of the allegations, if Plaintiffs are successful, the Subcontractors owe Meritage indemnity in equity for any and all losses and expenses, fees, fines, judgments, or other amounts, including attorney's fees and costs, and to reimburse and hold Meritage harmless for any losses resulting for their conduct.

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CLAIM V: NEGLIGENCE

36. Meritage re-alleges the foregoing paragraphs as if set forth verbatim.

37. The Subcontractors owe Meritage a duty of due care to perform their work in conformity with the applicable subcontracts, plans, specifications, industry standards, applicable building codes, and manufacturer's installation instructions.

38. Based on the allegations by Plaintiffs, and without admitting the veracity of the allegations, if Plaintiffs are successful, the Subcontractors would have breached this duty of due care owed to Meritage and have proximately caused Meritage injuries, damages, losses, and special damages for which the Subcontractors are responsible.

WHEREFORE, Defendant/Third-Party Plaintiff prays as follows:

1. That Plaintiffs have and recover nothing of the Defendant/Third-Party Plaintiff;

2. That the costs of this action be taxed to Plaintiffs or some party other than Defendant/Third-Party Plaintiff;

3. That Defendant/Third-Party Plaintiff recover what it seeks in its Third-Party Complaint from Third-Party Defendants; and

4. Such other and further relief as is just and proper.

TURNER PADGET

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Direct: (843) 576-2803
Fax: (843) 577-1629
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ATTORNEYS FOR DEFENDANT/
THIRD-PARTY PLAINTIFF

Charleston, South Carolina

February 11, 2020

Elizabeth Beasley

From: Elizabeth Beasley
Sent: Wednesday, September 29, 2021 8:47 AM
To: John Harjehausen; McIntosh, Lawton Secretary (Tammy Jennings); McIntosh, Lawton Law Clerk (Grace Kerley)
Cc: 'rtl@lylesfirm.com'; 'cworsham@lylesfirm.com'; 'kmn@lylesfirm.com'; 'rhemphill@mcdonaldpatrick.com'; 'preeves@gwblawfirm.com'; 'bboyd@murphygrantland.com'; 'JRogers@wardfirm.com'; 'cgraham@wardfirm.com'; 'rteague@wardfirm.com'; 'jgarraux@richardsonplowden.com'; Jim Walsh; David Schroeder; Megan Clark; 'JAtkins@clawsonandstaubes.com'; 'etonnsen@etblawfirm.com'; 'pbradley@etblawfirm.com'; 'aprice@etblawfirm.com'; 'George.james@mgclaw.com'; 'trippett.boineau@mgclaw.com'; 'dpowers@gwblawfirm.com'; 'cmassingill@gwblawfirm.com'; 'kjohnson@gwblawfirm.com'; 'kbarney@gwblawfirm.com'; 'dcobb@turnerpadget.com'; 'pja@lylesfirm.com'; 'slittle@mcdonaldpatrick.com'; 'mcohen@mcdonaldpatrick.com'; 'ahouser@gwblawfirm.com'; 'mtansey@murphygrantland.com'; 'bawilson@murphygrantland.com'; 'ssantana@wardfirm.com'; 'kparham@wardfirm.com'; 'rray@wardfirm.com'; 'kjandron@richardsonplowden.com'; 'khunt@clawsonandstaubes.com'; 'aprice@etblawfirm.com'; 'mrutland@mgclaw.com'; 'jsaxton@grsm.com'; 'colson@grsm.com'; 'sasmith@grsm.com'; 'hhagen@turnerpadget.com'; 'sbethell@turnerpadget.com'; 'rhemphill@mcdonaldpatrick.com'; 'mcohen@mcdonaldpatrick.com'
Subject: RE: 2017CP0400376-Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant

Thank you. I will mark this matter as withdrawn and remove it from the roster. It will not be rescheduled.

S. Elizabeth Beasley
Common Pleas Docket Clerk & ADR Coordinator
Anderson County Clerk of Court's Office
P.O. Box 8002, Anderson, SC 29622
864-260-4298|864-260-4718(fax)

From: John Harjehausen <jharjehausen@clarksonwalsh.com>
Sent: Tuesday, September 28, 2021 5:04 PM
To: Elizabeth Beasley <sebeasley@andersoncountysc.org>
Cc: 'rtl@lylesfirm.com' <rtl@lylesfirm.com>; 'cworsham@lylesfirm.com' <cworsham@lylesfirm.com>; 'kmn@lylesfirm.com' <kmn@lylesfirm.com>; 'rhemphill@mcdonaldpatrick.com' <rhemphill@mcdonaldpatrick.com>; 'preeves@gwblawfirm.com' <preeves@gwblawfirm.com>; 'bboyd@murphygrantland.com' <bboyd@murphygrantland.com>; 'JRogers@wardfirm.com' <JRogers@wardfirm.com>; 'cgraham@wardfirm.com' <cgraham@wardfirm.com>; 'rteague@wardfirm.com' <rteague@wardfirm.com>; 'jgarraux@richardsonplowden.com' <jgarraux@richardsonplowden.com>; Jim Walsh <jwalsh@clarksonwalsh.com>; John Harjehausen <jharjehausen@clarksonwalsh.com>; David Schroeder <dschroeder@clarksonwalsh.com>; Megan Clark

'21 SEP 29 PM3:05:05
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Subject: 2017CP0400376-Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant

CAUTION: This email originated from outside of Anderson County's email system. Please do not click links or open attachments unless you recognize the sender and know the content is safe. If you have any questions, please contact the county helpdesk.

Elizabeth:

My client, Sandlapper Concrete, LLC, has a Motion for Summary Judgment pending on the roster tomorrow on September 29, 2021 at 2:00 p.m. The parties to which the motion pertains have reached a tentative settlement and, therefore, I would like to withdraw the motion as it is no longer necessary. Please let me know if I need to do anything further to remove the motion from tomorrow's docket. Thank you.

John Harjehausen
Attorney

CWC
CLARKSON | WALSH | COULTER

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ELECTRONICALLY FILED - 2023 Jul 12 11:44 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT C. A. No. 2017-CP-04-00376 **STIPULATION OF DISMISSAL (DOES NOT END CASE)**
Meritage Homes of South Carolina, Inc., Third-Party Plaintiff, vs. 84 Lumber Company, LP; DRC Investment, LLC d/b/a Advantaclean of the Upstate; Down to Earth Grading, LLC; GGG Construction, LLC; Gutter Cutters, Inc.; HH Contracting, LLC; Harbin Company, LLC; M7M Foundations, LLC; Metro Garage Door, Inc.; Sandlapper Concrete, LLC; SDR Restoration and Construction, LLC; Sealing Agents Waterproofing, Inc.; and Star Builders, Inc., Third-Party Defendants.	

The parties to this action hereby stipulate that the Third Party Complaint and all claims by, against and between Third Party Plaintiff and Third-Party Defendants, and only as to Third Party Plaintiff and Third Party Defendants, be dismissed pursuant to Rule 41 of the *South Carolina Rules of Civil Procedure*, with prejudice, each party to bear its own costs.

WE SO STIPULATE.

Signatures follow

ELECTRONICALLY FILED - 2023 Jul 12 11:44 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

This 12th day of July, 2023.

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October 4, 2023

VIA E-MAIL

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RE: Raghu Athimoolam and Irene Athimoolam v. Meritage Homes of South Carolina, Inc.
Civil Action No.: 2017-CP-04-00376
Our File No.: 5160/5753

Dear Robert, Danny, and David:

Following the arbitration in Greenville, South Carolina, on September 21-22, 2023, enclosed herein please find the Order based on the testimony and evidence presented.

I appreciate the opportunity of having been asked to serve as an arbitrator in this matter. I have tried to be meticulous in recalling the testimony and evidence without the assistance of an official transcript. However, if you believe I have misstated facts, please advise.

If this Order needs to be filed, we'll be happy to handle – just let me know, please.

With warmest regards, I remain

Very truly yours,

Becky Laffitte

RL:srm

Enclosure

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	)	Civil Action No. 2017-CP-04-00376 **ARBITRATION ORDER**

This matter came to be heard in Arbitration in Greenville, South Carolina on September 21-22, 2023, pursuant to the arbitration clause in the Meritage Homes New Home Purchase Agreement executed by Raghu Athimoolam on April 10, 2015. The Agreement denotes "THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT AND IF THE FEDERAL ARBITRATION ACT IS INAPPLICABLE, THE UNIFORM ARBITRATION ACT SECTION 15-48-10 ET SEQ., CODE OF LAWS OF SOUTH CAROLINA 1976, AS AMENDED.

In their First Amended Complaint, plaintiffs assert causes of action against Meritage Homes of South Carolina, Inc., sounding in Negligence-Gross Negligence; Breach of Implied Warranty of Service and Breach of the Implied Warranty of Habitability.

FACTS

The plaintiffs, Raghu Athimoolam and Irene Athimoolam, purchased from Meritage Homes a three-story conventional wood-frame home supported by concrete foundation walls consisting of a walk-out balcony with two-floors above the basement level and an attached

garage. The exterior cladding consists of a mix of brick masonry veneer, adhered manufactured stone veneer, and fiber-cement siding. The cash purchase for the home located at 116 Ariel Way in Easley, South Carolina totaled Four Hundred Twenty-Four Thousand Seven Hundred Fifty Three and No/100ths ($424,753.00) Dollars as documented in the Meritage Homes New Home Purchase Agreement executed on April 3, 2015. (Plaintiffs' Ex. 1) The anticipated move-in date of September 2015 was delayed and the closing occurred on October 29, 2015 in New York. Given the construction delays, the testimony at arbitration revealed that Meritage Homes paid for the attorneys' fees and closing costs. Prior to and at the time of the closing, plaintiffs admittedly had an opportunity to review the Agreement and ask questions. There is no evidence that they were coerced to sign the closing documents before they inspected the home in South Carolina. The Athimoolams testified that since Mr. Athimoolam was home for two weeks from his job in Dubai, they needed to close on the home so he could move the family to South Carolina before his return to Dubai. The Athimoolams also testified they trusted Meritage.

On November 2, 2015, the plaintiffs arrived to South Carolina and testified they found an unfinished home; deck cluttered with trash and debris (Plaintiffs' Exs. 2 and 3) and muddy conditions around the exterior of the home (Plaintiffs' Ex. 4 and 7). Mrs. Athimoolam also testified they were in shock as a water issue was apparent in the basement as captured in the photograph introduced into evidence (Plaintiffs' Ex. 5). They also discovered wet carpet and padding; a repaired hole cut in the basement drywall (Plaintiffs' Ex. 6); a board in the master bedroom, tile issues in the master bath (Plaintiffs Ex. 24), and other purported issues which are documented in photographs submitted into evidence. (Plaintiffs' Ex. 1-24)

Meritage replaced the carpet pad and carpet in the basement. Given conditions which they considered uninhabitable, plaintiffs testified that they informed Meritage Homes that

they would need a hotel in which to live since the home was unfinished. Meritage Homes paid the hotel expenses for the Athimoolams until Friday or Saturday of that week. Plaintiffs allegedly were told by representatives of Meritage Homes that these issues would be addressed. Mrs. Athimoolam testified that when they returned to their home following a brief stay in a hotel, they found a side glass section in their door broken (Plaintiffs' Ex. 10); the range hood remained unfinished (Plaintiffs' Ex. 11) and the surround around the fireplace had not been constructed to code. (Plaintiffs' Ex. 12) Meritage Homes resolved these issues but Mrs. Athimoolam complained about shoddy painting throughout the home, including the wall by the staircase to the basement (Plaintiffs' Ex. 13-14); bathroom tiles and bonus room which photographs were entered into evidence. Gaps were alleged to exist in several doors; questions remained whether wainscoting should have been used throughout the house (Plaintiffs' Ex. 23) and if ductwork for the HVAC system should have been installed in the basement area (Plaintiffs' Ex. 16). Mrs. Athimoolam also testified about issues with stained bath tubs and the absence of glass in the shower. (Plaintiffs' Ex. 24) Further, Mrs. Athimoolam testified she made calls to Meritage and on December 8, 2015, spoke with a customer care manager with Meritage. She later contacted a Divisional President and thought the issues would be resolved. Also, shortly after moving in, Mrs. Athimoolam contacted AdvantaClean to conduct mold testing on her home as she and her son were feeling ill. She testified she was unaware of a possible connection between Meritage and AdvantaClean which connection was not established through testimony or evidence at arbitration. She testified AdvantaClean found mold and she provided the report to Meritage. Meritage then removed three walls in the basement to permit mold remediation and/or treatment by AdvantaClean. (Plaintiffs' Exs. 17, 19) Meritage also paid to have the attic "fogged" (treated) but Mrs. Athimoolam remained unsatisfied. Mrs. Athimoolam continued to make

complaints to Meritage about mold issues as she felt they were not being properly addressed. However, evidence introduced at arbitration noted that AdvantaClean tested the entire house and undertook and completed remediation in 2016. (Plaintiffs' Ex. 25; Defendant's Ex. 1)

On August 11, 2016, AdvantaClean wrote Meritage to report that mold remediation at the Athimoolam residence had been completed as outlined in the original scope of work, and the affected area(s) of the property were deemed visibly clean. (Defendant Ex. 1) A report from Southeast Environmental Microbiology Laboratories dated August 24, 2016, was introduced into evidence and attached to an email from Mrs. Athimoolam dated February 26, 2020 with results of testing on the outside, attic, main level, and basement of the Athimoolam home. (Plaintiffs' Ex. 26)

Mrs. Athimoolam sent an email dated September 7, 2016, to Meritage Homes detailing a number of issues, including her belief that AdvantaClean had utilized an improper dehumidifier in the basement, which email was introduced into evidence. (Plaintiffs' Ex. 27)

On September 6, 2016, Meritage prepared a ten (10) month Warranty List that was introduced into evidence. (Plaintiffs' Ex. 28)

On October 3, 2016, Mrs. Athimoolam prepared an email to Bryan Ross at Meritage Homes with twenty-four punch list items to which she testified remained unresolved. (Plaintiffs' Ex. 29)

On October 27, 2016, H. Ross Clements, AIA of Fuller Envelope prepared a Summary of Field Observations to the Athimoolam Residence. (Plaintiffs' Ex. 34). This report was revised on August 27, 2018, to include results from destructive testing. (Plaintiffs' Ex. 35)

On November 1, 2016, Meritage sent a "sign off" letter in lieu of obtaining a signature to "Homeowner" at 116 Ariel Way in Easley, SC advising that all 10 Month Warranty request items had been resolved. (Plaintiffs' Ex. 30)

On November 18, 2016, Attorney Robert T. Lyles sent a certified letter to Meritage –"right to cure"- detailing deficiencies with the home pursuant to S.C. Code Ann § 40-59-810 and enclosing a preliminary report from Fuller Consulting Engineers of Greenville, South Carolina. (Plaintiffs' Ex. 31)

On March 3, 2017, a First Amended Summons and Complaint were filed on behalf of the Athimoolams against Meritage Homes of South Carolina, Inc.

On February 11, 2020, Meritage Homes of South Carolina, Inc. filed a Third-Party Action against the contractors and building suppliers who provided labor and materials utilized in the construction of the Athimoolam home

On June 28, 2022, Attorney David S. Cobb, as counsel for Meritage, sent a letter to Attorney Robert T. Lyles, counsel for the Athimoolams. advising that Meritage "elects to exercise the contractual right to repurchase the home, as provided for in the sales contracts for the sum of $431, 932. (Defendant's Ex. 3)

FINDINGS

I. Construction

The testimony and evidence presented at arbitration were expert intensive given the technical construction issues in dispute. Therefore, the witnesses qualified as experts were allowed to offer opinions. See Rule 702, SCRE ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify

thereto in the form of an opinion or otherwise.") Although the opinions of the experts differed in certain respects, I find there was consensus in a number of opinions which addressed deficiencies and cost estimates.

Testimony was also offered by plaintiffs, Irene Athimoolam and Raghu Athimoolam. Although no one from Meritage testified at arbitration, the testimony and evidence introduced through expert testimony, reports, and correspondence adequately detailed Meritage's position. Accordingly, this Order will reflect the testimony of lay and expert witnesses and evidence upon which the award is based. Further, the credentials and qualifications of several witnesses were challenged as were their opinions and estimates. While all witnesses were allowed to testify, no testimony about scope and pricing that had not been produced prior to or in depositions, produced in discovery or prior to arbitration was permitted into evidence.

Irene Athimoolam was the first witness to testify and she described how this was to be her "forever" home as she was moving from New York to begin a life in South Carolina with her husband and son. She expressed concerns about shoddy workmanship; Meritage's alleged failure to complete the warranty items (Plaintiffs' Exs. 28-29); mold issues; and Meritage's alleged failure to adequately and properly address her concerns despite conversations with Meritage sales representatives, a customer care management associate, and a Divisional President. During her testimony, twenty four (24) photographs were introduced into evidence documenting construction issues with the home from her perspective. Mrs. Athimoolam, over objection by counsel for Meritage, introduced a list of personal items which she maintains have been damaged beyond repair due to mold exposure and for which she seeks compensation. (Plaintiffs' Ex. 33)

Mrs. Athimoolam further testified that she is unaware of any roof leaks since a repair to selected shingles was made to her home approximately six (6) years ago by a handy man, whose name she could not recall and which receipt documenting this expenditure was no longer available. Also, Mrs. Athimoolam testified that approximately seven (7) years ago, she had the exterior brick of her home power washed by a "neighborhood kid" and noticed no water intrusion. The veneer siding has not come off since the one section was repaired or replaced some years ago by Meritage. She also testified that no windows have leaked since they have occupied their home. As to her personal property damages, her testimony was permitted over objection by Meritage counsel, David Cobb, who argued these are non-recoverable damages as they were not claimed damages in the Amended Complaint; items are still in use; their purported value is speculative given the absence of receipts which document dates and costs of the purchases and plaintiffs' failure to mitigate their damages. (Plaintiffs' Ex. 33) Raghu Athimoolam also testified; however, since he was working in Dubai, he relied upon information provided by Mrs. Athimoolam.

H. Ross Clements, AIA, a partner with Fuller Envelope, was called as an expert on behalf of the Athimoolams and was qualified as an expert in forensic architecture, without objection. Mr. Clements testified that he inspected the Athimoolam home on September 1, 2016, with Jamison Hupp, Associate AIA, and made field observations. His October 27, 2016 report (Plaintiffs' Ex. 34) was revised on August 27, 2018 after destructive testing was performed at localized areas of the Athimoolam home. (Plaintiffs' Ex. 35) Mr. Clements has not returned to the Athimoolam home since 2018. During the August 2018 inspection, a contractor, Rodney Edwards, accompanied him and prepared an estimate on the suggested scope of repairs. Unfortunately, due to health issues, Mr. Edwards was unable to testify about his cost estimate

totaling approximately $265,730. The revised report of Mr. Clements dated August 27, 2018 included eighteen (18) recommendations, including but not limited to the following:

1. Removal and reinstallation of existing windows and doors, to include all necessary flashing, SAF, and WRB
2. Removal and replacement of exterior cladding; brick veneer, AMSV, composite MDF trim and related accessories
3. Contractor to provide an allowance for interior repairs for nail pops, drywall painting, etc.
4. At exterior alcove area of the walk-out basement, regrade surface by walk-out basement and install a catch basin with underground corrugated piping, if necessary
5. At the rear elevation, first floor level, repair and replace LVL beam; joist hangers; fasteners, etc., per manufacturer's installation instructions
6. Localized repairs shall be performed to the deck structure to provide lateral bracing; proper attachment of components, including, but not limited to, lateral connections; ledger fasteners; remove existing guardrail posts and install new 4 x 4 posts using appropriate bolts, anchors, wood columns, etc.
7. At the rear elevation, remove existing gutter and replace with 6" K style gutter. Reinstall existing downspouts. Gutters shall match existing color. Insure downspouts terminate.
8. Properly integrate drip edges with roofing underlayment along the eaves; replace any underlayment and/or shingles damaged during repair. Apply roof cements;

remove shingles at gable cornices (front elevation) and install underlayment properly lapped with the WRB and other flashings, as applicable.

9. At the first floor mudsill plate for perimeter of structure, install fasteners into unattached mudsill anchors and additional fasteners at anchors lacking fasteners.

10. Within the basement, install closed-cell spray foam at the rim board on first floor, and Rockwool Comfortbatt (R-13 minimum) batt insulation within the stud cavities. Spray foam over foam board blocking.

11. As recommended by Environmental Testing Report, abate fungal growth in all areas where fungal growth was found to be present (basement and attic). After abatement, indoor air quality investigation shall be performed in the basement by a certified indoor environmentalist. Remove and replace gypsum board finishes as required to perform abatement.

12. At the Master Bedroom, remove and reset out-of-square door and jamb. Install new interior casing as required. Paint and caulk finishes.

13. At the Garage, remove brown-colored masonry mortar and replace with Sika Repair SHB mortar. Prime exposed steel reinforcement with Sika Arnatec 110 EpoCem; repair additional spall locations not previously repaired. Install cementious parge coat on concrete walls for uniform finish.

14. At the Garage, remove the existing garage door guide rails and install rails of proper height to provide 6 – 8" minimum clearance at house entry door landing.

15. Replace adjacent materials affected by the repair work in-kind.

16. Contractor shall provide for all general conditions, including, but not limited to: protection of existing property and adjacent areas not subject to the repair areas, building permits, demolition/disposal costs, final cleaning, etc.

17. Contractor shall provide a 5% contingency allowance and their preferred overhead/profit percentages

18. Contractor shall provide a line item for A/E fees at 10% of the total cost of construction (including OHP)

(Plaintiffs' Ex. 35)

Mr. Clements testified that all of the documented deficiencies and recommendations need to be addressed to bring the home into compliance with the applicable building codes; manufacturer's instructions and industry standards. Support for his recommendations were documented and discussed in a PowerPoint presentation identified as Plaintiffs' Ex. 36. Mr. Clements further testified that it was his understanding that the scope of his noted deficiencies and recommendations to cure the deficiencies were provided to Matthew Harmon with Claims Construction & Restoration for pricing. Mr. Clements further testified that he had no discussions with Mr. Harmon about the proposed scope of repair and pricing. Also, Mr. Clements admitted that no repairs, etc., were requested to be made after the destructive testing in 2018 and he has no information if the conditions to the home as he observed in 2018 have changed in 2023.

In addition to observed window installation deficiencies, Mr. Clements noted concerns, in part, about the installation of the fiber-cement lap siding; grading deficiencies at the rear of the home near the basement; deck; roof underlayment along the eaves, as well as other areas denoted above.

During cross examination by Meritage's counsel, key points to which Mr. Clements testified about the 2018 conditions to the Athimoolam home included the following: a) there is no evidence that any of the windows have leaked or resulted in water intrusion into the home since occupancy; b) during the destructive testing in 2018, no rotten wood, deteriorated sheathing or evidence of water intrusion were observed at the front and side elevations of the home; alcove or roof; c) the window manufacturer was not contacted to determine if any warranties will be impacted if the windows are removed and reinstalled per the protocol recommended by Mr. Clements which do not include the replacement of any of the windows in the home. Mr. Clements further testified that the issues and recommendation noted for the garage could be corrected in one (1) day.

Matthew Harmon of Claims Construction and Restoration was offered as an expert by the plaintiffs in cost estimation and construction repairs. Although a motion was made to exclude Mr. Harmon's testimony based on challenges to his credentials, the objection was overruled but noted. Mr. Harmon was retained to prepare a cost estimate on the scope of work proposed by Ross Clements. Mr. Harmon prepared two reports identified as Plaintiffs' Exs. 37-38 to which "Preliminary Estimate Only" is affixed to both. He testified that following his deposition, he had to revise the initial cost estimate to correct a typo of 140 hours of labor to 40 hours; and to remove estimations for drywall and HVAC technician costs. Through his testimony, he admitted that he had not obtained quotes on the "bid" items and that many of the costs included in his reports exceeded the scope of Mr. Clements' recommendations and were included at the request of the Athimoolams. Also, he never discussed the scope and pricing with Mr. Clements as reflected in his reports. (Plaintiffs' Exs. 37 – 38)

At the time he met with the Athimoolams, Mr. Harmon had only been a licensed contractor for two months. (Defendant's Ex. 4) During this visit, Mr. Harmon did not look in the attic or inspect the second level of the home because Mr. Athimoolam was resting. However, he did record issues noted by Mrs. Athimoolam and included her concerns in the projected cost estimation which was not within the scope of work proposed by Ross Clements. Mr. Harmon utilized an insurance claims adjusting software, Xactimate, to prepare the cost estimates provided. He testified that he could input certain data about the location and zip code of the home which did not necessitate that he speak with building suppliers or contractors in Anderson, South Carolina, admitting that cost and price differences exist in various parts of the state.

In addressing some of the recommendations noted by Ross Clements, Mr. Harmon included the costs of new windows as he did not believe the warranty would be valid if he removed the windows, installed flashing, etc. and then reinstalled the windows. (Plaintiffs' Ex. 38, p. 25) However, he did not contact the manufacturer of the existing windows to discuss if the warranty would be impacted with a removal and reinstallation of the windows. Also, although the scope of work proposed by Ross Clements did not include the removal and installation of a new roof, Mr. Harmon included this in his cost estimate, as well as the construction of a new deck. (Plaintiffs' Ex. 38, p. 25).

As to Mr. Clements' recommendation about the removal and replacement of the exterior cladding and brick veneer repairs, Mr. Harmon listed these costs as bid items which costs have not yet been determined. Although Mr. Clements' scope of work to the deck structure does not indicate the necessity to construct a new deck, Mr. Harmon's estimate includes the construction of a deck as a "bid" number which has not yet been determined. While Mr. Clements' cost estimate only denoted the removal and replacement of the gutter to be followed

by the reinstallation of the existing downspouts, Mr. Harmon's estimate contemplates the removal and replacement of both the gutter and downspouts. The evidence further reveals, through Mr. Harmon's testimony, that 75% of his reported cost estimate was from items provided by the homeowners, while 25% from Mr. Clements' report. However, the testimony and evidence show that Mr. Harmon exceeded the scope of Mr. Clements' recommendation in his cost projection and that it is questionable if 25% of the costs in the report are attributable to the scope prepared by Mr. Clements as he has never communicated with Mr. Clements about his cost estimations or scope of work. Further, the cost estimations in both of Mr. Harmon's reports (Plaintiffs' Exs. 37 and 38) do not reflect the costs of the estimate of Rainbow International Restoration or that the scope of work and pricing in Rainbow's report are supported by the testimony and evidence. (Plaintiffs' Ex. 42)

Richard J. Rogers, P.E., M.B.A. of Rogers Construction Engineering was offered as an expert forensic engineer and licensed general contractor on behalf of Meritage Homes, without objection. Mr. Rogers testified that he received the Fuller Envelope (Clements) reports and visited the Athimoolam home on July 15 2019. Mr. Rogers testified that he went inside the Athimoolam home, stuck his head in the attic and concentrated his time in the basement. He was informed of no roof leaks or water intrusion through any of the windows since the Athimoolams moved into the home. He testified he is currently involved in seven litigation matters involving Meritage but he has not been hired in any to make repairs.

In discussing the Fuller Envelope reports addressing the windows, Mr. Rogers admitted that he could not tell if the building wrap had been properly applied. Although photos of the flashing are such that it appears flashing was properly installed, he could not testify to the manner of installation with certainty. As for questions about the positioning of the nails used in

the window installation, he testified it was his belief that installing the nails in areas other than the nail fin did not violate any requirements. Further, since he does not know the condition of each window in terms of installation, he found relevant and significant the absence of any leaks and water intrusion through any of the windows in the Athimoolam home since 2015 which supports his position that no repairs need to be made to any of the windows in the Athimoolam home. Defendant, Meritage Homes, also introduced into evidence numerous photographs of the Athimoolam home. (Defendant's Ex. 2 and 7)

As for the fourteen recommendations made by Mr. Clements, Mr. Rogers testified in conformity with a prior report identified as Defendant's Ex. 5; Plaintiffs' Ex. 32, which include his recommendations and pricing to resolve any construction issues:

1. Removal and reinstallation of the existing windows and doors – No action required
2. Removal and replacement of the exterior cladding, including all fiber-cement siding, brick veneer, AMSV, composite MDF trim and related accessories. All work described can be performed for less than $15,000.
3. Contractor allowance for interior repairs, for nail pops, drywall, painting, etc. – Unnecessary
4. Exterior alcove of the walk-out basement – work can be performed for $1,500
5. At rear elevation, first floor level – repairs should be performed as described in Fuller report – work can be performed for $1,000
6. Localized repairs to deck structure – work can be performed for $1,000
7. At the rear elevation remove existing gutter and replace Unnecessary as gutter is functioning.

8. Properly integrate drip edges with roofing underlayment – Unnecessary – $2,000 through testimony at arbitration

9. At the first-floor mudsill plate for perimeter of structure. Fasteners, etc. – work can be performed for $300

10. Basement, spray foam – batt insulation is acceptable by code – work can be performed for $500

11. As recommended by Environmental Testing & Management – Unnecessary Advanta issued clean report

12. At the Master Bedroom, remove and reset the out-of-square door and jamb - work can be performed for $1,000

13. At the Garage, remove brown colored masonry mortar and replace - work can be performed for $500

14. At the Garage, remove existing door guide rails and install proper rails - work can be performed for $500

Mr. Rogers further testified that his proposed cost estimate today based on inflation would be in the Thirty Thousand and No/100ths ($30,000.00) Dollars range, plus approximately Two Thousand and No/100ths ($2,000.00) Dollars to address some of the roofing issues noted by Mr. Clements.

II. Mold
(Industrial Hygienists)

Environmental Testing and Management, Inc. (Andrew G. Schauder) was retained by Mrs. Athimoolam to provide professional and technical consulting services by conducting a limited evaluation of an alleged water intrusion/mold issue impacting several locations within her residence. He was offered as an expert in industrial hygiene without opposition.

On the initial visit, November 28, 2016, Mr. Schauder was informed of prior services provided by AdvantaClean. His most notable observation from an exterior inspection was the grading of the land at the rear of the house, a sample collected in the basement – unfinished utility, and the level of the Penicillium/Aspergillus group of fungi which he testified was borderline elevated. Mrs. Athimoolam provided Mr. Schauder with two spore trap reports, one dated July 28, 2016 and one dated August 24, 2016. No written report accompanied either lab report. Of the information provided, Mr. Schauder opined that all of the samples collected inside the house were found to have a lower total fungal spore count than that present in the outdoor air.

A visual examination of the remainder of the interior of the house did not find any evidence of any significant water intrusion or mold growth. However, his report reflects elevations of Penicillium/Aspergillus group of fungi to be elevated on both the main floor, as well as the basement. From the initial inspection, Mr. Schauder concluded the most likely explanation for prior mold growth on the floor joists in the attic and basement was that the wood framing members were left exposed to the elements outside for an extended period of time. He suggested test cuts needed to be made in the sheetrock walls and ceilings so a complete scope of work could be determined and a protocol prepared for the remediation of the impacted areas. No recommendations in the December 2016 report were addressed. No complete scope of work was determined and no protocol for mold remediation was prepared or introduced into evidence. (Plaintiffs' Ex. 39)

Four-plus years later, on August 26, 2021, Mr. Schauder returned to the Athimoolam home and met with Mr. and Mrs. Athimoolam. During this time, there is no evidence that any other testing occurred or protocols proposed for mold remediation. As

documented in his report (Plaintiffs' Ex. 40), his follow-up inspection began in the basement. Finding what he described as prior or suspected fungal growth and staining in a bedroom, basement, and attic, he again recommended that a complete scope of work be determined, and a protocol prepared for the remediation of fungal growth in the designated areas. No protocol or scope of work was prepared or introduced into evidence.

On April 6, 2023, Mr. Schauder returned for a second follow up water intrusion/mold investigation in areas above the existing sheetrock ceilings and attic. (Plaintiffs' Ex. 41) In this report, Mr. Schauder referenced reports from Environmental Testing and Management, Inc., and General Engineering. (GEL Report March 3, 2021 – Defendant's Ex. 6) Mr. Schauder opined that the presence of staining on wood framing members found throughout the house and attic was most likely the result of prior mold growth. While he noted the necessity to remove all sheetrock walls and ceilings in the affected areas, he never proposed a scope of work or noted any health or safety issues. In a deposition taken before the arbitration, Mr. Schauder testified he had not prepared a protocol or performed mapping of the timbers. When he attempted to testify to a protocol at arbitration, an objection was made by counsel for Meritage and sustained given that the information had not been provided in discovery, in a deposition, and/or prior to the arbitration.

Also, during Mr. Schauder's deposition on November 23, 2020, he had no recommendations for a remediation protocol and found no evidence of fungal growth on the first and second levels of the home. Also, he noted no water intrusion in the attic and noted no health concerns for the Athimoolams. A few days before the arbitration, Mr. Schauder testified he was provided a copy of the Rainbow International Restoration proposal (Plaintiffs' Ex. 42) but did

not discuss specifics about the proposal or provide a scope of work to Steven Lambright with Rainbow International Restoration.

Steven Lambright, a licensed contractor with Rainbow International Restoration, prepared a cost projection utilizing Xactimate for mold remediation to the Athimoolam home. (Plaintiffs' Ex. 42) The expertise and qualifications of Mr. Lambright were challenged but he was permitted to testify, over objection. Mr. Lambright testified that approximately eighteen (18) months ago, he observed no active water leaks in the attic and none in the basement. Mr. Lambright admitted that Mr. Schauder had not approved the scope of the work or provided a suggested protocol for mold remediation. Therefore, I did not find his testimony reliable or his report properly supported.

Following the denial of directed verdict motions made by counsel for Meritage Homes, Meritage called Ronald S. Sharpe, C.I.H., R.S., with GEL Engineering LLC as an expert witness. Mr. Sharpe's report was marked as Defendant Exhibit 6. Mr. Sharpe, who conducted IEQ assessments of the environmental quality of the Athimoolam interior on October 30, 2019 and November 12, 2020 offered his opinions in his written report and noted that no further mold remediation is necessary at the Athimoolam home. Mr. Sharpe also noted in detail repairs and remedial activities that had predated his inspection and testing. He then offered suggestions once the repair of any source of water/moisture intrusion is resolved.

DAMAGES

It is well settled in South Carolina that "the applicable measure of damages [can] be shown by the cost of repairs." Kincaid v. Landing Dev. Corp., 289 S.C. 89, 94, 344 S.E.2d 869, 873 (Ct. App. 1986). Further, a plaintiff may testify as to his/her belief on value or damage to personal property. Waites v. S.C. Windstorm & Hail Underwriting Ass'n, 279 S.C. 362, 366,

307 S.E.2d 223, 225 (1983). However, the burden is still upon the plaintiff to establish the nature, character, an extent of damages which are proximate consequences of the defendant's acts. Despite Mrs. Athimoolam's testimony, no evidence was presented to support the allegations that any of the claimed personal property had been damaged or ruined due to water intrusion or mold. Also, she was unable to provide any testimony or evidence as to the value of the alleged items since no sales receipts were introduced into evidence. (Plaintiffs' Ex. 33) Further, testimony elicited during the arbitration revealed that many items are still in use in the home and that there has been no effort to mitigate damages by removing the items from the house.

Given the technical and scientific issues in dispute, the opinions of all qualified experts were considered as was the reliability of their testimony. Since Mr. Schauder did not provide a protocol and scope of work prior to arbitration, this testimony on a protocol and scope of repairs was not permitted into evidence. State v. Warner, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2000).

Since there have been no observed leaks or water intrusion at the windows since the Athimoolams moved in in 2015, I find that the recommendation by expert Ross Clements to remove and reinstall the windows to install flashing, etc., to be unnecessary, particularly absent any testimony of what impact his recommendation may have on any window warranties or costs associated with this recommendation.

Further, since there was no evidence of roof leaks to the Athimoolam home after a minor repair approximately six (6) years ago, I find the scope of work and associated costs in the report prepared by and testimony given by Jay Rogers to be reliable as he is a licensed general contractor and engineer.

Additionally, I find mold remediation in any area of the Athimoolam home is not supported by the testimony and evidence and no award is given for these claimed damages.

AWARD

Based on the testimony and evidence presented at arbitration, I hereby award damages to the Athimoolams in the amount of **Fifty-One Thousand Four Hundred Thirteen and 88/100ths ($51,413.88) Dollars** comprised of the following:

> The sum of **Twenty-Five Thousand and No/100ths ($25,000.00) Dollars** to address exterior siding issues, exclusive of siding removal (Item 2);
>
> The sum of **Five Hundred Fifty and No/100ths ($550.00) Dollars** for interior painting in master bedroom after removal and reset of out-of-square door and jamb (Item 3);
>
> The sum of **Three Thousand and No/100ths ($3,000.00) Dollars** for regrading of exterior alcove area of walk-out basement and installation of surface catch basin, if necessary (Item 4);
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> The sum of **One Thousand and No/100ths ($1,000.00) Dollars** for grading at the rear elevation, first floor level (Item 5);
>
> The sum of **Two Thousand Five Hundred and No/100ths ($2,500.00) Dollars** for localized repairs to deck structure (Item 6);
>
> The sum of **Seven Thousand Three Hundred Twenty-One and 97/100ths ($7,321.97) Dollars** for replacement of the gutter and downspouts with appropriate color match only at the rear elevation of the home with the size recommended by Ross Clements - 5 ½ x 4 ½ (Item 7);
>
> The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** per opinions of Jay Rogers (Item 8);
>
> The sum of **Three Hundred and No/100ths ($300.00) Dollars** for fastener installation into unattached mudsill anchors at mudsill plate for perimeter of structure (Item 9);
>
> The sum of **Three Thousand Two Hundred Ninety-Three and 63/100ths ($3,293.63) Dollars** for batt insulation, spray foam, etc. in basement (Item 10);

The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove and reset the out-of-square door and door jamb in Master Bedroom (Item 12);

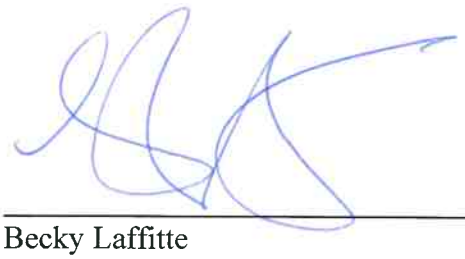
The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to remove brown-colored masonry mortar, repair spall locations and install a cementious parge coat to concrete walls for uniform finish (Item 13);

The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove existing garage door rails and install rails that are proper height (Item 14); and

The sum of **Two Thousand Four Hundred Forty-Eight and 28/100ths ($2,448.28) Dollars** as a 5% contingency allowance (Item 16).

Therefore, it is hereby Ordered, Adjudged, and Decreed that the plaintiffs are awarded the sum of **Fifty-One Thousand Four Hundred Thirteen and 88/100ths ($51,413.88) Dollars**.

AND IT IS SO ORDERED.



Becky Laffitte
Arbitrator

October 4, 2023

ELECTRONICALLY FILED - 2023 Oct 04 10:25 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	)	Civil Action No. 2017-CP-04-00376 **PROOF OF ADR**

(Within 10 days of the conclusion of ADR and no later than 300 days after filing, an original must be filed with the Clerk of Court and a copy forwarded to the attorneys for the parties.)

PURSUANT to the South Carolina Alternative Dispute Resolutions Rules (SCADR):

1. Alternative Dispute Resolution (ADR) was conducted on the 21st and 22nd days of September, 2023 in the form of
   a. ____ mediation
   b. ____ non-binding arbitration
   c. X binding arbitration

2. The neutral(s) was/were (Name(s) of arbitrator(s)/mediator(s)) Becky Laffitte

3. Present at the ADR conference were:
   a. X Plaintiffs
   b. X Defendant (Mike Harvey, Mark Reynolds)
   c. X Lawyer(s) for Plaintiff(s) Robert T. Lyles, Jr. and Joseph Daniel Winterstein
   d. X Lawyer(s) for Defendant David S. Cobb
   e. ____ Representative for Insurance Carrier
   f. ____ Guardian *ad litem*
   g. ____ Expert(s)

h. _____ Others _____

4. As a result of ADR, this case should be considered (check one)

a. _____ fully settled by Consent Judgment to be filed by _____

b. _____ fully settled Voluntary Dismissal to be filed by _____

c. _____ Partially settled _____

d. _____ at an impasse _____

e. X Other: Order following arbitration will be issued on or before October 4, 2023.

Submitted this 3rd day of October, 2023.

_____

Rebecca Laffitte
SC Bar 3105

ELECTRONICALLY FILED - 2023 Oct 04 10:25 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2017-CP-04-00376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,	)	
Plaintiffs,	)	
v.	)	
MERITAGE HOMES OF SOUTH CAROLINA, INC.,	)	**Plaintiffs' Motion for Reconsideration**
Defendant.	)	

Pursuant to 9 U.S.C. Code (The Federal Arbitration Act) § 9, 10, 11, the Order of Arbitration, Attached as Exhibit A, Plaintiffs, Raghu and Irene Athimoolam, (hereinafter "Plaintiffs"), by and through their undersigned attorneys and moves for reconsideration of the Arbitration Award (the "Award") dated October 4, 2023.

Plaintiffs request the Arbitrator to reconsider the Award on the numerous grounds set forth in the accompanying Memorandum.

Respectfully submitted,

LYLES & ASSOCIATES, LLC

s/Robert T. Lyles, Jr.
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October 16, 2023
Mount Pleasant, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)))	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, -vs- Meritage Homes of South Carolina, Inc., Defendant.	)))))))))	**CONSENT ORDER STAYING CASE AND COMPELLING ARBITRATION** C.A. No. 2017-CP-04-00376

Defendant Meritage Homes of South Carolina, Inc. moved this Court for an Order staying this litigation and compelling arbitration. For the reasons below, and with the consent of all parties, this Court grants Defendant's motion to stay this litigation and to compel arbitration.

Plaintiffs entered into an agreement with Defendant to build a home located in Easley, South Carolina ("Agreement"). The Agreement contains an arbitration provision, under which Plaintiffs agreed to binding arbitration. Plaintiffs filed suit in this Court, and Defendant moved to stay this action and compel arbitration pursuant to the terms of the Agreement and the Federal Arbitration Act ("FAA"). The parties have conferred, and Plaintiffs agree that this action should be stay and arbitration compelled pursuant to the terms of the Agreement and the FAA.

NOW, THEREFORE, on motion of the undersigned counsel for Defendant, by and with the consent of the undersigned counsel for the Plaintiffs,

IT IS HEREBY ORDERED that Defendant's motion to stay and to compel arbitration is granted.

IT IS FURTHER ORDERED that Plaintiffs and Defendant shall proceed to binding arbitration.

ELECTRONICALLY FILED - 2017 Aug 30 11:58 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

IT IS FURTHER ORDERED that the within matter as to Defendant is hereby stayed pending arbitration between the Plaintiff and Defendant.

AND IT IS SO ORDERED.

JUDGE, TENTH JUDICIAL CIRCUIT

Anderson, SC

August _____, 2017

s/ Robert T. Lyles
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ELECTRONICALLY FILED - 2017 Aug 30 11:58 AM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Stay

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT CASE NO.: 2017-CP-04-00376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	)	**Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Alter or Amend the Judgment** **XXXX**

Plaintiffs, Raghu and Irene Athimoolam, (hereinafter "Plaintiffs"), by and through their undersigned attorneys submit the following Memorandum in Support of Plaintiffs' Motion to Alter or Amend its Arbitration Award (the "Award") dated October 4, 2023.

SUMMARY OF ARGUMENT

1. The Award makes numerous findings that are completely unsupported by the evidence and are based on assumptions and arguments of defense counsel;
2. The Award is fundamentally flawed because of fundamental errors with respect to applicable law and even the burden of proof;
3. The Award reflects a flagrant disregard of uncontroverted evidence, including expert testimony; and
4. The errors reflected above reflect an improper partiality towards Meritage which justifies reconsideration of the Award or vacating the Award in its entirety.

PROCEDURAL HISTORY

Plaintiffs filed a Complaint against Meritage Homes of South Carolina Inc. ("Meritage" or "Defendant") on February 2, 2017, and an Amended Complaint on March 3, 2017 (the "Complaint") asserting claims of Negligence/Gross Negligence. Breach of Implied Warranty of

Service, and Breach of the Implied Warranty of Habitability. Meritage filed a Motion to Compel Arbitration, which was ultimately consented to on August 30, 2017. The Arbitration Provision of the sales contract includes an appeal process which was consented to by the parties. On February 11, 2020, Meritage made third-party claims (in Circuit Court) against a number of its subcontractors ("Subcontractor Defendants"). After asserting claims against the Subcontractor Defendants, Meritage moved to compel arbitration pursuant to its contract with Plaintiffs. Ultimately, the parties entered into an Arbitration Order, to conduct the arbitration pursuant to the Federal Arbitration Act ("FAA").

Meritage ultimately settled its third-party claims with the Subcontractor Defendants directly, and Meritage collected three-hundred and fifty thousand dollars ($350,000), however, Meritage and Plaintiffs were not able to settle their claims at mediation. This case was arbitrated September 21-22, 2023, and the reversible Award followed, on October 4, 2023 (the "Award").

ARGUMENT

The Award is replete with errors of law, erroneous factual and legal conclusions, erroneous calculations, and a consistent pattern on the Arbitrator of parroting the arguments of counsel for Meritage in her ruling, rather than weighing the evidence and testimony that was elicited at trial and making a decision that comports with applicable law. The result is that the Award imposed on Plaintiffs extra-legal proof requirements and belied the Arbitrator's lack of impartiality.

The errors are so numerous and so clear as to compel a reconsideration of the award.

I. Partiality.

Below, a number of the many errors in the award are discussed in detail. Taken *in toto*, it is clear that at every opportunity possible, when there was a dispute between the witnesses and evidence for Plaintiffs and that of Meritage, or when counsel for Meritage simply made arguments

about Plaintiffs evidence and testimony, the Arbitrator sided with Meritage even when it meant disregarded applicable law which favored Plaintiffs' positions or ignoring uncontroverted testimony. The Arbitrator disregarded the burden of proof applicable to Plaintiffs and instead created extra-legal burdens, which she contended Plaintiff failed to satisfy. At every opportunity possible, the Arbitrator parroted the arguments of Meritage counsel to discredit the testimony of Plaintiffs' and their expert witnesses, even when their testimony was uncontroverted. In many instances, the Arbitrator made numerous assumptions and factual conclusions in favor of Meritage, even in the absence of evidence and testimony, and based only on the argument of counsel.

Each instance discussed below establishes an inherit bias in favor of Meritage that has resulted in an award that is grossly inadequate and not supported by the evidence. Evidence of this bias further represents the gross miscarriage of justice. The Award contains clear errors and disregard of law and the order of $51,413.88, under the circumstances that it has been awarded in this matter, ***has resulted in a manifest injustice to Plaintiffs***, is grossly inadequate, and is "***dead wrong.***" *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

Bringing this pattern to the attention of the Arbitrator is in an effort to secure reconsideration of the award. The bias was likely unintentional but is glaringly apparent and justifies reconsideration of the Award.

II. The Award Disregards and Misapplies Directly Applicable Law.

A. Resulting Damages are Not Required to Support. Claim for Defective Construction.

Plaintiffs' forensic expert, Ross Clements, who was qualified without objection, conducted numerous site visits to Plaintiffs' home and did destructive testing. At the hearing, Mr. Clements walked through his findings in pain-staking detail, identifying numerous instances of code violations, manufacturers' instructions, and industry standards with respect to the roof and building

envelope at Plaintiffs' home. These defects created conditions which he opined have or would lead to water infiltration and required removal and replacement of the cladding at Plaintiffs' home, repair of the weather resistive barrier ("WRB"), the removal of the windows to correct WRB, and the proper re-installation of the windows (if possible) , in order to provide Plaintiffs with a home that is constructed in compliance with the code and industry standard and is properly warranted.

Meritage was unable to refute Clements' findings and did not try, either through a fact witness from Meritage, a subcontractor, or an expert. Instead, a constant theme of Meritage's defense to Mr. Clements' scope of repair was to point to the absence of proof of *resulting property damage*. In the Award, the Arbitrator acknowledges that the scope of repair provided by Clements, included eighteen (18) recommendations for violations of building code violations and breaches of industry standard, but then inexplicably goes on to parrot the arguments of Meritage (again, made through counsel, since Meritage did not offer any testimony in its own defense) and, *without any evidence*, discounting Clements' repair recommendations to address building code violations and breaches of industry standard finding them **"to be unnecessary."** Specifically, the Award states:

> **Since there have been no observed leaks or water intrusion at the windows since the Athimoolams moved in in 2015, I find that the recommendations by Expert Ross Clements to remove and reinstall the windows to install flashing, etc., to be unnecessary.**

(Award at 19).

This finding represents a gross disregard and application of directly relevant law. For decades, the South Carolina Supreme Court has expressly held that proof of resulting property damage is not necessary to establish liability for construction defects. *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980). In another seminal construction defect case, actually cited by the Arbitrator, Justice Toal discussed this explicitly, holding that it would be unfair to insulate a

building who had constructed a defective building just because that failure had not yet created physical damage: "It is clear that a builder is no less blameworthy in such a case where lady luck has smiled upon him, and no physical harm has yet occurred". *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 346. (1989). In summary, the law in South Carolina is crystal clear that a cause of action in negligence will be available where a builder has violated a *legal duty, no matter what the type of resulting damage. Kennedy*, 299 S.C. 335 at 347 (1989).

The scope of repair Clements testified is necessary is to remedy defects. It is not a requirement that those defects have already led to damage to justify their repair. By disregarding the clear and applicable law and imposing a burden on Plaintiffs to prove resulting property damages, the Arbitrator effectively imposed the duty of meeting a higher burden of proof on Plaintiffs and also evidences a lack of impartiality.

B. Rogers' Testimony Does Not Refute Clements' Opinions.

In the Award, the Arbitrator wholeheartedly relies on the testimony of J. Rogers. Rogers testified that he reviewed Clements' report, did not do any independent investigation or destructive testing, and did not offer any testimony or evidence to refute Clements' findings. Instead, Rogers relied on Clements' investigative efforts entirely, and rather than refute his opinions with relevant evidence, *irrelevantly* opined that the absence of damage meant that the repairs should be limited to areas revealed by Clements destructive testing, all in full support of the incorrect legal arguments of counsel for Meritage. The fact the Arbitrator disregarded the full opinions of Clements, in favor of those of Rogers, indicates a lack of impartiality.

III. The Award Made a Clear Calculation Error.

The only estimate offered to establish the cost of Ross Clements' scope of work was done by Matthew Harmon, who estimated the repair to cost $962,592.60. In the Award, in an effort to

discredit Plaintiffs' repair estimate, which again was the ONLY estimate to complete Ross Clements' unrefuted scope of repair, the Arbitrator incorrectly concluded that 75% of Plaintiffs' estimate was based on "homeowner requests."(Award at 13). This holding was expressly and quite obviously incorrect, and also reflects another gross misunderstanding of the burden of proof.

First, there was no testimony that 75% of the estimate was based on "homeowner requests." In fact, the testimony of Matthew Harmon was precisely the opposite; that approximately 75% of the estimate *was based on the scope of Mr. Clement*s, while the remaining 25% was based on "homeowner requests." Even counsel for Meritage conceded in his closing that his calculation for homeowner requests in Harmon's estimate was around "one-third" of the total estimate. Based on Meritage's counsel's analysis the cost to repair is $645,499.05.

A simple review of the Harmon estimate would have shown the Arbitrator that her "only 25%" allocation for Clements' scope of repair was incorrect. The "Exterior Repairs" alone (siding, WRB, windows, rood, deck, and grading), which were all called for by Clements, total a base amount of $430,566.10, 66.6% of the sub-total. Adding that percentage of general conditions results in a total for the Ross Clements mandated Exterior Repairs of $528,047.01. In addition, Andy Schauder (not Plaintiffs) called for mold remediation after his first visit to Plaintiffs home all the way through his compelling testimony at the hearing. While the Arbitrator erroneously found that no cost was provided for mold remediation, an estimate was provided by Rainbow Restoration in the amount of $104,657.55, which was expressly included in the Harmon estimate. With overhead that total cost is $125,589.07. Thus, looking at those two items alone total $653,636.08 which establishes that the Arbitrator's finding that "75%" of the Harmon estimate was to address "homeowner requests" is clearly erroneous and should be reconsidered.

That the Arbitrator did not undertake even a cursory review of the Harmon estimate belote

making findings of fact is more troubling and, combined with the numerous other errors, indicates a pattern of partiality.

IV. Damages Identified by the Homeowner are Recoverable.

In addition, there is no legal authority whatsoever for a proposition that damages related to conditions identified by the owner are not recoverable. The Arbitrator was presented with exhaustive testimony, supported by photographs, of the deplorable condition of her home when she moved in and for the next ten months. She testified that many of those conditions were never repaired, even as of the time of arbitration, which was supported by her contemporaneous emails at the time of the 10-month warranty work purportedly done by Meritage (Plaintiffs Ex.29). Shortly thereafter, Meritage did not respond to the Right to Cure Letter sent by counsel (Plaintiffs Ex.31). Not one syllable of that testimony was refuted by Meritage, which offered no testimony on its own behalf.

By holding, by implication, that expert testimony is required to support all of Plaintiffs' damages, the Arbitrator again altered the burden of proof, requiring more of the Plaintiffs than the law requires, which is clear evidence of a lack of impartiality and should be reconsidered.

V. Evidence that no Repairs Were Requested During Ongoing Litigation Should Not Have Been Considered.

The Award specifically relied on the fact that no repairs were requested during destructive testing. "Mr. Clements admitted that no repairs, etc., were requested to be made after the destructive testing in 2018." (Award at 10). This is completely irrelevant, which the Arbitrator well knows, and again is disturbingly indicative of partiality.

There is no legal requirement for a party to repair conditions observed during forensic investigative work. In fact, as the Arbitrator well knows, *or should*, it is elemental that Plaintiffs have a legal duty to *preserve* evidence rather than *alter* it, as the Arbitrator erroneously suggests

Plaintiffs were actually *obligated* to do. "A party has a duty to preserve evidence during litigation" *Hawkins v. College of Charleston,* 2013 WL 6050324 (4th Cir. 2013). Further, there is a common law duty to preserve evidence, and not only can a party be sanctioned for destroying evidence it has a duty to preserve. Not only would the Athimoolams have faced the possibility of sanctions for requesting repairs, a negative inference of the evidence would have been drawn in this litigation. "When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party." *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw County Board of Education v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)).

As the arbitrator is aware, it is customary and a legal right for defendants such as Meritage to have access to the defective conditions to make their own assessment of them as part of the litigation process. In this instance, Jay Rogers did that for Meritage. While unfortunately predictably, the Arbitrator finds it unremarkable, and apparently irrelevant, that Meritage, which actually created the defective conditions found by Clements, never offered to repair any of the conditions. It was also not noted by the Arbitrator that Mr. Rogers did not repair the conditions at the time of his visit.

This erroneous and peculiar finding by the Arbitrator is yet another, clear example of the Arbitrator's lack of impartiality and should be reconsidered.

VI. Andy Schauder Was Credible and Rainbow's Estimate was Admissible.

Andy Schauder has been a Board-Certified Industrial Hygienist for 40 years. He visited the Plaintiffs' home three times, in 2016, 2018 and again in 2022, and each time concluded that there is mold and mold spores on framing members throughout the home. His testimony,

supported by laboratory testing results, was explicit and clear that the mold needs to be remediated to avoid the risk of future mold growth at the home.

Notwithstanding that *testimony*, from a credentialed expert who was qualified without objection, the Arbitrator relied on a *letter* from AdvantaClean, Defendant's Exhibit 1, which merely stated that, in 2016, the mold in Plaintiffs' home, was "***visibly clean.***" AdvantaClean was not called to testify by Meritage and their conclusory finding, espoused in the letter, was directly refuted, after it was written, by the testimony and laboratory results provided by Schauder.

Disregarding Schauder's testimony and findings, in favor of a letter secured by Meritage from AdvantaClean, which did not testify at the hearing (and was not even listed as a witness by Meritage), evidences a clear lack of impartiality and should be reconsidered.

In addition, the Arbitrator disregarded the mold remediation estimate provided by Rainbow, on the basis that it was not based on a protocol developed by Schauder. Again, there is no legal requirement that Rainbow's estimate needed to be based on a protocol from Schauder. Rainbow was qualified as an expert, is a licensed contractor in the business of mold remediation and testified that they do over 800 remediation proposals every year. They are the only expert to testify about those costs and there was no legitimate legal basis upon which to disregard their testimony.

This is further evidence of the Arbitrator heightening the burden of proof for Plaintiffs as result of her impartiality and should be reconsidered.

VII. Meritage's Lack of Evidence.

An over-arching issue in this case was the lack of testimony provided by Meritage. Meritage offered *no* testimony in this case. As noted by the Supreme Court in *Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171* 648 S.E.2d 585 (2007), "The failure of a defendant to testify

raises an inference that his testimony, if it had been submitted, would have been unfavorable to his position." Far from inferring that Meritage's testimony would have been unfavorable, in numerous particulars discussed below, the Arbitrator accepted the legal arguments of Meritage's counsel concerning liability, damages, criticisms of Plaintiffs' experts (who actually testified) and the Plaintiffs own unrefuted testimony about Meritage.

In addition, Meritage did not call a single subcontractor, AdvantaClean, any employee who was involved with the sale of Plaintiffs' home, the punch-list, or with respect to reviewing and responding to the Right to Cure letter.

The Arbitrator's willingness to adopt Meritage's legal arguments (proffered only by counsel) to refute and discredit the actual testimony and evidence offered by Plaintiffs and their *four testifying* experts evidences a persistent effort by the Arbitrator to increase the Plaintiffs' burden of proof and to require Plaintiffs to present evidence the law does not require, while at the same time, ignoring the absence of rebuttal *testimony* by Meritage and its subcontractors or the poor quality of Meritage's two expert witnesses.

VIII. The Arbitrator's Award is Erroneous, and Her Impartiality is Established Meritage's by Meritage's Settlements with its Subcontractors.

As the Arbitrator is aware, this case was commenced in Circuit Court and arbitrated between Meritage and Plaintiffs by agreement. In Circuit Court, Meritage asserted indemnity claims against the Subcontractor Defendants to recover any sums Meritage was required to pay Plaintiffs arising from the faulty work of the Subcontractor Defendants. In reliance on the reports and testimony of Plaintiffs' experts, including Clements and Schauder, Meritage pursued claims against those Subcontractor Defendants, securing settlements from the Subcontractor Defendants totaling $350,000.00.

To be clear: The testimony and opinions of Plaintiffs, and their experts, which the Arbitrator heard at arbitration and blithely disregarded at the request of Meritage's counsel, is the same evidence that allowed Meritage to recover $350,000.00 from its subcontractors.

To the extent Meritage argues that their claims against subcontractors were for something other than indemnity for Plaintiffs' claims, that position is refuted by *Stoneledge at Lake Keowee Owners' Association v. Clearview Construction,* 776 S.E.2d 426 (S.C. Ct. App. 2015).

The fact is that the case which the Arbitrator found so unpersuasive, was persuasive enough to enrich Meritage at the expense of its subcontractors. That the Arbitrator found the same evidence unpersuasive is further evidence of a lack of impartiality which requires reconsideration of the case.

IX. Meritage Should Have Been Judicially Estopped from Taking Opposite Positions Throughout this Litigation.

Given the complete rejection of any disputed aspect of the claim by the Arbitrator, which were decided wholly and consistently in favor of Meritage, the doctrine of judicial estoppel applies in this situation. In *Hayne Federal Credit Union v. Bailey,* 327 S.C. 242, 489 S.E.2d 472 (1997), the Supreme Court held that the doctrine of judicial estoppel precludes a party from adopting the position in conflict with one previously taken in the same or related litigation. The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process in the courts. The *Hayne* Court noted, "The parties may vigorously assert their version of the facts, but they may not represent those facts in order to gain advantage in the process." Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, by its pleadings, statements or contentions made under oath is prohibited from adopting an inconsistent position in subsequent proceedings.

In sum, as Judge Anderson said in a concurring opinion in *Quinn v. Sharon Corp.*, 343 S.C. 411, 422, 540 S.E.2d 474 (Ct. App. 2000) a party cannot blow "hot and cold."

Here, Plaintiffs recognize that Meritage was entitled to dispute the extent of the deficiencies and the costs to repair. However, in light of the Arbitrator's impartiality and the errors referenced above, equity does not allow Meritage to reap a $300,000 windfall by obtaining a benefit from the Plaintiffs' evidence which the Arbitrator rejected, and those settlement sums should be awarded to Plaintiffs.

CONCLUSION

For the reasons stated above, Plaintiffs request that the Arbitrator grant Plaintiffs' Motion to Reconsider and order an award that is consistent with the applicable case law and evidence presented.

Respectfully submitted,

LYLES & ASSOCIATES, LLC

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Attorneys for Plaintiffs

October 16, 2023
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Docket No.: 2017-CP-04-376
RAGHU ATHIMOOLAM AND IRENE ATHIMOOLAM,	)	
Plaintiffs,	)	
v.	)	**DEFENDANT MERITAGE HOMES OF SOUTH CAROLINA, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND THE ARIBITRATION AWARD**
MERITAGE HOMES OF SOUTH CAROLINA, INC.,	)	
Defendant.	)	

Meritage respectfully files this memorandum in opposition to Plaintiffs' Motion to Alter or Amend the arbitration award. Plaintiffs' current motion does not meet the requirements of 9 U.S.C §§ 9 et al. See Title 9 excerpts, attached.

Furthermore, Plaintiffs' intentional and blatant violation of the confidentiality provision of the applicable South Carolina Alternative Dispute Resolution Rules by including in their current motion the specific amount of the settlement between Meritage and its subcontractors should not and cannot be tolerated. Rule 8 of the ADR Rules very clearly states that "any mediation communications disclosed during a mediation ... shall be confidential, and shall not be divulged by anyone in attendance at the mediation participating in the mediation" except as permitted by circumstances that do not apply here. Rule 8 further requires: "The parties and any other person present or participating [in the mediation] shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence at any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation ...." (emphasis added in both).

Any settlement between Meritage and its subcontractors resulted from the extended mediation that included Plaintiffs and that lasted many months. Plaintiffs are and were bound by the confidentiality requirements of the ADR Rules. Plaintiffs'

intentional violation of the confidentiality requirement can only be explained as an attempt by them to improperly gain an advantage with the pending motion, as an attempt to improperly influence the outcome of their current motion, and as an attempt to prejudice Meritage. That conduct runs counter to the spirit and purpose of the ADR process. Rule 10(b) of the ADR Rules provides the sanctions "if any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause", which is certainly the case here. Meritage respectfully suggests that Plaintiffs' intentional violation of the ADR Rules is worthy of sanctions, including, at a minimum, the dismissal of this motion and any additional sanctions at the arbitrator's discretion. In any event, Plaintiffs' claims on this issue ignore the fact that Meritage's settlement with its subcontractors included settlement of Meritage's claims for contractual indemnity, Additional Insured status, bad faith, and payment of past and future defense costs, including, but not limited to attorney's fees and expert witness fees. Moreover, the claim that Meritage's settlement with subcontractors somehow establishes a floor for Plaintiffs' claims is without any legal support, as evidenced by the fact that Plaintiffs did provide any case law support for the proposition.

With regards to the other claims, Meritage responds as follows:

I. Claimed Impartiality of the Arbitrator: Patently absurd comments devoid of any factual support.

II. Misapplication of Law: The Kennedy case cited by Plaintiffs confirms that a negligence cause of action is available to a homeowner, and the elements of a negligence cause of action include proximate cause and damages. The Kennedy case clearly indicates that a builder is liable for proximately caused damages. In this case, Meritage disputed the extent of some damages and the existence of other damages.

Meritage's construction/engineering expert Jay Rogers clearly testified that in his opinion the cost needed to be expended to address the legitimate concerns raised

by Plaintiffs' would be approximately $30,000.00. While not intending to, Plaintiffs' architect expert Clements agreed with certain aspects of Rogers' testimony that a wholesale stripping of the house was not required to address the issues. For example, Clements testified that the entire roof did not need to be replaced, yet Plaintiffs' repair contractor Harmon ignored that and nevertheless included a substantial amount for the complete removal and replacement of all roofing and flashings. In addition, Harmon's estimate included numerous examples of his misunderstanding of the Clements scope (see exterior deck and garage repairs) and also included items that Clements did not indicate needed to be repaired (perimeter foundation, entire sheathing, etc.). Meritage's contractor/engineering expert Jay Rogers similarly indicated that the complaints regarding the siding installation, stone installation, and brick installation could be addressed using localized repairs as opposed to the wholesale removal and replacement of those items. Rogers also pointed out that Clements performed numerous destructive cuts into the claddings and many of those explorations were not included with his testimony, presumably because the findings did not advance Plaintiffs' claims.

III. Alleged Calculation Error: Plaintiffs' claim in their motion that the estimate from their fifth repair contractor (Matthew Harmon) was not based largely on "homeowner complaints" is false. Harmon testified at the arbitration hearing consistently with his deposition testimony taken on September 5, 2023 (approximately three weeks before the arbitration). The relevant excerpt from his deposition is as follows:

Q: Where did you get the scope of repair to price?

A: From walking through with her and reading Mr. Ross' report. I would say 25-75, 75 being her concerns.

Q: So 75% of the scope is what Mrs. Athimoolam said needs to be done?

A: Yes, sir.

Q: And 25% of it was from the Ross Clements report?

A: Yes, sir. I know those answer don't work well, but that is the truth.

Deposition of Matthew Harmon dated September 5, 2023, page 41, line 16-page 42, line 2.

IV: Damages Identified by Homeowner Are Recoverable: Plaintiff does not provide any specific example of what she now claims under this topic; however, the testimony of her fifth contractor Harmon clearly refuted any claim that somehow some "deplorable" condition of the house remained from the original construction. Harmon testified that every item of interior repairs that he included in his estimate was based off of what he called a "homeowner complaint." Harmon further testified that each claimed "homeowner complaint" met the applicable building code and the applicable South Carolina Residential Construction Standard. Thus, the only dispute on this issue is that Plaintiff disagrees with her own expert.

V: Evidence of No Repairs Were Requested Should Not Have Been Considered: It is quite obvious from an objective reading of the arbitration award, that the award was not based on consideration that Plaintiffs did not request repairs during destructive testing.

VI: Andy Schauder/Rainbow Estimate: Andy Schauder's testimony clearly indicated that he did not see any health concerns to the homeowners, the house was habitable, he was not aware of any wood framing in the house that had an unacceptable moisture level, and that he saw no active fungal growth at any point when he inspected the house in 2016-2023. More importantly, Schauder testified at trial consistent with his deposition testimony that he had no discussions with the Rainbow personnel, he had no knowledge of any pricing by Rainbow, and that he would not consider any pricing done by some contractor without consultation with

him to be a valid price or a valid scope. Deposition of Andy Schauder, page 99, lines 17-21.

Further, Schauder testified at his deposition on August 22, 2023 (his second deposition in this case, which took place approximately one month before the arbitration hearing) that he had not completed any protocol because he had not been asked to complete it. Deposition of Schauder, page 99, lines 2-11. Thus, Schauder had not provided to Plaintiffs and Plaintiffs had not provided to Meritage any formal protocol generated by Schauder before the arbitration hearing.

That testimony mirrored Schauder's first deposition testimony taken on November 23, 2020. During that deposition, Schauder testified that the pricing by a prior entity (Paul Davis Restoration) included as part of one of the earlier repair estimates was not proper "because the full scope of work still needs to be developed." Deposition of Andy Schauder, November 23, 2020, page 17, line 17-page 18, line 7.

VII: Meritage's Alleged Lack of Evidence: Plaintiffs claim now that somehow Meritage had to provide testimony from a Meritage representative in order to have a proper defense is both incorrect and not recognized by applicable law. Meritage did not bear the burden of proof in this case, and testimony from a Meritage representative would have been cumulative to the testimony from Plaintiffs' fifth repair contractor Harmon that the interior conditions of the home did not violate the applicable building code or the South Carolina Residential Construction Standards. Moreover, Plaintiffs had the opportunity to call Meritage witnesses in their case, but chose not to do so.

In addition, the cross-examination of the alleged expert using the Advantaclear report showing that it had performed a mold remediation of the house in 2016 was proper cross-examination of an expert witness, as allowed by the South Carolina Rules of Evidence.

CONCLUSION

Meritage respectfully seeks denial of Plaintiffs' motion based on the specifics of the Federal Arbitration Act, Plaintiffs' intentional violation of the ADR Rules, and the lack of merit to Plaintiffs' current motion.

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ATTORNEYS FOR MERITAGE HOMES OF SOUTH CAROLINA, INC.

Charleston, South Carolina

October 30, 2023

TITLE 9—ARBITRATION

This title was enacted by act July 30, 1947, ch. 392, §1, 61 Stat. 669

Chap.		Sec.
1.	**General provisions**	1
2.	**Convention on the Recognition and Enforcement of Foreign Arbitral Awards**	201
3.	**Inter-American Convention on International Commercial Arbitration**	301

AMENDMENTS

1990—Pub. L. 101–369, §2, Aug. 15, 1990, 104 Stat. 450, added item for chapter 3.
1970—Pub. L. 91–368, §2, July 31, 1970, 84 Stat. 693, added analysis of chapters.

TABLE

Showing where former sections of Title 9 and the laws from which such former sections were derived, have been incorporated in revised Title 9.

Title 9 Former Sections	*Statutes at Large*	*Title 9 New Sections*
1	Feb. 12, 1925, ch. 213, §1, 43 Stat. 883	1
2	Feb. 12, 1925, ch. 213, §2, 43 Stat. 883	2
3	Feb. 12, 1925, ch. 213, §3, 43 Stat. 883	3
4	Feb. 12, 1925, ch. 213, §4, 43 Stat. 883	4
5	Feb. 12, 1925, ch. 213, §5, 43 Stat. 884	5
6	Feb. 12, 1925, ch. 213, §6, 43 Stat. 884	6
7	Feb. 12, 1925, ch. 213, §7, 43 Stat. 884	7
8	Feb. 12, 1925, ch. 213, §8, 43 Stat. 884	8
9	Feb. 12, 1925, ch. 213, §9, 43 Stat. 885	9
10	Feb. 12, 1925, ch. 213, §10, 43 Stat. 885	10
11	Feb. 12, 1925, ch. 213, §11, 43 Stat. 885	11
12	Feb. 12, 1925, ch. 213, §12, 43 Stat. 885	12
13	Feb. 12, 1925, ch. 213, §13, 43 Stat. 886	13
14	Feb. 12, 1925, ch. 213, §14, 43 Stat. 886	Rep.
15	Feb. 12, 1925, ch. 213, §15, 43 Stat. 886	14

POSITIVE LAW; CITATION

This title has been made positive law by section 1 of act July 30, 1947, ch. 392, 61 Stat. 669, which provided in part that: "title 9 of the United States Code, entitled 'Arbitration', is codified and enacted into positive law and may be cited as '9 U.S.C., §—' ".

REPEALS

Act July 30, 1947, ch. 392, §2, 61 Stat. 674, provided that the sections or parts thereof of the Statutes at Large covering provisions codified in this Act, insofar as such provisions appeared in former title 9 were repealed and provided that any rights or liabilities now existing under such repealed sections or parts thereof shall not be affected by such repeal.

CHAPTER 1—GENERAL PROVISIONS

Sec.

1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.
2. Validity, irrevocability, and enforcement of agreements to arbitrate.
3. Stay of proceedings where issue therein referable to arbitration.
4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.
5. Appointment of arbitrators or umpire.
6. Application heard as motion.
7. Witnesses before arbitrators; fees; compelling attendance.
8. Proceedings begun by libel in admiralty and seizure of vessel or property.
9. Award of arbitrators; confirmation; jurisdiction; procedure.
10. Same; vacation; grounds; rehearing.
11. Same; modification or correction; grounds; order.
12. Notice of motions to vacate or modify; service; stay of proceedings.
13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement.
14. Contracts not affected.
15. Inapplicability of the Act of State doctrine.
16. Appeals.

AMENDMENTS

1990—Pub. L. 101–650, title III, §325(a)(2), Dec. 1, 1990, 104 Stat. 5120, added item 15 "Inapplicability of the Act of State doctrine" and redesignated former item 15 "Appeals" as 16.

1988—Pub. L. 100–702, title X, §1019(b), Nov. 19, 1988, 102 Stat. 4671, added item 15 relating to appeals.

1970—Pub. L. 91–368, §3, July 31, 1970, 84 Stat. 693, designated existing sections 1 through 14 as "Chapter 1" and added heading for Chapter 1.

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §1, 43 Stat. 883.

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §2, 43 Stat. 883.

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §3, 43 Stat. 883.

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, §19, 68 Stat. 1233.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §4, 43 Stat. 883.

REFERENCES IN TEXT

Federal Rules of Civil Procedure, referred to in text, are set out in Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

1954—Act Sept. 3, 1954, brought section into conformity with present terms and practice.

§5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §5, 43 Stat. 884.

§6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §6, 43 Stat. 884.

§7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

(July 30, 1947, ch. 392, 61 Stat. 672; Oct. 31, 1951, ch. 655, §14, 65 Stat. 715.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §7, 43 Stat. 884.

AMENDMENTS

1951—Act Oct. 31, 1951, substituted "United States district court for" for "United States court in and for", and "by law for" for "on February 12, 1925, for".

§8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §8, 43 Stat 884.

§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §9, 43 Stat. 885.

§10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, ch. 392, 61 Stat. 672; Pub. L. 101–552, §5, Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102–354, §5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub. L. 107–169, §1, May 7, 2002, 116 Stat. 132.)

Derivation

Act Feb. 12, 1925, ch. 213, §10, 43 Stat. 885.

Amendments

2002—Subsec. (a)(1) to (4). Pub. L. 107–169, §1(1)–(3), substituted "where" for "Where" and realigned margins in pars. (1) to (4), and substituted a semicolon for period at end in pars. (1) and (2) and "; or" for the period at end in par. (3).

Subsec. (a)(5). Pub. L. 107–169, §1(5), substituted "If an award" for "Where an award", inserted a comma after "expired", and redesignated par. (5) as subsec. (b).

Subsec. (b). Pub. L. 107–169, §1(4), (5), redesignated subsec. (a)(5) as (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 107–169, §1(4), redesignated subsec. (b) as (c).

1992—Subsec. (b). Pub. L. 102–354 substituted "section 580" for "section 590" and "section 572" for "section 582".

1990—Pub. L. 101–552 designated existing provisions as subsec. (a), in introductory provisions substituted "In any" for "In either", redesignated former subsecs. (a) to (e) as pars. (1) to (5), respectively, and added subsec. (b) which read as follows: "The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5."

§11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch. 392, 61 Stat. 673.)

Derivation

Act Feb. 12, 1925, ch. 213, §11, 43 Stat. 885.

§12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, ch. 392, 61 Stat. 673.)

Derivation

Act Feb. 12, 1925, ch. 213, §12, 43 Stat. 885.

STATE OF SOUTH CAROLINA) IN ARBITRATION
:
COUNTY OF ANDERSON) CASE NO. 2017-CP-03-376

RAGHU ATHIMOOLAM and)
IRENE ATHIMOOLAM,)
)
Plaintiffs,)
)
vs.)
) THE DEPOSITION OF:
MERITAGE HOMES OF) MATTHEW HARMON
SOUTH CAROLINA, INC.,)
)
Defendant.)

DATE: Tuesday, September 5, 2023

TIME: 9:52 a.m.

LOCATION: Turner, Padget, Graham & Laney
40 Calhoun Street, Suite 200
Charleston, South Carolina

REPORTER: Margaret F. Barnett
Court Reporter and Notary Public

Electronically signed by Meg Barnett (201-024-523-6076)

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A. One of them, yes, sir.
Q. Where was the other issue they were having water intrusion in the basement?
A. At the front by where that drain system was, down that left side where the hill was steep.
Q. That's in the front of the house?
A. Well, that's where the pump for the water is, was at the front -- yeah, it was at the front over towards the left side when you came -- because you had to go through the basement, all the way -- kind of went from conditioned space to nonconditioned space where it was just framed but not drywalled yet.
Q. So there was a water leak?
A. Well, that's where the water went to to pump out. So where it was leaking there, somewhere outside that wall. I don't know where.
Q. Did you do any investigation to determine?
A. With her using the word mold, all I did was use just a thermal imaging camera to see if I saw moisture, which I did not.
Q. Did you see any signs of moisture intrusion in the house?
A. I did not.
Q. Did you see any signs of any active leaks into the house?

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A. You mean the true moisture, not something taken down from moisture, correct?
Q. I'm not following you.
A. So, in other words, if someone removed baseboard, that's from the moisture, but I didn't see the moisture itself.
Q. Correct.
A. So, no, I didn't see moisture.
Q. What I'm getting at is: You didn't see any signs of roof leaks?
A. No, sir.
Q. You didn't see any signs of any leaks around the windows or doors?
A. Some of the siding but not specifically windows or doors. There was siding that was already rotten down the left side around where the meter came up at. As well as where the water table would have turned up for the rollout flashing for the brick, there was rot there.
Q. That's on the exterior of the house?
A. Yes, sir. That's what I'm saying, that's the only thing. I saw moisture damage but no moisture.
Q. Inside the house, did you see any signs of water intrusion?

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A. No, sir.
Q. And other than that one corner in the basement, which we know about there being a problem that has been there for years, that has not been addressed, did you see any other indication that there was any signs of water intrusion around the windows, doors?
A. No, sir.
Q. Any penetrations inside the house?
A. No, sir.
Q. Did you take any moisture readings?
A. To my knowledge, I only used thermal imaging.
Q. Well, did the thermal imaging that you did show any anomaly?
A. No, sir.
Q. There's a fellow named Andy Schauder who has done some mold investigation for the Athimoolams. Have you had any contact with him?
A. No, sir.
Q. Have you been provided any of his reports?
A. I don't believe so.
Q. Why did you not go in the attic?
A. The only way up there was through the FROG where the gentleman was sleeping.

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Q. Did y'all have a scheduled appointment?
A. We did.
Q. Any particular reason why they did not give you access to the attic?
A. I was told because he was sleeping. I was less than impressed myself. But, yeah, I never saw the upstairs.
Q. When you say the "upstairs," meaning?
A. The FROG which leads into the attic area. Fifteen hours.
Q. Fifteen hours?
A. Yes.
Q. At $125 an hour?
A. 110. 125 when I come in here. That does include drive time, if that matters.
Q. Where did you get the scope of repair to price?
A. From walking through with her and reading Mr. Ross's report. I would say, 25 to 75, 75 being her concerns.
Q. So 75 percent of the scope is what Mrs. Athimoolam said needs to be done?
A. Yes, sir.
Q. And 25 percent of it was from the Ross Clements report?

Electronically signed by Meg Barnett (201-024-523-6076)

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A. Yes, sir. I know those answers don't work well, but that's the truth.

Q. How do we divide up, then, on each of these descriptions what is in the Ross Clements report versus what Mrs. Athimoolam thinks needs to be done?

A. It would be almost impossible at this point. Would have to go back and read the report and separate it. It would be difficult.

Q. You would concede to me that Mrs. Athimoolam is not a construction expert?

A. Yes, sir, correct.

Q. You would concede to me that Mrs. Athimoolam does not actually have an understanding of what actually needs to be repaired versus what she thinks needs to be repaired. Correct?

A. I would. A lot of it is cosmetic versus, yeah.

Q. Well, how do we determine what is actually a legitimate repair scoped out by the engineer she's hired to prosecute this lawsuit versus her wishes of having a 2023 house?

A. It would have to be a lot more time going through. For instance, I never confirmed the shower was leaking, so the area behind the shower in the master closet, is that a defect? Is that a -- I would

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have to go back and actually test that pan, test the shower, see did this moisture come from -- I would have to spend a lot more time to separate those, because that's a big number there in waterproofing, rewaterproofing an area, versus something getting wet behind it that could have came from somewhere else. It's not an easy number to come to.

Q. And it also could be a lack of maintenance by the homeowner, too, as well. Correct?

A. I'm not going to say -- in the shower it can be user hair, let's be honest. Yeah, let's be real. I see it all the time, people won't pull a door far enough closed. People won't -- yeah, it can be a user error.

Q. So what I'm getting at, let's take, for example, the first description: Residential supervision/project management, 300 hours. How much of that is actually to address the construction defects that Ross Clements has indicated need to be done versus addressing what Mrs. Athimoolam thinks needs to be done?

A. There is really not a good way. I can sit down and attempt it, but it would take hours.

Q. And what would you have to do?

A. I would have to figure out how to -- I'd

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first go through his and figure out, you know, look at this, what's on there that's his. Like I say, I remember some of the areas being -- you know, if you look at the laundry room, that's tile only. Whether it's a trip hazard or not really isn't something I see in the RBC code book. That right there is not on his, not in mine. She brought it up to me; I added that. I would have to sit down and come up with a way to go back through every single room and figure out what's one hundred percent related to the report versus what's not.

Q. Same thing here: The finish carpenter, 116 hours, how much of that is for addressing the Ross Clements issues versus what Mrs. Athimoolam wants done?

A. We're going back at -- yeah, I would have to sit down and almost start from scratch.

Q. 120 hours for the backhoe loader and operator?

A. So that would be -- that's water intrusion. That's not necessarily something that she pointed out. I would have to pull up his -- I'm pretty sure he points out water intrusion.

Q. So what is the backhoe loader and operator, 120 hours, what work is that?

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A. That's to pull the dirt back away from that foundation wall, all the way around to waterproof or to see what the drain system that's in, just to figure out where to even start. Because I don't have plans of the house, not like plan plans, to see how anything was engineered, does it have a drain system. So I'd have to dig it all back to be able to access it from the foundation up.

Q. So what part of the house are you anticipating using the backhoe loader at?

A. The front, down the left side, and a little bit right there by the garage.

Q. Why is that 120 hours?

A. You got to pull it out. You got to figure out with the wires -- with the electrical coming in. I mean, by the time you clear it all out around the house without hitting the house, without hitting lines, you're probably at 60 to 80 hours and then probably 40 to put it back.

Q. So you're estimating a week and a half to two weeks of work just to pull the dirt away from the house?

A. Um-hm.

Q. And a week of work to put the dirt back?

A. Um-hm.

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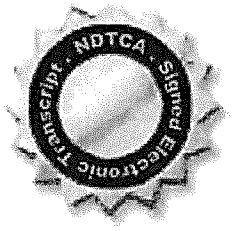
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CERTIFICATE OF REPORTER

I, Margaret F. Barnett, Professional Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record of the testimony of the witness and of all objections made at the time of the examination.

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 this 18th day of September, 2023 at Charleston, Charleston County, South Carolina.



Margaret F. Barnett
Notary Public
My Commission expires
February 25, 2030

Electronically signed by Meg Barnett (201-024-523-6076)

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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS OF THE TENTH JUDICIAL CIRCUIT

RAGHU ATHIMOOLAM AND IRENE ATHIMOOLAM,
Plaintiffs,
vs.
MERITAGE HOMES OF SOUTH CAROLINA, INC.,
Defendant.

CIVIL ACTION NO. 2017-CP-03-376

DEPOSITION OF ANDREW G. SCHAUDER

DATE TAKEN: August 22, 2023

TIME BEGAN: 2:00 p.m.

TIME ENDED: 4:30 p.m.

LOCATION: Turner, Padget, Graham & Laney
200 East Broad Street
Suite 250
Greenville, South Carolina

REPORTED BY: Eileen Thompson, CCR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

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Q. Well, how can you come up with the 25 percent?
A. That is an approximation I'm making at this point in time. The contractor will come and make their own measurements to determine for themselves what is the appropriate means and methods to do the remediation in the attic space.
Q. What percentage of the basement needs to be spot treated?
A. Probably similar.
Q. So roughly 25 percent?
A. Approximately, yes.
Q. Why are you qualifying it?
A. Because we haven't removed all of the Sheetrock to see every little location. Based on my visual observations and the places we have looked, that's an approximation.
Q. All right. So what 25 percent of the attic are you going to direct the remediator to address?
A. Areas where there's staining resulting from fungal growth having been present.
Q. Okay. And what specifically -- where are those specific areas in the attic?
A. All throughout the attic.

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Q. All right. Where specifically?
A. Left, right, up, down, everywhere throughout the attic.
Q. All right. With precision, where left, right, up, down? Where?
A. I can't be any more precise than that.
Q. Are you going to give them like a little piece of tape to mark it or are you going to spray paint? How do you think they're going to know where you think there is fungal growth that needs to be spot treated?
A. Where there is staining present.
Q. How do you know where you think there is staining present?
A. Because when we do a pre-bid meeting, I go through the attic and point out specific locations to them so they know what I'm looking for. And if they're an experienced contractor, they would already know what I'm looking for.
Q. Okay. And so you would agree with me that there's not a specific list of where they need to work either in the attic or in the basement, correct, that has got to be developed?
A. There is not a beam-by-beam, joist-by-joist list of every location. It's

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throughout the attic space where there is staining present.
Q. Okay. And if they're going to do spot treatment, they need that beam-by-beam, spot-by-spot location, correct?
A. No, they'll make that determination based upon their visual observations as to what it would take to complete the task.
Q. And so do they price it at the end?
A. I'm sorry. Say that again.
Q. Do they price this at the end?
A. They price it based upon the visual observations made at the pre-bid meeting.
Q. Okay. Well, what happens if they're wrong and there's less than what they visually observe? Is there a refund?
A. No, they're based upon a scope of work and their visual observations of what it would take to complete that work.
Q. So your process from here on out is you are just going to put together some protocol that says you-all show up at the house at some point, bid on it, and then we'll go from there?
A. That would depend on if we can get the Sheetrock removed so that we can get a clearer view

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of where it is and where it isn't.
Q. Have you had discussions with Mrs. Athimoolam about removing the Sheetrock in the heated space of the house?
A. No.
Q. Why not?
A. The protocol hasn't been developed yet to reach that point.
Q. Why has the protocol not been developed to that point?
A. I haven't been asked to do that.
Q. And so any pricing that currently exists or any remediation at the Athimoolam house is of no value, correct?
A. I have no knowledge that any such process has been undertaken.
Q. Well, you would agree with me that if pricing was done by some contractor without any consultation with you, that's not a valid price or a valid scope, correct?
A. If such had been done, yes.
MR. COBB: All right. I think for right now, I'm going to stop. Obviously, if you do any additional work, I need to be notified about that and we can regroup. Thanks for your

CERTIFICATE OF REPORTER

I, Eileen Thompson, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify, that the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

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 this 25th day of August, 2023 at Liberty, Pickens County, South Carolina.

_____

Eileen Thompson,
Registered Professional Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
October 17, 2024

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
)
COUNTY OF ANDERSON) CASE NO. 2017-CP-04-376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,

Plaintiffs,

vs.

MERITAGE HOMES OF SOUTH CAROLINA, INC.,

Defendant.

MERITAGE HOMES OF SOUTH CAROLINA, INC.,

Plaintiffs,

vs.

84 LUMBER COMPANY, LP; DRC INVESTMENT, LLC d/b/a ADVANTACLEAN OF THE UPSTATE; DOWN TO EARTH GRADING, LLC; GGG CONSTRUCTION, LLC; GUTTER CUTTERS, INC.; HH CONTRACTING, LLC; HARBIN COMPANY, LLC; M&M FOUNDATIONS, LLC; METRO GARAGE DOOR, INC.; SANDLAPPER CONCRETE, LLC; SDR RESTORATION AND CONSTRUCTION, LLC; SEALING AGENTS WATERPROOFING, INC; and STAR BUILDERS, INC.

Defendants.

* * * * * * * * * * * * * * * * *

ZOOM

DEPOSITION OF: ANDREW G. SCHAUDER
DATE TAKEN: Monday, November 23, 2020
TIME: 9:35 a.m.
REPORTED BY: EVE WILBANKS
Registered Professional
Reporter, Notary Public

Electronically signed by Eve Wilbanks (101-177-349-6970)

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A. It was done in the -- (video frozen).
Q. I think he froze.
(The deposition went off the record.)
BY THE WITNESS:
A. It was collected in the furnace room.
Q. Take me through the steps of what you do when you collect a sample.
A. Well, in this case, we're talking about air samples, so you use a particular device, a cassette that's manufactured for that purpose. You connect it to a device that's going to pull air through that cassette. Those type of cassettes are set to be sampled at 15 liters a minute, anywhere from one to ten minutes depending upon what you expect the concentration to be. Typically, we use a five-minute sample which collects 75 liters of air.
Once you've collected your sample, you re-seal the cassette and you send it off to a lab that's accredited to do that type of analyses, and they produce a report that then tells you what the concentrations of various genus of fungi are found on that sample.
Q. How long does it take you to do the sample?

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A. Well, the run time is five minutes, a couple minutes to set it up and take it back down again. So really just a few minutes, less than ten per sample.
Q. And are you wearing any type of PPE when you're doing this sampling?
A. As a rule, no.
Q. When you did the sampling at the Athimoolam residence, did you wear any PPE?
A. No.
Q. All right. Take me through the process -- because at some point during your work at the Athimoolam residence, Mrs. Athimoolam cut into the Sheetrock or exposed other parts of the basement?
A. There's a portion of the basement that has a Sheetrock ceiling. The homeowner, Ms. Athimoolam, had already cut a small opening in that Sheetrock ceiling. I enlarged it a little bit so I could get up in there and look and saw evidence, again, of staining and fungal growth. We took a sample up there, what is called a tape lift sample, of that growth, and that was identified as belonging to the aspergillus/penicillium group of fungi.

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Q. How many other tape lift samples did you take?
A. I didn't take any additional samples beyond that one.
Q. You make comments in your report about the grading of the property.
A. The area where the cove base was found to have fungal growth on the back of it, I went outside and looked, and it appears that the slope of the land is towards that particular wall. And so it is conceivable that you may be getting some accumulation of rainwater up against that wall. There is some transmission of moisture then through the wall. And as that moisture comes up against the back of the cove base -- it's a wood cove base -- it will collect there and fungal growth will occur. That was my opinion as to where the most likely source of that moisture was coming from.
Q. Do you make any recommendations about how the grading of the property can be changed?
A. No, I do not.
Q. Is that outside of your specialty?
A. Yes.
Q. With regards to the mold growth that you

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observed in the basement area, do you also believe that that resulted from, in part, the framing members being left exposed to the weather and then not dried before installed?
A. Yes. The appearance of where the fungal growth is and its intermittent nature all are suggestive that the fungal growth did not occur once it was installed and the building was in the dry.
Q. And do you make any recommendations about cleaning the fungal growth that's in the basement area?
A. Uh, that would need to come at some point. A protocol for the remediation would need to be developed once a full scope of work has been developed.
Q. Okay. Are you aware that there has been a pricing of your report for repair purposes?
A. No, I was not aware of that.
Q. Paul Davis Restoration?
A. I'm aware of the firm, but I have not provided that to them. I assume maybe the homeowner provided my report to them.
Q. But you have not been involved with Paul Davis Restoration's pricing of the Athimoolam

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residence?
A. No, I have not.
Q. Do you feel like what you've done in 2016 is at the point where someone can price repairs for it?
A. No, I do not, because a full scope of work still needs to be developed, which involves investigating if there's any other areas where there is significant fungal growth to wood framing members that are currently hidden behind either Sheetrock walls or Sheetrock ceilings.
Q. Okay. This may be a dumb question, but I ask a bunch of those so that's okay. Based on what you know now, is the remedy for the fungal growth on the framing members that you observed either in the attic or in the basement, is the repair protocol simply to try to get some sort of cleaning agent on those and wipe them down?
A. No. It typically would be a little more involved than that. You would first treat the areas where there's suspect fungal growth with a biocide; you kill what's there. And then you physically remove what you can from the surface. But wood is a semi-porous material, so you're not really going to get to all of it.

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So typically, in a situation like this, you apply a coating that contains an antifungal component. So if that wood should ever get wet again, it will retard, if not completely prevent, any future growth.
Q. And would that necessitate the removal and replacement of any of the framing members as long as that it can be treated with a biocide and/or the antifungal component coating?
A. If there was a framing member that was so significantly deteriorated, I would ask for an engineer to make that determination as to whether it needs to be replaced or not. From what I've seen, I wouldn't suspect any of those framing members would need to be replaced. They could simply be treated in place.
Q. What company that you know of in the Upstate does that work?
A. There's several good ones. There's one called Steamatic of Greenville who has done work for me on multiple occasions; PuroClean (ph) is another one in the Upstate that has done work for me on multiple occasions. So those would be two companies I would have considerable confidence in that would do a good job.

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Q. What is the first one?
A. Steamatic of Greenville.
Q. S-T-E-A-M- --
A. -A-T-I-C, yes.
Q. All right. And I take it, too, that you would recommend as far as repairs that whatever the source of the water intrusion, that that be addressed and then the affected elements either be treated and/or replaced, if needed?
A. Well, again, the only area where I suspect there's water intrusion occurring is along that one wall in the basement where the cove base with the fungal growth was present. So that would be the only area that would need to be addressed from a water intrusion point of view.
Q. And is that one wall -- does it run parallel with the backyard, or does it run perpendicular with the backyard?
A. What I have in my report -- let me get to that section. What I say in the last paragraph of page 2 is, "The most significant finding from the visual examination of the exterior of the house was that the grading of the land, particularly at the rear of the house, would allow rainfall to accumulate at the exterior wall. This

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is particularly noticeable around the patio at the rear of the house."
Q. Okay. How does that answer the question?
A. Well, you were asking about any areas that might need grading, so this is where we're seeing water intrusion, and so that area might -- one approach to prevent future water intrusion might be regrading it; that's not the only possible approach.
Q. I'm sorry. I was interested in the area -- the wall that you say there's active water intrusion. Is that wall running parallel with the backyard or perpendicular to the backyard?
A. Uh, I can't answer that question. I don't have any photographs showing that wall relative to the backyard.
Q. Okay. Do you think that all of the drywall and flooring in the basement needs to be removed and replaced?
A. No.
Q. Do you think the insulation in the attic needs to be replaced?
A. I would not expect so, but I would need to look at it to see if there's any issues. I

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likely explanation, given the visual appearance of the fungal growth and the relationship of its presence on one piece of wood versus another piece of wood.

Q. If you had just found mold on that baseboard area in the bedroom, what would your recommendation be?

A. That we determine why there's moisture transmission occurring through that wall, correct that, and obviously replace that baseboard. And then, depending upon what the air samples were, there might need to be a relatively minor remediation and decontamination in that portion of the basement.

MR. FARRAR: And I don't think I have any further questions. Thank you, sir.

EXAMINATION

BY MR. OLSON:

Q. Hey, everybody, this is Clay Olson. Can you hear me?

A. Yes.

Q. I represent HH Contracting. I just have one question. Do you anticipate being asked to provide additional opinions prior to trial?

A. Um, I suppose that's possible. I really

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couldn't say anything different from what I've already said unless some -- (video buffering) -- inspection work is done.

THE COURT REPORTER: I'm sorry. I couldn't hear that.

A. Okay. To repeat what I was saying was, that we really need to have a full scope of work developed. And so at that point, it could be determined what, if any, areas of remediation might be needed. Now, I'm not sure if that really answered your question. So if you need to rephrase it or ask it again, please do.

MR. OLSON: That answers my question. I have no further -- I have no others.

THE WITNESS: Any other questions?

MR. COBB: Anybody else? All right. We're done.

(The deposition concluded at 10:15 a.m.)

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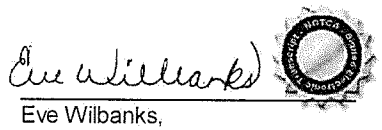
CERTIFICATE

STATE OF SOUTH CAROLINA:
COUNTY OF CHARLESTON:

I, EVE WILBANKS, Registered Professional Reporter and Notary Public, State of South Carolina at Large, certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 10th day of December, 2020, in the City of Charleston, County of Charleston, State of South Carolina.



Eve Wilbanks,
Registered Professional Reporter
and Notary Public
My commission expires:

Electronically signed by Eve Wilbanks (101-177-349-6970)

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LYLES & ASSOCIATES, LLC
ATTORNEYS AT LAW
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Robert T. Lyles, Jr.
Member

Reply to: Main Office
E-mail: rtl@lylesfirm.com

November 22, 2023

VIA EMAIL ONLY
Becky Laffitte, Esquire
Robinson Gray
P.O. Box 11449
Columbia, SC 29211
blaffitte@robinsongray.com

Re: *Raghu Athimoolam and Irene Athimoolam v. Meritage Homes of South Carolina, Inc.*
Case Number: 2017-CP-04-00376

Dear Becky:

Following our hearing on Friday, November 17th, you requested clarification for certain line-item costs, and the corresponding portions of the "Fuller Report" calling for those repairs. Below is a breakdown of those items. If I have missed anything, or failed to respond to something you requested, please let me know. Thank you for your willingness to consider this and for your hard work in sorting through the evidence.

I. Window Issues

I recall your question being whether window replacement, which was priced by Harmon, was called for by Ross Clements. Our review of the Clements scope indicates that he only called for removal and reinstallation, not replacement. See below:

Fuller Report:

A9. Observations during our destructive testing revealed that deficiencies exist at the window and window rough openings including but not limited to:

1. Improper fasteners installed at the window nailing fin and improperly spaced fasteners. Fasteners were also observed to be installed into the field of the nailing fin and not into the factory provided slot holes.

2. Asphalt-saturated felt utilized for the sill flashing was found to be improperly integrated with the WRB. The felt still flashing was also observed to be discontinuous at various locations.
3. No WRB or rough opening flashing was observed to be properly integrated into the window rough opening.

A12. Observations during our destructive testing revealed that the windows installed at brick veneer locations lacked proper head thru-wall flashing.

Recommendation: removal and reinstallation of existing windows and doors. The existing windows and doors and related interior trim shall be removed to provide access to the rough openings to address improperly installed/damaged rough opening flashing and WRB around the openings.

Remove and replace existing flashings at the windows and doors with new self-adhered flashings. New SAF shall be lapped with the new WRB in a water-shedding manner. A self-adhered pan flashing with end dams and an interior upturned leg shall be installed along the window sills. The pan flashing along the door sills shall consist of a on-piece continuous metal pan with end dams and an interior upturned leg. The flashings at the jambs shall lap onto the end dams of the pan flashings.

Following proper installation of the rough opening, flashings, the windows and doors shall be reinstalled with high-quality urethane sealant. Sealant and closed-cell backer rod shall be installed around the interior perimeter of windows and doors to form a continuous air seal.

Install metal head flashings and properly lap with the new WRB. Reinstall interior trim following completion of window and door repairs. Fill all nail holes in trim, caulk and paint to match existing.

Harmon priced replacement:

Window Cost -Total – 41,120.16

- Removal (per window) - $21.62 (page 25 CCR Estimate) x 29 windows = $626.98
- Replacement (new window cost) -$776.12 (page 25 CCR Estimate) x 29 windows = $22,507.48
- Tax - $1,833.76 (page 25 CCR Estimate)
- O&P – 4,993.66 (page 25 CCR Estimate)
- Finish Carpenter – Labor for interior repairs associated with replacement of windows 4hr x 29windows = $11,158.28. (Page 2 CCR Estimate)

Based on the above, the cost for new windows (29) is $22,507.48. As we discussed, the Clements' testimony and photos showed damage to the window flanges because of improper nailing, and removal and reinstallation may damage the windows justifying Harmon's replacement costs. If you disagree, the costs of the new windows are $22,507.48. The other costs remain the same.

II. Masonry Issues

I believe you asked if the masonry costs included all of the brick. Clements calls for the replacement of all cladding, including hardi, brick and stone:

Fuller Report:

A2. At the left, right, and rear elevations, metal flashing installed between the horizontal band board and brick veneer was observed to be filled with sealant. No additional thru-wall flashing was observed to be installed at the brick and lap siding transition.

1. Observations of the brick and lap siding transition during our destructive testing confirmed the metal thru-wall flashing was reverse-lapped with the weather barrier and the flashing was sealed with sealant.

A3. Adhered manufactured stone veneer (AMSV) was observed to be improperly installed at three walls that comprise a bay window feature a the front, left corner of the structure. Multiple deficiencies, were observed, including but not limited to:

1. Asphalt-saturated felt weather-resistant barrier (WRB) was observed to be reverse-lapped with the windowsill nailing fins.
2. At multiple locations between the stone sections and tat AMSV terminations, the metal lath was not fully embedded within the cementitious scratch coat and was visible.
3. At the inside, vertical corner join, where AMSV transitioned to brick veneer, the OSB wall sheathing was observed through a gap between the two materials, indicating an incomplete and improper application of the exterior WRB.

A6. Along the left elevation, the brick veneer at the base-of-wall was observed to lack thru-wall weeps above the adjacent grade. Additionally, a corrugated drain pipe was observed to be connected to a black plastic coupling that exited the brick veneer at the base of the wall, near the rear corner of the side elevation.

1. Observation during our destructive testing revealed that the corrugated drain pipe was connected to what is believed to be a channel drain wrapped in the three dimensional drainage material. It is unknown if this is a proprietary product that is approved for use in this application. Furthermore, the brick veneer lacks thru-wall flashing along this elevation.

Recommendation: removal and replacement of the exterior cladding, including all fiber-cement siding, brick veneer, AMSV, composite MDF trim, and related accessories. The removal of these materials is required to provide access to the weather-resistive barrier (WRB), flashings, and sheathing behind the cladding. Install additional fasteners at edges and field of OSB sheathing, as required to meet prescriptive building code requirements. Install new Tyvek WRB system. Following the completion of additional items outlined below, the exterior cladding shall be replaced in kind and to match the existing layout of the materials. Flashings at wall bases and roof-to-wall interfaces shall be installed and properly integrated with the WRB. Install additional fasteners at edges and field of OSB sheathing, as required to meet prescriptive building code

requirements.

A properly configured AMSV system should be installed, including all accessories, such as: hot-dipped galvanized metal lath, zinc casing beads, drip screeds, etc. Flashings at wall bases and cladding interfaces shall be installed and properly integrated with the new weather-resistive barrier (WRB). The new WRB shall be two layers, consisting of one layer of StuccoWrap installed underneath one layer of 30# felt or equivalent.

Brick veneer repairs shall include the installation of thru-wall flashings and weeps at locations including but not limited to: window/door heads and base-of-wall.

Contrary to what I said on our phone call, this portion of the Fuller Report scope of repair calls for the complete removal and replacement of all of the veneer, including the stone and brick, justifying Harmon's total masonry cost, **$97,552.80,** (plus OHP and general conditions).

III. Deck Issues

You asked if Clements called for the replacement of the deck, or just repairs to it. A review of his scope shows that he only called for the repair of components of the desk:

Fuller Report:

A.7 At the rear, wood deck, improper connections were observed including but not limited to, between the wood columns and deck floor framing, and between the guardrail posts and deck floor framing. Fuller believes the columns and guardrail posts, more likely than not, lack proper attachment to resist code-prescribed loads.

1. Measurements and additional documentation were performed during our destructive testing. Various deficiencies were observed and confirmed, including but not limited to the following:
    a. Missing lateral connections at the deck ledger board;
    b. Improper deck ledger fastening pattern;
    c. Missing lateral bracing at the deck columns;
    d. Improper guardrail post attachment;
    e. Improper baluster attachment;
    f. Unsupported connection at the stair stringer;
    g. Improper column-to-beam attachments; and
    h. Missing lateral support blocking between joists.

Recommendation: Localized repairs shall be performed at the deck structure to provide lateral bracing and proper attachment of components including but not limited to the following:

a. Install lateral connections (hold down anchors) at the deck ledger;
b. Install additional ledger fasteners (12" O.C. staggard). Match existing fastener types;
c. Install diagonal bracing at all deck columns;

d. Remove existing guardrail posts and install new 4x4 posts with hold down anchors, through-bolts, and blocking in accordance with building code requirements. Install additional, code required fasteners in balusters;
e. Install new 4x4 PT wood column and concrete footing below the stair stringer termination at the deck landing to complete load path;
f. Install retrofit Simpson post cap at all post-to-beam connections; and
g. Install full depth 2x blocking between joists at bearing ends.

Repairs shall be performed in accordance with the Prescriptive Residential Wood Deck Construction Guide. Corrosion resistant fasteners compatible with building materials shall be used.

While it does not call for a full replacement of the deck, this scope of repair is extensive and total replacement may be the most efficient means of repair the deck, which was Harmon's approach.

Deck Replacement Costs - $37,411.22 (Page 2 CCR Estimate)

IV. Column Issues

You asked about the Clements scope calling for a column at the rear of the home where there is an undersized beam:

Fuller Report:

A.5 It is our understanding that a Meritage Homes representative reported to the homeowner that a column should have been installed below the beam and first floor wall that spans between the two, perpendicular alcove walls at the walk-out basement. The exterior wood deck also bears along the beam span. Fuller agrees that a column may be required at the center of this span, due to its length and depth.

1. Observations during our destructive testing of the area at, and around the beam confirmed that various deficiencies exist with the existing double-ply LVL beam and framing installation, including but not limited to the following:
    a. The exterior OSB wall sheathing lacked the code prescribed number of fasteners along the edge and field of sheathing panels;
    b. The double-ply LVL beam lacked the code prescribed fastening pattern for composite beams. An approximately ½" deflection between the two LVLs was measured at the center of the span, on the inboard LVL member;
    c. Further structural analysis concluded that the double-ply LVL beam was improperly sized (insufficient load capacity) to resist the code-prescribed loads of the residence and deck structures; and
    d. Fasteners were observed to be missing at Simpson joint (truss) hanger brackets. Additionally, the joist hangers were observed to be inadequately sized. The ESR 2549

Code Report for LUS410 Simpson hanger stipulates joist hanger height to be 60% of the height of the joist, unless lateral restraint is provided.

A13. Observations during our destructive testing revealed inadequately sealed penetrations in the thermal envelope and discontinuous batt insulation at the ceiling (first-floor framing) of the exterior alcove of the walk-out basement.

Recommendation: At the rear elevation, first floor level, repairs shall be completed at the floor structure in accordance with the following:

a. Replace the existing double-ply LVL beam with (2) 1.75”x24” Trus Joist MircoLam LVL 2.0E or install new 6x6 nominal wood column and concrete footing at midspan;
b. The double-ply LVL beam shall be fastened together with 10D nails in 3 rows (top, middle, bottom) at 12” O.C. across the span; and
c. Install new joist hangers at the beam to meet building code requirements (60% of truss height) or install full depth 2x wood blocking between floor trusses.
    i. If exiting joist hangers are left in service, install additional fasteners where fasteners are missing. Ensure fasteners are properly sized, based on manufacturer's installation instructions.

We do not see that cost in Harmon’s repair estimate, and it may be that it is included in the deck repair cost or other item.

V. Gutter Issues

You asked about Harmon’s gutter repair number. Replacement is called for by Clements:

Fuller Report:

A8. The homeowner has reported that during heavy rain events, water from the roof spills over the edge of the gutter along the rear elevation. A downspout is located at each corner of the rear elevation. All gutters and downspouts should be properly sized in accordance with the applicable building code and accepted industry standards. Piping shall be installed to adequately carry downspout water away from the residence.

1. Measurements and additional documentation of the as-built condition were performed during our June 14, 2018 site visit. Calculations based upon accepted industry standards confirmed that the existing K-style gutter at the rear elevation is inadequately (under) sized.

Recommendation: At the rear elevation, remove existing gutter and replace with a 6” K-style gutter. Reinstall existing downspouts. Gutter shall match existing in color. Insure downspouts terminate and direct water away from the structure.

Harmon’s estimate seems to include that cost twice. We concede that the $11,700.00 Soffit, Facia and Gutter cost is likely inclusive of the gutter issue.

VI. Siding/Painting Issue

Danny and I were a little unsure of this question. Fuller calls for the removal and replacement of the siding which will necessitate painting of the new siding.

Fuller Report:

A10. Observations during our destructive testing revealed that deficiencies exist with the WRB at various locations including but not limited to:

1. Discontinuous WRB within the field of the wall.
2. Discontinuous and improperly integrated WRB (with wall waterproofing) at wall structural framing transition (wood-framed-to-concrete basement wall).
3. Discontinuous ad improperly integrated WRB (with flashings0 at the rear deck, deck-to-wall intersection.

Recommendations: At the first-floor mudsill plate for the perimeter of the structure, install fasteners into unattached mudsill anchors and additional fasteners at anchors lacking fasteners.

In Harmon's estimate, he includes the painting in the siding costs:

Siding Costs – $151,298.74

- Remove and Replace exterior cementitious siding - $84,882.24 (page 25 CCR Estimate)
- Painting (Siding) - $41,994.60 (page 25 CCR Estimate)
- Remove and Replace sheathing - $24,421.90. (page 26 CCR Estimate)

That painting number is for exterior painting only (the siding), he breaks down interior painting costs by room/area in the home he proposes to paint. I hope this answers that question.

The "hard" total costs breakdown for these items is **$346,600.3**6, which does not include a proportional increase for Overhead/Profit and a corresponding portion of the general conditions.

Should you have any additional questions, or need any clarification, please do not hesitate to reach out. Thank you again for your hard work on this.

With kindest regards, I am

Very truly yours,

LYLES & ASSOCIATES, LLC



Robert T. Lyles, Jr.

RTL/jdw
CC: David Cobb (via email only)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Docket No.: 2017-CP-04-376
	)	
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,	)	
	)	**DEFENDANT MERITAGE HOMES OF SOUTH CAROLINA, INC.'S SUPPLEMENTAL MEMORANDUM OPPOSING PLAINTIFFS' MOTION TO AMEND OR ALTER THE ARBITRATION AWARD**
Plaintiffs,	)	
	)	
v.	)	
	)	
MERITAGE HOMES OF SOUTH CAROLINA, INC.,	)	
	)	
Defendant.	)	
	)	

Meritage files this supplemental memorandum in opposition to Plaintiffs' Motion to Alter or Amend the arbitration award. Meritage incorporates the arguments made by the first memorandum into this current memorandum.

A. Modification of the arbitration award is not permitted.

The contract between Plaintiffs and Meritage compelled arbitration pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.). The contract further states that that the arbitration shall be administered pursuant to the Arbitration Rules and Comprehensive Procedures of the Judicial Arbitration and Mediation Services ("JAMS"), "including, but not limited to, the expedited procedures of JAMS Rule 16 and the JAMS Optional Arbitration Appeal Procedure, and in accordance with the Expedited Procedures in those Rules." Contract ¶ 16(D)(iv).

The JAMS rules do not permit modification of the arbitration award within the time frame now brought by Plaintiff. According to the JAMS Rule 24(j) (attached), a motion must be made within 7 calendar days after service of the award. Here the award was issued on October 4, 2023 and Plaintiff did not make the motion until October 16, 2023. And even if such motion to modify was brought within the appropriate time frame, JAMS Rule 24 only allow calculation errors to be

corrected/modified. Plaintiff's current motion for reconsideration seeks to do far more than correct a mere calculation error.

Thus, any "modified" arbitration award would be subject to vacatur under the Federal Arbitration Act ("FAA"), more specifically, 9 USC § 10(a)(4). In fact, this exact issue was examined by the Fifth Circuit in Smith v. Transport Workers Union of America, AFL-CIO Air Transport Local 556 374 F.3d 372 (5th Cir. 2004).

Therein, an arbitration award was issued to the plaintiff but "[q]uestions about taxation of additional costs and the arbitration panel's authority to modify its initial award gave rise to this controversy. The arbitral panel determined that it had such authority and modified the award to tax additional costs against the [defendant], favoring [plaintiff]. In district court [plaintiff] moved to confirm the modified award and the [defendant] opposed confirmation of the award as modified, but not the original award. The district court agreed with the [defendant] and vacated the modified award, confirming only the original award." Id. at 374.

As noted by the Court, "[a]rbitration is a matter of contract; a party cannot be required to submit to arbitration unless it agreed in advance that the dispute would be arbitrated. [Footnote omitted.] Although the law imposes a presumption in favor of arbitrability, the policy that favors resolving doubts in favor of arbitration 'cannot serve to stretch a contractual clause beyond the scope intended by the parties or authorize an arbiter to disregard or modify the plain and unambiguous provisions of the agreement.' " Id. at 374–375.

Indeed "[t]he plain wording of the arbitration agreement contemplates that the arbitrators will not consider correcting the arbitral award at all at the behest of the parties, and forbids a correction or amendment on the arbitrators own motion more than three business days after the award. We conclude that the modification made was beyond the reach of the arbitrators' power. If an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision." Id. at 375.

B. Plaintiffs' intentional and blatant violation of the confidentiality provision of the applicable South Carolina Alternative Dispute Resolution Rules by including in their current motion the specific amount of the settlement between Meritage and its subcontractors should not and cannot be tolerated, and that conduct warrants dismissal of Plaintiffs' pending motion.

Rule 8 of the ADR Rules very clearly states that "any mediation communications disclosed during a mediation ... shall be confidential, and shall not be divulged by anyone in attendance at the mediation participating in the mediation" except as permitted by circumstances that do not apply here. Rule 8 further requires: "The parties and any other person present or participating [in the mediation] shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence at any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation ...." (emphasis added in both).

Every mediation conducted in South Carolina includes a specific disclosure and warning by the mediator to the parties at the start of the mediation that all mediation discussions and negotiations are confidential and that none of the discussions and negotiations held during a mediation can be disclosed at any trial or hearing. This significant guarantee of confidentiality must be enforced. Otherwise, the negative impact to every mediation to be conducted is obvious, and the negative impact to every mediation moving forward because of this conduct cannot be understated.

The rationale for the confidentiality rule is clearly designed for an open discussion of the issues and settlement offers and demands in an effort to resolve all pending claims. To allow a party who participated in a mediation to intentionally disclose the confidential settlement discussions from a mediation in an obvious and blatant effort to gain an advantage in a post-arbitration motion should never be allowed and should be sanctioned. Otherwise, the impact of this conduct will be obvious. Moving forward, any party who does not settle at a mediation and who thinks they did not prevail at a subsequent trial or arbitration will intentionally disclose mediation conversations, including offers, demands, and settlements with

others, in an attempt to undo a result that the party does not like. Plaintiffs' conduct runs directly in contradiction of the mediation process.

An immediate mistrial would have been required if Plaintiffs in this case had disclosed the confidential information during a trial or during the arbitration hearing. To allow Plaintiffs to now disclose that information without the sanction being an immediate dismissal of their pending motion only rewards their egregious conduct. However, our appellate courts and the applicable rules do not reward that bad faith conduct. See Jones v. Robinson, 2023-UP-369 (S.C. Ct. App. Unpublished opinion filed November 15, 2023) (holding, among other things, that sanctions were appropriate for mediation abuses pursuant to Rule 10(b), SCADR, to include "payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; *and any other sanction authorized by Rule 37(b), SCRCP[.]*" (emphasis in original). Rule 37(b), SCRCP, permits dismissal as a sanction. Here, Plaintiffs clearly acted intentionally and in bad faith. Their conduct mocks the mediation rules and should be not tolerated. Furthermore, Plaintiffs cannot credibly argue that the intentional disclosure of the confidential settlement information does not have a significant negative impact on this matter and on the mediation process in general. If the Arbitrator allows this willful and deliberate conduct to go unchecked, Plaintiffs' behavior will alter the mediation process.

Any settlement between Meritage and its subcontractors resulted from the extended mediation that included Plaintiffs and that lasted many months. Plaintiffs are and were bound by the confidentiality requirements of the ADR Rules. Plaintiffs' intentional violation of the confidentiality requirement can only be explained as an attempt by them to improperly gain an advantage with the pending motion, as an attempt to improperly influence the outcome of their current motion, and as an attempt to prejudice Meritage. That conduct runs counter to the spirit and purpose of the ADR process. Plaintiffs took the risk of not settling at mediation and forcing this matter through arbitration. Plaintiffs should not now be allowed to use a confidential settlement entered into by other parties to unfairly influence an attempt

to alter the arbitration award simply because they do not like the result of the arbitration.

As mentioned, Rule 10(b) of the ADR Rules provides the sanctions "if any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause", which is certainly the case here. Plaintiffs intentional violation of the ADR Rules is worthy of sanctions, including, at a minimum, the dismissal of this motion and any additional sanctions at the arbitrator's discretion. In any event, Plaintiffs' claims on this issue ignore the fact that Meritage's settlement with its subcontractors included settlement of Meritage's claims for contractual indemnity, Additional Insured status, bad faith, and payment of past and future defense costs, including, but not limited to attorney's fees and expert witness fees. Moreover, the claim that Meritage's settlement with subcontractors somehow establishes a floor for Plaintiffs' claims is without any legal support, as evidenced by the fact that Plaintiffs did provide any case law support for the proposition.

C. The Fields v. J. Haynes Waters Builders, Inc. decision and Meritage's construction and engineering expert Rogers' testimony control the resolution of Plaintiffs' damage claims in this matter.

The Kennedy case cited by Plaintiffs confirms that a negligence cause of action is available to a homeowner, and the elements of a negligence cause of action include proximate cause and damages. The Kennedy case clearly indicates that a builder is liable for proximately caused damages. In this case, Meritage disputed the extent of some claimed damages and the existence of other claimed damages, which is permitted under South Carolina law and which happens in ever litigated construction case.

Moreover, the South Carolina Supreme Court's decision in Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) also controls the claimed damages issue. In Fields, the homeowner sued the builder alleging construction defects associated with an EIFS-clad home. Plaintiffs claimed the EIFS allowed moisture to enter the home, which caused significant damage to the structure. The

jury awarded the homeowners $6,000.00 in damages. The South Carolina Supreme Court affirmed that jury's verdict.

Chief Justice Jean Toal (who was the author of the one sentence quoted by Plaintiffs' counsel from the Kennedy case) wrote the Fields opinion. In Fields, Justice Toal wrote, in affirming the $6,000.00 jury award,:

> It was, of course, possible for the jury in this case to conclude, consistent with this testimony, that only five percent of the house had damage and that the calculations offered by the Builder's estimating expert represented reasonable repair costs. It was thus possible for the jury to arrive at an award of $6,000 based on evidence presented at trial in this case.

376 S.C. at 569, 658 S.E.2d at 92 (emphasis added).

The significance of the Fields decision cannot be ignored. That decision clearly rejects Plaintiffs' current contention that the Kennedy decision somehow requires that a homeowner be awarded whatever the homeowner requests during litigation if a building code violation exists from the original construction of a home. The Kennedy decision did not state that a homeowner was entitled to the costs for full removal and replacement of all building elements if a building code issue existed. And, the Fields opinion made it very clear that the trier of fact was to evaluate the claims based on the extent of any damage and what represented "reasonable repair costs." 376 S.C. at 569, 658 S.E.2d at 92 (emphasis added). That is what the October 4, 2023 Arbitration Award found, and nothing in the post-award motion can alter that decision. Accordingly, any award to Plaintiffs based on Harmon's estimate (a) would never be "fair, just, and reasonable", which is the standard under South Carolina law for any jury to base an award of actual damages (S.C. Requests to Charge – Civil § 13-2) and (b) would violate the requirements of the Fields decision that the award be based on the actual extent of damage and what constituted "reasonable repair costs."

In this matter, Meritage's construction/engineering expert Jay Rogers clearly testified that the cost that needed to be expended to address the legitimate concerns raised by Plaintiffs from original construction would be approximately $25,000.00-

30,000.00. Rogers further allocated those expenses to each claimed defect. While not intending to, Plaintiffs' architect expert Clements agreed with certain aspects of Rogers' testimony that a wholesale stripping of the house was not required to address the issues. For example, Clements testified that the entire roof did not need to be replaced, yet Plaintiffs' repair contractor Harmon ignored that and nevertheless included a substantial amount for the complete removal and replacement of all roofing and flashings. In addition, Harmon's estimate included numerous examples where he misunderstood Clements scope (see exterior deck and garage repairs) and also included items that Clements did not indicate needed to be repaired (perimeter foundation, entire sheathing, etc.).

Rogers testified that the complaints regarding the siding installation, stone installation, and brick installation could be addressed using localized repairs as opposed to the wholesale removal and replacement of those items. Rogers also pointed out that Clements performed numerous destructive cuts into the claddings and many of those test cuts and observations must not have shown any code violation or damage because Clements did not include those areas during his testimony because the findings did not advance Plaintiffs' claims. Clements bases his call for remediation of the siding, for example, on just a couple of places, which Rogers responded could be faced nailed and repainted without removing all of the siding. Jay Rogers May 29, 2021 Report, page 2. Any brick error can be remedied with a localized repair. Jay Rogers May 29, 2021 Report, page 2. The one location of stone where Clements found exposed wood framing can be repaired by removing that stone, adding peel and stick flashing, and re-adhering the stone. That location does not warrant the full replacement of all stone. Jay Rogers May 29, 2021 Report, page 2.

To reward Plaintiffs with an award based on the bloated estimate from Harmon also would constitute "economic waste" because many of the expenses Harmon listed would be to "repair" areas of the home where no person has testified that any defect exists and would also ignore that Clements only cited very limited areas of the house with any concern. For example, Clements only testified about one window where the nailing was not proper. He did not note any adverse impact to the

structure or any other window with a similar installation. No evidence in the record exists to support a claim that every window at this residence needs to be removed and replaced. To the contrary, Rogers confirmed that the windows and doors were installed to industry standards at the time of construction and that Clements' recommendations would be unnecessary and would constitute a betterment and be economically wasteful. Jay Rogers May 29, 2021 Report.

Further, the evidence clearly showed that Harmon lacked the experience and knowledge of Anderson County. He could not provide a legitimate repair estimate for this residence because he lacked the professional ability, experience, and subcontractors to issue a repair estimate for a single-family house in Anderson County. As he admitted, he was licensed as a residential builder for merely two months when he was hired by Plaintiffs' counsel for the estimate, he had never worked in Anderson County or the upstate of South Carolina, and he had no subcontractor or material supplier within 150 miles of the house.

Rogers was clearly qualified as a contractor and an engineer, and he has actually worked in Anderson County. Rogers' testimony was that Harmon's scope was excessive and his pricing was out of line with what would be charged where this home is located. "Excessive and overstated" is how Rogers described Plaintiffs' defect claims. Rogers May 29, 2021 Report, page 3. Rogers also pointed out that the 2021 estimate from Plaintiffs of $413,257 was "unwarranted." That testimony also confirmed the overzealous scope and pricing from Harmon's 2023 estimate, which was more than twice the 2021 estimate given to Plaintiffs by another contractor. Harmon's methodology of relying on a single computer program to generate a repair estimate for a house more than 100 miles away from any city where he has ever worked (and where he has no subcontractors or material suppliers) is no more accurate than a computer program trying to evaluate the value of a personal injury claim in Allendale County.

CONCLUSION

The record clearly supports the original October 4, 2023 ruling from the Arbitrator about the scope of repairs and cost of repairs needed at Plaintiffs' home to fairly, reasonably, and appropriately address the legitimate issues. As stated, the Fields opinion required the trier of fact to evaluate the claims based on the extent of any damage and what represented "reasonable repair costs." 376 S.C. at 569, 658 S.E.2d at 92 (emphasis added). Plaintiffs' current claims, many of which are improperly based off of argument and evidentiary submissions after the close of testimony (which is not permitted), fail as a matter of law. Further, Meritage objects to the consideration of the recent submissions made by Plaintiffs after the close of the testimony in the arbitration hearing because such submissions are improper.

Therefore, Meritage seeks denial of Plaintiffs' motion based on the specific rules governing this arbitration as agreed to by contract between the parties, Plaintiffs' intentional violation of the ADR Rules within their post-award motion, and the overwhelming lack of merit to Plaintiffs' current motion because the evidence in the record supported the October 4, 2023 arbitration award.

TURNER PADGET

s/David S. Cobb

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January 5, 2024

ATTORNEYS FOR MERITAGE HOMES OF SOUTH CAROLINA, INC.

JAMS Expedited Construction Arbitration Rules

Engineering and Construction Arbitration Rules & Procedures For Expedited Arbitration

Effective June 1, 2021

We understand that there is a lot on the line in arbitration. We know attorneys count on JAMS to provide highly skilled arbitrators who use JAMS Managed Arbitration Process to save time and money. JAMS offers efficiency, speed, and results.

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- **Construction ADR Services at JAMS**
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Rule 1. Scope of Rules

(a) The JAMS Engineering and Construction Arbitration Rules and Procedures for Expedited Arbitration ("Rules") govern binding Arbitrations of disputes administered by JAMS and related to or arising out of contracts pertaining to the built environment, including, without limitation, claims involving architecture, engineering, construction, surety bonds, surety indemnity, building materials, lending, insurance, equipment, and trade practice and usage, where the Parties have agreed to expedited Arbitration.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration Agreement ("Agreement") whenever they have provided either for Arbitration by JAMS under these Rules or for expedited Arbitration by JAMS without specifying any rules and the disputes or claims are within the scope of Rule 1(a).

(c) The authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of the General Counsel or their designees.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-filing) means the electronic transmission of documents to JAMS for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents to a party, attorney or representative under these Rules.

Rule 2. Party Self-Determination

(a) The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, Rules 15(i), 30 and 31). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

(b) When an Arbitration Agreement provides that the Arbitration will be non-administered or administered by an entity other than JAMS and/or conducted in accordance with rules other than JAMS Rules, the Parties may agree to modify that Agreement to provide that the Arbitration will be administered by JAMS and/or conducted in accordance with JAMS Rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or any supplementation or modification of these Rules agreed on by the Parties, is determined to be in conflict with a provision of applicable law, the law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS issues a Commencement Letter based upon the existence of one of the following:

(i) A post-dispute Arbitration Agreement fully executed by all Parties and that specifies expedited JAMS administration or use of these Rules; or

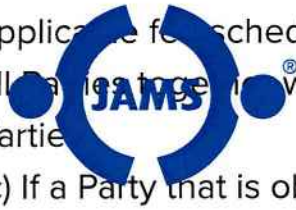
(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the dispute or claim and specifying expedited JAMS administration or use of these Rules or accompanied by the Parties' agreement that the Arbitration shall be administered by JAMS under these Rules; or

(iii) A written confirmation of an oral agreement of the Parties to participate in an arbitration conducted pursuant to these Rules; or

(iv) The Respondent's failure to timely object to JAMS administration, where the parties' Arbitration Agreement does not specify JAMS administration or JAMS Rules; or

(v) A copy of a court order compelling arbitration at JAMS.

(b) The issuance of the Commencement Letter confirms that the requirements for commencement have been met, that JAMS has received the payments required under the



applicable fee schedule, and that the Claimant has provided JAMS with contact information for all Parties together with evidence that the Demand for Arbitration has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate and, pursuant to Rule 22, the Arbitrator, once appointed, shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter but is not intended to be applicable to any legal requirement, such as the statute of limitations; any contractual limitations period; or any claims notice requirement. The term "commencement," as used in this Rule, is intended only to pertain to the operation of this and other rules (such as Rules 3, 13 and 31).

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the location of the project, the subject matter of the dispute, the convenience of the Parties and witnesses, and the relative resources of the Parties shall be considered. The location of the project shall be given the greatest weight in making this determination.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one party advances the payment owed by a non-paying party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying party's share of such costs in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules, applicable statutes or the Parties' Agreement.

(d) JAMS does not maintain a duplicate file of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within thirty (30) calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements.

(e) Unless the Parties' Agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate two or more of the Arbitrations into a single Arbitration.
(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.
(iii) Where a Demand or Demands for Arbitration is or are submitted naming parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators already appointed.
When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.
Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.
(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances he or she deems relevant and applicable.

Rule 7. Number and Neutrality of Arbitrators, Appointment and Authority of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator appointed by JAMS unless all Parties have agreed otherwise. In these Rules, the term "Arbitrator" shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.
(b) Where the Parties have agreed that each Party is to name one Arbitrator, the Claimant shall name its Arbitrator and provide contact information and curriculum vitae at the time of filing the Demand, and the Respondent shall name its Arbitrator and provide contact information and curriculum vitae within ten (10) calendar days of the date of the Commencement Letter. Failure to name an Arbitrator within the time specified in this Rule will confer the right to name the Arbitrator upon JAMS.
(c) In cases involving more than one Arbitrator the Parties shall agree within ten (10) calendar days of Respondent naming its Arbitrator on, or in the absence of agreement JAMS shall promptly designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrator agree, the Chairperson may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony of third parties who have been subpoenaed, in advance of the Arbitration Hearing, to produce documents.

(d) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party unless the Parties have agreed that they shall be non-neutral.

Rule 8. Service and Time Limits

(a) JAMS or the Arbitrator may at any time require electronic filing and service of documents in an Arbitration, including through the JAMS Electronic Filing System. If JAMS or the Arbitrator requires electronic filing and service, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of documents and notifications. Any document filed via the JAMS Electronic Filing System shall be considered as filed when the transmission to the JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date.

(b) Every document filed with the JAMS Electronic Filing System shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to the JAMS Electronic Filing System and shall bear the typed name, address, and telephone number of a signing attorney.

(c) Delivery of e-service documents through the JAMS Electronic Filing System shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through the JAMS Electronic Filing System. E-service shall be deemed complete when the party initiating e-service or JAMS completes the transmission of the electronic document(s) to the JAMS Electronic Filing System for e-filing and/or e-service.

(d) If an electronic filing and/or service via the JAMS Electronic Filing System does not occur due to technical error in the transmission of the document, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed and/or served *nunc pro tunc* to the date it was first attempted to be transmitted electronically. In such cases a Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document.

(f) In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period. If the last day for the performance of any act that is

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require[illegible] by these rules to be performed within a specific time falls on a Saturday, Sunday or other legal holiday, the period is extended to and includes the next day that is not a holiday.

Rule [illegible] Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5. It shall include a statement of the remedies sought. The Demand for Arbitration may attach and incorporate a copy of a Complaint previously filed with a court. In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by a Respondent.

(c) Within seven (7) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and a statement of any affirmative defenses, including jurisdictional challenges, or counterclaims it may have. JAMS may grant reasonable extensions of time to file a response or counterclaim prior to the appointment of the Arbitrator.

(d) Within seven (7) calendar days of service of a counterclaim, a Claimant may submit to JAMS and serve on other Parties a response to such counterclaim and any affirmative defenses, including jurisdictional challenges, it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

(f) Jurisdictional challenges under Rule 11 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.

Rule 10. Changes of Claims

After the filing of the Demand and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served on the other Parties. Thereafter, the response and reply procedure for submissions of claims shall apply. After the Arbitrator is appointed, no new or different claim may be submitted except with the Arbitrator's approval.

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issues by the Arbitrator shall be final.

(b) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the Agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(c) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(d) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may only be altered in accordance with Rules 22 and 24.

Rule 12. Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the JAMS Case Manager and the other Parties of the name, address, telephone number and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone number, and email address of the new representative. Such notice shall state that the written consent of the new representative has been obtained and shall state the effective date of the new representation.

(c) The Arbitrator may withhold approval of any intended change or addition to a Party's legal representative(s) where such change or addition could compromise the ability of the Arbitrator to continue to serve, the composition of the Panel in the case of a tripartite Arbitration or the finality of any Award (on the grounds of possible conflict or other like impediment). In deciding whether to grant or withhold such approval, the Arbitrator shall have regard to the circumstances, including the general principle that a Party may be represented by a legal representative chosen by that Party, the stage that the Arbitration has reached, the potential prejudice resulting from the possible disqualification of the Arbitrator, the efficiency resulting from maintaining the composition of the Panel (as constituted throughout the Arbitration), the views of the other Party or Parties to the Arbitration and any likely wasted costs or loss of time resulting from such change or addition.

Rule 13. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter, except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and on the Arbitrator. However, the opposing Parties may, within seven (7) calendar days of service of

such notice, request that the Arbitrator condition the withdrawal upon such terms as he or she may direct.

Rule 14. *Ex Parte* Communications

(a) No Party may have any *ex parte* communication with a neutral Arbitrator, except as provided in section (b) of this Rule. The Arbitrator(s) may authorize any party to communicate directly with the Arbitrator(s) by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have *ex parte* communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts and in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive *ex parte* communication between a Party and a non-neutral Arbitrator. More extensive communications with a non-neutral Arbitrator may also be permitted by applicable law and rules of ethics.

Rule 15. Arbitrator Selection, Disclosure and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least three (3) Arbitrator candidates in the case of a sole Arbitrator and at least six (6) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may add names to or replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike one (1) name in the case of a sole Arbitrator and two (2) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant any Party a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, or fails to respond according to the instructions provided by JAMS, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities or individuals are adverse for purposes of

Arbitrator selection, considering such factors as whether they are represented by the same attorney and whether they are presenting joint or separate positions at the Arbitration.
(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule, unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.
(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within five (5) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstances likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the results of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.
(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the challenging Party at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties who may respond within five (5) calendar days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.
(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator shall not be subject to disqualification on grounds of lack of neutrality.

Rule 16. Telephone Conference and Preliminary Conference

(a) Within five (5) days of appointment of the Arbitrator, JAMS will arrange a telephone conference between the Parties and the Arbitrator. During this telephone conference, the following subjects may be addressed:
(i) Any request for extension of time to make submissions;
(ii) Firm dates for initial requests for document discovery;
(iii) Selection of venue and date for the Preliminary Conference, and tentative selection of venue and date(s) for the Hearing; and
(iv) Any other procedural matters requiring attention prior to the Preliminary Conference.

(b) A Preliminary Conference shall be conducted with the Parties or their counsel or representatives to address any or all of the following subjects:
(i) The exchange of information in accordance with Rule 17 or otherwise including firm time limits;
(ii) Agreements to clarify or narrow the issues or structure the Arbitration Hearing, including stipulations of fact or applicable law and possible bifurcation of issues;
(iii) Time limits for presentations at the Hearing;
(iv) Arrangements for recording the Hearing by transcript or otherwise;
(v) The scheduling of firm dates for the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs as contemplated by Rule 20;
(vi) The attendance of witnesses as contemplated by Rule 21;
(vii) The scheduling of any dispositive motion pursuant to Rule 18;
(viii) The premarking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits as contemplated by Rule 20;
(ix) The form of the Award; and
(x) Such other matters as may be suggested by the Parties or the Arbitrator.
The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

Rule 17. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim as may be requested by an opposing party at the time set in the Telephone Conference. Such requests shall be focused on the material issues in dispute and as narrow as reasonably possible. The Parties shall exchange summaries of witness and expert witness testimony and any expert's report by a testifying expert at the time established in Rule 20 or in the Preliminary Conference. Depositions will not be taken except upon a showing of exceptional need for same and with the approval of the Arbitrator. When documents to be exchanged are maintained in electronic form, the Party in possession of such documents may make them available in the form most convenient for it. Broad requests for email discovery shall not be permissible.
(b) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents and information to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(c) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. JAMS shall arrange a conference with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

(d) In a consumer or employment case, the Parties may take discovery of third parties with the approval of the Arbitrator.

Rule 18. Summary Disposition of a Claim or Issue

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request. The Request may be granted only if the Arbitrator determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case.

Rule 19. Scheduling and Location of Hearing

(a) The dates of the Hearing shall be as determined in the Preliminary Conference. Absent special circumstances, the Hearing shall be scheduled no later than four (4) months from the date of the Preliminary Conference. The Arbitrator and the Parties shall schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, and the Arbitrator reasonably believes that the Party will not participate in the Hearing, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third-party witness.

Rule 20. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) an updated list of the witnesses they intend to call, including any experts in the likely order in which the witnesses are expected to be called; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; and (3) a list of all exhibits intended to be used at the Hearing, together with a copy of such exhibits to the extent that any such exhibit has not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit updated concise written statements of positions including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 21. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 22. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so.

(b) The Arbitrator shall determine the order of proof and may require two or more witnesses to give their evidence together.

(c) The Arbitrator may question witnesses and may direct that immaterial, irrelevant or cumulative evidence will not be admitted.

(d) The Arbitrator shall require witnesses to testify under oath if requested by any Party or deemed appropriate by the Arbitrator.

(e) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(f) The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony, even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as the Arbitrator deems appropriate.

(g) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider any settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(h) The Arbitrator has full authority to determine that the Hearing or any portion thereof be conducted in person or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places, or in a combined form. If some or all of the witnesses or other participants are located remotely, the Arbitrator may make such orders and set such procedures as the Arbitrator deems necessary or advisable.

(i) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date determined by the Arbitrator in order to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted, or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments, whichever is later.

(j) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, reopen the Hearing. If the Hearing is reopened, the time to render the Award shall be calculated from the date the reopened Hearing is declared closed by the Arbitrator.

(k) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(l) Any Party may arrange for a stenographic record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. No other means of recording the proceedings shall be permitted absent agreement of the Parties or by direction of the Arbitrator.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost of the stenographic record, it may not be provided to the Arbitrator and may not be used in the proceeding unless the Party arranging for the stenographic record either agrees to provide access to the stenographic record at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to an Optional Arbitration Appeal Procedure (see Rule 34), they shall, if possible, ensure that a stenographic or other record is made of the Hearing and shall share the cost of that record.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 23. Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 24. Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within twenty (20) calendar days after the date of the close of the Hearing as defined in Rule 22(i) or (j) or, if a Hearing has been waived, within twenty (20) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties' Agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(h) The Award will consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be served by JAMS upon the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and file with JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31(c) or on account of the effect of an offer to allow judgment), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file and serve any objection. The Arbitrator may make any necessary and appropriate correction to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after the Arbitrator's proposal to do so. The Arbitrator may extend the time to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either an Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 25. Enforcement of the Award

Judicial Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 *et seq.* or applicable

state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 26. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 27. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to JAMS. Failure to do so shall constitute a waiver of any objection to continued service of the Arbitrator.

Rule 28. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the

Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 29. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of arbitration fees and Arbitrator compensation and expenses; any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 30. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside Parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

Rule 31. Fees

(a) Each Party shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS Commencement Letter and fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation of fees and expenses or JAMS thereafter directs a different allocation upon consolidation with another Arbitration. JAMS' agreement to render services is jointly with the Party and the Party's attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its *pro rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) The parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS shall determine whether the interests between entities or individuals are adverse for purpose of fees, considering such factors as whether the entities or individuals are represented by the same attorney and whether the entities or individuals are presenting joint or separate positions at the Arbitration.

Rule 32. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon maximum and minimum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 33. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24 (c). JAMS shall promptly provide a copy of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the

Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals, and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

Rule 34. Optional Arbitration Appeal Procedure

The Parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.

Fees & Costs

Arbitration Schedule of Fees & Costs

Construction Arbitration Rules & Procedures

Complete List of Rules & Procedures
Optional Arbitration Appeal Procedure
Project Neutral Contract Clause

JAMS Global Engineering and Construction Group

Representative Matters
GEC Brochure
GEC Panelists

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STATE OF SOUTH CAROLINA)) COUNTY OF ANDERSON)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam,)) Plaintiffs,)) vs.)) Meritage Homes of South Carolina, Inc.,)) Defendant.)	Civil Action No. 2017-CP-04-00376 **ARBITRATION ORDER**

This matter is before the Arbitrator upon Motion of Plaintiffs seeking to Alter or Amend an Arbitration Order dated October 4, 2023, upon numerous grounds asserted by plaintiffs. The defendant, Meritage Homes of South Carolina, Inc., opposes the motion. Pursuant to the Meritage Homes New Purchase Agreement, "This agreement is subject to mandatory arbitration pursuant to the Federal Arbitration Act and if the Federal Arbitration Act is inapplicable, the Uniform Arbitration Act, Section 15-48-10, et. seq., Code of Laws of South Carolina, 1976, as amended, applies." Since no aspect of this Arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS"), the Arbitrator finds the Federal Arbitration Act to be inapplicable.

Despite unfounded and unsubstantiated allegations of bias and partiality which may be asserted against the Arbitrator, factual and legal errors by arbitrators do not constitute abuse of their powers and can be corrected to ensure that the interests of all parties are protected. Pittman Mortg. Co., Inc. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997).

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At no time during the Arbitration was the Arbitrator aware of any monetary recovery by defendant Meritage against any subcontractors brought in as third-party defendants. Accordingly, this Order will only reflect the testimony of lay and expert witnesses and evidence presented during arbitration and an analysis of the applicable law. However, the Arbitrator acknowledges the concerns raised by Meritage's counsel about the disclosure of the confidential settlement terms at mediation involving third-party defendants.

Based on the testimony, a detailed review of notes and all exhibits introduced into evidence at the Arbitration, the applicable law, a telephone hearing with all counsel on November 17, 2023, followed by additional submissions from both parties, the previous Order dated October 4, 2023, which was never entered, is hereby vacated, to the extent necessary, and this Order is hereby entered with the Honorable Clerk of Court for Anderson County.

FACTS

The plaintiffs, Raghu Athimoolam and Irene Athimoolam, purchased from Meritage Homes a three-story conventional wood-frame home supported by concrete foundation walls consisting of a walk-out balcony with two-floors above the basement level and an attached garage. The exterior cladding consists of a mix of brick masonry veneer, adhered manufactured stone veneer, and fiber-cement siding. The cash purchase for the home located at 116 Ariel Way in Easley, South Carolina totaled Four Hundred Twenty-Four Thousand Seven Hundred Fifty-Three and No/100ths ($424,753.00) Dollars as documented in the Meritage Homes New Home Purchase Agreement executed on April 3, 2015. (Plaintiffs' Ex. 1)

The anticipated move-in date of September 2015 was delayed and the closing occurred on October 29, 2015 in New York. Given the construction delays, the testimony at arbitration revealed that Meritage Homes paid for the attorneys' fees and closing costs. Prior to

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and at the time of the closing, plaintiffs admittedly had an opportunity to review the Agreement and ask questions. There is no evidence that they were coerced to sign the closing documents before they inspected the home in South Carolina. The Athimoolams testified that since Mr. Athimoolam was home for two weeks from his job in Dubai, they needed to close on the home so he could move the family to South Carolina before his return to Dubai. The Athimoolams also testified they trusted Meritage.

On November 2, 2015, the plaintiffs arrived to South Carolina and testified they found an unfinished home; deck cluttered with trash and debris (Plaintiffs' Exs. 2 and 3) and muddy conditions around the exterior of the home (Plaintiffs' Ex. 4 and 7). Mrs. Athimoolam also testified they were in shock as a water issue was apparent in the basement as captured in the photograph introduced into evidence (Plaintiffs' Ex. 5). They also discovered wet carpet and padding; a repaired hole cut in the basement drywall (Plaintiffs' Ex. 6); a board in the master bedroom, tile issues in the master bath (Plaintiffs' Ex. 24), and other purported issues which are documented in photographs submitted into evidence. (Plaintiffs' Ex. 1-24)

Meritage replaced the carpet pad and carpet in the basement. Given conditions which they considered uninhabitable, plaintiffs testified that they informed Meritage Homes that they would need a hotel in which to live since the home was unfinished. Meritage Homes paid the hotel expenses for the Athimoolams until Friday or Saturday of that week. Plaintiffs allegedly were told by representatives of Meritage Homes that these issues would be addressed. Mrs. Athimoolam testified that when they returned to their home following a brief stay in a hotel, they found a side glass section in their door broken (Plaintiffs' Ex. 10); the range hood remained unfinished (Plaintiffs' Ex. 11) and the surround around the fireplace had not been constructed to code. (Plaintiffs' Ex. 12) Meritage Homes resolved these issues but Mrs. Athimoolam

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complained about shoddy painting throughout the home, including the wall by the staircase to the basement (Plaintiffs' Ex. 13-14); bathroom tiles and bonus room which photographs were entered into evidence. Gaps were alleged to exist in several doors; questions remained whether wainscoting should have been used throughout the house (Plaintiffs' Ex. 23) and if ductwork for the HVAC system should have been installed in the basement area (Plaintiffs' Ex. 16). Mrs. Athimoolam also testified about issues with stained bath tubs and the absence of glass in the shower. (Plaintiffs' Ex. 24) Further, Mrs. Athimoolam testified she made calls to Meritage and on December 8, 2015, spoke with a customer care manager with Meritage. She later contacted a Divisional President and thought the issues would be resolved. Also, shortly after moving in, Mrs. Athimoolam contacted AdvantaClean to conduct mold testing on her home as she and her son were feeling ill. She testified she was unaware of a possible connection between Meritage and AdvantaClean which connection was not established through testimony or evidence at arbitration. She testified AdvantaClean found mold and she provided the report to Meritage. Meritage then removed three walls in the basement to permit mold remediation and/or treatment by AdvantaClean. (Plaintiffs' Exs. 17, 19) Meritage also paid to have the attic "fogged" (treated) but Mrs. Athimoolam remained unsatisfied. Mrs. Athimoolam continued to make complaints to Meritage about mold issues as she felt they were not being properly addressed. However, evidence introduced at arbitration noted that AdvantaClean tested the entire house and undertook and completed remediation in 2016. (Plaintiffs' Ex. 25; Defendant's Ex. 1)

On August 11, 2016, AdvantaClean wrote Meritage to report that mold remediation at the Athimoolam residence had been completed as outlined in the original scope of work, and the affected area(s) of the property were deemed visibly clean. (Defendant Ex. 1) A report from Southeast Environmental Microbiology Laboratories, dated August 24, 2016, which

analyzed the data from AdvantaClean Greenville, was also introduced into evidence. (Plaintiff's Ex. 26) An email dated August 25, 2016, from Meritage Homes to Mrs. Athimoolam noted "everything is clear" and was attached to an email from Mrs. Athimoolam to Paula Jean Allamong (Meritage Homes) dated February 26, 2020 with results of Airy Springs Air Test/Spore Trap Report on the outside, attic, main level, and basement of the Athimoolam home. (Plaintiffs' Ex. 26)

Mrs. Athimoolam sent a September 7, 2016, email to Meritage Homes detailing a number of issues, including her belief that AdvantaClean had utilized an improper dehumidifier in the basement and that the grading was not properly completed, which 2016 email was forwarded to Paula Jean Allamong with Meritage on February 26, 2020, and introduced into evidence. (Plaintiffs' Ex. 27)

On September 22, 2016, Meritage prepared a ten (10) month Warranty List that was introduced into evidence. (Plaintiffs' Ex. 28)

On October 3, 2016, Mrs. Athimoolam prepared an email to Bryan Ross at Meritage Homes with twenty-four punch list items to which she testified remained unresolved. (Plaintiffs' Ex. 29)

On October 27, 2016, H. Ross Clements, AIA of Fuller Envelope prepared a Summary of Field Observations to the Athimoolam Residence. (Plaintiffs' Ex. 34). This report was revised on August 27, 2018, to include results from destructive testing. (Plaintiffs' Ex. 35)

On November 1, 2016, Meritage sent a "sign off" letter in lieu of obtaining a signature to "Homeowner" at 116 Ariel Way in Easley, SC advising that all 10 Month Warranty request number 537485 items had been resolved. (Plaintiffs' Ex. 30)

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On November 18, 2016, Attorney Robert T. Lyles sent a certified letter to Meritage advising of his representation of the Athimoolams and of a "right to cure" detailing deficiencies with the home pursuant to S.C. Code Ann § 40-59-810 and enclosing a preliminary report from Fuller Consulting Engineers of Greenville, South Carolina. (Plaintiffs' Ex. 31)

On March 3, 2017, a First Amended Summons and Complaint were filed on behalf of the Athimoolams against Meritage Homes of South Carolina, Inc.

On February 11, 2020, Meritage Homes of South Carolina, Inc. filed a Third-Party Action against the contractors and building suppliers who provided labor and materials utilized in the construction of the Athimoolam home. At the time of the Arbitration and the issuance of the initial Order, the Arbitrator had no knowledge or information about any resolution of claims involving any third-party defendants sued by Meritage nor should the Arbitrator have been privy to any settlement that occurred at mediation.

On June 28, 2022, Attorney David S. Cobb, as counsel for Meritage, sent a letter to Attorney Robert T. Lyles, counsel for the Athimoolams. advising that Meritage "elects to exercise the contractual right to repurchase the home, as provided for in the sales contracts for the sum of $431,932. (Defendant's Ex. 3)

The Arbitration of this matter occurred on September 21 and 22, 2023, in Greenville, South Carolina. No aspect of this Arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS") pursuant to its arbitration rules and comprehensive services.

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FINDINGS

I. Construction

The testimony and evidence presented at arbitration on September 21 and 22, 2023, were expert intensive given the technical construction issues in dispute. Expert testimony is subject to the reliability requirement. See Rule 702, SCRE ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.") Also, a person may be qualified as an expert in a particular area based upon knowledge, skill, experience, and training. Watson v. Ford Motor Co., 389 S.C.437, 699 S.E.2d 169. If the opinions of the experts differ in certain respects, the Arbitrator is charged with determining questions of law and fact as would the judge and jury. S.C. Code Ann. § 15-48-180. Accordingly, the "decision to accept or reject [the experts] testimony [i]s ultimately a question of credibility for the [arbitrator] to decide." Id. (citing Menne v. Keowee Key Prop. Owners' Assn., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (stating "[t]he credibility of testimony is a matter for the finder of fact to judge.").

The experts who testified as to alleged construction defects were H. Ross Clements, AIA, and Richard J. Rogers, P.E., M.B.A., both offered without objection. While their opinions differed significantly, the Arbitrator found both to be qualified and has considered aspects of their respective opinions in deciding this matter.

The credentials, qualifications and/or opinions of Matthew Harmon with Claims Construction and Restoration (Exs. 37, 38); Steven Lambright with Rainbow International (Ex. 42), and Mr. Andrew G. Schauder, CIH (Exs. 39 – 41) were challenged, as were their opinions and estimates. While all witnesses were allowed to testify, no testimony about scope and pricing

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that had not been produced prior to or in depositions, in discovery or prior to arbitration was permitted into evidence. However, since plaintiffs moved for reconsideration, the Arbitrator requested and reviewed the "Draft" mold remediation scope of work prepared by Mr. Andrew Schauder dated April 18, 2023, which was marked as Exhibit 41 at Arbitration without the "Draft" designation, as well as the submissions submitted to the Arbitrator on behalf of the Athimoolams dated November 22, 2023, and December 5, 2023, and submissions on behalf of Meritage dated October 30, 2023, and January 5, 2024.

Testimony was also offered by plaintiffs, Irene Athimoolam and Raghu Athimoolam. The Athimoolams have asserted that Meritage's failure to testify at arbitration raises an inference that the testimony, if submitted, would have been unfavorable to Meritage's position. Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962). The Arbitrator is familiar with this legal principle, as well as the law that places the burden of proof upon plaintiffs to establish the asserted causes of action against Meritage.

Irene Athimoolam was the first witness to testify and she described how this was to be her "forever" home as she was moving from New York to begin a life in South Carolina with her husband and son. She expressed concerns about shoddy workmanship; Meritage's alleged failure to complete the warranty items (Plaintiffs' Exs. 28-29); mold issues; and Meritage's alleged failure to adequately and properly address her concerns despite conversations with Meritage sales representatives, a customer care management associate, and a Divisional President. During her testimony, twenty-four (24) photographs were introduced into evidence documenting construction issues with the home from her perspective. Mrs. Athimoolam, over objection by counsel for Meritage, introduced a list of personal items which she maintains have

been damaged beyond repair due to mold exposure and for which she seeks compensation. (Plaintiffs' Ex. 33)

Mrs. Athimoolam further testified at Arbitration that she is unaware of any roof leaks since a repair to selected shingles was made to her home approximately six (6) years ago by a handy man retained by her, whose name she could not recall and which receipt documenting this expenditure was no longer available. On a submission of additional documents for review on behalf of the Athimoolams by their counsel on December 5, 2023, Mrs. Athimoolam submitted a page from her deposition (page 22) discussing leaks in the bedroom and main bathroom level. Also, Mrs. Athimoolam testified that approximately seven (7) years ago, she had the exterior brick of her home power washed by a "neighborhood kid" and noticed no water intrusion. The veneer siding has not come off since the one section was repaired or replaced approximately six (6) years ago by Meritage. She also testified that no windows have leaked since they have occupied their home. As to her personal property damages, her testimony was permitted over objection by Meritage counsel, David Cobb, who argued these are non-recoverable damages as they were not claimed damages in the Amended Complaint and just provided to Attorney Robert Lyles in September 2023; the items are still in use; their purported value is speculative given the absence of receipts which document dates and costs of the purchases and plaintiffs' failure to mitigate their damages. (Plaintiffs' Ex. 33) Raghu Athimoolam also testified; however, since he was working in Dubai, he relied upon information provided by Mrs. Athimoolam.

H. Ross Clements, AIA, a partner with Fuller Envelope, was called as an expert witness on behalf of the Athimoolams and was qualified as an expert in forensic architecture, without objection. Mr. Clements introduced a PowerPoint presentation during Arbitration (Ex.

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36) and testified that he inspected the Athimoolam home on September 1, 2016, with Jamison Hupp, Associate AIA, and conducted a visual survey and made field observations. His October 27, 2016 report (Plaintiffs' Ex. 34) was revised on August 27, 2018 after destructive testing was performed and documented at localized areas of the exterior envelope at the Athimoolam home. (Plaintiffs' Exs. 35 and 36) Of note is the destructive testing conducted along the left elevation and base of the wall and window heads of the home with regard to the fiber-cement lap siding; brick veneer at the left, right and rear elevations; and adhered manufactured stone veneer (AMSV) at three walls that comprise the bay window feature at the front left corner of the home. Meritage's counsel challenged the isolated test cuts and findings as not determinative or conclusive of the condition of the entire exterior envelope of the Athimoolam home.

During the August 2018 inspection, a contractor, Rodney Edwards, accompanied Mr. Clements and prepared an estimate on the suggested scope of repairs. Unfortunately, due to health issues, Mr. Edwards was unable to testify about his cost estimate totaling approximately $265,730. The revised report of Mr. Clements dated August 27, 2018 included eighteen (18) recommendations which he opined were needed in order for the Athimoolam home to meet building code and industry standards, including but not limited to the following:

1. Removal and reinstallation of existing windows and doors, to include all necessary flashing, SAF, and WRB
2. Removal and replacement of exterior cladding; brick veneer, AMSV, composite MDF trim and related accessories
3. Contractor to provide an allowance for interior repairs for nail pops, drywall painting, etc.

4. At exterior alcove area of the walk-out basement, regrade surface by walk-out basement and install a catch basin with underground corrugated piping, if necessary

5. At the rear elevation, first floor level, repair and replace LVL beam; joist hangers; fasteners, etc., per manufacturer's installation instructions

6. Localized repairs shall be performed to the deck structure to provide lateral bracing; proper attachment of components, including, but not limited to, lateral connections; ledger fasteners; remove existing guardrail posts and install new 4 x 4 posts using appropriate bolts, anchors, wood columns, etc.

7. At the rear elevation, remove existing gutter and replace with 6" K style gutter. Reinstall existing downspouts. Gutters shall match existing color. Insure downspouts terminate.

8. Properly integrate drip edges with roofing underlayment along the eaves; replace any underlayment and/or shingles damaged during repair. Apply roof cements; remove shingles at gable cornices (front elevation) and install underlayment properly lapped with the WRB and other flashings, as applicable.

9. At the first floor mudsill plate for perimeter of structure, install fasteners into unattached mudsill anchors and additional fasteners at anchors lacking fasteners.

10. Within the basement, install closed-cell spray foam at the rim board on first floor, and Rockwool Comfortbatt (R-13 minimum) batt insulation within the stud cavities. Spray foam over foam board blocking.

11. As recommended by Environmental Testing Report, abate fungal growth in all areas where fungal growth was found to be present (basement and attic). After

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abatement, indoor air quality investigation shall be performed in the basement by a certified indoor environmentalist. Remove and replace gypsum board finishes as required to perform abatement.

12. At the Master Bedroom, remove and reset out-of-square door and jamb. Install new interior casing as required. Paint and caulk finishes.

13. At the Garage, remove brown-colored masonry mortar and replace with Sika Repair SHB mortar. Prime exposed steel reinforcement with Sika Arnatec 110 EpoCem; repair additional spall locations not previously repaired. Install cementious parge coat on concrete walls for uniform finish.

14. At the Garage, remove the existing garage door guide rails and install rails of proper height to provide 6 – 8" minimum clearance at house entry door landing.

15. Replace adjacent materials affected by the repair work in-kind.

16. Contractor shall provide for all general conditions, including, but not limited to: protection of existing property and adjacent areas not subject to the repair areas, building permits, demolition/disposal costs, final cleaning, etc.

17. Contractor shall provide a 5% contingency allowance and their preferred overhead/profit percentages.

18. Contractor shall provide a line item for A/E fees at 10% of the total cost of construction (including OHP).

(Plaintiffs' Ex. 35)

Mr. Clements opined that all of the documented deficiencies need to be addressed to bring the home into compliance with the applicable building codes; manufacturer's instructions and industry standards. Specifically, Mr. Clements observed loose and poorly

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attached siding at multiple locations along the left, right, and rear elevations of the home. He also noted that improper fasteners were used and that metal thru-wall flashing was reverse-lapped with the weather barrier and the flashing was sealed with sealant. Further, he testified that the adhered manufactured stone veneer (AMSV) had been improperly installed at three walls that comprise a bay window feature on the front and side elevations of the Athimoolam home.

Mr. Clements also testified that the existing windows (29) should be removed and reinstalled "to address improperly installed/damaged rough opening flashing and WRB around the openings." In support of his opinions, he relied on photos A9a, b, c, d, e, f, and g documented in the PowerPoint and his reports. (Exhibits 34, 35, and 36) He also criticized improper fasteners installed at the window nailing fin and improperly spaced fasteners. As noted in Photos A9.a, b, c, and d, Mr. Clements only recommended the removal and reinstallation of the existing twenty-nine (29) windows to address the fasteners, flashing and WRB issues as detailed in the Fuller reports.

In addition to observed window installation deficiencies, Mr. Clements noted concerns, in part, about the improper installation of the fiber-cement exterior lap siding along the left, right, and rear elevations of the residence; improperly installed adhered manufactured stone veneer (AMSV); grading deficiencies at the exterior alcove area of the walk-out basement; deck repairs (not total replacement); roof underlayment along the eaves; improperly sized K style gutter at the rear elevation of the home; drip edges, as well as other areas denoted in the reports. Mr. Clements also testified that he observed no water intrusion on the front or side elevations of the Athimoolam home, but opined that if the conditions he discovered were not resolved, it could lead to water intrusion such as the condition he observed on the left corner at the rear elevation of the home.

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During cross examination by Meritage's counsel, key points to which Mr. Clements testified about the 2018 conditions to the Athimoolam home included the following: a) there is no evidence that any of the windows have leaked or resulted in water intrusion into the home since occupancy; b) during the destructive testing in 2018, no rotten wood, deteriorated sheathing or evidence of water intrusion were observed at the front and side elevations of the home; alcove or roof; c) the window manufacturer was not contacted to determine if any warranties will be impacted if the windows are removed and reinstalled per the protocol recommended by Mr. Clements which do not include the replacement of any of the windows in the home or the installation of a new roof and deck. He testified to underlayment application at the drip edge and the undersized rear gutter that impacted roof drainage. Mr. Clements further testified that the issues and recommendation noted for the span issue in the garage could be corrected in one (1) day. Mr. Clements also opined that he neither observed nor was aware of any roof leaks. On the main level, living area, he testified about one (1) door in the master bath that was not square, but documented no damage to the hardwood floors or interior drywall.

Matthew Harmon of Claims Construction and Restoration was offered as an expert by the plaintiffs in cost estimation and construction repairs. He admitted he had never worked within 100 miles of the Athimoolam house; had never used any contractors in the Upstate, and that costs and price differences exist in various parts of South Carolina. Although a motion was made to exclude Mr. Harmon's testimony and report based on challenges to his expertise, credentials and report, the objection was overruled after a "proffer". Mr. Harmon was retained to prepare a cost estimate on the scope of work proposed by Ross Clements. Mr. Harmon never had any discussions with Mr. Clements or Mr. Andrew Schauder regarding the scope of repair or mold remediation and failed to provide justification for including some of the

items in his purported scope of repair. Mr. Harmon prepared two reports identified as Plaintiffs' Exs. 37-38 to which "Preliminary Estimate Only" is affixed to both. He testified that following his deposition, he had to revise the initial cost estimate (Ex. 37) to correct a typo of 140 hours of labor to 40 hours; and to remove estimations for drywall and HVAC technician costs. Mr. Harmon admitted that he had not solicited quotes on the "bid" items reflected in the cost estimate and that certain of the costs included in his reports exceeded the scope of Mr. Clements' recommendations and were included at the request of the Athimoolams.

Further, Mr. Harmon's cost estimate appears to add duplicate costs for overhead and profit, as each line item description includes an overhead and profit cost, while overhead and profit are also included on pages 27 – 28 of Plaintiffs' Exhibit 38. Of note, Mr. Harmon also included no contingency costs in his line item descriptions or cost estimate as recommended by Mr. Clements.

While Meritage questions the costs, including those attributed to the "bid" items, and stated overhead and profit costs of these "bid" items, Mr. Harmon testified that Xactimate is a software program used by insurance companies and recognized in the industry. Notably, while Meritage challenged the opinions of Mr. Clements and the cost estimate prepared by Mr. Harmon, it did not provide any alternative cost estimates to challenge the accuracy of the costs calculated through the Xactimate program for the removal and replacement of the exterior siding, brick veneer, and AMSV, which costs appear reasonable to correct the defects identified by Mr. Clements.

At the time he met with the Athimoolams in July 2022 for approximately 1 ½ hours, Mr. Harmon had only been a licensed contractor for two months. (Defendant's Ex. 4) During this visit, Mr. Harmon did not look in the attic or inspect the second level of the home

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because Mr. Athimoolam was resting. Mr. Harmon did not request permission to access these areas. He did not wear PPP equipment or wear a respirator while at the home. He had no issues breathing while in the Athimoolam home.

In addressing some of the recommendations noted by Ross Clements, Mr. Harmon included the costs of new windows as he did not believe the warranty would be valid if he removed the windows, installed flashing, etc. and then reinstalled the windows. (Plaintiffs' Ex. 38, p. 25) However, he did not contact the manufacturer of the existing windows to discuss if the warranty would be impacted with a removal and reinstallation of the windows.

Also, although the scope of work proposed by Ross Clements did not include the removal and installation of a new roof (he testified at arbitration that he observed no active moisture intrusion inside the home or leaks at windows or doors); construction of a new deck; painting; new gutter system; landscaping; concrete wall; and removal and replacement of footings; to name a few, Mr. Harmon included these items in his cost projection.

At arbitration, Mr. Harmon testified that 75% of his cost estimate was from items provided by the homeowners, while 25% from Mr. Clements' report, However, the testimony and evidence show that Mr. Harmon exceeded the scope of Mr. Clements' recommendations in his cost projection specifically on pages 2 – 19 of Plaintiffs' Exhibit 38, and that the numbers were "preliminary." Further, Mr. Clements testified he has never communicated with Mr. Harmon about his cost estimations or scope of work. The cost estimations in both of Mr. Harmon's reports (Plaintiffs' Exs. 37 and 38) as to mold remediation by Rainbow International Restoration accept the estimate "as is" although Mr. Lambright never received a scope of work from Andrew G. Schauder and included some areas of the home for mold remediation which he never inspected. (Plaintiffs' Ex. 42)

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Mr. Harmon also testified that Mrs. Athimoolam added three areas of tile (bedroom and laundry); two additional interior doors; prime and paint of the main level; and mold and fungal abatement which is already reflected in the report of Rainbow International. He also testified that he did not go onto the second floor or attic of the Athimoolam home. Also, he testified that in Exhibit 38, the items listed on pages 11 – 20 of his report (beginning with the main level and including laundry room, with the exception of two tiles being replaced; closet, breakfast area/room; family room; closet; master closet; sitting; bedroom 2; bedroom 1; master bath; master bedroom; closet 2; hallway; bathroom; stairs; kitchen; and closet) had been added to the repair estimate at the request of the Athimoolams. These line items on the main level, which include overhead and profit, total $57,798.08 (excluding garage). Accordingly, the Arbitrator has determined that a significant amount of the line item costs in Mr. Harmon's report should not be and are not considered in this Order since they are unsupported by the testimony and evidence presented at Arbitration.

Mr. Harmon, on cross-examination, testified that he never went into the attic or second level of the Athimoolam home. Thus, the "level two" costs detailed on pages 21 – 22 of the report should not have been included as neither Ross Clements nor Jay Rogers testified about the necessity of any repairs. These purported costs, which include overhead and profit, totaling $12,857.73 provide another example of costs not in conformity with the testimony and evidence and not considered in this Order.

Richard J. Rogers, P.E., M.B.A. of Rogers Construction Engineering was offered as an expert forensic engineer and licensed general contractor on behalf of Meritage Homes, without objection. Mr. Rogers testified that he received the Fuller Envelope (Clements) reports and visited the Athimoolam home on July 15, 2019. Mr. Rogers noted that he went inside the

Athimoolam home, stuck his head in the attic and concentrated his time in the basement. He was informed of no roof leaks or water intrusion through any of the windows since the Athimoolams moved into the home. He did not conduct any destructive testing. He testified he is currently involved in seven litigation matters involving Meritage but he has not been hired in any to make repairs.

In discussing the Fuller Envelope reports addressing the windows, defense expert, Jay Rogers, admitted that he could not opine if the building wrap had been properly applied or WRB properly folded in. Although photos of the flashing are such that it appears flashing was properly installed, he could not testify with certainty to the manner of installation and conformity to building codes and industry standards. As for questions about the positioning of the nails used in the window installation, he testified it was his belief that installing the nails in areas other than the nail fin did not violate any requirements. However, he was unable to testify to this with certainty. Further, since he does not know the condition of each window in terms of installation, he found relevant and significant the absence of any leaks and water intrusion through any of the windows in the Athimoolam home since 2015 which supports his position that no repairs need to be made to any of the windows in the Athimoolam home. He provided a cost estimate for repairs, not replacement, of the exterior siding, brick veneer, and AMSV based on his experience and opinions after inspecting the home. Defendant, Meritage Homes, also introduced into evidence numerous photographs of the Athimoolam home. (Defendant's Ex. 2 and 7) Although Mr. Rogers disagreed with the opinions of Mr. Clements, he presented no evidence, through destructive testing he conducted, to dispute the findings in the Fuller reports nor cost estimates from other sources to challenge the accuracy of the costs for the removal and replacement of the

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exterior siding, brick veneer, and AMSV as calculated by the Xactimate software used by Mr. Harmon. Mr. Rogers also opined that mold remediation was unnecessary.

As for the fourteen recommendations made by Mr. Clements, Mr. Rogers testified in conformity with a prior report identified as Defendant's Ex. 5; Plaintiffs' Ex. 32, which included his recommendations and pricing to resolve any construction issues:

1. Removal and reinstallation of the existing windows and doors – No action required
2. Removal and replacement of the exterior cladding, including all fiber-cement siding, brick veneer, AMSV, composite MDF trim and related accessories. All work described can be performed for less than $15,000.
3. Contractor allowance for interior repairs, for nail pops, drywall, painting, etc. – Unnecessary
4. Exterior alcove of the walk-out basement – work can be performed for $1,500
5. At rear elevation, first floor level – repairs should be performed as described in Fuller report – work can be performed for $1,000
6. Localized repairs to deck structure – work can be performed for $1,000
7. At the rear elevation remove existing gutter and replace Unnecessary as gutter is functioning.
8. Properly integrate drip edges with roofing underlayment – Unnecessary – $2,000 through testimony at arbitration
9. At the first-floor mudsill plate for perimeter of structure. Fasteners, etc. – work can be performed for $300

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10. Basement, spray foam – batt insulation is acceptable by code – work can be performed for $500

11. As recommended by Environmental Testing & Management – Unnecessary Advanta issued clean report

12. At the Master Bedroom, remove and reset the out-of-square door and jamb - work can be performed for $1,000

13. At the Garage, remove brown colored masonry mortar and replace - work can be performed for $500

14. At the Garage, remove existing door guide rails and install proper rails - work can be performed for $500

Mr. Rogers further testified that his proposed cost estimate at Arbitration based on inflation would be in the Thirty Thousand and No/100ths ($30,000.00) Dollars range, plus approximately Two Thousand and No/100ths ($2,000.00) Dollars to address some of the roofing underlay issues noted by Mr. Clements.

II. Mold
(Industrial Hygienists)

Environmental Testing and Management, Inc. (Andrew G. Schauder) was retained by Mrs. Athimoolam to provide professional and technical consulting services by conducting a limited evaluation of an alleged water intrusion/mold issue impacting several locations within her residence. He was offered as an expert in industrial hygiene without objection. Although his recommended scope of mold remediation identified as Exhibit 41 was not allowed into evidence because it had not been provided to Meritage and its counsel, this information was requested and considered by the Arbitrator after the Arbitration and prior to the issuance of this Order.

On the initial visit, November 28, 2016, Mr. Schauder was informed of prior services provided by AdvantaClean. His most notable observation from an exterior inspection was the grading of the land at the rear of the house, a sample collected in the basement – unfinished utility, and the level of the Penicillium/Aspergillus group of fungi which he testified was borderline elevated. Mrs. Athimoolam provided Mr. Schauder with two spore trap reports, one dated July 28, 2016 and one dated August 24, 2016. No written reports accompanied either lab report. Of the information provided, Mr. Schauder opined that all of the samples collected inside the house were found to have a lower total fungal spore count than present in the outdoor air.

A visual examination of the remainder of the interior of the house did not reveal any evidence of any significant water intrusion or mold growth. Further, his report reflects elevations of Penicillium/Aspergillus group of fungi on both the main floor, as well as the basement. From the initial inspection, Mr. Schauder concluded the most likely explanation for prior mold growth on the floor joists in the attic and basement was that the wood framing members were left exposed to the outside elements for an extended period of time. He suggested test cuts needed to be made in the sheetrock walls and ceilings so a complete scope of work could be determined and a protocol prepared for the remediation of the impacted areas. No recommendations in the December 2016 report were addressed. No complete scope of work was completed and no protocol for mold remediation was prepared or introduced into evidence as it was never discussed between Mr. Schauder and Mr. Lambright. (Plaintiffs' Ex. 39).

Four-plus years later, on August 24, 2021, Mr. Schauder returned to the Athimoolam home and met with Mr. and Mrs. Athimoolam. During this time, there is no evidence that any other testing occurred or protocols proposed for mold remediation. As

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documented in his report (Plaintiffs' Ex. 40), his follow-up inspection began in the basement. Finding what he described as prior or suspected fungal growth and staining in a bedroom, basement, and attic, he again recommended that a complete scope of work be determined, and a protocol prepared for the remediation of fungal growth in the designated areas. Mr. Schauder questioned if the floor joists in the basement had been treated or had an encapsulant applied with an antifungal component. Suspect mold growth was present on wood framing. No protocol about test cuts or scope of work was prepared by him or introduced into evidence. The only cost information was documented in the Rainbow document and prepared solely by Mr. Lambright with no consultation or input from Mr. Schauder. (Ex. 42)

On April 6, 2023, Mr. Schauder returned for a second follow up water intrusion/mold investigation in areas above the existing sheetrock ceilings and attic. (Plaintiffs' Ex. 41) In this report, Mr. Schauder referenced reports from Environmental Testing and Management, Inc., and General Engineering. (GEL Report March 3, 2021 – Defendant's Ex. 6) Mr. Schauder opined that the presence of staining on wood framing members found throughout the house (theater, storage 2, great room and attic) was most likely the result of prior mold growth. While he noted the necessity to remove all sheetrock walls and ceilings to allow for an examination of the wood framing members, this was not undertaken. In fact, the April 2023 inspection simply noted suspected mold growth and staining. In a deposition taken before the arbitration, Mr. Schauder testified he had not prepared a protocol or performed mapping of the timbers. When he attempted to testify to a protocol at arbitration, an objection was made by counsel for Meritage and sustained by the Arbitrator given that the information had not been provided in discovery, in a deposition, and/or prior to the arbitration. State v. Warner, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2000).

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Also, during Mr. Schauder's deposition on November 23, 2020, he had no recommendations for a remediation protocol and found no evidence of fungal growth on the first and second levels of the home. Also, he noted no water intrusion in the attic and noted no health concerns for the Athimoolams. A few days before the arbitration, Mr. Schauder testified he was provided a copy of the Rainbow International Restoration proposal (Plaintiffs' Ex. 42) but did not discuss specifics about the proposal or provide a scope of work to Steven Lambright with Rainbow International Restoration.

Steven Lambright, a licensed contractor with advance microbial remediation experience, with Rainbow International Restoration, prepared a cost projection utilizing Xactimate for mold remediation to the Athimoolam home after visiting the Athimoolam home for several hours on April 18, 2022. (Plaintiffs' Ex. 42) He admittedly is not an expert in air quality testing and mold growth assessment. Also, he never received the proposed scope of work of Mr. Andrew Schauder dated April 18, 2023. (Exhibit 41) The expertise and qualifications of Mr. Lambright were challenged but he was permitted to testify, over objection. Mr. Lambright testified that approximately eighteen (18) months ago, he observed no active water leaks in the attic and basement. During his inspection in the attic, he did not determine if active mold was present and conducted no testing. He also did not determine if the moisture content in the attic was elevated. Mr. Lambright admitted that Mr. Schauder had not approved the scope of the work or provided a suggested protocol for mold remediation. Therefore, the Arbitrator finds that neither Mr. Schauder nor Steven Lambright provided compelling evidence or testimony to substantiate the necessity for mold remediation.

Following the denial of directed verdict motions made by counsel for Meritage Homes, Meritage called Ronald S. Sharpe, C.I.H., R.S., with GEL Engineering LLC as an expert

witness. Mr. Sharpe's report was marked as Defendant's Exhibit 6. Mr. Sharpe, who conducted IEQ assessments of the environmental quality of the Athimoolam interior on October 30, 2019 and November 12, 2020 offered his opinions in his written report and noted that no further mold remediation is necessary at the Athimoolam home. Mr. Sharpe also offered suggestions to reduce the potential for amplification and/or proliferation of microbial growth inside the structure after sources of water intrusion are repaired.

DAMAGES

It is well settled in South Carolina that proof of resulting property damage is not necessary to establish liability for construction defects. Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). A cause of action is available where a builder has violated a legal duty, no matter what the type of resulting damage. Kennedy v. Columbia Lumber Mfg. Co., 299 S.C. 335, 346 (1989). It is well settled that "the applicable measure of damages [can] be shown by the cost of repairs." Kincaid v. Landing Development Corp., 289 S.C. 89, 94, 344 S.E.2d 869, 873 (Ct. App. 1986). Further, damages must be awarded to the extent they were proven. Hinds v. Elms, 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004).

Further, while plaintiff is allowed to testify about her belief on value or damage to personal property, Waites v. S.C. Windstorm & Hail Underwriting Ass'n, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983), the existence or amount of damages cannot be left to conjecture or speculation. Piggy Park Enterprises, Inc. v. Schofield, 162 S.E.2d 705, 708 (S.C. 1968). "It is the general rule that it is the duty of the owner of the property, which is injured by the negligence of another, to use reasonable means to mitigate the damages. Newman v. Brown, 228 S.C. 472, 480.

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Testimony elicited from Mrs. Athimoolam at the arbitration revealed that many personal items are still in use in the home and that there has been no effort to mitigate these alleged damages. Although Mrs. Athimoolam testified about the value of her personal items, she was unable to provide any sales receipts documenting the value of the items she claimed were damaged or ruined due to water and mold. (Plaintiffs' Ex. 33) Accordingly, the Arbitrator found her testimony about the purported damages in Plaintiffs' Ex. 33 left to conjecture or speculation. Gauld v. O'Shaugnessy Realty Co., 671 S.E.2d 79, 85 (Ct. App. 2008).

AWARD

Based on the testimony and evidence presented at Arbitration, the applicable law, and a review of all submissions by the respective attorneys after Arbitration, I hereby award damages to the Athimoolams in the sum of **Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100ths ($320,917.63) Dollars** as detailed below:

- The sum of **Nine Thousand One Hundred Eighty-Three and No/100ths ($9,183.00) Dollars** – Remove and reinstall twenty-nine (29) windows to install WRB, SAF and flashing
  - Labor ($116/hour x 2) to remove and reinstall windows x 29 = $6,728.00
  - Scaffolding - 1 month ($1,455/month) - $1,455.00
  - Flashing, WRB, SAF - $1,000.00
- The sum of **Two Hundred Six Thousand Four Hundred Fifty-Five and No/100ths ($206,455.00) Dollars**
  - Fiber Cement Siding - $70,000.00
  - Paint siding - $34,000.00
  - Remove and install brick veneer, AMSV - $81,000.00
  - Remove and replace sheathing - $20,000.00

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- Scaffolding – 1 month ($1,455/month) - $1,455.00

- The sum of **Five Thousand Five Hundred and No/100ths ($5,500.00) Dollars** for interior painting in master bedroom after removal and reset of out-of-square door and jamb;

- The sum of **Three Thousand and No/100ths ($3,000.00) Dollars** for regrading of exterior alcove area of walk-out basement and installation of surface catch basin, if necessary;

- The sum of **One Thousand and No/100ths ($1,000.00) Dollars** for grading at the rear elevation, first floor level;

- The sum of **Twelve Thousand and No/100ths ($12,000.00) Dollars** for localized repairs to deck structure;

- The sum of **Eleven Thousand Seven Hundred and No/100ths ($11,700.00) Dollars** for replacement of the gutter and downspouts with appropriate color match only at the rear elevation of the home with the size recommended by Ross Clements - 5 ½ x 4 ½;

- The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to properly integrate drip edges with roofing underlayment;

- The sum of **Three Hundred and No/100ths ($300.00) Dollars** for fastener installation into unattached mudsill anchors at mudsill plate for perimeter of structure;

- The sum of **Three Thousand Two Hundred Ninety-Three and 63/100ths ($3,293.63) Dollars** for batt insulation, spray foam, etc. in basement;

- The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove and reset the out-of-square door and door jamb in Master Bedroom;

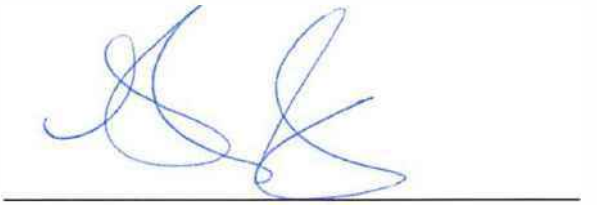
- The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to remove brown-colored masonry mortar, repair spall locations and install a cementious parge coat to concrete walls for uniform finish;

- The sum of **Ten Thousand and No/100ths ($10,000.00) Dollars** to remove existing garage door rails and install rails that are proper height;

- The sum of **Fifty-Three Thousand Four Hundred Eighty-Six and No/100ths ($53,486.00) Dollars** for overhead and profit.

Therefore, it is hereby Ordered, Adjudged, and Decreed that the plaintiffs are awarded the sum of **Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100ths ($320,917.63) Dollars**.

AND IT IS SO ORDERED.



Becky Laffitte
Arbitrator

January 19, 2024

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Docket No.: 2017-CP-04-376
	)	
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,	)	
	)	**DEFENDANT MERITAGE HOMES OF SOUTH CAROLINA, INC.'S MOTION TO VACATE THE JANUARY 23, 2024 ARBITRATION AWARD AND MOTION TO REINSTATE THE OCTOBER 4, 2023 ARBITRATION AWARD**
Plaintiffs,	)	
	)	
v.	)	
	)	
MERITAGE HOMES OF SOUTH CAROLINA, INC.,	)	
	)	
Defendant.	)	
	)	

TO PLAINTIFFS AND ATTORNEY FOR PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE THAT Defendant will move as soon as Counsel may be heard for an Order of this Court (a) vacating the purported January 23, 2024 Arbitration Award; (b) ruling the Arbitrator lacked subject matter jurisdiction to vacate or modify the October 4, 2023 Arbitration Award; (c) sanctioning Plaintiffs for intentionally violating the ADR Rules after the Arbitrator issued the October 4, 2023 award; and (d) reinstating the October 4, 2023 Arbitration Award.

As will be discussed, the parties submitted this construction defects claim to binding arbitration by Consent Order based on specific contract provisions to be discussed in this Appeal/Motion. Exhibit 1. The Arbitrator issued her final award on October 4, 2023, which she announced by a filing the "Proof of ADR" on October 4, 2023 with this Court that stated "Order following arbitration will be issued on or before October 4, 2023." Exhibit 2. The Arbitrator then emailed the parties with the Arbitration Award, which was 21 pages and included a cover letter to the award in which the Arbitrator stated she based "the Order … on the testimony and evidence presented" at the September 21-22, 2023 arbitration hearing in Greenville, South

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Carolina. Exhibit 3. The Arbitrator awarded Plaintiffs Fifty-One Thousand Four Hundred Thirteen and 88/100 Dollars ($51,413.88). Id.

Plaintiffs did not like that award and untimely submitted a motion to reconsider on October 16, 2023. Exhibit 4. Plaintiff submitted a "supplemental memorandum" and documents on November 22, 2023. Exhibit 5. Meritage filed responsive memos on October 30, 2023 (Exhibit 6) and January 5, 2024 (Exhibit 7) opposing any alteration of the October 4, 2023 Arbitration Award.

The Arbitrator then completely changed the award and gave Plaintiffs Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100 Dollars ($320,917,63) by order filed January 23, 2024 (Exhibit 8). The second award was completely improper because the Arbitrator lacked subject matter jurisdiction to vacate or modify her October 4, 2023 award.

Defendant moves for relief based on the following:

1. The "Consent Order Staying Case and Compelling Arbitration" for this matter was agreed to by both parties and filed with this Court on August 30, 2017. That Order specifically stated that "Plaintiffs agree that this action should be stayed and arbitration compelled pursuant to the terms of the [Construction] Agreement and the FAA." Exhibit 1. Further, the "New Home Purchase Agreement" ("Contract") between Plaintiffs and Meritage, which was Exhibit 1 at the arbitration between the parties, specifically stated at the top of the first page:

> **THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT AND IF THE FEDERAL ARBITRATION ACT IS INAPPLICABLE, THE UNIFORM ARBITRATION ACT SECTION 15-48-10 ET SEQ., CODE OF LAWS OF SOUTH CAROLINA 1976, AS AMENDED.**

Thus, the Arbitrator erred by concluding that the Federal Arbitration Act ("FAA") did not apply to this matter. The FAA applies to the parties'

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arbitration agreement. See Tolers Cove Homeowners Association, Inc. v. Trident Construction Company, Inc., 355 S.C. 605, 586 S.E.2d 581 (2003).

2. The FAA does not allow an Arbitrator to modify an award. Only a court of competent jurisdiction can do that in certain very limited circumstances. Here, Plaintiffs' motion for reconsideration of the October 4, 2023 Arbitration Award and the second award did not meet any of the factors stated by the Federal Arbitration Act, particularly the provisions of 9 U.S.C. §§10-11, to warrant alteration of the October 4, 2023 Arbitration Award. These are jurisdictional requirements.

9 U.S.C. §10(a) provides that an arbitration award may be vacated by the court (not an arbitrator) only under the following circumstances:

> 1. where the award was procured by corruption, fraud, or undue means;
> 2. where there was evident partiality or corruption in the arbitrators, or either of them;
> 3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> 4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

"[T]he proper standard for vacating an award on this ground is whether the failure to decide an issue causes the award to lack mutuality, finality, and definiteness." Harper Builders, Inc. v. Edens, 282 S.C. 379, 318 S.E.2d 363 (1984). There can be no doubt that the October 4, 2023 constituted a "mutual, final, and definite award." First, the Arbitrator filed the Proof of ADR that specifically stated "Order following arbitration will be issued on or before October 4, 2023." Secondly, the October 4, 2023 concluded very specifically:

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> "Therefore, it is hereby Ordered, Adjudged, and Decreed that the plaintiffs are awarded the sum of **Fifty-One Thousand Four Hundred Thirteen and 88/100ths ($51,413.88) Dollars**."

That ruling states "quite unambiguously" the Arbitrator's decision, which "could hardly be more final and definite." See Remmey v. PaineWebber, 32 F.3d 143 (4th Cir. 1994) (finding without merit a claim that the arbitration award in that case did not constitute a "mutual, final, and definitive award" as contemplated by 9 U.S.C. 10(a)(4)). Further, an arbitration award is "final" under the FAA if it "resolve[s] all issues submitted to arbitration." Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d 174, 177 (2d. 1998). Clearly, the October 4, 2023 Arbitration Award in this case did just that.

9 U.S.C. §11 provides an award may be modified or corrected by the court (not an arbitrator) only under the following circumstances:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

None of those factors apply to these facts. Thus, the Arbitrator lacked the authority to modify or correct the October 4, 2023 award.

Moreover, any "modified" arbitration award after the October 4, 2023 award would be subject to vacatur under the FAA, more specifically, 9 USC § 10(a)(4). In fact, this exact issue was examined by the Fifth Circuit in Smith v. Transport Workers Union of America, AFL-CIO Air Transport Local 556 374 F.3d 372 (5th Cir. 2004).

Therein, an arbitration award was issued to the plaintiff but "[q]uestions about taxation of additional costs and the arbitration panel's

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authority to modify its initial award gave rise to this controversy. The arbitral panel determined that it had such authority and modified the award to tax additional costs against the [defendant], favoring [plaintiff]. In district court [plaintiff] moved to confirm the modified award and the [defendant] opposed confirmation of the award as modified, but not the original award. The district court agreed with the [defendant] and vacated the modified award, confirming only the original award." Id. at 374.

As noted by the Court, "[a]rbitration is a matter of contract; a party cannot be required to submit to arbitration unless it agreed in advance that the dispute would be arbitrated. [Footnote omitted.] Although the law imposes a presumption in favor of arbitrability, the policy that favors resolving doubts in favor of arbitration 'cannot serve to stretch a contractual clause beyond the scope intended by the parties or authorize an arbiter to disregard or modify the plain and unambiguous provisions of the agreement.' " Id. at 374–375.

Indeed "[t]he plain wording of the arbitration agreement contemplates that the arbitrators will not consider correcting the arbitral award at all at the behest of the parties, and forbids a correction or amendment on the arbitrators own motion more than three business days after the award. We conclude that the modification made was beyond the reach of the arbitrators' power. If an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision." Id. at 375.

Clearly, the Arbitrator exceeded her subject matter jurisdiction and erred by issuing a second arbitration award, and the alteration of the October 4, 2023 Arbitration Award was not proper because none of the factors enumerated in either section referenced above applied to these facts. And, as stated, the specific terms of 9 U.S.C. §10(a)(4) require this Court to vacate the second award. If a party, such as Meritage in this matter, demonstrates "one of the infirmities listed in §10 of the [FAA]", the court must vacate the award.

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Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 333 S.E.2d 781 (1985).[1]

3. As stated above, the Contract between Plaintiffs and Meritage also referenced the provisions of S.C. Code Ann. §§15-48-10 et seq. South Carolina has adopted the Uniform Arbitration Act (S.C. Code Ann. §§ 15-48-10 to 15-48-240). The following provisions of the Act apply:

1. S.C. Code Ann. § 15-48-100 entitled "Change of Award by Arbitrators" states in part, "On application of a party . . . the arbitrators may modify or correct the award upon the grounds stated in paragraphs (1) and (3) of subdivision (a) of § 15-48-140, or for the purpose of clarifying the award."

2. S.C. Code Ann. § 15-48-140 entitled "Modification or correction of Award" states under section (a)(1) through (3) that the court shall modify or correct an award where: (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

3. S.C. Code Ann. § 15-48-130 entitled "Vacating an Award" states "a court shall vacate an award where: (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection . . . ."

[1] That case states "The Federal Arbitration Act essentially requires that this Court must 'uphold the award unless the challenging party demonstrates one of the infirmities listed in §10 of the Act.'"

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Section 15-48-100 and 15-48-140 together provide the instances where the arbitrator can modify an award under the Uniform Arbitration Act. Section 15-48-130 essentially provides the same grounds as Section 10 of the FAA for vacating an arbitrator's order, except it adds a fifth reason (no arbitration agreement) that is not applicable to this case. Reading those statutes, none of those reasons existed in this case to allow the arbitrator to modify the final Order issued on October 4, 2023.

4. The Contract between Plaintiffs and Meritage mandated that the parties would use the Arbitration Rules and Comprehensive Procedures of the Judicial Arbitration and Mediation Services ("JAMS"). The alteration of the October 4, 2023 Arbitration Award erred by not utilizing those rules. Specifically, JAMS Rule 24(j) required a Motion to Reconsider to be filed within "7 calendar days" of the order. Exhibit 6. Plaintiff filed their motion for reconsideration on October 16, 2023. Therefore, Plaintiffs' motion for reconsideration of the October 4, 2023 was not filed timely and Plaintiffs did not meet that standards required to alter the October 4, 2023 Arbitration Award.

5. In Plaintiffs' motion for reconsideration of the October 4, 2023 Arbitration Award, Plaintiffs intentionally and blatantly violated the confidentiality provision (Rule 8) of the South Carolina Alternative Dispute Resolution Rules by including the specific dollar amount of the prior confidential settlement between Meritage and its subcontractors. The arbitrator erred by ignoring this misconduct and the obvious prejudice to Meritage. The second arbitration award resulted in an approximate 7-fold increase in the monetary award to Plaintiffs based off the blatant violation of the ADR Rules.

Rule 8 of the ADR Rules very clearly states that "any mediation communications disclosed during a mediation … shall be confidential, and shall not be divulged by anyone in attendance at the mediation participating

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in the mediation" except as permitted by circumstances that do not apply here. Rule 8 further requires: "The parties and any other person present or participating [in the mediation] shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence at any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation …." (emphasis added in both).

Every mediation conducted in South Carolina includes a specific disclosure and warning by the mediator to the parties at the start of the mediation that all mediation discussions and negotiations are confidential and that none of the discussions and negotiations held during a mediation can be disclosed at any trial or hearing. This significant guarantee of confidentiality must be enforced. Otherwise, the negative impact to every mediation to be conducted is obvious, and the negative impact to every mediation moving forward because of this conduct cannot be understated.

The rationale for the confidentiality rule is clearly designed for an open discussion of the issues and settlement offers and demands in an effort to resolve all pending claims. To allow a party who participated in a mediation to intentionally disclose the confidential settlement discussions from a mediation in an obvious and blatant effort to gain an advantage in a post-arbitration motion should never be allowed and should be sanctioned. Otherwise, the impact of this conduct will be obvious. Moving forward, any party who does not settle at a mediation and who thinks they did not prevail at a subsequent trial or arbitration will intentionally disclose mediation conversations, including offers, demands, and settlements with others, in an attempt to undo a result that the party does not like. Plaintiffs' conduct runs directly in contradiction of the mediation process.

An immediate mistrial would have been required if Plaintiffs in this case had disclosed the confidential information during a trial or during the arbitration hearing. To allow Plaintiffs to now disclose that information without the sanction being an immediate dismissal of their pending motion

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only rewards their egregious conduct. However, our appellate courts and the applicable rules do not reward that bad faith conduct. See Jones v. Robinson, 2023-UP-369 (S.C. Ct. App. Unpublished opinion filed November 15, 2023) (holding, among other things, that sanctions were appropriate for mediation abuses pursuant to Rule 10(b), SCADR, to include "payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; *and any other sanction authorized by Rule 37(b), SCRCP[.]*" (emphasis in original). Rule 37(b), SCRCP, permits dismissal as a sanction. Here, Plaintiffs clearly acted intentionally and in bad faith. Their conduct mocks the mediation rules and should not be tolerated. Furthermore, Plaintiffs cannot credibly argue that the intentional disclosure of the confidential settlement information did not have a significant negative impact on this matter and on the mediation process in general. If the Court allows this willful and deliberate conduct to go unchecked, Plaintiffs' behavior will alter the mediation process.

Any settlement between Meritage and its subcontractors resulted from the extended mediation that included Plaintiffs and that lasted many months. Plaintiffs are and were bound by the confidentiality requirements of the ADR Rules. Plaintiffs' intentional violation of the confidentiality requirement can only be explained as an attempt by them to improperly gain an advantage with the Motion for Reconsideration submitted to the arbitrator, as an attempt to improperly influence the outcome of their Motion for Reconsideration, and as an attempt to prejudice Meritage. That conduct runs counter to the spirit and purpose of the ADR process. Plaintiffs took the risk of not settling at mediation and forcing this matter through arbitration. Plaintiffs should not now be allowed to use a confidential settlement entered into by other parties to unfairly influence an attempt to alter the arbitration award simply because they do not like the result of the arbitration.

As mentioned, Rule 10(b) of the ADR Rules provides the sanctions "if any person or entity subject to the ADR Rules violates any provision of the

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ADR Rules without good cause," which is certainly the case here. Plaintiffs' intentional violation of the ADR Rules is worthy of sanctions, including, at a minimum, vacating the January 23, 2024 Arbitration Award and any additional sanctions at the Court's discretion. In any event, Plaintiffs' claims on this issue ignore the fact that Meritage's settlement with its subcontractors included settlement of Meritage's claims for contractual indemnity, Additional Insured status, bad faith, and payment of past and future defense costs, including, but not limited to attorney's fees and expert witness fees. Moreover, the claim that Meritage's settlement with subcontractors somehow establishes a floor for Plaintiffs' claims is without any legal support, as evidenced by the fact that Plaintiffs did provide any case law support for the proposition.

Plaintiffs' misconduct warrants vacating the January 23, 2024 Arbitration Award and reinstating the October 4, 2023 Arbitration Award, in addition to other sanctions. This Court must vacate the January 23, 2024 Arbitration Award and reinstate the October 4, 2023 Arbitration Award to protect the confidentiality rules of mediation.

6. The October 4, 2023 Arbitration Award was based on proper findings of fact and proper application of South Carolina law, and the Arbitrator later improperly considered claims and submissions provided after October 4, 2023. The South Carolina Supreme Court's decision in Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) also controls the claimed damages issue. In Fields, the homeowner sued the builder alleging construction defects associated with an EIFS-clad home. Plaintiffs claimed the EIFS allowed moisture to enter the home, which caused significant damage to the structure. The jury awarded the homeowners $6,000.00 in damages. The South Carolina Supreme Court affirmed that jury's verdict.

Chief Justice Jean Toal (who was the author of the one sentence quoted by Plaintiffs' counsel from the Kennedy case) wrote the Fields opinion. In Fields, Justice Toal wrote, in affirming the $6,000.00 jury award,:

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> It was, of course, possible for the jury in this case to conclude, consistent with this testimony, that only five percent of the house had damage and that the calculations offered by the Builder's estimating expert represented reasonable repair costs. It was thus possible for the jury to arrive at an award of $6,000 based on evidence presented at trial in this case.

376 S.C. at 569, 658 S.E.2d at 92 (emphasis added).

The significance of the Fields decision cannot be ignored. That decision clearly rejects Plaintiffs' current contention that the Kennedy decision somehow requires that a homeowner be awarded whatever the homeowner requests during litigation if a building code violation exists from the original construction of a home. The Kennedy decision did not state that a homeowner was entitled to the costs for full removal and replacement of all building elements if a building code issue existed. And, the Fields opinion made it very clear that the trier of fact was to evaluate the claims based on the extent of any damage and what represented "reasonable repair costs." 376 S.C. at 569, 658 S.E.2d at 92 (emphasis added). That is what the October 4, 2023 Arbitration Award found, and nothing in the post-award motion can alter that decision.

Accordingly, any award to Plaintiffs based on Harmon's estimate (a) would never be "fair, just, and reasonable", which is the standard under South Carolina law for any jury to base an award of actual damages (S.C. Requests to Charge – Civil § 13-2) and (b) would violate the requirements of the Fields decision that the award be based on the actual extent of damage and what constituted "reasonable repair costs."

In this matter, Meritage's construction/engineering expert Jay Rogers clearly testified that the cost that needed to be expended to address the legitimate concerns raised by Plaintiffs from original construction would be approximately $25,000.00-30,000.00. Rogers further allocated those expenses to each claimed defect. While not intending to, Plaintiffs' architect expert Clements agreed with certain aspects of Rogers' testimony that a wholesale stripping of the house was not required to address the issues. For example,

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Clements testified that the entire roof did not need to be replaced, yet Plaintiffs' repair contractor Harmon ignored that and nevertheless included a substantial amount for the complete removal and replacement of all roofing and flashings. In addition, Harmon's estimate included numerous examples where he misunderstood Clements scope (see exterior deck and garage repairs) and also included items that Clements did not indicate needed to be repaired (perimeter foundation, entire sheathing, etc.).

Rogers testified that the complaints regarding the siding installation, stone installation, and brick installation could be addressed using localized repairs as opposed to the wholesale removal and replacement of those items. Rogers also pointed out that Clements performed numerous destructive cuts into the claddings and many of those test cuts and observations must not have shown any code violation or damage because Clements did not include those areas during his testimony because the findings did not advance Plaintiffs' claims. Clements bases his call for remediation of the siding, for example, on just a couple of places, which Rogers responded could be faced nailed and repainted without removing all of the siding. Jay Rogers May 29, 2021 Report, page 2. Any brick error can be remedied with a localized repair. Jay Rogers May 29, 2021 Report, page 2. The one location of stone where Clements found exposed wood framing can be repaired by removing that stone, adding peel and stick flashing, and re-adhering the stone. That location does not warrant the full replacement of all stone. Jay Rogers May 29, 2021 Report, page 2.

To reward Plaintiffs with an award based on the bloated estimate from Harmon also would constitute "economic waste" because many of the expenses Harmon listed would be to "repair" areas of the home where no person has testified that any defect exists and would also ignore that Clements only cited very limited areas of the house with any concern. For example, Clements only testified about one window where the nailing was not proper. He did not note any adverse impact to the structure or any other window with a similar installation. No evidence in the record exists to support a claim that every

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window at this residence needs to be removed and replaced. To the contrary, Rogers confirmed that the windows and doors were installed to industry standards at the time of construction and that Clements' recommendations would be unnecessary and would constitute a betterment and be economically wasteful. Jay Rogers May 29, 2021 Report.

Further, the evidence clearly showed that Harmon lacked the experience and knowledge of Anderson County. He could not provide a legitimate repair estimate for this residence because he lacked the professional ability, experience, and subcontractors to issue a repair estimate for a single-family house in Anderson County. As he admitted, he was licensed as a residential builder for merely two months when he was hired by Plaintiffs' counsel for the estimate, he had never worked in Anderson County or the upstate of South Carolina, and he had no subcontractor or material supplier within 150 miles of the house. On the other hand, Rogers was clearly qualified as a contractor and an engineer, and he has actually worked in Anderson County. Rogers' testimony was that Harmon's scope was excessive and his pricing was out of line with what would be charged where this home is located. "Excessive and overstated" is how Rogers described Plaintiffs' defect claims. Rogers May 29, 2021 Report, page 3. Rogers also pointed out that the 2021 estimate from Plaintiffs of $413,257 was "unwarranted." That testimony also confirmed the overzealous scope and pricing from Harmon's 2023 estimate, which was more than twice the 2021 estimate given to Plaintiffs by another contractor. Harmon's methodology of relying on a single computer program to generate a repair estimate for a house more than 100 miles away from any city where he has ever worked (and where he has no subcontractors or material suppliers) is not legitimate.

Accordingly, Meritage seeks an Order (a) vacating the purported January 23, 2024 Arbitration Award; (b) ruling the Arbitrator lacked subject matter jurisdiction to vacate or modify the October 4, 2023 Arbitration Award; (c) sanctioning Plaintiffs for

intentionally violating the ADR Rules after the Arbitrator issued the October 4, 2023 award; and (d) reinstating the October 4, 2023 Arbitration Award. Meritage may submit additional memorandum in support of this motion.

Meritage asks this Court to correct this significant error.

TURNER PADGET

s/David S. Cobb
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February 2, 2024

ATTORNEYS FOR MERITAGE HOMES OF SOUTH CAROLINA, INC.

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EXHIBIT 1

ELECTRONICALLY FILED - 2024 Aug 02 1:58 PM - ANDERSON - COMMON PLEAS - CASE#2017CP0400376

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	))	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, -vs- Meritage Homes of South Carolina, Inc., Defendant.	))))))))	**CONSENT ORDER STAYING CASE AND COMPELLING ARBITRATION** C.A. No. 2017-CP-04-00376

Defendant Meritage Homes of South Carolina, Inc. moved this Court for an Order staying this litigation and compelling arbitration. For the reasons below, and with the consent of all parties, this Court grants Defendant's motion to stay this litigation and to compel arbitration.

Plaintiffs entered into an agreement with Defendant to build a home located in Easley, South Carolina ("Agreement"). The Agreement contains an arbitration provision, under which Plaintiffs agreed to binding arbitration. Plaintiffs filed suit in this Court, and Defendant moved to stay this action and compel arbitration pursuant to the terms of the Agreement and the Federal Arbitration Act ("FAA"). The parties have conferred, and Plaintiffs agree that this action should be stay and arbitration compelled pursuant to the terms of the Agreement and the FAA.

NOW, THEREFORE, on motion of the undersigned counsel for Defendant, by and with the consent of the undersigned counsel for the Plaintiffs,

IT IS HEREBY ORDERED that Defendant's motion to stay and to compel arbitration is granted.

IT IS FURTHER ORDERED that Plaintiffs and Defendant shall proceed to binding arbitration.

IT IS FURTHER ORDERED that the within matter as to Defendant is hereby stayed pending arbitration between the Plaintiff and Defendant.

AND IT IS SO ORDERED.

JUDGE, TENTH JUDICIAL CIRCUIT

Anderson, SC

August _____, 2017

s/ Robert T. Lyles
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Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Stay

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

EXHIBIT 2

ELECTRONICALLY FILED - 2024 Feb 02 10:35 AM - ANDERSON - COMMON PLEAS - CASE #2017CP0400376

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	)	Civil Action No. 2017-CP-04-00376 **PROOF OF ADR**

(Within 10 days of the conclusion of ADR and no later than 300 days after filing, an original must be filed with the Clerk of Court and a copy forwarded to the attorneys for the parties.)

PURSUANT to the South Carolina Alternative Dispute Resolutions Rules (SCADR):

1. Alternative Dispute Resolution (ADR) was conducted on the 21st and 22nd days of September, 2023 in the form of
   a. ____ mediation
   b. ____ non-binding arbitration
   c. X binding arbitration

2. The neutral(s) was/were (Name(s) of arbitrator(s)/mediator(s)) Becky Laffitte

3. Present at the ADR conference were:
   a. X Plaintiffs
   b. X Defendant (Mike Harvey, Mark Reynolds)
   c. X Lawyer(s) for Plaintiff(s) Robert T. Lyles, Jr. and Joseph Daniel Winterstein
   d. X Lawyer(s) for Defendant David S. Cobb
   e. ____ Representative for Insurance Carrier
   f. ____ Guardian *ad litem*
   g. ____ Expert(s)

h. _____ Others _____

4. As a result of ADR, this case should be considered (check one)

a. _____ fully settled by Consent Judgment to be filed by _____

b. _____ fully settled Voluntary Dismissal to be filed by _____

c. _____ Partially settled _____

d. _____ at an impasse _____

e. X Other: Order following arbitration will be issued on or before October 4, 2023.

Submitted this 3rd day of October, 2023.

_____

Rebecca Laffitte
SC Bar 3105

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EXHIBIT 3

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ROBINSON GRAY
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October 4, 2023

VIA E-MAIL

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Joseph Daniel Winterstein, Esquire
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RE: Raghu Athimoolam and Irene Athimoolam v. Meritage Homes of South Carolina, Inc.
Civil Action No.: 2017-CP-04-00376
Our File No.: 5160/5753

Dear Robert, Danny, and David:

Following the arbitration in Greenville, South Carolina, on September 21-22, 2023, enclosed herein please find the Order based on the testimony and evidence presented.

I appreciate the opportunity of having been asked to serve as an arbitrator in this matter. I have tried to be meticulous in recalling the testimony and evidence without the assistance of an official transcript. However, if you believe I have misstated facts, please advise.

If this Order needs to be filed, we'll be happy to handle – just let me know, please.

With warmest regards, I remain

Very truly yours,

Becky Laffitte

RL:srm

Enclosure

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	)	Civil Action No. 2017-CP-04-00376 **ARBITRATION ORDER**

This matter came to be heard in Arbitration in Greenville, South Carolina on September 21-22, 2023, pursuant to the arbitration clause in the Meritage Homes New Home Purchase Agreement executed by Raghu Athimoolam on April 10, 2015. The Agreement denotes "THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT AND IF THE FEDERAL ARBITRATION ACT IS INAPPLICABLE, THE UNIFORM ARBITRATION ACT SECTION 15-48-10 ET SEQ., CODE OF LAWS OF SOUTH CAROLINA 1976, AS AMENDED.

In their First Amended Complaint, plaintiffs assert causes of action against Meritage Homes of South Carolina, Inc., sounding in Negligence-Gross Negligence; Breach of Implied Warranty of Service and Breach of the Implied Warranty of Habitability.

FACTS

The plaintiffs, Raghu Athimoolam and Irene Athimoolam, purchased from Meritage Homes a three-story conventional wood-frame home supported by concrete foundation walls consisting of a walk-out balcony with two-floors above the basement level and an attached

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garage. The exterior cladding consists of a mix of brick masonry veneer, adhered manufactured stone veneer, and fiber-cement siding. The cash purchase for the home located at 116 Ariel Way in Easley, South Carolina totaled Four Hundred Twenty-Four Thousand Seven Hundred Fifty Three and No/100ths ($424,753.00) Dollars as documented in the Meritage Homes New Home Purchase Agreement executed on April 3, 2015. (Plaintiffs' Ex. 1) The anticipated move-in date of September 2015 was delayed and the closing occurred on October 29, 2015 in New York. Given the construction delays, the testimony at arbitration revealed that Meritage Homes paid for the attorneys' fees and closing costs. Prior to and at the time of the closing, plaintiffs admittedly had an opportunity to review the Agreement and ask questions. There is no evidence that they were coerced to sign the closing documents before they inspected the home in South Carolina. The Athimoolams testified that since Mr. Athimoolam was home for two weeks from his job in Dubai, they needed to close on the home so he could move the family to South Carolina before his return to Dubai. The Athimoolams also testified they trusted Meritage.

On November 2, 2015, the plaintiffs arrived to South Carolina and testified they found an unfinished home; deck cluttered with trash and debris (Plaintiffs' Exs. 2 and 3) and muddy conditions around the exterior of the home (Plaintiffs' Ex. 4 and 7). Mrs. Athimoolam also testified they were in shock as a water issue was apparent in the basement as captured in the photograph introduced into evidence (Plaintiffs' Ex. 5). They also discovered wet carpet and padding; a repaired hole cut in the basement drywall (Plaintiffs' Ex. 6); a board in the master bedroom, tile issues in the master bath (Plaintiffs Ex. 24), and other purported issues which are documented in photographs submitted into evidence. (Plaintiffs' Ex. 1-24)

Meritage replaced the carpet pad and carpet in the basement. Given conditions which they considered uninhabitable, plaintiffs testified that they informed Meritage Homes that

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they would need a hotel in which to live since the home was unfinished. Meritage Homes paid the hotel expenses for the Athimoolams until Friday or Saturday of that week. Plaintiffs allegedly were told by representatives of Meritage Homes that these issues would be addressed. Mrs. Athimoolam testified that when they returned to their home following a brief stay in a hotel, they found a side glass section in their door broken (Plaintiffs' Ex. 10); the range hood remained unfinished (Plaintiffs' Ex. 11) and the surround around the fireplace had not been constructed to code. (Plaintiffs' Ex. 12) Meritage Homes resolved these issues but Mrs. Athimoolam complained about shoddy painting throughout the home, including the wall by the staircase to the basement (Plaintiffs' Ex. 13-14); bathroom tiles and bonus room which photographs were entered into evidence. Gaps were alleged to exist in several doors; questions remained whether wainscoting should have been used throughout the house (Plaintiffs' Ex. 23) and if ductwork for the HVAC system should have been installed in the basement area (Plaintiffs' Ex. 16). Mrs. Athimoolam also testified about issues with stained bath tubs and the absence of glass in the shower. (Plaintiffs' Ex. 24) Further, Mrs. Athimoolam testified she made calls to Meritage and on December 8, 2015, spoke with a customer care manager with Meritage. She later contacted a Divisional President and thought the issues would be resolved. Also, shortly after moving in, Mrs. Athimoolam contacted AdvantaClean to conduct mold testing on her home as she and her son were feeling ill. She testified she was unaware of a possible connection between Meritage and AdvantaClean which connection was not established through testimony or evidence at arbitration. She testified AdvantaClean found mold and she provided the report to Meritage. Meritage then removed three walls in the basement to permit mold remediation and/or treatment by AdvantaClean. (Plaintiffs' Exs. 17, 19) Meritage also paid to have the attic "fogged" (treated) but Mrs. Athimoolam remained unsatisfied. Mrs. Athimoolam continued to make

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complaints to Meritage about mold issues as she felt they were not being properly addressed. However, evidence introduced at arbitration noted that AdvantaClean tested the entire house and undertook and completed remediation in 2016. (Plaintiffs' Ex. 25; Defendant's Ex. 1)

On August 11, 2016, AdvantaClean wrote Meritage to report that mold remediation at the Athimoolam residence had been completed as outlined in the original scope of work, and the affected area(s) of the property were deemed visibly clean. (Defendant Ex. 1) A report from Southeast Environmental Microbiology Laboratories dated August 24, 2016, was introduced into evidence and attached to an email from Mrs. Athimoolam dated February 26, 2020 with results of testing on the outside, attic, main level, and basement of the Athimoolam home. (Plaintiffs' Ex. 26)

Mrs. Athimoolam sent an email dated September 7, 2016, to Meritage Homes detailing a number of issues, including her belief that AdvantaClean had utilized an improper dehumidifier in the basement, which email was introduced into evidence. (Plaintiffs' Ex. 27)

On September 6, 2016, Meritage prepared a ten (10) month Warranty List that was introduced into evidence. (Plaintiffs' Ex. 28)

On October 3, 2016, Mrs. Athimoolam prepared an email to Bryan Ross at Meritage Homes with twenty-four punch list items to which she testified remained unresolved. (Plaintiffs' Ex. 29)

On October 27, 2016, H. Ross Clements, AIA of Fuller Envelope prepared a Summary of Field Observations to the Athimoolam Residence. (Plaintiffs' Ex. 34). This report was revised on August 27, 2018, to include results from destructive testing. (Plaintiffs' Ex. 35)

On November 1, 2016, Meritage sent a "sign off" letter in lieu of obtaining a signature to "Homeowner" at 116 Ariel Way in Easley, SC advising that all 10 Month Warranty request items had been resolved. (Plaintiffs' Ex. 30)

On November 18, 2016, Attorney Robert T. Lyles sent a certified letter to Meritage –"right to cure"- detailing deficiencies with the home pursuant to S.C. Code Ann § 40-59-810 and enclosing a preliminary report from Fuller Consulting Engineers of Greenville, South Carolina. (Plaintiffs' Ex. 31)

On March 3, 2017, a First Amended Summons and Complaint were filed on behalf of the Athimoolams against Meritage Homes of South Carolina, Inc.

On February 11, 2020, Meritage Homes of South Carolina, Inc. filed a Third-Party Action against the contractors and building suppliers who provided labor and materials utilized in the construction of the Athimoolam home

On June 28, 2022, Attorney David S. Cobb, as counsel for Meritage, sent a letter to Attorney Robert T. Lyles, counsel for the Athimoolams. advising that Meritage "elects to exercise the contractual right to repurchase the home, as provided for in the sales contracts for the sum of $431, 932. (Defendant's Ex. 3)

FINDINGS

I. Construction

The testimony and evidence presented at arbitration were expert intensive given the technical construction issues in dispute. Therefore, the witnesses qualified as experts were allowed to offer opinions. See Rule 702, SCRE ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify

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thereto in the form of an opinion or otherwise.") Although the opinions of the experts differed in certain respects, I find there was consensus in a number of opinions which addressed deficiencies and cost estimates.

Testimony was also offered by plaintiffs, Irene Athimoolam and Raghu Athimoolam. Although no one from Meritage testified at arbitration, the testimony and evidence introduced through expert testimony, reports, and correspondence adequately detailed Meritage's position. Accordingly, this Order will reflect the testimony of lay and expert witnesses and evidence upon which the award is based. Further, the credentials and qualifications of several witnesses were challenged as were their opinions and estimates. While all witnesses were allowed to testify, no testimony about scope and pricing that had not been produced prior to or in depositions, produced in discovery or prior to arbitration was permitted into evidence.

Irene Athimoolam was the first witness to testify and she described how this was to be her "forever" home as she was moving from New York to begin a life in South Carolina with her husband and son. She expressed concerns about shoddy workmanship; Meritage's alleged failure to complete the warranty items (Plaintiffs' Exs. 28-29); mold issues; and Meritage's alleged failure to adequately and properly address her concerns despite conversations with Meritage sales representatives, a customer care management associate, and a Divisional President. During her testimony, twenty four (24) photographs were introduced into evidence documenting construction issues with the home from her perspective. Mrs. Athimoolam, over objection by counsel for Meritage, introduced a list of personal items which she maintains have been damaged beyond repair due to mold exposure and for which she seeks compensation. (Plaintiffs' Ex. 33)

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Mrs. Athimoolam further testified that she is unaware of any roof leaks since a repair to selected shingles was made to her home approximately six (6) years ago by a handy man, whose name she could not recall and which receipt documenting this expenditure was no longer available. Also, Mrs. Athimoolam testified that approximately seven (7) years ago, she had the exterior brick of her home power washed by a "neighborhood kid" and noticed no water intrusion. The veneer siding has not come off since the one section was repaired or replaced some years ago by Meritage. She also testified that no windows have leaked since they have occupied their home. As to her personal property damages, her testimony was permitted over objection by Meritage counsel, David Cobb, who argued these are non-recoverable damages as they were not claimed damages in the Amended Complaint; items are still in use; their purported value is speculative given the absence of receipts which document dates and costs of the purchases and plaintiffs' failure to mitigate their damages. (Plaintiffs' Ex. 33) Raghu Athimoolam also testified; however, since he was working in Dubai, he relied upon information provided by Mrs. Athimoolam.

H. Ross Clements, AIA, a partner with Fuller Envelope, was called as an expert on behalf of the Athimoolams and was qualified as an expert in forensic architecture, without objection. Mr. Clements testified that he inspected the Athimoolam home on September 1, 2016, with Jamison Hupp, Associate AIA, and made field observations. His October 27, 2016 report (Plaintiffs' Ex. 34) was revised on August 27, 2018 after destructive testing was performed at localized areas of the Athimoolam home. (Plaintiffs' Ex. 35) Mr. Clements has not returned to the Athimoolam home since 2018. During the August 2018 inspection, a contractor, Rodney Edwards, accompanied him and prepared an estimate on the suggested scope of repairs. Unfortunately, due to health issues, Mr. Edwards was unable to testify about his cost estimate

totaling approximately $265,730. The revised report of Mr. Clements dated August 27, 2018 included eighteen (18) recommendations, including but not limited to the following:

1. Removal and reinstallation of existing windows and doors, to include all necessary flashing, SAF, and WRB
2. Removal and replacement of exterior cladding; brick veneer, AMSV, composite MDF trim and related accessories
3. Contractor to provide an allowance for interior repairs for nail pops, drywall painting, etc.
4. At exterior alcove area of the walk-out basement, regrade surface by walk-out basement and install a catch basin with underground corrugated piping, if necessary
5. At the rear elevation, first floor level, repair and replace LVL beam; joist hangers; fasteners, etc., per manufacturer's installation instructions
6. Localized repairs shall be performed to the deck structure to provide lateral bracing; proper attachment of components, including, but not limited to, lateral connections; ledger fasteners; remove existing guardrail posts and install new 4 x 4 posts using appropriate bolts, anchors, wood columns, etc.
7. At the rear elevation, remove existing gutter and replace with 6" K style gutter. Reinstall existing downspouts. Gutters shall match existing color. Insure downspouts terminate.
8. Properly integrate drip edges with roofing underlayment along the eaves; replace any underlayment and/or shingles damaged during repair. Apply roof cements;

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remove shingles at gable cornices (front elevation) and install underlayment properly lapped with the WRB and other flashings, as applicable.

9. At the first floor mudsill plate for perimeter of structure, install fasteners into unattached mudsill anchors and additional fasteners at anchors lacking fasteners.

10. Within the basement, install closed-cell spray foam at the rim board on first floor, and Rockwool Comfortbatt (R-13 minimum) batt insulation within the stud cavities. Spray foam over foam board blocking.

11. As recommended by Environmental Testing Report, abate fungal growth in all areas where fungal growth was found to be present (basement and attic). After abatement, indoor air quality investigation shall be performed in the basement by a certified indoor environmentalist. Remove and replace gypsum board finishes as required to perform abatement.

12. At the Master Bedroom, remove and reset out-of-square door and jamb. Install new interior casing as required. Paint and caulk finishes.

13. At the Garage, remove brown-colored masonry mortar and replace with Sika Repair SHB mortar. Prime exposed steel reinforcement with Sika Arnatec 110 EpoCem; repair additional spall locations not previously repaired. Install cementious parge coat on concrete walls for uniform finish.

14. At the Garage, remove the existing garage door guide rails and install rails of proper height to provide 6 – 8" minimum clearance at house entry door landing.

15. Replace adjacent materials affected by the repair work in-kind.

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16. Contractor shall provide for all general conditions, including, but not limited to: protection of existing property and adjacent areas not subject to the repair areas, building permits, demolition/disposal costs, final cleaning, etc.

17. Contractor shall provide a 5% contingency allowance and their preferred overhead/profit percentages

18. Contractor shall provide a line item for A/E fees at 10% of the total cost of construction (including OHP)

(Plaintiffs' Ex. 35)

Mr. Clements testified that all of the documented deficiencies and recommendations need to be addressed to bring the home into compliance with the applicable building codes; manufacturer's instructions and industry standards. Support for his recommendations were documented and discussed in a PowerPoint presentation identified as Plaintiffs' Ex. 36. Mr. Clements further testified that it was his understanding that the scope of his noted deficiencies and recommendations to cure the deficiencies were provided to Matthew Harmon with Claims Construction & Restoration for pricing. Mr. Clements further testified that he had no discussions with Mr. Harmon about the proposed scope of repair and pricing. Also, Mr. Clements admitted that no repairs, etc., were requested to be made after the destructive testing in 2018 and he has no information if the conditions to the home as he observed in 2018 have changed in 2023.

In addition to observed window installation deficiencies, Mr. Clements noted concerns, in part, about the installation of the fiber-cement lap siding; grading deficiencies at the rear of the home near the basement; deck; roof underlayment along the eaves, as well as other areas denoted above.

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During cross examination by Meritage's counsel, key points to which Mr. Clements testified about the 2018 conditions to the Athimoolam home included the following: a) there is no evidence that any of the windows have leaked or resulted in water intrusion into the home since occupancy; b) during the destructive testing in 2018, no rotten wood, deteriorated sheathing or evidence of water intrusion were observed at the front and side elevations of the home; alcove or roof; c) the window manufacturer was not contacted to determine if any warranties will be impacted if the windows are removed and reinstalled per the protocol recommended by Mr. Clements which do not include the replacement of any of the windows in the home. Mr. Clements further testified that the issues and recommendation noted for the garage could be corrected in one (1) day.

Matthew Harmon of Claims Construction and Restoration was offered as an expert by the plaintiffs in cost estimation and construction repairs. Although a motion was made to exclude Mr. Harmon's testimony based on challenges to his credentials, the objection was overruled but noted. Mr. Harmon was retained to prepare a cost estimate on the scope of work proposed by Ross Clements. Mr. Harmon prepared two reports identified as Plaintiffs' Exs. 37-38 to which "Preliminary Estimate Only" is affixed to both. He testified that following his deposition, he had to revise the initial cost estimate to correct a typo of 140 hours of labor to 40 hours; and to remove estimations for drywall and HVAC technician costs. Through his testimony, he admitted that he had not obtained quotes on the "bid" items and that many of the costs included in his reports exceeded the scope of Mr. Clements' recommendations and were included at the request of the Athimoolams. Also, he never discussed the scope and pricing with Mr. Clements as reflected in his reports. (Plaintiffs' Exs. 37 – 38)

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At the time he met with the Athimoolams, Mr. Harmon had only been a licensed contractor for two months. (Defendant's Ex. 4) During this visit, Mr. Harmon did not look in the attic or inspect the second level of the home because Mr. Athimoolam was resting. However, he did record issues noted by Mrs. Athimoolam and included her concerns in the projected cost estimation which was not within the scope of work proposed by Ross Clements. Mr. Harmon utilized an insurance claims adjusting software, Xactimate, to prepare the cost estimates provided. He testified that he could input certain data about the location and zip code of the home which did not necessitate that he speak with building suppliers or contractors in Anderson, South Carolina, admitting that cost and price differences exist in various parts of the state.

In addressing some of the recommendations noted by Ross Clements, Mr. Harmon included the costs of new windows as he did not believe the warranty would be valid if he removed the windows, installed flashing, etc. and then reinstalled the windows. (Plaintiffs' Ex. 38, p. 25) However, he did not contact the manufacturer of the existing windows to discuss if the warranty would be impacted with a removal and reinstallation of the windows. Also, although the scope of work proposed by Ross Clements did not include the removal and installation of a new roof, Mr. Harmon included this in his cost estimate, as well as the construction of a new deck. (Plaintiffs' Ex. 38, p. 25).

As to Mr. Clements' recommendation about the removal and replacement of the exterior cladding and brick veneer repairs, Mr. Harmon listed these costs as bid items which costs have not yet been determined. Although Mr. Clements' scope of work to the deck structure does not indicate the necessity to construct a new deck, Mr. Harmon's estimate includes the construction of a deck as a "bid" number which has not yet been determined. While Mr. Clements' cost estimate only denoted the removal and replacement of the gutter to be followed

by the reinstallation of the existing downspouts, Mr. Harmon's estimate contemplates the removal and replacement of both the gutter and downspouts. The evidence further reveals, through Mr. Harmon's testimony, that 75% of his reported cost estimate was from items provided by the homeowners, while 25% from Mr. Clements' report. However, the testimony and evidence show that Mr. Harmon exceeded the scope of Mr. Clements' recommendation in his cost projection and that it is questionable if 25% of the costs in the report are attributable to the scope prepared by Mr. Clements as he has never communicated with Mr. Clements about his cost estimations or scope of work. Further, the cost estimations in both of Mr. Harmon's reports (Plaintiffs' Exs. 37 and 38) do not reflect the costs of the estimate of Rainbow International Restoration or that the scope of work and pricing in Rainbow's report are supported by the testimony and evidence. (Plaintiffs' Ex. 42)

Richard J. Rogers, P.E., M.B.A. of Rogers Construction Engineering was offered as an expert forensic engineer and licensed general contractor on behalf of Meritage Homes, without objection. Mr. Rogers testified that he received the Fuller Envelope (Clements) reports and visited the Athimoolam home on July 15 2019. Mr. Rogers testified that he went inside the Athimoolam home, stuck his head in the attic and concentrated his time in the basement. He was informed of no roof leaks or water intrusion through any of the windows since the Athimoolams moved into the home. He testified he is currently involved in seven litigation matters involving Meritage but he has not been hired in any to make repairs.

In discussing the Fuller Envelope reports addressing the windows, Mr. Rogers admitted that he could not tell if the building wrap had been properly applied. Although photos of the flashing are such that it appears flashing was properly installed, he could not testify to the manner of installation with certainty. As for questions about the positioning of the nails used in

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the window installation, he testified it was his belief that installing the nails in areas other than the nail fin did not violate any requirements. Further, since he does not know the condition of each window in terms of installation, he found relevant and significant the absence of any leaks and water intrusion through any of the windows in the Athimoolam home since 2015 which supports his position that no repairs need to be made to any of the windows in the Athimoolam home. Defendant, Meritage Homes, also introduced into evidence numerous photographs of the Athimoolam home. (Defendant's Ex. 2 and 7)

As for the fourteen recommendations made by Mr. Clements, Mr. Rogers testified in conformity with a prior report identified as Defendant's Ex. 5; Plaintiffs' Ex. 32, which include his recommendations and pricing to resolve any construction issues:

1. Removal and reinstallation of the existing windows and doors – No action required
2. Removal and replacement of the exterior cladding, including all fiber-cement siding, brick veneer, AMSV, composite MDF trim and related accessories. All work described can be performed for less than $15,000.
3. Contractor allowance for interior repairs, for nail pops, drywall, painting, etc. – Unnecessary
4. Exterior alcove of the walk-out basement – work can be performed for $1,500
5. At rear elevation, first floor level – repairs should be performed as described in Fuller report – work can be performed for $1,000
6. Localized repairs to deck structure – work can be performed for $1,000
7. At the rear elevation remove existing gutter and replace Unnecessary as gutter is functioning.

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8. Properly integrate drip edges with roofing underlayment – Unnecessary – $2,000 through testimony at arbitration

9. At the first-floor mudsill plate for perimeter of structure. Fasteners, etc. – work can be performed for $300

10. Basement, spray foam – batt insulation is acceptable by code – work can be performed for $500

11. As recommended by Environmental Testing & Management – Unnecessary Advanta issued clean report

12. At the Master Bedroom, remove and reset the out-of-square door and jamb - work can be performed for $1,000

13. At the Garage, remove brown colored masonry mortar and replace - work can be performed for $500

14. At the Garage, remove existing door guide rails and install proper rails - work can be performed for $500

Mr. Rogers further testified that his proposed cost estimate today based on inflation would be in the Thirty Thousand and No/100ths ($30,000.00) Dollars range, plus approximately Two Thousand and No/100ths ($2,000.00) Dollars to address some of the roofing issues noted by Mr. Clements.

II. Mold
(Industrial Hygienists)

Environmental Testing and Management, Inc. (Andrew G. Schauder) was retained by Mrs. Athimoolam to provide professional and technical consulting services by conducting a limited evaluation of an alleged water intrusion/mold issue impacting several locations within her residence. He was offered as an expert in industrial hygiene without opposition.

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On the initial visit, November 28, 2016, Mr. Schauder was informed of prior services provided by AdvantaClean. His most notable observation from an exterior inspection was the grading of the land at the rear of the house, a sample collected in the basement – unfinished utility, and the level of the Penicillium/Aspergillus group of fungi which he testified was borderline elevated. Mrs. Athimoolam provided Mr. Schauder with two spore trap reports, one dated July 28, 2016 and one dated August 24, 2016. No written report accompanied either lab report. Of the information provided, Mr. Schauder opined that all of the samples collected inside the house were found to have a lower total fungal spore count than that present in the outdoor air.

A visual examination of the remainder of the interior of the house did not find any evidence of any significant water intrusion or mold growth. However, his report reflects elevations of Penicillium/Aspergillus group of fungi to be elevated on both the main floor, as well as the basement. From the initial inspection, Mr. Schauder concluded the most likely explanation for prior mold growth on the floor joists in the attic and basement was that the wood framing members were left exposed to the elements outside for an extended period of time. He suggested test cuts needed to be made in the sheetrock walls and ceilings so a complete scope of work could be determined and a protocol prepared for the remediation of the impacted areas. No recommendations in the December 2016 report were addressed. No complete scope of work was determined and no protocol for mold remediation was prepared or introduced into evidence. (Plaintiffs' Ex. 39)

Four-plus years later, on August 26, 2021, Mr. Schauder returned to the Athimoolam home and met with Mr. and Mrs. Athimoolam. During this time, there is no evidence that any other testing occurred or protocols proposed for mold remediation. As

documented in his report (Plaintiffs' Ex. 40), his follow-up inspection began in the basement. Finding what he described as prior or suspected fungal growth and staining in a bedroom, basement, and attic, he again recommended that a complete scope of work be determined, and a protocol prepared for the remediation of fungal growth in the designated areas. No protocol or scope of work was prepared or introduced into evidence.

On April 6, 2023, Mr. Schauder returned for a second follow up water intrusion/mold investigation in areas above the existing sheetrock ceilings and attic. (Plaintiffs' Ex. 41) In this report, Mr. Schauder referenced reports from Environmental Testing and Management, Inc., and General Engineering. (GEL Report March 3, 2021 – Defendant's Ex. 6) Mr. Schauder opined that the presence of staining on wood framing members found throughout the house and attic was most likely the result of prior mold growth. While he noted the necessity to remove all sheetrock walls and ceilings in the affected areas, he never proposed a scope of work or noted any health or safety issues. In a deposition taken before the arbitration, Mr. Schauder testified he had not prepared a protocol or performed mapping of the timbers. When he attempted to testify to a protocol at arbitration, an objection was made by counsel for Meritage and sustained given that the information had not been provided in discovery, in a deposition, and/or prior to the arbitration.

Also, during Mr. Schauder's deposition on November 23, 2020, he had no recommendations for a remediation protocol and found no evidence of fungal growth on the first and second levels of the home. Also, he noted no water intrusion in the attic and noted no health concerns for the Athimoolams. A few days before the arbitration, Mr. Schauder testified he was provided a copy of the Rainbow International Restoration proposal (Plaintiffs' Ex. 42) but did

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not discuss specifics about the proposal or provide a scope of work to Steven Lambright with Rainbow International Restoration.

Steven Lambright, a licensed contractor with Rainbow International Restoration, prepared a cost projection utilizing Xactimate for mold remediation to the Athimoolam home. (Plaintiffs' Ex. 42) The expertise and qualifications of Mr. Lambright were challenged but he was permitted to testify, over objection. Mr. Lambright testified that approximately eighteen (18) months ago, he observed no active water leaks in the attic and none in the basement. Mr. Lambright admitted that Mr. Schauder had not approved the scope of the work or provided a suggested protocol for mold remediation. Therefore, I did not find his testimony reliable or his report properly supported.

Following the denial of directed verdict motions made by counsel for Meritage Homes, Meritage called Ronald S. Sharpe, C.I.H., R.S., with GEL Engineering LLC as an expert witness. Mr. Sharpe's report was marked as Defendant Exhibit 6. Mr. Sharpe, who conducted IEQ assessments of the environmental quality of the Athimoolam interior on October 30, 2019 and November 12, 2020 offered his opinions in his written report and noted that no further mold remediation is necessary at the Athimoolam home. Mr. Sharpe also noted in detail repairs and remedial activities that had predated his inspection and testing. He then offered suggestions once the repair of any source of water/moisture intrusion is resolved.

DAMAGES

It is well settled in South Carolina that "the applicable measure of damages [can] be shown by the cost of repairs." Kincaid v. Landing Dev. Corp., 289 S.C. 89, 94, 344 S.E.2d 869, 873 (Ct. App. 1986). Further, a plaintiff may testify as to his/her belief on value or damage to personal property. Waites v. S.C. Windstorm & Hail Underwriting Ass'n, 279 S.C. 362, 366,

307 S.E.2d 223, 225 (1983). However, the burden is still upon the plaintiff to establish the nature, character, an extent of damages which are proximate consequences of the defendant's acts. Despite Mrs. Athimoolam's testimony, no evidence was presented to support the allegations that any of the claimed personal property had been damaged or ruined due to water intrusion or mold. Also, she was unable to provide any testimony or evidence as to the value of the alleged items since no sales receipts were introduced into evidence. (Plaintiffs' Ex. 33) Further, testimony elicited during the arbitration revealed that many items are still in use in the home and that there has been no effort to mitigate damages by removing the items from the house.

Given the technical and scientific issues in dispute, the opinions of all qualified experts were considered as was the reliability of their testimony. Since Mr. Schauder did not provide a protocol and scope of work prior to arbitration, this testimony on a protocol and scope of repairs was not permitted into evidence. State v. Warner, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2000).

Since there have been no observed leaks or water intrusion at the windows since the Athimoolams moved in in 2015, I find that the recommendation by expert Ross Clements to remove and reinstall the windows to install flashing, etc., to be unnecessary, particularly absent any testimony of what impact his recommendation may have on any window warranties or costs associated with this recommendation.

Further, since there was no evidence of roof leaks to the Athimoolam home after a minor repair approximately six (6) years ago, I find the scope of work and associated costs in the report prepared by and testimony given by Jay Rogers to be reliable as he is a licensed general contractor and engineer.

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Additionally, I find mold remediation in any area of the Athimoolam home is not supported by the testimony and evidence and no award is given for these claimed damages.

AWARD

Based on the testimony and evidence presented at arbitration, I hereby award damages to the Athimoolams in the amount of **Fifty-One Thousand Four Hundred Thirteen and 88/100ths ($51,413.88) Dollars** comprised of the following:

The sum of **Twenty-Five Thousand and No/100ths ($25,000.00) Dollars** to address exterior siding issues, exclusive of siding removal (Item 2);

The sum of **Five Hundred Fifty and No/100ths ($550.00) Dollars** for interior painting in master bedroom after removal and reset of out-of-square door and jamb (Item 3);

The sum of **Three Thousand and No/100ths ($3,000.00) Dollars** for regrading of exterior alcove area of walk-out basement and installation of surface catch basin, if necessary (Item 4);

The sum of **One Thousand and No/100ths ($1,000.00) Dollars** for grading at the rear elevation, first floor level (Item 5);

The sum of **Two Thousand Five Hundred and No/100ths ($2,500.00) Dollars** for localized repairs to deck structure (Item 6);

The sum of **Seven Thousand Three Hundred Twenty-One and 97/100ths ($7,321.97) Dollars** for replacement of the gutter and downspouts with appropriate color match only at the rear elevation of the home with the size recommended by Ross Clements - 5 ½ x 4 ½ (Item 7);

The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** per opinions of Jay Rogers (Item 8);

The sum of **Three Hundred and No/100ths ($300.00) Dollars** for fastener installation into unattached mudsill anchors at mudsill plate for perimeter of structure (Item 9);

The sum of **Three Thousand Two Hundred Ninety-Three and 63/100ths ($3,293.63) Dollars** for batt insulation, spray foam, etc. in basement (Item 10);

The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove and reset the out-of-square door and door jamb in Master Bedroom (Item 12);

The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to remove brown-colored masonry mortar, repair spall locations and install a cementious parge coat to concrete walls for uniform finish (Item 13);

The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove existing garage door rails and install rails that are proper height (Item 14); and

The sum of **Two Thousand Four Hundred Forty-Eight and 28/100ths ($2,448.28) Dollars** as a 5% contingency allowance (Item 16).

Therefore, it is hereby Ordered, Adjudged, and Decreed that the plaintiffs are awarded the sum of **Fifty-One Thousand Four Hundred Thirteen and 88/100ths ($51,413.88) Dollars.**

AND IT IS SO ORDERED.

Becky Laffitte
Arbitrator

October 4, 2023

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EXHIBIT 4

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT CASE NO.: 2017-CP-04-00376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	)	**Plaintiffs' Motion for Reconsideration**

Pursuant to 9 U.S.C. Code (The Federal Arbitration Act) § 9, 10, 11, the Order of Arbitration, Attached as Exhibit A, Plaintiffs, Raghu and Irene Athimoolam, (hereinafter "Plaintiffs"), by and through their undersigned attorneys and moves for reconsideration of the Arbitration Award (the "Award") dated October 4, 2023.

Plaintiffs request the Arbitrator to reconsider the Award on the numerous grounds set forth in the accompanying Memorandum.

Respectfully submitted,

LYLES & ASSOCIATES, LLC

s/Robert T. Lyles, Jr.
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October 16, 2023
Mount Pleasant, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, -vs- Meritage Homes of South Carolina, Inc., Defendant.	)	**CONSENT ORDER STAYING CASE AND COMPELLING ARBITRATION** C.A. No. 2017-CP-04-00376

Defendant Meritage Homes of South Carolina, Inc. moved this Court for an Order staying this litigation and compelling arbitration. For the reasons below, and with the consent of all parties, this Court grants Defendant's motion to stay this litigation and to compel arbitration.

Plaintiffs entered into an agreement with Defendant to build a home located in Easley, South Carolina ("Agreement"). The Agreement contains an arbitration provision, under which Plaintiffs agreed to binding arbitration. Plaintiffs filed suit in this Court, and Defendant moved to stay this action and compel arbitration pursuant to the terms of the Agreement and the Federal Arbitration Act ("FAA"). The parties have conferred, and Plaintiffs agree that this action should be stay and arbitration compelled pursuant to the terms of the Agreement and the FAA.

NOW, THEREFORE, on motion of the undersigned counsel for Defendant, by and with the consent of the undersigned counsel for the Plaintiffs,

IT IS HEREBY ORDERED that Defendant's motion to stay and to compel arbitration is granted.

IT IS FURTHER ORDERED that Plaintiffs and Defendant shall proceed to binding arbitration.

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IT IS FURTHER ORDERED that the within matter as to Defendant is hereby stayed pending arbitration between the Plaintiff and Defendant.

AND IT IS SO ORDERED.

JUDGE, TENTH JUDICIAL CIRCUIT

Anderson, SC

August _____, 2017

s/ Robert T. Lyles
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Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Stay

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT CASE NO.: 2017-CP-04-00376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	)	**Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Alter or Amend the Judgment** **XXXX**

Plaintiffs, Raghu and Irene Athimoolam, (hereinafter "Plaintiffs"), by and through their undersigned attorneys submit the following Memorandum in Support of Plaintiffs' Motion to Alter or Amend its Arbitration Award (the "Award") dated October 4, 2023.

SUMMARY OF ARGUMENT

1. The Award makes numerous findings that are completely unsupported by the evidence and are based on assumptions and arguments of defense counsel;
2. The Award is fundamentally flawed because of fundamental errors with respect to applicable law and even the burden of proof;
3. The Award reflects a flagrant disregard of uncontroverted evidence, including expert testimony; and
4. The errors reflected above reflect an improper partiality towards Meritage which justifies reconsideration of the Award or vacating the Award in its entirety.

PROCEDURAL HISTORY

Plaintiffs filed a Complaint against Meritage Homes of South Carolina Inc. ("Meritage" or "Defendant") on February 2, 2017, and an Amended Complaint on March 3, 2017 (the "Complaint") asserting claims of Negligence/Gross Negligence. Breach of Implied Warranty of

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Service, and Breach of the Implied Warranty of Habitability. Meritage filed a Motion to Compel Arbitration, which was ultimately consented to on August 30, 2017. The Arbitration Provision of the sales contract includes an appeal process which was consented to by the parties. On February 11, 2020, Meritage made third-party claims (in Circuit Court) against a number of its subcontractors ("Subcontractor Defendants"). After asserting claims against the Subcontractor Defendants, Meritage moved to compel arbitration pursuant to its contract with Plaintiffs. Ultimately, the parties entered into an Arbitration Order, to conduct the arbitration pursuant to the Federal Arbitration Act ("FAA").

Meritage ultimately settled its third-party claims with the Subcontractor Defendants directly, and Meritage collected three-hundred and fifty thousand dollars ($350,000), however, Meritage and Plaintiffs were not able to settle their claims at mediation. This case was arbitrated September 21-22, 2023, and the reversible Award followed, on October 4, 2023 (the "Award").

ARGUMENT

The Award is replete with errors of law, erroneous factual and legal conclusions, erroneous calculations, and a consistent pattern on the Arbitrator of parroting the arguments of counsel for Meritage in her ruling, rather than weighing the evidence and testimony that was elicited at trial and making a decision that comports with applicable law. The result is that the Award imposed on Plaintiffs extra-legal proof requirements and belied the Arbitrator's lack of impartiality.

The errors are so numerous and so clear as to compel a reconsideration of the award.

I. Partiality.

Below, a number of the many errors in the award are discussed in detail. Taken *in toto*, it is clear that at every opportunity possible, when there was a dispute between the witnesses and evidence for Plaintiffs and that of Meritage, or when counsel for Meritage simply made arguments

about Plaintiffs evidence and testimony, the Arbitrator sided with Meritage even when it meant disregarded applicable law which favored Plaintiffs' positions or ignoring uncontroverted testimony. The Arbitrator disregarded the burden of proof applicable to Plaintiffs and instead created extra-legal burdens, which she contended Plaintiff failed to satisfy. At every opportunity possible, the Arbitrator parroted the arguments of Meritage counsel to discredit the testimony of Plaintiffs' and their expert witnesses, even when their testimony was uncontroverted. In many instances, the Arbitrator made numerous assumptions and factual conclusions in favor of Meritage, even in the absence of evidence and testimony, and based only on the argument of counsel.

Each instance discussed below establishes an inherit bias in favor of Meritage that has resulted in an award that is grossly inadequate and not supported by the evidence. Evidence of this bias further represents the gross miscarriage of justice. The Award contains clear errors and disregard of law and the order of $51,413.88, under the circumstances that it has been awarded in this matter, ***has resulted in a manifest injustice to Plaintiffs***, is grossly inadequate, and is "***dead wrong.***" *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

Bringing this pattern to the attention of the Arbitrator is in an effort to secure reconsideration of the award. The bias was likely unintentional but is glaringly apparent and justifies reconsideration of the Award.

II. The Award Disregards and Misapplies Directly Applicable Law.

A. Resulting Damages are Not Required to Support. Claim for Defective Construction.

Plaintiffs' forensic expert, Ross Clements, who was qualified without objection, conducted numerous site visits to Plaintiffs' home and did destructive testing. At the hearing, Mr. Clements walked through his findings in pain-staking detail, identifying numerous instances of code violations, manufacturers' instructions, and industry standards with respect to the roof and building

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envelope at Plaintiffs' home. These defects created conditions which he opined have or would lead to water infiltration and required removal and replacement of the cladding at Plaintiffs' home, repair of the weather resistive barrier ("WRB"), the removal of the windows to correct WRB, and the proper re-installation of the windows (if possible) , in order to provide Plaintiffs with a home that is constructed in compliance with the code and industry standard and is properly warranted.

Meritage was unable to refute Clements' findings and did not try, either through a fact witness from Meritage, a subcontractor, or an expert. Instead, a constant theme of Meritage's defense to Mr. Clements' scope of repair was to point to the absence of proof of *resulting property damage*. In the Award, the Arbitrator acknowledges that the scope of repair provided by Clements, included eighteen (18) recommendations for violations of building code violations and breaches of industry standard, but then inexplicably goes on to parrot the arguments of Meritage (again, made through counsel, since Meritage did not offer any testimony in its own defense) and, *without any evidence*, discounting Clements' repair recommendations to address building code violations and breaches of industry standard finding them **"to be unnecessary."** Specifically, the Award states:

> **Since there have been no observed leaks or water intrusion at the windows since the Athimoolams moved in in 2015, I find that the recommendations by Expert Ross Clements to remove and reinstall the windows to install flashing, etc., to be unnecessary.**

(Award at 19).

This finding represents a gross disregard and application of directly relevant law. For decades, the South Carolina Supreme Court has expressly held that proof of resulting property damage is not necessary to establish liability for construction defects. *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980). In another seminal construction defect case, actually cited by the Arbitrator, Justice Toal discussed this explicitly, holding that it would be unfair to insulate a

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building who had constructed a defective building just because that failure had not yet created physical damage: "It is clear that a builder is no less blameworthy in such a case where lady luck has smiled upon him, and no physical harm has yet occurred". *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 346. (1989). In summary, the law in South Carolina is crystal clear that a cause of action in negligence will be available where a builder has violated a *legal duty, no matter what the type of resulting damage*. *Kennedy*, 299 S.C. 335 at 347 (1989).

The scope of repair Clements testified is necessary is to remedy defects. It is not a requirement that those defects have already led to damage to justify their repair. By disregarding the clear and applicable law and imposing a burden on Plaintiffs to prove resulting property damages, the Arbitrator effectively imposed the duty of meeting a higher burden of proof on Plaintiffs and also evidences a lack of impartiality.

B. Rogers' Testimony Does Not Refute Clements' Opinions.

In the Award, the Arbitrator wholeheartedly relies on the testimony of J. Rogers. Rogers testified that he reviewed Clements' report, did not do any independent investigation or destructive testing, and did not offer any testimony or evidence to refute Clements' findings. Instead, Rogers relied on Clements' investigative efforts entirely, and rather than refute his opinions with relevant evidence, *irrelevantly* opined that the absence of damage meant that the repairs should be limited to areas revealed by Clements destructive testing, all in full support of the incorrect legal arguments of counsel for Meritage. The fact the Arbitrator disregarded the full opinions of Clements, in favor of those of Rogers, indicates a lack of impartiality.

III. The Award Made a Clear Calculation Error.

The only estimate offered to establish the cost of Ross Clements' scope of work was done by Matthew Harmon, who estimated the repair to cost $962,592.60. In the Award, in an effort to

discredit Plaintiffs' repair estimate, which again was the ONLY estimate to complete Ross Clements' unrefuted scope of repair, the Arbitrator incorrectly concluded that 75% of Plaintiffs' estimate was based on "homeowner requests."(Award at 13). This holding was expressly and quite obviously incorrect, and also reflects another gross misunderstanding of the burden of proof.

First, there was no testimony that 75% of the estimate was based on "homeowner requests." In fact, the testimony of Matthew Harmon was precisely the opposite; that approximately 75% of the estimate *was based on the scope of Mr. Clements*, while the remaining 25% was based on "homeowner requests." Even counsel for Meritage conceded in his closing that his calculation for homeowner requests in Harmon's estimate was around "one-third" of the total estimate. Based on Meritage's counsel's analysis the cost to repair is $645,499.05.

A simple review of the Harmon estimate would have shown the Arbitrator that her "only 25%" allocation for Clements' scope of repair was incorrect. The "Exterior Repairs" alone (siding, WRB, windows, rood, deck, and grading), which were all called for by Clements, total a base amount of $430,566.10, 66.6% of the sub-total. Adding that percentage of general conditions results in a total for the Ross Clements mandated Exterior Repairs of $528,047.01. In addition, Andy Schauder (not Plaintiffs) called for mold remediation after his first visit to Plaintiffs home all the way through his compelling testimony at the hearing. While the Arbitrator erroneously found that no cost was provided for mold remediation, an estimate was provided by Rainbow Restoration in the amount of $104,657.55, which was expressly included in the Harmon estimate. With overhead that total cost is $125,589.07. Thus, looking at those two items alone total $653,636.08 which establishes that the Arbitrator's finding that "75%" of the Harmon estimate was to address "homeowner requests" is clearly erroneous and should be reconsidered.

That the Arbitrator did not undertake even a cursory review of the Harmon estimate belote

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making findings of fact is more troubling and, combined with the numerous other errors, indicates a pattern of partiality.

IV. Damages Identified by the Homeowner are Recoverable.

In addition, there is no legal authority whatsoever for a proposition that damages related to conditions identified by the owner are not recoverable. The Arbitrator was presented with exhaustive testimony, supported by photographs, of the deplorable condition of her home when she moved in and for the next ten months. She testified that many of those conditions were never repaired, even as of the time of arbitration, which was supported by her contemporaneous emails at the time of the 10-month warranty work purportedly done by Meritage (Plaintiffs Ex.29). Shortly thereafter, Meritage did not respond to the Right to Cure Letter sent by counsel (Plaintiffs Ex.31). Not one syllable of that testimony was refuted by Meritage, which offered no testimony on its own behalf.

By holding, by implication, that expert testimony is required to support all of Plaintiffs' damages, the Arbitrator again altered the burden of proof, requiring more of the Plaintiffs than the law requires, which is clear evidence of a lack of impartiality and should be reconsidered.

V. Evidence that no Repairs Were Requested During Ongoing Litigation Should Not Have Been Considered.

The Award specifically relied on the fact that no repairs were requested during destructive testing. "Mr. Clements admitted that no repairs, etc., were requested to be made after the destructive testing in 2018." (Award at 10). This is completely irrelevant, which the Arbitrator well knows, and again is disturbingly indicative of partiality.

There is no legal requirement for a party to repair conditions observed during forensic investigative work. In fact, as the Arbitrator well knows, *or should*, it is elemental that Plaintiffs have a legal duty to *preserve* evidence rather than *alter* it, as the Arbitrator erroneously suggests

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Plaintiffs were actually *obligated* to do. "A party has a duty to preserve evidence during litigation" *Hawkins v. College of Charleston,* 2013 WL 6050324 (4th Cir. 2013). Further, there is a common law duty to preserve evidence, and not only can a party be sanctioned for destroying evidence it has a duty to preserve. Not only would the Athimoolams have faced the possibility of sanctions for requesting repairs, a negative inference of the evidence would have been drawn in this litigation. "When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party." *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw County Board of Education v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)).

As the arbitrator is aware, it is customary and a legal right for defendants such as Meritage to have access to the defective conditions to make their own assessment of them as part of the litigation process. In this instance, Jay Rogers did that for Meritage. While unfortunately predictably, the Arbitrator finds it unremarkable, and apparently irrelevant, that Meritage, which actually created the defective conditions found by Clements, never offered to repair any of the conditions. It was also not noted by the Arbitrator that Mr. Rogers did not repair the conditions at the time of his visit.

This erroneous and peculiar finding by the Arbitrator is yet another, clear example of the Arbitrator's lack of impartiality and should be reconsidered.

VI. Andy Schauder Was Credible and Rainbow's Estimate was Admissible.

Andy Schauder has been a Board-Certified Industrial Hygienist for 40 years. He visited the Plaintiffs' home three times, in 2016, 2018 and again in 2022, and each time concluded that there is mold and mold spores on framing members throughout the home. His testimony,

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supported by laboratory testing results, was explicit and clear that the mold needs to be remediated to avoid the risk of future mold growth at the home.

Notwithstanding that *testimony*, from a credentialed expert who was qualified without objection, the Arbitrator relied on a *letter* from AdvantaClean, Defendant's Exhibit 1, which merely stated that, in 2016, the mold in Plaintiffs' home, was "***visibly clean.***" AdvantaClean was not called to testify by Meritage and their conclusory finding, espoused in the letter, was directly refuted, after it was written, by the testimony and laboratory results provided by Schauder.

Disregarding Schauder's testimony and findings, in favor of a letter secured by Meritage from AdvantaClean, which did not testify at the hearing (and was not even listed as a witness by Meritage), evidences a clear lack of impartiality and should be reconsidered.

In addition, the Arbitrator disregarded the mold remediation estimate provided by Rainbow, on the basis that it was not based on a protocol developed by Schauder. Again, there is no legal requirement that Rainbow's estimate needed to be based on a protocol from Schauder. Rainbow was qualified as an expert, is a licensed contractor in the business of mold remediation and testified that they do over 800 remediation proposals every year. They are the only expert to testify about those costs and there was no legitimate legal basis upon which to disregard their testimony.

This is further evidence of the Arbitrator heightening the burden of proof for Plaintiffs as result of her impartiality and should be reconsidered.

VII. Meritage's Lack of Evidence.

An over-arching issue in this case was the lack of testimony provided by Meritage. Meritage offered *no* testimony in this case. As noted by the Supreme Court in *Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171* 648 S.E.2d 585 (2007), "The failure of a defendant to testify

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raises an inference that his testimony, if it had been submitted, would have been unfavorable to his position." Far from inferring that Meritage's testimony would have been unfavorable, in numerous particulars discussed below, the Arbitrator accepted the legal arguments of Meritage's counsel concerning liability, damages, criticisms of Plaintiffs' experts (who actually testified) and the Plaintiffs own unrefuted testimony about Meritage.

In addition, Meritage did not call a single subcontractor, AdvantaClean, any employee who was involved with the sale of Plaintiffs' home, the punch-list, or with respect to reviewing and responding to the Right to Cure letter.

The Arbitrator's willingness to adopt Meritage's legal arguments (proffered only by counsel) to refute and discredit the actual testimony and evidence offered by Plaintiffs and their *four testifying* experts evidences a persistent effort by the Arbitrator to increase the Plaintiffs' burden of proof and to require Plaintiffs to present evidence the law does not require, while at the same time, ignoring the absence of rebuttal *testimony* by Meritage and its subcontractors or the poor quality of Meritage's two expert witnesses.

VIII. The Arbitrator's Award is Erroneous, and Her Impartiality is Established Meritage's by Meritage's Settlements with its Subcontractors.

As the Arbitrator is aware, this case was commenced in Circuit Court and arbitrated between Meritage and Plaintiffs by agreement. In Circuit Court, Meritage asserted indemnity claims against the Subcontractor Defendants to recover any sums Meritage was required to pay Plaintiffs arising from the faulty work of the Subcontractor Defendants. In reliance on the reports and testimony of Plaintiffs' experts, including Clements and Schauder, Meritage pursued claims against those Subcontractor Defendants, securing settlements from the Subcontractor Defendants totaling $350,000.00.

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To be clear: The testimony and opinions of Plaintiffs, and their experts, which the Arbitrator heard at arbitration and blithely disregarded at the request of Meritage's counsel, is the same evidence that allowed Meritage to recover $350,000.00 from its subcontractors.

To the extent Meritage argues that their claims against subcontractors were for something other than indemnity for Plaintiffs' claims, that position is refuted by *Stoneledge at Lake Keowee Owners' Association v. Clearview Construction,* 776 S.E.2d 426 (S.C. Ct. App. 2015).

The fact is that the case which the Arbitrator found so unpersuasive, was persuasive enough to enrich Meritage at the expense of its subcontractors. That the Arbitrator found the same evidence unpersuasive is further evidence of a lack of impartiality which requires reconsideration of the case.

IX. Meritage Should Have Been Judicially Estopped from Taking Opposite Positions Throughout this Litigation.

Given the complete rejection of any disputed aspect of the claim by the Arbitrator, which were decided wholly and consistently in favor of Meritage, the doctrine of judicial estoppel applies in this situation. In *Hayne Federal Credit Union v. Bailey,* 327 S.C. 242, 489 S.E.2d 472 (1997), the Supreme Court held that the doctrine of judicial estoppel precludes a party from adopting the position in conflict with one previously taken in the same or related litigation. The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process in the courts. The *Hayne* Court noted, "The parties may vigorously assert their version of the facts, but they may not represent those facts in order to gain advantage in the process." Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, by its pleadings, statements or contentions made under oath is prohibited from adopting an inconsistent position in subsequent proceedings.

In sum, as Judge Anderson said in a concurring opinion in *Quinn v. Sharon Corp.*, 343 S.C. 411, 422, 540 S.E.2d 474 (Ct. App. 2000) a party cannot blow "hot and cold."

Here, Plaintiffs recognize that Meritage was entitled to dispute the extent of the deficiencies and the costs to repair. However, in light of the Arbitrator's impartiality and the errors referenced above, equity does not allow Meritage to reap a $300,000 windfall by obtaining a benefit from the Plaintiffs' evidence which the Arbitrator rejected, and those settlement sums should be awarded to Plaintiffs.

CONCLUSION

For the reasons stated above, Plaintiffs request that the Arbitrator grant Plaintiffs' Motion to Reconsider and order an award that is consistent with the applicable case law and evidence presented.

Respectfully submitted,

LYLES & ASSOCIATES, LLC

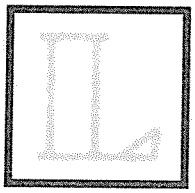
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November 22, 2023

VIA EMAIL ONLY
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Re: *Raghu Athimoolam and Irene Athimoolam v. Meritage Homes of South Carolina, Inc.*
Case Number: 2017-CP-04-00376

Dear Becky:

Following our hearing on Friday, November 17th, you requested clarification for certain line-item costs, and the corresponding portions of the "Fuller Report" calling for those repairs. Below is a breakdown of those items. If I have missed anything, or failed to respond to something you requested, please let me know. Thank you for your willingness to consider this and for your hard work in sorting through the evidence.

I. Window Issues

I recall your question being whether window replacement, which was priced by Harmon, was called for by Ross Clements. Our review of the Clements scope indicates that he only called for removal and reinstallation, not replacement. See below:

Fuller Report:

A9. Observations during our destructive testing revealed that deficiencies exist at the window and window rough openings including but not limited to:

1. Improper fasteners installed at the window nailing fin and improperly spaced fasteners. Fasteners were also observed to be installed into the field of the nailing fin and not into the factory provided slot holes.

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2. Asphalt-saturated felt utilized for the sill flashing was found to be improperly integrated with the WRB. The felt still flashing was also observed to be discontinuous at various locations.
3. No WRB or rough opening flashing was observed to be properly integrated into the window rough opening.

A12. Observations during our destructive testing revealed that the windows installed at brick veneer locations lacked proper head thru-wall flashing.

Recommendation: removal and reinstallation of existing windows and doors. The existing windows and doors and related interior trim shall be removed to provide access to the rough openings to address improperly installed/damaged rough opening flashing and WRB around the openings.

Remove and replace existing flashings at the windows and doors with new self-adhered flashings. New SAF shall be lapped with the new WRB in a water-shedding manner. A self-adhered pan flashing with end dams and an interior upturned leg shall be installed along the window sills. The pan flashing along the door sills shall consist of a on-piece continuous metal pan with end dams and an interior upturned leg. The flashings at the jambs shall lap onto the end dams of the pan flashings.

Following proper installation of the rough opening, flashings, the windows and doors shall be reinstalled with high-quality urethane sealant. Sealant and closed-cell backer rod shall be installed around the interior perimeter of windows and doors to form a continuous air seal.

Install metal head flashings and properly lap with the new WRB. Reinstall interior trim following completion of window and door repairs. Fill all nail holes in trim, caulk and paint to match existing.

Harmon priced replacement:

Window Cost -Total – 41,120.16

- Removal (per window) - $21.62 (page 25 CCR Estimate) x 29 windows = $626.98
- Replacement (new window cost) -$776.12 (page 25 CCR Estimate) x 29 windows = $22,507.48
- Tax - $1,833.76 (page 25 CCR Estimate)
- O&P – 4,993.66 (page 25 CCR Estimate)
- Finish Carpenter – Labor for interior repairs associated with replacement of windows 4hr x 29windows = $11,158.28. (Page 2 CCR Estimate)

Based on the above, the cost for new windows (29) is $22,507.48. As we discussed, the Clements' testimony and photos showed damage to the window flanges because of improper nailing, and removal and reinstallation may damage the windows justifying Harmon's replacement costs. If you disagree, the costs of the new windows are $22,507.48. The other costs remain the same.

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II. Masonry Issues

I believe you asked if the masonry costs included all of the brick. Clements calls for the replacement of all cladding, including hardi, brick and stone:

Fuller Report:

A2. At the left, right, and rear elevations, metal flashing installed between the horizontal band board and brick veneer was observed to be filled with sealant. No additional thru-wall flashing was observed to be installed at the brick and lap siding transition.

1. Observations of the brick and lap siding transition during our destructive testing confirmed the metal thru-wall flashing was reverse-lapped with the weather barrier and the flashing was sealed with sealant.

A3. Adhered manufactured stone veneer (AMSV) was observed to be improperly installed at three walls that comprise a bay window feature a the front, left corner of the structure. Multiple deficiencies, were observed, including but not limited to:

1. Asphalt-saturated felt weather-resistant barrier (WRB) was observed to be reverse-lapped with the windowsill nailing fins.
2. At multiple locations between the stone sections and tat AMSV terminations, the metal lath was not fully embedded within the cementitious scratch coat and was visible.
3. At the inside, vertical corner join, where AMSV transitioned to brick veneer, the OSB wall sheathing was observed through a gap between the two materials, indicating an incomplete and improper application of the exterior WRB.

A6. Along the left elevation, the brick veneer at the base-of-wall was observed to lack thru-wall weeps above the adjacent grade. Additionally, a corrugated drain pipe was observed to be connected to a black plastic coupling that exited the brick veneer at the base of the wall, near the rear corner of the side elevation.

1. Observation during our destructive testing revealed that the corrugated drain pipe was connected to what is believed to be a channel drain wrapped in the three dimensional drainage material. It is unknown if this is a proprietary product that is approved for use in this application. Furthermore, the brick veneer lacks thru-wall flashing along this elevation.

Recommendation: removal and replacement of the exterior cladding, including all fiber-cement siding, brick veneer, AMSV, composite MDF trim, and related accessories. The removal of these materials is required to provide access to the weather-resistive barrier (WRB), flashings, and sheathing behind the cladding. Install additional fasteners at edges and field of OSB sheathing, as required to meet prescriptive building code requirements. Install new Tyvek WRB system. Following the completion of additional items outlined below, the exterior cladding shall be replaced in kind and to match the existing layout of the materials. Flashings at wall bases and roof-to-wall interfaces shall be installed and properly integrated with the WRB. Install additional fasteners at edges and field of OSB sheathing, as required to meet prescriptive building code

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requirements.

A properly configured AMSV system should be installed, including all accessories, such as: hot-dipped galvanized metal lath, zinc casing beads, drip screeds, etc. Flashings at wall bases and cladding interfaces shall be installed and properly integrated with the new weather-resistive barrier (WRB). The new WRB shall be two layers, consisting of one layer of StuccoWrap installed underneath one layer of 30# felt or equivalent.

Brick veneer repairs shall include the installation of thru-wall flashings and weeps at locations including but not limited to: window/door heads and base-of-wall.

Contrary to what I said on our phone call, this portion of the Fuller Report scope of repair calls for the complete removal and replacement of all of the veneer, including the stone and brick, justifying Harmon's total masonry cost, **$97,552.80,** (plus OHP and general conditions).

III. Deck Issues

You asked if Clements called for the replacement of the deck, or just repairs to it. A review of his scope shows that he only called for the repair of components of the desk:

Fuller Report:

A.7 At the rear, wood deck, improper connections were observed including but not limited to, between the wood columns and deck floor framing, and between the guardrail posts and deck floor framing. Fuller believes the columns and guardrail posts, more likely than not, lack proper attachment to resist code-prescribed loads.

1. Measurements and additional documentation were performed during our destructive testing. Various deficiencies were observed and confirmed, including but not limited to the following:
   a. Missing lateral connections at the deck ledger board;
   b. Improper deck ledger fastening pattern;
   c. Missing lateral bracing at the deck columns;
   d. Improper guardrail post attachment;
   e. Improper baluster attachment;
   f. Unsupported connection at the stair stringer;
   g. Improper column-to-beam attachments; and
   h. Missing lateral support blocking between joists.

Recommendation: Localized repairs shall be performed at the deck structure to provide lateral bracing and proper attachment of components including but not limited to the following:

a. Install lateral connections (hold down anchors) at the deck ledger;
b. Install additional ledger fasteners (12" O.C. staggard). Match existing fastener types;
c. Install diagonal bracing at all deck columns;

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d. Remove existing guardrail posts and install new 4x4 posts with hold down anchors, through-bolts, and blocking in accordance with building code requirements. Install additional, code required fasteners in balusters;
e. Install new 4x4 PT wood column and concrete footing below the stair stringer termination at the deck landing to complete load path;
f. Install retrofit Simpson post cap at all post-to-beam connections; and
g. Install full depth 2x blocking between joists at bearing ends.

Repairs shall be performed in accordance with the Prescriptive Residential Wood Deck Construction Guide. Corrosion resistant fasteners compatible with building materials shall be used.

While it does not call for a full replacement of the deck, this scope of repair is extensive and total replacement may be the most efficient means of repair the deck, which was Harmon's approach.

Deck Replacement Costs - $37,411.22 (Page 2 CCR Estimate)

IV. Column Issues

You asked about the Clements scope calling for a column at the rear of the home where there is an undersized beam:

Fuller Report:

A.5 It is our understanding that a Meritage Homes representative reported to the homeowner that a column should have been installed below the beam and first floor wall that spans between the two, perpendicular alcove walls at the walk-out basement. The exterior wood deck also bears along the beam span. Fuller agrees that a column may be required at the center of this span, due to its length and depth.

1. Observations during our destructive testing of the area at, and around the beam confirmed that various deficiencies exist with the existing double-ply LVL beam and framing installation, including but not limited to the following:
   a. The exterior OSB wall sheathing lacked the code prescribed number of fasteners along the edge and field of sheathing panels;
   b. The double-ply LVL beam lacked the code prescribed fastening pattern for composite beams. An approximately ½" deflection between the two LVLs was measured at the center of the span, on the inboard LVL member;
   c. Further structural analysis concluded that the double-ply LVL beam was improperly sized (insufficient load capacity) to resist the code-prescribed loads of the residence and deck structures; and
   d. Fasteners were observed to be missing at Simpson joint (truss) hanger brackets. Additionally, the joist hangers were observed to be inadequately sized. The ESR 2549

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Code Report for LUS410 Simpson hanger stipulates joist hanger height to be 60% of the height of the joist, unless lateral restraint is provided.

A13. Observations during our destructive testing revealed inadequately sealed penetrations in the thermal envelope and discontinuous batt insulation at the ceiling (first-floor framing) of the exterior alcove of the walk-out basement.

Recommendation: At the rear elevation, first floor level, repairs shall be completed at the floor structure in accordance with the following:

a. Replace the existing double-ply LVL beam with (2) 1.75"x24" Trus Joist MircoLam LVL 2.0E or install new 6x6 nominal wood column and concrete footing at midspan;
b. The double-ply LVL beam shall be fastened together with 10D nails in 3 rows (top, middle, bottom) at 12" O.C. across the span; and
c. Install new joist hangers at the beam to meet building code requirements (60% of truss height) or install full depth 2x wood blocking between floor trusses.
    i. If exiting joist hangers are left in service, install additional fasteners where fasteners are missing. Ensure fasteners are properly sized, based on manufacturer's installation instructions.

We do not see that cost in Harmon's repair estimate, and it may be that it is included in the deck repair cost or other item.

V. Gutter Issues

You asked about Harmon's gutter repair number. Replacement is called for by Clements:

Fuller Report:

A8. The homeowner has reported that during heavy rain events, water from the roof spills over the edge of the gutter along the rear elevation. A downspout is located at each corner of the rear elevation. All gutters and downspouts should be properly sized in accordance with the applicable building code and accepted industry standards. Piping shall be installed to adequately carry downspout water away from the residence.

1. Measurements and additional documentation of the as-built condition were performed during our June 14, 2018 site visit. Calculations based upon accepted industry standards confirmed that the existing K-style gutter at the rear elevation is inadequately (under) sized.

Recommendation: At the rear elevation, remove existing gutter and replace with a 6" K-style gutter. Reinstall existing downspouts. Gutter shall match existing in color. Insure downspouts terminate and direct water away from the structure.

Harmon's estimate seems to include that cost twice. We concede that the $11,700.00 Soffit, Facia and Gutter cost is likely inclusive of the gutter issue.

VI. Siding/Painting Issue

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Danny and I were a little unsure of this question. Fuller calls for the removal and replacement of the siding which will necessitate painting of the new siding.

Fuller Report:

A10. Observations during our destructive testing revealed that deficiencies exist with the WRB at various locations including but not limited to:

1. Discontinuous WRB within the field of the wall.
2. Discontinuous and improperly integrated WRB (with wall waterproofing) at wall structural framing transition (wood-framed-to-concrete basement wall).
3. Discontinuous ad improperly integrated WRB (with flashings0 at the rear deck, deck-to-wall intersection.

Recommendations: At the first-floor mudsill plate for the perimeter of the structure, install fasteners into unattached mudsill anchors and additional fasteners at anchors lacking fasteners.

In Harmon's estimate, he includes the painting in the siding costs:

Siding Costs – $151,298.74

- Remove and Replace exterior cementitious siding - $84,882.24 (page 25 CCR Estimate)
- Painting (Siding) - $41,994.60 (page 25 CCR Estimate)
- Remove and Replace sheathing - $24,421.90. (page 26 CCR Estimate)

That painting number is for exterior painting only (the siding), he breaks down interior painting costs by room/area in the home he proposes to paint. I hope this answers that question.

The "hard" total costs breakdown for these items is **$346,600.3**6, which does not include a proportional increase for Overhead/Profit and a corresponding portion of the general conditions.

Should you have any additional questions, or need any clarification, please do not hesitate to reach out. Thank you again for your hard work on this.

With kindest regards, I am

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert T. Lyles, Jr.

RTL/jdw
CC: David Cobb (via email only)

Deposition

OPEN

basement bedroom?

A. That's all I know.

Q. In the attic space, are you aware of any roof leaks?

A. Yes.

Q. Anything that would put water in the house?

A. Yes.

Q. Where are the roof leaks?

A. They're here -- they're here in my family room. And I noticed one the other day like in the bathroom, the main level bathroom.

Q. How do you know those are roof leaks as opposed to something else?

A. I don't know. I mean, um --

Q. Have you ever been in your attic?

A. Yes.

Q. When is the last time you went in the attic?

A. Um, I went there probably a month ago.

Q. Why were you up there?

A. Because we're having problems -- we had problems with our air-conditioner.

Q. Why did you go in the attic?

A. Uh, I don't know. I went in there to

look to see if everything was okay.

Q. What were you looking for?

Athimoolam Supp (L&A) 000001
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Mer[illegible]ge moved light fixture and did not fix drywall.



Outlet should have a GFCI outlet. & more through out

home need to be repla[illegible] Not up to code. National Electrical Code (NEC)

Athimoolam Supp (L&A) 000002

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Athimoolam Supp (L&A) 000003

Record on Appeal 273

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uneven floor in master bath



Athimoolam Supp (L&A) 000004

Record on Appeal 274

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August 2016





Record on Appeal 275

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Example of cracked tile in laundry room



Example cracked in Mast Bath.

Athimoolam Supp (L&A) 000096

Record on Appeal 276

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Athimoolam Supp (L&A) 000007
Record on Appeal 277

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master bath shower grout and tiles are cracked throughout shower. Not addressed at 10 month warranty.



Record on Appeal 279

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Shoddy tile installation in 2nd bath. On 10 month warranty work



Athimoolam Supp (L&A) 000010

Record on Appeal 280

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Record on Appeal 281

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Record on Appeal 282

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uneven floor in laundry room and tiles are cracking in many places



Athimoolam Supp (L&A) 000013

Record on Appeal 283

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Latch is broken and does not lock. On 10 month warranty list and was never fixed.



Record on Appeal 284

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Have never used basement because of a pungent musty smell from mold.



Meritage sheetrocked ceiling, 1/2 walls and painted 40% of the basement, that should not have been finished. mold is on the Trusses and Joist.

Record on Appeal 285

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Record on Appeal 286

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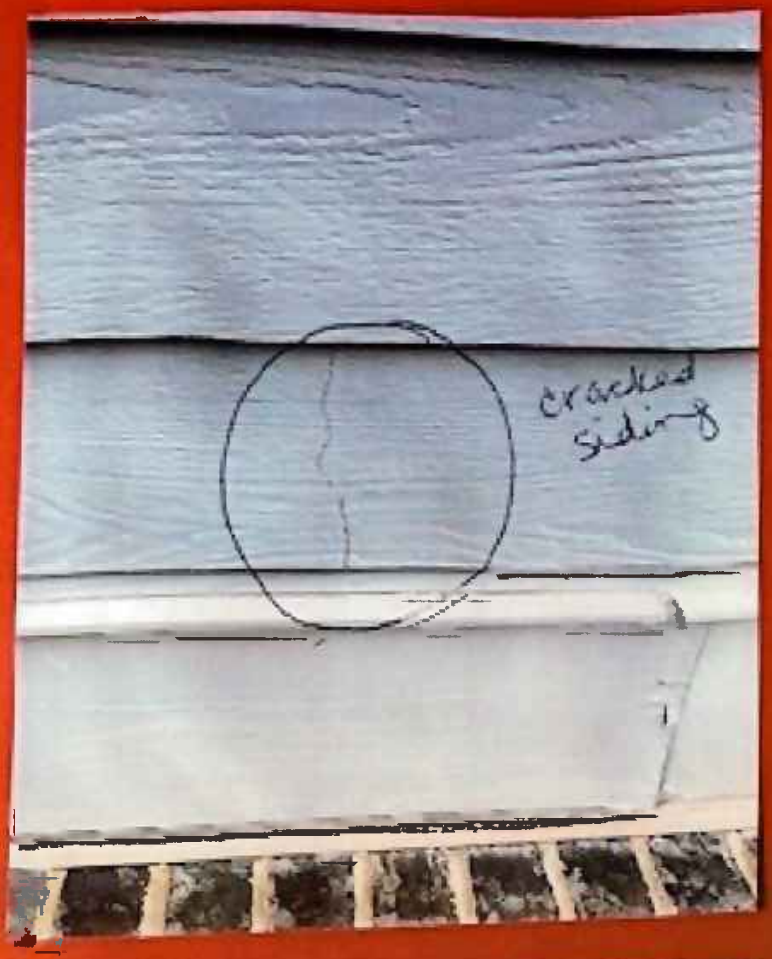
Record on Appeal 287

Athimoolam Supp (L&A) 000017

Excessive shingle granule loss

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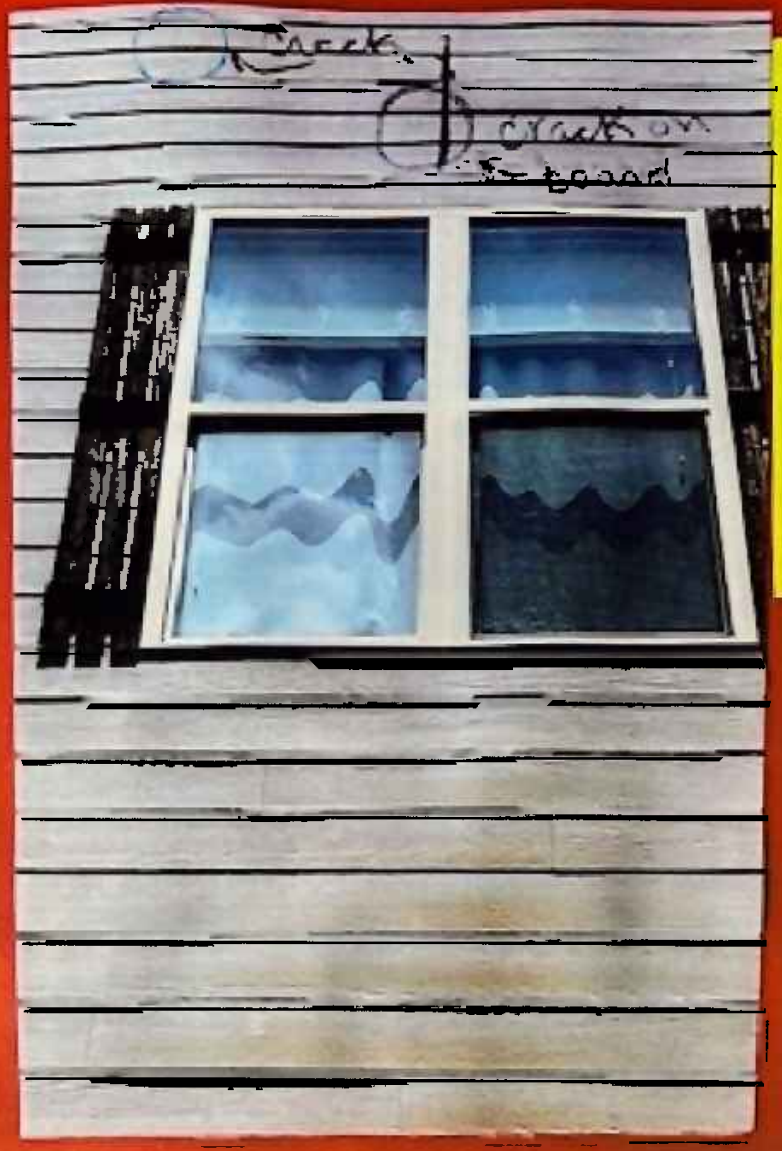
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Record on Appeal 289

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34 cracks on siding, many uneven & warped boards



Record on Appeal 290

Attachment Supp (L&A) 000020

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Water damage on white painted belt board at bottom of siding and is caused from water running behind the siding

Athimoolam Supp (L&A) 000021

Record on Appeal 291

2 roof leaks in family room

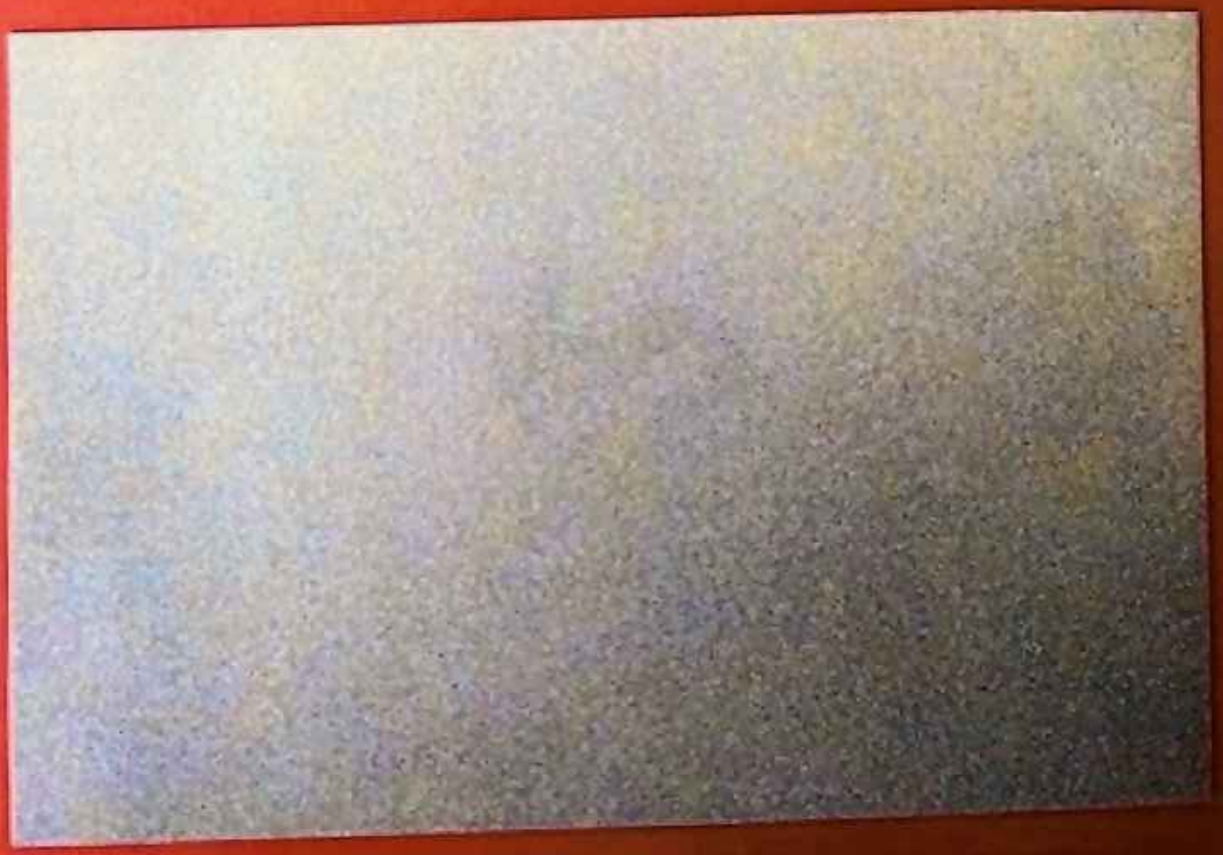
Secon Bath Leak

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Old leaks in family room



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Record on Appeal 294

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10:58



Ply Gem

WARRANTY REGISTRATION

Activate your warranty at
plygem.com/windows-doors/warranty-activate

You will need the following information to complete the warranty registration. Please keep this information for your records.

PRODUCT INFORMATION

Installation Date _____

Number of Windows Purchased _____

Number of Doors Purchased _____

Order No. _____

HOMEOWNER INFORMATION

Name _____

Address _____

City _____

State _____ Zip _____

Telephone _____

Email _____

INSTALLER INFORMATION

Company Name _____

Address _____

City _____

State _____ Zip _____

Telephone _____

Email _____

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WINDOWS & DOORS

VINYL

Ply Gem
WINDOWS & DOORS

LIFETIME LIMITED
WARRANTY

LIFETIME LIMITED WARRANTY

This warranty covers Ply Gem Premium Series, Pro Series, Builder/Contractor Series, windows and doors and all other Ply Gem branded windows and doors manufactured in Ply Gem's Auburn, West Sacramento and Corona manufacturing plants and installed only in the United States of America.

Overview of Lifetime Limited Warranty

Ply Gem Parts Limited Warranty. Ply Gem subject to the conditions and limitations set forth below warrants to the original property owner/purchaser who lived in home and used product installed. Put in and address and date set by this from manufacturing date in use of the original property owner/consumer during ownership of the property. Provided by windows and doors were installed Ply Gem will provide, replace, or refinish, at its option, free of charge, replacing parts and vinyl surfacing color in accordance with the repair or removal of the original product or installation of the replacement product, any damage or poor performance to be detected under the terms of this warranty. In lieu of replacement, refinish, or repair Ply Gem at its sole discretion, reserves the right to refund the amount originally paid by the original property owner/consumer for the window or door installed reasonable cost as determined by Ply Gem for the original installation.

A. Vinyl Components. Chipping, cracking, peeling, fading, blistering and corrosion, under normal use and exposure. Ply Gem windows installed between 1,000 feet above sea level (ASL) and 7,000 feet ASL are warranted only for period of ten (10) years from the original date of manufacture, and Ply Gem Windows requires no warranty and will have no responsibility with respect to any installation over 10,000 feet ASL.

B. Factory Applied Painted Exterior Covers. If excessive fading and uneven weathering, under normal use and proper care, for period of ten (10) years from the original date of manufacture. "Excessive fading" is more than normal weathering, but before which it is outside of a Delta E of 5 Hunter units, as determined by Ply Gem Windows, following the initial installation of the product and "normal weathering" means uneven or non-uniform change in color or appearance commonly understood to occur as a result of exposure to sunlight, natural oxidation and natural oxidation in temperatures and other atmospheric conditions, provided that any excessive change or appearance fade or weathering is not due to a coating or accumulation of stains, dirt, mold, mildew, or any other factors caused by the care of or lack of care on your property. Notwithstanding the foregoing, Ply Gem Windows makes no warranty and will have no responsibility with respect to any installation over 10,000 feet ASL.

Lifetime Limited Warranty and Property Sale

In the event the original property owner/consumer sells the property in which the windows or doors covered by this warranty are installed, the coverage provided by this warranty may be transferred to the subsequent property owner/consumer however limited to ten (10) years for material and five (5) years for labor coverage commencing from the date the original property owner/consumer has been installed.

Lifetime Limited Warranty and Commercial Property Restrictions

The lifetime coverage offered by this warranty, applies to individual homeowners and does not apply to property purchased by or installed in property owned by corporations, governmental agencies, partnerships, trusts, religious organizations, schools, cooperative housing corporations or residential or apartment buildings, or any other type of building or premises not used by individual homeowners as their residences. For such property owners/purchasers or entities to which the lifetime coverage does not apply, the warranty period shall be for 10- years measured from the date the original property owner/consumer has been installed.

Construction of Lifetime Limited Warranty After Repair or Replacement of Product

In the event of repair, refinish or replacement under the terms of this warranty, the original warranty will apply to the replacement product and will extend for the balance of the warranty period in effect at the time the product was determined to be defective.

Limitations on Scope of Warranty

Ply Gem Windows shall have no obligation to address any condition not directly caused by a defect in its product or its manufacturing. Any Ply Gem Window's component or component part proven defective per manufacturer's instruction and care during the limited warranty period. Any replacement product was purchased and proper care by owner. This warranty does not include consideration against any failure caused or damage caused by situations and events beyond normal expected conditions including but not limited to:

A. Defects, damage or failure caused by improper handling or damage, abuse, abuse, transportation or improper installation.

B. Any defects in the product caused by effects of human-made, fire, earthquake, flood, lightning, hurricane, tornado or other casualty or act of God.

C. Windows or doors that have been altered by acts, whether or not authorized by Ply Gem subsequent to the purchase.

D. Defects or damage caused by the effects of aging, normal deterioration, ordinary wear, abuse, misuse, poor maintenance or improper products, neglect or failure of owners or other normally responsible, negligent, irresponsible acts or manufacturer improper care, improper or normal cleaning, operation acts or lack of care, salt water spray, sand, pollutants or the atmosphere or other environmental factors, airborne debris, mold and mildew, accumulations caused by or improper use or exposure to excessive, prolonged or reflective heat sources (e.g. radiating reflected, glare, glass, screening or personal materials), or excessive heat or heat retention or reduced impact (less than ASL or as normally given climate with prolonged elevated heat, ambient temperatures and other excessive heat build-up conditions). "Normal conditions" is not intended by this warranty and is the damaging effects of sunlight, weather and atmospheric conditions that may cause any reduced benefit to heat, light or opposite directional, solar or thermal. The degree to which normal conditions may exist may vary depending on or apply the building location and other local conditions over which Ply Gem Windows has no control. Many local typically experience by manufactured solar energy as a type, exposure to the elements and local climate, pollen, plants and trees and normal weathering of and damages the new warranty. Periodic cleaning of the vinyl surfaces with a mild soap or detergent will help protect the original color and help extend against premature fade or weathering. The severity of any condition depends on the duration of the sun in the area and many other local influences over which Ply Gem has no control. Ply Gem shall have sole discretion to determine, based on reasonable criteria, whether the product has experienced normal weathering, in the case of a product warranty is a claim determined by Ply Gem to be beyond normal. Ply Gem shall retain all its sole discretion who of the options as set forth in the section of this warranty titled "Overview of Lifetime Limited Warranty."

E. Damage caused by failure to provide usual customary routine maintenance or repair.

F. Corrosion of any metal parts, whatsoever except as hardware which material other than those of a package or purpose or result, except that such parts shall be warranted where corrosion to any of such parts after 10 years from date of purchase by original property owner/consumer if applied cleaned of salt deposits and treated with chemical-free cleaners.

G. The addition of applied trim or films to glass.

H. Defects or damage or injury caused by commission or problems caused by the negligent that may have been or of, caused from date of purchase or date installed and turn warranty.

Ply Gem reserves the right to discontinue or modify any of its products, including the color changes, without giving notice to the original property owner/consumer and shall not be liable as a result of such discontinuance or modification, nor shall Ply Gem be liable in the event replacement materials may vary in color or gloss in comparison to the original product as a result of normal weathering. If Ply Gem replaces any warranty under the warranty, it may substitute parts or products designated by Ply Gem as by of comparable quality or price range in the event the parts or products originally installed have been discontinued or changed.

DISCLAIMER. Concerning the use of vinyl trim from outdoor applied around the perimeter of the Ply Gem window frame with professional quality non-shrinking, flexible, paintable with a tinted application may be used. Professional any distortion or damage to the window found to be caused by the vinyl trim from outdoor or where or in part will not be covered under this Ply Gem Parts. Window Corporation warrant's

Other Conditions

THIS WARRANTY REPLACES ALL OTHER EXPRESS OR IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT SHALL PLY GEM BE LIABLE FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES OF ANY KIND, INCLUDING ANY DAMAGE TO THE BUILDING, ITS CONTENTS OR ANY PERSONS THEREIN, RESULTING FROM THE BREACH OF THIS WARRANTY. NO FIELD REPRESENTATIVE, DISTRIBUTOR OR DEALER OF PLY GEM IS AUTHORIZED TO CHANGE, VARY OR EXTEND THIS WARRANTY. SOME STATES DO NOT ALLOW FOR THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE EXCLUSIONS MAY NOT APPLY TO YOU.

This limited warranty gives you specific legal rights and you may also have other rights which vary from state to state.

How to Make a Claim

Contact the Ply Gem warranty Claims Department at 800-999-9436 or visit [illegible] and submit the claim. Ply Gem will investigate the claim and if a defect covered by the warranty is confirmed, Ply Gem will, within a reasonable amount of time, repair or replace the defective window or door or refund the amount paid by the original property owner/consumer for the window or door per the terms of this warranty.

This warranty is effective on Ply Gem windows and doors installed on or after May 6, 2014. This warranty supersedes the written warranty previously issued by Ply Gem, copy 828-05 2014.

Maintenance and Cleaning – New Windows and Doors

1. Ply Gem Vinyl and metal components require only normal cleaning to maintain their appearance and performance. Use a mild soap or detergent and water solution and a soft cloth or sponge. Rinse thoroughly with clean water and dry with a soft cloth.
2. Do not use abrasive cleaners, solvents, or harsh chemicals on any surface.
3. Clean weep holes periodically to ensure proper drainage.
4. Inspect and lubricate moving parts annually as needed.

Maintenance and Cleaning – Ongoing

All windows require some basic maintenance and cleaning to keep them looking good and operating smoothly.

1. Keep sills, tracks, and weep holes clear of dirt and debris that may obstruct water's drainage with vacuum or brush, when necessary.
2. For moving parts, such as hinges and sash operators, apply a silicone-based lubricant to ensure smooth operation. Avoid using petroleum-based products, as they can damage vinyl parts. Refer to the manufacturer's recommendations for specific lubricant types and application frequency.
3. Use a soft cloth or sponge with mild soap and water to clean the glass surfaces. Avoid using abrasive cleaners or harsh chemicals that can scratch the glass or vinyl. Do not use strong solvents or concentrated solutions of vinegar, bleach, or ammonia to clean. These may cause damage or discoloration.

plygem.com

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Today
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All Photos



Edit

EXHIBIT 6

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STATE OF SOUTH CAROLINA)) COUNTY OF ANDERSON)	IN THE COURT OF COMMON PLEAS Docket No.: 2017-CP-04-376
RAGHU ATHIMOOLAM AND IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	**DEFENDANT MERITAGE HOMES OF SOUTH CAROLINA, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND THE ARIBITRATION AWARD**

Meritage respectfully files this memorandum in opposition to Plaintiffs' Motion to Alter or Amend the arbitration award. Plaintiffs' current motion does not meet the requirements of 9 U.S.C §§ 9 et al. See Title 9 excerpts, attached.

Furthermore, Plaintiffs' intentional and blatant violation of the confidentiality provision of the applicable South Carolina Alternative Dispute Resolution Rules by including in their current motion the specific amount of the settlement between Meritage and its subcontractors should not and cannot be tolerated. Rule 8 of the ADR Rules very clearly states that "any mediation communications disclosed during a mediation ... shall be confidential, and shall not be divulged by anyone in attendance at the mediation participating in the mediation" except as permitted by circumstances that do not apply here. Rule 8 further requires: "The parties and any other person present or participating [in the mediation] shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence at any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation ...." (emphasis added in both).

Any settlement between Meritage and its subcontractors resulted from the extended mediation that included Plaintiffs and that lasted many months. Plaintiffs are and were bound by the confidentiality requirements of the ADR Rules. Plaintiffs'

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intentional violation of the confidentiality requirement can only be explained as an attempt by them to improperly gain an advantage with the pending motion, as an attempt to improperly influence the outcome of their current motion, and as an attempt to prejudice Meritage. That conduct runs counter to the spirit and purpose of the ADR process. Rule 10(b) of the ADR Rules provides the sanctions "if any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause", which is certainly the case here. Meritage respectfully suggests that Plaintiffs' intentional violation of the ADR Rules is worthy of sanctions, including, at a minimum, the dismissal of this motion and any additional sanctions at the arbitrator's discretion. In any event, Plaintiffs' claims on this issue ignore the fact that Meritage's settlement with its subcontractors included settlement of Meritage's claims for contractual indemnity, Additional Insured status, bad faith, and payment of past and future defense costs, including, but not limited to attorney's fees and expert witness fees. Moreover, the claim that Meritage's settlement with subcontractors somehow establishes a floor for Plaintiffs' claims is without any legal support, as evidenced by the fact that Plaintiffs did provide any case law support for the proposition.

With regards to the other claims, Meritage responds as follows:

I. Claimed Impartiality of the Arbitrator: Patently absurd comments devoid of any factual support.

II. Misapplication of Law: The Kennedy case cited by Plaintiffs confirms that a negligence cause of action is available to a homeowner, and the elements of a negligence cause of action include proximate cause and damages. The Kennedy case clearly indicates that a builder is liable for proximately caused damages. In this case, Meritage disputed the extent of some damages and the existence of other damages.

Meritage's construction/engineering expert Jay Rogers clearly testified that in his opinion the cost needed to be expended to address the legitimate concerns raised

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by Plaintiffs' would be approximately $30,000.00. While not intending to, Plaintiffs' architect expert Clements agreed with certain aspects of Rogers' testimony that a wholesale stripping of the house was not required to address the issues. For example, Clements testified that the entire roof did not need to be replaced, yet Plaintiffs' repair contractor Harmon ignored that and nevertheless included a substantial amount for the complete removal and replacement of all roofing and flashings. In addition, Harmon's estimate included numerous examples of his misunderstanding of the Clements scope (see exterior deck and garage repairs) and also included items that Clements did not indicate needed to be repaired (perimeter foundation, entire sheathing, etc.). Meritage's contractor/engineering expert Jay Rogers similarly indicated that the complaints regarding the siding installation, stone installation, and brick installation could be addressed using localized repairs as opposed to the wholesale removal and replacement of those items. Rogers also pointed out that Clements performed numerous destructive cuts into the claddings and many of those explorations were not included with his testimony, presumably because the findings did not advance Plaintiffs' claims.

III. Alleged Calculation Error: Plaintiffs' claim in their motion that the estimate from their fifth repair contractor (Matthew Harmon) was not based largely on "homeowner complaints" is false. Harmon testified at the arbitration hearing consistently with his deposition testimony taken on September 5, 2023 (approximately three weeks before the arbitration). The relevant excerpt from his deposition is as follows:

Q: Where did you get the scope of repair to price?

A: From walking through with her and reading Mr. Ross' report. I would say 25-75, 75 being her concerns.

Q: So 75% of the scope is what Mrs. Athimoolam said needs to be done?

A: Yes, sir.

Q: And 25% of it was from the Ross Clements report?

A: Yes, sir. I know those answer don't work well, but that is the truth.

Deposition of Matthew Harmon dated September 5, 2023, page 41, line 16-page 42, line 2.

IV: Damages Identified by Homeowner Are Recoverable: Plaintiff does not provide any specific example of what she now claims under this topic; however, the testimony of her fifth contractor Harmon clearly refuted any claim that somehow some "deplorable" condition of the house remained from the original construction. Harmon testified that every item of interior repairs that he included in his estimate was based off of what he called a "homeowner complaint." Harmon further testified that each claimed "homeowner complaint" met the applicable building code and the applicable South Carolina Residential Construction Standard. Thus, the only dispute on this issue is that Plaintiff disagrees with her own expert.

V: Evidence of No Repairs Were Requested Should Not Have Been Considered: It is quite obvious from an objective reading of the arbitration award, that the award was not based on consideration that Plaintiffs did not request repairs during destructive testing.

VI: Andy Schauder/Rainbow Estimate: Andy Schauder's testimony clearly indicated that he did not see any health concerns to the homeowners, the house was habitable, he was not aware of any wood framing in the house that had an unacceptable moisture level, and that he saw no active fungal growth at any point when he inspected the house in 2016-2023. More importantly, Schauder testified at trial consistent with his deposition testimony that he had no discussions with the Rainbow personnel, he had no knowledge of any pricing by Rainbow, and that he would not consider any pricing done by some contractor without consultation with

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him to be a valid price or a valid scope. Deposition of Andy Schauder, page 99, lines 17-21.

Further, Schauder testified at his deposition on August 22, 2023 (his second deposition in this case, which took place approximately one month before the arbitration hearing) that he had not completed any protocol because he had not been asked to complete it. Deposition of Schauder, page 99, lines 2-11. Thus, Schauder had not provided to Plaintiffs and Plaintiffs had not provided to Meritage any formal protocol generated by Schauder before the arbitration hearing.

That testimony mirrored Schauder's first deposition testimony taken on November 23, 2020. During that deposition, Schauder testified that the pricing by a prior entity (Paul Davis Restoration) included as part of one of the earlier repair estimates was not proper "because the full scope of work still needs to be developed." Deposition of Andy Schauder, November 23, 2020, page 17, line 17-page 18, line 7.

VII: Meritage's Alleged Lack of Evidence: Plaintiffs claim now that somehow Meritage had to provide testimony from a Meritage representative in order to have a proper defense is both incorrect and not recognized by applicable law. Meritage did not bear the burden of proof in this case, and testimony from a Meritage representative would have been cumulative to the testimony from Plaintiffs' fifth repair contractor Harmon that the interior conditions of the home did not violate the applicable building code or the South Carolina Residential Construction Standards. Moreover, Plaintiffs had the opportunity to call Meritage witnesses in their case, but chose not to do so.

In addition, the cross-examination of the alleged expert using the Advantaclear report showing that it had performed a mold remediation of the house in 2016 was proper cross-examination of an expert witness, as allowed by the South Carolina Rules of Evidence.

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CONCLUSION

Meritage respectfully seeks denial of Plaintiffs' motion based on the specifics of the Federal Arbitration Act, Plaintiffs' intentional violation of the ADR Rules, and the lack of merit to Plaintiffs' current motion.

TURNER PADGET

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ATTORNEYS FOR MERITAGE HOMES OF SOUTH CAROLINA, INC.

Charleston, South Carolina

October 30, 2023

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TITLE 9—ARBITRATION

This title was enacted by act July 30, 1947, ch. 392, §1, 61 Stat. 669

Chap.		Sec.
1.	General provisions	1
2.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards	201
3.	Inter-American Convention on International Commercial Arbitration	301

AMENDMENTS

1990—Pub. L. 101–369, §2, Aug. 15, 1990, 104 Stat. 450, added item for chapter 3.
1970—Pub. L. 91–368, §2, July 31, 1970, 84 Stat. 693, added analysis of chapters.

TABLE

Showing where former sections of Title 9 and the laws from which such former sections were derived, have been incorporated in revised Title 9.

Title 9 Former Sections	*Statutes at Large*	*Title 9 New Sections*
1	Feb. 12, 1925, ch. 213, §1, 43 Stat. 883	1
2	Feb. 12, 1925, ch. 213, §2, 43 Stat. 883	2
3	Feb. 12, 1925, ch. 213, §3, 43 Stat. 883	3
4	Feb. 12, 1925, ch. 213, §4, 43 Stat. 883	4
5	Feb. 12, 1925, ch. 213, §5, 43 Stat. 884	5
6	Feb. 12, 1925, ch. 213, §6, 43 Stat. 884	6
7	Feb. 12, 1925, ch. 213, §7, 43 Stat. 884	7
8	Feb. 12, 1925, ch. 213, §8, 43 Stat. 884	8
9	Feb. 12, 1925, ch. 213, §9, 43 Stat. 885	9
10	Feb. 12, 1925, ch. 213, §10, 43 Stat. 885	10
11	Feb. 12, 1925, ch. 213, §11, 43 Stat. 885	11
12	Feb. 12, 1925, ch. 213, §12, 43 Stat. 885	12
13	Feb. 12, 1925, ch. 213, §13, 43 Stat. 886	13
14	Feb. 12, 1925, ch. 213, §14, 43 Stat. 886	Rep.
15	Feb. 12, 1925, ch. 213, §15, 43 Stat. 886	14

POSITIVE LAW; CITATION

This title has been made positive law by section 1 of act July 30, 1947, ch. 392, 61 Stat. 669, which provided in part that: "title 9 of the United States Code, entitled 'Arbitration', is codified and enacted into positive law and may be cited as '9 U.S.C., §—' ".

REPEALS

Act July 30, 1947, ch. 392, §2, 61 Stat. 674, provided that the sections or parts thereof of the Statutes at Large covering provisions codified in this Act, insofar as such provisions appeared in former title 9 were repealed and provided that any rights or liabilities now existing under such repealed sections or parts thereof shall not be affected by such repeal.

CHAPTER 1—GENERAL PROVISIONS

Sec.
1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.
2. Validity, irrevocability, and enforcement of agreements to arbitrate.
3. Stay of proceedings where issue therein referable to arbitration.
4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.
5. Appointment of arbitrators or umpire.
6. Application heard as motion.
7. Witnesses before arbitrators; fees; compelling attendance.
8. Proceedings begun by libel in admiralty and seizure of vessel or property.
9. Award of arbitrators; confirmation; jurisdiction; procedure.
10. Same; vacation; grounds; rehearing.
11. Same; modification or correction; grounds; order.
12. Notice of motions to vacate or modify; service; stay of proceedings.
13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement.
14. Contracts not affected.
15. Inapplicability of the Act of State doctrine.
16. Appeals.

AMENDMENTS

1990—Pub. L. 101–650, title III, §325(a)(2), Dec. 1, 1990, 104 Stat. 5120, added item 15 "Inapplicability of the Act of State doctrine" and redesignated former item 15 "Appeals" as 16.

1988—Pub. L. 100–702, title X, §1019(b), Nov. 19, 1988, 102 Stat. 4671, added item 15 relating to appeals.

1970—Pub. L. 91–368, §3, July 31, 1970, 84 Stat. 693, designated existing sections 1 through 14 as "Chapter 1" and added heading for Chapter 1.

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §1, 43 Stat. 883.

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

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(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §2, 43 Stat. 883.

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §3, 43 Stat. 883.

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, §19, 68 Stat. 1233.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §4, 43 Stat. 883.

REFERENCES IN TEXT

Federal Rules of Civil Procedure, referred to in text, are set out in Appendix to Title 28, Judiciary and Judicial Procedure.

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AMENDMENTS

1954—Act Sept. 3, 1954, brought section into conformity with present terms and practice.

§5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §5, 43 Stat. 884.

§6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §6, 43 Stat. 884.

§7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

(July 30, 1947, ch. 392, 61 Stat. 672; Oct. 31, 1951, ch. 655, §14, 65 Stat. 715.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §7, 43 Stat. 884.

AMENDMENTS

1951—Act Oct. 31, 1951, substituted "United States district court for" for "United States court in and for", and "by law for" for "on February 12, 1925, for".

§8. Proceedings begun by libel in admiralty and seizure of vessel or property

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If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §8, 43 Stat 884.

§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §9, 43 Stat. 885.

§10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, ch. 392, 61 Stat. 672; Pub. L. 101–552, §5, Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102–354, §5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub. L. 107–169, §1, May 7, 2002, 116 Stat. 132.)

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DERIVATION

Act Feb. 12, 1925, ch. 213, §10, 43 Stat. 885.

AMENDMENTS

2002—Subsec. (a)(1) to (4). Pub. L. 107–169, §1(1)–(3), substituted "where" for "Where" and realigned margins in pars. (1) to (4), and substituted a semicolon for period at end in pars. (1) and (2) and "; or" for the period at end in par. (3).

Subsec. (a)(5). Pub. L. 107–169, §1(5), substituted "If an award" for "Where an award", inserted a comma after "expired", and redesignated par. (5) as subsec. (b).

Subsec. (b). Pub. L. 107–169, §1(4), (5), redesignated subsec. (a)(5) as (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 107–169, §1(4), redesignated subsec. (b) as (c).

1992—Subsec. (b). Pub. L. 102–354 substituted "section 580" for "section 590" and "section 572" for "section 582".

1990—Pub. L. 101–552 designated existing provisions as subsec. (a), in introductory provisions substituted "In any" for "In either", redesignated former subsecs. (a) to (e) as pars. (1) to (5), respectively, and added subsec. (b) which read as follows: "The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5."

§11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §11, 43 Stat. 885.

§12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, §12, 43 Stat. 885.

STATE OF SOUTH CAROLINA) IN ARBITRATION
:
COUNTY OF ANDERSON) CASE NO. 2017-CP-03-376

RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,

Plaintiffs,

vs.

MERITAGE HOMES OF SOUTH CAROLINA, INC.,

Defendant.

THE DEPOSITION OF:
MATTHEW HARMON

DATE: Tuesday, September 5, 2023

TIME: 9:52 a.m.

LOCATION: Turner, Padget, Graham & Laney
40 Calhoun Street, Suite 200
Charleston, South Carolina

REPORTER: Margaret F. Barnett
Court Reporter and Notary Public

Electronically signed by Meg Barnett (201-024-523-6076)

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A. One of them, yes, sir.
Q. Where was the other issue they were having water intrusion in the basement?
A. At the front by where that drain system was, down that left side where the hill was steep.
Q. That's in the front of the house?
A. Well, that's where the pump for the water is, was at the front -- yeah, it was at the front over towards the left side when you came -- because you had to go through the basement, all the way -- kind of went from conditioned space to nonconditioned space where it was just framed but not drywalled yet.
Q. So there was a water leak?
A. Well, that's where the water went to to pump out. So where it was leaking there, somewhere outside that wall. I don't know where.
Q. Did you do any investigation to determine?
A. With her using the word mold, all I did was use just a thermal imaging camera to see if I saw moisture, which I did not.
Q. Did you see any signs of moisture intrusion in the house?
A. I did not.
Q. Did you see any signs of any active leaks into the house?

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A. You mean the true moisture, not something taken down from moisture, correct?
Q. I'm not following you.
A. So, in other words, if someone removed baseboard, that's from the moisture, but I didn't see the moisture itself.
Q. Correct.
A. So, no, I didn't see moisture.
Q. What I'm getting at is: You didn't see any signs of roof leaks?
A. No, sir.
Q. You didn't see any signs of any leaks around the windows or doors?
A. Some of the siding but not specifically windows or doors. There was siding that was already rotten down the left side around where the meter came up at. As well as where the water table would have turned up for the rollout flashing for the brick, there was rot there.
Q. That's on the exterior of the house?
A. Yes, sir. That's what I'm saying, that's the only thing. I saw moisture damage but no moisture.
Q. Inside the house, did you see any signs of water intrusion?

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A. No, sir.
Q. And other than that one corner in the basement, which we know about there being a problem that has been there for years, that has not been addressed, did you see any other indication that there was any signs of water intrusion around the windows, doors?
A. No, sir.
Q. Any penetrations inside the house?
A. No, sir.
Q. Did you take any moisture readings?
A. To my knowledge, I only used thermal imaging.
Q. Well, did the thermal imaging that you did show any anomaly?
A. No, sir.
Q. There's a fellow named Andy Schauder who has done some mold investigation for the Athimoolams. Have you had any contact with him?
A. No, sir.
Q. Have you been provided any of his reports?
A. I don't believe so.
Q. Why did you not go in the attic?
A. The only way up there was through the FROG where the gentleman was sleeping.

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Q. Did y'all have a scheduled appointment?
A. We did.
Q. Any particular reason why they did not give you access to the attic?
A. I was told because he was sleeping. I was less than impressed myself. But, yeah, I never saw the upstairs.
Q. When you say the "upstairs," meaning?
A. The FROG which leads into the attic area. Fifteen hours.
Q. Fifteen hours?
A. Yes.
Q. At $125 an hour?
A. 110. 125 when I come in here. That does include drive time, if that matters.
Q. Where did you get the scope of repair to price?
A. From walking through with her and reading Mr. Ross's report. I would say, 25 to 75, 75 being her concerns.
Q. So 75 percent of the scope is what Mrs. Athimoolam said needs to be done?
A. Yes, sir.
Q. And 25 percent of it was from the Ross Clements report?

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A. Yes, sir. I know those answers don't work well, but that's the truth.

Q. How do we divide up, then, on each of these descriptions what is in the Ross Clements report versus what Mrs. Athimoolam thinks needs to be done?

A. It would be almost impossible at this point. Would have to go back and read the report and separate it. It would be difficult.

Q. You would concede to me that Mrs. Athimoolam is not a construction expert?

A. Yes, sir, correct.

Q. You would concede to me that Mrs. Athimoolam does not actually have an understanding of what actually needs to be repaired versus what she thinks needs to be repaired. Correct?

A. I would. A lot of it is cosmetic versus, yeah.

Q. Well, how do we determine what is actually a legitimate repair scoped out by the engineer she's hired to prosecute this lawsuit versus her wishes of having a 2023 house?

A. It would have to be a lot more time going through. For instance, I never confirmed the shower was leaking, so the area behind the shower in the master closet, is that a defect? Is that a -- I would

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have to go back and actually test that pan, test the shower, see did this moisture come from -- I would have to spend a lot more time to separate those, because that's a big number there in waterproofing, rewaterproofing an area, versus something getting wet behind it that could have came from somewhere else. It's not an easy number to come to.

Q. And it also could be a lack of maintenance by the homeowner, too, as well. Correct?

A. I'm not going to say -- in the shower it can be user hair, let's be honest. Yeah, let's be real. I see it all the time, people won't pull a door far enough closed. People won't -- yeah, it can be a user error.

Q. So what I'm getting at, let's take, for example, the first description: Residential supervision/project management, 300 hours. How much of that is actually to address the construction defects that Ross Clements has indicated need to be done versus addressing what Mrs. Athimoolam thinks needs to be done?

A. There is really not a good way. I can sit down and attempt it, but it would take hours.

Q. And what would you have to do?

A. I would have to figure out how to -- I'd

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first go through his and figure out, you know, look at this, what's on there that's his. Like I say, I remember some of the areas being -- you know, if you look at the laundry room, that's tile only. Whether it's a trip hazard or not really isn't something I see in the RBC code book. That right there is not on his, not in mine. She brought it up to me; I added that. I would have to sit down and come up with a way to go back through every single room and figure out what's one hundred percent related to the report versus what's not.

Q. Same thing here: The finish carpenter, 116 hours, how much of that is for addressing the Ross Clements issues versus what Mrs. Athimoolam wants done?

A. We're going back at -- yeah, I would have to sit down and almost start from scratch.

Q. 120 hours for the backhoe loader and operator?

A. So that would be -- that's water intrusion. That's not necessarily something that she pointed out. I would have to pull up his -- I'm pretty sure he points out water intrusion.

Q. So what is the backhoe loader and operator, 120 hours, what work is that?

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A. That's to pull the dirt back away from that foundation wall, all the way around to waterproof or to see what the drain system that's in, just to figure out where to even start. Because I don't have plans of the house, not like plan plans, to see how anything was engineered, does it have a drain system. So I'd have to dig it all back to be able to access it from the foundation up.

Q. So what part of the house are you anticipating using the backhoe loader at?

A. The front, down the left side, and a little bit right there by the garage.

Q. Why is that 120 hours?

A. You got to pull it out. You got to figure out with the wires -- with the electrical coming in. I mean, by the time you clear it all out around the house without hitting the house, without hitting lines, you're probably at 60 to 80 hours and then probably 40 to put it back.

Q. So you're estimating a week and a half to two weeks of work just to pull the dirt away from the house?

A. Um-hm.

Q. And a week of work to put the dirt back?

A. Um-hm.

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CERTIFICATE OF REPORTER

I, Margaret F. Barnett, Professional Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record of the testimony of the witness and of all objections made at the time of the examination.

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 this 18th day of September, 2023 at Charleston, Charleston County, South Carolina.

Margaret F. Barnett
Notary Public
My Commission expires
February 25, 2030

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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS OF THE TENTH JUDICIAL CIRCUIT

RAGHU ATHIMOOLAM AND IRENE ATHIMOOLAM,
Plaintiffs,
vs.
MERITAGE HOMES OF SOUTH CAROLINA, INC.,
Defendant.

CIVIL ACTION NO. 2017-CP-03-376

DEPOSITION OF ANDREW G. SCHAUDER

DATE TAKEN: August 22, 2023

TIME BEGAN: 2:00 p.m.

TIME ENDED: 4:30 p.m.

LOCATION: Turner, Padget, Graham & Laney
200 East Broad Street
Suite 250
Greenville, South Carolina

REPORTED BY: Eileen Thompson, CCR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

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Q. Well, how can you come up with the 25 percent?
A. That is an approximation I'm making at this point in time. The contractor will come and make their own measurements to determine for themselves what is the appropriate means and methods to do the remediation in the attic space.
Q. What percentage of the basement needs to be spot treated?
A. Probably similar.
Q. So roughly 25 percent?
A. Approximately, yes.
Q. Why are you qualifying it?
A. Because we haven't removed all of the Sheetrock to see every little location. Based on my visual observations and the places we have looked, that's an approximation.
Q. All right. So what 25 percent of the attic are you going to direct the remediator to address?
A. Areas where there's staining resulting from fungal growth having been present.
Q. Okay. And what specifically -- where are those specific areas in the attic?
A. All throughout the attic.

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Q. All right. Where specifically?
A. Left, right, up, down, everywhere throughout the attic.
Q. All right. With precision, where left, right, up, down? Where?
A. I can't be any more precise than that.
Q. Are you going to give them like a little piece of tape to mark it or are you going to spray paint? How do you think they're going to know where you think there is fungal growth that needs to be spot treated?
A. Where there is staining present.
Q. How do you know where you think there is staining present?
A. Because when we do a pre-bid meeting, I go through the attic and point out specific locations to them so they know what I'm looking for. And if they're an experienced contractor, they would already know what I'm looking for.
Q. Okay. And so you would agree with me that there's not a specific list of where they need to work either in the attic or in the basement, correct, that has got to be developed?
A. There is not a beam-by-beam, joist-by-joist list of every location. It's

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throughout the attic space where there is staining present.
Q. Okay. And if they're going to do spot treatment, they need that beam-by-beam, spot-by-spot location, correct?
A. No, they'll make that determination based upon their visual observations as to what it would take to complete the task.
Q. And so do they price it at the end?
A. I'm sorry. Say that again.
Q. Do they price this at the end?
A. They price it based upon the visual observations made at the pre-bid meeting.
Q. Okay. Well, what happens if they're wrong and there's less than what they visually observe? Is there a refund?
A. No, they're based upon a scope of work and their visual observations of what it would take to complete that work.
Q. So your process from here on out is you are just going to put together some protocol that says you-all show up at the house at some point, bid on it, and then we'll go from there?
A. That would depend on if we can get the Sheetrock removed so that we can get a clearer view

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of where it is and where it isn't.
Q. Have you had discussions with Mrs. Athimoolam about removing the Sheetrock in the heated space of the house?
A. No.
Q. Why not?
A. The protocol hasn't been developed yet to reach that point.
Q. Why has the protocol not been developed to that point?
A. I haven't been asked to do that.
Q. And so any pricing that currently exists or any remediation at the Athimoolam house is of no value, correct?
A. I have no knowledge that any such process has been undertaken.
Q. Well, you would agree with me that if pricing was done by some contractor without any consultation with you, that's not a valid price or a valid scope, correct?
A. If such had been done, yes.
MR. COBB: All right. I think for right now, I'm going to stop. Obviously, if you do any additional work, I need to be notified about that and we can regroup. Thanks for your

CERTIFICATE OF REPORTER

I, Eileen Thompson, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify, that the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

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 this 25th day of August, 2023 at Liberty, Pickens County, South Carolina.

_____

Eileen Thompson,
Registered Professional Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
October 17, 2024

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STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
)
COUNTY OF ANDERSON) CASE NO. 2017-CP-04-376

RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,

Plaintiffs,

vs.

MERITAGE HOMES OF SOUTH CAROLINA, INC.,

Defendant.

MERITAGE HOMES OF SOUTH CAROLINA, INC.,

Plaintiffs,

vs.

84 LUMBER COMPANY, LP; DRC INVESTMENT, LLC d/b/a ADVANTACLEAN OF THE UPSTATE; DOWN TO EARTH GRADING, LLC; GGG CONSTRUCTION, LLC; GUTTER CUTTERS, INC.; HH CONTRACTING, LLC; HARBIN COMPANY, LLC; M&M FOUNDATIONS, LLC; METRO GARAGE DOOR, INC.; SANDLAPPER CONCRETE, LLC; SDR RESTORATION AND CONSTRUCTION, LLC; SEALING AGENTS WATERPROOFING, INC; and STAR BUILDERS, INC.

Defendants.

* * * * * * * * * * * * * * * * *

ZOOM

DEPOSITION OF: ANDREW G. SCHAUDER
DATE TAKEN: Monday, November 23, 2020
TIME: 9:35 a.m.
REPORTED BY: EVE WILBANKS
Registered Professional Reporter, Notary Public

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A. It was done in the -- (video frozen).
Q. I think he froze.
(The deposition went off the record.)
BY THE WITNESS:
A. It was collected in the furnace room.
Q. Take me through the steps of what you do when you collect a sample.
A. Well, in this case, we're talking about air samples, so you use a particular device, a cassette that's manufactured for that purpose. You connect it to a device that's going to pull air through that cassette. Those type of cassettes are set to be sampled at 15 liters a minute, anywhere from one to ten minutes depending upon what you expect the concentration to be. Typically, we use a five-minute sample which collects 75 liters of air.
Once you've collected your sample, you re-seal the cassette and you send it off to a lab that's accredited to do that type of analyses, and they produce a report that then tells you what the concentrations of various genus of fungi are found on that sample.
Q. How long does it take you to do the sample?

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A. Well, the run time is five minutes, a couple minutes to set it up and take it back down again. So really just a few minutes, less than ten per sample.
Q. And are you wearing any type of PPE when you're doing this sampling?
A. As a rule, no.
Q. When you did the sampling at the Athimoolam residence, did you wear any PPE?
A. No.
Q. All right. Take me through the process -- because at some point during your work at the Athimoolam residence, Mrs. Athimoolam cut into the Sheetrock or exposed other parts of the basement?
A. There's a portion of the basement that has a Sheetrock ceiling. The homeowner, Ms. Athimoolam, had already cut a small opening in that Sheetrock ceiling. I enlarged it a little bit so I could get up in there and look and saw evidence, again, of staining and fungal growth. We took a sample up there, what is called a tape lift sample, of that growth, and that was identified as belonging to the aspergillus/penicillium group of fungi.

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Q. How many other tape lift samples did you take?
A. I didn't take any additional samples beyond that one.
Q. You make comments in your report about the grading of the property.
A. The area where the cove base was found to have fungal growth on the back of it, I went outside and looked, and it appears that the slope of the land is towards that particular wall. And so it is conceivable that you may be getting some accumulation of rainwater up against that wall. There is some transmission of moisture then through the wall. And as that moisture comes up against the back of the cove base -- it's a wood cove base -- it will collect there and fungal growth will occur. That was my opinion as to where the most likely source of that moisture was coming from.
Q. Do you make any recommendations about how the grading of the property can be changed?
A. No, I do not.
Q. Is that outside of your specialty?
A. Yes.
Q. With regards to the mold growth that you

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observed in the basement area, do you also believe that that resulted from, in part, the framing members being left exposed to the weather and then not dried before installed?
A. Yes. The appearance of where the fungal growth is and its intermittent nature all are suggestive that the fungal growth did not occur once it was installed and the building was in the dry.
Q. And do you make any recommendations about cleaning the fungal growth that's in the basement area?
A. Uh, that would need to come at some point. A protocol for the remediation would need to be developed once a full scope of work has been developed.
Q. Okay. Are you aware that there has been a pricing of your report for repair purposes?
A. No, I was not aware of that.
Q. Paul Davis Restoration?
A. I'm aware of the firm, but I have not provided that to them. I assume maybe the homeowner provided my report to them.
Q. But you have not been involved with Paul Davis Restoration's pricing of the Athimoolam

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residence?
A. No, I have not.
Q. Do you feel like what you've done in 2016 is at the point where someone can price repairs for it?
A. No, I do not, because a full scope of work still needs to be developed, which involves investigating if there's any other areas where there is significant fungal growth to wood framing members that are currently hidden behind either Sheetrock walls or Sheetrock ceilings.
Q. Okay. This may be a dumb question, but I ask a bunch of those so that's okay. Based on what you know now, is the remedy for the fungal growth on the framing members that you observed either in the attic or in the basement, is the repair protocol simply to try to get some sort of cleaning agent on those and wipe them down?
A. No. It typically would be a little more involved than that. You would first treat the areas where there's suspect fungal growth with a biocide; you kill what's there. And then you physically remove what you can from the surface. But wood is a semi-porous material, so you're not really going to get to all of it.

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So typically, in a situation like this, you apply a coating that contains an antifungal component. So if that wood should ever get wet again, it will retard, if not completely prevent, any future growth.
Q. And would that necessitate the removal and replacement of any of the framing members as long as that it can be treated with a biocide and/or the antifungal component coating?
A. If there was a framing member that was so significantly deteriorated, I would ask for an engineer to make that determination as to whether it needs to be replaced or not. From what I've seen, I wouldn't suspect any of those framing members would need to be replaced. They could simply be treated in place.
Q. What company that you know of in the Upstate does that work?
A. There's several good ones. There's one called Steamatic of Greenville who has done work for me on multiple occasions; PuroClean (ph) is another one in the Upstate that has done work for me on multiple occasions. So those would be two companies I would have considerable confidence in that would do a good job.

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Q. What is the first one?
A. Steamatic of Greenville.
Q. S-T-E-A-M- --
A. -A-T-I-C, yes.
Q. All right. And I take it, too, that you would recommend as far as repairs that whatever the source of the water intrusion, that that be addressed and then the affected elements either be treated and/or replaced, if needed?
A. Well, again, the only area where I suspect there's water intrusion occurring is along that one wall in the basement where the cove base with the fungal growth was present. So that would be the only area that would need to be addressed from a water intrusion point of view.
Q. And is that one wall -- does it run parallel with the backyard, or does it run perpendicular with the backyard?
A. What I have in my report -- let me get to that section. What I say in the last paragraph of page 2 is, "The most significant finding from the visual examination of the exterior of the house was that the grading of the land, particularly at the rear of the house, would allow rainfall to accumulate at the exterior wall. This

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is particularly noticeable around the patio at the rear of the house."
Q. Okay. How does that answer the question?
A. Well, you were asking about any areas that might need grading, so this is where we're seeing water intrusion, and so that area might -- one approach to prevent future water intrusion might be regrading it; that's not the only possible approach.
Q. I'm sorry. I was interested in the area -- the wall that you say there's active water intrusion. Is that wall running parallel with the backyard or perpendicular to the backyard?
A. Uh, I can't answer that question. I don't have any photographs showing that wall relative to the backyard.
Q. Okay. Do you think that all of the drywall and flooring in the basement needs to be removed and replaced?
A. No.
Q. Do you think the insulation in the attic needs to be replaced?
A. I would not expect so, but I would need to look at it to see if there's any issues. I

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likely explanation, given the visual appearance of the fungal growth and the relationship of its presence on one piece of wood versus another piece of wood.

Q. If you had just found mold on that baseboard area in the bedroom, what would your recommendation be?

A. That we determine why there's moisture transmission occurring through that wall, correct that, and obviously replace that baseboard. And then, depending upon what the air samples were, there might need to be a relatively minor remediation and decontamination in that portion of the basement.

MR. FARRAR: And I don't think I have any further questions. Thank you, sir.

EXAMINATION

BY MR. OLSON:

Q. Hey, everybody, this is Clay Olson. Can you hear me?

A. Yes.

Q. I represent HH Contracting. I just have one question. Do you anticipate being asked to provide additional opinions prior to trial?

A. Um, I suppose that's possible. I really

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couldn't say anything different from what I've already said unless some -- (video buffering) -- inspection work is done.

THE COURT REPORTER: I'm sorry. I couldn't hear that.

A. Okay. To repeat what I was saying was, that we really need to have a full scope of work developed. And so at that point, it could be determined what, if any, areas of remediation might be needed. Now, I'm not sure if that really answered your question. So if you need to rephrase it or ask it again, please do.

MR. OLSON: That answers my question. I have no further -- I have no others.

THE WITNESS: Any other questions?

MR. COBB: Anybody else? All right. We're done.

(The deposition concluded at 10:15 a.m.)

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CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, EVE WILBANKS, Registered Professional Reporter and Notary Public, State of South Carolina at Large, certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 10th day of December, 2020, in the City of Charleston, County of Charleston, State of South Carolina.

Eve Wilbanks,
Registered Professional Reporter
and Notary Public
My commission expires:

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EXHIBIT 7

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STATE OF SOUTH CAROLINA)) COUNTY OF ANDERSON)	IN THE COURT OF COMMON PLEAS Docket No.: 2017-CP-04-376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	**DEFENDANT MERITAGE HOMES OF SOUTH CAROLINA, INC.'S SUPPLEMENTAL MEMORANDUM OPPOSING PLAINTIFFS' MOTION TO AMEND OR ALTER THE ARBITRATION AWARD**

Meritage files this supplemental memorandum in opposition to Plaintiffs' Motion to Alter or Amend the arbitration award. Meritage incorporates the arguments made by the first memorandum into this current memorandum.

A. Modification of the arbitration award is not permitted.

The contract between Plaintiffs and Meritage compelled arbitration pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.). The contract further states that that the arbitration shall be administered pursuant to the Arbitration Rules and Comprehensive Procedures of the Judicial Arbitration and Mediation Services ("JAMS"), "including, but not limited to, the expedited procedures of JAMS Rule 16 and the JAMS Optional Arbitration Appeal Procedure, and in accordance with the Expedited Procedures in those Rules." Contract ¶ 16(D)(iv).

The JAMS rules do not permit modification of the arbitration award within the time frame now brought by Plaintiff. According to the JAMS Rule 24(j) (attached), a motion must be made within 7 calendar days after service of the award. Here the award was issued on October 4, 2023 and Plaintiff did not make the motion until October 16, 2023. And even if such motion to modify was brought within the appropriate time frame, JAMS Rule 24 only allow calculation errors to be

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corrected/modified. Plaintiff's current motion for reconsideration seeks to do far more than correct a mere calculation error.

Thus, any "modified" arbitration award would be subject to vacatur under the Federal Arbitration Act ("FAA"), more specifically, 9 USC § 10(a)(4). In fact, this exact issue was examined by the Fifth Circuit in Smith v. Transport Workers Union of America, AFL-CIO Air Transport Local 556 374 F.3d 372 (5th Cir. 2004).

Therein, an arbitration award was issued to the plaintiff but "[q]uestions about taxation of additional costs and the arbitration panel's authority to modify its initial award gave rise to this controversy. The arbitral panel determined that it had such authority and modified the award to tax additional costs against the [defendant], favoring [plaintiff]. In district court [plaintiff] moved to confirm the modified award and the [defendant] opposed confirmation of the award as modified, but not the original award. The district court agreed with the [defendant] and vacated the modified award, confirming only the original award." Id. at 374.

As noted by the Court, "[a]rbitration is a matter of contract; a party cannot be required to submit to arbitration unless it agreed in advance that the dispute would be arbitrated. [Footnote omitted.] Although the law imposes a presumption in favor of arbitrability, the policy that favors resolving doubts in favor of arbitration 'cannot serve to stretch a contractual clause beyond the scope intended by the parties or authorize an arbiter to disregard or modify the plain and unambiguous provisions of the agreement.' " Id. at 374–375.

Indeed "[t]he plain wording of the arbitration agreement contemplates that the arbitrators will not consider correcting the arbitral award at all at the behest of the parties, and forbids a correction or amendment on the arbitrators own motion more than three business days after the award. We conclude that the modification made was beyond the reach of the arbitrators' power. If an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision." Id. at 375.

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B. Plaintiffs' intentional and blatant violation of the confidentiality provision of the applicable South Carolina Alternative Dispute Resolution Rules by including in their current motion the specific amount of the settlement between Meritage and its subcontractors should not and cannot be tolerated, and that conduct warrants dismissal of Plaintiffs' pending motion.

Rule 8 of the ADR Rules very clearly states that "any mediation communications disclosed during a mediation ... shall be confidential, and shall not be divulged by anyone in attendance at the mediation participating in the mediation" except as permitted by circumstances that do not apply here. Rule 8 further requires: "The parties and any other person present or participating [in the mediation] shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence at any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation ...." (emphasis added in both).

Every mediation conducted in South Carolina includes a specific disclosure and warning by the mediator to the parties at the start of the mediation that all mediation discussions and negotiations are confidential and that none of the discussions and negotiations held during a mediation can be disclosed at any trial or hearing. This significant guarantee of confidentiality must be enforced. Otherwise, the negative impact to every mediation to be conducted is obvious, and the negative impact to every mediation moving forward because of this conduct cannot be understated.

The rationale for the confidentiality rule is clearly designed for an open discussion of the issues and settlement offers and demands in an effort to resolve all pending claims. To allow a party who participated in a mediation to intentionally disclose the confidential settlement discussions from a mediation in an obvious and blatant effort to gain an advantage in a post-arbitration motion should never be allowed and should be sanctioned. Otherwise, the impact of this conduct will be obvious. Moving forward, any party who does not settle at a mediation and who thinks they did not prevail at a subsequent trial or arbitration will intentionally disclose mediation conversations, including offers, demands, and settlements with

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others, in an attempt to undo a result that the party does not like. Plaintiffs' conduct runs directly in contradiction of the mediation process.

An immediate mistrial would have been required if Plaintiffs in this case had disclosed the confidential information during a trial or during the arbitration hearing. To allow Plaintiffs to now disclose that information without the sanction being an immediate dismissal of their pending motion only rewards their egregious conduct. However, our appellate courts and the applicable rules do not reward that bad faith conduct. See Jones v. Robinson, 2023-UP-369 (S.C. Ct. App. Unpublished opinion filed November 15, 2023) (holding, among other things, that sanctions were appropriate for mediation abuses pursuant to Rule 10(b), SCADR, to include "payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; *and any other sanction authorized by Rule 37(b), SCRCP[.]*" (emphasis in original). Rule 37(b), SCRCP, permits dismissal as a sanction. Here, Plaintiffs clearly acted intentionally and in bad faith. Their conduct mocks the mediation rules and should be not tolerated. Furthermore, Plaintiffs cannot credibly argue that the intentional disclosure of the confidential settlement information does not have a significant negative impact on this matter and on the mediation process in general. If the Arbitrator allows this willful and deliberate conduct to go unchecked, Plaintiffs' behavior will alter the mediation process.

Any settlement between Meritage and its subcontractors resulted from the extended mediation that included Plaintiffs and that lasted many months. Plaintiffs are and were bound by the confidentiality requirements of the ADR Rules. Plaintiffs' intentional violation of the confidentiality requirement can only be explained as an attempt by them to improperly gain an advantage with the pending motion, as an attempt to improperly influence the outcome of their current motion, and as an attempt to prejudice Meritage. That conduct runs counter to the spirit and purpose of the ADR process. Plaintiffs took the risk of not settling at mediation and forcing this matter through arbitration. Plaintiffs should not now be allowed to use a confidential settlement entered into by other parties to unfairly influence an attempt

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to alter the arbitration award simply because they do not like the result of the arbitration.

As mentioned, Rule 10(b) of the ADR Rules provides the sanctions "if any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause", which is certainly the case here. Plaintiffs intentional violation of the ADR Rules is worthy of sanctions, including, at a minimum, the dismissal of this motion and any additional sanctions at the arbitrator's discretion. In any event, Plaintiffs' claims on this issue ignore the fact that Meritage's settlement with its subcontractors included settlement of Meritage's claims for contractual indemnity, Additional Insured status, bad faith, and payment of past and future defense costs, including, but not limited to attorney's fees and expert witness fees. Moreover, the claim that Meritage's settlement with subcontractors somehow establishes a floor for Plaintiffs' claims is without any legal support, as evidenced by the fact that Plaintiffs did provide any case law support for the proposition.

C. The Fields v. J. Haynes Waters Builders, Inc. decision and Meritage's construction and engineering expert Rogers' testimony control the resolution of Plaintiffs' damage claims in this matter.

The Kennedy case cited by Plaintiffs confirms that a negligence cause of action is available to a homeowner, and the elements of a negligence cause of action include proximate cause and damages. The Kennedy case clearly indicates that a builder is liable for proximately caused damages. In this case, Meritage disputed the extent of some claimed damages and the existence of other claimed damages, which is permitted under South Carolina law and which happens in ever litigated construction case.

Moreover, the South Carolina Supreme Court's decision in Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) also controls the claimed damages issue. In Fields, the homeowner sued the builder alleging construction defects associated with an EIFS-clad home. Plaintiffs claimed the EIFS allowed moisture to enter the home, which caused significant damage to the structure. The

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jury awarded the homeowners $6,000.00 in damages. The South Carolina Supreme Court affirmed that jury's verdict.

Chief Justice Jean Toal (who was the author of the one sentence quoted by Plaintiffs' counsel from the Kennedy case) wrote the Fields opinion. In Fields, Justice Toal wrote, in affirming the $6,000.00 jury award,:

> It was, of course, possible for the jury in this case to conclude, consistent with this testimony, that only five percent of the house had damage and that the calculations offered by the Builder's estimating expert represented reasonable repair costs. It was thus possible for the jury to arrive at an award of $6,000 based on evidence presented at trial in this case.

376 S.C. at 569, 658 S.E.2d at 92 (emphasis added).

The significance of the Fields decision cannot be ignored. That decision clearly rejects Plaintiffs' current contention that the Kennedy decision somehow requires that a homeowner be awarded whatever the homeowner requests during litigation if a building code violation exists from the original construction of a home. The Kennedy decision did not state that a homeowner was entitled to the costs for full removal and replacement of all building elements if a building code issue existed. And, the Fields opinion made it very clear that the trier of fact was to evaluate the claims based on the extent of any damage and what represented "reasonable repair costs." 376 S.C. at 569, 658 S.E.2d at 92 (emphasis added). That is what the October 4, 2023 Arbitration Award found, and nothing in the post-award motion can alter that decision. Accordingly, any award to Plaintiffs based on Harmon's estimate (a) would never be "fair, just, and reasonable", which is the standard under South Carolina law for any jury to base an award of actual damages (S.C. Requests to Charge – Civil § 13-2) and (b) would violate the requirements of the Fields decision that the award be based on the actual extent of damage and what constituted "reasonable repair costs."

In this matter, Meritage's construction/engineering expert Jay Rogers clearly testified that the cost that needed to be expended to address the legitimate concerns raised by Plaintiffs from original construction would be approximately $25,000.00-

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30,000.00. Rogers further allocated those expenses to each claimed defect. While not intending to, Plaintiffs' architect expert Clements agreed with certain aspects of Rogers' testimony that a wholesale stripping of the house was not required to address the issues. For example, Clements testified that the entire roof did not need to be replaced, yet Plaintiffs' repair contractor Harmon ignored that and nevertheless included a substantial amount for the complete removal and replacement of all roofing and flashings. In addition, Harmon's estimate included numerous examples where he misunderstood Clements scope (see exterior deck and garage repairs) and also included items that Clements did not indicate needed to be repaired (perimeter foundation, entire sheathing, etc.).

Rogers testified that the complaints regarding the siding installation, stone installation, and brick installation could be addressed using localized repairs as opposed to the wholesale removal and replacement of those items. Rogers also pointed out that Clements performed numerous destructive cuts into the claddings and many of those test cuts and observations must not have shown any code violation or damage because Clements did not include those areas during his testimony because the findings did not advance Plaintiffs' claims. Clements bases his call for remediation of the siding, for example, on just a couple of places, which Rogers responded could be faced nailed and repainted without removing all of the siding. Jay Rogers May 29, 2021 Report, page 2. Any brick error can be remedied with a localized repair. Jay Rogers May 29, 2021 Report, page 2. The one location of stone where Clements found exposed wood framing can be repaired by removing that stone, adding peel and stick flashing, and re-adhering the stone. That location does not warrant the full replacement of all stone. Jay Rogers May 29, 2021 Report, page 2.

To reward Plaintiffs with an award based on the bloated estimate from Harmon also would constitute "economic waste" because many of the expenses Harmon listed would be to "repair" areas of the home where no person has testified that any defect exists and would also ignore that Clements only cited very limited areas of the house with any concern. For example, Clements only testified about one window where the nailing was not proper. He did not note any adverse impact to the

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structure or any other window with a similar installation. No evidence in the record exists to support a claim that every window at this residence needs to be removed and replaced. To the contrary, Rogers confirmed that the windows and doors were installed to industry standards at the time of construction and that Clements' recommendations would be unnecessary and would constitute a betterment and be economically wasteful. Jay Rogers May 29, 2021 Report.

Further, the evidence clearly showed that Harmon lacked the experience and knowledge of Anderson County. He could not provide a legitimate repair estimate for this residence because he lacked the professional ability, experience, and subcontractors to issue a repair estimate for a single-family house in Anderson County. As he admitted, he was licensed as a residential builder for merely two months when he was hired by Plaintiffs' counsel for the estimate, he had never worked in Anderson County or the upstate of South Carolina, and he had no subcontractor or material supplier within 150 miles of the house.

Rogers was clearly qualified as a contractor and an engineer, and he has actually worked in Anderson County. Rogers' testimony was that Harmon's scope was excessive and his pricing was out of line with what would be charged where this home is located. "Excessive and overstated" is how Rogers described Plaintiffs' defect claims. Rogers May 29, 2021 Report, page 3. Rogers also pointed out that the 2021 estimate from Plaintiffs of $413,257 was "unwarranted." That testimony also confirmed the overzealous scope and pricing from Harmon's 2023 estimate, which was more than twice the 2021 estimate given to Plaintiffs by another contractor. Harmon's methodology of relying on a single computer program to generate a repair estimate for a house more than 100 miles away from any city where he has ever worked (and where he has no subcontractors or material suppliers) is no more accurate than a computer program trying to evaluate the value of a personal injury claim in Allendale County.

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CONCLUSION

The record clearly supports the original October 4, 2023 ruling from the Arbitrator about the scope of repairs and cost of repairs needed at Plaintiffs' home to fairly, reasonably, and appropriately address the legitimate issues. As stated, the Fields opinion required the trier of fact to evaluate the claims based on the extent of any damage and what represented "reasonable repair costs." 376 S.C. at 569, 658 S.E.2d at 92 (emphasis added). Plaintiffs' current claims, many of which are improperly based off of argument and evidentiary submissions after the close of testimony (which is not permitted), fail as a matter of law. Further, Meritage objects to the consideration of the recent submissions made by Plaintiffs after the close of the testimony in the arbitration hearing because such submissions are improper.

Therefore, Meritage seeks denial of Plaintiffs' motion based on the specific rules governing this arbitration as agreed to by contract between the parties, Plaintiffs' intentional violation of the ADR Rules within their post-award motion, and the overwhelming lack of merit to Plaintiffs' current motion because the evidence in the record supported the October 4, 2023 arbitration award.

TURNER PADGET

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January 5, 2024

ATTORNEYS FOR MERITAGE HOMES OF SOUTH CAROLINA, INC.

EXHIBIT 8

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	)	Civil Action No. 2017-CP-04-00376 **ARBITRATION ORDER**

This matter is before the Arbitrator upon Motion of Plaintiffs seeking to Alter or Amend an Arbitration Order dated October 4, 2023, upon numerous grounds asserted by plaintiffs. The defendant, Meritage Homes of South Carolina, Inc., opposes the motion. Pursuant to the Meritage Homes New Purchase Agreement, "This agreement is subject to mandatory arbitration pursuant to the Federal Arbitration Act and if the Federal Arbitration Act is inapplicable, the Uniform Arbitration Act, Section 15-48-10, et. seq., Code of Laws of South Carolina, 1976, as amended, applies." Since no aspect of this Arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS"), the Arbitrator finds the Federal Arbitration Act to be inapplicable.

Despite unfounded and unsubstantiated allegations of bias and partiality which may be asserted against the Arbitrator, factual and legal errors by arbitrators do not constitute abuse of their powers and can be corrected to ensure that the interests of all parties are protected. Pittman Mortg. Co., Inc. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997).

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At no time during the Arbitration was the Arbitrator aware of any monetary recovery by defendant Meritage against any subcontractors brought in as third-party defendants. Accordingly, this Order will only reflect the testimony of lay and expert witnesses and evidence presented during arbitration and an analysis of the applicable law. However, the Arbitrator acknowledges the concerns raised by Meritage's counsel about the disclosure of the confidential settlement terms at mediation involving third-party defendants.

Based on the testimony, a detailed review of notes and all exhibits introduced into evidence at the Arbitration, the applicable law, a telephone hearing with all counsel on November 17, 2023, followed by additional submissions from both parties, the previous Order dated October 4, 2023, which was never entered, is hereby vacated, to the extent necessary, and this Order is hereby entered with the Honorable Clerk of Court for Anderson County.

FACTS

The plaintiffs, Raghu Athimoolam and Irene Athimoolam, purchased from Meritage Homes a three-story conventional wood-frame home supported by concrete foundation walls consisting of a walk-out balcony with two-floors above the basement level and an attached garage. The exterior cladding consists of a mix of brick masonry veneer, adhered manufactured stone veneer, and fiber-cement siding. The cash purchase for the home located at 116 Ariel Way in Easley, South Carolina totaled Four Hundred Twenty-Four Thousand Seven Hundred Fifty-Three and No/100ths ($424,753.00) Dollars as documented in the Meritage Homes New Home Purchase Agreement executed on April 3, 2015. (Plaintiffs' Ex. 1)

The anticipated move-in date of September 2015 was delayed and the closing occurred on October 29, 2015 in New York. Given the construction delays, the testimony at arbitration revealed that Meritage Homes paid for the attorneys' fees and closing costs. Prior to

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and at the time of the closing, plaintiffs admittedly had an opportunity to review the Agreement and ask questions. There is no evidence that they were coerced to sign the closing documents before they inspected the home in South Carolina. The Athimoolams testified that since Mr. Athimoolam was home for two weeks from his job in Dubai, they needed to close on the home so he could move the family to South Carolina before his return to Dubai. The Athimoolams also testified they trusted Meritage.

On November 2, 2015, the plaintiffs arrived to South Carolina and testified they found an unfinished home; deck cluttered with trash and debris (Plaintiffs' Exs. 2 and 3) and muddy conditions around the exterior of the home (Plaintiffs' Ex. 4 and 7). Mrs. Athimoolam also testified they were in shock as a water issue was apparent in the basement as captured in the photograph introduced into evidence (Plaintiffs' Ex. 5). They also discovered wet carpet and padding; a repaired hole cut in the basement drywall (Plaintiffs' Ex. 6); a board in the master bedroom, tile issues in the master bath (Plaintiffs' Ex. 24), and other purported issues which are documented in photographs submitted into evidence. (Plaintiffs' Ex. 1-24)

Meritage replaced the carpet pad and carpet in the basement. Given conditions which they considered uninhabitable, plaintiffs testified that they informed Meritage Homes that they would need a hotel in which to live since the home was unfinished. Meritage Homes paid the hotel expenses for the Athimoolams until Friday or Saturday of that week. Plaintiffs allegedly were told by representatives of Meritage Homes that these issues would be addressed. Mrs. Athimoolam testified that when they returned to their home following a brief stay in a hotel, they found a side glass section in their door broken (Plaintiffs' Ex. 10); the range hood remained unfinished (Plaintiffs' Ex. 11) and the surround around the fireplace had not been constructed to code. (Plaintiffs' Ex. 12) Meritage Homes resolved these issues but Mrs. Athimoolam

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complained about shoddy painting throughout the home, including the wall by the staircase to the basement (Plaintiffs' Ex. 13-14); bathroom tiles and bonus room which photographs were entered into evidence. Gaps were alleged to exist in several doors; questions remained whether wainscoting should have been used throughout the house (Plaintiffs' Ex. 23) and if ductwork for the HVAC system should have been installed in the basement area (Plaintiffs' Ex. 16). Mrs. Athimoolam also testified about issues with stained bath tubs and the absence of glass in the shower. (Plaintiffs' Ex. 24) Further, Mrs. Athimoolam testified she made calls to Meritage and on December 8, 2015, spoke with a customer care manager with Meritage. She later contacted a Divisional President and thought the issues would be resolved. Also, shortly after moving in, Mrs. Athimoolam contacted AdvantaClean to conduct mold testing on her home as she and her son were feeling ill. She testified she was unaware of a possible connection between Meritage and AdvantaClean which connection was not established through testimony or evidence at arbitration. She testified AdvantaClean found mold and she provided the report to Meritage. Meritage then removed three walls in the basement to permit mold remediation and/or treatment by AdvantaClean. (Plaintiffs' Exs. 17, 19) Meritage also paid to have the attic "fogged" (treated) but Mrs. Athimoolam remained unsatisfied. Mrs. Athimoolam continued to make complaints to Meritage about mold issues as she felt they were not being properly addressed. However, evidence introduced at arbitration noted that AdvantaClean tested the entire house and undertook and completed remediation in 2016. (Plaintiffs' Ex. 25; Defendant's Ex. 1)

On August 11, 2016, AdvantaClean wrote Meritage to report that mold remediation at the Athimoolam residence had been completed as outlined in the original scope of work, and the affected area(s) of the property were deemed visibly clean. (Defendant Ex. 1) A report from Southeast Environmental Microbiology Laboratories, dated August 24, 2016, which

analyzed the data from AdvantaClean Greenville, was also introduced into evidence. (Plaintiff's Ex. 26) An email dated August 25, 2016, from Meritage Homes to Mrs. Athimoolam noted "everything is clear" and was attached to an email from Mrs. Athimoolam to Paula Jean Allamong (Meritage Homes) dated February 26, 2020 with results of Airy Springs Air Test/Spore Trap Report on the outside, attic, main level, and basement of the Athimoolam home. (Plaintiffs' Ex. 26)

Mrs. Athimoolam sent a September 7, 2016, email to Meritage Homes detailing a number of issues, including her belief that AdvantaClean had utilized an improper dehumidifier in the basement and that the grading was not properly completed, which 2016 email was forwarded to Paula Jean Allamong with Meritage on February 26, 2020, and introduced into evidence. (Plaintiffs' Ex. 27)

On September 22, 2016, Meritage prepared a ten (10) month Warranty List that was introduced into evidence. (Plaintiffs' Ex. 28)

On October 3, 2016, Mrs. Athimoolam prepared an email to Bryan Ross at Meritage Homes with twenty-four punch list items to which she testified remained unresolved. (Plaintiffs' Ex. 29)

On October 27, 2016, H. Ross Clements, AIA of Fuller Envelope prepared a Summary of Field Observations to the Athimoolam Residence. (Plaintiffs' Ex. 34). This report was revised on August 27, 2018, to include results from destructive testing. (Plaintiffs' Ex. 35)

On November 1, 2016, Meritage sent a "sign off" letter in lieu of obtaining a signature to "Homeowner" at 116 Ariel Way in Easley, SC advising that all 10 Month Warranty request number 537485 items had been resolved. (Plaintiffs' Ex. 30)

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On November 18, 2016, Attorney Robert T. Lyles sent a certified letter to Meritage advising of his representation of the Athimoolams and of a "right to cure" detailing deficiencies with the home pursuant to S.C. Code Ann § 40-59-810 and enclosing a preliminary report from Fuller Consulting Engineers of Greenville, South Carolina. (Plaintiffs' Ex. 31)

On March 3, 2017, a First Amended Summons and Complaint were filed on behalf of the Athimoolams against Meritage Homes of South Carolina, Inc.

On February 11, 2020, Meritage Homes of South Carolina, Inc. filed a Third-Party Action against the contractors and building suppliers who provided labor and materials utilized in the construction of the Athimoolam home. At the time of the Arbitration and the issuance of the initial Order, the Arbitrator had no knowledge or information about any resolution of claims involving any third-party defendants sued by Meritage nor should the Arbitrator have been privy to any settlement that occurred at mediation.

On June 28, 2022, Attorney David S. Cobb, as counsel for Meritage, sent a letter to Attorney Robert T. Lyles, counsel for the Athimoolams. advising that Meritage "elects to exercise the contractual right to repurchase the home, as provided for in the sales contracts for the sum of $431,932. (Defendant's Ex. 3)

The Arbitration of this matter occurred on September 21 and 22, 2023, in Greenville, South Carolina. No aspect of this Arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS") pursuant to its arbitration rules and comprehensive services.

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FINDINGS

I. Construction

The testimony and evidence presented at arbitration on September 21 and 22, 2023, were expert intensive given the technical construction issues in dispute. Expert testimony is subject to the reliability requirement. See Rule 702, SCRE ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.") Also, a person may be qualified as an expert in a particular area based upon knowledge, skill, experience, and training. Watson v. Ford Motor Co., 389 S.C.437, 699 S.E.2d 169. If the opinions of the experts differ in certain respects, the Arbitrator is charged with determining questions of law and fact as would the judge and jury. S.C. Code Ann. § 15-48-180. Accordingly, the "decision to accept or reject [the experts] testimony [i]s ultimately a question of credibility for the [arbitrator] to decide." Id. (citing Menne v. Keowee Key Prop. Owners' Assn., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (stating "[t]he credibility of testimony is a matter for the finder of fact to judge.").

The experts who testified as to alleged construction defects were H. Ross Clements, AIA, and Richard J. Rogers, P.E., M.B.A., both offered without objection. While their opinions differed significantly, the Arbitrator found both to be qualified and has considered aspects of their respective opinions in deciding this matter.

The credentials, qualifications and/or opinions of Matthew Harmon with Claims Construction and Restoration (Exs. 37, 38); Steven Lambright with Rainbow International (Ex. 42), and Mr. Andrew G. Schauder, CIH (Exs. 39 – 41) were challenged, as were their opinions and estimates. While all witnesses were allowed to testify, no testimony about scope and pricing

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that had not been produced prior to or in depositions, in discovery or prior to arbitration was permitted into evidence. However, since plaintiffs moved for reconsideration, the Arbitrator requested and reviewed the "Draft" mold remediation scope of work prepared by Mr. Andrew Schauder dated April 18, 2023, which was marked as Exhibit 41 at Arbitration without the "Draft" designation, as well as the submissions submitted to the Arbitrator on behalf of the Athimoolams dated November 22, 2023, and December 5, 2023, and submissions on behalf of Meritage dated October 30, 2023, and January 5, 2024.

Testimony was also offered by plaintiffs, Irene Athimoolam and Raghu Athimoolam. The Athimoolams have asserted that Meritage's failure to testify at arbitration raises an inference that the testimony, if submitted, would have been unfavorable to Meritage's position. Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962). The Arbitrator is familiar with this legal principle, as well as the law that places the burden of proof upon plaintiffs to establish the asserted causes of action against Meritage.

Irene Athimoolam was the first witness to testify and she described how this was to be her "forever" home as she was moving from New York to begin a life in South Carolina with her husband and son. She expressed concerns about shoddy workmanship; Meritage's alleged failure to complete the warranty items (Plaintiffs' Exs. 28-29); mold issues; and Meritage's alleged failure to adequately and properly address her concerns despite conversations with Meritage sales representatives, a customer care management associate, and a Divisional President. During her testimony, twenty-four (24) photographs were introduced into evidence documenting construction issues with the home from her perspective. Mrs. Athimoolam, over objection by counsel for Meritage, introduced a list of personal items which she maintains have

been damaged beyond repair due to mold exposure and for which she seeks compensation. (Plaintiffs' Ex. 33)

Mrs. Athimoolam further testified at Arbitration that she is unaware of any roof leaks since a repair to selected shingles was made to her home approximately six (6) years ago by a handy man retained by her, whose name she could not recall and which receipt documenting this expenditure was no longer available. On a submission of additional documents for review on behalf of the Athimoolams by their counsel on December 5, 2023, Mrs. Athimoolam submitted a page from her deposition (page 22) discussing leaks in the bedroom and main bathroom level. Also, Mrs. Athimoolam testified that approximately seven (7) years ago, she had the exterior brick of her home power washed by a "neighborhood kid" and noticed no water intrusion. The veneer siding has not come off since the one section was repaired or replaced approximately six (6) years ago by Meritage. She also testified that no windows have leaked since they have occupied their home. As to her personal property damages, her testimony was permitted over objection by Meritage counsel, David Cobb, who argued these are non-recoverable damages as they were not claimed damages in the Amended Complaint and just provided to Attorney Robert Lyles in September 2023; the items are still in use; their purported value is speculative given the absence of receipts which document dates and costs of the purchases and plaintiffs' failure to mitigate their damages. (Plaintiffs' Ex. 33) Raghu Athimoolam also testified; however, since he was working in Dubai, he relied upon information provided by Mrs. Athimoolam.

H. Ross Clements, AIA, a partner with Fuller Envelope, was called as an expert witness on behalf of the Athimoolams and was qualified as an expert in forensic architecture, without objection. Mr. Clements introduced a PowerPoint presentation during Arbitration (Ex.

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36) and testified that he inspected the Athimoolam home on September 1, 2016, with Jamison Hupp, Associate AIA, and conducted a visual survey and made field observations. His October 27, 2016 report (Plaintiffs' Ex. 34) was revised on August 27, 2018 after destructive testing was performed and documented at localized areas of the exterior envelope at the Athimoolam home. (Plaintiffs' Exs. 35 and 36) Of note is the destructive testing conducted along the left elevation and base of the wall and window heads of the home with regard to the fiber-cement lap siding; brick veneer at the left, right and rear elevations; and adhered manufactured stone veneer (AMSV) at three walls that comprise the bay window feature at the front left corner of the home. Meritage's counsel challenged the isolated test cuts and findings as not determinative or conclusive of the condition of the entire exterior envelope of the Athimoolam home.

During the August 2018 inspection, a contractor, Rodney Edwards, accompanied Mr. Clements and prepared an estimate on the suggested scope of repairs. Unfortunately, due to health issues, Mr. Edwards was unable to testify about his cost estimate totaling approximately $265,730. The revised report of Mr. Clements dated August 27, 2018 included eighteen (18) recommendations which he opined were needed in order for the Athimoolam home to meet building code and industry standards, including but not limited to the following:

1. Removal and reinstallation of existing windows and doors, to include all necessary flashing, SAF, and WRB
2. Removal and replacement of exterior cladding; brick veneer, AMSV, composite MDF trim and related accessories
3. Contractor to provide an allowance for interior repairs for nail pops, drywall painting, etc.

4. At exterior alcove area of the walk-out basement, regrade surface by walk-out basement and install a catch basin with underground corrugated piping, if necessary

5. At the rear elevation, first floor level, repair and replace LVL beam; joist hangers; fasteners, etc., per manufacturer's installation instructions

6. Localized repairs shall be performed to the deck structure to provide lateral bracing; proper attachment of components, including, but not limited to, lateral connections; ledger fasteners; remove existing guardrail posts and install new 4 x 4 posts using appropriate bolts, anchors, wood columns, etc.

7. At the rear elevation, remove existing gutter and replace with 6" K style gutter. Reinstall existing downspouts. Gutters shall match existing color. Insure downspouts terminate.

8. Properly integrate drip edges with roofing underlayment along the eaves; replace any underlayment and/or shingles damaged during repair. Apply roof cements; remove shingles at gable cornices (front elevation) and install underlayment properly lapped with the WRB and other flashings, as applicable.

9. At the first floor mudsill plate for perimeter of structure, install fasteners into unattached mudsill anchors and additional fasteners at anchors lacking fasteners.

10. Within the basement, install closed-cell spray foam at the rim board on first floor, and Rockwool Comfortbatt (R-13 minimum) batt insulation within the stud cavities. Spray foam over foam board blocking.

11. As recommended by Environmental Testing Report, abate fungal growth in all areas where fungal growth was found to be present (basement and attic). After

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abatement, indoor air quality investigation shall be performed in the basement by a certified indoor environmentalist. Remove and replace gypsum board finishes as required to perform abatement.

12. At the Master Bedroom, remove and reset out-of-square door and jamb. Install new interior casing as required. Paint and caulk finishes.

13. At the Garage, remove brown-colored masonry mortar and replace with Sika Repair SHB mortar. Prime exposed steel reinforcement with Sika Arnatec 110 EpoCem; repair additional spall locations not previously repaired. Install cementious parge coat on concrete walls for uniform finish.

14. At the Garage, remove the existing garage door guide rails and install rails of proper height to provide 6 – 8" minimum clearance at house entry door landing.

15. Replace adjacent materials affected by the repair work in-kind.

16. Contractor shall provide for all general conditions, including, but not limited to: protection of existing property and adjacent areas not subject to the repair areas, building permits, demolition/disposal costs, final cleaning, etc.

17. Contractor shall provide a 5% contingency allowance and their preferred overhead/profit percentages.

18. Contractor shall provide a line item for A/E fees at 10% of the total cost of construction (including OHP).

(Plaintiffs' Ex. 35)

Mr. Clements opined that all of the documented deficiencies need to be addressed to bring the home into compliance with the applicable building codes; manufacturer's instructions and industry standards. Specifically, Mr. Clements observed loose and poorly

attached siding at multiple locations along the left, right, and rear elevations of the home. He also noted that improper fasteners were used and that metal thru-wall flashing was reverse-lapped with the weather barrier and the flashing was sealed with sealant. Further, he testified that the adhered manufactured stone veneer (AMSV) had been improperly installed at three walls that comprise a bay window feature on the front and side elevations of the Athimoolam home.

Mr. Clements also testified that the existing windows (29) should be removed and reinstalled "to address improperly installed/damaged rough opening flashing and WRB around the openings." In support of his opinions, he relied on photos A9a, b, c, d, e, f, and g documented in the PowerPoint and his reports. (Exhibits 34, 35, and 36) He also criticized improper fasteners installed at the window nailing fin and improperly spaced fasteners. As noted in Photos A9.a, b, c, and d, Mr. Clements only recommended the removal and reinstallation of the existing twenty-nine (29) windows to address the fasteners, flashing and WRB issues as detailed in the Fuller reports.

In addition to observed window installation deficiencies, Mr. Clements noted concerns, in part, about the improper installation of the fiber-cement exterior lap siding along the left, right, and rear elevations of the residence; improperly installed adhered manufactured stone veneer (AMSV); grading deficiencies at the exterior alcove area of the walk-out basement; deck repairs (not total replacement); roof underlayment along the eaves; improperly sized K style gutter at the rear elevation of the home; drip edges, as well as other areas denoted in the reports. Mr. Clements also testified that he observed no water intrusion on the front or side elevations of the Athimoolam home, but opined that if the conditions he discovered were not resolved, it could lead to water intrusion such as the condition he observed on the left corner at the rear elevation of the home.

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During cross examination by Meritage's counsel, key points to which Mr. Clements testified about the 2018 conditions to the Athimoolam home included the following: a) there is no evidence that any of the windows have leaked or resulted in water intrusion into the home since occupancy; b) during the destructive testing in 2018, no rotten wood, deteriorated sheathing or evidence of water intrusion were observed at the front and side elevations of the home; alcove or roof; c) the window manufacturer was not contacted to determine if any warranties will be impacted if the windows are removed and reinstalled per the protocol recommended by Mr. Clements which do not include the replacement of any of the windows in the home or the installation of a new roof and deck. He testified to underlayment application at the drip edge and the undersized rear gutter that impacted roof drainage. Mr. Clements further testified that the issues and recommendation noted for the span issue in the garage could be corrected in one (1) day. Mr. Clements also opined that he neither observed nor was aware of any roof leaks. On the main level, living area, he testified about one (1) door in the master bath that was not square, but documented no damage to the hardwood floors or interior drywall.

Matthew Harmon of Claims Construction and Restoration was offered as an expert by the plaintiffs in cost estimation and construction repairs. He admitted he had never worked within 100 miles of the Athimoolam house; had never used any contractors in the Upstate, and that costs and price differences exist in various parts of South Carolina. Although a motion was made to exclude Mr. Harmon's testimony and report based on challenges to his expertise, credentials and report, the objection was overruled after a "proffer". Mr. Harmon was retained to prepare a cost estimate on the scope of work proposed by Ross Clements. Mr. Harmon never had any discussions with Mr. Clements or Mr. Andrew Schauder regarding the scope of repair or mold remediation and failed to provide justification for including some of the

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items in his purported scope of repair. Mr. Harmon prepared two reports identified as Plaintiffs' Exs. 37-38 to which "Preliminary Estimate Only" is affixed to both. He testified that following his deposition, he had to revise the initial cost estimate (Ex. 37) to correct a typo of 140 hours of labor to 40 hours; and to remove estimations for drywall and HVAC technician costs. Mr. Harmon admitted that he had not solicited quotes on the "bid" items reflected in the cost estimate and that certain of the costs included in his reports exceeded the scope of Mr. Clements' recommendations and were included at the request of the Athimoolams.

Further, Mr. Harmon's cost estimate appears to add duplicate costs for overhead and profit, as each line item description includes an overhead and profit cost, while overhead and profit are also included on pages 27 – 28 of Plaintiffs' Exhibit 38. Of note, Mr. Harmon also included no contingency costs in his line item descriptions or cost estimate as recommended by Mr. Clements.

While Meritage questions the costs, including those attributed to the "bid" items, and stated overhead and profit costs of these "bid" items, Mr. Harmon testified that Xactimate is a software program used by insurance companies and recognized in the industry. Notably, while Meritage challenged the opinions of Mr. Clements and the cost estimate prepared by Mr. Harmon, it did not provide any alternative cost estimates to challenge the accuracy of the costs calculated through the Xactimate program for the removal and replacement of the exterior siding, brick veneer, and AMSV, which costs appear reasonable to correct the defects identified by Mr. Clements.

At the time he met with the Athimoolams in July 2022 for approximately 1 ½ hours, Mr. Harmon had only been a licensed contractor for two months. (Defendant's Ex. 4) During this visit, Mr. Harmon did not look in the attic or inspect the second level of the home

because Mr. Athimoolam was resting. Mr. Harmon did not request permission to access these areas. He did not wear PPP equipment or wear a respirator while at the home. He had no issues breathing while in the Athimoolam home.

In addressing some of the recommendations noted by Ross Clements, Mr. Harmon included the costs of new windows as he did not believe the warranty would be valid if he removed the windows, installed flashing, etc. and then reinstalled the windows. (Plaintiffs' Ex. 38, p. 25) However, he did not contact the manufacturer of the existing windows to discuss if the warranty would be impacted with a removal and reinstallation of the windows.

Also, although the scope of work proposed by Ross Clements did not include the removal and installation of a new roof (he testified at arbitration that he observed no active moisture intrusion inside the home or leaks at windows or doors); construction of a new deck; painting; new gutter system; landscaping; concrete wall; and removal and replacement of footings; to name a few, Mr. Harmon included these items in his cost projection.

At arbitration, Mr. Harmon testified that 75% of his cost estimate was from items provided by the homeowners, while 25% from Mr. Clements' report, However, the testimony and evidence show that Mr. Harmon exceeded the scope of Mr. Clements' recommendations in his cost projection specifically on pages 2 – 19 of Plaintiffs' Exhibit 38, and that the numbers were "preliminary." Further, Mr. Clements testified he has never communicated with Mr. Harmon about his cost estimations or scope of work. The cost estimations in both of Mr. Harmon's reports (Plaintiffs' Exs. 37 and 38) as to mold remediation by Rainbow International Restoration accept the estimate "as is" although Mr. Lambright never received a scope of work from Andrew G. Schauder and included some areas of the home for mold remediation which he never inspected. (Plaintiffs' Ex. 42)

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Mr. Harmon also testified that Mrs. Athimoolam added three areas of tile (bedroom and laundry); two additional interior doors; prime and paint of the main level; and mold and fungal abatement which is already reflected in the report of Rainbow International. He also testified that he did not go onto the second floor or attic of the Athimoolam home. Also, he testified that in Exhibit 38, the items listed on pages 11 – 20 of his report (beginning with the main level and including laundry room, with the exception of two tiles being replaced; closet, breakfast area/room; family room; closet; master closet; sitting; bedroom 2; bedroom 1; master bath; master bedroom; closet 2; hallway; bathroom; stairs; kitchen; and closet) had been added to the repair estimate at the request of the Athimoolams. These line items on the main level, which include overhead and profit, total $57,798.08 (excluding garage). Accordingly, the Arbitrator has determined that a significant amount of the line item costs in Mr. Harmon's report should not be and are not considered in this Order since they are unsupported by the testimony and evidence presented at Arbitration.

Mr. Harmon, on cross-examination, testified that he never went into the attic or second level of the Athimoolam home. Thus, the "level two" costs detailed on pages 21 – 22 of the report should not have been included as neither Ross Clements nor Jay Rogers testified about the necessity of any repairs. These purported costs, which include overhead and profit, totaling $12,857.73 provide another example of costs not in conformity with the testimony and evidence and not considered in this Order.

Richard J. Rogers, P.E., M.B.A. of Rogers Construction Engineering was offered as an expert forensic engineer and licensed general contractor on behalf of Meritage Homes, without objection. Mr. Rogers testified that he received the Fuller Envelope (Clements) reports and visited the Athimoolam home on July 15, 2019. Mr. Rogers noted that he went inside the

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Athimoolam home, stuck his head in the attic and concentrated his time in the basement. He was informed of no roof leaks or water intrusion through any of the windows since the Athimoolams moved into the home. He did not conduct any destructive testing. He testified he is currently involved in seven litigation matters involving Meritage but he has not been hired in any to make repairs.

In discussing the Fuller Envelope reports addressing the windows, defense expert, Jay Rogers, admitted that he could not opine if the building wrap had been properly applied or WRB properly folded in. Although photos of the flashing are such that it appears flashing was properly installed, he could not testify with certainty to the manner of installation and conformity to building codes and industry standards. As for questions about the positioning of the nails used in the window installation, he testified it was his belief that installing the nails in areas other than the nail fin did not violate any requirements. However, he was unable to testify to this with certainty. Further, since he does not know the condition of each window in terms of installation, he found relevant and significant the absence of any leaks and water intrusion through any of the windows in the Athimoolam home since 2015 which supports his position that no repairs need to be made to any of the windows in the Athimoolam home. He provided a cost estimate for repairs, not replacement, of the exterior siding, brick veneer, and AMSV based on his experience and opinions after inspecting the home. Defendant, Meritage Homes, also introduced into evidence numerous photographs of the Athimoolam home. (Defendant's Ex. 2 and 7) Although Mr. Rogers disagreed with the opinions of Mr. Clements, he presented no evidence, through destructive testing he conducted, to dispute the findings in the Fuller reports nor cost estimates from other sources to challenge the accuracy of the costs for the removal and replacement of the

exterior siding, brick veneer, and AMSV as calculated by the Xactimate software used by Mr. Harmon. Mr. Rogers also opined that mold remediation was unnecessary.

As for the fourteen recommendations made by Mr. Clements, Mr. Rogers testified in conformity with a prior report identified as Defendant's Ex. 5; Plaintiffs' Ex. 32, which included his recommendations and pricing to resolve any construction issues:

1. Removal and reinstallation of the existing windows and doors – No action required
2. Removal and replacement of the exterior cladding, including all fiber-cement siding, brick veneer, AMSV, composite MDF trim and related accessories. All work described can be performed for less than $15,000.
3. Contractor allowance for interior repairs, for nail pops, drywall, painting, etc. – Unnecessary
4. Exterior alcove of the walk-out basement – work can be performed for $1,500
5. At rear elevation, first floor level – repairs should be performed as described in Fuller report – work can be performed for $1,000
6. Localized repairs to deck structure – work can be performed for $1,000
7. At the rear elevation remove existing gutter and replace Unnecessary as gutter is functioning.
8. Properly integrate drip edges with roofing underlayment – Unnecessary – $2,000 through testimony at arbitration
9. At the first-floor mudsill plate for perimeter of structure. Fasteners, etc. – work can be performed for $300

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10. Basement, spray foam – batt insulation is acceptable by code – work can be performed for $500

11. As recommended by Environmental Testing & Management – Unnecessary Advanta issued clean report

12. At the Master Bedroom, remove and reset the out-of-square door and jamb - work can be performed for $1,000

13. At the Garage, remove brown colored masonry mortar and replace - work can be performed for $500

14. At the Garage, remove existing door guide rails and install proper rails - work can be performed for $500

Mr. Rogers further testified that his proposed cost estimate at Arbitration based on inflation would be in the Thirty Thousand and No/100ths ($30,000.00) Dollars range, plus approximately Two Thousand and No/100ths ($2,000.00) Dollars to address some of the roofing underlay issues noted by Mr. Clements.

II. Mold
(Industrial Hygienists)

Environmental Testing and Management, Inc. (Andrew G. Schauder) was retained by Mrs. Athimoolam to provide professional and technical consulting services by conducting a limited evaluation of an alleged water intrusion/mold issue impacting several locations within her residence. He was offered as an expert in industrial hygiene without objection. Although his recommended scope of mold remediation identified as Exhibit 41 was not allowed into evidence because it had not been provided to Meritage and its counsel, this information was requested and considered by the Arbitrator after the Arbitration and prior to the issuance of this Order.

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On the initial visit, November 28, 2016, Mr. Schauder was informed of prior services provided by AdvantaClean. His most notable observation from an exterior inspection was the grading of the land at the rear of the house, a sample collected in the basement – unfinished utility, and the level of the Penicillium/Aspergillus group of fungi which he testified was borderline elevated. Mrs. Athimoolam provided Mr. Schauder with two spore trap reports, one dated July 28, 2016 and one dated August 24, 2016. No written reports accompanied either lab report. Of the information provided, Mr. Schauder opined that all of the samples collected inside the house were found to have a lower total fungal spore count than present in the outdoor air.

A visual examination of the remainder of the interior of the house did not reveal any evidence of any significant water intrusion or mold growth. Further, his report reflects elevations of Penicillium/Aspergillus group of fungi on both the main floor, as well as the basement. From the initial inspection, Mr. Schauder concluded the most likely explanation for prior mold growth on the floor joists in the attic and basement was that the wood framing members were left exposed to the outside elements for an extended period of time. He suggested test cuts needed to be made in the sheetrock walls and ceilings so a complete scope of work could be determined and a protocol prepared for the remediation of the impacted areas. No recommendations in the December 2016 report were addressed. No complete scope of work was completed and no protocol for mold remediation was prepared or introduced into evidence as it was never discussed between Mr. Schauder and Mr. Lambright. (Plaintiffs' Ex. 39).

Four-plus years later, on August 24, 2021, Mr. Schauder returned to the Athimoolam home and met with Mr. and Mrs. Athimoolam. During this time, there is no evidence that any other testing occurred or protocols proposed for mold remediation. As

documented in his report (Plaintiffs' Ex. 40), his follow-up inspection began in the basement. Finding what he described as prior or suspected fungal growth and staining in a bedroom, basement, and attic, he again recommended that a complete scope of work be determined, and a protocol prepared for the remediation of fungal growth in the designated areas. Mr. Schauder questioned if the floor joists in the basement had been treated or had an encapsulant applied with an antifungal component. Suspect mold growth was present on wood framing. No protocol about test cuts or scope of work was prepared by him or introduced into evidence. The only cost information was documented in the Rainbow document and prepared solely by Mr. Lambright with no consultation or input from Mr. Schauder. (Ex. 42)

On April 6, 2023, Mr. Schauder returned for a second follow up water intrusion/mold investigation in areas above the existing sheetrock ceilings and attic. (Plaintiffs' Ex. 41) In this report, Mr. Schauder referenced reports from Environmental Testing and Management, Inc., and General Engineering. (GEL Report March 3, 2021 – Defendant's Ex. 6) Mr. Schauder opined that the presence of staining on wood framing members found throughout the house (theater, storage 2, great room and attic) was most likely the result of prior mold growth. While he noted the necessity to remove all sheetrock walls and ceilings to allow for an examination of the wood framing members, this was not undertaken. In fact, the April 2023 inspection simply noted suspected mold growth and staining. In a deposition taken before the arbitration, Mr. Schauder testified he had not prepared a protocol or performed mapping of the timbers. When he attempted to testify to a protocol at arbitration, an objection was made by counsel for Meritage and sustained by the Arbitrator given that the information had not been provided in discovery, in a deposition, and/or prior to the arbitration. State v. Warner, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2000).

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Also, during Mr. Schauder's deposition on November 23, 2020, he had no recommendations for a remediation protocol and found no evidence of fungal growth on the first and second levels of the home. Also, he noted no water intrusion in the attic and noted no health concerns for the Athimoolams. A few days before the arbitration, Mr. Schauder testified he was provided a copy of the Rainbow International Restoration proposal (Plaintiffs' Ex. 42) but did not discuss specifics about the proposal or provide a scope of work to Steven Lambright with Rainbow International Restoration.

Steven Lambright, a licensed contractor with advance microbial remediation experience, with Rainbow International Restoration, prepared a cost projection utilizing Xactimate for mold remediation to the Athimoolam home after visiting the Athimoolam home for several hours on April 18, 2022. (Plaintiffs' Ex. 42) He admittedly is not an expert in air quality testing and mold growth assessment. Also, he never received the proposed scope of work of Mr. Andrew Schauder dated April 18, 2023. (Exhibit 41) The expertise and qualifications of Mr. Lambright were challenged but he was permitted to testify, over objection. Mr. Lambright testified that approximately eighteen (18) months ago, he observed no active water leaks in the attic and basement. During his inspection in the attic, he did not determine if active mold was present and conducted no testing. He also did not determine if the moisture content in the attic was elevated. Mr. Lambright admitted that Mr. Schauder had not approved the scope of the work or provided a suggested protocol for mold remediation. Therefore, the Arbitrator finds that neither Mr. Schauder nor Steven Lambright provided compelling evidence or testimony to substantiate the necessity for mold remediation.

Following the denial of directed verdict motions made by counsel for Meritage Homes, Meritage called Ronald S. Sharpe, C.I.H., R.S., with GEL Engineering LLC as an expert

witness. Mr. Sharpe's report was marked as Defendant's Exhibit 6. Mr. Sharpe, who conducted IEQ assessments of the environmental quality of the Athimoolam interior on October 30, 2019 and November 12, 2020 offered his opinions in his written report and noted that no further mold remediation is necessary at the Athimoolam home. Mr. Sharpe also offered suggestions to reduce the potential for amplification and/or proliferation of microbial growth inside the structure after sources of water intrusion are repaired.

DAMAGES

It is well settled in South Carolina that proof of resulting property damage is not necessary to establish liability for construction defects. Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). A cause of action is available where a builder has violated a legal duty, no matter what the type of resulting damage. Kennedy v. Columbia Lumber Mfg. Co., 299 S.C. 335, 346 (1989). It is well settled that "the applicable measure of damages [can] be shown by the cost of repairs." Kincaid v. Landing Development Corp., 289 S.C. 89, 94, 344 S.E.2d 869, 873 (Ct. App. 1986). Further, damages must be awarded to the extent they were proven. Hinds v. Elms, 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004).

Further, while plaintiff is allowed to testify about her belief on value or damage to personal property, Waites v. S.C. Windstorm & Hail Underwriting Ass'n, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983), the existence or amount of damages cannot be left to conjecture or speculation. Piggy Park Enterprises, Inc. v. Schofield, 162 S.E.2d 705, 708 (S.C. 1968). "It is the general rule that it is the duty of the owner of the property, which is injured by the negligence of another, to use reasonable means to mitigate the damages. Newman v. Brown, 228 S.C. 472, 480.

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Testimony elicited from Mrs. Athimoolam at the arbitration revealed that many personal items are still in use in the home and that there has been no effort to mitigate these alleged damages. Although Mrs. Athimoolam testified about the value of her personal items, she was unable to provide any sales receipts documenting the value of the items she claimed were damaged or ruined due to water and mold. (Plaintiffs' Ex. 33) Accordingly, the Arbitrator found her testimony about the purported damages in Plaintiffs' Ex. 33 left to conjecture or speculation. Gauld v. O'Shaugnessy Realty Co., 671 S.E.2d 79, 85 (Ct. App. 2008).

AWARD

Based on the testimony and evidence presented at Arbitration, the applicable law, and a review of all submissions by the respective attorneys after Arbitration, I hereby award damages to the Athimoolams in the sum of **Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100ths ($320,917.63) Dollars** as detailed below:

- The sum of **Nine Thousand One Hundred Eighty-Three and No/100ths ($9,183.00) Dollars** – Remove and reinstall twenty-nine (29) windows to install WRB, SAF and flashing
  - Labor ($116/hour x 2) to remove and reinstall windows x 29 = $6,728.00
  - Scaffolding - 1 month ($1,455/month) - $1,455.00
  - Flashing, WRB, SAF - $1,000.00
- The sum of **Two Hundred Six Thousand Four Hundred Fifty-Five and No/100ths ($206,455.00) Dollars**
  - Fiber Cement Siding - $70,000.00
  - Paint siding - $34,000.00
  - Remove and install brick veneer, AMSV - $81,000.00
  - Remove and replace sheathing - $20,000.00

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- Scaffolding – 1 month ($1,455/month) - $1,455.00

- The sum of **Five Thousand Five Hundred and No/100ths ($5,500.00) Dollars** for interior painting in master bedroom after removal and reset of out-of-square door and jamb;

- The sum of **Three Thousand and No/100ths ($3,000.00) Dollars** for regrading of exterior alcove area of walk-out basement and installation of surface catch basin, if necessary;

- The sum of **One Thousand and No/100ths ($1,000.00) Dollars** for grading at the rear elevation, first floor level;

- The sum of **Twelve Thousand and No/100ths ($12,000.00) Dollars** for localized repairs to deck structure;

- The sum of **Eleven Thousand Seven Hundred and No/100ths ($11,700.00) Dollars** for replacement of the gutter and downspouts with appropriate color match only at the rear elevation of the home with the size recommended by Ross Clements - 5 ½ x 4 ½;

- The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to properly integrate drip edges with roofing underlayment;

- The sum of **Three Hundred and No/100ths ($300.00) Dollars** for fastener installation into unattached mudsill anchors at mudsill plate for perimeter of structure;

- The sum of **Three Thousand Two Hundred Ninety-Three and 63/100ths ($3,293.63) Dollars** for batt insulation, spray foam, etc. in basement;

- The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove and reset the out-of-square door and door jamb in Master Bedroom;

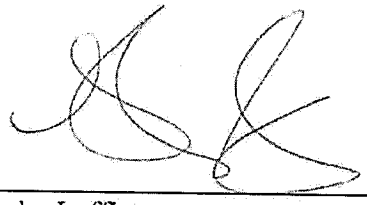
- The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to remove brown-colored masonry mortar, repair spall locations and install a cementious parge coat to concrete walls for uniform finish;

- The sum of **Ten Thousand and No/100ths ($10,000.00) Dollars** to remove existing garage door rails and install rails that are proper height;

- The sum of **Fifty-Three Thousand Four Hundred Eighty-Six and No/100ths ($53,486.00) Dollars** for overhead and profit.

Therefore, it is hereby Ordered, Adjudged, and Decreed that the plaintiffs are awarded the sum of **Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100ths ($320,917.63) Dollars.**

AND IT IS SO ORDERED.



Becky Laffitte
Arbitrator

January 19, 2024

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT CASE NO.: 2017-CP-04-00376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	)	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MERTIAGE HOMES OF SOUTH CAROLINA, INC.'S MOTION TO VACATE**

Plaintiffs, Raghu and Irene Athimoolam (collectively hereinafter "Plaintiffs"), by and through their undersigned attorneys, submit the following Memorandum in Opposition to Meritage Homes of South Carolina, Inc.'s ("Meritage") Motion to Vacate the Arbitration Award filed with this Court on January 23, 2024 (the "Award").

SUMMARY OF ARGUMENT

The Arbitrator issued a preliminary award on October 4, 2023 (the "**Preliminary Award**") (attached here as Ex. 1) which was never confirmed. When presented with Plaintiffs' request to reconsider many of her findings in the Preliminary Award, which were based on legal and factual errors, she conferred with both parties, accepted supplemental materials, and ultimately issued her final award on January 23, 2024 (the "**Final Award**") (attached here as Ex. 2), in which she corrected a number of her legal and factual errors. The Final Award was enrolled and confirmed on January 24, 2024.

Despite failing to file or confirm the Preliminary Award, Meritage now asks this Court to vacate the Final Award and reinstate the Preliminary Award, which the Arbitrator herself recognized as erroneous and incorrect. Meritage's request to reinstate an order that was not final

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is not a proper request, and this Court lacks jurisdiction to reverse, alter, or amend an Arbitrator's final ruling on the merits, even if that final ruling corrects her own factual and legal errors.

This Court's jurisdiction is limited to enforcement of the confirmed Final Award and to reversal of the arbitrator on very limited grounds, set forth in the Federal Arbitration Act, 9 U.S.C. §§1-16 (the "FAA"), and the South Carolina Uniform Arbitration Act S.C. Code Ann. §15-48-10 *et seq.* ("SCUAA") Meritage lacks grounds to reverse or vacate the Final Award under either act.

Third, any action taken by the Arbitrator was well within the arbitration agreement and scope of the Arbitrator. Fourth, this Court is an improper venue for Meritage to attempt to relitigate the merits of this case. Fifth, Plaintiffs did not violate any rule of the South Carolina Rules of ADR.

DISCUSSION

A. Overview

This case involves construction deficiencies associated with development, construction, and sale of Plaintiffs' residence located at 116 Aerial Way, Easley, South Carolina, 26462 (the "Home"). Meritage was the developer, seller, and general contractor for the construction of the Home, and ultimately attempted and performed certain repairs (Compl., ¶¶ 3, 5,). The defects include water intrusion, premature degradation of components, structural deficiencies, the presence of mold and mildew, and latent and previously undiscoverable deficiencies. (Compl., ¶ 6).

Many of these problems are the results of defects and building code violations. Meritage knew or should have known of these defects for several reasons, including its post-construction repair efforts at the Home. (Compl., ¶ 5).

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B. Procedural History

Plaintiffs filed a Complaint against Meritage on February 2, 2017, and an Amended Complaint on March 3, 2017 (the "Complaint") asserting claims of Negligence/Gross Negligence, Breach of Implied Warranty of Service, and Breach of the Implied Warranty of Habitability. Meritage filed a Motion to Compel Arbitration, which was ultimately consented to on August 30, 2017. Ultimately, the parties entered into an Arbitration Order, to conduct the arbitration pursuant to the Federal Arbitration Act ("FAA"), however, as the Arbitrator found in her Order, the FAA was not applicable, and no aspect of the arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS"), which was the arbitration procedure called for in the Meritage sale contract. (Final Award at 1.) On February 11, 2020, Meritage asserted third-party claims (in Circuit Court) against a number of its subcontractors ("Subcontractor Defendants"). Those claims were never subject to the arbitration between Plaintiffs and Meritage.

Meritage ultimately settled its third-party claims with the Subcontractor Defendants directly, and a Stipulation of Dismissal was filed on July 12, 2023. As part of that action, Meritage collected three-hundred and fifty thousand dollars ($350,000.00) from the Subcontractor Defendants, which is reflected in the Non-Confidential Settlement Agreement between Meritage and those subcontractors (Ex. 3). Plaintiffs were not a party to those negotiations or the Settlement Agreement. Meritage and Plaintiffs were not able to settle their claims and this case was arbitrated on September 21-22, 2023.

Following the arbitration, the Arbitrator issued the Preliminary Award, which was neither filed nor confirmed by either party. Instead, Plaintiffs filed a Motion to Reconsider on October 16, 2023, along with a supporting memorandum (Ex. 4). That motion was based on numerous factual and legal errors contained in the Preliminary Award. Following the filing of the Motion to

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Reconsider, the Arbitrator communicated with counsel for the parties via email. After careful review of the law and the evidence presented at the arbitration, she requested a telephone conference with the parties which was held on November 17, 2023. As a result of the hearing, the Arbitrator requested additional documents and submissions from both parties, following the receipt and consideration of which, the Arbitrator issued the Final Award, which was filed with this Court.

On February 2, 2024, Meritage filed its improper "Motion to Vacate the January 23, 2024, Arbitration Award and Motion to Reinstate the October 5, 2023, Arbitration Award."

APPLICABLE LAW

1. Review of an Arbitrator's Award

Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. *Gissel v. Hart*, 382, S.C. 235, 241, 676 S.E.2d 320, 323 (2009). "[T]he scope of judicial review for an arbitrator's decision 'is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all . . . .'" *Group III Mgmt. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 819 S.E.2d 781 (Ct. App. 2018) (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc*, 492 F.3d 520, 527 (4th Cir. 2007). The award is presumptively correct, and "[i]t is the general rule that the courts will refuse to review the merits of an arbitration award" *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985) (quoting *Newarks Stereotypes' Union No. 18 v. Neward Morning Ledger Co.*, 261 F.Supp, 832 (D.N.J. 1966), *aff'd* 397 F.(2d) 594 (3d Cir. 1968), *cert. denied*, 393 U.S. 954, 89 S.Ct. 378, 21 L.Ed (ed) 365 (1968).

"[C]ourts defer to the arbitral panel both on the merits of the final decision **and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its**

final disposition.’” *Group III Mgmt. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 819 S.E.2d 781 (Ct. App. 2018) (quoting *UBS Fin. Servs., Inc*, 842 F.3d 336, 339 (4th Cir. 2016)) (emphasis supplied).

2. The Factors to Vacate or Modify Arbitration Award

Under the FAA, 9 U.S.C. §10 (a), grounds for vacating an arbitration award **by the Court** are only allowed when:

1. Where the award was procured by corruption, fraud, or undue means;

2. Where there was evident partiality or corruption in the arbitrators, or either of them;

3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

4. Where the arbitrator exceeds their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Further, 9 U.S.C. §11 states modification or correction to an award **by the Court** can be made when:

a. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

b. Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

c. Where the award is imperfect in matter of form not affecting the merits of the controversy.

d. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

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Similarly, under the SCUAA an arbitration award can only be vacated **by the Court** when one of the following is met:

1. The award was procured by corruption, fraud or other undue means;

2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 15-48-50, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 15-48-20 and the party did not participate in the arbitration hearing without raising the objection;

S.C. Code Ann. §15-48-130 (a). Further, modification of an arbitration award **by the Court** is allowed only when:

1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

S.C. Code Ann. §15-48-140.

3. The Award "Shall" or "Must" Be Confirmed

A court's mandate under the plain language of both acts is that confirmation "shall" or "must" be made in the absence of grounds for warranting vacating, modifying, or correcting the

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award. Confirmation is a ministerial act of recording the results of the arbitration. *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 748 S.E.2d 221 (2013).

Further, under the SCUAA, a party may move the circuit court to confirm an award, vacate an award, or modify or correct an award. S.C. Code Ann. §§15-48-10 et seq. "If the application to vacate is denied . . . the court **shall confirm the award**" (S.C. Code Ann. §15-48-130 (d)).

4. Authority of an Arbitrator

Generally speaking, "[a]n award within the scope of submission is conclusive on fact issues and interpretation of law." *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985) (quoting *Oinoussian Steamship Corp. v. Sabre Shipping Cort.*, 224 F. Supp. 807, 809 (D.N.Y 1963) (footnote omitted). Additionally, [cases vacating an arbitration awarded where there is a manifest disregard of the law] requiring circumstances far more egregious than mere errors in interpreting or applying the law. *Trident Technical College c. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985).

"Manifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), *vacated and remanded on other grounds*, 539 U.S. 444, 156 L. Ed. 2d 414, 123 S. Ct. 2402 (2003).

An arbitrator exceeds his powers and authority when he attempts to resolve an issue that is not arbitrable because it is ***outside the scope of the arbitration agreement***. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, S. Ct. 1358, 4 L. Ed. (2d) 1424 (1960).

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A party may not attempt to relitigate the merits of the arbitrator[']s resolution of the arbitrable issues under the guise of questioning the arbitrators' power. *Id.; Trident Technical College, supra*.

5. Evidence of Settlement is Not Confidential

South Carolina allows a broad scope of discovery. *Samples v. Mitchell*, 329 S.C. 105, 108, 495 S.E.2d 213, 215 (Ct. App. 1997). Information that would be admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in a mediation. Rule 8(h) of the South Carolina Alternative Dispute Resolution Rules. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. S.C.R. Civ. P. 26(b)(1). Relevance "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Rule 8 is designed to protect the communications made during the mediation itself and to protect the process . . . Further, any confidential matters the parties do not want disclosed can be protected through court proceedings including confidentiality provisions. *Huck v. Oakland Wings, LLC*, No. 5500, 2018 S.C. App. LEXIS 22 (Ct. App. Mar 28, 2018),

ARGUMENT

A. This Court Lacks Jurisdiction to "Reinstate" an Order That Was Not Final

Whether a particular arbitration award is "final" is not for this Court to decide. When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. *Gissel*, 382, S.C. at, 241. Further, "[C]ourts defer to the arbitral panel both on the merits of the final decision **and on procedural questions that 'grow out of the dispute,' even where those**

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questions 'bear on its final disposition.'" *Group III Mgmt. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 819 S.E.2d 781 (Ct. App. 2018) (quoting *UBS Fin. Servs., Inc,* 842 F.3d 336, 339 (4th Cir. 2016)) (emphasis supplied). An Arbitrator is vested with authority to determine when her award becomes final, after taking up the arguments and evidence she wishes to consider. In this case, the Final Award was her final decision relating to this case.

As the Arbitrator made abundantly clear, the Award specifically states that "the previous Order dated October 4, 2023, ***which was never entered***, is hereby vacated, to the extent necessary, and this Order is hereby entered with the Honorable Clerk of Court for Anderson County." Order at 2. (emphasis supplied). There is one final Order in this case, and that is the only Order that was entered with this Court, and the only Order that can be considered. This was manifestly stated by the Arbitrator in her email on January 8, 2024, to all counsel, which is attached hereto as Ex 5, "[n]ow that I've received ***all submissions***, which I appreciate, I'll be ***finalizing the Order***. For clarification, I would like confirmation that you agree the Order was never filed. It was sent to you both but neither I nor you filed it." Subsequently, in a January 18, 2024, email, the Arbitrator ***confirms that no final order has been reached***, "[h]owever, as far as the Court is concerned, I believe they will look at the current Order as controlling given that the other was not filed. I apologize in advance for any confusion over the Orders. I have tried to be fair to all parties and have reviewed my notes from Arbitration, the Arbitration exhibits and subsequent submissions and controlling lawt [sic] to render a decision based upon the facts, evidence and controlling law." Ex. 6. The acceptance of supplemental submissions and evidence is fully within the scope of the Arbitrator's duties, as "[t]he arbitration hearing is concluded when *all the evidence is in and any arguments or post-hearing briefs the arbitrator permits have been completed or received*." Rule 12(c)(1) of the South Carolina Alternative Dispute Resolution Rules (emphasis supplied).

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There is simply no permissible question for this Court to decide on any procedural question that "[grew] out of the dispute." The law is clear, and this Court must defer to the Arbitrator's decision and deny Meritage's Motion to Vacate.

Not only is a procedure question not a question for this Court, there is nothing to suggest that this Court has the authority to "reinstate an order that was never final" as counsel for Meritage has improperly sought. Moreover, Meritage's reliance on *Smith v. Transport Workers Union of America, AFL-CIO Air Transport Local 556*, 374 F.3d 372 (5th Cir. 2004) warrants a closer review of that case as those facts differ greatly from the case at hand. The full case is attached here as Ex. 7.

Specifically in *Smith*, the Fifth Circuit vacated a modified award because the arbitration agreement "clearly restricts the authority of the arbitrators to amend or correct their award." *Id*. The arbitration agreement in *Smith* states that "[t]he arbitrators *sua sponte* may amend or correct their award within three business days after the award." *Id*. Here, there is no contractual agreement that restricts modification of an award; therefore, *Smith* has no bearing and should not be persuasive on this Court. Additionally, there is no "modified award" here. As discussed above, there is one Final Award, which was filed and confirmed without amendment.

Furthermore, ***vacate*** is defined as "[t]o nullify or cancel; make void; invalidate" Black's Law Dictionary (11th Edition, 2019). Here, the Arbitrator, specifically and to the extent necessary, ***vacated*** the Preliminary Award, which she further went on to specify was never entered. By the plain meaning of the language, there can be no modification of something that has been vacated. The only award that can be considered is the Final Award entered with this Court. There is nothing to "reinstate." The only thing for this Court to do is to **enforce and confirm** the judgment against Meritage.

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Therefore, because this Court can only consider the Final Award of the Arbitrator, and this Court should defer to the procedural questions arising from any final order, this Court should refuse to grant Meritage's Motion to Vacate the Award.

B. Meritage Cannot Satisfy the Requirements to Vacate or Modify the Award.

Regardless of whether the FAA or the SCUAA applies, Meritage ***fails to satisfy any of the necessary factors*** to vacate the Final Award of the Arbitrator. For this Court to vacate the award, under both the FAA and the SCUAA, Meritage must show (which it cannot) that the Final Award was obtained by corruption, fraud, or undue means, partiality on behalf of the arbitrator, the arbitrator exceeding her powers, refusal to postpone a hearing that has resulted in prejudice, and if the SCUAA applies, that there was no arbitration agreement between the parties.

Here, Meritage has not, and ***cannot***, supply any evidence to satisfy any prong necessary to vacate the Final Award. Simply put, the Arbitrator acted in a way that an arbitrator should and submitted her Final Award to this Court to enter judgment.

Additionally, Meritage fails to satisfy any of the necessary factors to modify the Final Award of the Arbitrator. Much like the factors necessary to vacate an award, in order to modify an award, Meritage is faced with presenting evidence of miscalculation of figures or an evident mistake in something referred to in the award, the arbitrator awarding upon a matter not submitted to them or the award is imperfect in a matter of form, not affecting the merits. 9 U.S.C. §11, S.C. Code Ann. §15-48-140. Again, Meritage has not presented any compelling evidence that any factor is met, and thus ***cannot meet this burden***.

Therefore, because Meritage fails to satisfy any of the prerequisite factors to either vacate or modify the arbitration award, this Court must confirm the Final Award.

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C. Because the Court Should Not Vacate or Modify the Award, It Shall Confirm the Award.

Under both the FAA and SCUAA, [a] court's mandate under the plain language of both acts is that confirmation "***shall***" or "***must***" be made in the absence of grounds for warranting vacating, modifying, or correcting the award. Confirmation is a ministerial act of recording the results of the arbitration. *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 748 S.E.2d 221 (2013).

Here, because Meritage cannot meet its burden to vacate or modify the Final Award, and again whether the FAA or SCUAA applies, this Court ***shall*** or ***must*** confirm the Final Award.

D. The Arbitrator Acted Within Her Authority and Only Ruled on Matters Within Her Jurisdiction.

As discussed in depth above, and because the arbitrator is charged with determining both the law and the fact, an arbitration award will be vacated only in limited circumstances as discussed above. *See generally Trident Technical College* 286 S.C. 98. *See also Bazzle*, 351 S.C. 244.

Meritage has taken the unique position that somehow, in determining this action on the merits, the arbitrator has exceeded her authority under the arbitration provision and Consent Order of this Court, which was filed on August 30, 2017, that specifically orders, and ***with the consent of all parties***, all portions of this action "shall proceed to binding arbitration." (Ex 8).

The arbitration agreement, and further, the Consent Order Staying Case and Compelling Arbitration, grants the authority and power to the Arbitrator to decide the merits of this case, including procedural matters "**that 'grow out of the dispute,' even where those questions 'bear on its final disposition'**" *Group III Mgmt.* 425 S.C. 141.

Somehow, after drafting the arbitration agreement, consenting to arbitration in this matter, and being dissatisfied with the result after all facts, testimony, and evidence was properly

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considered, counsel for Meritage wants this Court to conclude that the Arbitrator acted outside the powers and authority granted to her, not only by this Court, but by the ***consent of Meritage***. To allow this type of argument and position completely undermines the purpose of arbitration and would render arbitration pointless.

Our Courts have consistently held that "Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *Group III Mgmt.* 425 S.C. 141 (quoting *Remmey v. PaineWebber, Inc*, 32 F.3d 143, 146 (4th Cir. 1994). Meritage cannot now ask this Court to act as the "Varsity Team" and take away the actions of the Arbitrator that they are dissatisfied with.

Plaintiffs submitted a Motion to Reconsider on October 16, 2023. Rather than seeking to confirm the preliminary arbitration award, Meritage continued to engage in the arbitration proceedings, continued to submit motions and memoranda, continued to participate in hearings, and continued to submit and consent to the jurisdiction of arbitration. Any argument by counsel for Meritage at this juncture that the Arbitrator lacked authority, or lacked jurisdiction, is disingenuous as Meritage's action evidence its consent to the Arbitrator's continued assertion and assumption of its jurisdiction of this matter rather than seek intervention by this Court. As noted previously, the South Carolina Alternate Dispute Resolution Rules allow for the review of "any arguments or post-hearing briefs the *arbitrator permits*…" Rule 12(c)(1) of the South Carolina Alternative Dispute Resolution Rules (emphasis supplied).

In addition to failing to meet the burden that the Arbitrator exceeded her powers, Meritage cannot meet the heavy burden of showing the Arbitrator showed a "manifest disregard" of the law. Not only can Meritage not meet this burden, the Arbitrator took steps to ensure that the order correctly and accurately reflected the law, testimony, and evidence submitted.

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E. Meritage is Attempting to Use This Court Relitigate This Case.

A motion to vacate or modify an arbitration award is not a chance to relitigate the underlying merits of a case. *Pittmann Mortg. Co v. Edwards*, 327 S.C. 72488 S.E.2.d 335 (1997), *see also Trident Technical College, supra.*

As evidenced in Meritage's improper and misleading Motion to Vacate the January 23, 2024, Arbitration Award and Motion to Reinstate the October 4, 2023, Arbitration Award, Meritage seeks to use this Motion and this Court to improperly relitigate the merits of this case. Meritage makes numerous arguments and references to the underlying evidence that was submitted to the Arbitrator, and then makes arguments as to why it thinks the Arbitrator was wrong in the conclusions reached in the Final Award.

Meritage does not stop there but continues those arguments as support of why this Court should somehow enforce an order that was vacated and does not exist. There cannot be more clear evidence of an attempt to relitigate the merits of a case, which is improper, and this Court must not consider. '"A party may not attempt to relitigate the merits of the arbitrator's resolution of the arbitrable issues under the guise of questioning the arbitrators' power. *Id.*;'" *Trident Technical College, supra.*

Just like the *Trident Technical College* Court held, here:

> [c]learly, [Meritage] is attempting to relitigate the merits of the arbitration panel's resolution of concededly arbitrable issues under the guise of questioning the panel's power and authority**; *this is not proper***. *Amoco Oil Co. v. Oil, Chem. & Atomic Workers Internat. Union*, 548 F. (2d) 1288 (7th Cir. 1977), *cert. denied*, 431 U.S. 905 (1977). Even assuming *arguendo* that the award misconstrued the contracts, this would not constitute an abuse of the arbitrators' power under 9 U.S.C. § 10(d). *National Railroad Passenger Corp. v. Chesapeake & O. Ry. Co.*, 551 F. (2d) 136 (7th Cir. 1977).

Meritage must not be allowed to use this Court to improperly relitigate the merits of this case and its Motion should be denied.

F. <u>Sanctions Are Not Proper.</u>

Much like many of the unique positions Meritage has taken in this case, Meritage wrongfully believes that disclosure by Plaintiffs of Meritage's settlements with its Subcontractor Defendants, is a violation of the South Carolina Rules of ADR, and is worthy of sanctions. Meritage's logic again is misguided and non-sensical. To be clear, Meritage's argument is that Plaintiffs deserve to be sanctioned because they disclosed, to an arbitrator, terms of a settlement between Meritage and its subcontractors 1) to which the Plaintiffs were not a party; 2) from which Plaintiffs received no consideration; and 3) was a matter of public record.

As evidenced by the pleadings, Meritage brought third-party claims against its Subcontractor Defendants. Plaintiffs did not bring any direct actions against any party other than Meritage (see generally, Compl.). Meritage settled its claims with its Subcontractor Defendants, executed the Settlement Agreement (the terms of which Meritage likely drafted and unquestionably agreed to) and filed a Stipulation of Dismissal (Ex 9).

Plaintiffs brought no direct claims against the Subcontractor Defendants and were not a party to the Settlement Agreement or the negotiations leading to the settlement between Meritage and its subcontractors. Plaintiffs also received ***<u>nothing</u>*** from that settlement.

The dismissal of Meritage's claims against its Subcontractor Defendants is a matter of public record and the Settlement Agreement does not contain any confidentiality provision (which would not be binding on Plaintiffs even if it were, since Plaintiffs were not parties to that agreement).

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Further, all information disclosed by Plaintiffs is discoverable, and disclosure of that information is not improper nor sanctionable, and if the settlement terms were not relevant or admissible, that is a decision that was within the authority of the Arbitrator to make.

Not only that, it is common practice for a court (in both jury and nonjury matters), or an arbitrator (like in the present matter), to know of settlements between parties in a case to consider set-off, contribution and other similar issues. None of the Plaintiffs' actions violated any ADR Rule, and do not come close to the threshold for sanctions.

"Rule 8 is designed to protect the communications made during the mediation itself and to protect the process . . . Further, any confidential matters the parties do not want disclosed can be protected through court proceedings including confidentiality provisions." *Huck v. Oakland Wings, LLC,* No. 5500, 2018 S.C. App. LEXIS 22 (Ct. App. Mar 28, 2018). Had Meritage wanted to conceal the settlement terms, it could have done so, and could have made Plaintiffs parties to that agreement in exchange for some valid consideration, none of which occurred.

Finally, as expressly noted by the Arbitrator, she did not consider or rely on the information provided regarding Meritage's settlement with its subcontractors. Specifically, the Arbitrator said "[a]t no time during the Arbitration was the Arbitrator aware of any monetary recovery by defendant Meritage against any subcontractors brought in as third-party defendants. Accordingly, this Order will only reflect the testimony of lay and expert witnesses and evidence presented during arbitration and an analysis of the applicable law." Final Award at p. 2. Thus, even if the provision of the non-confidential settlement information to the arbitrator was error, which the Plaintiffs deny, it is well settled that South Carolina Courts shall disregard harmless errors. See Rule 61, South Carolina Rules of Civil Procedure ("No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of

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the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.")

CONCLUSION

In sum, this Court should deny Meritage's Motion to Vacate the January 23, 2024, Arbitration Award and Motion to Reinstate the October 4, 2023, Arbitration Award, and in doing so, the Court should find:

1. The Final Award entered by the Arbitrator on January 23, 2024, is the only, and final award issued;
2. Meritage has failed to satisfy the requirements to either vacate or modify an arbitration award;
3. Confirm the Final Award of the Arbitrator entered with this Court on January 23, 2024;
4. The Arbitrator acted within her authority;
5. Circuit Court is not a proper venue to relitigate arbitration; and
6. Plaintiffs did not violate the South Carolina Rules of ADR and sanctions are improper.

Alternatively, should this Court be inclined to vacate the Final Award, which Plaintiffs do not believe is proper, there is no basis in law or equity for the Court to impose upon Plaintiff the Preliminary Award which was never confirmed and was formally vacated by the Arbitrator because it was erroneous. If the Final Award is vacated, then this matter should be arbitrated in its entirety with a new arbitrator.

[*signature page to follow]*

Respectfully submitted,

LYLES & ASSOCIATES, LLC

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March 20, 2024
Mount Pleasant, South Carolina

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October 4, 2023

VIA E-MAIL

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RE: Raghu Athimoolam and Irene Athimoolam v. Meritage Homes of South Carolina, Inc.
Civil Action No.: 2017-CP-04-00376
Our File No.: 5160/5753

Dear Robert, Danny, and David:

Following the arbitration in Greenville, South Carolina, on September 21-22, 2023, enclosed herein please find the Order based on the testimony and evidence presented.

I appreciate the opportunity of having been asked to serve as an arbitrator in this matter. I have tried to be meticulous in recalling the testimony and evidence without the assistance of an official transcript. However, if you believe I have misstated facts, please advise.

If this Order needs to be filed, we'll be happy to handle – just let me know, please.

With warmest regards, I remain

Very truly yours,

Becky Laffitte

RL:srm

Enclosure

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STATE OF SOUTH CAROLINA)) COUNTY OF ANDERSON)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	Civil Action No. 2017-CP-04-00376 **ARBITRATION ORDER**

This matter came to be heard in Arbitration in Greenville, South Carolina on September 21-22, 2023, pursuant to the arbitration clause in the Meritage Homes New Home Purchase Agreement executed by Raghu Athimoolam on April 10, 2015. The Agreement denotes "THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT AND IF THE FEDERAL ARBITRATION ACT IS INAPPLICABLE, THE UNIFORM ARBITRATION ACT SECTION 15-48-10 ET SEQ., CODE OF LAWS OF SOUTH CAROLINA 1976, AS AMENDED.

In their First Amended Complaint, plaintiffs assert causes of action against Meritage Homes of South Carolina, Inc., sounding in Negligence-Gross Negligence; Breach of Implied Warranty of Service and Breach of the Implied Warranty of Habitability.

FACTS

The plaintiffs, Raghu Athimoolam and Irene Athimoolam, purchased from Meritage Homes a three-story conventional wood-frame home supported by concrete foundation walls consisting of a walk-out balcony with two-floors above the basement level and an attached

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garage. The exterior cladding consists of a mix of brick masonry veneer, adhered manufactured stone veneer, and fiber-cement siding. The cash purchase for the home located at 116 Ariel Way in Easley, South Carolina totaled Four Hundred Twenty-Four Thousand Seven Hundred Fifty Three and No/100ths ($424,753.00) Dollars as documented in the Meritage Homes New Home Purchase Agreement executed on April 3, 2015. (Plaintiffs' Ex. 1) The anticipated move-in date of September 2015 was delayed and the closing occurred on October 29, 2015 in New York. Given the construction delays, the testimony at arbitration revealed that Meritage Homes paid for the attorneys' fees and closing costs. Prior to and at the time of the closing, plaintiffs admittedly had an opportunity to review the Agreement and ask questions. There is no evidence that they were coerced to sign the closing documents before they inspected the home in South Carolina. The Athimoolams testified that since Mr. Athimoolam was home for two weeks from his job in Dubai, they needed to close on the home so he could move the family to South Carolina before his return to Dubai. The Athimoolams also testified they trusted Meritage.

On November 2, 2015, the plaintiffs arrived to South Carolina and testified they found an unfinished home; deck cluttered with trash and debris (Plaintiffs' Exs. 2 and 3) and muddy conditions around the exterior of the home (Plaintiffs' Ex. 4 and 7). Mrs. Athimoolam also testified they were in shock as a water issue was apparent in the basement as captured in the photograph introduced into evidence (Plaintiffs' Ex. 5). They also discovered wet carpet and padding; a repaired hole cut in the basement drywall (Plaintiffs' Ex. 6); a board in the master bedroom, tile issues in the master bath (Plaintiffs Ex. 24), and other purported issues which are documented in photographs submitted into evidence. (Plaintiffs' Ex. 1-24)

Meritage replaced the carpet pad and carpet in the basement. Given conditions which they considered uninhabitable, plaintiffs testified that they informed Meritage Homes that

they would need a hotel in which to live since the home was unfinished. Meritage Homes paid the hotel expenses for the Athimoolams until Friday or Saturday of that week. Plaintiffs allegedly were told by representatives of Meritage Homes that these issues would be addressed. Mrs. Athimoolam testified that when they returned to their home following a brief stay in a hotel, they found a side glass section in their door broken (Plaintiffs' Ex. 10); the range hood remained unfinished (Plaintiffs' Ex. 11) and the surround around the fireplace had not been constructed to code. (Plaintiffs' Ex. 12) Meritage Homes resolved these issues but Mrs. Athimoolam complained about shoddy painting throughout the home, including the wall by the staircase to the basement (Plaintiffs' Ex. 13-14); bathroom tiles and bonus room which photographs were entered into evidence. Gaps were alleged to exist in several doors; questions remained whether wainscoting should have been used throughout the house (Plaintiffs' Ex. 23) and if ductwork for the HVAC system should have been installed in the basement area (Plaintiffs' Ex. 16). Mrs. Athimoolam also testified about issues with stained bath tubs and the absence of glass in the shower. (Plaintiffs' Ex. 24) Further, Mrs. Athimoolam testified she made calls to Meritage and on December 8, 2015, spoke with a customer care manager with Meritage. She later contacted a Divisional President and thought the issues would be resolved. Also, shortly after moving in, Mrs. Athimoolam contacted AdvantaClean to conduct mold testing on her home as she and her son were feeling ill. She testified she was unaware of a possible connection between Meritage and AdvantaClean which connection was not established through testimony or evidence at arbitration. She testified AdvantaClean found mold and she provided the report to Meritage. Meritage then removed three walls in the basement to permit mold remediation and/or treatment by AdvantaClean. (Plaintiffs' Exs. 17, 19) Meritage also paid to have the attic "fogged" (treated) but Mrs. Athimoolam remained unsatisfied. Mrs. Athimoolam continued to make

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complaints to Meritage about mold issues as she felt they were not being properly addressed. However, evidence introduced at arbitration noted that AdvantaClean tested the entire house and undertook and completed remediation in 2016. (Plaintiffs' Ex. 25; Defendant's Ex. 1)

On August 11, 2016, AdvantaClean wrote Meritage to report that mold remediation at the Athimoolam residence had been completed as outlined in the original scope of work, and the affected area(s) of the property were deemed visibly clean. (Defendant Ex. 1) A report from Southeast Environmental Microbiology Laboratories dated August 24, 2016, was introduced into evidence and attached to an email from Mrs. Athimoolam dated February 26, 2020 with results of testing on the outside, attic, main level, and basement of the Athimoolam home. (Plaintiffs' Ex. 26)

Mrs. Athimoolam sent an email dated September 7, 2016, to Meritage Homes detailing a number of issues, including her belief that AdvantaClean had utilized an improper dehumidifier in the basement, which email was introduced into evidence. (Plaintiffs' Ex. 27)

On September 6, 2016, Meritage prepared a ten (10) month Warranty List that was introduced into evidence. (Plaintiffs' Ex. 28)

On October 3, 2016, Mrs. Athimoolam prepared an email to Bryan Ross at Meritage Homes with twenty-four punch list items to which she testified remained unresolved. (Plaintiffs' Ex. 29)

On October 27, 2016, H. Ross Clements, AIA of Fuller Envelope prepared a Summary of Field Observations to the Athimoolam Residence. (Plaintiffs' Ex. 34). This report was revised on August 27, 2018, to include results from destructive testing. (Plaintiffs' Ex. 35)

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On November 1, 2016, Meritage sent a "sign off" letter in lieu of obtaining a signature to "Homeowner" at 116 Ariel Way in Easley, SC advising that all 10 Month Warranty request items had been resolved. (Plaintiffs' Ex. 30)

On November 18, 2016, Attorney Robert T. Lyles sent a certified letter to Meritage –"right to cure"- detailing deficiencies with the home pursuant to S.C. Code Ann § 40-59-810 and enclosing a preliminary report from Fuller Consulting Engineers of Greenville, South Carolina. (Plaintiffs' Ex. 31)

On March 3, 2017, a First Amended Summons and Complaint were filed on behalf of the Athimoolams against Meritage Homes of South Carolina, Inc.

On February 11, 2020, Meritage Homes of South Carolina, Inc. filed a Third-Party Action against the contractors and building suppliers who provided labor and materials utilized in the construction of the Athimoolam home

On June 28, 2022, Attorney David S. Cobb, as counsel for Meritage, sent a letter to Attorney Robert T. Lyles, counsel for the Athimoolams. advising that Meritage "elects to exercise the contractual right to repurchase the home, as provided for in the sales contracts for the sum of $431, 932. (Defendant's Ex. 3)

FINDINGS

I. Construction

The testimony and evidence presented at arbitration were expert intensive given the technical construction issues in dispute. Therefore, the witnesses qualified as experts were allowed to offer opinions. See Rule 702, SCRE ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify

thereto in the form of an opinion or otherwise.") Although the opinions of the experts differed in certain respects, I find there was consensus in a number of opinions which addressed deficiencies and cost estimates.

Testimony was also offered by plaintiffs, Irene Athimoolam and Raghu Athimoolam. Although no one from Meritage testified at arbitration, the testimony and evidence introduced through expert testimony, reports, and correspondence adequately detailed Meritage's position. Accordingly, this Order will reflect the testimony of lay and expert witnesses and evidence upon which the award is based. Further, the credentials and qualifications of several witnesses were challenged as were their opinions and estimates. While all witnesses were allowed to testify, no testimony about scope and pricing that had not been produced prior to or in depositions, produced in discovery or prior to arbitration was permitted into evidence.

Irene Athimoolam was the first witness to testify and she described how this was to be her "forever" home as she was moving from New York to begin a life in South Carolina with her husband and son. She expressed concerns about shoddy workmanship; Meritage's alleged failure to complete the warranty items (Plaintiffs' Exs. 28-29); mold issues; and Meritage's alleged failure to adequately and properly address her concerns despite conversations with Meritage sales representatives, a customer care management associate, and a Divisional President. During her testimony, twenty four (24) photographs were introduced into evidence documenting construction issues with the home from her perspective. Mrs. Athimoolam, over objection by counsel for Meritage, introduced a list of personal items which she maintains have been damaged beyond repair due to mold exposure and for which she seeks compensation. (Plaintiffs' Ex. 33)

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Mrs. Athimoolam further testified that she is unaware of any roof leaks since a repair to selected shingles was made to her home approximately six (6) years ago by a handy man, whose name she could not recall and which receipt documenting this expenditure was no longer available. Also, Mrs. Athimoolam testified that approximately seven (7) years ago, she had the exterior brick of her home power washed by a "neighborhood kid" and noticed no water intrusion. The veneer siding has not come off since the one section was repaired or replaced some years ago by Meritage. She also testified that no windows have leaked since they have occupied their home. As to her personal property damages, her testimony was permitted over objection by Meritage counsel, David Cobb, who argued these are non-recoverable damages as they were not claimed damages in the Amended Complaint; items are still in use; their purported value is speculative given the absence of receipts which document dates and costs of the purchases and plaintiffs' failure to mitigate their damages. (Plaintiffs' Ex. 33) Raghu Athimoolam also testified; however, since he was working in Dubai, he relied upon information provided by Mrs. Athimoolam.

H. Ross Clements, AIA, a partner with Fuller Envelope, was called as an expert on behalf of the Athimoolams and was qualified as an expert in forensic architecture, without objection. Mr. Clements testified that he inspected the Athimoolam home on September 1, 2016, with Jamison Hupp, Associate AIA, and made field observations. His October 27, 2016 report (Plaintiffs' Ex. 34) was revised on August 27, 2018 after destructive testing was performed at localized areas of the Athimoolam home. (Plaintiffs' Ex. 35) Mr. Clements has not returned to the Athimoolam home since 2018. During the August 2018 inspection, a contractor, Rodney Edwards, accompanied him and prepared an estimate on the suggested scope of repairs. Unfortunately, due to health issues, Mr. Edwards was unable to testify about his cost estimate

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totaling approximately $265,730. The revised report of Mr. Clements dated August 27, 2018 included eighteen (18) recommendations, including but not limited to the following:

1. Removal and reinstallation of existing windows and doors, to include all necessary flashing, SAF, and WRB
2. Removal and replacement of exterior cladding; brick veneer, AMSV, composite MDF trim and related accessories
3. Contractor to provide an allowance for interior repairs for nail pops, drywall painting, etc.
4. At exterior alcove area of the walk-out basement, regrade surface by walk-out basement and install a catch basin with underground corrugated piping, if necessary
5. At the rear elevation, first floor level, repair and replace LVL beam; joist hangers; fasteners, etc., per manufacturer's installation instructions
6. Localized repairs shall be performed to the deck structure to provide lateral bracing; proper attachment of components, including, but not limited to, lateral connections; ledger fasteners; remove existing guardrail posts and install new 4 x 4 posts using appropriate bolts, anchors, wood columns, etc.
7. At the rear elevation, remove existing gutter and replace with 6" K style gutter. Reinstall existing downspouts. Gutters shall match existing color. Insure downspouts terminate.
8. Properly integrate drip edges with roofing underlayment along the eaves; replace any underlayment and/or shingles damaged during repair. Apply roof cements;

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remove shingles at gable cornices (front elevation) and install underlayment properly lapped with the WRB and other flashings, as applicable.

9. At the first floor mudsill plate for perimeter of structure, install fasteners into unattached mudsill anchors and additional fasteners at anchors lacking fasteners.

10. Within the basement, install closed-cell spray foam at the rim board on first floor, and Rockwool Comfortbatt (R-13 minimum) batt insulation within the stud cavities. Spray foam over foam board blocking.

11. As recommended by Environmental Testing Report, abate fungal growth in all areas where fungal growth was found to be present (basement and attic). After abatement, indoor air quality investigation shall be performed in the basement by a certified indoor environmentalist. Remove and replace gypsum board finishes as required to perform abatement.

12. At the Master Bedroom, remove and reset out-of-square door and jamb. Install new interior casing as required. Paint and caulk finishes.

13. At the Garage, remove brown-colored masonry mortar and replace with Sika Repair SHB mortar. Prime exposed steel reinforcement with Sika Arnatec 110 EpoCem; repair additional spall locations not previously repaired. Install cementious parge coat on concrete walls for uniform finish.

14. At the Garage, remove the existing garage door guide rails and install rails of proper height to provide 6 – 8" minimum clearance at house entry door landing.

15. Replace adjacent materials affected by the repair work in-kind.

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16. Contractor shall provide for all general conditions, including, but not limited to: protection of existing property and adjacent areas not subject to the repair areas, building permits, demolition/disposal costs, final cleaning, etc.

17. Contractor shall provide a 5% contingency allowance and their preferred overhead/profit percentages

18. Contractor shall provide a line item for A/E fees at 10% of the total cost of construction (including OHP)

(Plaintiffs' Ex. 35)

Mr. Clements testified that all of the documented deficiencies and recommendations need to be addressed to bring the home into compliance with the applicable building codes; manufacturer's instructions and industry standards. Support for his recommendations were documented and discussed in a PowerPoint presentation identified as Plaintiffs' Ex. 36. Mr. Clements further testified that it was his understanding that the scope of his noted deficiencies and recommendations to cure the deficiencies were provided to Matthew Harmon with Claims Construction & Restoration for pricing. Mr. Clements further testified that he had no discussions with Mr. Harmon about the proposed scope of repair and pricing. Also, Mr. Clements admitted that no repairs, etc., were requested to be made after the destructive testing in 2018 and he has no information if the conditions to the home as he observed in 2018 have changed in 2023.

In addition to observed window installation deficiencies, Mr. Clements noted concerns, in part, about the installation of the fiber-cement lap siding; grading deficiencies at the rear of the home near the basement; deck; roof underlayment along the eaves, as well as other areas denoted above.

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During cross examination by Meritage's counsel, key points to which Mr. Clements testified about the 2018 conditions to the Athimoolam home included the following: a) there is no evidence that any of the windows have leaked or resulted in water intrusion into the home since occupancy; b) during the destructive testing in 2018, no rotten wood, deteriorated sheathing or evidence of water intrusion were observed at the front and side elevations of the home; alcove or roof; c) the window manufacturer was not contacted to determine if any warranties will be impacted if the windows are removed and reinstalled per the protocol recommended by Mr. Clements which do not include the replacement of any of the windows in the home. Mr. Clements further testified that the issues and recommendation noted for the garage could be corrected in one (1) day.

Matthew Harmon of Claims Construction and Restoration was offered as an expert by the plaintiffs in cost estimation and construction repairs. Although a motion was made to exclude Mr. Harmon's testimony based on challenges to his credentials, the objection was overruled but noted. Mr. Harmon was retained to prepare a cost estimate on the scope of work proposed by Ross Clements. Mr. Harmon prepared two reports identified as Plaintiffs' Exs. 37-38 to which "Preliminary Estimate Only" is affixed to both. He testified that following his deposition, he had to revise the initial cost estimate to correct a typo of 140 hours of labor to 40 hours; and to remove estimations for drywall and HVAC technician costs. Through his testimony, he admitted that he had not obtained quotes on the "bid" items and that many of the costs included in his reports exceeded the scope of Mr. Clements' recommendations and were included at the request of the Athimoolams. Also, he never discussed the scope and pricing with Mr. Clements as reflected in his reports. (Plaintiffs' Exs. 37 – 38)

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At the time he met with the Athimoolams, Mr. Harmon had only been a licensed contractor for two months. (Defendant's Ex. 4) During this visit, Mr. Harmon did not look in the attic or inspect the second level of the home because Mr. Athimoolam was resting. However, he did record issues noted by Mrs. Athimoolam and included her concerns in the projected cost estimation which was not within the scope of work proposed by Ross Clements. Mr. Harmon utilized an insurance claims adjusting software, Xactimate, to prepare the cost estimates provided. He testified that he could input certain data about the location and zip code of the home which did not necessitate that he speak with building suppliers or contractors in Anderson, South Carolina, admitting that cost and price differences exist in various parts of the state.

In addressing some of the recommendations noted by Ross Clements, Mr. Harmon included the costs of new windows as he did not believe the warranty would be valid if he removed the windows, installed flashing, etc. and then reinstalled the windows. (Plaintiffs' Ex. 38, p. 25) However, he did not contact the manufacturer of the existing windows to discuss if the warranty would be impacted with a removal and reinstallation of the windows. Also, although the scope of work proposed by Ross Clements did not include the removal and installation of a new roof, Mr. Harmon included this in his cost estimate, as well as the construction of a new deck. (Plaintiffs' Ex. 38, p. 25).

As to Mr. Clements' recommendation about the removal and replacement of the exterior cladding and brick veneer repairs, Mr. Harmon listed these costs as bid items which costs have not yet been determined. Although Mr. Clements' scope of work to the deck structure does not indicate the necessity to construct a new deck, Mr. Harmon's estimate includes the construction of a deck as a "bid" number which has not yet been determined. While Mr. Clements' cost estimate only denoted the removal and replacement of the gutter to be followed

by the reinstallation of the existing downspouts, Mr. Harmon's estimate contemplates the removal and replacement of both the gutter and downspouts. The evidence further reveals, through Mr. Harmon's testimony, that 75% of his reported cost estimate was from items provided by the homeowners, while 25% from Mr. Clements' report. However, the testimony and evidence show that Mr. Harmon exceeded the scope of Mr. Clements' recommendation in his cost projection and that it is questionable if 25% of the costs in the report are attributable to the scope prepared by Mr. Clements as he has never communicated with Mr. Clements about his cost estimations or scope of work. Further, the cost estimations in both of Mr. Harmon's reports (Plaintiffs' Exs. 37 and 38) do not reflect the costs of the estimate of Rainbow International Restoration or that the scope of work and pricing in Rainbow's report are supported by the testimony and evidence. (Plaintiffs' Ex. 42)

Richard J. Rogers, P.E., M.B.A. of Rogers Construction Engineering was offered as an expert forensic engineer and licensed general contractor on behalf of Meritage Homes, without objection. Mr. Rogers testified that he received the Fuller Envelope (Clements) reports and visited the Athimoolam home on July 15 2019. Mr. Rogers testified that he went inside the Athimoolam home, stuck his head in the attic and concentrated his time in the basement. He was informed of no roof leaks or water intrusion through any of the windows since the Athimoolams moved into the home. He testified he is currently involved in seven litigation matters involving Meritage but he has not been hired in any to make repairs.

In discussing the Fuller Envelope reports addressing the windows, Mr. Rogers admitted that he could not tell if the building wrap had been properly applied. Although photos of the flashing are such that it appears flashing was properly installed, he could not testify to the manner of installation with certainty. As for questions about the positioning of the nails used in

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the window installation, he testified it was his belief that installing the nails in areas other than the nail fin did not violate any requirements. Further, since he does not know the condition of each window in terms of installation, he found relevant and significant the absence of any leaks and water intrusion through any of the windows in the Athimoolam home since 2015 which supports his position that no repairs need to be made to any of the windows in the Athimoolam home. Defendant, Meritage Homes, also introduced into evidence numerous photographs of the Athimoolam home. (Defendant's Ex. 2 and 7)

As for the fourteen recommendations made by Mr. Clements, Mr. Rogers testified in conformity with a prior report identified as Defendant's Ex. 5; Plaintiffs' Ex. 32, which include his recommendations and pricing to resolve any construction issues:

1. Removal and reinstallation of the existing windows and doors – No action required
2. Removal and replacement of the exterior cladding, including all fiber-cement siding, brick veneer, AMSV, composite MDF trim and related accessories. All work described can be performed for less than $15,000.
3. Contractor allowance for interior repairs, for nail pops, drywall, painting, etc. – Unnecessary
4. Exterior alcove of the walk-out basement – work can be performed for $1,500
5. At rear elevation, first floor level – repairs should be performed as described in Fuller report – work can be performed for $1,000
6. Localized repairs to deck structure – work can be performed for $1,000
7. At the rear elevation remove existing gutter and replace Unnecessary as gutter is functioning.

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8. Properly integrate drip edges with roofing underlayment – Unnecessary – $2,000 through testimony at arbitration

9. At the first-floor mudsill plate for perimeter of structure. Fasteners, etc. – work can be performed for $300

10. Basement, spray foam – batt insulation is acceptable by code – work can be performed for $500

11. As recommended by Environmental Testing & Management – Unnecessary Advanta issued clean report

12. At the Master Bedroom, remove and reset the out-of-square door and jamb - work can be performed for $1,000

13. At the Garage, remove brown colored masonry mortar and replace - work can be performed for $500

14. At the Garage, remove existing door guide rails and install proper rails - work can be performed for $500

Mr. Rogers further testified that his proposed cost estimate today based on inflation would be in the Thirty Thousand and No/100ths ($30,000.00) Dollars range, plus approximately Two Thousand and No/100ths ($2,000.00) Dollars to address some of the roofing issues noted by Mr. Clements.

II. Mold
(Industrial Hygienists)

Environmental Testing and Management, Inc. (Andrew G. Schauder) was retained by Mrs. Athimoolam to provide professional and technical consulting services by conducting a limited evaluation of an alleged water intrusion/mold issue impacting several locations within her residence. He was offered as an expert in industrial hygiene without opposition.

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On the initial visit, November 28, 2016, Mr. Schauder was informed of prior services provided by AdvantaClean. His most notable observation from an exterior inspection was the grading of the land at the rear of the house, a sample collected in the basement – unfinished utility, and the level of the Penicillium/Aspergillus group of fungi which he testified was borderline elevated. Mrs. Athimoolam provided Mr. Schauder with two spore trap reports, one dated July 28, 2016 and one dated August 24, 2016. No written report accompanied either lab report. Of the information provided, Mr. Schauder opined that all of the samples collected inside the house were found to have a lower total fungal spore count than that present in the outdoor air.

A visual examination of the remainder of the interior of the house did not find any evidence of any significant water intrusion or mold growth. However, his report reflects elevations of Penicillium/Aspergillus group of fungi to be elevated on both the main floor, as well as the basement. From the initial inspection, Mr. Schauder concluded the most likely explanation for prior mold growth on the floor joists in the attic and basement was that the wood framing members were left exposed to the elements outside for an extended period of time. He suggested test cuts needed to be made in the sheetrock walls and ceilings so a complete scope of work could be determined and a protocol prepared for the remediation of the impacted areas. No recommendations in the December 2016 report were addressed. No complete scope of work was determined and no protocol for mold remediation was prepared or introduced into evidence. (Plaintiffs' Ex. 39)

Four-plus years later, on August 26, 2021, Mr. Schauder returned to the Athimoolam home and met with Mr. and Mrs. Athimoolam. During this time, there is no evidence that any other testing occurred or protocols proposed for mold remediation. As

documented in his report (Plaintiffs' Ex. 40), his follow-up inspection began in the basement. Finding what he described as prior or suspected fungal growth and staining in a bedroom, basement, and attic, he again recommended that a complete scope of work be determined, and a protocol prepared for the remediation of fungal growth in the designated areas. No protocol or scope of work was prepared or introduced into evidence.

On April 6, 2023, Mr. Schauder returned for a second follow up water intrusion/mold investigation in areas above the existing sheetrock ceilings and attic. (Plaintiffs' Ex. 41) In this report, Mr. Schauder referenced reports from Environmental Testing and Management, Inc., and General Engineering. (GEL Report March 3, 2021 – Defendant's Ex. 6) Mr. Schauder opined that the presence of staining on wood framing members found throughout the house and attic was most likely the result of prior mold growth. While he noted the necessity to remove all sheetrock walls and ceilings in the affected areas, he never proposed a scope of work or noted any health or safety issues. In a deposition taken before the arbitration, Mr. Schauder testified he had not prepared a protocol or performed mapping of the timbers. When he attempted to testify to a protocol at arbitration, an objection was made by counsel for Meritage and sustained given that the information had not been provided in discovery, in a deposition, and/or prior to the arbitration.

Also, during Mr. Schauder's deposition on November 23, 2020, he had no recommendations for a remediation protocol and found no evidence of fungal growth on the first and second levels of the home. Also, he noted no water intrusion in the attic and noted no health concerns for the Athimoolams. A few days before the arbitration, Mr. Schauder testified he was provided a copy of the Rainbow International Restoration proposal (Plaintiffs' Ex. 42) but did

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not discuss specifics about the proposal or provide a scope of work to Steven Lambright with Rainbow International Restoration.

Steven Lambright, a licensed contractor with Rainbow International Restoration, prepared a cost projection utilizing Xactimate for mold remediation to the Athimoolam home. (Plaintiffs' Ex. 42) The expertise and qualifications of Mr. Lambright were challenged but he was permitted to testify, over objection. Mr. Lambright testified that approximately eighteen (18) months ago, he observed no active water leaks in the attic and none in the basement. Mr. Lambright admitted that Mr. Schauder had not approved the scope of the work or provided a suggested protocol for mold remediation. Therefore, I did not find his testimony reliable or his report properly supported.

Following the denial of directed verdict motions made by counsel for Meritage Homes, Meritage called Ronald S. Sharpe, C.I.H., R.S., with GEL Engineering LLC as an expert witness. Mr. Sharpe's report was marked as Defendant Exhibit 6. Mr. Sharpe, who conducted IEQ assessments of the environmental quality of the Athimoolam interior on October 30, 2019 and November 12, 2020 offered his opinions in his written report and noted that no further mold remediation is necessary at the Athimoolam home. Mr. Sharpe also noted in detail repairs and remedial activities that had predated his inspection and testing. He then offered suggestions once the repair of any source of water/moisture intrusion is resolved.

DAMAGES

It is well settled in South Carolina that "the applicable measure of damages [can] be shown by the cost of repairs." Kincaid v. Landing Dev. Corp., 289 S.C. 89, 94, 344 S.E.2d 869, 873 (Ct. App. 1986). Further, a plaintiff may testify as to his/her belief on value or damage to personal property. Waites v. S.C. Windstorm & Hail Underwriting Ass'n, 279 S.C. 362, 366,

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307 S.E.2d 223, 225 (1983). However, the burden is still upon the plaintiff to establish the nature, character, an extent of damages which are proximate consequences of the defendant's acts. Despite Mrs. Athimoolam's testimony, no evidence was presented to support the allegations that any of the claimed personal property had been damaged or ruined due to water intrusion or mold. Also, she was unable to provide any testimony or evidence as to the value of the alleged items since no sales receipts were introduced into evidence. (Plaintiffs' Ex. 33) Further, testimony elicited during the arbitration revealed that many items are still in use in the home and that there has been no effort to mitigate damages by removing the items from the house.

Given the technical and scientific issues in dispute, the opinions of all qualified experts were considered as was the reliability of their testimony. Since Mr. Schauder did not provide a protocol and scope of work prior to arbitration, this testimony on a protocol and scope of repairs was not permitted into evidence. State v. Warner, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2000).

Since there have been no observed leaks or water intrusion at the windows since the Athimoolams moved in in 2015, I find that the recommendation by expert Ross Clements to remove and reinstall the windows to install flashing, etc., to be unnecessary, particularly absent any testimony of what impact his recommendation may have on any window warranties or costs associated with this recommendation.

Further, since there was no evidence of roof leaks to the Athimoolam home after a minor repair approximately six (6) years ago, I find the scope of work and associated costs in the report prepared by and testimony given by Jay Rogers to be reliable as he is a licensed general contractor and engineer.

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Additionally, I find mold remediation in any area of the Athimoolam home is not supported by the testimony and evidence and no award is given for these claimed damages.

AWARD

Based on the testimony and evidence presented at arbitration, I hereby award damages to the Athimoolams in the amount of **Fifty-One Thousand Four Hundred Thirteen and 88/100ths ($51,413.88) Dollars** comprised of the following:

The sum of **Twenty-Five Thousand and No/100ths ($25,000.00) Dollars** to address exterior siding issues, exclusive of siding removal (Item 2);

The sum of **Five Hundred Fifty and No/100ths ($550.00) Dollars** for interior painting in master bedroom after removal and reset of out-of-square door and jamb (Item 3);

The sum of **Three Thousand and No/100ths ($3,000.00) Dollars** for regrading of exterior alcove area of walk-out basement and installation of surface catch basin, if necessary (Item 4);

The sum of **One Thousand and No/100ths ($1,000.00) Dollars** for grading at the rear elevation, first floor level (Item 5);

The sum of **Two Thousand Five Hundred and No/100ths ($2,500.00) Dollars** for localized repairs to deck structure (Item 6);

The sum of **Seven Thousand Three Hundred Twenty-One and 97/100ths ($7,321.97) Dollars** for replacement of the gutter and downspouts with appropriate color match only at the rear elevation of the home with the size recommended by Ross Clements - 5 ½ x 4 ½ (Item 7);

The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** per opinions of Jay Rogers (Item 8);

The sum of **Three Hundred and No/100ths ($300.00) Dollars** for fastener installation into unattached mudsill anchors at mudsill plate for perimeter of structure (Item 9);

The sum of **Three Thousand Two Hundred Ninety-Three and 63/100ths ($3,293.63) Dollars** for batt insulation, spray foam, etc. in basement (Item 10);

The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove and reset the out-of-square door and door jamb in Master Bedroom (Item 12);

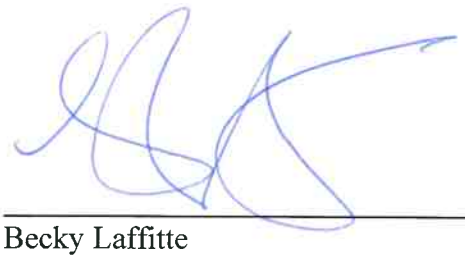
The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to remove brown-colored masonry mortar, repair spall locations and install a cementious parge coat to concrete walls for uniform finish (Item 13);

The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove existing garage door rails and install rails that are proper height (Item 14); and

The sum of **Two Thousand Four Hundred Forty-Eight and 28/100ths ($2,448.28) Dollars** as a 5% contingency allowance (Item 16).

Therefore, it is hereby Ordered, Adjudged, and Decreed that the plaintiffs are awarded the sum of **Fifty-One Thousand Four Hundred Thirteen and 88/100ths ($51,413.88) Dollars**.

AND IT IS SO ORDERED.



Becky Laffitte
Arbitrator

October 4, 2023

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	)	Civil Action No. 2017-CP-04-00376 **ARBITRATION ORDER**

This matter is before the Arbitrator upon Motion of Plaintiffs seeking to Alter or Amend an Arbitration Order dated October 4, 2023, upon numerous grounds asserted by plaintiffs. The defendant, Meritage Homes of South Carolina, Inc., opposes the motion. Pursuant to the Meritage Homes New Purchase Agreement, "This agreement is subject to mandatory arbitration pursuant to the Federal Arbitration Act and if the Federal Arbitration Act is inapplicable, the Uniform Arbitration Act, Section 15-48-10, et. seq., Code of Laws of South Carolina, 1976, as amended, applies." Since no aspect of this Arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS"), the Arbitrator finds the Federal Arbitration Act to be inapplicable.

Despite unfounded and unsubstantiated allegations of bias and partiality which may be asserted against the Arbitrator, factual and legal errors by arbitrators do not constitute abuse of their powers and can be corrected to ensure that the interests of all parties are protected. Pittman Mortg. Co., Inc. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997).

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At no time during the Arbitration was the Arbitrator aware of any monetary recovery by defendant Meritage against any subcontractors brought in as third-party defendants. Accordingly, this Order will only reflect the testimony of lay and expert witnesses and evidence presented during arbitration and an analysis of the applicable law. However, the Arbitrator acknowledges the concerns raised by Meritage's counsel about the disclosure of the confidential settlement terms at mediation involving third-party defendants.

Based on the testimony, a detailed review of notes and all exhibits introduced into evidence at the Arbitration, the applicable law, a telephone hearing with all counsel on November 17, 2023, followed by additional submissions from both parties, the previous Order dated October 4, 2023, which was never entered, is hereby vacated, to the extent necessary, and this Order is hereby entered with the Honorable Clerk of Court for Anderson County.

FACTS

The plaintiffs, Raghu Athimoolam and Irene Athimoolam, purchased from Meritage Homes a three-story conventional wood-frame home supported by concrete foundation walls consisting of a walk-out balcony with two-floors above the basement level and an attached garage. The exterior cladding consists of a mix of brick masonry veneer, adhered manufactured stone veneer, and fiber-cement siding. The cash purchase for the home located at 116 Ariel Way in Easley, South Carolina totaled Four Hundred Twenty-Four Thousand Seven Hundred Fifty-Three and No/100ths ($424,753.00) Dollars as documented in the Meritage Homes New Home Purchase Agreement executed on April 3, 2015. (Plaintiffs' Ex. 1)

The anticipated move-in date of September 2015 was delayed and the closing occurred on October 29, 2015 in New York. Given the construction delays, the testimony at arbitration revealed that Meritage Homes paid for the attorneys' fees and closing costs. Prior to

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and at the time of the closing, plaintiffs admittedly had an opportunity to review the Agreement and ask questions. There is no evidence that they were coerced to sign the closing documents before they inspected the home in South Carolina. The Athimoolams testified that since Mr. Athimoolam was home for two weeks from his job in Dubai, they needed to close on the home so he could move the family to South Carolina before his return to Dubai. The Athimoolams also testified they trusted Meritage.

On November 2, 2015, the plaintiffs arrived to South Carolina and testified they found an unfinished home; deck cluttered with trash and debris (Plaintiffs' Exs. 2 and 3) and muddy conditions around the exterior of the home (Plaintiffs' Ex. 4 and 7). Mrs. Athimoolam also testified they were in shock as a water issue was apparent in the basement as captured in the photograph introduced into evidence (Plaintiffs' Ex. 5). They also discovered wet carpet and padding; a repaired hole cut in the basement drywall (Plaintiffs' Ex. 6); a board in the master bedroom, tile issues in the master bath (Plaintiffs' Ex. 24), and other purported issues which are documented in photographs submitted into evidence. (Plaintiffs' Ex. 1-24)

Meritage replaced the carpet pad and carpet in the basement. Given conditions which they considered uninhabitable, plaintiffs testified that they informed Meritage Homes that they would need a hotel in which to live since the home was unfinished. Meritage Homes paid the hotel expenses for the Athimoolams until Friday or Saturday of that week. Plaintiffs allegedly were told by representatives of Meritage Homes that these issues would be addressed. Mrs. Athimoolam testified that when they returned to their home following a brief stay in a hotel, they found a side glass section in their door broken (Plaintiffs' Ex. 10); the range hood remained unfinished (Plaintiffs' Ex. 11) and the surround around the fireplace had not been constructed to code. (Plaintiffs' Ex. 12) Meritage Homes resolved these issues but Mrs. Athimoolam

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complained about shoddy painting throughout the home, including the wall by the staircase to the basement (Plaintiffs' Ex. 13-14); bathroom tiles and bonus room which photographs were entered into evidence. Gaps were alleged to exist in several doors; questions remained whether wainscoting should have been used throughout the house (Plaintiffs' Ex. 23) and if ductwork for the HVAC system should have been installed in the basement area (Plaintiffs' Ex. 16). Mrs. Athimoolam also testified about issues with stained bath tubs and the absence of glass in the shower. (Plaintiffs' Ex. 24) Further, Mrs. Athimoolam testified she made calls to Meritage and on December 8, 2015, spoke with a customer care manager with Meritage. She later contacted a Divisional President and thought the issues would be resolved. Also, shortly after moving in, Mrs. Athimoolam contacted AdvantaClean to conduct mold testing on her home as she and her son were feeling ill. She testified she was unaware of a possible connection between Meritage and AdvantaClean which connection was not established through testimony or evidence at arbitration. She testified AdvantaClean found mold and she provided the report to Meritage. Meritage then removed three walls in the basement to permit mold remediation and/or treatment by AdvantaClean. (Plaintiffs' Exs. 17, 19) Meritage also paid to have the attic "fogged" (treated) but Mrs. Athimoolam remained unsatisfied. Mrs. Athimoolam continued to make complaints to Meritage about mold issues as she felt they were not being properly addressed. However, evidence introduced at arbitration noted that AdvantaClean tested the entire house and undertook and completed remediation in 2016. (Plaintiffs' Ex. 25; Defendant's Ex. 1)

On August 11, 2016, AdvantaClean wrote Meritage to report that mold remediation at the Athimoolam residence had been completed as outlined in the original scope of work, and the affected area(s) of the property were deemed visibly clean. (Defendant Ex. 1) A report from Southeast Environmental Microbiology Laboratories, dated August 24, 2016, which

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analyzed the data from AdvantaClean Greenville, was also introduced into evidence. (Plaintiff's Ex. 26) An email dated August 25, 2016, from Meritage Homes to Mrs. Athimoolam noted "everything is clear" and was attached to an email from Mrs. Athimoolam to Paula Jean Allamong (Meritage Homes) dated February 26, 2020 with results of Airy Springs Air Test/Spore Trap Report on the outside, attic, main level, and basement of the Athimoolam home. (Plaintiffs' Ex. 26)

Mrs. Athimoolam sent a September 7, 2016, email to Meritage Homes detailing a number of issues, including her belief that AdvantaClean had utilized an improper dehumidifier in the basement and that the grading was not properly completed, which 2016 email was forwarded to Paula Jean Allamong with Meritage on February 26, 2020, and introduced into evidence. (Plaintiffs' Ex. 27)

On September 22, 2016, Meritage prepared a ten (10) month Warranty List that was introduced into evidence. (Plaintiffs' Ex. 28)

On October 3, 2016, Mrs. Athimoolam prepared an email to Bryan Ross at Meritage Homes with twenty-four punch list items to which she testified remained unresolved. (Plaintiffs' Ex. 29)

On October 27, 2016, H. Ross Clements, AIA of Fuller Envelope prepared a Summary of Field Observations to the Athimoolam Residence. (Plaintiffs' Ex. 34). This report was revised on August 27, 2018, to include results from destructive testing. (Plaintiffs' Ex. 35)

On November 1, 2016, Meritage sent a "sign off" letter in lieu of obtaining a signature to "Homeowner" at 116 Ariel Way in Easley, SC advising that all 10 Month Warranty request number 537485 items had been resolved. (Plaintiffs' Ex. 30)

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On November 18, 2016, Attorney Robert T. Lyles sent a certified letter to Meritage advising of his representation of the Athimoolams and of a "right to cure" detailing deficiencies with the home pursuant to S.C. Code Ann § 40-59-810 and enclosing a preliminary report from Fuller Consulting Engineers of Greenville, South Carolina. (Plaintiffs' Ex. 31)

On March 3, 2017, a First Amended Summons and Complaint were filed on behalf of the Athimoolams against Meritage Homes of South Carolina, Inc.

On February 11, 2020, Meritage Homes of South Carolina, Inc. filed a Third-Party Action against the contractors and building suppliers who provided labor and materials utilized in the construction of the Athimoolam home. At the time of the Arbitration and the issuance of the initial Order, the Arbitrator had no knowledge or information about any resolution of claims involving any third-party defendants sued by Meritage nor should the Arbitrator have been privy to any settlement that occurred at mediation.

On June 28, 2022, Attorney David S. Cobb, as counsel for Meritage, sent a letter to Attorney Robert T. Lyles, counsel for the Athimoolams. advising that Meritage "elects to exercise the contractual right to repurchase the home, as provided for in the sales contracts for the sum of $431,932. (Defendant's Ex. 3)

The Arbitration of this matter occurred on September 21 and 22, 2023, in Greenville, South Carolina. No aspect of this Arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS") pursuant to its arbitration rules and comprehensive services.

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FINDINGS

I. Construction

The testimony and evidence presented at arbitration on September 21 and 22, 2023, were expert intensive given the technical construction issues in dispute. Expert testimony is subject to the reliability requirement. See Rule 702, SCRE ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.") Also, a person may be qualified as an expert in a particular area based upon knowledge, skill, experience, and training. Watson v. Ford Motor Co., 389 S.C.437, 699 S.E.2d 169. If the opinions of the experts differ in certain respects, the Arbitrator is charged with determining questions of law and fact as would the judge and jury. S.C. Code Ann. § 15-48-180. Accordingly, the "decision to accept or reject [the experts] testimony [i]s ultimately a question of credibility for the [arbitrator] to decide." Id. (citing Menne v. Keowee Key Prop. Owners' Assn., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (stating "[t]he credibility of testimony is a matter for the finder of fact to judge.").

The experts who testified as to alleged construction defects were H. Ross Clements, AIA, and Richard J. Rogers, P.E., M.B.A., both offered without objection. While their opinions differed significantly, the Arbitrator found both to be qualified and has considered aspects of their respective opinions in deciding this matter.

The credentials, qualifications and/or opinions of Matthew Harmon with Claims Construction and Restoration (Exs. 37, 38); Steven Lambright with Rainbow International (Ex. 42), and Mr. Andrew G. Schauder, CIH (Exs. 39 – 41) were challenged, as were their opinions and estimates. While all witnesses were allowed to testify, no testimony about scope and pricing

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that had not been produced prior to or in depositions, in discovery or prior to arbitration was permitted into evidence. However, since plaintiffs moved for reconsideration, the Arbitrator requested and reviewed the "Draft" mold remediation scope of work prepared by Mr. Andrew Schauder dated April 18, 2023, which was marked as Exhibit 41 at Arbitration without the "Draft" designation, as well as the submissions submitted to the Arbitrator on behalf of the Athimoolams dated November 22, 2023, and December 5, 2023, and submissions on behalf of Meritage dated October 30, 2023, and January 5, 2024.

Testimony was also offered by plaintiffs, Irene Athimoolam and Raghu Athimoolam. The Athimoolams have asserted that Meritage's failure to testify at arbitration raises an inference that the testimony, if submitted, would have been unfavorable to Meritage's position. Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962). The Arbitrator is familiar with this legal principle, as well as the law that places the burden of proof upon plaintiffs to establish the asserted causes of action against Meritage.

Irene Athimoolam was the first witness to testify and she described how this was to be her "forever" home as she was moving from New York to begin a life in South Carolina with her husband and son. She expressed concerns about shoddy workmanship; Meritage's alleged failure to complete the warranty items (Plaintiffs' Exs. 28-29); mold issues; and Meritage's alleged failure to adequately and properly address her concerns despite conversations with Meritage sales representatives, a customer care management associate, and a Divisional President. During her testimony, twenty-four (24) photographs were introduced into evidence documenting construction issues with the home from her perspective. Mrs. Athimoolam, over objection by counsel for Meritage, introduced a list of personal items which she maintains have

been damaged beyond repair due to mold exposure and for which she seeks compensation. (Plaintiffs' Ex. 33)

Mrs. Athimoolam further testified at Arbitration that she is unaware of any roof leaks since a repair to selected shingles was made to her home approximately six (6) years ago by a handy man retained by her, whose name she could not recall and which receipt documenting this expenditure was no longer available. On a submission of additional documents for review on behalf of the Athimoolams by their counsel on December 5, 2023, Mrs. Athimoolam submitted a page from her deposition (page 22) discussing leaks in the bedroom and main bathroom level. Also, Mrs. Athimoolam testified that approximately seven (7) years ago, she had the exterior brick of her home power washed by a "neighborhood kid" and noticed no water intrusion. The veneer siding has not come off since the one section was repaired or replaced approximately six (6) years ago by Meritage. She also testified that no windows have leaked since they have occupied their home. As to her personal property damages, her testimony was permitted over objection by Meritage counsel, David Cobb, who argued these are non-recoverable damages as they were not claimed damages in the Amended Complaint and just provided to Attorney Robert Lyles in September 2023; the items are still in use; their purported value is speculative given the absence of receipts which document dates and costs of the purchases and plaintiffs' failure to mitigate their damages. (Plaintiffs' Ex. 33) Raghu Athimoolam also testified; however, since he was working in Dubai, he relied upon information provided by Mrs. Athimoolam.

H. Ross Clements, AIA, a partner with Fuller Envelope, was called as an expert witness on behalf of the Athimoolams and was qualified as an expert in forensic architecture, without objection. Mr. Clements introduced a PowerPoint presentation during Arbitration (Ex.

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36) and testified that he inspected the Athimoolam home on September 1, 2016, with Jamison Hupp, Associate AIA, and conducted a visual survey and made field observations. His October 27, 2016 report (Plaintiffs' Ex. 34) was revised on August 27, 2018 after destructive testing was performed and documented at localized areas of the exterior envelope at the Athimoolam home. (Plaintiffs' Exs. 35 and 36) Of note is the destructive testing conducted along the left elevation and base of the wall and window heads of the home with regard to the fiber-cement lap siding; brick veneer at the left, right and rear elevations; and adhered manufactured stone veneer (AMSV) at three walls that comprise the bay window feature at the front left corner of the home. Meritage's counsel challenged the isolated test cuts and findings as not determinative or conclusive of the condition of the entire exterior envelope of the Athimoolam home.

During the August 2018 inspection, a contractor, Rodney Edwards, accompanied Mr. Clements and prepared an estimate on the suggested scope of repairs. Unfortunately, due to health issues, Mr. Edwards was unable to testify about his cost estimate totaling approximately $265,730. The revised report of Mr. Clements dated August 27, 2018 included eighteen (18) recommendations which he opined were needed in order for the Athimoolam home to meet building code and industry standards, including but not limited to the following:

1. Removal and reinstallation of existing windows and doors, to include all necessary flashing, SAF, and WRB
2. Removal and replacement of exterior cladding; brick veneer, AMSV, composite MDF trim and related accessories
3. Contractor to provide an allowance for interior repairs for nail pops, drywall painting, etc.

4. At exterior alcove area of the walk-out basement, regrade surface by walk-out basement and install a catch basin with underground corrugated piping, if necessary

5. At the rear elevation, first floor level, repair and replace LVL beam; joist hangers; fasteners, etc., per manufacturer's installation instructions

6. Localized repairs shall be performed to the deck structure to provide lateral bracing; proper attachment of components, including, but not limited to, lateral connections; ledger fasteners; remove existing guardrail posts and install new 4 x 4 posts using appropriate bolts, anchors, wood columns, etc.

7. At the rear elevation, remove existing gutter and replace with 6" K style gutter. Reinstall existing downspouts. Gutters shall match existing color. Insure downspouts terminate.

8. Properly integrate drip edges with roofing underlayment along the eaves; replace any underlayment and/or shingles damaged during repair. Apply roof cements; remove shingles at gable cornices (front elevation) and install underlayment properly lapped with the WRB and other flashings, as applicable.

9. At the first floor mudsill plate for perimeter of structure, install fasteners into unattached mudsill anchors and additional fasteners at anchors lacking fasteners.

10. Within the basement, install closed-cell spray foam at the rim board on first floor, and Rockwool Comfortbatt (R-13 minimum) batt insulation within the stud cavities. Spray foam over foam board blocking.

11. As recommended by Environmental Testing Report, abate fungal growth in all areas where fungal growth was found to be present (basement and attic). After

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abatement, indoor air quality investigation shall be performed in the basement by a certified indoor environmentalist. Remove and replace gypsum board finishes as required to perform abatement.

12. At the Master Bedroom, remove and reset out-of-square door and jamb. Install new interior casing as required. Paint and caulk finishes.

13. At the Garage, remove brown-colored masonry mortar and replace with Sika Repair SHB mortar. Prime exposed steel reinforcement with Sika Arnatec 110 EpoCem; repair additional spall locations not previously repaired. Install cementious parge coat on concrete walls for uniform finish.

14. At the Garage, remove the existing garage door guide rails and install rails of proper height to provide 6 – 8" minimum clearance at house entry door landing.

15. Replace adjacent materials affected by the repair work in-kind.

16. Contractor shall provide for all general conditions, including, but not limited to: protection of existing property and adjacent areas not subject to the repair areas, building permits, demolition/disposal costs, final cleaning, etc.

17. Contractor shall provide a 5% contingency allowance and their preferred overhead/profit percentages.

18. Contractor shall provide a line item for A/E fees at 10% of the total cost of construction (including OHP).

(Plaintiffs' Ex. 35)

Mr. Clements opined that all of the documented deficiencies need to be addressed to bring the home into compliance with the applicable building codes; manufacturer's instructions and industry standards. Specifically, Mr. Clements observed loose and poorly

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attached siding at multiple locations along the left, right, and rear elevations of the home. He also noted that improper fasteners were used and that metal thru-wall flashing was reverse-lapped with the weather barrier and the flashing was sealed with sealant. Further, he testified that the adhered manufactured stone veneer (AMSV) had been improperly installed at three walls that comprise a bay window feature on the front and side elevations of the Athimoolam home.

Mr. Clements also testified that the existing windows (29) should be removed and reinstalled "to address improperly installed/damaged rough opening flashing and WRB around the openings." In support of his opinions, he relied on photos A9a, b, c, d, e, f, and g documented in the PowerPoint and his reports. (Exhibits 34, 35, and 36) He also criticized improper fasteners installed at the window nailing fin and improperly spaced fasteners. As noted in Photos A9.a, b, c, and d, Mr. Clements only recommended the removal and reinstallation of the existing twenty-nine (29) windows to address the fasteners, flashing and WRB issues as detailed in the Fuller reports.

In addition to observed window installation deficiencies, Mr. Clements noted concerns, in part, about the improper installation of the fiber-cement exterior lap siding along the left, right, and rear elevations of the residence; improperly installed adhered manufactured stone veneer (AMSV); grading deficiencies at the exterior alcove area of the walk-out basement; deck repairs (not total replacement); roof underlayment along the eaves; improperly sized K style gutter at the rear elevation of the home; drip edges, as well as other areas denoted in the reports. Mr. Clements also testified that he observed no water intrusion on the front or side elevations of the Athimoolam home, but opined that if the conditions he discovered were not resolved, it could lead to water intrusion such as the condition he observed on the left corner at the rear elevation of the home.

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During cross examination by Meritage's counsel, key points to which Mr. Clements testified about the 2018 conditions to the Athimoolam home included the following: a) there is no evidence that any of the windows have leaked or resulted in water intrusion into the home since occupancy; b) during the destructive testing in 2018, no rotten wood, deteriorated sheathing or evidence of water intrusion were observed at the front and side elevations of the home; alcove or roof; c) the window manufacturer was not contacted to determine if any warranties will be impacted if the windows are removed and reinstalled per the protocol recommended by Mr. Clements which do not include the replacement of any of the windows in the home or the installation of a new roof and deck. He testified to underlayment application at the drip edge and the undersized rear gutter that impacted roof drainage. Mr. Clements further testified that the issues and recommendation noted for the span issue in the garage could be corrected in one (1) day. Mr. Clements also opined that he neither observed nor was aware of any roof leaks. On the main level, living area, he testified about one (1) door in the master bath that was not square, but documented no damage to the hardwood floors or interior drywall.

Matthew Harmon of Claims Construction and Restoration was offered as an expert by the plaintiffs in cost estimation and construction repairs. He admitted he had never worked within 100 miles of the Athimoolam house; had never used any contractors in the Upstate, and that costs and price differences exist in various parts of South Carolina. Although a motion was made to exclude Mr. Harmon's testimony and report based on challenges to his expertise, credentials and report, the objection was overruled after a "proffer". Mr. Harmon was retained to prepare a cost estimate on the scope of work proposed by Ross Clements. Mr. Harmon never had any discussions with Mr. Clements or Mr. Andrew Schauder regarding the scope of repair or mold remediation and failed to provide justification for including some of the

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items in his purported scope of repair. Mr. Harmon prepared two reports identified as Plaintiffs' Exs. 37-38 to which "Preliminary Estimate Only" is affixed to both. He testified that following his deposition, he had to revise the initial cost estimate (Ex. 37) to correct a typo of 140 hours of labor to 40 hours; and to remove estimations for drywall and HVAC technician costs. Mr. Harmon admitted that he had not solicited quotes on the "bid" items reflected in the cost estimate and that certain of the costs included in his reports exceeded the scope of Mr. Clements' recommendations and were included at the request of the Athimoolams.

Further, Mr. Harmon's cost estimate appears to add duplicate costs for overhead and profit, as each line item description includes an overhead and profit cost, while overhead and profit are also included on pages 27 – 28 of Plaintiffs' Exhibit 38. Of note, Mr. Harmon also included no contingency costs in his line item descriptions or cost estimate as recommended by Mr. Clements.

While Meritage questions the costs, including those attributed to the "bid" items, and stated overhead and profit costs of these "bid" items, Mr. Harmon testified that Xactimate is a software program used by insurance companies and recognized in the industry. Notably, while Meritage challenged the opinions of Mr. Clements and the cost estimate prepared by Mr. Harmon, it did not provide any alternative cost estimates to challenge the accuracy of the costs calculated through the Xactimate program for the removal and replacement of the exterior siding, brick veneer, and AMSV, which costs appear reasonable to correct the defects identified by Mr. Clements.

At the time he met with the Athimoolams in July 2022 for approximately 1 ½ hours, Mr. Harmon had only been a licensed contractor for two months. (Defendant's Ex. 4) During this visit, Mr. Harmon did not look in the attic or inspect the second level of the home

because Mr. Athimoolam was resting. Mr. Harmon did not request permission to access these areas. He did not wear PPP equipment or wear a respirator while at the home. He had no issues breathing while in the Athimoolam home.

In addressing some of the recommendations noted by Ross Clements, Mr. Harmon included the costs of new windows as he did not believe the warranty would be valid if he removed the windows, installed flashing, etc. and then reinstalled the windows. (Plaintiffs' Ex. 38, p. 25) However, he did not contact the manufacturer of the existing windows to discuss if the warranty would be impacted with a removal and reinstallation of the windows.

Also, although the scope of work proposed by Ross Clements did not include the removal and installation of a new roof (he testified at arbitration that he observed no active moisture intrusion inside the home or leaks at windows or doors); construction of a new deck; painting; new gutter system; landscaping; concrete wall; and removal and replacement of footings; to name a few, Mr. Harmon included these items in his cost projection.

At arbitration, Mr. Harmon testified that 75% of his cost estimate was from items provided by the homeowners, while 25% from Mr. Clements' report, However, the testimony and evidence show that Mr. Harmon exceeded the scope of Mr. Clements' recommendations in his cost projection specifically on pages 2 – 19 of Plaintiffs' Exhibit 38, and that the numbers were "preliminary." Further, Mr. Clements testified he has never communicated with Mr. Harmon about his cost estimations or scope of work. The cost estimations in both of Mr. Harmon's reports (Plaintiffs' Exs. 37 and 38) as to mold remediation by Rainbow International Restoration accept the estimate "as is" although Mr. Lambright never received a scope of work from Andrew G. Schauder and included some areas of the home for mold remediation which he never inspected. (Plaintiffs' Ex. 42)

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Mr. Harmon also testified that Mrs. Athimoolam added three areas of tile (bedroom and laundry); two additional interior doors; prime and paint of the main level; and mold and fungal abatement which is already reflected in the report of Rainbow International. He also testified that he did not go onto the second floor or attic of the Athimoolam home. Also, he testified that in Exhibit 38, the items listed on pages 11 – 20 of his report (beginning with the main level and including laundry room, with the exception of two tiles being replaced; closet, breakfast area/room; family room; closet; master closet; sitting; bedroom 2; bedroom 1; master bath; master bedroom; closet 2; hallway; bathroom; stairs; kitchen; and closet) had been added to the repair estimate at the request of the Athimoolams. These line items on the main level, which include overhead and profit, total $57,798.08 (excluding garage). Accordingly, the Arbitrator has determined that a significant amount of the line item costs in Mr. Harmon's report should not be and are not considered in this Order since they are unsupported by the testimony and evidence presented at Arbitration.

Mr. Harmon, on cross-examination, testified that he never went into the attic or second level of the Athimoolam home. Thus, the "level two" costs detailed on pages 21 – 22 of the report should not have been included as neither Ross Clements nor Jay Rogers testified about the necessity of any repairs. These purported costs, which include overhead and profit, totaling $12,857.73 provide another example of costs not in conformity with the testimony and evidence and not considered in this Order.

Richard J. Rogers, P.E., M.B.A. of Rogers Construction Engineering was offered as an expert forensic engineer and licensed general contractor on behalf of Meritage Homes, without objection. Mr. Rogers testified that he received the Fuller Envelope (Clements) reports and visited the Athimoolam home on July 15, 2019. Mr. Rogers noted that he went inside the

Athimoolam home, stuck his head in the attic and concentrated his time in the basement. He was informed of no roof leaks or water intrusion through any of the windows since the Athimoolams moved into the home. He did not conduct any destructive testing. He testified he is currently involved in seven litigation matters involving Meritage but he has not been hired in any to make repairs.

In discussing the Fuller Envelope reports addressing the windows, defense expert, Jay Rogers, admitted that he could not opine if the building wrap had been properly applied or WRB properly folded in. Although photos of the flashing are such that it appears flashing was properly installed, he could not testify with certainty to the manner of installation and conformity to building codes and industry standards. As for questions about the positioning of the nails used in the window installation, he testified it was his belief that installing the nails in areas other than the nail fin did not violate any requirements. However, he was unable to testify to this with certainty. Further, since he does not know the condition of each window in terms of installation, he found relevant and significant the absence of any leaks and water intrusion through any of the windows in the Athimoolam home since 2015 which supports his position that no repairs need to be made to any of the windows in the Athimoolam home. He provided a cost estimate for repairs, not replacement, of the exterior siding, brick veneer, and AMSV based on his experience and opinions after inspecting the home. Defendant, Meritage Homes, also introduced into evidence numerous photographs of the Athimoolam home. (Defendant's Ex. 2 and 7) Although Mr. Rogers disagreed with the opinions of Mr. Clements, he presented no evidence, through destructive testing he conducted, to dispute the findings in the Fuller reports nor cost estimates from other sources to challenge the accuracy of the costs for the removal and replacement of the

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exterior siding, brick veneer, and AMSV as calculated by the Xactimate software used by Mr. Harmon. Mr. Rogers also opined that mold remediation was unnecessary.

As for the fourteen recommendations made by Mr. Clements, Mr. Rogers testified in conformity with a prior report identified as Defendant's Ex. 5; Plaintiffs' Ex. 32, which included his recommendations and pricing to resolve any construction issues:

1. Removal and reinstallation of the existing windows and doors – No action required
2. Removal and replacement of the exterior cladding, including all fiber-cement siding, brick veneer, AMSV, composite MDF trim and related accessories. All work described can be performed for less than $15,000.
3. Contractor allowance for interior repairs, for nail pops, drywall, painting, etc. – Unnecessary
4. Exterior alcove of the walk-out basement – work can be performed for $1,500
5. At rear elevation, first floor level – repairs should be performed as described in Fuller report – work can be performed for $1,000
6. Localized repairs to deck structure – work can be performed for $1,000
7. At the rear elevation remove existing gutter and replace Unnecessary as gutter is functioning.
8. Properly integrate drip edges with roofing underlayment – Unnecessary – $2,000 through testimony at arbitration
9. At the first-floor mudsill plate for perimeter of structure. Fasteners, etc. – work can be performed for $300

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10. Basement, spray foam – batt insulation is acceptable by code – work can be performed for $500

11. As recommended by Environmental Testing & Management – Unnecessary Advanta issued clean report

12. At the Master Bedroom, remove and reset the out-of-square door and jamb - work can be performed for $1,000

13. At the Garage, remove brown colored masonry mortar and replace - work can be performed for $500

14. At the Garage, remove existing door guide rails and install proper rails - work can be performed for $500

Mr. Rogers further testified that his proposed cost estimate at Arbitration based on inflation would be in the Thirty Thousand and No/100ths ($30,000.00) Dollars range, plus approximately Two Thousand and No/100ths ($2,000.00) Dollars to address some of the roofing underlay issues noted by Mr. Clements.

II. Mold
(Industrial Hygienists)

Environmental Testing and Management, Inc. (Andrew G. Schauder) was retained by Mrs. Athimoolam to provide professional and technical consulting services by conducting a limited evaluation of an alleged water intrusion/mold issue impacting several locations within her residence. He was offered as an expert in industrial hygiene without objection. Although his recommended scope of mold remediation identified as Exhibit 41 was not allowed into evidence because it had not been provided to Meritage and its counsel, this information was requested and considered by the Arbitrator after the Arbitration and prior to the issuance of this Order.

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On the initial visit, November 28, 2016, Mr. Schauder was informed of prior services provided by AdvantaClean. His most notable observation from an exterior inspection was the grading of the land at the rear of the house, a sample collected in the basement – unfinished utility, and the level of the Penicillium/Aspergillus group of fungi which he testified was borderline elevated. Mrs. Athimoolam provided Mr. Schauder with two spore trap reports, one dated July 28, 2016 and one dated August 24, 2016. No written reports accompanied either lab report. Of the information provided, Mr. Schauder opined that all of the samples collected inside the house were found to have a lower total fungal spore count than present in the outdoor air.

A visual examination of the remainder of the interior of the house did not reveal any evidence of any significant water intrusion or mold growth. Further, his report reflects elevations of Penicillium/Aspergillus group of fungi on both the main floor, as well as the basement. From the initial inspection, Mr. Schauder concluded the most likely explanation for prior mold growth on the floor joists in the attic and basement was that the wood framing members were left exposed to the outside elements for an extended period of time. He suggested test cuts needed to be made in the sheetrock walls and ceilings so a complete scope of work could be determined and a protocol prepared for the remediation of the impacted areas. No recommendations in the December 2016 report were addressed. No complete scope of work was completed and no protocol for mold remediation was prepared or introduced into evidence as it was never discussed between Mr. Schauder and Mr. Lambright. (Plaintiffs' Ex. 39).

Four-plus years later, on August 24, 2021, Mr. Schauder returned to the Athimoolam home and met with Mr. and Mrs. Athimoolam. During this time, there is no evidence that any other testing occurred or protocols proposed for mold remediation. As

documented in his report (Plaintiffs' Ex. 40), his follow-up inspection began in the basement. Finding what he described as prior or suspected fungal growth and staining in a bedroom, basement, and attic, he again recommended that a complete scope of work be determined, and a protocol prepared for the remediation of fungal growth in the designated areas. Mr. Schauder questioned if the floor joists in the basement had been treated or had an encapsulant applied with an antifungal component. Suspect mold growth was present on wood framing. No protocol about test cuts or scope of work was prepared by him or introduced into evidence. The only cost information was documented in the Rainbow document and prepared solely by Mr. Lambright with no consultation or input from Mr. Schauder. (Ex. 42)

On April 6, 2023, Mr. Schauder returned for a second follow up water intrusion/mold investigation in areas above the existing sheetrock ceilings and attic. (Plaintiffs' Ex. 41) In this report, Mr. Schauder referenced reports from Environmental Testing and Management, Inc., and General Engineering. (GEL Report March 3, 2021 – Defendant's Ex. 6) Mr. Schauder opined that the presence of staining on wood framing members found throughout the house (theater, storage 2, great room and attic) was most likely the result of prior mold growth. While he noted the necessity to remove all sheetrock walls and ceilings to allow for an examination of the wood framing members, this was not undertaken. In fact, the April 2023 inspection simply noted suspected mold growth and staining. In a deposition taken before the arbitration, Mr. Schauder testified he had not prepared a protocol or performed mapping of the timbers. When he attempted to testify to a protocol at arbitration, an objection was made by counsel for Meritage and sustained by the Arbitrator given that the information had not been provided in discovery, in a deposition, and/or prior to the arbitration. State v. Warner, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2000).

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Also, during Mr. Schauder's deposition on November 23, 2020, he had no recommendations for a remediation protocol and found no evidence of fungal growth on the first and second levels of the home. Also, he noted no water intrusion in the attic and noted no health concerns for the Athimoolams. A few days before the arbitration, Mr. Schauder testified he was provided a copy of the Rainbow International Restoration proposal (Plaintiffs' Ex. 42) but did not discuss specifics about the proposal or provide a scope of work to Steven Lambright with Rainbow International Restoration.

Steven Lambright, a licensed contractor with advance microbial remediation experience, with Rainbow International Restoration, prepared a cost projection utilizing Xactimate for mold remediation to the Athimoolam home after visiting the Athimoolam home for several hours on April 18, 2022. (Plaintiffs' Ex. 42) He admittedly is not an expert in air quality testing and mold growth assessment. Also, he never received the proposed scope of work of Mr. Andrew Schauder dated April 18, 2023. (Exhibit 41) The expertise and qualifications of Mr. Lambright were challenged but he was permitted to testify, over objection. Mr. Lambright testified that approximately eighteen (18) months ago, he observed no active water leaks in the attic and basement. During his inspection in the attic, he did not determine if active mold was present and conducted no testing. He also did not determine if the moisture content in the attic was elevated. Mr. Lambright admitted that Mr. Schauder had not approved the scope of the work or provided a suggested protocol for mold remediation. Therefore, the Arbitrator finds that neither Mr. Schauder nor Steven Lambright provided compelling evidence or testimony to substantiate the necessity for mold remediation.

Following the denial of directed verdict motions made by counsel for Meritage Homes, Meritage called Ronald S. Sharpe, C.I.H., R.S., with GEL Engineering LLC as an expert

witness. Mr. Sharpe's report was marked as Defendant's Exhibit 6. Mr. Sharpe, who conducted IEQ assessments of the environmental quality of the Athimoolam interior on October 30, 2019 and November 12, 2020 offered his opinions in his written report and noted that no further mold remediation is necessary at the Athimoolam home. Mr. Sharpe also offered suggestions to reduce the potential for amplification and/or proliferation of microbial growth inside the structure after sources of water intrusion are repaired.

DAMAGES

It is well settled in South Carolina that proof of resulting property damage is not necessary to establish liability for construction defects. Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). A cause of action is available where a builder has violated a legal duty, no matter what the type of resulting damage. Kennedy v. Columbia Lumber Mfg. Co., 299 S.C. 335, 346 (1989). It is well settled that "the applicable measure of damages [can] be shown by the cost of repairs." Kincaid v. Landing Development Corp., 289 S.C. 89, 94, 344 S.E.2d 869, 873 (Ct. App. 1986). Further, damages must be awarded to the extent they were proven. Hinds v. Elms, 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004).

Further, while plaintiff is allowed to testify about her belief on value or damage to personal property, Waites v. S.C. Windstorm & Hail Underwriting Ass'n, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983), the existence or amount of damages cannot be left to conjecture or speculation. Piggy Park Enterprises, Inc. v. Schofield, 162 S.E.2d 705, 708 (S.C. 1968). "It is the general rule that it is the duty of the owner of the property, which is injured by the negligence of another, to use reasonable means to mitigate the damages. Newman v. Brown, 228 S.C. 472, 480.

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Testimony elicited from Mrs. Athimoolam at the arbitration revealed that many personal items are still in use in the home and that there has been no effort to mitigate these alleged damages. Although Mrs. Athimoolam testified about the value of her personal items, she was unable to provide any sales receipts documenting the value of the items she claimed were damaged or ruined due to water and mold. (Plaintiffs' Ex. 33) Accordingly, the Arbitrator found her testimony about the purported damages in Plaintiffs' Ex. 33 left to conjecture or speculation. Gauld v. O'Shaugnessy Realty Co., 671 S.E.2d 79, 85 (Ct. App. 2008).

AWARD

Based on the testimony and evidence presented at Arbitration, the applicable law, and a review of all submissions by the respective attorneys after Arbitration, I hereby award damages to the Athimoolams in the sum of **Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100ths ($320,917.63) Dollars** as detailed below:

- The sum of **Nine Thousand One Hundred Eighty-Three and No/100ths ($9,183.00) Dollars** – Remove and reinstall twenty-nine (29) windows to install WRB, SAF and flashing
  - Labor ($116/hour x 2) to remove and reinstall windows x 29 = $6,728.00
  - Scaffolding - 1 month ($1,455/month) - $1,455.00
  - Flashing, WRB, SAF - $1,000.00
- The sum of **Two Hundred Six Thousand Four Hundred Fifty-Five and No/100ths ($206,455.00) Dollars**
  - Fiber Cement Siding - $70,000.00
  - Paint siding - $34,000.00
  - Remove and install brick veneer, AMSV - $81,000.00
  - Remove and replace sheathing - $20,000.00

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- Scaffolding – 1 month ($1,455/month) - $1,455.00

- The sum of **Five Thousand Five Hundred and No/100ths ($5,500.00) Dollars** for interior painting in master bedroom after removal and reset of out-of-square door and jamb;

- The sum of **Three Thousand and No/100ths ($3,000.00) Dollars** for regrading of exterior alcove area of walk-out basement and installation of surface catch basin, if necessary;

- The sum of **One Thousand and No/100ths ($1,000.00) Dollars** for grading at the rear elevation, first floor level;

- The sum of **Twelve Thousand and No/100ths ($12,000.00) Dollars** for localized repairs to deck structure;

- The sum of **Eleven Thousand Seven Hundred and No/100ths ($11,700.00) Dollars** for replacement of the gutter and downspouts with appropriate color match only at the rear elevation of the home with the size recommended by Ross Clements - 5 ½ x 4 ½;

- The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to properly integrate drip edges with roofing underlayment;

- The sum of **Three Hundred and No/100ths ($300.00) Dollars** for fastener installation into unattached mudsill anchors at mudsill plate for perimeter of structure;

- The sum of **Three Thousand Two Hundred Ninety-Three and 63/100ths ($3,293.63) Dollars** for batt insulation, spray foam, etc. in basement;

- The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove and reset the out-of-square door and door jamb in Master Bedroom;

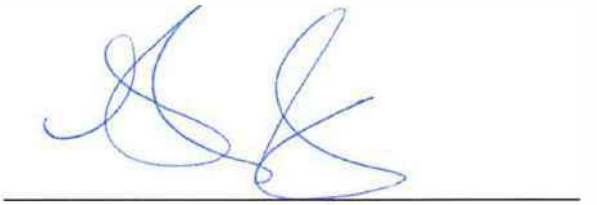
- The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to remove brown-colored masonry mortar, repair spall locations and install a cementious parge coat to concrete walls for uniform finish;

- The sum of **Ten Thousand and No/100ths ($10,000.00) Dollars** to remove existing garage door rails and install rails that are proper height;

- The sum of **Fifty-Three Thousand Four Hundred Eighty-Six and No/100ths ($53,486.00) Dollars** for overhead and profit.

Therefore, it is hereby Ordered, Adjudged, and Decreed that the plaintiffs are awarded the sum of **Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100ths ($320,917.63) Dollars**.

AND IT IS SO ORDERED.



Becky Laffitte
Arbitrator

January 19, 2024

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ANDERSON)	Docket No.: 2017-CP-04-376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM,)	
Plaintiffs,)	
v.)	**SETTLEMENT AGREEMENT BETWEEN MERITAGE AND THIRD-PARTY DEFENDANTS**
MERITAGE HOMES OF SOUTH CAROLINA, INC.,)	
Subcontractor.)	
MERITAGE HOMES OF SOUTH CAROLINA, INC.,)	
Third-Party Plaintiff,)	
v.)	
84 LUMBER COMPANY, LP; DRC INVESTMENT, LLC d/b/a ADVANTACLEAN OF THE UPSTATE; DOWN TO EARTH GRADING, LLC; GGG CONSTRUCTION, LLC; GUTTER CUTTERS, INC.; HH CONTRACTING, LLC; HARBIN COMPANY, LLC; M&M FOUNDATIONS, LLC; METRO GARAGE DOOR, INC.; SANDLAPPER CONCRETE, LLC; SDR RESTORATION AND CONSTRUCTION, LLC; SEALING AGENTS WATERPROOFING, INC.; and STAR BUILDERS, INC.,)	
Third-Party Subcontractors.)	

This Settlement Agreement ("Agreement") is made as of the Effective Date defined in this Agreement between and among:

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MERITAGE HOMES OF SOUTH CAROLINA, INC. ("Meritage")

and

84 LUMBER COMPANY, LP, DOWN TO EARTH GRADING, LLC, GGG CONSTRUCTION, LLC, GUTTER CUTTERS, INC., HH CONTRACTING, LLC, HARBIN COMPANY, LLC, M&M FOUNDATIONS, LLC, METRO GARAGE DOOR, INC., SANDLAPPER CONCRETE, LLC, SDR RESTORATION AND CONSTRUCTION, LLC, SEALING AGENTS WATERPROOFING, INC., and STAR BUILDERS, INC. (listed singularly as "Subcontractor" and collectively as "Subcontractors").

WHEREAS, Plaintiffs filed a lawsuit with the Anderson County Clerk of Court that alleged construction deficiencies at the home located at 116 Ariel Way, Easley, South Carolina 29642 (the "House") and Docket Number 2017-CP-04-376 (the "Lawsuit"); and

WHEREAS, Meritage answered the Lawsuit, denied liability, raised certain additional defenses, and filed a Third-Party Complaint against numerous subcontractors and vendors; and

WHEREAS, certain subcontractors and vendors filed Fourth-Party Complaints and a Fifth-Party Complaint against others; and

WHEREAS, the Parties to this Agreement now desire to forever end the disputes between them arising from the allegations of the Lawsuit, and Meritage and Subcontractors wish to avoid the expenses and fees of protracted litigation over these issues; therefore, they have agreed to settle all claims asserted in the Third-Party Complaint as provided in this Agreement; and

NOW, THEREFORE, for and in consideration of the mutual terms, covenants, and conditions stated in this Agreement and for other good and valuable consideration stated, the receipt and sufficiency of which is expressly acknowledged, it is agreed by and between the Parties as follows:

1. **Payment to Meritage and Release of All Claims by Meritage against Subcontractors**

Meritage will receive the total sum of Three Hundred Fifty Thousand Five Hundred and no/100 ($350,500.00) paid on behalf of Subcontractors. Subcontractors deny any liability, and it is agreed that this payment is not to be construed as an admission of any liability or as an admission of any violation of any federal, state, or local statute or regulation, any common law, or any duty owed by any Subcontractor. Payment is made to avoid further dispute, to end the Lawsuit, and to avoid the expense of protracted litigation.

The settlement contributions are as follows:

84 LUMBER COMPANY, LP:	$15,000.00
DOWN TO EARTH GRADING, LLC:	$25,000.00
GGG CONSTRUCTION, LLC:	$15,000.00
GUTTER CUTTERS, INC.:	$5,500.00
HH CONTRACTING, LLC:	$65,000.00
HARBIN COMPANY, LLC:	$125,000.00
M&M FOUNDATIONS, LLC:	$20,000.00
METRO GARAGE DOOR, INC.:	$5,000.00
SANDLAPPER CONCRETE, LLC:	$5,000.00
SDR RESTORATION AND CONSTRUCTION, LLC:	$40,000.00
SEALING AGENTS WATERPROOFING, INC.:	$25,000.00
STAR BUILDERS, INC.:	$5,000.00
TOTAL	**$350,500.00**

In exchange for these payments, Meritage (individually and on behalf of any statutory beneficiaries) agrees to dismiss, release, and forever discharge with prejudice all claims, liability, causes of action, demands, promises, warranties, costs (including attorney fees), claims as an Additional Insured or for contractual indemnity, and/or all damages of any kind whatsoever whether known or unknown, vested or unvested, which each now has, or ever may have, arising out of or related to the House or the Lawsuit (regardless of whether or not asserted in the Lawsuit) as of the Effective Date of this Agreement against (1) any Subcontractor; (2) any officer, agent, current or former employee, or insurer of any Subcontractor; (3) any business entity owned, controlled, or operated by any Subcontractor; (4) all affiliates, subsidiaries, direct and indirect parent entities, franchisees, successors, predecessors, assigns, agents, independent contractors, attorneys, officers, directors, shareholders, owners, employers, members, managers, partners, insurers, and employees of any Subcontractor or any business entity owned, controlled, or operated by any Subcontractor; and (5) any person or entity that provided any service, advice, or representation to any Subcontractor concerning the Lawsuit and the facts giving rise to the Lawsuit.

2. Mutual Releases of All Claims Among Subcontractors

In exchange for payments made to Meritage, each Subcontractor (individually and on behalf of any statutory beneficiaries or related individuals or companies) agree to dismiss, release, and forever discharge with prejudice all claims, liability, causes of action, demands, promises, warranties, costs (including attorney fees), claims as an Additional Insured or for contractual indemnity, and/or all damages of any kind whatsoever whether known or unknown, vested or unvested, which each now has, or ever may have, arising out of or related to the House or the Lawsuit (regardless of whether or not asserted in the Lawsuit) as of the Effective Date of this Agreement against (1) any other Subcontractor or Meritage; (2) any officer, agent, current or

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former employee, or insurer of any other Subcontractor or Meritage; (3) any business entity owned, controlled, or operated by any other Subcontractor or Meritage; (4) all affiliates, subsidiaries, direct and indirect parent entities, franchisees, successors, predecessors, assigns, agents, independent contractors, attorneys, officers, directors, shareholders, owners, employers, members, managers, partners, insurers, and employees of any other Subcontractor or Meritage or any business entity owned, controlled, or operated by any other Subcontractor or Meritage; and (5) any person or entity that provided any service, advice, or representation to any other Subcontractor or Meritage concerning the Lawsuit and the facts giving rise to the Lawsuit.

3. Dismissal of Third-Party Complaint

Upon receipt of all funds and the execution by all Subcontractors and Meritage of this Agreement, Meritage shall file a Stipulation with the Anderson County Clerk of Court dismissing the Third-Party Complaint with prejudice.

4. Costs and Attorneys' Fees

Each of the Parties shall bear its own costs and attorneys' fees incurred in asserting, defending, and settling the Lawsuit.

5. Severability

Except as noted below, should any term or provision of this Agreement be found, declared or determined to be invalid, illegal or unenforceable, the validity and enforceability of the remaining provisions, terms, and parts shall not be affected.

6. Voluntary Execution

The Parties have freely and voluntarily entered into this Agreement. The Parties further represent that attorneys of their own choosing have represented them in the preparation and negotiation of this Agreement. The Parties have carefully read this Agreement, have had a full and complete opportunity to consult with counsel regarding this Agreement, and to know and understand what is in this Agreement.

7. Authority to Bind

By executing this Agreement, each Party stipulates, agrees, and warrants as follows: (a) the terms of this Agreement are reasonable; (b) that he or it will not challenge or contest in any way the capacity or the authority of any party to enter into this Agreement; and (c) the person executing this Agreement on behalf of himself and a former or current entity has the necessary and appropriate authority and capacity to execute this Agreement and to make this Agreement fully binding upon and enforceable against the entity he represents and that this Agreement is not prohibited or restricted by any contract or other legally recognized arrangement applicable to them.

8. Rebuttal of Drafting Presumption

The Parties acknowledge and agree that this Agreement is the product of negotiations by and among the Parties to this Agreement and their attorneys; therefore, the Parties expressly acknowledge and agree that the presumption that any ambiguity in this Agreement shall be construed against the drafter is hereby rebutted and the presumption shall not be used to interpret this Agreement.

9. Entire Agreement

This Agreement is the sole and exclusive agreement between the Parties and supersedes all prior agreements, representations, promises, undertakings, negotiations and discussions among them with respect to the subject matter covered, whether oral or written. No consent or waiver, express or implied, by any party to or of any breach or default by the other in the performance by the other of its obligations shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other party of the same or any other obligations of such party. No modification or amendment to this Agreement shall be effective unless set forth in writing and signed by the party against whom the modification or amendment is sought to be enforced.

10. Successors and Assigns/Disclosure

This Agreement is intended to and shall release and inure to the benefit of and shall be binding upon the Parties' respective predecessors and successors-in-interest, parents, subsidiaries, affiliated and/or related corporations, divisions, owners, officers, directors, partners, agents, employees, representatives, stockholders, accountants, assigns, heirs, next of kin, personal representatives, executors, and attorneys of the parties to this Agreement, both individually and in the capacity indicated.

11. Taxes

The Parties have considered and accepted the potential tax ramifications to them of entering into this Agreement, and the parties shall be solely responsible for paying any taxes, penalties, or interest that may be imposed upon them as a result of this settlement.

12. Governing Law and Jurisdiction

This Agreement shall be governed by, construed, interpreted, and applied in accordance with the laws of the State of South Carolina. In addition, the Parties expressly agree that any and all legal proceedings to enforce the rights and obligations of this Agreement shall be initiated in a Court of competent jurisdiction within the State of South Carolina.

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13. Counterparts

This Agreement may be executed in any number of counterparts, each of which when executed and delivered shall be an original, but all such counterparts shall constitute one and the same instrument. Signatures transmitted by facsimile or pdf are fully effective for all purposes.

14. Effective Date

The Effective Date of this Agreement shall be the date that the last signature of any Party is affixed to the signature page of this Agreement.

IN WITNESS WHEREOF, the Parties execute and deliver this Settlement Agreement:

_____

Meritage
By: _____
Its: _____
Date: _____

_____

84 Lumber Company, LP
By: _____
Its: _____
Date: _____

_____

Down to Earth Grading, LLC
By: _____
Its: _____
Date: _____

_____

GGG Construction, LLC
By: _____
Its: _____
Date: _____

_____

Gutter Cutters, Inc.
By: _____
Its: _____
Date: _____

HH Contracting, LLC
By: _____
Its: _____
Date: _____

N. Keith Emge, Jr.

Harbin Company, LLC
By: N. Keith Emge, Jr.
Its: Attorney
Date: 9/12/2022

M&M Foundations, LLC
By: [signature]
Its: Owner
Date: 11-21-2022

Metro Garage Door, Inc.
By: _____
Its: _____
Date: _____

Sandlapper Concrete, LLC
By: _____
Its: _____
Date: _____

SDR Restoration and Construction, LLC
By: _____
Its: _____
Date: _____

Sealing Agents Waterproofing, Inc.
By: _____
Its: _____
Date: _____

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Star Builders, Inc.

By: _____

Its: _____

Date: _____

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Exhibit 4

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)))	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT CASE NO.: 2017-CP-04-00376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	)))))))))	**Plaintiffs' Motion for Reconsideration**

Pursuant to 9 U.S.C. Code (The Federal Arbitration Act) § 9, 10, 11, the Order of Arbitration, Attached as Exhibit A, Plaintiffs, Raghu and Irene Athimoolam, (hereinafter "Plaintiffs"), by and through their undersigned attorneys and moves for reconsideration of the Arbitration Award (the "Award") dated October 4, 2023.

Plaintiffs request the Arbitrator to reconsider the Award on the numerous grounds set forth in the accompanying Memorandum.

Respectfully submitted,

LYLES & ASSOCIATES, LLC

s/Robert T. Lyles, Jr.
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October 16, 2023
Mount Pleasant, South Carolina

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Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)))	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, -vs- Meritage Homes of South Carolina, Inc., Defendant.	)))))))))	**CONSENT ORDER STAYING CASE AND COMPELLING ARBITRATION** C.A. No. 2017-CP-04-00376

Defendant Meritage Homes of South Carolina, Inc. moved this Court for an Order staying this litigation and compelling arbitration. For the reasons below, and with the consent of all parties, this Court grants Defendant's motion to stay this litigation and to compel arbitration.

Plaintiffs entered into an agreement with Defendant to build a home located in Easley, South Carolina ("Agreement"). The Agreement contains an arbitration provision, under which Plaintiffs agreed to binding arbitration. Plaintiffs filed suit in this Court, and Defendant moved to stay this action and compel arbitration pursuant to the terms of the Agreement and the Federal Arbitration Act ("FAA"). The parties have conferred, and Plaintiffs agree that this action should be stay and arbitration compelled pursuant to the terms of the Agreement and the FAA.

NOW, THEREFORE, on motion of the undersigned counsel for Defendant, by and with the consent of the undersigned counsel for the Plaintiffs,

IT IS HEREBY ORDERED that Defendant's motion to stay and to compel arbitration is granted.

IT IS FURTHER ORDERED that Plaintiffs and Defendant shall proceed to binding arbitration.

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IT IS FURTHER ORDERED that the within matter as to Defendant is hereby stayed pending arbitration between the Plaintiff and Defendant.

AND IT IS SO ORDERED.

JUDGE, TENTH JUDICIAL CIRCUIT

Anderson, SC

August _____, 2017

s/ Robert T. Lyles
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Attorneys for Defendant

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2017 Aug 30 11:46 AM - ANDERSON COUNTY
CASE #2017CP0403765

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Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Stay

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT CASE NO.: 2017-CP-04-00376
RAGHU ATHIMOOLAM and IRENE ATHIMOOLAM, Plaintiffs, v. MERITAGE HOMES OF SOUTH CAROLINA, INC., Defendant.	**Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Alter or Amend the Judgment**

Plaintiffs, Raghu and Irene Athimoolam, (hereinafter "Plaintiffs"), by and through their undersigned attorneys submit the following Memorandum in Support of Plaintiffs' Motion to Alter or Amend its Arbitration Award (the "Award") dated October 4, 2023.

SUMMARY OF ARGUMENT

1. The Award makes numerous findings that are completely unsupported by the evidence and are based on assumptions and arguments of defense counsel;
2. The Award is fundamentally flawed because of fundamental errors with respect to applicable law and even the burden of proof;
3. The Award reflects a flagrant disregard of uncontroverted evidence, including expert testimony; and
4. The errors reflected above reflect an improper partiality towards Meritage which justifies reconsideration of the Award or vacating the Award in its entirety.

PROCEDURAL HISTORY

Plaintiffs filed a Complaint against Meritage Homes of South Carolina Inc. ("Meritage" or "Defendant") on February 2, 2017, and an Amended Complaint on March 3, 2017 (the "Complaint") asserting claims of Negligence/Gross Negligence. Breach of Implied Warranty of

Service, and Breach of the Implied Warranty of Habitability. Meritage filed a Motion to Compel Arbitration, which was ultimately consented to on August 30, 2017. The Arbitration Provision of the sales contract includes an appeal process which was consented to by the parties. On February 11, 2020, Meritage made third-party claims (in Circuit Court) against a number of its subcontractors ("Subcontractor Defendants"). After asserting claims against the Subcontractor Defendants, Meritage moved to compel arbitration pursuant to its contract with Plaintiffs. Ultimately, the parties entered into an Arbitration Order, to conduct the arbitration pursuant to the Federal Arbitration Act ("FAA").

Meritage ultimately settled its third-party claims with the Subcontractor Defendants directly, and Meritage collected three-hundred and fifty thousand dollars ($350,000), however, Meritage and Plaintiffs were not able to settle their claims at mediation. This case was arbitrated September 21-22, 2023, and the reversible Award followed, on October 4, 2023 (the "Award").

ARGUMENT

The Award is replete with errors of law, erroneous factual and legal conclusions, erroneous calculations, and a consistent pattern on the Arbitrator of parroting the arguments of counsel for Meritage in her ruling, rather than weighing the evidence and testimony that was elicited at trial and making a decision that comports with applicable law. The result is that the Award imposed on Plaintiffs extra-legal proof requirements and belied the Arbitrator's lack of impartiality.

The errors are so numerous and so clear as to compel a reconsideration of the award.

I. Partiality.

Below, a number of the many errors in the award are discussed in detail. Taken *in toto*, it is clear that at every opportunity possible, when there was a dispute between the witnesses and evidence for Plaintiffs and that of Meritage, or when counsel for Meritage simply made arguments

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about Plaintiffs evidence and testimony, the Arbitrator sided with Meritage even when it meant disregarded applicable law which favored Plaintiffs' positions or ignoring uncontroverted testimony. The Arbitrator disregarded the burden of proof applicable to Plaintiffs and instead created extra-legal burdens, which she contended Plaintiff failed to satisfy. At every opportunity possible, the Arbitrator parroted the arguments of Meritage counsel to discredit the testimony of Plaintiffs' and their expert witnesses, even when their testimony was uncontroverted. In many instances, the Arbitrator made numerous assumptions and factual conclusions in favor of Meritage, even in the absence of evidence and testimony, and based only on the argument of counsel.

Each instance discussed below establishes an inherit bias in favor of Meritage that has resulted in an award that is grossly inadequate and not supported by the evidence. Evidence of this bias further represents the gross miscarriage of justice. The Award contains clear errors and disregard of law and the order of $51,413.88, under the circumstances that it has been awarded in this matter, ***has resulted in a manifest injustice to Plaintiffs***, is grossly inadequate, and is "***dead wrong.***" *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc*., 866 F.2d 228, 233 (7th Cir. 1988)).

Bringing this pattern to the attention of the Arbitrator is in an effort to secure reconsideration of the award. The bias was likely unintentional but is glaringly apparent and justifies reconsideration of the Award.

II. The Award Disregards and Misapplies Directly Applicable Law.

A. Resulting Damages are Not Required to Support. Claim for Defective Construction.

Plaintiffs' forensic expert, Ross Clements, who was qualified without objection, conducted numerous site visits to Plaintiffs' home and did destructive testing. At the hearing, Mr. Clements walked through his findings in pain-staking detail, identifying numerous instances of code violations, manufacturers' instructions, and industry standards with respect to the roof and building

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envelope at Plaintiffs' home. These defects created conditions which he opined have or would lead to water infiltration and required removal and replacement of the cladding at Plaintiffs' home, repair of the weather resistive barrier ("WRB"), the removal of the windows to correct WRB, and the proper re-installation of the windows (if possible) , in order to provide Plaintiffs with a home that is constructed in compliance with the code and industry standard and is properly warranted.

Meritage was unable to refute Clements' findings and did not try, either through a fact witness from Meritage, a subcontractor, or an expert. Instead, a constant theme of Meritage's defense to Mr. Clements' scope of repair was to point to the absence of proof of *resulting property damage*. In the Award, the Arbitrator acknowledges that the scope of repair provided by Clements, included eighteen (18) recommendations for violations of building code violations and breaches of industry standard, but then inexplicably goes on to parrot the arguments of Meritage (again, made through counsel, since Meritage did not offer any testimony in its own defense) and, *without any evidence*, discounting Clements' repair recommendations to address building code violations and breaches of industry standard finding them **"to be unnecessary."** Specifically, the Award states:

> **Since there have been no observed leaks or water intrusion at the windows since the Athimoolams moved in in 2015, I find that the recommendations by Expert Ross Clements to remove and reinstall the windows to install flashing, etc., to be unnecessary.**

(Award at 19).

This finding represents a gross disregard and application of directly relevant law. For decades, the South Carolina Supreme Court has expressly held that proof of resulting property damage is not necessary to establish liability for construction defects. *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980). In another seminal construction defect case, actually cited by the Arbitrator, Justice Toal discussed this explicitly, holding that it would be unfair to insulate a

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building who had constructed a defective building just because that failure had not yet created physical damage: "It is clear that a builder is no less blameworthy in such a case where lady luck has smiled upon him, and no physical harm has yet occurred". *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 346. (1989). In summary, the law in South Carolina is crystal clear that a cause of action in negligence will be available where a builder has violated a *legal duty, no matter what the type of resulting damage*. *Kennedy*, 299 S.C. 335 at 347 (1989).

The scope of repair Clements testified is necessary is to remedy defects. It is not a requirement that those defects have already led to damage to justify their repair. By disregarding the clear and applicable law and imposing a burden on Plaintiffs to prove resulting property damages, the Arbitrator effectively imposed the duty of meeting a higher burden of proof on Plaintiffs and also evidences a lack of impartiality.

B. Rogers' Testimony Does Not Refute Clements' Opinions.

In the Award, the Arbitrator wholeheartedly relies on the testimony of J. Rogers. Rogers testified that he reviewed Clements' report, did not do any independent investigation or destructive testing, and did not offer any testimony or evidence to refute Clements' findings. Instead, Rogers relied on Clements' investigative efforts entirely, and rather than refute his opinions with relevant evidence, *irrelevantly* opined that the absence of damage meant that the repairs should be limited to areas revealed by Clements destructive testing, all in full support of the incorrect legal arguments of counsel for Meritage. The fact the Arbitrator disregarded the full opinions of Clements, in favor of those of Rogers, indicates a lack of impartiality.

III. The Award Made a Clear Calculation Error.

The only estimate offered to establish the cost of Ross Clements' scope of work was done by Matthew Harmon, who estimated the repair to cost $962,592.60. In the Award, in an effort to

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discredit Plaintiffs' repair estimate, which again was the ONLY estimate to complete Ross Clements' unrefuted scope of repair, the Arbitrator incorrectly concluded that 75% of Plaintiffs' estimate was based on "homeowner requests."(Award at 13). This holding was expressly and quite obviously incorrect, and also reflects another gross misunderstanding of the burden of proof.

First, there was no testimony that 75% of the estimate was based on "homeowner requests." In fact, the testimony of Matthew Harmon was precisely the opposite; that approximately 75% of the estimate *was based on the scope of Mr. Clement*s, while the remaining 25% was based on "homeowner requests." Even counsel for Meritage conceded in his closing that his calculation for homeowner requests in Harmon's estimate was around "one-third" of the total estimate. Based on Meritage's counsel's analysis the cost to repair is $645,499.05.

A simple review of the Harmon estimate would have shown the Arbitrator that her "only 25%" allocation for Clements' scope of repair was incorrect. The "Exterior Repairs" alone (siding, WRB, windows, rood, deck, and grading), which were all called for by Clements, total a base amount of $430,566.10, 66.6% of the sub-total. Adding that percentage of general conditions results in a total for the Ross Clements mandated Exterior Repairs of $528,047.01. In addition, Andy Schauder (not Plaintiffs) called for mold remediation after his first visit to Plaintiffs home all the way through his compelling testimony at the hearing. While the Arbitrator erroneously found that no cost was provided for mold remediation, an estimate was provided by Rainbow Restoration in the amount of $104,657.55, which was expressly included in the Harmon estimate. With overhead that total cost is $125,589.07. Thus, looking at those two items alone total $653,636.08 which establishes that the Arbitrator's finding that "75%" of the Harmon estimate was to address "homeowner requests" is clearly erroneous and should be reconsidered.

That the Arbitrator did not undertake even a cursory review of the Harmon estimate belote

making findings of fact is more troubling and, combined with the numerous other errors, indicates a pattern of partiality.

IV. Damages Identified by the Homeowner are Recoverable.

In addition, there is no legal authority whatsoever for a proposition that damages related to conditions identified by the owner are not recoverable. The Arbitrator was presented with exhaustive testimony, supported by photographs, of the deplorable condition of her home when she moved in and for the next ten months. She testified that many of those conditions were never repaired, even as of the time of arbitration, which was supported by her contemporaneous emails at the time of the 10-month warranty work purportedly done by Meritage (Plaintiffs Ex.29). Shortly thereafter, Meritage did not respond to the Right to Cure Letter sent by counsel (Plaintiffs Ex.31). Not one syllable of that testimony was refuted by Meritage, which offered no testimony on its own behalf.

By holding, by implication, that expert testimony is required to support all of Plaintiffs' damages, the Arbitrator again altered the burden of proof, requiring more of the Plaintiffs than the law requires, which is clear evidence of a lack of impartiality and should be reconsidered.

V. Evidence that no Repairs Were Requested During Ongoing Litigation Should Not Have Been Considered.

The Award specifically relied on the fact that no repairs were requested during destructive testing. "Mr. Clements admitted that no repairs, etc., were requested to be made after the destructive testing in 2018." (Award at 10). This is completely irrelevant, which the Arbitrator well knows, and again is disturbingly indicative of partiality.

There is no legal requirement for a party to repair conditions observed during forensic investigative work. In fact, as the Arbitrator well knows, *or should*, it is elemental that Plaintiffs have a legal duty to *preserve* evidence rather than *alter* it, as the Arbitrator erroneously suggests

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Plaintiffs were actually *obligated* to do. "A party has a duty to preserve evidence during litigation" *Hawkins v. College of Charleston*, 2013 WL 6050324 (4th Cir. 2013). Further, there is a common law duty to preserve evidence, and not only can a party be sanctioned for destroying evidence it has a duty to preserve. Not only would the Athimoolams have faced the possibility of sanctions for requesting repairs, a negative inference of the evidence would have been drawn in this litigation. "When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party." *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw County Board of Education v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)).

As the arbitrator is aware, it is customary and a legal right for defendants such as Meritage to have access to the defective conditions to make their own assessment of them as part of the litigation process. In this instance, Jay Rogers did that for Meritage. While unfortunately predictably, the Arbitrator finds it unremarkable, and apparently irrelevant, that Meritage, which actually created the defective conditions found by Clements, never offered to repair any of the conditions. It was also not noted by the Arbitrator that Mr. Rogers did not repair the conditions at the time of his visit.

This erroneous and peculiar finding by the Arbitrator is yet another, clear example of the Arbitrator's lack of impartiality and should be reconsidered.

VI. Andy Schauder Was Credible and Rainbow's Estimate was Admissible.

Andy Schauder has been a Board-Certified Industrial Hygienist for 40 years. He visited the Plaintiffs' home three times, in 2016, 2018 and again in 2022, and each time concluded that there is mold and mold spores on framing members throughout the home. His testimony,

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supported by laboratory testing results, was explicit and clear that the mold needs to be remediated to avoid the risk of future mold growth at the home.

Notwithstanding that *testimony*, from a credentialed expert who was qualified without objection, the Arbitrator relied on a *letter* from AdvantaClean, Defendant's Exhibit 1, which merely stated that, in 2016, the mold in Plaintiffs' home, was "***visibly clean.***" AdvantaClean was not called to testify by Meritage and their conclusory finding, espoused in the letter, was directly refuted, after it was written, by the testimony and laboratory results provided by Schauder.

Disregarding Schauder's testimony and findings, in favor of a letter secured by Meritage from AdvantaClean, which did not testify at the hearing (and was not even listed as a witness by Meritage), evidences a clear lack of impartiality and should be reconsidered.

In addition, the Arbitrator disregarded the mold remediation estimate provided by Rainbow, on the basis that it was not based on a protocol developed by Schauder. Again, there is no legal requirement that Rainbow's estimate needed to be based on a protocol from Schauder. Rainbow was qualified as an expert, is a licensed contractor in the business of mold remediation and testified that they do over 800 remediation proposals every year. They are the only expert to testify about those costs and there was no legitimate legal basis upon which to disregard their testimony.

This is further evidence of the Arbitrator heightening the burden of proof for Plaintiffs as result of her impartiality and should be reconsidered.

VII. Meritage's Lack of Evidence.

An over-arching issue in this case was the lack of testimony provided by Meritage. Meritage offered *no* testimony in this case. As noted by the Supreme Court in *Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171* 648 S.E.2d 585 (2007), "The failure of a defendant to testify

raises an inference that his testimony, if it had been submitted, would have been unfavorable to his position." Far from inferring that Meritage's testimony would have been unfavorable, in numerous particulars discussed below, the Arbitrator accepted the legal arguments of Meritage's counsel concerning liability, damages, criticisms of Plaintiffs' experts (who actually testified) and the Plaintiffs own unrefuted testimony about Meritage.

In addition, Meritage did not call a single subcontractor, AdvantaClean, any employee who was involved with the sale of Plaintiffs' home, the punch-list, or with respect to reviewing and responding to the Right to Cure letter.

The Arbitrator's willingness to adopt Meritage's legal arguments (proffered only by counsel) to refute and discredit the actual testimony and evidence offered by Plaintiffs and their *four testifying* experts evidences a persistent effort by the Arbitrator to increase the Plaintiffs' burden of proof and to require Plaintiffs to present evidence the law does not require, while at the same time, ignoring the absence of rebuttal *testimony* by Meritage and its subcontractors or the poor quality of Meritage's two expert witnesses.

VIII. The Arbitrator's Award is Erroneous, and Her Impartiality is Established Meritage's by Meritage's Settlements with its Subcontractors.

As the Arbitrator is aware, this case was commenced in Circuit Court and arbitrated between Meritage and Plaintiffs by agreement. In Circuit Court, Meritage asserted indemnity claims against the Subcontractor Defendants to recover any sums Meritage was required to pay Plaintiffs arising from the faulty work of the Subcontractor Defendants. In reliance on the reports and testimony of Plaintiffs' experts, including Clements and Schauder, Meritage pursued claims against those Subcontractor Defendants, securing settlements from the Subcontractor Defendants totaling $350,000.00.

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To be clear: The testimony and opinions of Plaintiffs, and their experts, which the Arbitrator heard at arbitration and blithely disregarded at the request of Meritage's counsel, is the same evidence that allowed Meritage to recover $350,000.00 from its subcontractors.

To the extent Meritage argues that their claims against subcontractors were for something other than indemnity for Plaintiffs' claims, that position is refuted by *Stoneledge at Lake Keowee Owners' Association v. Clearview Construction,* 776 S.E.2d 426 (S.C. Ct. App. 2015).

The fact is that the case which the Arbitrator found so unpersuasive, was persuasive enough to enrich Meritage at the expense of its subcontractors. That the Arbitrator found the same evidence unpersuasive is further evidence of a lack of impartiality which requires reconsideration of the case.

IX. Meritage Should Have Been Judicially Estopped from Taking Opposite Positions Throughout this Litigation.

Given the complete rejection of any disputed aspect of the claim by the Arbitrator, which were decided wholly and consistently in favor of Meritage, the doctrine of judicial estoppel applies in this situation. In *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997), the Supreme Court held that the doctrine of judicial estoppel precludes a party from adopting the position in conflict with one previously taken in the same or related litigation. The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process in the courts. The *Hayne* Court noted, "The parties may vigorously assert their version of the facts, but they may not represent those facts in order to gain advantage in the process." Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, by its pleadings, statements or contentions made under oath is prohibited from adopting an inconsistent position in subsequent proceedings.

In sum, as Judge Anderson said in a concurring opinion in *Quinn v. Sharon Corp.*, 343 S.C. 411, 422, 540 S.E.2d 474 (Ct. App. 2000) a party cannot blow "hot and cold."

Here, Plaintiffs recognize that Meritage was entitled to dispute the extent of the deficiencies and the costs to repair. However, in light of the Arbitrator's impartiality and the errors referenced above, equity does not allow Meritage to reap a $300,000 windfall by obtaining a benefit from the Plaintiffs' evidence which the Arbitrator rejected, and those settlement sums should be awarded to Plaintiffs.

CONCLUSION

For the reasons stated above, Plaintiffs request that the Arbitrator grant Plaintiffs' Motion to Reconsider and order an award that is consistent with the applicable case law and evidence presented.

Respectfully submitted,

LYLES & ASSOCIATES, LLC

s/Robert T. Lyles, Jr.

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Attorneys for Plaintiffs

October 16, 2023
Mount Pleasant, South Carolina

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Exhibit 5

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From: Becky Laffitte <blaffitte@robinsongray.com>
Sent: Monday, January 8, 2024 9:17 AM
To: Cobb, David S.
Cc: Robert Lyles; Danny Winterstein; Carenn Moore; Erica Rehorn; Hagen, Heather A.; Becky Laffitte
Subject: RE: Athimoolam v. Meritage Homes January 8

Good morning, David, Danny and Robert:

Now that I've received all submissions, which I appreciate, I'll be finalizing the Order. For clarification, I would like confirmation that you agree the Order was never filed. It was sent to you both but neither I nor you filed it. It is important to get consensus on this because I don't want to move to vacate an Order that was never filed. I appreciate your willingness to provide additional information and confirmation about the Order. Have a great day Best Becky

ROBINSON GRAY
Litigation + Business

BECKY LAFFITTE MEMBER

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Exhibit 6

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From: Carenn Moore <cmoore@robinsongray.com>
Sent: Friday, January 19, 2024 2:58 PM
To: Elizabeth Beasley
Cc: Robert Lyles; Danny Winterstein; David Cobb; Becky Laffitte; Erica Rehorn; Hagen, Heather A.
Subject: Athimoolam v. Meritage Homes of South Carolina, Inc. / 2017-CP-04-00376 (from Becky Laffitte)
Attachments: 5160_5753 FINAL ARBITRATION ORDER (1_19_24)(38978473.1).pdf

Good afternoon, Ms. Beasley.

Attached please find the Arbitration Order following the arbitration in the above matter. We would appreciate you filing this Order on behalf of the arbitrator.

By copy of this e-mail to all counsel involved, we are providing them with a copy of this Order.

If you have any questions, please let us know.

Carenn Moore
Legal Assistant

ROBINSON GRAY
Litigation + Business

CARENN MOORE LEGAL ASSISTANT

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	)	Civil Action No. 2017-CP-04-00376 **ARBITRATION ORDER**

This matter is before the Arbitrator upon Motion of Plaintiffs seeking to Alter or Amend an Arbitration Order dated October 4, 2023, upon numerous grounds asserted by plaintiffs. The defendant, Meritage Homes of South Carolina, Inc., opposes the motion. Pursuant to the Meritage Homes New Purchase Agreement, "This agreement is subject to mandatory arbitration pursuant to the Federal Arbitration Act and if the Federal Arbitration Act is inapplicable, the Uniform Arbitration Act, Section 15-48-10, et. seq., Code of Laws of South Carolina, 1976, as amended, applies." Since no aspect of this Arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS"), the Arbitrator finds the Federal Arbitration Act to be inapplicable.

Despite unfounded and unsubstantiated allegations of bias and partiality which may be asserted against the Arbitrator, factual and legal errors by arbitrators do not constitute abuse of their powers and can be corrected to ensure that the interests of all parties are protected. Pittman Mortg. Co., Inc. v. Edwards, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997).

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At no time during the Arbitration was the Arbitrator aware of any monetary recovery by defendant Meritage against any subcontractors brought in as third-party defendants. Accordingly, this Order will only reflect the testimony of lay and expert witnesses and evidence presented during arbitration and an analysis of the applicable law. However, the Arbitrator acknowledges the concerns raised by Meritage's counsel about the disclosure of the confidential settlement terms at mediation involving third-party defendants.

Based on the testimony, a detailed review of notes and all exhibits introduced into evidence at the Arbitration, the applicable law, a telephone hearing with all counsel on November 17, 2023, followed by additional submissions from both parties, the previous Order dated October 4, 2023, which was never entered, is hereby vacated, to the extent necessary, and this Order is hereby entered with the Honorable Clerk of Court for Anderson County.

FACTS

The plaintiffs, Raghu Athimoolam and Irene Athimoolam, purchased from Meritage Homes a three-story conventional wood-frame home supported by concrete foundation walls consisting of a walk-out balcony with two-floors above the basement level and an attached garage. The exterior cladding consists of a mix of brick masonry veneer, adhered manufactured stone veneer, and fiber-cement siding. The cash purchase for the home located at 116 Ariel Way in Easley, South Carolina totaled Four Hundred Twenty-Four Thousand Seven Hundred Fifty-Three and No/100ths ($424,753.00) Dollars as documented in the Meritage Homes New Home Purchase Agreement executed on April 3, 2015. (Plaintiffs' Ex. 1)

The anticipated move-in date of September 2015 was delayed and the closing occurred on October 29, 2015 in New York. Given the construction delays, the testimony at arbitration revealed that Meritage Homes paid for the attorneys' fees and closing costs. Prior to

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and at the time of the closing, plaintiffs admittedly had an opportunity to review the Agreement and ask questions. There is no evidence that they were coerced to sign the closing documents before they inspected the home in South Carolina. The Athimoolams testified that since Mr. Athimoolam was home for two weeks from his job in Dubai, they needed to close on the home so he could move the family to South Carolina before his return to Dubai. The Athimoolams also testified they trusted Meritage.

On November 2, 2015, the plaintiffs arrived to South Carolina and testified they found an unfinished home; deck cluttered with trash and debris (Plaintiffs' Exs. 2 and 3) and muddy conditions around the exterior of the home (Plaintiffs' Ex. 4 and 7). Mrs. Athimoolam also testified they were in shock as a water issue was apparent in the basement as captured in the photograph introduced into evidence (Plaintiffs' Ex. 5). They also discovered wet carpet and padding; a repaired hole cut in the basement drywall (Plaintiffs' Ex. 6); a board in the master bedroom, tile issues in the master bath (Plaintiffs' Ex. 24), and other purported issues which are documented in photographs submitted into evidence. (Plaintiffs' Ex. 1-24)

Meritage replaced the carpet pad and carpet in the basement. Given conditions which they considered uninhabitable, plaintiffs testified that they informed Meritage Homes that they would need a hotel in which to live since the home was unfinished. Meritage Homes paid the hotel expenses for the Athimoolams until Friday or Saturday of that week. Plaintiffs allegedly were told by representatives of Meritage Homes that these issues would be addressed. Mrs. Athimoolam testified that when they returned to their home following a brief stay in a hotel, they found a side glass section in their door broken (Plaintiffs' Ex. 10); the range hood remained unfinished (Plaintiffs' Ex. 11) and the surround around the fireplace had not been constructed to code. (Plaintiffs' Ex. 12) Meritage Homes resolved these issues but Mrs. Athimoolam

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complained about shoddy painting throughout the home, including the wall by the staircase to the basement (Plaintiffs' Ex. 13-14); bathroom tiles and bonus room which photographs were entered into evidence. Gaps were alleged to exist in several doors; questions remained whether wainscoting should have been used throughout the house (Plaintiffs' Ex. 23) and if ductwork for the HVAC system should have been installed in the basement area (Plaintiffs' Ex. 16). Mrs. Athimoolam also testified about issues with stained bath tubs and the absence of glass in the shower. (Plaintiffs' Ex. 24) Further, Mrs. Athimoolam testified she made calls to Meritage and on December 8, 2015, spoke with a customer care manager with Meritage. She later contacted a Divisional President and thought the issues would be resolved. Also, shortly after moving in, Mrs. Athimoolam contacted AdvantaClean to conduct mold testing on her home as she and her son were feeling ill. She testified she was unaware of a possible connection between Meritage and AdvantaClean which connection was not established through testimony or evidence at arbitration. She testified AdvantaClean found mold and she provided the report to Meritage. Meritage then removed three walls in the basement to permit mold remediation and/or treatment by AdvantaClean. (Plaintiffs' Exs. 17, 19) Meritage also paid to have the attic "fogged" (treated) but Mrs. Athimoolam remained unsatisfied. Mrs. Athimoolam continued to make complaints to Meritage about mold issues as she felt they were not being properly addressed. However, evidence introduced at arbitration noted that AdvantaClean tested the entire house and undertook and completed remediation in 2016. (Plaintiffs' Ex. 25; Defendant's Ex. 1)

On August 11, 2016, AdvantaClean wrote Meritage to report that mold remediation at the Athimoolam residence had been completed as outlined in the original scope of work, and the affected area(s) of the property were deemed visibly clean. (Defendant Ex. 1) A report from Southeast Environmental Microbiology Laboratories, dated August 24, 2016, which

analyzed the data from AdvantaClean Greenville, was also introduced into evidence. (Plaintiff's Ex. 26) An email dated August 25, 2016, from Meritage Homes to Mrs. Athimoolam noted "everything is clear" and was attached to an email from Mrs. Athimoolam to Paula Jean Allamong (Meritage Homes) dated February 26, 2020 with results of Airy Springs Air Test/Spore Trap Report on the outside, attic, main level, and basement of the Athimoolam home. (Plaintiffs' Ex. 26)

Mrs. Athimoolam sent a September 7, 2016, email to Meritage Homes detailing a number of issues, including her belief that AdvantaClean had utilized an improper dehumidifier in the basement and that the grading was not properly completed, which 2016 email was forwarded to Paula Jean Allamong with Meritage on February 26, 2020, and introduced into evidence. (Plaintiffs' Ex. 27)

On September 22, 2016, Meritage prepared a ten (10) month Warranty List that was introduced into evidence. (Plaintiffs' Ex. 28)

On October 3, 2016, Mrs. Athimoolam prepared an email to Bryan Ross at Meritage Homes with twenty-four punch list items to which she testified remained unresolved. (Plaintiffs' Ex. 29)

On October 27, 2016, H. Ross Clements, AIA of Fuller Envelope prepared a Summary of Field Observations to the Athimoolam Residence. (Plaintiffs' Ex. 34). This report was revised on August 27, 2018, to include results from destructive testing. (Plaintiffs' Ex. 35)

On November 1, 2016, Meritage sent a "sign off" letter in lieu of obtaining a signature to "Homeowner" at 116 Ariel Way in Easley, SC advising that all 10 Month Warranty request number 537485 items had been resolved. (Plaintiffs' Ex. 30)

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On November 18, 2016, Attorney Robert T. Lyles sent a certified letter to Meritage advising of his representation of the Athimoolams and of a "right to cure" detailing deficiencies with the home pursuant to S.C. Code Ann § 40-59-810 and enclosing a preliminary report from Fuller Consulting Engineers of Greenville, South Carolina. (Plaintiffs' Ex. 31)

On March 3, 2017, a First Amended Summons and Complaint were filed on behalf of the Athimoolams against Meritage Homes of South Carolina, Inc.

On February 11, 2020, Meritage Homes of South Carolina, Inc. filed a Third-Party Action against the contractors and building suppliers who provided labor and materials utilized in the construction of the Athimoolam home. At the time of the Arbitration and the issuance of the initial Order, the Arbitrator had no knowledge or information about any resolution of claims involving any third-party defendants sued by Meritage nor should the Arbitrator have been privy to any settlement that occurred at mediation.

On June 28, 2022, Attorney David S. Cobb, as counsel for Meritage, sent a letter to Attorney Robert T. Lyles, counsel for the Athimoolams. advising that Meritage "elects to exercise the contractual right to repurchase the home, as provided for in the sales contracts for the sum of $431,932. (Defendant's Ex. 3)

The Arbitration of this matter occurred on September 21 and 22, 2023, in Greenville, South Carolina. No aspect of this Arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS") pursuant to its arbitration rules and comprehensive services.

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FINDINGS

I. Construction

The testimony and evidence presented at arbitration on September 21 and 22, 2023, were expert intensive given the technical construction issues in dispute. Expert testimony is subject to the reliability requirement. See Rule 702, SCRE ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.") Also, a person may be qualified as an expert in a particular area based upon knowledge, skill, experience, and training. Watson v. Ford Motor Co., 389 S.C.437, 699 S.E.2d 169. If the opinions of the experts differ in certain respects, the Arbitrator is charged with determining questions of law and fact as would the judge and jury. S.C. Code Ann. § 15-48-180. Accordingly, the "decision to accept or reject [the experts] testimony [i]s ultimately a question of credibility for the [arbitrator] to decide." Id. (citing Menne v. Keowee Key Prop. Owners' Assn., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) (stating "[t]he credibility of testimony is a matter for the finder of fact to judge.").

The experts who testified as to alleged construction defects were H. Ross Clements, AIA, and Richard J. Rogers, P.E., M.B.A., both offered without objection. While their opinions differed significantly, the Arbitrator found both to be qualified and has considered aspects of their respective opinions in deciding this matter.

The credentials, qualifications and/or opinions of Matthew Harmon with Claims Construction and Restoration (Exs. 37, 38); Steven Lambright with Rainbow International (Ex. 42), and Mr. Andrew G. Schauder, CIH (Exs. 39 – 41) were challenged, as were their opinions and estimates. While all witnesses were allowed to testify, no testimony about scope and pricing

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that had not been produced prior to or in depositions, in discovery or prior to arbitration was permitted into evidence. However, since plaintiffs moved for reconsideration, the Arbitrator requested and reviewed the "Draft" mold remediation scope of work prepared by Mr. Andrew Schauder dated April 18, 2023, which was marked as Exhibit 41 at Arbitration without the "Draft" designation, as well as the submissions submitted to the Arbitrator on behalf of the Athimoolams dated November 22, 2023, and December 5, 2023, and submissions on behalf of Meritage dated October 30, 2023, and January 5, 2024.

Testimony was also offered by plaintiffs, Irene Athimoolam and Raghu Athimoolam. The Athimoolams have asserted that Meritage's failure to testify at arbitration raises an inference that the testimony, if submitted, would have been unfavorable to Meritage's position. Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962). The Arbitrator is familiar with this legal principle, as well as the law that places the burden of proof upon plaintiffs to establish the asserted causes of action against Meritage.

Irene Athimoolam was the first witness to testify and she described how this was to be her "forever" home as she was moving from New York to begin a life in South Carolina with her husband and son. She expressed concerns about shoddy workmanship; Meritage's alleged failure to complete the warranty items (Plaintiffs' Exs. 28-29); mold issues; and Meritage's alleged failure to adequately and properly address her concerns despite conversations with Meritage sales representatives, a customer care management associate, and a Divisional President. During her testimony, twenty-four (24) photographs were introduced into evidence documenting construction issues with the home from her perspective. Mrs. Athimoolam, over objection by counsel for Meritage, introduced a list of personal items which she maintains have

been damaged beyond repair due to mold exposure and for which she seeks compensation. (Plaintiffs' Ex. 33)

Mrs. Athimoolam further testified at Arbitration that she is unaware of any roof leaks since a repair to selected shingles was made to her home approximately six (6) years ago by a handy man retained by her, whose name she could not recall and which receipt documenting this expenditure was no longer available. On a submission of additional documents for review on behalf of the Athimoolams by their counsel on December 5, 2023, Mrs. Athimoolam submitted a page from her deposition (page 22) discussing leaks in the bedroom and main bathroom level. Also, Mrs. Athimoolam testified that approximately seven (7) years ago, she had the exterior brick of her home power washed by a "neighborhood kid" and noticed no water intrusion. The veneer siding has not come off since the one section was repaired or replaced approximately six (6) years ago by Meritage. She also testified that no windows have leaked since they have occupied their home. As to her personal property damages, her testimony was permitted over objection by Meritage counsel, David Cobb, who argued these are non-recoverable damages as they were not claimed damages in the Amended Complaint and just provided to Attorney Robert Lyles in September 2023; the items are still in use; their purported value is speculative given the absence of receipts which document dates and costs of the purchases and plaintiffs' failure to mitigate their damages. (Plaintiffs' Ex. 33) Raghu Athimoolam also testified; however, since he was working in Dubai, he relied upon information provided by Mrs. Athimoolam.

H. Ross Clements, AIA, a partner with Fuller Envelope, was called as an expert witness on behalf of the Athimoolams and was qualified as an expert in forensic architecture, without objection. Mr. Clements introduced a PowerPoint presentation during Arbitration (Ex.

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36) and testified that he inspected the Athimoolam home on September 1, 2016, with Jamison Hupp, Associate AIA, and conducted a visual survey and made field observations. His October 27, 2016 report (Plaintiffs' Ex. 34) was revised on August 27, 2018 after destructive testing was performed and documented at localized areas of the exterior envelope at the Athimoolam home. (Plaintiffs' Exs. 35 and 36) Of note is the destructive testing conducted along the left elevation and base of the wall and window heads of the home with regard to the fiber-cement lap siding; brick veneer at the left, right and rear elevations; and adhered manufactured stone veneer (AMSV) at three walls that comprise the bay window feature at the front left corner of the home. Meritage's counsel challenged the isolated test cuts and findings as not determinative or conclusive of the condition of the entire exterior envelope of the Athimoolam home.

During the August 2018 inspection, a contractor, Rodney Edwards, accompanied Mr. Clements and prepared an estimate on the suggested scope of repairs. Unfortunately, due to health issues, Mr. Edwards was unable to testify about his cost estimate totaling approximately $265,730. The revised report of Mr. Clements dated August 27, 2018 included eighteen (18) recommendations which he opined were needed in order for the Athimoolam home to meet building code and industry standards, including but not limited to the following:

1. Removal and reinstallation of existing windows and doors, to include all necessary flashing, SAF, and WRB
2. Removal and replacement of exterior cladding; brick veneer, AMSV, composite MDF trim and related accessories
3. Contractor to provide an allowance for interior repairs for nail pops, drywall painting, etc.

4. At exterior alcove area of the walk-out basement, regrade surface by walk-out basement and install a catch basin with underground corrugated piping, if necessary

5. At the rear elevation, first floor level, repair and replace LVL beam; joist hangers; fasteners, etc., per manufacturer's installation instructions

6. Localized repairs shall be performed to the deck structure to provide lateral bracing; proper attachment of components, including, but not limited to, lateral connections; ledger fasteners; remove existing guardrail posts and install new 4 x 4 posts using appropriate bolts, anchors, wood columns, etc.

7. At the rear elevation, remove existing gutter and replace with 6" K style gutter. Reinstall existing downspouts. Gutters shall match existing color. Insure downspouts terminate.

8. Properly integrate drip edges with roofing underlayment along the eaves; replace any underlayment and/or shingles damaged during repair. Apply roof cements; remove shingles at gable cornices (front elevation) and install underlayment properly lapped with the WRB and other flashings, as applicable.

9. At the first floor mudsill plate for perimeter of structure, install fasteners into unattached mudsill anchors and additional fasteners at anchors lacking fasteners.

10. Within the basement, install closed-cell spray foam at the rim board on first floor, and Rockwool Comfortbatt (R-13 minimum) batt insulation within the stud cavities. Spray foam over foam board blocking.

11. As recommended by Environmental Testing Report, abate fungal growth in all areas where fungal growth was found to be present (basement and attic). After

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abatement, indoor air quality investigation shall be performed in the basement by a certified indoor environmentalist. Remove and replace gypsum board finishes as required to perform abatement.

12. At the Master Bedroom, remove and reset out-of-square door and jamb. Install new interior casing as required. Paint and caulk finishes.

13. At the Garage, remove brown-colored masonry mortar and replace with Sika Repair SHB mortar. Prime exposed steel reinforcement with Sika Arnatec 110 EpoCem; repair additional spall locations not previously repaired. Install cementious parge coat on concrete walls for uniform finish.

14. At the Garage, remove the existing garage door guide rails and install rails of proper height to provide 6 – 8" minimum clearance at house entry door landing.

15. Replace adjacent materials affected by the repair work in-kind.

16. Contractor shall provide for all general conditions, including, but not limited to: protection of existing property and adjacent areas not subject to the repair areas, building permits, demolition/disposal costs, final cleaning, etc.

17. Contractor shall provide a 5% contingency allowance and their preferred overhead/profit percentages.

18. Contractor shall provide a line item for A/E fees at 10% of the total cost of construction (including OHP).

(Plaintiffs' Ex. 35)

Mr. Clements opined that all of the documented deficiencies need to be addressed to bring the home into compliance with the applicable building codes; manufacturer's instructions and industry standards. Specifically, Mr. Clements observed loose and poorly

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attached siding at multiple locations along the left, right, and rear elevations of the home. He also noted that improper fasteners were used and that metal thru-wall flashing was reverse-lapped with the weather barrier and the flashing was sealed with sealant. Further, he testified that the adhered manufactured stone veneer (AMSV) had been improperly installed at three walls that comprise a bay window feature on the front and side elevations of the Athimoolam home.

Mr. Clements also testified that the existing windows (29) should be removed and reinstalled "to address improperly installed/damaged rough opening flashing and WRB around the openings." In support of his opinions, he relied on photos A9a, b, c, d, e, f, and g documented in the PowerPoint and his reports. (Exhibits 34, 35, and 36) He also criticized improper fasteners installed at the window nailing fin and improperly spaced fasteners. As noted in Photos A9.a, b, c, and d, Mr. Clements only recommended the removal and reinstallation of the existing twenty-nine (29) windows to address the fasteners, flashing and WRB issues as detailed in the Fuller reports.

In addition to observed window installation deficiencies, Mr. Clements noted concerns, in part, about the improper installation of the fiber-cement exterior lap siding along the left, right, and rear elevations of the residence; improperly installed adhered manufactured stone veneer (AMSV); grading deficiencies at the exterior alcove area of the walk-out basement; deck repairs (not total replacement); roof underlayment along the eaves; improperly sized K style gutter at the rear elevation of the home; drip edges, as well as other areas denoted in the reports. Mr. Clements also testified that he observed no water intrusion on the front or side elevations of the Athimoolam home, but opined that if the conditions he discovered were not resolved, it could lead to water intrusion such as the condition he observed on the left corner at the rear elevation of the home.

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During cross examination by Meritage's counsel, key points to which Mr. Clements testified about the 2018 conditions to the Athimoolam home included the following: a) there is no evidence that any of the windows have leaked or resulted in water intrusion into the home since occupancy; b) during the destructive testing in 2018, no rotten wood, deteriorated sheathing or evidence of water intrusion were observed at the front and side elevations of the home; alcove or roof; c) the window manufacturer was not contacted to determine if any warranties will be impacted if the windows are removed and reinstalled per the protocol recommended by Mr. Clements which do not include the replacement of any of the windows in the home or the installation of a new roof and deck. He testified to underlayment application at the drip edge and the undersized rear gutter that impacted roof drainage. Mr. Clements further testified that the issues and recommendation noted for the span issue in the garage could be corrected in one (1) day. Mr. Clements also opined that he neither observed nor was aware of any roof leaks. On the main level, living area, he testified about one (1) door in the master bath that was not square, but documented no damage to the hardwood floors or interior drywall.

Matthew Harmon of Claims Construction and Restoration was offered as an expert by the plaintiffs in cost estimation and construction repairs. He admitted he had never worked within 100 miles of the Athimoolam house; had never used any contractors in the Upstate, and that costs and price differences exist in various parts of South Carolina. Although a motion was made to exclude Mr. Harmon's testimony and report based on challenges to his expertise, credentials and report, the objection was overruled after a "proffer". Mr. Harmon was retained to prepare a cost estimate on the scope of work proposed by Ross Clements. Mr. Harmon never had any discussions with Mr. Clements or Mr. Andrew Schauder regarding the scope of repair or mold remediation and failed to provide justification for including some of the

items in his purported scope of repair. Mr. Harmon prepared two reports identified as Plaintiffs' Exs. 37-38 to which "Preliminary Estimate Only" is affixed to both. He testified that following his deposition, he had to revise the initial cost estimate (Ex. 37) to correct a typo of 140 hours of labor to 40 hours; and to remove estimations for drywall and HVAC technician costs. Mr. Harmon admitted that he had not solicited quotes on the "bid" items reflected in the cost estimate and that certain of the costs included in his reports exceeded the scope of Mr. Clements' recommendations and were included at the request of the Athimoolams.

Further, Mr. Harmon's cost estimate appears to add duplicate costs for overhead and profit, as each line item description includes an overhead and profit cost, while overhead and profit are also included on pages 27 – 28 of Plaintiffs' Exhibit 38. Of note, Mr. Harmon also included no contingency costs in his line item descriptions or cost estimate as recommended by Mr. Clements.

While Meritage questions the costs, including those attributed to the "bid" items, and stated overhead and profit costs of these "bid" items, Mr. Harmon testified that Xactimate is a software program used by insurance companies and recognized in the industry. Notably, while Meritage challenged the opinions of Mr. Clements and the cost estimate prepared by Mr. Harmon, it did not provide any alternative cost estimates to challenge the accuracy of the costs calculated through the Xactimate program for the removal and replacement of the exterior siding, brick veneer, and AMSV, which costs appear reasonable to correct the defects identified by Mr. Clements.

At the time he met with the Athimoolams in July 2022 for approximately 1 ½ hours, Mr. Harmon had only been a licensed contractor for two months. (Defendant's Ex. 4) During this visit, Mr. Harmon did not look in the attic or inspect the second level of the home

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because Mr. Athimoolam was resting. Mr. Harmon did not request permission to access these areas. He did not wear PPP equipment or wear a respirator while at the home. He had no issues breathing while in the Athimoolam home.

In addressing some of the recommendations noted by Ross Clements, Mr. Harmon included the costs of new windows as he did not believe the warranty would be valid if he removed the windows, installed flashing, etc. and then reinstalled the windows. (Plaintiffs' Ex. 38, p. 25) However, he did not contact the manufacturer of the existing windows to discuss if the warranty would be impacted with a removal and reinstallation of the windows.

Also, although the scope of work proposed by Ross Clements did not include the removal and installation of a new roof (he testified at arbitration that he observed no active moisture intrusion inside the home or leaks at windows or doors); construction of a new deck; painting; new gutter system; landscaping; concrete wall; and removal and replacement of footings; to name a few, Mr. Harmon included these items in his cost projection.

At arbitration, Mr. Harmon testified that 75% of his cost estimate was from items provided by the homeowners, while 25% from Mr. Clements' report, However, the testimony and evidence show that Mr. Harmon exceeded the scope of Mr. Clements' recommendations in his cost projection specifically on pages 2 – 19 of Plaintiffs' Exhibit 38, and that the numbers were "preliminary." Further, Mr. Clements testified he has never communicated with Mr. Harmon about his cost estimations or scope of work. The cost estimations in both of Mr. Harmon's reports (Plaintiffs' Exs. 37 and 38) as to mold remediation by Rainbow International Restoration accept the estimate "as is" although Mr. Lambright never received a scope of work from Andrew G. Schauder and included some areas of the home for mold remediation which he never inspected. (Plaintiffs' Ex. 42)

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Mr. Harmon also testified that Mrs. Athimoolam added three areas of tile (bedroom and laundry); two additional interior doors; prime and paint of the main level; and mold and fungal abatement which is already reflected in the report of Rainbow International. He also testified that he did not go onto the second floor or attic of the Athimoolam home. Also, he testified that in Exhibit 38, the items listed on pages 11 – 20 of his report (beginning with the main level and including laundry room, with the exception of two tiles being replaced; closet, breakfast area/room; family room; closet; master closet; sitting; bedroom 2; bedroom 1; master bath; master bedroom; closet 2; hallway; bathroom; stairs; kitchen; and closet) had been added to the repair estimate at the request of the Athimoolams. These line items on the main level, which include overhead and profit, total $57,798.08 (excluding garage). Accordingly, the Arbitrator has determined that a significant amount of the line item costs in Mr. Harmon's report should not be and are not considered in this Order since they are unsupported by the testimony and evidence presented at Arbitration.

Mr. Harmon, on cross-examination, testified that he never went into the attic or second level of the Athimoolam home. Thus, the "level two" costs detailed on pages 21 – 22 of the report should not have been included as neither Ross Clements nor Jay Rogers testified about the necessity of any repairs. These purported costs, which include overhead and profit, totaling $12,857.73 provide another example of costs not in conformity with the testimony and evidence and not considered in this Order.

Richard J. Rogers, P.E., M.B.A. of Rogers Construction Engineering was offered as an expert forensic engineer and licensed general contractor on behalf of Meritage Homes, without objection. Mr. Rogers testified that he received the Fuller Envelope (Clements) reports and visited the Athimoolam home on July 15, 2019. Mr. Rogers noted that he went inside the

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Athimoolam home, stuck his head in the attic and concentrated his time in the basement. He was informed of no roof leaks or water intrusion through any of the windows since the Athimoolams moved into the home. He did not conduct any destructive testing. He testified he is currently involved in seven litigation matters involving Meritage but he has not been hired in any to make repairs.

In discussing the Fuller Envelope reports addressing the windows, defense expert, Jay Rogers, admitted that he could not opine if the building wrap had been properly applied or WRB properly folded in. Although photos of the flashing are such that it appears flashing was properly installed, he could not testify with certainty to the manner of installation and conformity to building codes and industry standards. As for questions about the positioning of the nails used in the window installation, he testified it was his belief that installing the nails in areas other than the nail fin did not violate any requirements. However, he was unable to testify to this with certainty. Further, since he does not know the condition of each window in terms of installation, he found relevant and significant the absence of any leaks and water intrusion through any of the windows in the Athimoolam home since 2015 which supports his position that no repairs need to be made to any of the windows in the Athimoolam home. He provided a cost estimate for repairs, not replacement, of the exterior siding, brick veneer, and AMSV based on his experience and opinions after inspecting the home. Defendant, Meritage Homes, also introduced into evidence numerous photographs of the Athimoolam home. (Defendant's Ex. 2 and 7) Although Mr. Rogers disagreed with the opinions of Mr. Clements, he presented no evidence, through destructive testing he conducted, to dispute the findings in the Fuller reports nor cost estimates from other sources to challenge the accuracy of the costs for the removal and replacement of the

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exterior siding, brick veneer, and AMSV as calculated by the Xactimate software used by Mr. Harmon. Mr. Rogers also opined that mold remediation was unnecessary.

As for the fourteen recommendations made by Mr. Clements, Mr. Rogers testified in conformity with a prior report identified as Defendant's Ex. 5; Plaintiffs' Ex. 32, which included his recommendations and pricing to resolve any construction issues:

1. Removal and reinstallation of the existing windows and doors – No action required
2. Removal and replacement of the exterior cladding, including all fiber-cement siding, brick veneer, AMSV, composite MDF trim and related accessories. All work described can be performed for less than $15,000.
3. Contractor allowance for interior repairs, for nail pops, drywall, painting, etc. – Unnecessary
4. Exterior alcove of the walk-out basement – work can be performed for $1,500
5. At rear elevation, first floor level – repairs should be performed as described in Fuller report – work can be performed for $1,000
6. Localized repairs to deck structure – work can be performed for $1,000
7. At the rear elevation remove existing gutter and replace Unnecessary as gutter is functioning.
8. Properly integrate drip edges with roofing underlayment – Unnecessary – $2,000 through testimony at arbitration
9. At the first-floor mudsill plate for perimeter of structure. Fasteners, etc. – work can be performed for $300

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10. Basement, spray foam – batt insulation is acceptable by code – work can be performed for $500

11. As recommended by Environmental Testing & Management – Unnecessary Advanta issued clean report

12. At the Master Bedroom, remove and reset the out-of-square door and jamb - work can be performed for $1,000

13. At the Garage, remove brown colored masonry mortar and replace - work can be performed for $500

14. At the Garage, remove existing door guide rails and install proper rails - work can be performed for $500

Mr. Rogers further testified that his proposed cost estimate at Arbitration based on inflation would be in the Thirty Thousand and No/100ths ($30,000.00) Dollars range, plus approximately Two Thousand and No/100ths ($2,000.00) Dollars to address some of the roofing underlay issues noted by Mr. Clements.

II. Mold
(Industrial Hygienists)

Environmental Testing and Management, Inc. (Andrew G. Schauder) was retained by Mrs. Athimoolam to provide professional and technical consulting services by conducting a limited evaluation of an alleged water intrusion/mold issue impacting several locations within her residence. He was offered as an expert in industrial hygiene without objection. Although his recommended scope of mold remediation identified as Exhibit 41 was not allowed into evidence because it had not been provided to Meritage and its counsel, this information was requested and considered by the Arbitrator after the Arbitration and prior to the issuance of this Order.

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On the initial visit, November 28, 2016, Mr. Schauder was informed of prior services provided by AdvantaClean. His most notable observation from an exterior inspection was the grading of the land at the rear of the house, a sample collected in the basement – unfinished utility, and the level of the Penicillium/Aspergillus group of fungi which he testified was borderline elevated. Mrs. Athimoolam provided Mr. Schauder with two spore trap reports, one dated July 28, 2016 and one dated August 24, 2016. No written reports accompanied either lab report. Of the information provided, Mr. Schauder opined that all of the samples collected inside the house were found to have a lower total fungal spore count than present in the outdoor air.

A visual examination of the remainder of the interior of the house did not reveal any evidence of any significant water intrusion or mold growth. Further, his report reflects elevations of Penicillium/Aspergillus group of fungi on both the main floor, as well as the basement. From the initial inspection, Mr. Schauder concluded the most likely explanation for prior mold growth on the floor joists in the attic and basement was that the wood framing members were left exposed to the outside elements for an extended period of time. He suggested test cuts needed to be made in the sheetrock walls and ceilings so a complete scope of work could be determined and a protocol prepared for the remediation of the impacted areas. No recommendations in the December 2016 report were addressed. No complete scope of work was completed and no protocol for mold remediation was prepared or introduced into evidence as it was never discussed between Mr. Schauder and Mr. Lambright. (Plaintiffs' Ex. 39).

Four-plus years later, on August 24, 2021, Mr. Schauder returned to the Athimoolam home and met with Mr. and Mrs. Athimoolam. During this time, there is no evidence that any other testing occurred or protocols proposed for mold remediation. As

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documented in his report (Plaintiffs' Ex. 40), his follow-up inspection began in the basement. Finding what he described as prior or suspected fungal growth and staining in a bedroom, basement, and attic, he again recommended that a complete scope of work be determined, and a protocol prepared for the remediation of fungal growth in the designated areas. Mr. Schauder questioned if the floor joists in the basement had been treated or had an encapsulant applied with an antifungal component. Suspect mold growth was present on wood framing. No protocol about test cuts or scope of work was prepared by him or introduced into evidence. The only cost information was documented in the Rainbow document and prepared solely by Mr. Lambright with no consultation or input from Mr. Schauder. (Ex. 42)

On April 6, 2023, Mr. Schauder returned for a second follow up water intrusion/mold investigation in areas above the existing sheetrock ceilings and attic. (Plaintiffs' Ex. 41) In this report, Mr. Schauder referenced reports from Environmental Testing and Management, Inc., and General Engineering. (GEL Report March 3, 2021 – Defendant's Ex. 6) Mr. Schauder opined that the presence of staining on wood framing members found throughout the house (theater, storage 2, great room and attic) was most likely the result of prior mold growth. While he noted the necessity to remove all sheetrock walls and ceilings to allow for an examination of the wood framing members, this was not undertaken. In fact, the April 2023 inspection simply noted suspected mold growth and staining. In a deposition taken before the arbitration, Mr. Schauder testified he had not prepared a protocol or performed mapping of the timbers. When he attempted to testify to a protocol at arbitration, an objection was made by counsel for Meritage and sustained by the Arbitrator given that the information had not been provided in discovery, in a deposition, and/or prior to the arbitration. State v. Warner, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2000).

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Also, during Mr. Schauder's deposition on November 23, 2020, he had no recommendations for a remediation protocol and found no evidence of fungal growth on the first and second levels of the home. Also, he noted no water intrusion in the attic and noted no health concerns for the Athimoolams. A few days before the arbitration, Mr. Schauder testified he was provided a copy of the Rainbow International Restoration proposal (Plaintiffs' Ex. 42) but did not discuss specifics about the proposal or provide a scope of work to Steven Lambright with Rainbow International Restoration.

Steven Lambright, a licensed contractor with advance microbial remediation experience, with Rainbow International Restoration, prepared a cost projection utilizing Xactimate for mold remediation to the Athimoolam home after visiting the Athimoolam home for several hours on April 18, 2022. (Plaintiffs' Ex. 42) He admittedly is not an expert in air quality testing and mold growth assessment. Also, he never received the proposed scope of work of Mr. Andrew Schauder dated April 18, 2023. (Exhibit 41) The expertise and qualifications of Mr. Lambright were challenged but he was permitted to testify, over objection. Mr. Lambright testified that approximately eighteen (18) months ago, he observed no active water leaks in the attic and basement. During his inspection in the attic, he did not determine if active mold was present and conducted no testing. He also did not determine if the moisture content in the attic was elevated. Mr. Lambright admitted that Mr. Schauder had not approved the scope of the work or provided a suggested protocol for mold remediation. Therefore, the Arbitrator finds that neither Mr. Schauder nor Steven Lambright provided compelling evidence or testimony to substantiate the necessity for mold remediation.

Following the denial of directed verdict motions made by counsel for Meritage Homes, Meritage called Ronald S. Sharpe, C.I.H., R.S., with GEL Engineering LLC as an expert

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witness. Mr. Sharpe's report was marked as Defendant's Exhibit 6. Mr. Sharpe, who conducted IEQ assessments of the environmental quality of the Athimoolam interior on October 30, 2019 and November 12, 2020 offered his opinions in his written report and noted that no further mold remediation is necessary at the Athimoolam home. Mr. Sharpe also offered suggestions to reduce the potential for amplification and/or proliferation of microbial growth inside the structure after sources of water intrusion are repaired.

DAMAGES

It is well settled in South Carolina that proof of resulting property damage is not necessary to establish liability for construction defects. Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). A cause of action is available where a builder has violated a legal duty, no matter what the type of resulting damage. Kennedy v. Columbia Lumber Mfg. Co., 299 S.C. 335, 346 (1989). It is well settled that "the applicable measure of damages [can] be shown by the cost of repairs." Kincaid v. Landing Development Corp., 289 S.C. 89, 94, 344 S.E.2d 869, 873 (Ct. App. 1986). Further, damages must be awarded to the extent they were proven. Hinds v. Elms, 358 S.C. 581, 595 S.E.2d 855 (Ct. App. 2004).

Further, while plaintiff is allowed to testify about her belief on value or damage to personal property, Waites v. S.C. Windstorm & Hail Underwriting Ass'n, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983), the existence or amount of damages cannot be left to conjecture or speculation. Piggy Park Enterprises, Inc. v. Schofield, 162 S.E.2d 705, 708 (S.C. 1968). "It is the general rule that it is the duty of the owner of the property, which is injured by the negligence of another, to use reasonable means to mitigate the damages. Newman v. Brown, 228 S.C. 472, 480.

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Testimony elicited from Mrs. Athimoolam at the arbitration revealed that many personal items are still in use in the home and that there has been no effort to mitigate these alleged damages. Although Mrs. Athimoolam testified about the value of her personal items, she was unable to provide any sales receipts documenting the value of the items she claimed were damaged or ruined due to water and mold. (Plaintiffs' Ex. 33) Accordingly, the Arbitrator found her testimony about the purported damages in Plaintiffs' Ex. 33 left to conjecture or speculation. Gauld v. O'Shaugnessy Realty Co., 671 S.E.2d 79, 85 (Ct. App. 2008).

AWARD

Based on the testimony and evidence presented at Arbitration, the applicable law, and a review of all submissions by the respective attorneys after Arbitration, I hereby award damages to the Athimoolams in the sum of **Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100ths ($320,917.63) Dollars** as detailed below:

- The sum of **Nine Thousand One Hundred Eighty-Three and No/100ths ($9,183.00) Dollars** – Remove and reinstall twenty-nine (29) windows to install WRB, SAF and flashing
  - Labor ($116/hour x 2) to remove and reinstall windows x 29 = $6,728.00
  - Scaffolding - 1 month ($1,455/month) - $1,455.00
  - Flashing, WRB, SAF - $1,000.00
- The sum of **Two Hundred Six Thousand Four Hundred Fifty-Five and No/100ths ($206,455.00) Dollars**
  - Fiber Cement Siding - $70,000.00
  - Paint siding - $34,000.00
  - Remove and install brick veneer, AMSV - $81,000.00
  - Remove and replace sheathing - $20,000.00

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- Scaffolding – 1 month ($1,455/month) - $1,455.00

- The sum of **Five Thousand Five Hundred and No/100ths ($5,500.00) Dollars** for interior painting in master bedroom after removal and reset of out-of-square door and jamb;

- The sum of **Three Thousand and No/100ths ($3,000.00) Dollars** for regrading of exterior alcove area of walk-out basement and installation of surface catch basin, if necessary;

- The sum of **One Thousand and No/100ths ($1,000.00) Dollars** for grading at the rear elevation, first floor level;

- The sum of **Twelve Thousand and No/100ths ($12,000.00) Dollars** for localized repairs to deck structure;

- The sum of **Eleven Thousand Seven Hundred and No/100ths ($11,700.00) Dollars** for replacement of the gutter and downspouts with appropriate color match only at the rear elevation of the home with the size recommended by Ross Clements - 5 ½ x 4 ½;

- The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to properly integrate drip edges with roofing underlayment;

- The sum of **Three Hundred and No/100ths ($300.00) Dollars** for fastener installation into unattached mudsill anchors at mudsill plate for perimeter of structure;

- The sum of **Three Thousand Two Hundred Ninety-Three and 63/100ths ($3,293.63) Dollars** for batt insulation, spray foam, etc. in basement;

- The sum of **One Thousand and No/100ths ($1,000.00) Dollars** to remove and reset the out-of-square door and door jamb in Master Bedroom;

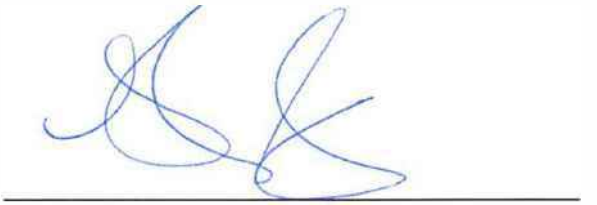
- The sum of **Two Thousand and No/100ths ($2,000.00) Dollars** to remove brown-colored masonry mortar, repair spall locations and install a cementious parge coat to concrete walls for uniform finish;

- The sum of **Ten Thousand and No/100ths ($10,000.00) Dollars** to remove existing garage door rails and install rails that are proper height;

- The sum of **Fifty-Three Thousand Four Hundred Eighty-Six and No/100ths ($53,486.00) Dollars** for overhead and profit.

Therefore, it is hereby Ordered, Adjudged, and Decreed that the plaintiffs are awarded the sum of **Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100ths ($320,917.63) Dollars**.

AND IT IS SO ORDERED.



Becky Laffitte
Arbitrator

January 19, 2024

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Exhibit 7

KeyCite Yellow Flag - Negative Treatment
Distinguished by PoolRe Ins. Corp. v. Organizational Strategies, Inc., 5th Cir.(Tex.), April 7, 2015

374 F.3d 372
United States Court of Appeals,
Fifth Circuit.

Melissa E. SMITH, Plaintiff–Appellant,
v.
TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO AIR TRANSPORT LOCAL 556, Defendant–Appellee.

No. 04–10230
|
Summary Calendar.
|
July 6, 2004.

Synopsis

Background: Former president of local union sued local union. Following stay of litigation, submission of matter to arbitration, entry of initial arbitration award, and entry of modified arbitration award, the United States District Court for the Northern District of Texas, James E. Kinkeade, J., vacated modified award and confirmed original award. Former president appealed.

Holdings: The Court of Appeals held that:

[1] issue whether arbitration panel could modify its prior award was for courts;

[2] panel lacked power, over one month after issuing initial decision, to modify such decision; and

[3] union did not violate contractual provision limiting its right to appeal to appeals of "arbitrator misconduct."

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (8)

[1] **Alternative Dispute Resolution** Scope and Standards of Review

The Court of Appeals' review of a district court's confirmation or vacatur of an arbitrator's award is de novo; the Court of Appeals' review of the arbitrator's award itself, however, is very deferential.

2 Cases that cite this headnote

[2] **Alternative Dispute Resolution** Disputes and Matters Arbitrable Under Agreement

Alternative Dispute Resolution Trial or Hearing

Whether a contract requires arbitration of a given dispute is a matter of contract interpretation and a question of law for the court.

13 Cases that cite this headnote

[3] **Alternative Dispute Resolution** Particular Issues or Questions

Alternative Dispute Resolution Amended and Supplemental Awards

Issue whether arbitration panel could modify its prior award over one month after having entered its original award was matter of contract interpretation, and thus was for courts rather than for arbitrators, since issue involved question of arbitrators' authority.

12 Cases that cite this headnote

[4] **Alternative Dispute Resolution** Contractual or Consensual Basis

Arbitration is a matter of contract; a party cannot be required to submit to arbitration unless it agreed in advance that the dispute would be arbitrated.

19 Cases that cite this headnote

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[5] **Alternative Dispute Resolution** Construction in Favor of Arbitration

Although the law imposes a presumption in favor of arbitrability, the policy that favors resolving doubts in favor of arbitration cannot serve to stretch a contractual clause beyond the scope intended by the parties or authorize an arbiter to disregard or modify the plain and unambiguous provisions of the agreement.

11 Cases that cite this headnote

[6] **Alternative Dispute Resolution** Amended and Supplemental Awards

Arbitration panel lacked power, over one month after issuing initial decision, to modify such decision, where plain wording of arbitration agreement contemplated that arbitrators would not consider correcting arbitral award at behest of parties, and forbade correction or amendment on arbitrators' own motion more than three business days after award.

9 Cases that cite this headnote

[7] **Alternative Dispute Resolution** Actions Exceeding Arbitrator's Authority

Under federal and Texas law, if an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision. 9 U.S.C.A. § 10(a)(4); V.T.C.A., Civil Practice & Remedies Code § 171.088(a)(3)(A).

5 Cases that cite this headnote

[8] **Labor and Employment** Waiver and Estoppel

Local union did not violate contractual provision limiting its right to appeal arbitration award to appeals of "arbitrator misconduct," when union lodged objection to its former president's request to confirm award, based on arbitrators' alleged lack of power to modify award, which was question of law for court.

9 Cases that cite this headnote

Attorneys and Law Firms

***373** Frank Lewis Broyles, Goins, Underkofler, Crawford & Langdon, Andrew Monroe Trusevich, Quilling, Selander, Cummiskey & Lownds, Dallas, TX, for Plaintiff–Appellant.

Edward B. Cloutman, III, Law Offices of Ed Cloutman, Dallas, TX, for Defendant–Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

Opinion

PER CURIAM:

Plaintiff–Appellant Melissa Smith appeals a district court order vacating a modification of an arbitration award. Defendant–Appellee Transport Workers Union ***374** Local 556 argued to the district court that the arbitration panel lacked authority to modify the initial arbitration award after three business days, the period specified in the arbitration agreement for amendment to an award. Agreeing with the Union, the district court vacated the arbitration award as modified and confirmed only the initial award. Smith appeals. Because the arbitration agreement clearly restricts the authority of the arbitrators to amend or correct their award, we affirm.

I.

Smith, former president of the Union, initially sued the Union about matters no longer pertinent in this appeal. The issue presently before us arose after the parties agreed to stay litigation and submit to binding arbitration, and indeed after an initial arbitral award in favor of Smith. Questions about taxation of additional costs and the arbitration panel's authority to modify its initial award gave rise to this controversy. The arbitral panel determined that it had such authority and modified the award to tax additional costs against the Union, favoring Smith.

In district court Smith moved to confirm the modified award and the Union opposed confirmation of the award *as modified,* but not the original award. The district court agreed with the

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Union and vacated the modified award, confirming only the original award. [1]

[1] Our review of the district court's confirmation or vacatur of an arbitrator's award is de novo; our review of the arbitrator's award itself, however, is very deferential. [2]

[2] Whether a contract requires arbitration of a given dispute is a matter of contract interpretation and a question of law for the court. [3] The arbitration agreement states that, "The arbitrators *sua sponte* may amend or correct their award within three business days after the award, but the parties shall not have a right to seek correction of the award." [4]

[3] More than a month after the initial award, the arbitration panel found a modification to be "consistent with the arbitration agreement of the parties and the intention of the drafter of the award." [5] Smith argues that the district court should accept the arbitration panel's interpretation because it was based on evidence that was not before the district court. She contends that, without a transcript of the arbitration proceedings, we must presume the evidence was adequate to support the award. While Smith asks us to defer to the panel, we view the real question as a matter of contract interpretation and one for the courts, since it involves the question of the arbitrators' authority. [6]

[4] **[5]** Arbitration is a matter of contract; a party cannot be required to submit to arbitration unless it agreed in advance that the dispute would be arbitrated. ***375** [7] Although the law imposes a presumption in favor of arbitrability, the policy that favors resolving doubts in favor of arbitration "cannot serve to stretch a contractual clause beyond the scope intended by the parties or authorize an arbiter to disregard or modify the plain and unambiguous provisions of the agreement." [8]

[6] **[7]** The plain wording of the arbitration agreement contemplates that the arbitrators will not consider correcting the arbitral award at all at the behest of the parties, and forbids a correction or amendment on the arbitrators own motion more than three business days after the award. We conclude that the modification made was beyond the reach of the arbitrators' power. If an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision. [9]

II.

[8] As a second ground to reverse, Smith points to the Union's contractual limitation on its right of appeal to "arbitrator misconduct." We note, however, that the Union did not appeal the merits of the arbitral award at all. As discussed above, the Union lodged its objection to Smith's request to confirm based on the power of the arbitrators to modify the award, a question of law for the court. We do not find that the Union violated its agreement to waive appeal of certain matters.

III. CONCLUSION

By modifying the original award, the arbitration panel in this case exceeded the authority granted by the parties' agreement to arbitrate. Consequently, we affirm the district court's judgment vacating the modified award and confirming the original arbitration award.

AFFIRMED.

All Citations

374 F.3d 372, 175 L.R.R.M. (BNA) 2204, 150 Lab.Cas. P 10,370

Footnotes

1 R. 177.

2 *Gulf Coast Indus. Workers Union v. Exxon Co., USA,* 70 F.3d 847, 850 (5th Cir.1995); *Gateway Techs., Inc. v. MCI Telecomms. Corp.,* 64 F.3d 993, 996 (5th Cir.1995); *Executone Info. Sys., Inc. v. Davis,* 26 F.3d 1314, 1320 (5th Cir.1994).

3 *AT & T Techs., Inc. v. Communications Workers of America,* 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986); *see also Babcock & Wilcox Co. v. PMAC, Ltd.,* 863 S.W.2d 225, 229–30 (Tex.App.—Houston [14th Dist.], 1993, *writ denied*) (citing *AT & T*).

4 R. 154.

5 R. 124.

6 *AT & T,* 475 U.S. at 649, 106 S.Ct. 1415; *Babcock,* 863 S.W.2d at 230.

7 *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 1352–53, 4 L.Ed.2d 1409 (1960).

8 *Babcock,* 863 S.W.2d at 230.

9 The Texas Arbitration Act (applicable under the contract, R. 154) provides that a court shall vacate an award if the arbitrators exceeded their powers. Tex. Civ. Prac. & Rem.Code § 171.088(a)(3)(A). The same is true under federal law. 9 U.S.C.A. § 10(a)(4) (district court "may make an order vacating the award ... where the arbitrators exceeded their powers"); *Container Prods., Inc. v. United Steelworkers of America, and its Local 5651,* 873 F.2d 818, 820 (5th Cir.1989) ("[V]acation or modification of an arbitration award is clearly proper where the arbitrator has exceeded his authority.")

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Exhibit 8

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)))	IN THE COURT OF COMMON PLEAS
Raghu Athimoolam and Irene Athimoolam, Plaintiffs, -vs- Meritage Homes of South Carolina, Inc., Defendant.	)))))))))	**CONSENT ORDER STAYING CASE AND COMPELLING ARBITRATION** C.A. No. 2017-CP-04-00376

Defendant Meritage Homes of South Carolina, Inc. moved this Court for an Order staying this litigation and compelling arbitration. For the reasons below, and with the consent of all parties, this Court grants Defendant's motion to stay this litigation and to compel arbitration.

Plaintiffs entered into an agreement with Defendant to build a home located in Easley, South Carolina ("Agreement"). The Agreement contains an arbitration provision, under which Plaintiffs agreed to binding arbitration. Plaintiffs filed suit in this Court, and Defendant moved to stay this action and compel arbitration pursuant to the terms of the Agreement and the Federal Arbitration Act ("FAA"). The parties have conferred, and Plaintiffs agree that this action should be stay and arbitration compelled pursuant to the terms of the Agreement and the FAA.

NOW, THEREFORE, on motion of the undersigned counsel for Defendant, by and with the consent of the undersigned counsel for the Plaintiffs,

IT IS HEREBY ORDERED that Defendant's motion to stay and to compel arbitration is granted.

IT IS FURTHER ORDERED that Plaintiffs and Defendant shall proceed to binding arbitration.

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IT IS FURTHER ORDERED that the within matter as to Defendant is hereby stayed pending arbitration between the Plaintiff and Defendant.

AND IT IS SO ORDERED.

JUDGE, TENTH JUDICIAL CIRCUIT

Anderson, SC

August _____, 2017

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Anderson Common Pleas

Case Caption: Raghu Athimoolam , plaintiff, et al VS Meritage Homes Corporation , defendant, et al

Case Number: 2017CP0400376

Type: Order/Stay

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON Raghu Athimoolam and Irene Athimoolam, Plaintiffs, vs. Meritage Homes of South Carolina, Inc., Defendant.	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT C. A. No. 2017-CP-04-00376 **STIPULATION OF DISMISSAL (DOES NOT END CASE)**
Meritage Homes of South Carolina, Inc., Third-Party Plaintiff, vs. 84 Lumber Company, LP; DRC Investment, LLC d/b/a Advantaclean of the Upstate; Down to Earth Grading, LLC; GGG Construction, LLC; Gutter Cutters, Inc.; HH Contracting, LLC; Harbin Company, LLC; M7M Foundations, LLC; Metro Garage Door, Inc.; Sandlapper Concrete, LLC; SDR Restoration and Construction, LLC; Sealing Agents Waterproofing, Inc.; and Star Builders, Inc., Third-Party Defendants.	

The parties to this action hereby stipulate that the Third Party Complaint and all claims by, against and between Third Party Plaintiff and Third-Party Defendants, and only as to Third Party Plaintiff and Third Party Defendants, be dismissed pursuant to Rule 41 of the *South Carolina Rules of Civil Procedure*, with prejudice, each party to bear its own costs.

WE SO STIPULATE.

Signatures follow

This 12th day of July, 2023.

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