

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

SC Court of Appeals

John C. Hayes, III, Circuit Court Judge

Case No. 2012-213730

Juontonio Pinckney, Josephine Sciacca, Addie Smith, James Barone, Deborah Barone, Ismael Gonzalez, Valerie Gonzales, Joe Moore, and Sandra Moore, Plaintiffs,

v.

Epcon Communities, Inc., Epcon Communities Franchising, Inc., Brock L. Fankhauser, Fankhauser Property Group, Inc. and Stonecrest Villas of Tega Cay Home Owners Association, Inc., Defendants,

Of whom Epcon Communities, Inc. and Epcon Communities Franchising, Inc., are the Respondents,

And Fankhauser Property Group, Inc. is the Appellant.

Fankhauser Property Group, Inc., Third Party Plaintiff,

v.

Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega Construction, Inc., Procar, Inc., Procar II, Inc., The Southeastern Group, Inc., Lucas Lawn and Landscape, Inc., Jose Simenez, Individually and d/b/a M&L Roofing, Co., LLC and/or MB Roofing Company, Third Party Defendants,

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., Third Party Plaintiff,

v.

Stonecrest Villas of Tega Cay, LLC and Epcon Communities Franchising, Inc., Third Party Defendants.

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff,

v.

Marcos Gonzalez, Fourth Party Defendant

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Balanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

Noe Perez, Juan Abundez Saucedo, and Moises Chavarra Hernandez, Fourth Party Defendants.

RECORD ON APPEAL

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602326

Juontonio Pinckney Addie Smith	Joséphine Sciacca James Barone	Brock L Frankhauser Stonecrest Villas of Tega Cay Home Owners Association Inc Al-Mega Construction Inc Southeastern Group Inc Jose Jimenez	Frankhauser Property Group Inc Exterior Expressions of North Carolina Inc Procar Inc Lucas Lawn And Landscape Inc
Deborah Barone Valerie Gonzales Sandra Moore	Ismael Gonzales Joe Moore		
PLAINTIFF(S)			DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ 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

Re: Defendant Epcon Communities Franchising, Inc.'s Motion for Summary Judgment On
StoneCrest Villas of Tega Cay Condominium Owners Association, Inc.'s Third Party Complaint

This order ☐ ends ☐ does not end the case.

ORDER INFORMATION

Additional Information for the Clerk:

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 order for judgment details.

s/John C. Hayes, III

Circuit Court Judge

2049

Judge Code

August 21, 2012

Date

For Clerk of Court Office Use Only

This judgment was entered on August, 27, 2012, and a copy mailed first class or placed in the appropriate attorney's box on August, 27, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

See Attached List

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David Hamilton - Clerk of Court

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COUNTY OF YORK

2012 AUG 27 PM 03:46

SIXTEENTH JUDICIAL CIRCUIT

Juontonio Pinckney, et al.,

DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

C.A. No.: 2010-CP-46-2326

Epcon Communities, et al.,

ORDER

**Re: Defendant Epcon Communities
Franchising, Inc.'s Motion for Summary
Judgment on Stonecrest Villas of Tega Cay
Condominium Owners Association, Inc.'s
Third-Party Complaint**

the Court for Summary Judgment on Third-Party Plaintiff Stonecrest Villas of Tega Cay

require the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874

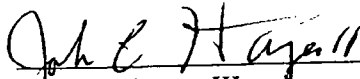
summary judgment should be granted . . . in cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ.” Anders v. S.C. Farm Bureau Mut. Ins. Co., 307 S.C. 371, 373, 415 S.E.2d 406, 407 (Ct. App. 1992).

ECFI is entitled to summary judgment because no contract existed between ECFI and the COA pursuant to which an express warranty arose. “A warranty is created when the seller makes an affirmation with respect to the thing to be sold with the intention that the buyer shall rely on it in making the purchase.” Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 105, 439 S.E.2d 283, 284 (Ct. App. 1993) (citing Iler v. Jennings, 87 S.C.87, 68 S.E. 1041 (1910)). ECFI did not sell any condominiums (or anything else) to the COA that would have given rise to any warranty between the two parties. Moreover, any marketing materials ECFI, as franchisor, may have provided to Fankhauser Property Group, Inc. (“FPG”), as franchisee, under the Franchise Agreement which permitted FPG to develop the Stonecrest condominium development at issue in this case could not have given rise to an express warranty to the COA under the *Fields* analysis because they do not in and of themselves constitute affirmations from a seller to a buyer.

There being no genuine issue of material fact, Epcon Communities Franchising, Inc. is entitled to Summary Judgment as a matter of law in Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.’s Seventh Cause of Action in its Third-Party Complaint.

IT IS SO ORDERED.

August 21st, 2012
York, South Carolina


John C. Hayes, III
Presiding Judge 

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602326

Juontonio Pinckney Addie Smith	Joséphine Sciacca James Barone	Brock L. Frankhauser Stonecrest Villas of Tega Cay Home Owners Association Inc Al-Mega Construction Inc Southeastern Group Inc Jose Jimenez	Frankhauser Property Group Inc Exterior Expressions of North Carolina Inc Procar Inc Lucas Lawn And Landscape Inc
Deborah Barone Valerie Gonzales Sandra Moore	Ismael Gonzales Joe Moore		
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by: Wilkes Law Firm	Attorney for: ☐ Plaintiff ☒ Defendants ☐ 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.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ 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

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)
N/A	N/A	N/A

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 order for judgment details.

s/ John C Hayes III

2049

8/27/2012

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only:

This judgment was entered on August 27, 2012, and a copy mailed first class or placed in the appropriate attorney's box on August 27, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

***See Attached Certificate of Service**

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA - RECEIVED
COUNTY OF YORK 2012 AUG 27 PM 4:09

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2010-CP-46-2326

DAVID W. HUGHES
C.C.P. & G.S.
YORK COUNTY SC

Juontonio Pinckney, et al.,

Plaintiffs,

vs.

Epcon Communities, et al.,

Defendants.

ORDER

Re: Defendant Epcon Communities, Inc.
and Epcon Communities Franchising, Inc.'s
Motion for Summary Judgment

This matter is before the Court on the Motion of Defendants Epcon Communities, Inc. ("ECI") and Epcon Communities Franchising, Inc.'s ("ECFI") and collectively with ECI, "Epcon") for dismissal pursuant to Rule 12(b)(6), SCRCF, which this Court converted into a Motion for Summary Judgment pursuant to Rule 56, SCRCF. For the reasons set forth below, Epcon's Motion for Summary Judgment as to Plaintiffs' First (Rescission), Fourth (Breach of Contract), Tenth and Fourteenth (Breach of Express Warranties) causes of action is Granted.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Hendricks v. Clemson University, 353 S.C. 449, 455, 578 S.E.2d 711, 714 (2003). "in determining whether a triable issue of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id.* At 456, 578 S.E.2d at 714. However, "it is well established that summary judgment should be granted . . . in cases in which plain, palpable and indisputable facts



exist on which reasonable minds cannot differ.” Anders v. S.C. Farm Bureau Mut. Ins. Co., 307 S.C. 371, 373, 415 S.E.2d 406, 407 (Ct. App. 1992).

Plaintiffs filed their Third Amended Complaint on September 16, 2011 (the “Complaint”). The Complaint asserts the following causes of action against ECI and ECFI: Rescission, Breach of Contract, Fraud and Misrepresentation, Breach of Express Warranty, Breach of Implied Warranty of Merchantability, Breach of Implied Warranty of Fitness for a Particular Purpose, Breach of Express Warranties, and Unfair Trade Practices.

On October 13, 2011, ECI and ECFI filed a motion to dismiss all claims in the Complaint (the “Motion”). In response to the Motion, on March 15, 2012, Plaintiffs’ counsel served the Affidavit of Thea-Eve Vicari and asked the Court to consider other matters outside the pleadings, thus implicitly requesting that this Court convert the Motion to a motion for summary judgment under SCRCP 56. The Court consequently considered the Motion as one for summary judgment.

FINDINGS OF FACT

This matter arises from a condominium development project in York County, South Carolina known as Stonecrest Villas at Tega Cay (the “Project”). Defendant Fankhauser Property Group, Inc. (“FPG”) possessed the rights to develop the Project pursuant to a Franchise Agreement and Market Area Agreement between FPG and ECFI dated March 30, 2006 (collectively, the “Franchise Agreement”), a copy of which was attached to ECI/ECFI’s Memorandum in Support of its Motion for Summary Judgment as Exhibit A.¹ Under the Franchise Agreement, ECFI is franchisor and FPG is franchisee. (Exhibit A at 1.) The franchise granted to FPG consists of the right to use the Development System, as that term is defined in Section 2.1.1 of the Franchise Agreement. (Exhibit A, Franchise Agreement § 1.1, 1.2 and 2.1.1)

¹ For purposes of this Order, exhibit references shall be to the exhibits to Epcon’s Memorandum in Support of its Motion for Summary Judgment.

Plaintiffs' allegations in this lawsuit arise from FPG's use of the Development System. Plaintiffs allege their units at Stonecrest suffer from recurring water intrusion and construction defects. *See* Complaint, ¶20. Plaintiffs further allege the units do not conform to the plans and specifications and model home designs used to advertise, market and sell units in the Project. *Id.* *See* Complaint, ¶¶21 and 22(g). FPG built the Project and served as general contractor. (Exhibit B, 03/07/12 FPG Tr. At 21:12-15). The individual units at the Project were marketed and sold to Plaintiffs by Stonecrest Villas of Tega Cay, LLC ("SVTC"), of which Brock Fankhauser was the sole member. (Exhibit C, Fankhauser Tr. At 27:12-14). ECI did not enter into any agreement with Brock Fankhauser, FPG or SVTC regarding Stonecrest. (Exhibit C, Fankhauser Tr. At 314:9-17).

Defendants ECI and ECFI have moved for dismissal of Plaintiffs' Complaint as to them. The Court treats the motion as one for summary judgment with agreement of the parties.

CONCLUSIONS OF LAW

I. Epcon is entitled to Summary Judgment on Plaintiffs' Rescission Claim because No Contractual Relationship Exists between Epcon and any Plaintiff.

Rescission is an abrogation or undoing of [a contract] from the beginning, which seeks to create a situation the same as if no contract ever had existed. Ellie, Inc. v. Miccichi, 358 S.C. 78, 95, 594 S.E.2d 485, 493 (Ct. App. 2004) (citing Gov't. Employees Ins. Co. v. Chavis, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970); Boddie-Noelle Props., Inc. v. 42 Magnolia Pship., 344 S.C. 474, 483, 544 S.E.2d 279, 283 (Ct. App. 2000)). In Plaintiffs' First Cause-of Action against ECI and ECFI, Plaintiffs have not alleged the existence of any contracts between ECI and/or ECFI and any Plaintiff. In fact, Plaintiffs allege in Paragraph 10 of the First Cause of Action of

their Complaint that SVTC sold the homes to Plaintiffs. Neither ECI nor ECFI had any ownership interest or involvement in SVTC.

There are no contracts to undo between Plaintiffs and ECI and/or ECFI, and the remedy of rescission is inapplicable to ECI and ECFI. Therefore, Epcon is entitled to summary judgment on Plaintiffs' rescission cause of action.

II. Epcon is Entitled to Summary Judgment on Plaintiffs Breach of Contract Claim because No Contract ever existed between Epcon and any Plaintiff.

In Plaintiffs' Fourth Cause of Action (Breach of Contract), Plaintiffs allege they are intended third-party beneficiaries of the terms and conditions of the Franchise Agreement between ECFI and FPG. *See* Complaint, Fourth Cause of Action ¶ 2. Plaintiffs assert no other factual allegations to support their contention in this regard and the record before the Court contains no evidence to support this claim. Plaintiffs have neither alleged any direct contractual relationship with either ECI or ECFI nor alleged any breach of the Franchise Agreement. Instead, Plaintiffs seek to recover damages from ECI and ECFI based on those entities' alleged *failure to enforce* the terms of the Franchise Agreement against FPG.

A third-party beneficiary is a party that the contracting parties intend to directly benefit. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 337, 611 S.E.2d 485, 488 (2005). Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff." Bob Hammond Const. Co., Inc. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). A third party may enforce a contract between contracting parties if the contracting parties intended to confer a direct, as opposed to an incidental or consequential benefit to the third party, a stranger to the contract, Cothran v. Rock Hill, 211 S.C. 17, 43 S.E.2d 615 (1947).

In their Complaint, Plaintiffs allege they are intended third-party beneficiaries of the Franchise Agreement. See Complaint, Fourth Cause of Action ¶ 2. There are no other factual allegations in the Complaint supporting the claim that FPG and ECFI intended to directly benefit Plaintiffs by entering into the Franchise Agreement. Moreover, nothing in the Franchise Agreement itself, which was incorporated by reference into the Complaint, supports Plaintiffs' allegation they were intended beneficiaries of the Franchise Agreement. Accordingly, "there is not sufficient allegation that [ECFI] and [FPG] contracted for the intended benefit of the [Plaintiffs]," and their Breach of Contract action against ECI and ECFI is deficient as a matter of law, entitling Epcon to summary judgment thereon. Cothran, 211 S.C. 17, 43 S.E.2d at 617.

In their Memorandum in support of their Motion for Summary Judgment on this cause of action, ECI and ECFI refer to Allen v. Greenville Hotel Partners, Inc., 409 F. Supp. 2d 672 (E. S.C. 2006).

Allen and the case of Bass v. Gopal, Inc., 384 S.C. 238, 680 S.E.2d 915 (Ct. App. 2009) are distinguishable from the instant case. Both Allen and Bass address franchisor liability based on the day to day operation of a franchise. In this case, Plaintiffs' allegations relate to a Franchisor's Liability based on something more fundamental than operation. Plaintiffs' allegations allege liability based on rights and obligations related to design and construction of Stonecrest Villas of Tega Cay.

III. Epcon is Entitled to Summary Judgment on Plaintiffs' Express Warranty Claims because Epcon Did Not Extend any Express Warranties to Plaintiffs.

Plaintiffs allege in their Tenth Cause of Action a Breach of Express Warranty Claim against all Defendants. Plaintiffs also allege Breach of Express Warranty in their Fourteenth Cause of Action. Epcon is entitled to summary judgment on each of Plaintiffs' breach of express

warranty claims because there was no evidence of any affirmation by ECI or ECFI on which any Plaintiff relied. See Amended Affidavit of Joel D. Rhoades ¶¶ 9, 11.

"A warranty is created when the seller makes an affirmation with respect to the thing to be sold with the intention that the buyer shall rely on it in making the purchase." Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 105, 439 S.E.2d 283, 284 (Ct. App. 1993)(citing Ller v. Jennings, 87 S.C. 87, 68 S.E. 1041 (1910)). Neither ECI nor ECFI sold any condominiums to Plaintiffs. See Exhibit G, Amended Affidavit of Joel D. Rhoades ¶¶ 7, 9, 11; See also Exhibit B, FPG dep. at 442, 11, 14-25 (all sales and marketing staff for the Stonecrest project were employees of FPG). As discussed in *Fields*, a warranty arises when a seller makes an affirmation as to the thing to be sold. Therefore, ECI and ECFI cannot have, by definition, created any express warranties as to Plaintiffs. Moreover, no evidence has been adduced that anyone from ECI or ECFI had any contact with any Plaintiff prior to the purchase of his or her condominium. Brock Fankhauser testified in FPG's 30(b)(6) Deposition that no one from FPG ever made any warranties on behalf of any Epcon entity. See Exhibit B, FPG dep. at 453:5-8. Additionally, Plaintiffs have not identified any affirmation on which they relied in making their purchase. There being no genuine issues of material fact to support Plaintiffs' breach of express warranty claims in the tenth and fourteenth causes of action in the Complaint, Epcon is entitled to summary judgment on those claims.

IV. As to Plaintiffs' Sixth, Eleventh, Twelfth, and Fifteenth Causes of Action, the Court finds there exists genuine issues of material facts and neither ECI nor ECFI are entitled to summary judgment as a matter of law.

In any summary judgment motion, the Court is reluctant to outline or catalogue the factual issues that exist. Outlining and cataloguing is not required and citing facts at this stage

could cause later issues at trial, such as a party taking the position that facts cited in an Order denying summary judgment are the exclusive facts for presentation at trial.

The purpose of an Order denying a motion for summary judgment is to recognize the existence of facts, not to make factual findings.

I find that the record established to date factual issues on each of the referenced causes of action in Section IV of this Order. These issues include not only factual issues on the question of liability and damages, but also questions as to direct and/or vicarious liability of the moving Defendants. By way of example and example only, there exists issues underlying the theory of amalgamation and actual and apparent agency.

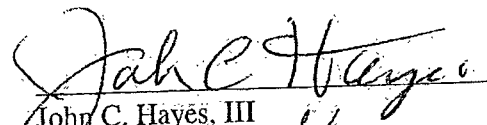
Conclusion

Summary Judgment is Granted to Epcon Communities, Inc. and Epcon Communities Franchising, Inc. on Plaintiffs' First, Fourth, Tenth and Fourteenth Causes of Action.

Summary Judgment is Denied on Plaintiffs' Sixth, Eleventh, Twelfth and Fifteenth Causes of Action.

IT IS SO ORDERED.

August 27th, 2012
York, South Carolina


John C. Hayes, III
Presiding Judge 

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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602326

Juontonio Pinckney Addie Smith	Jospephine Sciacca James Barone	Brock L Frankhauser Stonecrest Villas of Tega Cay Home Owners Association Inc Al-Mega Construction Inc Southeastern Group Inc Jose Jimenez	Frankhauser Property Group Inc Exterior Expressions of North Carolina Inc Procar Inc Lucas Lawn And Landscape Inc
Deborah Barone Valerie Gonzales Sandra Moore	Ismael Gonzales Joe Moore		
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ 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

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 order for judgment details.

s/ JOHN C. HAYES, III.

Circuit Court Judge

2049

Judge Code

9/27/12

Date

For Clerk of Court Office Use Only

This judgment was entered on October 2, 2012, and a copy mailed first class or placed in the appropriate attorney's box on October 2, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

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Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK)

C.A. No.: 2010-CP-46-2326

Juontonio Pinckney, *et al.*,)

Plaintiffs,)

vs.)

Epcon Communities, Inc.,)

Epcon Communities Franchising, Inc.,)

Brock L. Fankhauser, Fankhauser Property)

Group, Inc. and Stonecrest Villas of Tega)

Cay Home Owners Association, Inc.,)

Defendants.)

ORDER

)Re: Epcon Communities Franchising, Inc.'s and
)Epcon Communities, Inc.'s Motion for Summary
)Judgment on its Cross-Claims for Indemnification
)against Fankhauser Property Group, Inc.

Fankhauser Prop. Group, Inc.,)

Third-Party Plaintiff,)

vs.)

Architectural Alliance, Ltd., Exterior)

Expressions of North Carolina, Inc.,)

Al-Mega Construction, Inc., Procar, Inc.,)

The Southeastern Group, Inc., Lucas Lawn)

and Landscape, Inc., and Jose Simenez,)

Individually and d/b/a M&L Roofing Co.,)

LLC and/or MB Roofing Company,)

Third-Party Defendants.)

Stonecrest Villas of Tega Cay)

Condominium Owners Association, Inc.,)

Third-Party Plaintiff,)

vs.)

Stonecrest Villas of Tega Cay, LLC and)

Epcon Communities Franchising, Inc.)

Third-Party Defendants.)

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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC



Exterior Expressions of North Carolina, Inc.	)
	)
Fourth-Party Plaintiff,	)
	)
vs.	)
	)
Marcos Gonzalez,	)
	)
Fourth-Party Defendant.	)
	)
Procar, Inc. and Procar II, Inc.,	)
	)
Fourth-Party Plaintiffs,	)
	)
vs.	)
	)
Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Balanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez,	)
	)
Fourth-Party Defendants.	)
	)
Al-Mega Construction, Inc.,	)
	)
Fourth-Party Plaintiff,	)
	)
vs.	)
	)
Noe Perez, Juan Abundez Saucedo, and Moisese Chavarra Hernandez,	)
	)
Fourth-Party Defendants.	)

This matter came before the Court on the Motion of Epcon Communities, Inc. ("ECI") and Epcon Communities Franchising, Inc. ("ECFI")(collectively, "Epcon") for Summary Judgment on Epcon's cross-claims against Fankhauser Property Group ("FPG") for contractual and equitable indemnification. Epcon filed its Motion on January 10, 2012. This Court

conducted a hearing on Epcon's Motion on July 30, 2012. In addition to the oral arguments presented at the hearing, the Court has considered documents the parties submitted in connection with the Motion, including memoranda of law and supporting affidavits. Epcon's Motion on its cross-claim for contractual indemnity against FPG is GRANTED. Because the Court grants summary judgment on Epcon's contractual claim, it does not reach the issue of Epcon's cross-claim for equitable indemnity.

PROCEDURAL HISTORY

Plaintiffs filed their Third Amended Complaint on September 16, 2011 (the "Complaint"). The Complaint asserted the following causes of action against Epcon: Rescission, Breach of Contract, Fraud and Misrepresentation, Breach of Express Warranty, Breach of Implied Warranty of Merchantability, Breach of Implied Warranty of Fitness for a Particular Purpose, Breach of Express Warranties, and Unfair Trade Practices.¹ Third-Party Plaintiff COA asserted claims against ECFI also arising from allegedly defective construction.² ECI and ECFI timely answered the Complaint and Third-Party Complaint and, in their Answers, asserted cross-claims against FPG for contractual and equitable indemnity.

ECI and ECFI demanded FPG assume the defense and indemnify ECI and ECFI for costs incurred in connection with this matter as provided by Section 16.1 of the Franchise Agreement. FPG refused to do so. On January 9, 2012, ECI and ECFI served their Motion for Summary Judgment against FPG on their contractual and equitable indemnification claims against FPG.

STANDARD OF REVIEW

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

¹ By separate Order of the Court, Epcon was granted summary judgment on Plaintiffs' claims for Rescission, Breach of Contract, and Breach of Express Warranties.

² The COA's claim against ECFI has been disposed of by the entry of summary judgment in ECFI's favor.

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCF. Because this is a Motion for Summary Judgment, the facts are viewed in the light most favorable to FPG, the non-moving party. See Rule 56, SCRCF; see also *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990) (noting standard for summary judgment).

A party opposing a Motion for Summary Judgment “may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule must set forth specific facts showing there is a genuine issue for trial.” Rule 56(e), SCRCF. “The purpose of summary judgment is to expedite the resolution of cases that do not require a fact finder.” *Shirley’s Iron Works, Inc. v. City of Union*, 387 S.C. 389, 397, 693 S.E.2d 1, 5 (Ct. App. 2010).

FINDINGS OF FACT

This matter arises from a condominium development project in York County, South Carolina known as Stonecrest Villas at Tega Cay (the “Project”). Defendant FPG possessed the rights to develop and construct the Project pursuant to a Franchise Agreement and Market Area Agreement between FPG and ECFI dated March 30, 2006 (collectively, the “Franchise Agreement”), a copy of which was attached to Epcon’s Motion for Summary Judgment as Exhibit A. Under the Franchise Agreement, ECFI is franchisor and FPG is franchisee. Section 20.2 of the Franchise Agreement provides that it shall be governed under Ohio Law. The franchise granted to FPG consists of the right to use the Development System, as that term is defined in Section 2.1.1 of the Franchise Agreement. Specifically, Section 2.1.1 of the Franchise Agreement defines “Development System” as:

[ECFI’s] method, pattern documents, materials, know-how, knowledge, process, and procedure used for development, construction, and marketing of the

residential, multi-family community using a unique architectural design, as well as other proprietary and confidential information, including copyrighted and patented material, and material for which the copyright registration or patent is pending, including, without limitation, all architectural plans and specifications for two- and four-unit buildings, architectural plans and specifications for the clubhouse, site planning guidelines, and sample condominium association materials provided by [ECFI]. The Development System shall be deemed to include any method, pattern, process, or procedure used by [FPG] during the term of this Agreement, along with any modifications or changes thereto.

The Project was built by FPG as general contractor. The individual units at the Project were marketed and sold to Plaintiffs by Stonecrest Villas of Tega Cay, LLC, of which Brock Fankhauser was the sole member. To develop and construct the Project, FPG licensed the Development System from ECFI pursuant to the terms of the Franchise Agreement. Among other things, the Development System includes *unstamped* architectural plans and specifications and site planning guidelines. The Franchise Agreement specifically required FPG to have its own architect seal and stamp the plans provided to it under the Franchise Agreement. Specifically, Section 9.2 of the Franchise Agreement provides as follows:

Franchisee understands and acknowledges that, due to the continual evolution of the plans, and the other materials referenced above, and the volume of detailed information and data contained therein, there are likely to be some inaccuracies and/or items subject to specific local or other requirements which will require correction, at Franchisee's expense, by Franchisee's architects, engineers, contractors, counsel and/or other professionals as work progresses. **Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, make any changes or modifications including, but not limited to, the seal or stamp of a registered architect, to the plans, specifications, or any other part of the Development System used or proposed for use for or at its Project(s) which changes or modifications are necessitated by any applicable zoning and building codes, permit requirements, or any other federal, state or local laws, including, without limitation, licensing requirements for contractors, property managers and real estate salespersons, the formation and management of condominium associations, occupational health and safety on the construction site, housing finance, equal housing laws, the Fair Housing Act and the Americans with Disabilities Act, as well as the Accessibility Guidelines promulgated under each of these acts. Franchisee further acknowledges that it possesses sole responsibility hereunder to comply with all applicable laws in the marketing**

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of condominium units in its projects, including, without limitation, the Fair Housing Act. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, have the seal or stamp of a registered architect affixed to said plans. No changes, however extensive, shall operate to relieve Franchisee of its obligations to make payments due to Franchisor pursuant to the terms of this Agreement.

Therefore, it was the responsibility of FPG under the Franchise Agreement to ensure the plans and specifications are stamped or sealed by a registered architect and that they complied with all applicable legal requirements. Plaintiffs have not alleged any construction defect claims against ECI or ECFI. Rather, Plaintiffs allege "the construction practices employed by Defendants Fankhauser Property Group, Inc. and Brock L. Fankhauser were carried out in a negligent and un-workmanlike manner and constitute violations of building code, the franchised Epcon Developmental System, Epon [sic] plans, Epcon specifications and recommended materials."

The crux of this action is alleged defective construction in the Project. Plaintiffs allege their units suffer from recurring water intrusion and construction defects. Plaintiffs further allege the units do not conform to the plans and specifications and model home designs used to advertise, market and sell units in the Project.

FPG agreed in the Franchise Agreement to defend and indemnify Epcon for claims arising from FPG's use of the Development System. Section 16.1 of the Franchise Agreement provides as follows:

[FPG] shall indemnify and hold harmless, to the fullest extent permitted by law, [ECFI], its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership [i.e. ECI], and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation, or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, [FPG's] ownership or operation of its business hereunder and/or

Handwritten signature/initials

its use or utilization or the Development System, including without limitation the use of any architectural plans and designs provided by [ECFI]. In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving [ECFI], [FPG] shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at [FPG's] sole cost and expense or shall cause it to be resisted or defended by an insurer. [FPG] shall also make every reasonable effort to seek to have [ECFI] dismissed or released from liability in the event of such action, suit, proceeding, investigation, inquiry, claim or demand. [ECFI] shall have the right to resist and defend itself in and/or against any such action, suit, proceeding, investigation, inquiry, claim or demand, and, upon receipt of written notice from [ECFI] of the amount expended by [ECFI] in such defense, [FPG] shall, within ten business days of such receipt, reimburse [ECFI] in full for the total amount of such expenses.

✓ FPG's
FPG, prior to this Order being signed, questioned whether or not it should be liable, while disputing liability to any degree, for all attorneys' fees and costs incurred by Epcon. FPG suggests that any liability for attorneys' fees and costs should not include certain causes of action wherein Plaintiffs allege direct liability of Epcon. Here, the old proverb of "in for a penny, in for a pound" applies. The indemnity clause set forth above broadly provides, in the court's opinion, for indemnification for any and all claims to which Epcon has been exposed by virtue of conduct which in any way relates to the Franchise Agreement. Here, but for FPG's proceeding under the Franchise Agreement, Epcon would not have any exposure to claims by Plaintiffs.

It is undisputed that ECI is a legal entity separate from ECFI, but which is under common ownership with ECFI. Moreover, no dispute exists as to the validity or content of the Franchise Agreement. In fact, FPG admitted through deposition testimony that ECFI fulfilled all of its obligations under the Franchise Agreement. FPG's 30(b)(6) representative also admitted FPG is not aware of any facts to support FPG's failure to defend and indemnify ECI and ECFI in this matter.

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CONCLUSIONS OF LAW

Under the Franchise Agreement, FPG is contractually obligated to defend and indemnify ECI and ECFI for the claims asserted against them in this action. The claims asserted by Plaintiffs and Third-Party Plaintiffs all arise from and in connection with FPG's use of the Development System. Specifically, the claims in this case all arise from FPG's construction, marketing and sale of the condominiums at Stonecrest Villas of Tega Cay and are precisely the type of claims the defense and indemnification provision in Section 16.1 of the Franchise Agreement was intended to address. For example, in Paragraph 4 of Plaintiffs' Sixth Cause of Action, Plaintiffs allege FPG "materially deviated from the [Development System] and materially concealed these facts from Plaintiff buyers." The Complaint repeatedly alleges deviations from the Development System FPG licensed from ECFI pursuant to the Franchise Agreement.

Section 20.2 of the Franchise Agreement contains a choice of law provision which provides, in pertinent part, that the Franchise Agreement "shall be deemed to have been entered into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles." Choice of law clauses are generally honored in South Carolina. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011)(citing *Nucor Corp. v. Bell*, 482 F.Supp.2d 714, 728 (D.S.C. 2007)). The Court finds that Ohio law governs the construction of the Franchise Agreement and that the application of Ohio law as set forth in this Order does not contravene the public policy of South Carolina.

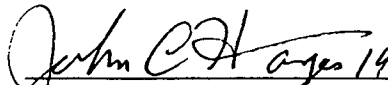
Ohio law generally allows enforcement of indemnity agreements. *Glaspell v. Ohio Edison Co.*, 505 N.E.2d 264 (Ohio 1987). "If a contract is clear and unambiguous, then its

interpretation is a matter of law and there is no issue of fact to be determined.” *Corporate Protection Servs., Inc. v. Guardian Alarm of Ohio*, 2012 WL 439645 (Ohio App. 2012) at *3. The indemnification clause in Section 16.1 of the Franchise Agreement is clear. FPG is obligated to indemnify and defend ECI and ECFI for any litigation fees and costs incurred by ECI and ECFI in this lawsuit. ECI and ECFI are also entitled to reimbursement of fees and costs incurred to date with respect to this lawsuit in accordance with the terms of Section 16.1 of the Franchise Agreement.

CONCLUSION

For the foregoing reasons, ECI and ECFI are entitled to the entry of summary judgment on their claims of contractual indemnity against FPG. Because the Court finds ECI and ECFI are entitled to summary judgment on their contractual indemnity claims, the Court does not reach the issue of Epcon’s claim for equitable indemnification against FPG. Epcon’s Motion for Summary Judgment on its Contractual Indemnification claim against FPG is GRANTED. FPG is hereby ordered to resist and defend the claims against Epcon in this lawsuit at FPG’s own expense. FPG is further ordered to reimburse Epcon for litigation fees and costs Epcon has incurred to date in the defense of this lawsuit. Epcon is ordered, within twenty (20) days after the entry of this Order, to submit to the Court a current accounting of fees and costs Epcon has incurred in the defense of this lawsuit. FPG shall have ten (10) days following such submission to file any response thereto.

IT IS SO ORDERED.



John C. Hayes, III
Presiding Judge

September 27th, 2012
York, South Carolina

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602326

Juontonio Pinckney Addie Smith	Jospephine Sciacca James Barone	Brock L Frankhauser Stonecrest Villas of Tega Cay Home Owners Association Inc Al-Mega Construction Inc Southeastern Group Inc Jose Jimenez	Frankhauser Property Group Inc Exterior Expressions of North Carolina Inc Procar Inc Lucas Lawn And Landscape Inc
Deborah Barone Valerie Gonzales Sandra Moore	Ismael Gonzales Joe Moore		
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ 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 FILING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order; (formal order to follow)☐ Statement of Judgment by the Court:

Order (Reconsider is Denied)

This order ☐ ends ☒ does not end the case.

ORDER INFORMATION

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)
na	na	na

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 order for judgment details.

s/ John C. Hayes

Circuit Court Judge

2049

Judge Code

11/06/2012

Date

CPFORM4M

SCCA SCRPC Form 4C (Revised 10/2011)

For Clerk of Court Office Use Only

This judgment was entered on November 12, 2012, and a copy mailed first class or placed in the appropriate attorney's box on November 12, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

Juontonio Pinckney, *et al.*,

Plaintiffs,

vs.

Epcon Communities, Inc.,
Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property
Group, Inc. and Stonecrest Villas of Tega
Cay Home Owners Association, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-46-2326

ORDER

Re: Epcon Communities Franchising, Inc.'s motion
to reconsider.

Fankhauser Prop. Group, Inc.,

Third-Party Plaintiff,

vs.

Architectural Alliance, Ltd., Exterior
Expressions of North Carolina, Inc.,
Al-Mega Construction, Inc., Procar, Inc.,
The Southeastern Group, Inc., Lucas Lawn
and Landscape, Inc., and Jose Simenez,
Individually and d/b/a M&L Roofing Co.,
LLC and/or MB Roofing Company,

Third-Party Defendants.

Stonecrest Villas of Tega Cay
Condominium Owners Association, Inc.,

Third-Party Plaintiff,

vs.

Stonecrest Villas of Tega Cay, LLC and
Epcon Communities Franchising, Inc.

Third-Party Defendants.

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DAVID L. HAMILTON
CLERK OF COURT
C.C.P. & C.S.
JULY 17, 2007

Exterior Expressions of North Carolina, Inc.	)
	)
Fourth-Party Plaintiff,	)
	)
vs.	)
	)
Marcos Gonzalez,	)
	)
Fourth-Party Defendant.	)
	)
Procar, Inc. and Procar II, Inc.,	)
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Fourth-Party Plaintiffs,	)
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Noe Perez, Juan Abundez Saucedo, and Moisese Chavarra Hernandez,	)
	)
Fourth-Party Defendants.	)
	)

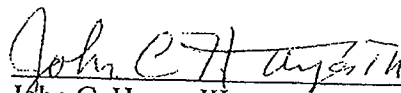
Defendant/Third Party Plaintiff, Fankhauser Property Group, Inc. ("FPG"), by and through its attorneys timely filed a motion for this court to reconsider its order granting in part the Motion for Summary Judgment filed by Epcon Communities, Inc. ("ECI") and Epcon

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Communities Franchising, Inc. ("ECFI") (collectively "Epcon") with respect to Epcon's cross claim against FPG for contractual indemnification pursuant to SCRCP 59(e).

The Court has ruled on each of the issues raised in FPG's Motion, and the undersigned's order clearly disposes of the grounds of FPG's motion. Accordingly, FPG's Motion to Reconsider is DENIED.

IT IS SO ORDERED.



John C. Hayes, III
Presiding Judge #3

November 16th, 2012
York, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Juontonio Pinckney, *et al.*,)

Plaintiffs,)

vs.)

Epcon Communities, Inc.,)

Epcon Communities Franchising, Inc.,)

Brock L. Fankhauser, Fankhauser Property)

Group, Inc. and Stonecrest Villas of Tega)

Cay Home Owners Association, Inc.,)

Defendants.)

Fankhauser Prop. Group, Inc.,)

Third-Party Plaintiff,)

vs.)

Architectural Alliance, Ltd., Exterior)

Expressions of North Carolina, Inc.,)

Al-Mega Construction, Inc., Procar, Inc.,)

The Southeastern Group, Inc., Lucas Lawn)

and Landscape, Inc., and Jose Simenez,)

Individually and d/b/a M&L Roofing Co.,)

LLC and/or MB Roofing Company,)

Third-Party Defendants.)

Stonecrest Villas of Tega Cay)

Condominium Owners Association, Inc.,)

Third-Party Plaintiff,)

vs.)

Stonecrest Villas of Tega Cay, LLC and)

Epcon Communities Franchising, Inc.)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-46-2326

ORDER 
AWARDING ~~INTERIM~~
EPCON ATTORNEYS' FEES
AND
COSTS

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

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SG

Je #1

Exterior Expressions of North Carolina,
Inc.)

Fourth-Party Plaintiff,)

vs.)

Marcos Gonzalez,)

Fourth-Party Defendant.)

Procar, Inc. and Procar II, Inc.,)

Fourth-Party Plaintiffs,)

vs.)

Marcos Zertuche, David Carbajal,
Victorina Cortez, Balancos Construction
Co., Balanos Framing, Inc., Ricardo
Hernandez, and Silverio Cortez,)

Fourth-Party Defendants.)

Al-Mega Construction, Inc.,)

Fourth-Party Plaintiff,)

vs.)

Noe Perez, Juan Abundez Saucedo, and
Moisese Chavarra Hernandez,)

Fourth-Party Defendants.)

This matter came before the Court on the Motion of Epcon Communities, Inc. ("ECI") and Epcon Communities Franchising, Inc. ("ECFI")(collectively, "Epcon") for Summary Judgment on Epcon's cross-claims against Fankhauser Property Group ("FPG") for contractual and equitable indemnification. Epcon filed its Motion on January 10, 2012. This Court

JPH 2

conducted a hearing on Epcon's Motion on July 30, 2012. By its Order dated September 27, 2012 (the "Summary Judgment Order"), this Court granted summary judgment in favor of Epcon on its cross-claim against FPG for contractual indemnification. The Summary Judgment Order directed Epcon to submit to the Court a current accounting of fees and costs Epcon had incurred in its defense of this lawsuit. FPG filed a Motion to Alter or Amend the Court's Summary Judgment Order, which was denied. Epcon timely submitted the Affidavit of Melissa M. Nichols Regarding Attorney's Fees and Costs dated October 16, 2012 ("Affidavit"). The Court has reviewed the Affidavit and finds that the ^{get}interim attorneys' fees and costs set forth therein are appropriate to this matter and are hereby approved and awarded. As of October 3, 2012, the amount of attorneys' fees and costs were \$185,021.50 and \$25,842.54, respectively, for an aggregate sum due of \$210,864.04. The amount set forth herein, having been ascertained and being due, shall draw interest from the date this Order is filed at the rate of eight and three-fourths percent per annum as set forth in S.C. Code Ann. § 34-31-20(A)(2012). ^{get}~~Nothing in this Order shall limit the continued operation of the Summary Judgment Order, including, without limitation, FPG's continued obligation to defend Epcon and to indemnify Epcon for any further litigation fees and costs incurred by Epcon in this lawsuit.~~ ^{get}

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge #3

12/11, 2012
York, South Carolina

^{get}1. This Code section addresses the rate of interest in pre and post judgement situations. The Code section does not establish the time from which a certain interest rate is to accrue. JCH

COPY

STATE OF SOUTH CAROLINA

COUNTY OF YORK

JUONTONIO PINCKNEY, et al.,

Plaintiffs,

v.

EPCON COMMUNITIES, INC.; EPCON
COMMUNITIES FRANCHISING, INC.;
BROCK L. FANKHAUSER; FANKHAUSER
PROPERTY GROUP, INC.; STONECREST
VILLAS OF TEGA CAY, L.L.C.;
STONECREST VILLAS OF TEGA CAY HOME
OWNERS ASSOCIATION, INC.,

Defendants.

FANKHAUSER PROP. GROUP, INC.,

Third-Party Plaintiff,

v.

EXTERIOR EXPRESSIONS OF NC, INC., AL-
AL-MEGA CONSTRUCTION, INC.; PROCAR,
INC.; THE SOUTHEASTERN GROUP, INC.;
And JOSE SIMENEZ, Individually and d/b/a
M&L ROOFING CO., LLC and/or MB
ROOFING COMPANY,

Third-Party Defendants.

STONECREST VILLAS OF TEGA CAY HOME
OWNERS ASSOCIATION, INC.,

Third-Party Plaintiff,

v.

STONECREST VILLAS OF TEGA CAY, LLC,

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Civil Action No.: 10-CP-46-2326

AMENDED SUMMONS

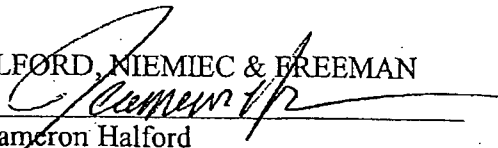
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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Third-Party Defendant,	)
	)
_____	)
EXTERIOR EXPRESSIONS OF NORTH	)
CAROLINA, INC.,	)
	)
Fourth-Party Plaintiff,	)
	)
v.	)
	)
MARCOS GONZALEZ,	)
	)
Fourth-Party Defendant.	)
_____	)

TO:
DEFENDANTS ABOVE NAMED: EPCON COMMUNITIES, INC.; EPCON COMMUNITIES FRANCHISING, INC.; BROCK L. FANKHAUSER; FANKHAUSER PROPERTY GROUP, INC.; STONECREST VILLAS OF TEGA CAY, LLC; AND (HOA) STONECREST VILLAS OF TEGA CAY OWNERS ASSOCIATION, INC.

YOU ARE HEREBY SUMMONED AND REQUIRED to Answer the Amended Consolidated Complaint in this action, a copy of which is herewith served upon you, and provide a copy of your Answer to the Complaint to the undersigned subscriber within thirty days of service of the Summons and Complaint.

YOU WILL TAKE NOTICE that should you fail to Answer in the time set forth above the Plaintiffs will, by and through their undersigned counsel, petition the court to render judgment against you in your absence and by default for all relief demanded in the Complaint.

HALFORD, NIEMIEC & FREEMAN

 J. Cameron Halford
 238 Rockmont Drive
 Fort Mill, South Carolina 29708
 803-547-6618
 803-547-6639 fax

September 15, 2011

COPY

STATE OF SOUTH CAROLINA

COUNTY OF YORK

JUONTONIO PINCKNEY, et al.,

Plaintiffs,

v.

EPCON COMMUNITIES, INC.; EPCON
COMMUNITIES FRANCHISING, INC.;
BROCK L. FANKHAUSER; FANKHAUSER
PROPERTY GROUP, INC.; STONECREST
VILLAS OF TEGA CAY, L.L.C.;
STONECREST VILLAS OF TEGA CAY HOME
OWNERS ASSOCIATION, INC.,

Defendants.

FANKHAUSER PROP. GROUP, INC.,

Third-Party Plaintiff,

v.

EXTERIOR EXPRESSIONS OF NC, INC., AL-
AL-MEGA CONSTRUCTION, INC.; PROCAR,
INC.; THE SOUTHEASTERN GROUP, INC.;
And JOSE SIMENEZ, Individually and d/b/a
M&L ROOFING CO., LLC and/or MB
ROOFING COMPANY,

Third-Party Defendants.

STONECREST VILLAS OF TEGA CAY HOME
OWNERS ASSOCIATION, INC.,

Third-Party Plaintiff,

v.

STONECREST VILLAS OF TEGA CAY, LLC,

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Civil Action No.: 10-CP-46-2326

AMENDED COMPLAINT

JURY TRIAL DEMANDED

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DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Third-Party Defendant.	)
	)
EXTERIOR EXPRESSIONS OF NORTH	)
CAROLINA, INC.,	)
	)
Fourth-Party Plaintiff,	)
	)
v.	)
	)
MARCOS GONZALEZ,	)
	)
Fourth-Party Defendant.	)
	)

TO:
DEFENDANTS ABOVE NAMED: EPCON COMMUNITIES, INC.; EPCON COMMUNITIES FRANCHISING, INC.; BROCK L. FANKHAUSER; FANKHAUSER PROPERTY GROUP, INC.; STONECREST VILLAS OF TEGA CAY, LLC; AND (HOA) STONECREST VILLAS OF TEGA CAY OWNERS ASSOCIATION, INC.

This Amended Consolidated Complaint is filed pursuant to Order of Hon. John C. Hayes, III dated September 6, 2011 permitting Plaintiffs Leave to Amend to add as necessary Defendant parties Epcon Communities Franchising, LLC and developmental and selling entity Stonecrest Villas of Tega Cay, LLC. Additionally, the Amended Complaint adds three (3) Plaintiff home owners, represented by units described in paragraph 2(a), 2(d) and 2(j) *infra* and causes of action by Plaintiffs for Rescission and Slander of Title.

Plaintiffs would respectfully show the court the following:

JURISDICTION

1. Jurisdiction of this case is proper in York County as all causes of action alleged *infra* occur from conduct, misrepresentations, errors, omissions, duties, and privities (seller to purchaser) associated with the sale and/or maintenance of York County real properties known as "Stonecrest Villas of Tega Cay" condominiums situated within York County.
2. Plaintiffs are purchasers and owners of condominium properties within the horizontal property regime known as Stone Crest Villas of Tega Cay, Inc. constructed and sold to Plaintiffs by Brock L. Fankhauser ("Fankhauser") and Fankhauser Property Group, Inc. ("FPG, Inc."), and Stonecrest Villas of Tega Cay, LLC consisting of the following:

a. <u>Gerry & Thomas Arcoria:</u>	768 Ledgestone Court, Tega Cay, SC 29708.
b. <u>James and Deborah Barone :</u>	767 Ledgestone Court, Tega Cay, SC 29708.

c. <u>Ismael & Valerie Gonzales :</u>	709 Ledgestone Court, Tega Cay, SC 29708.
d. <u>Vincent Longobardo:</u>	870 Ledgestone Court, Tega Cay, SC 29708.
e. <u>Joe and Sandra Moore :</u>	821 Ledgestone Court, Tega Cay, SC 29708.
f. <u>David Musgrave :</u>	748 Ledgestone Court, Tega Cay, SC 29708.
g. <u>Juontonio Pinckney :</u>	809 Ledgestone Court, Tega Cay, SC 29708.
h. <u>Josephine Sciacca :</u>	717 Ledgestone Court, Tega Cay, SC 29708.
i. <u>Addie Smith :</u>	858 Ledgestone Court, Tega Cay, SC 29708.
j. <u>Allen & Edith Vesting:</u>	868 Ledgestone Court, Tega Cay, SC 29708.
k. <u>Thea – Eve Vicari :</u>	830 Ledgestone Court, Tega Cay, SC 29708.
l. <u>Troy and Nancy Williams :</u>	828 Ledgestone Court, Tega Cay, SC 29708.
3. Defendant Epcon Communities, Inc. ("EPCON") is a commercial developer of single story attached residential condominiums, including the "*pinwheel*" design, which offers for sale to purchasers by and through Epcon builder Brock L. Fankhauser ("Fankhauser"), Fankhauser Property Group, Inc. ("FPG"), and/or Stonecrest Villas of Tega Cay, LLC condominiums of the Epcon design within Stonecrest community development in Tega Cay, York County.
 4. Defendant Epcon Communities Franchising, Inc. ("ECF, INC.") is on information and belief Epcon owned, or an Epcon affiliate, *franchisor*, and the trademark owner of Epcon designs, plans and specifications and the "Epcon Developmental System", utilized by the Fankhauser Defendants in the advertisement, marketing, sale and construction of Plaintiffs' homes within the Stonecrest Development of Tega Cay.
 5. Defendant Brock L. Fankhauser ("Fankhauser") is a *franchisee* of Epcon and its affiliate Epcon Communities Franchising, Inc., ("ECF, INC."), is owner, builder, principal, president, and registered agent for both Defendant Fankhauser Property Group, Inc. ("FPG, Inc."), Stonecrest Villas of Tega Cay, LLC, and Stonecrest Villas of Tega Cay Owners Association, Inc. ("Stonecrest HOA") all of whom do business in York County, South Carolina. This Defendant is a resident of North Carolina doing business in York County, South Carolina.
 6. Defendant Fankhauser Property Group, Inc. ("FPG, Inc.") is a North Carolina corporation owned by Brock L. Fankhauser; FPG, Inc., franchisee of the Epcon Developmental system plans and specifications owned by Epcon Communities and/or Epcon affiliate Epcon Communities Franchising, Inc., and FPG, Inc. served as developer and contractor for the construction and development of Stonecrest condominiums including the construction of each respective Plaintiff's home by and through licensed contractor Brock L. Fankhauser.
 7. Defendant Stonecrest Villas of Tega Cay, LLC ("SCVTC, LLC") is a wholly owned developmental and sales entity owned by Brock L. Fankhauser which sold Plaintiffs their homes in Stonecrest Villas by and through owner and manager and operator Brock L. Fankhauser.

8. Defendant Stonecrest Villas of Tega Cay Owners Association, Inc. ("Stonecrest HOA") is a South Carolina non-profit corporation organized by Defendant Brock L. Fankhauser under South Carolina law and existing pursuant to the Master Deed and declaration of covenants and restrictions filed with the York County Clerk of Court governing the Stonecrest community development.
9. Stonecrest Villas of Tega Cay is an Epcn horizontal property regime in York County, planned, advertised, marketed, developed, constructed by and through Defendants Epcn Communities, Epcn Communities Franchising, Inc., builder and developer Brock L. Fankhauser, Fankhauser Property Group, Inc. ("FPG, INC.") , and Stonecrest Villas of Tega Cay, LLC ("SCVTC, LLC").
10. Plaintiffs are informed and believe that direct privity exists between the Plaintiffs and Defendant parties by virtue of Plaintiffs' purchase and ownership of a Stonecrest Villas condominium and by virtue of Master Deed and restrictive covenants running with, appurtenant to, and binding said properties.
11. Plaintiffs are informed and believe that contractual duties existed between the Plaintiffs and all Defendants, supported by consideration, and that Defendants jointly and severally have breached said contractual obligations and express warranties owed to Plaintiffs, to wit:

FOR A FIRST CAUSE OF ACTION

(AS AGAINST DEFENDANTS BROCK L. FANKHAUSER, FANKHAUSER PROPERTY
GROUP, INC., STONECREST VILLAS OF TEGA CAY, LLC and
EPCON COMMUNITIES, INC. and EPCON COMMUNITIES FRANCHISING, INC.)
(ACTION FOR RESCISSION)

1. The above allegations are re-stated and incorporated by reference as if having been set forth verbatim.
2. That pursuant to Franchise Agreement, Epcn and Epcn Communities Franchising, Inc. ("ECF, INC.") expressly granted unto Epcn builder and developer Fankhauser and FPG the rights to engage in advertising, marketing, development and sale using the Epcn Developmental System, the terms and conditions of said Franchise Agreement are incorporated by reference.
3. Plaintiffs are informed and believe that Defendants Epcn Communities, and Epcn Communities Franchising, Inc., by and through builder Brock L. Fankhauser and Fankhauser Property Group, Inc. exhibited Epcn Communities, Inc. communities and model home designs during the sales process to Plaintiffs which was material to Plaintiffs' decision to purchase a Epcn Communities home in the Stonecrest Villas development in York County.

4. Plaintiffs are informed and believe that Defendants represented to Plaintiffs as purchasers that the condominiums and community they were purchasing within Stonecrest was an Epcon community design active-adult and maintenance free home. Said representations were materially false, as set forth in paragraph (6) below.
5. Plaintiffs are informed and believe that Defendants Epcon Communities, Inc. and Epcon Communities Franchising, permitted Fankhauser use and sale of trademark Epcon plans, designs and specifications in the advertising, marketing and sale of Stonecrest condominiums to these Plaintiffs.
6. Plaintiffs are informed and believe that Defendant Epcon Communities Franchising, Inc. by and through Brock L. Fankhauser, developed, published, and permitted use of its home plans and specifications for building of homes in the Stonecrest Villas of Tega Cay community.
7. Plaintiffs are informed and believe that the contractor and developer Fankhauser and FPG, Inc. materially deviated from Epcon Communities Franchising, Inc. plans and specifications in the construction of the Stonecrest Community condominiums sold to Plaintiffs, including the homes of Plaintiffs Vesting, Longobardo and others, and that Epcon and ECF, Inc. failed to enforce strict compliance with Franchise Agreement terms upon Fankhauser and FPG, Inc.
8. Plaintiffs are informed and believe that Brock L. Fankhauser and FPG, Inc. were Epcon Builders pursuant to that certain Franchise Agreement between the Epcon Defendants and Fankhauser Defendants, the terms and conditions of which are incorporated by reference.
9. Plaintiffs are informed and believe that Brock L. Fankhauser, by and through Fankhauser Property Group, Inc. "FPG" was the contractor, developer, builder, and seller of said Epcon designs and specifications which were ultimately sold to Plaintiffs as maintenance free Epcon home designs within an Epcon Community "Stonecrest Villas of Tega Cay".
10. Plaintiffs are informed and believe that Brock L. Fankhauser through "Stonecrest Villas of Tega Cay, LLC" sold the homes to Plaintiffs. Brock L. Fankhauser also served as contractor and developer for the properties. Brock L. Fankhauser also served as sole controlling interest of the HOA Stonecrest Villas of Tega Cay Owners Association, Inc. until June 30, 2010. Brock L. Fankhauser is the controlling interest and manager of developmental and selling LLC entity Stonecrest Villas of Tega Cay, LLC.
11. Plaintiffs are informed and believe that due to building code violations and deviations from the Epcon Developmental System by Fankhauser, Defendants have breached contractual duties to these Plaintiffs by selling homes which suffer from reoccurring water intrusion, construction defects, and/or design defects, and which do not conform to the representations made to these Plaintiffs by Epcon sales agents and Epcon Builder Fankhauser of maintenance free active adult homes constructed in a workmanlike manner

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pursuant to Epcon Communities, Inc. models and Epcon Communities Franchising, Inc. plans and specifications.

12. Plaintiffs are informed and believe that their homes were constructed with code violations, do not conform to the applicable building code, and do not conform to the specifications of the Epcon Communities Franchising, Inc. specifications; and that builder Brock L. Fankhauser materially deviated from code and Epcon Community Franchising, Inc. plans and specifications in development and construction of homes sold at Stonecrest to these Plaintiffs and others.
13. Plaintiffs are informed and believe that Brock L. Fankhauser, by and through Stonecrest Villas of Tega Cay, LLC, was the declarant for the Stonecrest community development and by provisions of the Master Deed created the HOA "Stonecrest Villas of Tega Cay Owners Association, Inc."
14. That Brock L. Fankhauser as contractor, developer, and seller through Stonecrest Villas of Tega Cay, LLC was the sole board member and controlling interest for the HOA "Stonecrest Villas of Tega Cay Owners Association, Inc." ("HOA") until June 30, 2010, including the date of February 15, 2010 mortgaging the common properties by instrument recorded at Book 11272 at Page 129-139 in York County.
15. That Brock L. Fankhauser and FPG, Inc. as Epcon Communities, Inc. and Epcon Communities Franchising, Inc. *franchisee* materially deviated from the Epcon Developmental System, Epcon plans, Epcon specifications, and building code in construction of Stonecrest condominiums, including the Plaintiffs' condominium homes.
16. That despite actual knowledge of flooring and foundation defects by Epcon principal Philip Fankhauser, Epcon Communities and Epcon Communities Franchising, Inc. knowingly and willfully permitted further contracts and sale by Fankhauser, FPG, and Stonecrest Villas of Tega Cay, LLC of homes whose construction by FPG materially deviated from Epcon plans, specifications, materials and designs.
17. That Epcon Communities and Epcon Communities Franchising, Inc. willfully and deliberately failed to enforce Franchise Agreement terms and conditions upon Fankhauser and FPG, Inc. as Epcon franchisee, resulting in construction of homes that deviate from Epcon plans, models, specifications, building code, and which now suffer reoccurring water intrusion and mold.
18. That the duties and responsibilities of Stonecrest Villas of Tega Cay Owners Association, Inc. ("Stonecrest HOA") are set forth in the bylaws, restrictive covenants, and master deed recorded at Book 8852 at Page 149, which is incorporated by reference, including taking any steps or performing any acts deemed necessary to appropriate to preserve the values of the condominium units and to promote the health, safety and welfare of unit owners, including payment of taxes on Stonecrest common properties.

19. That Defendant Stonecrest Villas of Tega Cay Owners Assoc. Inc. ("HOA") has failed and is failing to carry out its purposes under the Master Deed to these Plaintiffs. The HOA, through Brock Fankhauser has engaged in private loans with the Epcon builder Fankhauser, failed to remedy water intrusion, failed to pay taxes on the common elements, and failed to protect and preserve Plaintiffs' homes or home exteriors.
20. That Defendants named in this cause of action have breached contractual duties owed to Plaintiffs by selling them dwellings which suffer from reoccurring water intrusion, construction defects, and which do not conform to the Epcon Communities, Inc. communities, model home designs, or Epcon Communities Franchising plans and specifications used to advertise to, market, and ultimately sell to Plaintiffs Epcon homes.
21. Plaintiffs are informed and believe that Defendant Stonecrest Villas of Tega Cay Owners Association, Inc. "Stonecrest HOA" has breached contractual and fiduciary duties owed to these Plaintiffs, is undercapitalized and incapable of carrying out its functions under the Master Deed to protect the common properties of Stonecrest, including the exterior components comprising these Plaintiffs' homes and payment of taxes. As a result, said homes suffer from routine water intrusion and mold and are subject to tax levies resulting in increased financial burden on owners.
22. That Defendants' failures and breach of contract is so fundamental and substantial that it defeats the purpose of the contract as entered into by Plaintiffs with Defendants, to wit:
 - a. Defendants Epcon Communities and Epcon Communities Franchising have knowingly failed to enforce Franchise Agreement compliance terms upon Epcon franchisee and Epcon seller Brock L. Fankhauser and FPG, permitting FPG and Brock L. Fankhauser to build Epcon homes which materially deviate from building code and the Epcon developmental system, Epcon plans and Epcon specifications.
 - b. Defendants Brock L. Fankhauser, Fankhauser Property Group, Inc. "FPG" and Stonecrest Villas of Tega Cay, LLC have using Epcon trademark styles and designs advertised, marketed, constructed, sold and conveyed to Plaintiffs homes that are substantially different, materially deviate from, and are non-conforming to representations of Epcon designs and quality Plaintiffs were promised and bargained for.
 - c. That Epcon's representations of Epcon quality and value, through Epcon sales agents and Epcon builder Fankhauser, were material to Plaintiffs' decision to purchase a Stonecrest condominium.
 - d. Plaintiffs' homes suffer from routine re-occurring water intrusion and water penetration at various locations per household, including foundations, windows, siding, and roofs. Plaintiffs are informed and believe said water intrusion cannot be remedied and that their homes are compromised by construction defects or design defects as constructed by FPG and Brock L. Fankhauser.

- e. The construction of Plaintiffs homes materially differs and substantially deviates from the Epcon Communities, Inc. plans and specifications due to errors, omissions, deviations from code and plans, and misrepresentations of the contractor/developer Brock Fankhauser and Fankhauser Property Group, Inc. ("FPG").
- f. Defendants homes on information and belief suffer from growth of mold caused by reoccurring water intrusion which is the direct and proximate result of builder error or omissions, specifically by Brock L. Fankhauser and Fankhauser Property Group, Inc. "FPG".
- g. That despite demands made, Defendant HOA "Stonecrest Villas of Tega Cay Owners Association, Inc.", has been and remains unwilling or incapable of assisting Plaintiffs to repair homes, including common elements, to prevent further water intrusion and mold damages, despite accepting Plaintiffs' monthly assessments faithfully paid to the HOA.
- h. Plaintiffs were sold homes within a horizontal property regime wherein the HOA is unwilling or incapable of maintaining the common elements pursuant to the Master Deed created by developer Brock L. Fankhauser / declarant Stonecrest Villas of Tega Cay, LLC. by and through Brock L. Fankhauser.
- i. That due to financial mismanagement of Brock L. Fankhauser as controlling HOA board, Plaintiffs have been subjected and will continue to be subjected to special assessments caused by conflicts of interest wherein the HOA board was incapable or unwilling to take action as against declarant, developer, builder, and seller Brock L. Fankhauser, Fankhauser Property Group, Inc., and Stonecrest Villas of Tega Cay, LLC financial mismanagement, failure to pay taxes, and unlawful encumbering by mortgage of common properties at Book 11272 at Page 129.
- j. Plaintiffs have been subjected and will continue to be subjected to special assessments caused by Defendant Stonecrest Villas of Tega Cay Owners Association, Inc. "HOA" failure to mitigate damages occurring due to re-occurring episodes of water intrusion at the homes of these Plaintiffs.
- k. Plaintiffs have been subjected and will continue to be subjected to increased special assessments due to the HOA board failure to pay taxes or prevent unauthorized loans and mortgaging of the Stonecrest common property by Stonecrest Villas of Tega Cay, LLC and Brock L. Fankhauser in violation of Section 10.6 of the Master Deed.

23. Plaintiffs are informed and believe that the condominium homes purchased by these twelve (12) Plaintiffs are structurally compromised, suffer from irreparable deficiencies, impracticality of repair due to cost, water intrusion, and mold contamination which are the direct and proximate result of errors, misrepresentations, deviations, and omissions of Brock L. Fankhauser.
24. Plaintiffs are informed and believe that Plaintiffs are entitled to recovery of the full purchase price paid by Plaintiff buyers, plus damages, attorneys fees, and costs in the discretion of the court and a jury.

FOR A SECOND CAUSE OF ACTION

[AS TO BROCK L. FANKHAUSER AND STONECREST VILLAS OF TEGA CAY, LLC]
(SLANDER OF TITLE)

1. The above allegations are re-stated here and incorporated by reference as if having been set forth verbatim.
2. That Defendant Stonecrest Villas of Tega Cay, LLC is the Declarant under the Master Deed for the developed community Stonecrest Villas of Tega Cay and sold condominium homes to Plaintiffs by and through Brock L. Fankhauser.
3. That Brock L. Fankhauser is the controlling interest, manager, and owner of Stonecrest Villas of Tega Cay, LLC. Brock L. Fankhauser occupied the board and controlling interest of the HOA Stonecrest Villas of Tega Cay Owners Association beyond the end of the Declarant Control period as identified in the Master Deed, resigning June 30, 2010.
4. That Defendant Brock L. Fankhauser, by and through parents Philip Fankhauser and Kathleen Fankhauser, permitted private lending and private mortgage to encumber the common property within the horizontal property regime Stonecrest Villas of Tega Cay in violation of the community master deed, Section 10.6, page (17), as published by Fankhauser and Stonecrest Villas of Tega Cay, LLC.
5. In so doing, Brock L. Fankhauser by and through Declarant Stonecrest Villas of Tega Cay, LLC encumbered the common properties without lawful authority and in violation of the Master Deed Section 10.6, in the amount of \$560,000.00 on February 15, 2010 as recorded in Book 11272 Page 129-139 in the records of the York County Clerk of Court.
6. That as a direct and proximate result of Epcon Builder Fankhauser violations of Section 10.6 of the Master Deed, Plaintiffs' undivided ownership interests in the common properties has been mortgaged through unauthorized loans undertaken by Stonecrest Villas of Tega Cay ("SCVTC, LLC") by and through Brock L. Fankhauser, Epcon principal Philip Fankhauser, and Stonecrest Villas HOA.
7. That said conduct occurred in violation of the Master Deed sold to Plaintiffs by Stonecrest Villas of Tega Cay LLC (SVTC, LLC), after end of the Declarant Control period as set forth in the Master Deed, and while Brock L. Fankhauser occupied

controlling interest of SVTC, LLC and HOA Stonecrest Villas of Tega Cay Owners Association, Inc "HOA".

FOR A THIRD CAUSE OF ACTION
[AS TO DEFENDANTS BROCK L. FANKHAUSER
FPG, INC. AND HOA STONECREST VILLAS OF TEGA CAY OWNERS ASSOC. INC.
AND STONECREST VILLAS OF TEGA CAY, LLC]
(BREACH OF FIDUCIARY DUTY)

1. The above allegations are restated and incorporated by reference as if set forth verbatim.
2. Plaintiffs are informed and believe that Plaintiffs as owners are required to pay monthly assessments and dues to Stonecrest Villas of Tega Cay Owners Association, Inc. ("HOA") for preservation and maintenance of condominium exteriors and common areas and amenities pursuant to the Master Deed, bylaws and restrictive covenants.
3. Plaintiffs are informed and believe that a fiduciary relationship exists between Plaintiffs and these Defendants wherein Defendants are required, by virtue of Master Deed, bylaws and restrictive covenants, to act in equity, in good faith, and with proper due regard for Plaintiffs' interests in preservation, maintenance, and protecting Plaintiffs' properties from water intrusion damages.
4. Plaintiffs are informed and believe that Defendants voluntarily undertook this fiduciary obligation, imposed by Master Deed restrictive covenants, through acceptance of Plaintiffs' monthly assessments.
5. Plaintiffs are informed and believe that Defendants have breached this fiduciary obligation by failing to act to preserve and protect Plaintiffs' health and property values. Defendants, jointly and severally, have failed to act to preserve and maintain Plaintiff's Properties from water intrusion and potential health risks, including mold, as reported by Plaintiffs Barone (767), Pinckney (809), Sciacca (717), Vicari (830) and Arcoria (768), specifically.
6. Plaintiffs are informed and believe that Defendants have breached fiduciary duties to Plaintiffs by denying needed repairs for temporary flooring, wall repairs, and mold remediation while granting unto board members these same repairs without cost.
7. Plaintiffs are informed and believe that Defendants have breached fiduciary duties imposed upon Defendants by Master Deed by failing to timely pay taxes on the common properties of Stonecrest Villas and subjecting the same to tax levy.
8. Plaintiffs are informed and believe that these Defendants, jointly and severally, have breached said fiduciary obligations by failing to prudently act to preserve and maintain common properties within Stonecrest, including the clubhouse and Plaintiffs' home exteriors, and despite accepting monthly assessments paid by Plaintiffs.

9. Plaintiffs are informed and believe that Defendants, jointly and severally, through Brock L. Fankhauser and Stonecrest Villas of Tega Cay, LLC have permitted private loans encumbering the common properties of Stonecrest Villas in violation of Section 10.6 of the Master Deed, recorded at Book 11272 at Page 129-139 in the records of the clerk of court for York County, South Carolina.
10. Plaintiffs are informed and believe Defendants, jointly and severally, through Brock L. Fankhauser, failed to act to pay taxes on the Common Properties, subjecting the same to tax levy sale and increased financial burdens on the Plaintiffs and home owners.
11. Plaintiffs are informed and believe that Defendants, through Brock L. Fankhauser individually, have deliberately and arbitrarily refused to enforce bylaws by permitting Fankhauser-appointed board members to operate small businesses out of their garages in express violation of the Master Deed.
12. Plaintiffs are informed and believe that Defendants, jointly and severally, improperly utilized monthly HOA assessments for purposes other than payment of taxes and maintenance of Stonecrest properties, including development of adjacent commercial property tracts and roadways, instead of employing said funds to remedy defects, make needed repairs, and cure water intrusions issues at Plaintiffs' homes.
13. Plaintiffs are informed and believe that Defendants, jointly and severally, have undercapitalized the HOA and have depleted reserves as set forth in paragraph (12) above, resulting in the HOA being unable or unwilling to protect and preserve Plaintiffs' properties, maintain values, repair water intrusion damage, mold or pay taxes.
14. That Plaintiffs' demands to Stonecrest HOA, Fankhauser and FGP, Inc. to remedy water intrusion and make repairs has met with procrastination, deliberate failure to act, and has required that this legal action be brought against Defendants.
15. Defendants, through the HOA board, have arbitrarily refused to effect repairs to the interiors of Plaintiffs' homes, caused by water intrusion originating from the HOA' failure to preserve and protect the common elements of the horizontal property regime, including walls, foundations, exteriors, roofs, siding, and landscaping of Plaintiffs homes.
16. Defendant Stonecrest HOA, through its appointed board, has breached fiduciary obligations owed to Plaintiffs by voluntarily undertaking to remove flooring at the residences of Plaintiffs Pinckney, Sciacca and Arcoria, and thereafter refusing to replace the same without lawful justification while repairing residences of HOA appointed board members with new temporary flooring and mold remediation.
17. Defendants through the HOA board has breached fiduciary obligations by arbitrarily permitting Fankhauser-appointed HOA board members to install new floor coverings, while denying repairs to Pinckney, Sciacca, Arcoria, and other Plaintiffs.

18. Defendants, through Brock L. Fankhauser, have breached fiduciary obligations by voluntarily conveying value to board members, including conveying undivided common area properties for deck extensions, in violation of Master Deed, restrictive covenants and bylaws.
19. Defendants have breached fiduciary obligations to Plaintiffs by refusing, prior to June, 2011 to undertake temporary protective measures using tarps to prevent water intrusion at Plaintiffs' residences, while arbitrarily repairing the residence flooring and wall systems of Fankhauser-appointed board members, including Iadanza and Moscovitz.
20. That due to Defendants' breach of fiduciary duties to Plaintiffs, Plaintiffs each have been damaged in amounts exceeding \$7,500 to be proven at trial of this matter before a jury.
21. Plaintiffs are informed and believe that they are entitled to an award of actual and punitive damages due to the HOA Breach of Fiduciary Duties and financial mismanagement by Brock L. Fankhauser individually and as principal and controlling officer of Stonecrest HOA and FPG, Inc. wherein Defendants, through Brock Fankhauser, have acted in an arbitrary, willful, wanton, and reckless disregard of Plaintiffs' rights and interests as Stonecrest owners.
22. Plaintiffs are informed and believe that they are entitled to an award of actual and punitive damages due to the HOA executive board violations of the Master Deed, Section 10.6 both before and after resignation of principal Brock L. Fankhauser, including encumbering of the common properties by private mortgage and subjecting the common properties to tax levy sale due to non-payment of taxes in violation of duties imposed upon the HOA by Master Deed.
23. Plaintiffs are informed and believe that they are entitled to an award of all attorneys' fees and costs associated with bringing this matter before the court.

FOR A FOURTH CAUSE OF ACTION

AS TO EPCON COMMUNITIES, INC.; EPCON COMMUNITIES FRANCHISING, INC.;
BROCK L. FANKHAUSER, INDIVIDUALLY, FANKHAUSER PRPOERTY GROUP, INC.
STONECREST HOA, and STONECREST VILLAS OF TEGA CAY, LLC
(BREACH OF CONTRACT)

1. The above allegations are set forth and incorporated by reference as if stated again verbatim. Plaintiffs allege that their homes were advertised, marketed, and sold pursuant to the terms of a Franchise Agreement between Epcon Communities Franchising, Inc. and Fankhauser Property Group, Inc.
2. Plaintiffs show and allege that they are intended third party beneficiaries of the terms and conditions of said Franchise Agreement terms between Epcon and Fankhauser.

3. Plaintiffs are informed and believe that the Defendants named in this cause of action knew, *or should have known*, that the property being purchased by each respective Plaintiff would serve as the Plaintiff's primary residence and home.
4. Plaintiffs are informed and believe that contractual duties exist between Plaintiffs and these Defendants, supported by consideration, and that the Defendants jointly and severally have breached said contractual obligations, to wit:
 - a. Epcon and ECF, Inc. failure to enforce strict compliance upon Epcon builder Fankhauser with Franchise Agreement terms, conditions, and restrictions.
 - b. Epcon and Defendant Brock L. Fankhauser's knowing deviation from Epcon plans, specifications, and building code in construction of the Plaintiffs' Stonecrest condominiums.
 - c. Defendant Brock L. Fankhauser until July, 2010 was the sole controlling board member, owner, and agent of Stonecrest HOA. FPG, Inc. as contractor, developer, and sole controlling HOA interest is solely responsible for misrepresentations, breach of warranties, inaction, errors, omissions, neglect, procrastination, and arbitrary refusal to take sufficient corrective action to prevent recurring water intrusion to Plaintiffs' residences and effect necessary repairs despite Brock Fankhauser's awareness and Epcon principal Philip Fankhauser awareness of ongoing defects and water intrusion issues at Stonecrest properties.
 - d. That Defendants, specifically including Defendant Brock L. Fankhauser, knew, *or should have known*, of the construction defects and/or design defects which plagued the Stonecrest Condominium properties, yet continued to repeatedly market and sell the same to innocent purchasers for cash, including Plaintiffs Williams and Vicari, *supra*.
 - e. Defendant Fankhauser Property Group (FPG, Inc.) as general contractor, by and through Brock L. Fankhauser, has by breach of warranty and breach of implied duties of good faith and fair dealing failed to render workmanlike construction on Plaintiffs' residences, including deviating from the Epcon Development System received by way of Franchise Agreement, resulting in defects and water intrusion caused by construction defects and/or design defects.
 - f. Defendant FPG, Inc., as general contractor, by and through Brock L. Fankhauser individually, has arbitrarily refused to vigilantly protect and restore Plaintiffs' properties from further damage and conduct needed repairs, despite repeated written notices and demands.
 - g. Defendants, including FPG, Inc., as general contractor, by and through Brock L. Fankhauser individually, has arbitrarily refused to repair and/or maintain Plaintiffs' properties.

- h. Defendants, by and through Brock L. Fankhauser, have arbitrarily commenced free repairs to those properties belonging to Stonecrest HOA board members appointed by Fankhauser, including Lou Moscovitz and Paulette Iadanza, while ignoring the Plaintiffs' needs for repairs in the face of known water intrusion and mold damages at Plaintiffs' residences.
 - i. Defendant Stonecrest HOA, despite notice, permitted Brock L. Fankhauser individually to exercise control of the HOA in violation of Master Deed and bylaws. Stonecrest HOA by and through Fankhauser individually (sole board member and owner) failed to act promptly to protect Plaintiffs' properties and interests from damages and failed to effect repairs, despite notice and despite acceptance of Plaintiffs' monthly assessments.
 - j. Defendant Stonecrest HOA has ratified the conduct of Fankhauser individually, acting arbitrarily to perform work on board members' property while ignoring repair needs of the Plaintiffs and other residents whose properties leak water and are affected by mold and lack of proper flooring.
 - k. Defendants Brock Fankhauser, FPG, Inc. and Stonecrest Villas of Tega Cay LLC (SVTC, LLC) and Stonecrest HOA through its board have knowingly, deliberately, and recklessly disregarded fiduciary obligations imposed upon Defendants by Master Deed and contract privity with Plaintiffs by engaged in private loans, unlawful mortgage of undivided common property owned by Plaintiffs, failed to pay taxes, and ignored known defects and repair needs existing at Plaintiffs' residences despite express knowledge of water intrusion and mold growth.
 - l. Plaintiffs are informed and believe Defendants named in this cause have improperly and in bad faith employed Plaintiffs' monthly assessments resulting in HOA undercapitalization and inability to carry out Master Deed duties to protect, preserve, repair or remedy defects, damages, and water intrusion at Plaintiffs' properties, thereby breaching contractual duties owed to Plaintiffs as purchasers for value of an Epcon product within an Epcon community.
 - m. Defendants, jointly, have failed to act prudently to repair Plaintiffs' home interiors, exteriors, pay taxes due upon and preserve common properties, including the Stonecrest Club House, from being damaged by mold and water intrusion despite accepting monthly assessments from owners.
5. That the conduct of each respective Defendant, jointly and severally, constitutes breach of contract as between the parties as set forth more fully below, including Breach of Fiduciary Duty, Breach of Contract Accompanied by Fraudulent Acts, Breach of Implied Duties of Good Faith and Fair Dealing, and Breach of Express Warranties as set forth more fully below.

6. That as a direct and proximate result of the Defendants' breach of contractual duties, jointly and severally, each respective Plaintiff has been damaged in amounts exceeding \$7,500 to be proven at trial of this matter before the court. Plaintiffs' damages are legally and proximately the result of Defendants' breach of contractual duties and obligations.
7. Plaintiffs seek actual, punitive, compensatory, and expectation damages, attorney's fees, and costs as against Defendants in amounts to be proven at trial of this matter before the court, including the expectation value of what Plaintiffs purchased vs. the value of the product and services each Plaintiff was sold by Defendants.

FOR A FIFTH CAUSE OF ACTION

[AS TO BROCK L. FANKHAUSER; FPG, INC; STONECREST VILLAS OF TEGA CAY, LLC ("SVTC, LLC") and STONECREST VILLAS OF TC OWNERS ASSOCIATION, INC.
(BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS)]

1. Plaintiffs are informed and believe that Defendants, including Brock L. Fankhauser individually, *knew or was substantially certain* that the Epcon Communities, Inc. "Stonecrest" condominium properties built by Fankhauser were plagued by water intrusion problems, construction defects, and/or design defects.
2. Plaintiffs are informed and believe that Epcon builder Fankhauser and Alice McDonald, Epcon and FGP director of construction, knowingly and deliberately deviated from Epcon Communities Franchising, Inc. materials, plans, specifications, and guidelines, in constructing Epcon "Stonecrest Villas" condominiums.
3. Yet, Defendants falsely and dishonestly continued to market and sell the condominiums as built in compliance with Epcon guidelines, specifications, and building code, without full disclosure to purchasers for value, specifically including Plaintiffs Williams and Vicari.
4. Defendants Brock Fankhauser, FPG, Inc., SVTC, LLC and Epcon were dishonest in fact by misleading Plaintiffs and by continuing to sell homes which substantially deviated from and was non-conforming to Epcon designs, plans and specifications.
5. Plaintiffs are informed and believe that these Defendants knew, or should have known, of material facts involving substantial water intrusion problems within the Stonecrest, but concealed from Plaintiffs these material facts and continued to sell defectively constructed homes after December 19, 2009.
6. Despite express knowledge by Defendants of the problems identified in paragraph (5) above, on March 19, 2009, Defendants permitted to be sold condominium # 828 to Troy and Nancy Williams.
7. Despite express knowledge by Defendants of the problems identified in paragraph (5) above, on May 28, 2010, Defendants permitted to be sold condominium # 830 to Thea-Eve Vicari, *for cash*.

8. That Defendants, through Epcon builder Brock L. Fankhauser, expressly reassured Plaintiffs at time of purchase, specifically including Plaintiffs Gonzalez (unit 709), Addie Smith (unit 858) and Thea-Eve Vicari (unit 83), that their condominium properties would be properly repaired; said assurances were materially false.
9. Plaintiff Vicari, upon notice of the true extent of water intrusion problems, demanded rescission of sale refund of cash paid to Brock L. Fankhauser. Plaintiffs are informed and believe that Defendant Brock L. Fankhauser falsely denied contract rescission was possible, and denied refund to Plaintiff Vicari, while permitting rescission and refund to other buyers within Stonecrest, said conduct constituting dishonesty in fact.
10. Defendants, expressly including Stonecrest HOA, have refused despite demand to effect repairs to Plaintiffs' properties to prevent water intrusion, despite accepting monthly assessments paid by Plaintiffs.
11. Defendants, expressly including Stonecrest HOA by its board, have arbitrarily refused despite demand to effect interior repairs to Plaintiffs' homes caused by exterior deterioration or defects known to Defendants falsely disclaiming responsibility for interior damages originating or emanating from faulty builder workmanship.
12. Defendants, despite undertaking to remove the flooring of Sciacca (unit 717) and Pinckney (unit 809), and Arcoria (768), have arbitrarily refused to complete repairs and install replacement flooring while arbitrarily providing temporary repairs to other Stonecrest properties belonging to HOA board members, including Moscowitz and Iadanza. As a result, Sciacca and Pinckney have suffered loss of use of portions of their residence for months without being compensated.
13. Plaintiffs are informed and believe that Defendants misrepresentations and failures to act are arbitrary and dishonest in fact; Defendants having never repaired Plaintiffs' properties despite repeated pleas and demands.
14. Plaintiffs are informed and believe that Defendants owed to Plaintiffs a duty to not materially conceal material material facts and to repair their homes pursuant to Master Deed, which Defendants through Epcon developer Fankhauser failed to do.
15. Plaintiffs are informed and believe Defendants, jointly and severally, through Epcon Builder Brock Fankhauser, expressly failed by *deliberate concealment* to *fully disclose* to Vicari and Williams, as purchasers, the full extent of the construction defects and/or design flaws described above and known to Defendants, including Brock L. Fankhauser individually, as affecting numerous condominium structures in Stonecrest.
16. Plaintiffs are informed and believe that Defendants, including Fankhauser individually, had and gained a pecuniary interest in the sale of defective homes being sold to Plaintiffs and others, including Vicari for cash.

17. That Plaintiffs as a group were ignorant of builder deviations from Epcon plans and specifications, building code, and the the false representations made by Defendants that their properties would be properly repaired.
18. That Plaintiffs believed that they were purchasing an EPCON home as constructed by Epcon builder and Defendant Brock L. Fankhauser and Fankhauser Property Group, Inc. which would be maintained and preserved by Stonecrest HOA pursuant to Master Deed restrictive covenants and bylaws of the HOA. *Said representations were material to Plaintiffs' decision to purchase, and were materially misleading and false.*
19. That Plaintiffs, expressly including Williams and Vicari, as purchasers for value, had the right to rely upon Defendants' representations, jointly and severally, in purchasing their Epcon Stonecrest condominium home and did in fact rely upon the representations of Defendants that they were purchasing an Epcon Communities, Inc. product, built by the Fankhauser Defendants, which would be maintained and preserved by Stonecrest HOA under Master Deed.
20. That Plaintiffs, expressly including Vicari, are now informed and believe that they have were deceived in the sales process, and were sold for value Epcon homes which suffer from construction defects and/or design defects known to the Defendants jointly and severally at the time of sale, the scope and magnitude of which were material facts concealed by Fankhauser in bad faith to induce purchase.
21. Plaintiffs are informed and believe that had Defendants disclosed material facts concerning the extent of water intrusion within the community, Plaintiffs would not have purchased a Stonecrest home.
22. That Plaintiffs have faithfully paid monthly assessments despite the Defendants being unwilling or unable to effect repairs required to protect each Plaintiffs' property, and that the HOA unwillingness or inability to repair properties while preserving board members' properties constitutes arbitrary, bad faith, and dishonest in fact breach of contract.
23. Plaintiffs are informed and believe that they have incurred damages as a direct and proximate result of the Defendants' knowing and deliberate concealment concerning construction defects and/or design defects known to Defendants to exist in the Epcon "Stonecrest" development as constructed by Defendants Fankhauser and by Defendants' continued refusal to assist and repair Plaintiffs' properties.
24. Plaintiffs believe they are entitled to all actual and punitive damages including an award of attorney's fees and costs due to Defendants' bad faith breach of contract accompanied by fraudulent act.

FOR A SIXTH CAUSE OF ACTION

[AS AGAINST DEFENDANTS BROCK L. FANKHAUSER, FANKHAUSER PROPERTY GROUP, INC., STONECREST HOA, EPCON COMMUNITIES, INC. and EPCON COMMUNITIES FRANCHISING, INC.]

(FRAUD AND MISREPRESENTATION)

1. The above allegations are set forth and incorporated by reference as if re-stated verbatim.
2. That a Franchise Agreement exists as between the Epcon Defendants and Fankhauser Defendants, under which Defendants advertised, marketed and sold Epcon designs to Plaintiffs. The terms and conditions of the Franchise Agreement are incorporated by reference.
3. Defendant FPG, Inc., by and through its President Brock L. Fankhauser, is an Epcon Franchisee pursuant to that certain March 23, 2006 Franchise Agreement. FPG, Inc. and Brock L. Fankhauser was the developer and builder of these Plaintiffs' condominium homes under said Franchise Agreement.
4. As Franchisee, Defendants FPG and Brock L. Fankhauser were under a duty to strictly comply and adhere to the Epcon "Development System" and not deviate from the materials, procedures, and guidelines. Defendants materially deviated from the Epcon Developmental system and materially concealed these facts from Plaintiff buyers.
5. As Franchisee, the Fankhauser Defendants were permitted the use of "Epcon" trade name, logo, brand, marks, designs, marketing materials, guidelines, video presentations, and specification manuals for advertising, marketing, construction, sales, and warranty communications.
6. Defendants Epcon and ECF, Inc., by and through Brock L. Fankhauser, permitted material deviations from plans, designs, construction specifications, and the Epcon "developmental system" in the construction of Stonecrests Condominiums, including the homes of these Plaintiffs, falsely representing that Plaintiffs were buying Epcon quality homes.
7. That Defendant Epcon Communities, Inc., by and through its affiliate Epcon Communities Franchising Inc. and Defendants named in this Cause of Action, and pursuant to Epcon Franchise Agreement, through FPG, Inc., developed, created, marketed, sold to the Plaintiffs condominium homes, and operated a horizontal property regime known as Stonecrest Villas of Tega Cay. The homes constructed in Stonecrest were advertised and sold as an Epcon homes within the horizontal property regime "Stonecrest Villas of Tega Cay" with intent that Plaintiffs and others purchase 'Epcon' design homes within an "Epcon" style community.
8. That Epcon, by and through its employees, agents, independent contractors, and affiliates, including Brock L. Fankhauser 'an Epcon Communities' developer, represented the dwellings to be constructed and ultimately sold to Plaintiffs to be quality Epcon homes built pursuant to Epcon architectural plans, designs, guidelines and specifications, free from defects. Said representation were *materially false*, to wit:
 - a. The Stonecrest Homes sold to Plaintiffs materially deviated from building code.

- b. The Stonecrests Homes sold to Plaintiffs materially deviate from Epcon guidelines, plans, specifications, and recommended materials.
 - c. The Stonecrest Homes sold to Plaintiff suffer from reoccurring water intrusion.
9. Plaintiffs as buyers materially relied on the representations of "Epcon" developer and builder Brock L. Fankhauser, and Defendants named in this cause of action, to their detriment, believing they were buying "Epcon" homes constructed like all Epcon homes and models and communities they were shown by Epcon sales personnel.
 10. The homes purchased by Plaintiffs do not conform to Epcon standards of quality or Epcon specifications as they suffer from reoccurring water intrusion and deterioration due to builder deviations from the Epcon Developmental System, uniform plans, designs and construction specifications, and building code.
 11. That Defendant Epcon Communities, by and through Alice McDonald and Brock L. Fankhauser, knew, *or should have known*, the dwellings being constructed and sold to Plaintiffs materially deviated from Epcon guidelines, Epcon materials, Epcon plans and Epcon specifications as published by Epcon and its affiliate Epcon Communities Franchising, Inc. Yet, these Defendants continued to deviate from, build, and sell Epcon materials, combinations, plans and specifications in building and selling condominiums without full disclosure to purchasers for value, including Plaintiffs.
 12. That Defendants' deviation from Epcon plans and specifications was a material fact concealed from Plaintiffs as purchasers and to which Plaintiffs were ignorant, relying upon Defendants representations, good faith, judgment, and skill in the purchasing process of an Epcon home.
 13. Defendants Brock L. Fankhauser and FPG, Inc. materially concealed deviation from the Epcon Developmental System, representing to Plaintiffs their homes were of the same uniform quality, design and specification as all Epcon Community homes and models. Defendants Fankhauser, FPG and SVTC, LLC knowingly sold homes to Plaintiffs under the Epcon trade name which materially and substantially differed in construction from Epcon guidelines and specifications published by Epcon and/or its affiliate Epcon Communities Franchising, Inc.
 14. Plaintiffs are informed and believe that Brock L. Fankhauser and FPG, Inc. deliberately deviated from the Epcon Developmental System, specifications, and *materially concealed* deviations from the Epcon Developmental system, intending that Plaintiffs purchase condominiums from Stonecrest Villas of Tega Cay, LLC (owned by Brock L. Fankhauser) believing they were buying Epcon standards and quality from an Epcon Developer and builder, Brock L. Fankhauser.
 15. Plaintiffs as purchasers were deceived by these Defendants, and were ignorant to the false representations of Epcon Communities by and through Brock L. Fankhauser, Alice McDonald, and could not have known the builder and developer had materially deviated

from Epcon specifications and guidelines these Plaintiffs reasonably believed they were purchasing.

16. Plaintiffs contracted for an "Epcon Communities" home based on representations of "Epcon" models, and as buyers purchased Epcon homes constructed by FPG and Brock L. Fankhauser from SVTC, LLC relying upon the representations of quality they received from Epcon sales personnel, including Brock L. Fankhauser individually, Alice McDonald, and construction superintendents.
17. Plaintiffs are informed and believe that their homes suffer construction defect or design defect resulting in reoccurring water intrusion, due to builder deviations from the Epcon developmental system, including specified materials, resulting in construction defects, design defects, code violations, and reoccurring water intrusion problems.
18. Plaintiffs are informed and believe that as purchasers for value, Plaintiffs were third party beneficiaries of the Franchise Agreement terms between FPG, Inc., Epcon and ECF, Inc., and had the right to rely upon the representations of these Defendants, including the logo, plans, videos, designs, logos, business cards, signs, drawings, videos, marketing materials, exhibit boards, poster renderings, and contracts representing that they would buy and receive an "Epcon" type home within an "Epcon Community" Stonecrest Villas of Tega Cay, built to Epcon quality guidelines and specifications.
19. Plaintiffs are informed and believe that Epcon Communities and ECF, Inc., pursuant to Franchise Agreement, had the absolute right to enforce strict adherence to Epcon Developmental System, including architectural guidelines, blueprints, material use, and specifications used by builder Brock L. Fankhauser and FPG, Inc.
20. Plaintiffs are informed and believe that Epcon and ECF, Inc. knowingly failed to do so, resulting in builder deviations from the Epcon Developmental system, Epcon plans, and Epcon specifications as published by Epcon or its affiliate Epcon Communities Franchising, Inc.
21. That as a direct and proximate result, Plaintiffs purchased homes from Defendants named in this cause which materially differ from Epcon specifications, suffer from re-occurring water intrusion, construction defect or design defect, and which continue to deteriorate, and which do not conform to Epcon standards or specifications due to builder deviations by FPG, Inc. and Brock L. Fankhauser as an "Epcon" developer and franchisee.
22. That each respective property is bound by Master Deed and restrictive covenants published by Stonecrest Villas of Tega Cay, LLC requiring monthly assessments of any owner within the Stonecrest development, paid by these Plaintiffs.
23. That Defendants SVTC, LLC, by and through Brock L. Fankhauser, created Stonecrest HOA, Master Deed, and bylaws applicable to Stonecrest HOA under the Master Deed to preserve and maintain the Stonecrest Community under the Master Deed, and thereby accepted and undertook an express duty to carry out preservation and protection of the

properties to prevent deterioration and waste, which Defendants have expressly failed to do. Said covenants of the Master Deeded community were sold to these Plaintiffs for value and formed part of the basis of the bargain to buy in Stonecrest Community.

24. That Defendants through Master Deed have required monthly assessments which have been paid by each respective Plaintiff without fail. That despite payment of monthly assessments, Defendants have knowingly failed to preserve, protect and repair Plaintiffs' properties to cure reoccurring water infiltration, mold growth, or personal property damage. Defendants Stonecrest Villas HOA, due to undercapitalization, is unwilling or incapable of protecting, preserving or maintaining the common property elements of Plaintiffs' homes, resulting in deterioration and damages.
25. That Defendants, through Fankhauser individually, have *knowingly* employed monthly assessments in violation of the Master Deed, restrictive covenants and bylaws, including utilization of assessments for personal loans to Brock L. Fankhauser as an "Epcon" developer, development of adjacent commercial tracts and roadways, without lawful authority.
26. That Defendants in the sales process failed to disclose material facts that their monthly assessments would be utilized in a Master Property Association "SPOA". That said nondisclosure was a material fact Plaintiffs were ignorant of, wherein Plaintiffs had they known these facts would have opted not to buy.
27. That as a result of said conduct, the HOA Stonecrest Villas of Tega Cay Owners Association, Inc., by and through its past and existing corporate board, is unwilling or incapable of carrying out preservation and maintenance of the Plaintiff's properties to prevent further water intrusion and mold damages.
28. That on February 15, 2010 Defendant development and sales entity Stonecrest Villas of Tega Cay, LLC as owned, operated, and managed by Brock L. Fankhauser, encumbered the common properties of Stonecrest in violation of Section 10.6 of the Master Deed.
29. Stonecrest Villas of Tega Cay borrowed \$560,000 from Epcon Principal, Phillip Fankhauser, *father to Brock L. Fankhauser*, to further carry out development and sale of Epcon construction at Stonecrest which Defendants knew, *or should have known*, was plagued by construction defect, design defect, reoccurring water intrusion problems, and mold. "Epcon" principal Philip Fankhauser is denoted as "lender" on said mortgage, recorded February 22, 2010 at Book 11272 Page 129-139, in the records of the Clerk of Court for York County, subsequently satisfied on January 10, 2011.
30. That failure to disclose private loans and private mortgages was a material fact concealed from Plaintiffs, which bound their undivided interest in common properties, and which was unauthorized under the Master Deed Section 10.6, which Plaintiffs, including Vicari, had they known, would have declined to purchase.

31. That as a result of financial mismanagement by Brock L. Fankhauser and the HOA board, resulting in undercapitalization of the HOA, Plaintiffs are informed and believe that the HOA board now seeks to assess Plaintiffs and others for Defendants' financial mismanagement and construction errors, and levy assessments against each respective property owner to pay for the costs of repairs and litigation after deliberately and knowingly failing to preserve, protect and maintain Plaintiff's homes and common elements from ongoing water intrusion damage pursuant to the Master Deed.
32. Plaintiffs are informed and believe they are entitled to all actual, compensatory and punitive damages as against defendants, *including any injunctive or equitable relief as may be ordered by the court*, to protect their properties.

FOR A SEVENTH CAUSE OF ACTION

[AGAINST DEFENDANTS FANKHAUSER, FPG, INC. AND STONECREST HOA]
(EQUITABLE ACTION FOR ACCOUNTING)

1. The above allegations are set forth here and incorporated by reference as if set forth verbatim.
2. Plaintiffs are informed and believe that Defendants, through Brock L. Fankhauser, have undercapitalized the HOA, engaged in unauthorized private loans, mortgages, and have improperly employed assessments for improper purposes, including development of adjacent commercial tracts and roadways by Fankhauser and FPG, Inc. in violation of HOA bylaws and restrictive covenants, specifically Section 10.6 of the Master Deed.
3. Plaintiffs are informed and believe that Defendants in this cause of action, upon notice of water intrusion issues, had a duty to act to preserve common elements of the Plaintiffs' homes first and foremost, but expressly failed to do so.
4. Plaintiffs as owners and residents are entitled to an accounting by the HOA to Plaintiffs to account for the manner in which reserves have been depleted and to investigate whether monthly assessments and reserves have been employed by Fankhauser or FPG, Inc. improperly during the time Fankhauser was in sole control of the Stonecrest HOA or board resignation of Brock L. Fankhauser June 30, 2010.
5. Plaintiffs seek that the court require the Defendants, specifically including Fankhauswer and the HOA, its past and current board, to render an accounting of all receipts and disbursements to Plaintiffs as interested owners and residents.

FOR AN EIGHTH CAUSE OF ACTION

[AGAINST DEFENDANTS FANKHAUSER, FPG, INC. AND STONECREST HOA]
(CONVERSION)

1. The above allegations are re-stated here and incorporated by reference as if set forth verbatim.

2. Plaintiffs are informed and believe that Brock L. Fankhauser individually exercised exclusive dominion and control of the HOA board, and exclusive ownership of Stonecrest HOA, until approximately June 30, 2010.
3. Plaintiffs are informed and believe that said conduct occurred after expiration of the Declarant Control period, was a violation of Master Deed restrictive covenants, bylaws, and constituted an express conflict of interest wherein Fankhauser and the HOA acted in reckless disregard of Plaintiffs health and property rights.
4. Plaintiffs are informed and believe that Fankhauser has improperly employed HOA financial reserves and assessments for development of commercial tracts and roadways, violating corporate bylaws and duties imposed upon Defendants by restrictive covenants to preserve, protect, maintain and repair Plaintiffs' properties.
5. That despite demand, Defendants are unwilling and/or unable to effect necessary repairs to Plaintiffs' residences to prevent water infiltration and mold.
6. Plaintiffs are informed and believe that Fankhauser individually or corporately assumed and exercised control over community assessments and reserves, depleting the same through mismanagement, illegal use, misuse to the exclusion of the HOA and Plaintiff owners.
7. That Plaintiffs as owners and payors of monthly assessments had an interest in the funds so converted or misused by Fankhauser, or SVHOA, as set forth in paragraphs (4) and (6).
8. Plaintiffs are informed and believe that Fankhauser as controlling board member of Stonecrest HOA converted reserves and assessments to his own use without authority of Plaintiffs or Stonecrest owners at large, without notice, vote, or minutes advising Plaintiff owners of the same, and in violation of Master Deed Section 10.6 engaged in private unauthorized loans.
9. That use of HOA reserves and assessments for purposes other than required by Master Deed was without Plaintiffs' permission and/or consent and was accomplished by Fankhauser deliberately, recklessly and with conscious indifference to Plaintiffs' rights as Stonecrest home owners' needs for repairs and preservation of Plaintiffs' properties.
10. That as a direct and proximate result, the Defendants, including Stonecrest HOA, is unwilling or incapable of acting to permanently protect, preserve, repair, and/or and maintain Plaintiffs' properties or Stonecrest common elements.
11. Plaintiffs are informed and believe that they are entitled to all amounts converted by Fankhauser or Fankhauser as controlling HOA board, with legal interest, from the date of conversion.

FOR A NINTH CAUSE OF ACTION
[AS AGAINST DEFENDANTS FANKHAUSER, FPG, INC. AND STONECREST HOA]
(CIVIL CONSPIRACY)

1. The above allegations are set forth here and incorporated by referenced as if set forth verbatim.
2. That Defendant Brock L. Fankhauser engaged in private loans unauthorized by the Master Deed or vote of the community at large while Fankhauser was controlling interest and controlling board member of the HOA.
3. Plaintiffs are informed and believe that Defendants Fankhauser as Stonecrest controlling board member and agent, and Stonecrest HOA by and through Fankhauser appointed board members, conspired to injure Plaintiffs by depleting HOA reserves and assessments for purposes other than preservation and maintenance of Plaintiffs' properties per Master Deed restrictive covenants.
4. Plaintiffs are informed and believe that Fankhauser, by and through Stonecrest HOA assessments, has employed reserves and assessments to develop adjacent commercial tracts and roadways owned by or under development by Fankhauser and FPG, Inc. without notice or lawful authority, while recklessly and wantonly disregarding home repair demands of the Plaintiffs.
5. That Defendant SV HOA, by and through its past and existing board, knowingly failed to mitigate damages by acting vigilantly under the Master Deed to correct problems with Plaintiffs homes, common exterior walls, foundation and flooring components.
6. Plaintiffs are informed and believe that Fankhauser and HOA board members, past and present, have acted maliciously and in conscious disregard of Plaintiffs' rights by permitting financial mismanagement of reserves and assessments.
7. Plaintiffs are informed that the HOA board, by and through Fankhauser, has effected free repairs to only certain board members' homes, while arbitrarily denying repairs needed at Plaintiffs' residences to prevent known and reported further water intrusion and mold damages.
8. Plaintiffs are informed and believe that the combination of Fankhauser and Stonecrest board conduct has repeatedly violated Master Deed HOA bylaws, restrictive covenants, and has injured the HOA and Plaintiffs financially.
9. That as a result, Plaintiffs have incurred special damages and are unable to compel Defendants to repair their residences to prevent further water intrusion, damages, and mold, necessitating that this action be brought.

10. Plaintiffs are informed and believe Defendants' depletion of reserves and assessments was with the express knowledge of Fankhauser individually and other Fankhauser appointed board members, before and after July, 2010.
11. Plaintiffs are informed and believe that they are entitled to an award of actual and punitive damages for Defendants' willful and malicious misuse of HOA reserves and assessments paid by Plaintiffs.

FOR A TENTH CAUSE OF ACTION
[AGAINST ALL DEFENDANTS]
(BREACH OF EXPRESS WARRANTY)

1. The above allegations are re-stated here and incorporated by reference as if set forth verbatim.
2. Defendants, in concert with Epcon Communities, Inc., by voluntary affirmative act permitted marketing, display of model Epcon condominium homes shown to Plaintiffs as potential purchasers. The model homes and communities shown to Plaintiffs were represented to be Epcon products and Epcon communities.
3. Defendants, in concert with Epcon Communities, Inc. represented that Plaintiffs were purchasing Epcon homes in an Epcon Communities, Inc. development which were constructed to Epcon quality standards and in a workmanlike manner. Said representations were materially false due to Epcon builder Fankhauser's deviations from the Epcon Developmental System, unknown and undisclosed to Plaintiffs as buyers.
4. That Defendant Brock L. Fankhauser, prior to closing of the Vicari residence, materially concealed the true nature of water intrusion problems within Stonecrest, and falsely reassured Plaintiff Vicari that all inspections and repairs would be completed on condominium 830 permanently fixing leaks, and that said representations were materially false and designed to induce Vicari to purchase unit 830.
5. That Epcon developer Brock L. Fankhauser, FPG, Inc. and Stonecrest Villas of Tega Cay LLC (SVTC, LLC) knew that Plaintiffs' residences, including Vicari condominium 830, were plagued by either design defect or construction defect at the time of sale, but that Defendants nevertheless proceeded in the face of this knowledge to sell defectively constructed homes to Plaintiffs, including Vicari, *for cash*.
6. That said representations of quality and workmanship were material to each Plaintiffs' decision to purchase Epcon homes within the Stonecrest community and became a material part of the bargain wherein each Plaintiff entered into an Epcon purchase contract with Defendants believing they were purchasing Epcon Communities product in an Epcon community development.
7. That Epcon representation of Epcon quality, value, visual affirmations by display of models, and marketing of restricted community by Defendants, including Epcon, created

an express warranty that the product and community being sold to Plaintiffs would conform to the representations of Defendants, jointly. Said representations were materially false.

8. That Plaintiffs, including Williams and Vicari, were sold condominium properties by Defendants not reasonably fit or safe for use as a residence due to construction defects or design defects *well after* Defendants, particularly Brock L. Fankhauser, knew or should have known, of construction defects plaguing construction of the Stonecrest condominiums.
9. That Epcon Communities, Inc., through principal Philip Fankhauser, knew, or should have known, as early as 2007 of foundational and improper grading being built upon by Epcon franchisee and son Brock L. Fankhauser, specifically due to written exchanges of email with the Gonzalez 709 residence wherein Epcon principal Philip Fankhauser assured Plaintiff Gonzalez he would investigate his franchisee son's construction practices, which Epcon through Philip Fankhauser, expressly failed to do.
10. Plaintiffs are informed and believe their residences leak, suffer from water intrusion, and that their residences fail to conform to the EPCON model display homes they were sold by Defendants Fankhauser, FPG, and SVTC, LLC.
11. That Plaintiffs are informed and believe that the community was represented by Defendants to be a restricted community by virtue of restrictive covenants and HOA bylaws which Defendants would per Master Deed preserve, protect and maintain the properties and common elements.
12. Plaintiffs are informed and believe that said assurances as described by paragraph (110) above were materially false.
13. That Defendants' failure, inability, or unwillingness to enforce restrictive covenants and HOA corporate bylaws is a material breach wherein the community does not conform to the representations made by Defendants which induced Plaintiffs to purchase in an Epcon Community.
14. Defendants Epcon, ECF, Inc., Fankhauser, FPG, Inc. and Stonecrest HOA knew, *or should have known*, of the need to fully disclose to potential purchasers the defects each known water intrusion problems to exist within the condominiums property; yet failed to disclosed and materially concealed the same and continue to market and sell the properties despite defects for cash to innocent purchasers for value, including Vicari unit 830.
15. Plaintiffs are informed and believe that they are entitled to all actual and punitive damages, attorneys fees and costs, in the discretion of the court and jury for Defendants' knowing and willful breach of express warranties.

FOR AN ELEVENTH CAUSE OF ACTION
[AS AGAINST ALL DEFENDANTS AND EPCON COMMUNITIES, INC.]
(BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY)

1. The above allegations are set forth and incorporated by reference as if stated again verbatim.
2. Plaintiffs are informed and believe that Defendants, jointly and severally, sold Plaintiffs defective combination of products used to construct residences now characterized by construction defects or design defect and which suffer from re-occurring water infiltration and leak water due to the defects described in paragraphs 5(a) through 5(h) of the Thirteenth Cause of Action, infra.
3. Plaintiffs are informed and believe that Defendants Epcon, ECF, Inc., Fankhauser, FPG, Inc. and SVTC, LLC are sellers of condominium residences and specifically are merchants of Epcon style and Epcon design condominium products and communities of the same kind sold to Plaintiffs.
4. Plaintiffs are informed and believe that Defendants represented Stonecrest to be an Epcon community development with implied warranty they residences sold to Plaintiffs were constructed in a workmanlike manner and would have with no construction defects, design defects, and would not leak or suffer water intrusion.
5. That the Epcon materials, products, residences and community sold to Plaintiffs as an Epcon development are not fit for the ordinary purposes as a residence due to water leakage, water intrusion, and Defendants SVHOA inability to permanently resolve the same.
6. Plaintiffs are informed and believe that they are entitled to all actual, compensatory, and punitive damages arising from Defendants' Breach of Implied Warranties of Merchantability due to condominiums components being unfit for its intended use or resale.

FOR A TWELTH CAUSE OF ACTION
[AS AGAINST ALL DEFENDANTS AND EPCON COMMUNITIES, INC.]
(BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE)

1. The above allegations are re-stated here and incorporated by reference as if set forth verbatim.
2. Plaintiffs are informed and believe that Defendants, jointly and severally, at the time of contracting with each respective Plaintiff had reason to know the Plaintiffs were purchasing an Epcon home constructed by Fankhauser and FPG, Inc. which would serve as each Plaintiffs' primary residence.

3. Plaintiffs relied on Defendants' representations of quality, value, and skill in selecting an Epcon home to be constructed by FPG, Inc. and Brock L. Fankhauser.
4. Plaintiffs are informed and believe that there arose an implied warranty made by Defendants, jointly and severally, that the homes and property being purchased would conform to Epcon specifications, building code, would not leak, deteriorate, and would be fit to serve as a defect free residence within a Master Deed community.
5. Plaintiffs are informed and believe that there arose an implied warranty made by Defendants, jointly and severally, that the Stonecrest HOA would pursuant to Master Deed restrictive covenants and bylaws preserve, protect and maintain Plaintiffs' properties and common properties.
6. That the condition of the condominiums is such that they leak water reoccurringly and that the condition of the HOA is such that the HOA, by and through Brock L. Fankhauser (and post July, 2010 through its board of directors) has been unwilling or incapable of protecting, repairing or preserving Plaintiffs' properties per the Master Deed.
7. Plaintiffs are informed and believe the Epcon home they were sold, including the Stonecrest condominiums and Stonecrest HOA, is unfit for intended use as sold to Plaintiffs by Defendants as the Plaintiffs' condominiums suffer from water intrusion wherein the HOA is either unwilling or incapable of preserving Plaintiffs' properties and common areas.
8. That said misrepresentations, failures, and omissions to act constitute breach of implied warranties of fitness for a particular purpose under South Carolina law concerning the product and community model sold to Plaintiffs by Defendants.
9. Plaintiffs are informed and believe that they are entitled to award of all actual, compensatory, and punitive damages as against Defendants, jointly and severally because the residences and property do not conform to the implied warranties of fitness for particular purpose which Defendants, at the time of contracting, were aware of.

FOR A THIRTEENTH CAUSE OF ACTION
[AS AGAINST DEFENDANTS BROCK L. FANKHAUSER AND
FANKHAUSER PROPERTY GROUP, INC.
(CONSTRUCTION DEFECT)

1. The above allegations are set forth and incorporated by reference as if re-stated verbatim.
2. Defendant Fankhauser Property Group, Inc. by and through Brock L. Fankhauser constructed the Epcon homes in an Epcon community known as Stonecrest Villas of Tega Cay, which construction encompasses the residences of the Plaintiffs, respectively, allegedly pursuant to Epcon Franchise Agreement terms.

3. Defendants Fankhauser Property Group, Inc. and Brock L. Fankhauser constructed said condominiums with a stone masonry veneer exterior, slab on grade, atop improperly back-filled lots and improperly excavated and graded lots and common property.
4. Plaintiffs are informed and believe that Defendants Brock L. Fankhauser and Fankhauswer Property Group, Inc.'s construction practices resulted in condominiums which have construction defects or design defects, and suffer from re-occurring slab cracking, water intrusion, and leaks.
5. Plaintiffs are informed and believe that Defendant Fankhauser Property Group, Inc. was careless, willful, wanton, and negligent in its deviation from Epcon guides, materials, specifications, plans and in Fankhauser supervision and oversight of construction practices, to wit:
 - a. By failing to excavate, pour, and build upon weather resistant barrier or non-porous foundations properly compacted so as to prevent cracking and water intrusion damages.
 - b. By failing to properly excavate, fill, back-fill, or compact lots being built upon to meet or exceed standard load requirements.
 - c. By failing to install proper drainage away from residences constructed atop excavated and compacted soils which violate code requirements.
 - d. By failure to properly employ Epcon recommended materials, including roof truss assemblies, OSB sheathing, and weather resistant barrier envelopes.
 - e. By failing to install proper waterproofing, including moisture barriers, concurrently with the stone masonry veneer on each building exterior directly contributing to water infiltration to the Plaintiffs' residences.
 - f. By improperly constructing brick masonry veneers at window sill structures to divert rain water properly and prevent water intrusion into Plaintiffs' residences.
 - g. By failing to provide proper drip edges, and by improperly sealing brick masonry veneer exterior walls to prevent water infiltration into components of the homes.
 - h. By failing to install proper window flashing and internal drainage to prevent water infiltration into Plaintiffs' residences.
 - i. By failing to install proper weep holes to permit water drainage away from and behind the masonry veneer exteriors.
 - j. By failing to install a moisture barrier to prevent water intrusion and seepage through the masonry veneer exteriors.

- k. By failing to provide a properly graded slope exterior foundation wall to each respective Plaintiffs' property to prevent surface water intrusion per code.
 - l. By failing to properly gutter the condominiums sold to Plaintiffs to properly divert rainwater away from the Plaintiffs' dwellings.
 - m. By failing to properly install drainage away from residence foundations.
- 6. Plaintiffs are informed and believe that the construction practices employed by Defendants Fankhauser Property Group, Inc. and Brock L. Fankhauser were carried out in a negligent and un-workmanlike manner and constitute violations of building code, the franchised Epcon Developmental System, Epcon plans, Epcon specifications and recommended materials.
 - 7. As a direct and proximate result of the un-workmanlike and faulty construction practices of Defendants, Plaintiffs have repeatedly experienced water infiltration into their homes and have incurred actual and special damages exceeding \$7,500 to be proven at trial of this matter before a jury.
 - 8. Plaintiffs are informed and believe that they are entitled to all attorney's fees and costs associated with the necessity of bringing this matter before the court pursuant to statute, contract, and the Master Deed.

FOR A FOURTEENTH CAUSE OF ACTION
(AS TO ALL DEFENDANTS NAMED)
[BREACH OF EXPESS WARRANTIES]

- 1. The above allegations are re-stated here and incorporated by reference as if set forth verbatim. Plaintiffs are informed and believe that they were purchasing through Defendants an Epcon Communities, Inc. condominium home within an Epcon development Stonecrest Villas of Tega Cay.
- 2. Plaintiffs, including Vicari specifically, during the process of sale were shown Epcon videos and Epcon model homes in Epcon developments known as Mt. Island Lake, Polo Club, Silver Oaks, Ridge Road Villas, Polo Club at Weddington. Plaintiffs were shown model homes in York County within the Stonecrest community development by Epcon employees.
- 3. Plaintiffs are informed and believe that Defendants jointly, by affirmative representation and display of multiple Epcon models and Epcon communities, voluntarily made Express Warranties to the Plaintiffs during the sale and contracting of each respective Plaintiff's Stonecrest home.
- 4. That said affirmations of quality and workmanship were material to and formed the basis of each respective purchase an Epcon product constructed by Fankhauser and FPG, Inc. as contracted upon by Plaintiffs.

5. Plaintiffs are informed and believe that all Defendants named by voluntary affirmation and/or promises, developer, builder, construction company, and HOA to purchasers, represented to Plaintiffs that the Stonecrest Villas condominium being purchased by each respective Plaintiff was an Epcon Communities, Inc. product free of defects and properly preserved and maintained by restrictive covenants and HOA bylaws through an HOA board.
6. Plaintiffs are informed and believe that the condominiums were improperly constructed in a un-workmanlike manner, are not free of defects and/or design flaws, resulting in each residence sold to Plaintiffs suffering from reoccurring water infiltration through condominium exterior common property components.
7. Plaintiffs are informed and believe that the HOA Stonecrest Villas Owners Association of Tega Cay, Inc. was under a duty and pursuant to Master Deed, restrictive covenants, and bylaws of the HOA to maintain and enforce maintenance as to condominium exteriors and common areas to preserve, protect and maintain owners' properties, yet has failed to protect and preserve Plaintiffs' properties despite repeated pleas and demand.
8. That while under Franchise Agreement, Defendants Brock L. Fankhauswer, Fankhauswer Property Group, Inc., Stonecrest HOA and Epcon Communities, Inc. jointly employed sample and/or model condominium homes by express affirmative display which became a material part of the basis of the bargain to reach respective Plaintiff purchaser. That the whole of the condominiums as purchased by Plaintiffs respectively fail to conform to the Epcon model homes and are not fit for the ordinary purpose and reasonable expectations of the Plaintiffs.
9. That Defendants' affirmative displays and descriptions of Epcon model types, plans, model condominiums, community representations, exhibition and display of models, affirmative representation, by contract, covenants, Master Deed, and bylaws formed the basis of and were material to the Plaintiffs' decisions to purchase an Epcon Stonecrest Villas condominium.
10. Plaintiffs are informed and believe that said representations were false or made in reckless disregard of Plaintiffs' rights as purchasers of a Stonecrest home and that the homes, as constructed, violate Express Warranties made by Defendants jointly and do not conform to Express Warranties and affirmations made by Defendants that Plaintiffs were purchasing an Epcon Communities product within an Epcon community.
11. Plaintiffs are informed and believe that each condominium property sold contained construction defects and/or design defects, including grading errors and absence of moisture barriers, making the home not conform to the Epcon home they bargained and contracted for with Defendants.

12. That the failure to correct water intrusion into Plaintiffs' residences, and the joint failure of all Defendants to act to protect Plaintiff's property values, is an affirmative breach of Express Warranty made by all Defendants to Plaintiffs.

13. That the Builder and HOA management has not confirmed to the representations and express warranties being made by Defendants to Plaintiffs as purchasers, to wit:

- a. Defendant Epcon Communities permitted and by affirmative representation and display of Epcon sales literature, videos, and model condominiums representing to Plaintiffs that they were purchasing an Epcon home in terms of value, quality and workmanship. Said representations were materially false.
- b. Defendant Brock L. Fankhauser, as sole controlling officer and owner of Stonecrest Villas HOA board, and while accepting Plaintiffs' monthly assessments, knowingly and deliberately retained control of the corporation board after end of the Declarant Control Period defined in the Master Deed, and utilized Plaintiffs' assessments in master deed, bylaws and restrictive covenants.
- c. That Defendants Brock L. Fankhauser and Stonecrest Villas HOA by and through Brock Fankhauser utilized said monthly assessments required of the Plaintiffs improperly and in violation of Master Deed, including development of adjacent commercial tracts and roadways and private loans from the HOA to Brock L. Fankhauser, instead of using the same to rectify known water intrusion problems.
- d. Epcon developer and builder Brock L. Fankhauser by affirmative false representations, for cash, seller to purchasers, sold to Plaintiffs defective condominium residences and repeatedly failed to honor express warranties that any defects would be repaired properly, and that "*we will make this right*". Said promises were materially false.
- e. Defendant Brock L. Fankhauser knew, *or should have known*, of the construction and /or design defects existing in the products he sold Plaintiffs as an Epcon product, yet failed to repeatedly disclose the same to Plaintiffs as purchasers, specifically including Vicari and Williams, *supra*.
- f. Defendant Fankhauser Property Group, Inc. by affirmative false representations to Plaintiffs, through Epcon franchisee and builder Brock L. Fankhauser individually, repeatedly assured Plaintiffs that their residences would be repaired. Plaintiffs are informed and believe said representations to be materially false and *dishonest in fact* designed to induce complacency and litigation forbearance.
- g. Defendant Stonecrest Owners Association of Tega Cay, Inc. by affirmative representations, by and through Brock L. Fankhauser and its existing executive board, by affirmative false representations to Plaintiffs, has arbitrarily refused to protect Plaintiffs home owners to prevent further water intrusion, mold, and damages which re-occur at Plaintiffs' residences.

- h. Plaintiffs are informed and believe that Defendant Stonecrest Villas of Tega Cay HOA through its board has acted arbitrarily to temporarily repair only those residences owned by board members, without rendering flooring or mold remediation assistance whatsoever to Plaintiffs, including Pinckney, Sciacca, Barone, Arcoria and Vicari specifically.
14. That Plaintiffs are informed and believe their residences suffer from construction defects or design defects which have caused Plaintiffs damages due to routine water intrusion into their homes wherein Defendants have failed to protect and preserve Plaintiffs' properties under duties imposed by Master Deed of declarant and seller SCVTC, LLC and Brock L. Fankhauser.
15. That Defendants' joint affirmative failures, by acts and/or omissions to act, failed to protect Plaintiffs' properties and constitute breach of Express Warranty made by all Defendants to Plaintiffs as purchasers.
16. That said conduct has resulted in each respective Plaintiffs' condominium property, the Stonecrest community, and the HOA management not conforming to the affirmative representations and express warranties of the Master Deed made by Defendants at the time of display, contracting, purchase, and ownership thereby damaging Plaintiffs.
17. Plaintiffs as purchasers for value, and as owners with direct privity with Defendants as sellers, were entitled to and in fact relied upon Defendants' representations of quality and workmanship.
18. Plaintiffs are informed and believe that they are entitled to an award of special damages, all actual, incidental and consequential damages as against Defendants for breach of said Express Warranties made by Defendants as sellers to Plaintiffs as purchasers.
19. That Plaintiffs have been forced to engage the services of an attorney to compel action by the Defendants, including the HOA. Plaintiffs are informed and believe that they are entitled to indemnification by the HOA, award of attorney's fees and costs should the court determine that an Express Warranty from Defendants to Plaintiffs has been breached, including breach of Master Deed duties and covenants.
20. Plaintiffs are informed and believe they are entitled to equitable relief as against the HOA, in the discretion of the court, against levy of dues and assessments for repairs and legal fees occasioned by the malfeasance and negligence of Defendants, including Fankhauser individually, as controlling HOA board member.

FOR A FIFTEENTH CAUSE OF ACTION
[AS AGAINST ALL DEFENDANTS JOINTLY]
(UNFAIR TRADE PRACTICES ACT VIOLATION)

1. The above allegations are set forth and incorporated by reference as if repeated verbatim.
2. That Epcon Communities, Inc. and ECF, Inc. expressly contractually permitted Defendants Fankhauser and FPG, Inc. to display and market products represented to be Epcon condominium plans and homes within Epcon developments, including Stonecrest and other North Carolina communities, allegedly constructed pursuant to Epcon representations of quality and workmanship.
3. That the relationships between Plaintiffs and Defendants, including Fankhauser, FPG, Inc. and Stonecrest Villas of Tega Cay (SVTC, LLC) is characterized by privity of title, seller to purchasers, wherein Plaintiffs and others purchased for value Epcon condominium properties.
4. Plaintiffs are informed and believe they purchased from Defendants under a scheme which required owners to become payors of monthly assessments to Stonecrest HOA, imposed and enforced by Master Deed created by Defendants Fankhauser, FPG, Inc. and Stonecrest Villas of Tega Cay, LLC pursuant to an overall Epcon Communities, Inc. developmental design.
5. That the conduct of Defendants, jointly and severally, created false assurances to Plaintiffs that Defendants would act in Plaintiffs' best interest and with due regard of Plaintiffs property preservation and property value and that the homes purchased by Plaintiffs would conform to Epcon representations made by these Defendants and which formed the basis of the Plaintiffs' decisions to buy.
6. That said conduct was materially false, deceived Plaintiffs, and constitutes methods of unfair and deceptive acts and practices declared unlawful by South Carolina law, including knowingly and falsely selling homes known to deviate from Franchisor plans, specifications, and building code.
7. That Defendants, by virtue of Franchise Agreement, jointly and severally, knew or should have known, of the necessity to act to protect owners' properties from water intrusion and other damages, yet Defendants deliberately failed to act whereby Plaintiffs and others have continued to experience water intrusion, HOA and builder inaction, procrastination, leaks, interior damages, and mold.
8. Plaintiffs have collectively suffered an ascertainable loss of money, property damages, diminution in value due specifically to reoccurring water intrusion, and special damages legally and proximately caused by Defendants' deceptive and unfair trade practices, to wit:
 - a. By Defendants falsely advertising, pricing, and offering for sale Epcon model homes and communities, yet selling Plaintiffs condominiums which suffer from construction defects or design flaws and which leak water and which are not representative of Epcon models or Epcon communities in terms of value or quality.

- b. By creating a Owners Association (HOA) where Defendant Brock L. Fankhauser knew, or should have known, that a conflict of interest would exist between his duties to Plaintiffs as developer and that of HOA chairman, President and controlling interest wherein Master Deed and HOA bylaws were not enforced to adequately protect owners' properties' from damage.
 - c. By Brock L. Fankhauser, FPG, Inc. and Stonecrest HOA board members engaging in self dealing, private loans, and failure to protect Plaintiffs' interests, specifically in failing to protect Plaintiffs' properties and failing to protect common properties, and failing to enforce Master Deed covenants and duties imposed by bylaws.
 - d. By falsely misappropriating dues, assessments, and special assessments where the HOA, by and through Brock Fankhauser, failed to honor duties to preserve and protect properties as required by HOA bylaws and Master Deed restrictive covenants.
 - e. By Brock L. Fankhauser willfully and knowingly applying monthly property assessments for private loans and/or development of adjacent commercial tracts and roads instead of properly capitalizing HOA reserves and acting promptly to remedy known water defects existing in the residences of the Plaintiffs and others with similar defects.
 - f. By permitting HOA undercapitalization by and through Brock L. Fankhauser and self dealing of board members wherein the HOA is undercapitalized, incapable, or unwilling to serve the Plaintiff owners to prevent further damage and water intrusion, proper maintenance, repair, or preservation of Plaintiffs' property value.
 - g. By violation of the duties imposed by Master Deed restrictive covenants created by Defendants where Defendants knew, or should have known, of the need to act promptly to prevent Plaintiffs and others from further water intrusion and mold damages despite requiring Plaintiffs to pay, and accepting from Plaintiffs, monthly assessments.
 - h. By misrepresentation of warranties described above where Defendants knew, or should have known, the falsity of the warranties including financial impracticability of repair, Breach of Express Warranties, and Breach of Implied Warranties, as set forth supra and where Defendants knew or should have known of the necessity to act to mitigate damages, which Defendants expressly failed to do under the Master Deed.
9. That Defendants' misrepresentations of quality and value, deviations, errors, omissions, and misconduct, jointly and severally, affects the public interests at large; the same conduct has occurred with numerous Stonecrest buyers; has been and is being repeated;

and is capable of further repetition as evidenced by the Vicari and Williams transactions. As such, it expressly affects commerce within York County, South Carolina.

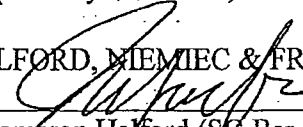
10. That Plaintiffs' actual, incidental, special, and consequential damages suffered by Plaintiffs and others would not have occurred but for the Defendants' unfair and deceptive acts and practices, which should be legally deterred.
11. Plaintiffs respectively are informed and believe that they are entitled to an award of actual, punitive, and *trebled* damages pursuant to South Carolina Code Ann. 39-5-140(a), *et. seq.*, together with costs and attorneys fees associated with prosecuting this action against Defendants.

WHEREFORE, Plaintiffs would pray for the following relief from this court:

1. For trial by jury of the matters set forth in this Amended Consolidated Complaint.
2. For judgment as against Defendants Epcon Communities, Inc., Epcon Communities Franchising, Inc., Brock L. Fankhauser, Fankhauswer Property Group, Inc. (FPG, Inc.), Stonecrest Villas of Tega Cay, LLC (SVTC, LLC) and HOA Stonecrest Villas of Tega Cay Home Owners Association in the discretion of a jury.
3. For an award of all actual and punitive damages as against Defendants in the discretion of the court and jury.
4. For an award of any incidental or special damages as may be proven specifically by each of the Plaintiffs individually, expressly including loss of use.
5. For an award of *trebled* damages pursuant to the UTPA in South Carolina, S.C. Code Ann. 39-5-140(a) to deter future such conduct by Defendants.
6. For an award of all attorneys fees and costs associated with bringing this matter before the court.
7. For such other and further relief, *legal or equitable*, as the court deems just and proper under the circumstances, including the right to temporary or permanent injunctive as may be required to prohibit further inequitable conduct by Defendants.

Respectfully submitted,

HALFORD, MIEMIEC & FREEMAN, LLP


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238 Rockmont Drive
Fort Mill, South Carolina 29708
803-547-6619
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September 16, 2011
Fort Mill, SC

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Juontonio Pinckney, Josephine Sciacca,
Addie Smith, James Barone and Deborah
Barone, et al.,

Plaintiffs,

v.

Epcon Communities, Inc., Brock L.
Fankhauser, Fankhauser Property Group,
Inc., and Stonecrest Villas of Tega Cay
Home Owners Association, Inc.,

Defendants.

Fankhauser Prop. Group, Inc.,

Third-Party Plaintiff,

v.

Exterior Expressions of NC., Inc., Al-
Mega Construction, Inc., Procar, Inc., The
Southeastern Group, Inc., and Jose
Simenez, Individually and d/b/a M&L
Roofing Co., LLC and/or MB Roofing
Company,

Third-Party Defendants,

Stonecrest Villas of Tega Cay Home
Owners Association, Inc.,

Third-Party Plaintiff,

v.

Stonecrest Villas of Tega Cay, LLC, and
Epcon Communities Franchising, Inc.,

Third-Party Defendant.

Civil Action No. 2010-CP-46-2326

**STONECREST HOA'S ANSWER TO
AMENDED COMPLAINT, FIRST
AMENDED CROSS-CLAIM, AND
THIRD-PARTY COMPLAINT**

Exterior Expressions of North Carolina,
Inc.,

Fourth-Party Plaintiff,

v.

Marcos Gonzalez,

Fourth-Party Defendant.

Defendant Stonecrest Villas of Tega Cay, Home Owners Association, Inc.,
reserving all rights under motions within or separately filed, answering the Second
Amended Complaint (dated September 20, 2011) herein, will respectfully show unto the
Court as follows^{1,2,3,4}:

FOR A FIRST DEFENSE

(Response to Factual and Jurisdictional Allegations)

1. Defendant denies each and every allegation of the Complaint except for
those things specifically admitted below.
2. Defendant lacks sufficient knowledge or information to admit the
allegations of paragraph 1.
3. Paragraph 2 is admitted, upon information and belief.

¹ Any and all inconsistent material is pled in the alternative pursuant to Rule 8(e)(2),
SCRCP and such other law as is applicable. Such inconsistent material may—or may
not—be specifically designated as such.

² To the extent material appearing in one defense is applicable to another defense and not
inconsistent with the other defense, the material is to be deemed incorporated into the
other defense.

³ To the extent material appearing herein is inconsistent with existing law, the Defendant
respectfully requests to argue in good faith for a change in the law. Nothing pled in any
portion of the Answer, First Amended Cross-Claim, and Third-Party Complaint is to be
deemed a waiver of any defense available to the Defendant or consent to this Court
exercising jurisdiction over the matter or over this Defendant.

⁴ The Defendant is incorrectly identified. The proper party is Stonecrest Villas of Tega
Cay Condominium Owners Association, Inc.

4. Paragraphs 3 and 4 are admitted, upon information and belief.
5. As to paragraph 5, it is admitted that at one time, Fankhauser did serve in the capacities stated in the Amended Complaint. Additionally, the correct identity of the Defendant is Stonecrest Villas of Tega Cay Condominium Owners Association, Inc. (See footnote 4).⁵
6. Paragraph 6 is admitted.
7. Paragraph 7 is admitted, upon information and belief.
8. Paragraph 8 is admitted, subject to the qualifications set forth above.
9. Paragraph 9, is admitted, upon information and belief.
10. Paragraph 10 calls for a legal opinion and, therefore, no response is required. To the extent that these allegations in any way seek to impose liability on this Defendant, such liability of this Defendant is denied.
11. Paragraph 11 is denied as to this Defendant.

AS TO THE FIRST CAUSE OF ACTION
(Action for Rescission)

12. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.
13. The cause of action asserted in paragraphs 2 through 24 is not directed to this Defendant and, therefore, no response to these allegations is required. To the extent any response is required, the Defendant denies the allegations to the extent they seek to impose any liability on this Defendant or are contrary to the allegations of this Defendant as set forth in its Answer, Cross-Claim and Third-Party Complaint.

⁵ Upon information and belief, Defendant Brock E. Fankhauser's last day as President of the Association was June 30, 2010.

AS TO THE SECOND CAUSE OF ACTION

(Slander of Title)

14. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

15. The cause of action asserted in paragraphs 2 through 7 is not directed to this Defendant and, therefore, no response to these allegations is required. To the extent any response is required, the Defendant denies the allegations to the extent they seek to impose any liability on this Defendant or are contrary to the allegations of this Defendant as set forth in its Answer, Cross-Claim and Third-Party Complaint.

AS TO THE THIRD CAUSE OF ACTION

(Breach of Fiduciary Duty)

16. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

17. As to paragraph 2, Defendant admits only that certain payments are to be paid by members as set forth in the Bylaws.

18. As to paragraph 3, while it is admitted that certain rights and duties exist between the parties, it is denied that a fiduciary relationship exists between the Plaintiffs and this Defendant.

19. Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 are denied as to this Defendant.

AS TO THE FOURTH CAUSE OF ACTION

(Breach of Contract)

20. Defendant realleges the allegations contained above in response to the allegations of paragraph 1. Further, as to the Franchise Agreement, such document will speak for itself as to its terms and conditions.

21. The allegations of paragraph 2 sets forth a legal conclusion which does not require an answer from this Defendant. To the extent that a response is required, Defendant denies all allegations which allege or imply any wrongdoing on the part of the Defendant.

22. Paragraph 3 is admitted, upon information and belief.

23. Paragraphs, 4, 5 and 6 are denied as to this Defendant.

24. As to paragraph 7, Defendant denies that the Plaintiffs are entitled to any recovery against this Defendant.

AS TO THE FIFTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Acts)

25. Paragraph 1 is denied as to this Defendant.

26. Paragraphs 2, 3 and 4 are not directed to this Defendant and, therefore, no response to these allegations is required. To the extent any response is required, the Defendant denies the allegations to the extent they seek to impose any liability on this Defendant or are contrary to the allegations of this Defendant as set forth in its Answer, Cross-Claim and Third-Party Complaint.

27. Paragraphs 5, 6 and 7 are denied as to this Defendant.

28. As to paragraph 8, Defendant lacks information sufficient upon which to form a belief as to the truth of the allegations regarding what Fankhauser told the Plaintiff. Defendant denies having express knowledge of the defects.

29. As to paragraph 9, Defendant lacks knowledge or information sufficient upon which to form an opinion or belief as to the allegations.

30. As to paragraphs 10 and 11, Defendant has and will continue to take steps to identify the cause of the water intrusion so an appropriate repair can be identified and undertaken.

31. As to paragraph 12, admits that flooring has been removed from the Moscowitz and Iadanza units, and admits upon information and belief that flooring has been removed from the Sciacca and Pinckney units. Defendant further admits that the flooring has not been replaced in the Moscowitz or Iadanza units, and upon information and belief, the flooring has not been replaced in the Sciacca or Pinckney units.

32. Paragraph 13 is denied as to this Defendant.

33. As to paragraph 14, Defendant denies that it has concealed any material facts regarding this matter. Defendant denies any liability to the Plaintiffs.

34. Paragraphs 15, 16 and 17 are denied as to this Defendant.

35. As to paragraph 18, Defendant lacks knowledge of what Plaintiffs believed at the time of purchase. Defendant denies that it made any false representations to the Plaintiffs.

36. As to paragraph 19, Defendants lack knowledge or information sufficient to form a belief as to what representations were made to Plaintiffs by parties other than this Defendant. Defendant denies that it made any false statements to the Plaintiffs.

37. Paragraph 20 is denied as to this Defendant.

38. As to paragraph 21, Defendant lacks knowledge or information sufficient to form a belief as to what the Plaintiffs were informed and believe regarding disclosures from other parties. Defendant denies that it made any false statements to the Plaintiffs.

39. Paragraphs 22 and 23 are denied as to this Defendant.

40. As to paragraph 24, Defendant denies that the Plaintiffs are entitled to any recovery against this Defendant.

AS TO THE SIXTH CAUSE OF ACTION
(Fraud and Misrepresentation)

41. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

42. As to paragraph 2, the document referenced therein would speak for itself and Defendant craves reference to such document. Defendant denies any allegations of paragraph 2 which seeks to impose any liability on this Defendant.

43. Paragraph 3 is admitted, upon information and belief.

44. Paragraphs 4 through 21 are not directed to this Defendant and, therefore, no response to these allegations is required. To the extent any response is required, the Defendant denies the allegations to the extent they seek to impose any liability on this Defendant or are contrary to the allegations of this Defendant as set forth in its Answer, Cross-Claim and Third-Party Complaint.

45. Paragraph 22 is admitted.

46. As to paragraph 23, it is admitted that Brock L. Fankhauser, by and through Stonecrest Villas of Tega Cay, LLC, formed Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., the stated purpose of which is to administer, operate and manage the Common Elements. Defendant denies any allegations implying any failure on its part to carry out its duties.

47. As to paragraph 24, it is admitted that Plaintiffs have paid assessments as required by the Bylaws. It is admitted that the cause of the water intrusion has not been

identified and therefore no fix or repair has been undertaken. Defendant denies any allegations which seek to impose any liability on this Defendant.

48. Paragraphs 25, 26 and 27 are denied as to this Defendant.

49. As to paragraph 28, Defendant lacks knowledge or information sufficient to form a belief as to what was done by Stonecrest Villas of Tega Cay, LLC, as managed by Fankhauser, as alleged in this paragraph. Defendant denies that anything done by those parties imposes any liability on this Defendant.

50. As to paragraph 29, the document referenced therein would speak for itself and Defendant craves reference to such document. Defendant denies any allegations of paragraph 24 which seeks to impose any liability on this Defendant.

51. As to paragraph 30, Defendant lacks knowledge or information sufficient to form a belief as to what Plaintiffs would have done regarding their purchases.

52. As to paragraph 31, this Defendant reserves the right to levy a special assessment if necessary to administer, operate and manage the Common Elements, though it has not done so at this time. The remaining allegations of paragraph 31 are denied as to this Defendant.

53. As to paragraph 32, Defendant denies that the Plaintiffs are entitled to any recovery from this Defendant.

AS TO THE SEVENTH CAUSE OF ACTION
(Equitable Action for Accounting)

54. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

55. Paragraph 2 is denied as to this Defendant.

56. Paragraph 3 is denied.

57. The allegations of paragraph 4 set forth a legal conclusion which does not require an answer from this Defendant.

58. As to paragraph 5, it is admitted that Plaintiffs seek the court to require Defendants, including this Defendant, to render an accounting.

AS TO THE EIGHTH CAUSE OF ACTION

(Conversion)

59. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

60. The allegations of paragraph 2 are admitted.

61. As to paragraph 3, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

62. As to paragraph 4, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

63. As to paragraph 5, Defendant admits that the cause of the water intrusion has not been identified and therefore the water intrusion problem has not been fixed.

64. As to paragraphs 6, 7, 8 and 9, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

65. As to paragraph 10, Defendant admits that the cause of the water intrusion has not been identified and therefore the water intrusion problem has not been fixed.

66. As to paragraph 11, Defendant denies that Plaintiffs are entitled to any recovery from this Defendant.

AS TO THE NINTH CAUSE OF ACTION
(Civil Conspiracy)

67. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

68. As to paragraph 2, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

69. Paragraph 3 is denied as to this Defendant.

70. As to paragraph 4, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations.

71. Paragraph 5 is denied.

72. Paragraph 6 is denied as to this Defendant. Defendant specifically denies that any present board members have acted maliciously and in conscious disregard of Plaintiffs' rights by permitting financial mismanagement of reserves and assessments.

73. Paragraphs 7, 8, 9 and 10 are denied as to this Defendant.

74. As to paragraph 11, Defendant denies that the Plaintiffs are entitled to any recovery from this Defendant.

AS TO THE TENTH CAUSE OF ACTION
(Breach of Express Warranty)

75. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

76. Paragraphs 2 and 3 are denied as to this Defendant.

77. As to paragraph 4, Defendant lacks knowledge or information as to what representations were made by parties other than this Defendant to Plaintiff Vicari. This Defendant denies making any representations to Plaintiff Vicari.

78. Paragraphs 5, 6, 7 and 8 are denied as to this Defendant.

79. Paragraph 9 is not directed to this Defendant and, therefore, no response is required. To the extent that these allegations in any way seek to impose liability on this Defendant, such liability of this Defendant is denied.

80. Paragraphs 10, 11, 12, 13 and 14

81. As to paragraph 15, Defendant denies that the Plaintiffs are entitled to any recovery from this Defendant.

AS TO THE ELEVENTH CAUSE OF ACTION
(Breach of Implied Warranty of Merchantability)

82. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

83. Paragraph 2 is denied as to this Defendant.

84. Paragraph 3 is admitted, upon information and belief.

85. Paragraphs 4 and 5 are denied as to this Defendant.

86. As to paragraph 6, Defendant denies that the Plaintiffs are entitled to any recovery from this Defendant.

AS TO THE TWELFTH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for a Particular Purpose)

87. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

88. Paragraph 2 is denied as to this Defendant.

89. As to paragraph 3, Defendant lacks knowledge or information sufficient to form a belief as to the truth of the matters asserted. Denied as to this Defendant.

90. Paragraph 4 is denied as to this Defendant.

91. Paragraph 5 sets forth a legal conclusion that does not require an answer from this Defendant. To the extent that an answer is required, the liability of this Defendant is denied.

92. As to paragraphs 6 and 7, Defendant admits that the cause of the water intrusion has not been identified and therefore the water intrusion problem has not been fixed. The remaining allegations in paragraphs 6 and 7 are denied as to this Defendant.

93. Paragraph 8 sets forth a legal conclusion that does not require an answer from this Defendant. To the extent that an answer is required, the liability of this Defendant is denied.

94. As to paragraph 9, Defendant denies that the Plaintiffs are entitled to any recovery from this Defendant.

AS TO THE THIRTEENTH CAUSE OF ACTION
(Construction Defect)

95. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

96. Paragraphs 2, 3, 4, 5, 6, 7 and 8 are not directed to this Defendant and, therefore, no response is required. To the extent that these allegations in any way seek to impose liability on this Defendant, such liability of this Defendant arising from the allegations directed at Fankhauser and FPG are denied.

AS TO THE FOURTEENTH CAUSE OF ACTION
(Breach of Express Warranties)

97. Defendant realleges the allegations contained above in response to the first sentence of paragraph 1. As to the remaining allegations of paragraph 1, they are admitted upon information and belief.

98. As to paragraph 2, Defendant lacks information sufficient upon which to form a belief as to the truth of the allegations.

99. As to paragraphs 3 and 4, Defendant lacks information sufficient upon which to form a belief as to the truth of the allegations regarding parties other than this Defendant. Those allegations are denied as to this Defendant.

100. Paragraph 5 is denied as to this Defendant as stated.

101. Paragraph 6 is admitted.

102. As to paragraph 7, Defendant admits that it is responsible for administering, operating and managing the Common Elements. Defendant further admits that the cause of the water intrusion has not been identified and therefore the water intrusion problem has not been fixed.

103. Paragraphs 8, 9 and 10 are denied as to this Defendant.

104. Paragraph 11 is admitted upon information and belief.

105. Paragraph 12 is denied as to this Defendant.

106. As to paragraph 13, this Defendant denies making representations and express warranties to Plaintiffs. Defendant lacks information sufficient to form a belief as to the truth of the allegations regarding other parties' representations and express warranties to Plaintiffs. Defendant denies that it has arbitrarily refused to protect Plaintiffs from water intrusion, mold or damages. Defendant further denies that it has repaired residences owned by board members without rendering assistance to Plaintiffs.

107. Paragraphs 14 and 15 are denied as to this Defendant.

108. As to paragraph 16, this Defendant denies making representations and express warranties to Plaintiffs. Defendant lacks information sufficient to form a belief

as to the truth of the allegations regarding other parties' representations and express warranties to Plaintiffs.

109. Paragraph 17 is denied as to this Defendant.

110. As to paragraphs 18, 19 and 20, Defendant denies that the Plaintiffs are entitled to any recovery from this Defendant.

AS TO THE FIFTEENTH CAUSE OF ACTION
(Unfair Trade Practices Act Violation)

111. Defendant realleges the allegations contained above in response to the allegations of paragraph 1.

112. Paragraph 2 is admitted upon information and belief.

113. Paragraphs 3, 4, 5, 6, 7 and 8 are denied as to this Defendant. Defendant specifically denies any self dealing as alleged in paragraphs 8c and f.

114. Paragraph 9 is denied as to this Defendant.

115. Paragraph 10 is denied as to this Defendant.

116. As to paragraph 11, Defendant denies that the Plaintiffs are entitled to any recovery from this Defendant.

AS TO THE PRAYER FOR RELIEF

117. Defendant denies that the Plaintiffs are entitled to the relief requested in the prayer.

FOR A SECOND DEFENSE
(Rule 12(b)(6), SCRCP—Failure to State Facts)

118. With regard to some or all causes of action appearing in the Amended Complaint, the Amended Complaint fails to state facts sufficient to constitute a cause of

action upon which relief may be granted and thus, those causes of action should be dismissed.

FOR A THIRD DEFENSE
(Attorney's Fees – Not Recoverable)

119. With regard to some or all of the causes of action appearing in the Amended Complaint, the Amended Complaint fails to state facts sufficient to constitute causes of action on which the recovery of attorney's fees are allowed.

FOR A FOURTH DEFENSE
(Improper Identify of the Defendant)

120. The Defendant is improperly identified in this action.

FOR A FIFTH DEFENSE
(Standing)

121. With regard to some or all causes of action appearing in the Amended Complaint, the Plaintiffs lack standing.

FOR A SIXTH DEFENSE
(Proximate Cause)

122. No acts or omissions on the part of this Defendant were the proximate cause or cause in fact of some or all damages allegedly suffered by the Plaintiffs (the existence of such damages being denied); therefore, the Plaintiffs' action is barred in whole or in part.

FOR A SEVENTH DEFENSE
(Alleged Damages Caused by Third-Party)

123. Some or all damages allegedly sustained by the Plaintiffs (the existence of such damages being denied) were a direct or proximate result of the acts or omissions of another party or parties over whom this Defendant had no control or duty to control. The Defendant pleads the acts of another party or parties as a complete defense to all claims.

FOR AN EIGHTH DEFENSE

(Waiver)

124. With regard to some or all causes of action appearing in the Amended Complaint, the Plaintiffs' claims are barred by the doctrine of waiver.

FOR A NINTH DEFENSE

(Estoppel)

125. With regard to some or all causes of action appearing in the Amended Complaint, the Plaintiffs' claims are barred by the doctrine of estoppel.

FOR A TENTH DEFENSE

(Assumption of Risk)

126. With regard to some or all causes of action appearing in the Amended Complaint, the Plaintiffs' claims are barred by the Plaintiffs' assumption of risk.

FOR AN ELEVENTH DEFENSE

(Intervening Causes)

127. Some or all damages allegedly sustained by the Plaintiffs (the existence of such damages being denied) were a proximate result of one or more independent, efficient, intervening causes which the Defendant pleads as a bar to this action.

FOR A TWELFTH DEFENSE

(Punitive Damages)

128. An award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution and the Excessive Fines Clause of the South Carolina Constitution in that:

a. The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;

b. Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

c. Any award of punitive damages based upon the wealth of the Defendant violates due process guarantees;

d. The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

e. Even if it can be argued that a standard governing the imposition of punitive damages exists, the standard is void for vagueness and ambiguity;

f. The claim for punitive damages violates the equal protection and due process clauses of the United States Constitution, Article 1, Section 3 of the South Carolina Constitution, and the Excessive Fines Clause of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendant and other factors which are constitutionally impermissible; and

g. The claim for punitive damages violates the Federal Doctrine of Separation of Powers and Article 1, Section 8 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

FOR A THIRTEENTH DEFENSE

(South Carolina Unfair Trade Practices Act Inapplicable)

129. The South Carolina Unfair Trade Practices Act is inapplicable to the allegations contained in the Amended Complaint directed at this Defendant:

FOR A FOURTEENTH DEFENSE
(Statute of Limitations)

130. The Plaintiffs allege an ongoing course of conduct which supposedly resulted in their damages. This ongoing course of conduct is stated to precede the specific transaction complained of herein and appears to have persisted for some time prior to this action. Accordingly, the Defendant pleads the statute of limitations as a complete defense to some or all of the Plaintiffs' claims.

FOR A FIFTEENTH DEFENSE
(Laches)

131. The Plaintiffs allege an ongoing course of conduct which supposedly resulted in their damages. This ongoing course of conduct is stated to precede the specific transaction complained of herein and appears to have persisted for some time prior to this action. Accordingly, the Defendant pleads the doctrine of laches as a complete defense to some or all of the Plaintiffs' claims.

FOR A SIXTEENTH DEFENSE
(Meeting of the Minds)

132. To the extent a contract or other duties arose between the Defendant and the Plaintiffs, the contracts terms did not include those allegedly breached by the Defendant nor did the duties require the Defendant to take any action that has not been taken or abstain from any action that has been taken because there was no meeting of the minds with regard to those contract terms or duties.

FOR A SEVENTEENTH DEFENSE

(Failure to Mitigate)

133. With regard to some or all causes of action appearing in the Amended Complaint for which the Plaintiffs seeks damages, the Plaintiffs' claims are barred in whole or in part because of the Plaintiffs' or their agents' failure to mitigate damages.

FOR AN EIGHTEENTH DEFENSE

(Impossibility of Performance)

134. To the extent a contract or other duties arose between the Defendant and the Plaintiffs, the Defendant's performance of such duties was rendered impossible in a manner that excused performance.

FOR A NINETEENTH DEFENSE

(Plaintiff's Own Negligence)

135. The Plaintiffs' own negligence, gross negligence, recklessness, or willfulness contributed to their damages in a manner which should reduce or completely bar any award in this matter.

FOR A TWENTIETH DEFENSE

(Acquiescence)

136. With regard to some or all causes of action appearing in the Amended Complaint, the Plaintiffs' claims are barred by the doctrine of acquiescence.

FOR A TWENTY-FIRST DEFENSE

(Frustration of Purpose)

137. To the extent a contract or other duties arose between the Defendant and the Plaintiffs, the Defendant's performance of such duties was discharged under the doctrine of frustration of purpose.

FOR A TWENTY-SECOND DEFENSE
(Course of Conduct)

138. The Plaintiffs allege an ongoing course of conduct which supposedly resulted in their damages. This ongoing course of conduct was approved of by the Plaintiffs. The Plaintiffs are now barred from complaining about this course of conduct.

FOR A TWENTY-THIRD DEFENSE
(Election of Remedies)

139. The Plaintiffs will be subject to an election of remedies should they prevail on some or all of their causes of action.

FOR A TWENTY-FOURTH DEFENSE
(Defenses of other Defendants)

140. Defendant incorporates by reference any defenses pled by other Defendants which apply to Plaintiffs' claims against this Defendant and which are not inconsistent with this Defendant's other defenses stated herein.

FOR A TWENTY-FIFTH DEFENSE
(Economic Loss Rule)

141. With regard to some or all claims for damages appearing in the Amended Complaint, the Plaintiffs' claims are barred, in whole or in part, by the economic loss rule.

FOR A TWENTY-SIXTH DEFENSE
(Arbitration)

142. Defendant reserves all rights it may have to demand binding arbitration.

FOR A TWENTY-SEVENTH DEFENSE

(Additional Defenses)

143. Defendant places the Plaintiffs on notice that it will subsequently move to amend this Answer to assert other defenses should it appear through discovery or continued fact investigation that any additional defenses are available.

FURTHER ANSWERING THE AMENDED COMPLAINT AND BY WAY OF CROSS-CLAIM AGAINST BROCK FANKHAUSER, FANKHAUSER PROPERTY GROUP, INC., EXTERIOR EXPRESSIONS OF NORTH CAROLINA, INC., A1-MEGA CONSTRUCTION, INC., PROCAR, INC., THE SOUTHEASTERN GROUP, INC., LUCAS LAWN AND LANDSCAPE, INC., JOSE JIMINEZ, INDIVIDUALLY AND/OR D/B/A M&L ROOFING CO., LLC AND/OR MB ROOFING COMPANY, MARCOS GONZALEZ AND BY WAY OF THIRD-PARTY COMPLAINT AGAINST STONECREST VILLAS OF TEGA CAY, LLC., AND EPCON COMMUNITIES FRANCHISING, INC.

(Factual Background)

1. The allegations of the above paragraphs are realleged to the extent they are relevant and not inconsistent with the allegations of the claims which follow.
2. Defendant Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., ("Association"), is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principal place of business in York County, South Carolina.
3. Defendant Fankhauser Property Group, Inc. ("FPG"), is a corporation organized and existing under the laws of the State of North Carolina which is authorized to conduct business in the State of South Carolina, and was the general contractor for construction of the Stonecrest Villas at Tega Cay Condominium project (the "Project").
4. Third-Party Defendant Stonecrest Villas of Tega Cay, LLC ("Stonecrest"), upon information and belief, is the developer of the Project.

5. Third-Party Defendant Epcon Communities Franchising, Inc. is a corporation organized and existing under the laws of the state of Ohio and is doing business in York County, South Carolina. Defendant Epcon is a commercial developer of single story, attached residential condominiums, including Stonecrest Villas at Tega Cay, which are offered for sale to purchasers through Defendant Brock L. Fankhauser and FPG, Inc.

6. Exterior Expressions of Carolina, Inc. ("Exterior Expressions") is a North Carolina corporation doing business in York County, South Carolina. Exterior Expressions contracted with Stonecrest for the installation of the exterior stone masonry on the Project and related work.

7. Upon information and belief, Third-Party Defendant A1-Mega Construction, Inc. ("A1-Mega") is a North Carolina corporation doing business in York County, South Carolina. A1-Mega contracted with Stonecrest for the installation of the siding and related work on the Project.

8. Upon information and belief, Third-Party Defendant Procar, Inc. ("Procar") is a North Carolina corporation doing business in York County, South Carolina. Procar contracted with Stonecrest to perform framing and concrete work on the Project.

9. Upon information and belief, Third-Party Defendant The Southeastern Group, Inc. ("Southeastern") is a North Carolina corporation doing business in York County, South Carolina. Southeastern contracted with Stonecrest to perform painting, caulking, and sealant work on the Project.

10. Upon information and belief, Third-Party Defendant Lucas Lawn and Landscape, Inc. ("Lucas") is a North Carolina corporation doing business in York County, South Carolina. Lucas contracted with Stonecrest to perform landscaping and related work on the Project.

11. Upon information and belief, Jose Jimenez, individually and/or d/b/a M&L Roofing Co., LLC and/or MB Roofing Company (collectively "M&L") is an individual residing in North Carolina doing business in York County, South Carolina and/or a North Carolina limited liability company and/or North Carolina corporation doing business in York County, South Carolina. M&L contracted with Stonecrest to perform roofing work on the Project.

12. Upon information and belief, Marcos Gonzalez is an individual residing in South Carolina doing business in South Carolina.

13. Defendant Brock Fankhauser is a resident and citizen of Mecklenburg County, North Carolina, and is the owner, principal and president of Defendant FPG, and is the sole member of Defendant Stonecrest. At all relevant times herein, Defendant Fankhauser was the President of Defendant Association.

14. On February 26, 2007, Stonecrest, as Declarant, filed a Master Deed of Stonecrest Villas of Tega Cay Horizontal Property Regime ("Master Deed") pursuant to the South Carolina Horizontal Property Act, recorded in Book 8852 at page 149 of the public registry of the York County Clerk of Court.

15. The Master Deed states that the Defendant Stonecrest deemed it desirable to create the Defendant Association which will be delegated and assigned the powers of maintaining and administering the common elements and facilities on the property.

16. Article V, Section 5.4(a) of the Master Deed states that the "Association shall be responsible for the maintenance and repair of all Common Elements, including the Limited Common Elements, and except for maintenance or repairs caused by the negligence or intentional misconduct of any Owner, his agents, employees or invitees, which shall be the responsibility of that Owner."

17. Article V, Section 5.1, of the Master Deed defines the Common Elements to include among other things, all portions of the Buildings (as defined in the Master Deed) located outside the Units (as defined in the Master Deed), roofs, foundations, and exterior and interior load bearing walls.

18. The Project was constructed in or about 2007.

19. After the Project was completed, Third-Party Defendant Stonecrest and/or Defendant FPG maintained control of the Defendant Association. Defendant Fankhauser was the president of the Defendant Association at all relevant times herein. Defendant Fankhauser resigned his position with the Association in June 2010 after this litigation was commenced.

20. Upon information and belief, in or about 2009, individual condominium unit owners within Stonecrest Villas of Tega Cay, including Plaintiffs herein, experienced water intrusion into their units. The neighborhood clubhouse also experienced water intrusion.

21. The Common Elements and other portions of the Project for which the Association is responsible for maintenance, repair and replacement are collectively referred to herein as the "Improvements."

22. The Improvements were developed and constructed by Third-Party

Defendant Stonecrest and/or FPG, acting by and through its agents, representatives and employees, or acting through contractors and suppliers selected by said Defendants.

23. There exist defects and deficiencies in the workmanship and material used by the Third-Party Defendant/Defendants in the construction of the Improvements including, without limitation, defects and deficiencies in the workmanship and materials used in connection with the construction and installation, including but not limited to:

- a. Failing to install a proper waterproofing, including a moisture barrier, concurrently with the masonry veneer building exterior directly contributing to water infiltration into individual unit owners residences and the Common Elements;
- b. Improperly constructing brick masonry at window sill structures to divert rain water intrusion properly from the individual unit owners residences and the Common Elements;
- c. Improperly sealing brick masonry veneer exterior walls to prevent water infiltration into individual unit owners residences and the Common Elements;
- d. Failing to install proper flashing and internal drainage to prevent water infiltration into individual unit owners residences and the Common Elements;
- e. Failing to install proper weep holes to permit water drainage away from and behind the masonry veneer exterior;
- f. Failing to install a moisture barrier to prevent water intrusion and seepage through the masonry veneer exterior;
- g. Failing to provide a proper slope around brick masonry ledges and wall transitions to deflect water flow away from individual unit owners residences and the Common Elements;

- h. Failing to properly grade and slope exterior foundation walls to prevent surface water intrusion per code; and
- i. Failing to properly gutter the condominiums to properly divert rainwater away from the individual unit owners residences and the Common Elements.

24. As a result of the deficiencies in the construction of the Project by Third-Party Defendants Stonecrest and FPG and the resulting damage, Defendant Association has been sued as set forth in Plaintiffs' Amended Complaint which is incorporated by reference herein.

25. Defendant Association contends that the fault lies with Defendants FPG and Fankhauser and Third-Party Defendants Stonecrest and Epcon.

FOR A FIRST CAUSE OF ACTION
(Negligence as to Stonecrest, FPG and Fankhauser)

26. The allegations contained in the foregoing paragraphs are incorporated by reference herein.

27. Defendant Fankhauser is the sole shareholder of Defendant FPG and the sole member of Third-Party Defendant Stonecrest. Defendants Fankhauser and FPG and Third-Party Defendant Stonecrest are collectively referred to as the "Fankhauser Defendants."

28. The Fankhauser Defendants were negligent as is more fully set forth in Paragraphs 16(a) through (i), supra.

29. The Fankhauser Defendants failed to properly oversee and supervise the construction of the Project by its agents, employees, and subcontractors which resulted in Project being constructed not in a good and workmanlike manner.

30. The Fankhauser Defendants were negligent and/or careless in failing to

properly carry out their tasks and by failing to employ construction practices and methods that conformed with project plans, applicable building codes, industry standards, and/or manufacturers' instructions.

31. As a direct and proximate result of the negligence of the Fankhauser Defendants, Defendant Association has been sued by Plaintiff herein and other unit owners for the development and construction of the Project by the Fankhauser Defendants, and faces liability for the work performed by or at the direction of the Fankhauser Defendants.

32. As direct and proximate result of the negligence of the Fankhauser Defendants, Defendant Association has been damaged in an amount greater than \$7,500.00, and is entitled to a judgment against the Fankhauser Defendants in an amount necessary to properly compensate Defendant Association for damage to the Common Elements and any amount it may be required to compensate Plaintiffs as a result of these Defendants' negligence.

FOR A SECOND CAUSE OF ACTION
(Equitable Indemnity – Fankhauser Defendants)

33. The allegations contained in the foregoing paragraphs are incorporated by reference herein.

34. The Fankhauser Defendants were under a duty by virtue of the duties that they took on the Project as set forth herein to comply with the Project plans and specifications, applicable building codes, industry standards, manufacturers' instructions, and to properly oversee and supervise its agents, employees, and subcontractors.

35. The Fankhauser Defendants were negligent and/or careless in failing to

properly carry out their tasks or by improperly instructing others to carry out their tasks and by failing to employ practices and methods of construction in compliance with Project plans and specifications, applicable building codes, industry standards, manufacturers' instructions, and failing to properly oversee and supervise its agents, employees and subcontractors.

36. Defendant Association is entitled to equitable indemnity from the Fankhauser Defendants, individually and severally, for costs and expenses incurred in order to protect its interests and any amounts Defendant Association may be required to pay the Plaintiff herein as result of the negligence of the Fankhauser Defendants.

FOR A THIRD CAUSE OF ACTION
(Breach of Implied Warranty of Habitability and
Workmanlike Construction – Fankhauser Defendants)

37. The allegations contained in the foregoing paragraphs are incorporated by reference herein.

38. The Improvements are being infiltrated by water caused by the defects in construction caused by the Fankhauser Defendants.

39. The Fankhauser Defendants impliedly warranted, for the benefit of the Association and all individual unit Owners, that the construction of the Project, including the Improvements which are a part thereof, the proper quality, care, adequacy, suitability, and workmanship of the labor and materials that they provided on the Project.

40. The Fankhauser Defendants have breached their obligations and duties under the implied warranties of habitability, quality and fitness. As a result of Defendants' breach of implied warranties as set forth herein, Defendant Association has

been damaged in an amount in excess of \$7,500.00, and has incurred special damages.

41. Defendant Association is entitled to judgment against the Fankhauser Defendants for costs and expenses incurred in order to protect its interests and any amounts Defendant Association may be required to pay Plaintiffs herein as result of such breaches of warranty.

FOR A FOURTH CAUSE OF ACTION

(Breach of Implied Warranty of Fitness for Particular Purpose – Fankhauser Defendants)

42. The allegations contained in the foregoing paragraphs are incorporated by reference herein.

43. Defendant Association is informed and believes that the Fankhauser Defendants' unworkmanlike construction resulted in the breach of an implied warranty of fitness for a particular purpose wherein the Improvements do not prevent water infiltration and seepage into individual units and/or the Common Elements.

44. As a direct and proximate result of the Fankhauser Defendants' unworkmanlike construction, Defendant has incurred economic and structural damages to the Improvements in amounts to be proven at trial of this matter exceeding \$7,500.

45. The Fankhauser Defendants, at the time of contracting, knew that Defendant Association would utilize the clubhouse for Association related activities and that individual unit owners would use their units as a family dwelling.

46. As a result of the Fankhauser Defendants' un-workmanlike construction, the Improvements and their components are not fit for the particular purpose for which they were intended, and the structural components of the Improvements home are not fit to prevent water intrusion into individual unit owners' residences or the Common Elements.

47. The Fankhauser Defendants have breached their obligations and duties under the implied warranty of fitness for a particular purpose. As a result of Defendants' breach of implied warranty as set forth herein, Defendant Association has been damaged in an amount in excess of \$7,500.00, and has incurred special damages.

48. Defendant Association is entitled to judgment against the Fankhauser Defendants for costs and expenses incurred in order to protect its interests and any amounts Defendant Association may be required to pay Plaintiffs herein as result of such breaches of warranty.

FOR A FIFTH CAUSE OF ACTION
(Breach of Fiduciary Duty – Fankhauser Defendants)

49. The allegations contained the foregoing paragraphs are incorporated by reference herein.

50. Defendant Fankhauser was the sole member and president of Third-Party Defendant Stonecrest and the sole shareholder and president of Defendant FPG. Defendants Stonecrest and FPG were under the total control of Defendant Fankhauser. Defendant Fankhauser was a member of the Board of Directors of the Association and owed a fiduciary duty to the Defendant Association.

51. Defendant Fankhauser was in control of the Association at all times relevant herein, and promoted the Association, and therefore, had a fiduciary duty to the Defendant Association.

52. Defendant Fankhauser had a fiduciary duty to Defendant Association due to the special relationship that existed between the two.

53. This duty required, among other things, that the Fankhauser Defendants

act in the best interests of Defendant Association to ensure that all Common Areas and Improvements were constructed and turned over to the Association in a reasonable state of repair.

54. As a member of the Board of Directors, Defendant Fankhauser acted in his own interests in breach of his duties as a Board Member.

55. Defendant Fankhauser breached his duty by failing to ensure that the Improvements were turned over to Defendant Association in a good state of repair.

56. The Fankhauser Defendants breached their duties by failing to ensure that the Improvements were constructed in a good and workmanlike manner.

57. As a result of Defendants' breach of fiduciary duties as set forth herein, Defendant Association has been damaged in an amount in excess of \$7,500.00, and has incurred special damages.

58. Defendant Association is entitled to judgment against the Fankhauser Defendants for costs and expenses incurred in order to protect its interests and any amounts Defendant Association may be required to pay Plaintiffs herein as result of such breaches of fiduciary duty.

FOR A SIXTH CAUSE OF ACTION

(Unfair Trade Practices Act Violations – Fankhauser Defendants)

59. The allegations contained the foregoing paragraphs are incorporated by reference herein.

60. The Fankhauser Defendants owed Defendant Association certain fiduciary duties as hereinabove described, thereby creating a special relationship between the parties.

61. The conduct of the Fankhauser Defendants, jointly and severally, created

false assurances to the Defendant Association that Defendants would act in the best interest of the Association, which assurances were false and constitute methods of unfair and deceptive acts and practices declared unlawful by South Carolina law.

62. The Fankhauser Defendants, jointly and severally, knew or should have known, due to the existing privities and restrictive covenants and the necessity to take immediate action to protect the Improvements, yet Defendants deliberately failed to act with diligence whereby the Association and individual unit owners continue to experience inaction, procrastination, further water intrusions, interior damages, and mold.

63. Defendant Association and others have suffered an ascertainable loss of money, property damages, diminution of property value and special damages proximately caused by Defendants' deceptive acts and practices which are pled upon information and belief to wit.

64. The Fankhauser Defendants' conduct affects the public interest at large; the same conduct has occurred with at least four Stonecrest owners, has been repeated, and affects commerce at large within York County.

a. By falsely advertising, pricing, offering for sale, falsely warranting, and falsely binding properties per restrictive covenants where the Association is undercapitalized, making it difficult to serve the Association's and owners'/residents' needs to prevent water intrusion, proper maintenance and/or proper diligence to preserve the Association's and owners' properties and property values.

b. By creating an Owners Association where Defendant Fankhauser knew, or should have known, that a conflict of interest would exist between his duties

as developer, contractor and that of HOA chairman and president to enforce covenants and adequately protect the Association's and owners' properties and interests.

c. By falsely charging dues and assessments where Defendant Association, by and through Defendant Fankhauser, failed to honor duties to preserve and protect the Improvements as required by restrictive covenants.

d. Upon information and belief, by willfully and knowingly applying property assessments for development of adjacent commercial tracts instead of properly capitalizing Defendant Association and acting promptly to remedy defects existing in the Improvements and individual residences.

e. By violation of duties imposed by restrictive covenants where the Fankhauser Defendants knew, or should have known, of the need to act promptly to prevent Defendant Association and individual unit owners from further property damage.

f. By misrepresentation of warranties described above where Defendants knew, or should have known, the falsity of the warranties.

65. Damages and special damages suffered by Defendant Association and others would not have occurred but for the Fankhauser Defendants' unfair and deceptive acts and should be legally deterred.

66. Defendant Association is informed and believes that it is entitled to an award, of actual and trebled damages pursuant to South Carolina Code Ann. §39-5-140(a), *et seq*, together with any costs associated with prosecution of this action.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Express Warranties – Epcon)

67. The allegations contained the foregoing paragraphs are incorporated by reference herein.

68. Third-Party Defendant Epcon Communities has been building condominium communities for more than 20 years. Epcon represents itself to have a successful history of condominium development throughout the United States.

69. Third-Party Defendant Epcon Communities marketed and represented that Stonecrest Villas of Tega Cay was an Epcon Community and was an exceptional community.

70. Being part of an Epcon Community, Third-Party Defendant Epcon Communities represented and warranted that the construction in the community would result in buildings with zero defects and a high level of quality.

71. Third-Party Defendant Epcon Communities represented and warranted that Stonecrest Villas at Tega Cay was part of Epcon Communities QualityMark warranty program. The specific objectives of warranty program are:

- a. to produce a high quality product
- b. identify defects in the buildings at a time when it is appropriate for Epcon Communities' contractors and subcontractors to respond
- c. identify and correct deficiencies before occupancy occurs
- d. to ensure that the quality of the construction meets Epcon Communities' alleged standard of excellence.

72. Third-Party Defendant Epcon Communities represented and warranted that the construction would be thoroughly inspected, including mechanical, structural and cosmetic items.

73. Third-Party Defendant Epcon Communities represented and warranted that the construction would be maintenance free.

74. The clubhouse and common elements in Stonecrest Villas at Tega Cay were part of the construction that was warranted by Third-Party Defendant Epcon Communities.

75. Third-Party Defendant Epcon Communities breached its warranties in that, among other things:

- a. Failed to construct Stonecrest Villas, including the clubhouse and common elements, in such a manner as to result in zero defects and a high level of quality;
- b. It failed to identify defects at a time when its contractors and subcontractors can address the defect before occupancy occurs;
- c. It failed to thoroughly inspect the construction, including mechanical, structural and cosmetic items;
- d. It failed to construct Stonecrest Villas, including the clubhouse and common elements in such a manner that it was maintenance free.

76. As a result of Third-Party Defendant Epcon Communities' breach of its warranties, the Improvements and their components are not fit for the particular purpose for which they were intended, and the structural components of the Improvements are

not fit to prevent water intrusion into individual unit owners' residences or the Common Elements.

77. Defendant Association is entitled to judgment against the Third-Party Defendant Epcon Communities for costs and expenses incurred in order to protect its interests and any amounts Defendant Association may be required to pay Plaintiffs herein as result of such breach of warranty.

FOR AN EIGHTH CAUSE OF ACTION
(Negligence against Subcontractors)

78. The Association realleges and reavers Paragraphs 1 through 77 as if set forth herein.

79. Exterior Expressions, A1-Mega, Procar, Southeastern, Lucas, Jose Sminez, M&L Roofing, MB Roofing and Gonzalez (collectively referred to as "Subcontractors") were under a duty to use due care in the performance of their respective tasks referenced above and to perform those tasks in a manner in compliance with the project plans, applicable building codes, industry standards, and manufacturers' instructions.

80. The Subcontractors were negligent and/or careless in failing to properly carry out their tasks and by failing to employ practices and methods of construction conformance with the project plans, applicable building codes, industry standards, and/or manufacturers' instructions.

81. The negligence of the Subcontractors has proximately caused financial damage to the Association, including but not limited to the repair of the exterior portions of the buildings at issue in this case. Moreover, the Subcontractors' work caused damages to work other than that of the respective Subcontractors' work, namely interior

damages to various units as a result of water penetration. While the Association denies it is liable for the repair of any interior units, if the Court determines otherwise, the Association hereby states a contingent claim for such damages in an amount equal to repair any damaged interior unit spaces.

FOR NINTH CAUSE OF ACTION
(Breach of Implied Warranty as to Subcontractors)

82. The Association realleges and reavers Paragraphs 1 through 81 above as if set forth herein.

83. The Subcontractors impliedly warranted the proper quality, care, adequacy, suitability, and workmanship of the materials and labor that they provided on the Project.

84. The Subcontractors breached their implied warranty of workmanship as described above by constructing building exteriors that allow for water to penetrate the building interiors.

85. The Association has been damaged by the Subcontractors' breach of implied warranty in that the exterior surfaces must be rebuilt or repaired. While the Association denies it is liable for the repair of any interior units, if the Court determines otherwise, the Association hereby states a contingent claim for such damages in an amount equal to repair any damaged interior unit spaces.

WHEREFORE, Defendant Association prays the Court that:

1. The Plaintiffs' Amended Complaint be dismissed with Prejudice;
2. It have and recover judgment against the Defendant Brock L. Fankhauser, Fankhauser Property Group, Inc., and Third Party Defendant Stonecrest Villas of Tega Cay, LLC, on Defendant Association's First through Sixth Causes of Action as set out

hereinabove;

3. It have and recover judgment against the Third Party Defendant Epcon Communities Franchising, Inc., on Defendant Association's Seventh Cause of Action as set out hereinabove;

4. It have and recover judgment against the Subcontractors on the Association's Eighth and Ninth Causes of Action as set out hereinabove;

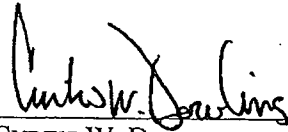
5. It be awarded actual, consequential, incidental, and punitive damages against the Fankhauser Defendants, Epcon, and Subcontractors in the discretion of the court and jury;

6. It be awarded any special damages as may be proven by Defendant Association;

7. It receive a trial by jury of the matters alleged herein; and

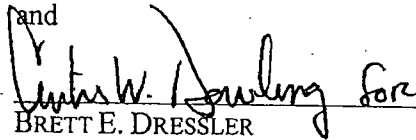
8. It be awarded such other and further relief as the Court may deem just and proper.

Signature page follows.



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and



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Condominium Owners Association, Inc.
(Cross-Claims and Third-Party Complaint)

October 25, 2011

CERTIFICATE OF SERVICE

The undersigned employee of Barnes, Alford, Stork & Johnson, LLP certifies that he or she has, on the date below, served the below document(s) upon the below person(s) via first class mail.

DOCUMENT(S) SERVED:

- **Stonecrest HOA's Answer to Amended Complaint, First Amended Cross-Claim and Third-Party Complaint**

PERSON(S) SERVED:

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Halford, Niemiec & Freeman, LLP
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Attorney for Plaintiff

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and Stonecrest Villas of Tega Cay, LLC

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Charleston, SC 29492
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Bonum S. Wilson, III, Esquire
Post Office Box 13177
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and

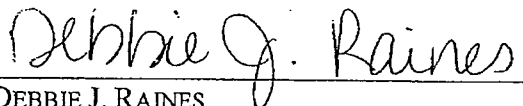
D. Andrew Williams, Esquire
Turner, Padgett, Graham & Laney, PA
Post Office Box 1473
Columbia, SC 29202
Attorney for M&L Roofing Co., LLC, MB Roofing Company and Jose Simenez

Michael B.T. Wilkes, Esquire
Melissa Nichols, Esquire
Wilkes Law Firm
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Spartanburg, SC 29305
and

Jonathan P. Corwin, Esquire
Vorys, Sater, Seymour and Pease, LLP
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Columbus, OH 43215

Attorney for Epcon Communities, Inc. and Epcon Communities Franchising, Inc.

Stephanie H. Burton, Esquire
Scott D. Spivey, Esquire
Gibbes Burton, LLC
308 East St. John Street
Spartanburg, SC 29302
Attorney for Architectural Alliance, Ltd.


DEBBIE J. RAINES

October 25, 2011

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Juontonio Pinckney, et al.,

☐ Plaintiff

FILED - RECEIVED

2012 JAN 10 AM 10:25

CASE NO.

2010-CP-46-2326

v.

DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SCMOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Epcon Communities, Inc, Et Al.,

☒ Defendant.

Plaintiff's Attorney:

J. Cameron Halford, Bar No.

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Ft. Mill, SC 29708

phone: (803) 547-6618 fax: (803) 547-6638

e-mail: cam@fortmilllaw.com other:

Defendant's Attorney:

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Spartanburg, SC 29307

phone: (864) 591-2355 fax: (864) 591-1767

e-mail: dcole@wilkeslaw.com other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Defendant Epcon Communities, Inc.'s and Epcon Communities Franchising, Inc.'s Motion for Summary Judgment on Their Cross-Claims Against Fankhauser Property Group, Inc.
 Estimated Time Needed: 15 Minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

January 9, 2012

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act☐ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication☐ Motion for Execution (Rule 69, SCRPC)☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

SCCA/233 (11-03)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Juontonio Pinckney, *et al.*,

Plaintiffs,

vs.

Epcon Communities, Inc.,
Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property
Group, Inc. and Stonecrest Villas of Tega
Cay Home Owners Association, Inc.,

Defendants.

Fankhauser Prop. Group, Inc.,

Third-Party Plaintiff,

vs.

Architectural Alliance, Ltd., Exterior
Expressions of North Carolina, Inc.,
Al-Mega Construction, Inc., Procar, Inc.,
The Southeastern Group, Inc., Lucas Lawn
and Landscape, Inc., and Jose Simenez,
Individually and d/b/a M&L Roofing Co.,
LLC and/or MB Roofing Company,

Third-Party Defendants.

Stonecrest Villas of Tega Cay
Condominium Owners Association, Inc.,

Third-Party Plaintiff,

vs.

Stonecrest Villas of Tega Cay, LLC and
Epcon Communities Franchising, Inc.

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-46-2326

DEFENDANTS EPCON COMMUNITIES, INC.
AND
EPCON COMMUNITIES FRANCHISING,
INC.
MOTION FOR SUMMARY JUDGMENT
ON THEIR
CROSS-CLAIMS AGAINST FANKHAUSER
PROPERTY GROUP, INC.

FILED - RECEIVED
2012 JAN 10 AM 10:25
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Exterior Expressions of North Carolina, Inc.	)
	)
Fourth-Party Plaintiff,	)
	)
vs.	)
	)
Marcos Gonzalez,	)
	)
Fourth-Party Defendant.	)
	)
Procar, Inc. and Procar II, Inc.,	)
	)
Fourth-Party Plaintiffs,	)
	)
vs.	)
	)
Marcos Zertuche, David Carbajal,	)
Victorina Cortez, Balancos Construction	)
Co., Balanos Framing, Inc., Ricardo	)
Hernandez, and Silverio Cortez,	)
	)
Fourth-Party Defendants.	)
	)
Al-Mega Construction, Inc.,	)
	)
Fourth-Party Plaintiff,	)
	)
vs.	)
	)
Noe Perez, Juan Abundez Saucedo, and	)
Moisese Chavarra Hernandez,	)
	)
Fourth-Party Defendants.	)
	)

NOW COMES Defendant Epcon Communities, Inc. ("ECI") and Defendant/Third-Party Defendant Epcon Communities Franchising, Inc. ("ECFI")(collectively, "Epcon"), by and through their undersigned counsel, and move the Court for Summary Judgment on Epcon's claims for contractual and equitable indemnity against Fankhauser Property Group, Inc. ("FPG").

Epcon has asserted Cross-Claims for contractual indemnity and equitable indemnity in its Answer to Plaintiffs' Complaint. ECFI has also asserted the same Cross-Claims in its Answer to the Third-Party Complaint. In support of its Motion, Epcon would show as follows:

1. ECFI, as franchisor, and FPG, as franchisee, entered into a Franchise Agreement dated March 30, 2006 (the "Franchise Agreement"), pursuant to which FPG developed the project at issue in this litigation, Stonecrest Villas at Tega Cay (the "Project"). A copy of the Franchise Agreement is attached as Exhibit A and incorporated herein by reference.

2. Section 16.1 of the Franchise Agreement contains an indemnification provision requiring FPG to indemnify and hold harmless ECFI (as well as ECI, an entity affiliated with ECFI through common ownership) from all claims arising directly or indirectly from, as a result of, or in connection with, [FPG's] ownership or operation of its business [under the Franchise Agreement] and/or its use or utilization of the Development System, including without limitation the use of any architectural plans and designs provided by [ECFI].

3. Section 16.1 of the Franchise Agreement further requires FPG to resist and defend, or cause to be resisted and defended, any action relating to FPG's use of the Development System in which Epcon is implicated.

4. The Plaintiffs in the above-captioned action (the "Action") have asserted claims against Epcon, FPG, Brock L. Fankhauser, and Stonecrest Villas of Tega Cay Home Owners Association, Inc. alleging, *inter alia*, damages caused by construction defects in the Project.

5. Other than ECFI's role as franchisor under the Franchise Agreement, Epcon neither had a role in the development in the Project, nor was it obligated to undertake any role in the development of the Project.

6. On January 26, 2011, Epcon, through its counsel, sent FPG's counsel a letter demanding that FPG assume Epcon's defense and indemnify Epcon pursuant to Section 16.1 of the Franchise Agreement. By correspondence dated January 27, 2011 and February 8, 2011, FPG rejected Epcon's demand that FPG defend and indemnify it in this Action.

7. Epcon renewed its demand for defense and indemnification by way of letter dated November 29, 2011. To date, FPG has not agreed to assume the defense and indemnification of Epcon as required by the Franchise Agreement.

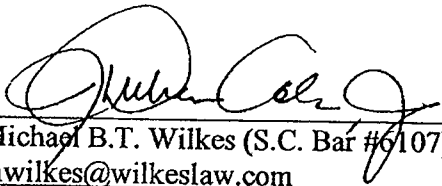
8. For the foregoing reasons, Epcon is entitled to summary judgment on its claims for contractual and equitable indemnification against FPG.

WHEREFORE, ECI and ECFI move this Court for an entry of Summary Judgment on their claims for contractual indemnity and equitable indemnity, and request that the Court order FPG to assume the defense of Epcon in the Action. Epcon further requests that the Court order FPG to indemnify and reimburse Epcon for any expenses Epcon has incurred or may have to incur in the future in connection with the Action. This Motion is supported by the pleadings, the affidavit of Joel D. Rhoades attached as Exhibit B, and other documents and memoranda which may be hereinafter submitted to the Court.

(signature block on following page)

January 9, 2012

By:


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Melissa M. Nichols (S.C. Bar #76591)
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J. Derham Cole, Jr. (S.C. Bar #70269)
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127 Dunbar Street, Suite 200
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(864) 591-1113

Attorneys for Epcon Communities, Inc. and
Epcon Communities Franchising, Inc.

EXHIBIT A

FRANCHISE AGREEMENT

This Franchise Agreement (this "Agreement") is made by and between EPCON Communities Franchising, Inc., an Ohio corporation having its principal business offices at 500 Stonehenge Parkway, Dublin, Ohio 43017 (hereinafter referred to as "Franchisor"), and Fankhauser Property Group, Inc., a(n) North Carolina corporation having its principal business offices at 300 E. John Street, Suite 126, Matthews, North Carolina 28105 (hereinafter referred to as "Franchisee"), to be effective as of the date executed by Franchisor as set forth on Page 19 hereof.

For and in consideration of the covenants and promises herein contained, Franchisor and Franchisee make the following agreement, intending to be legally bound thereby:

Article 1

The Development System and Franchisee's Acknowledgments

1.1 Franchisor, as a result of the expenditure of substantial time, effort, and money, has created a unique Development System (as hereinafter defined) for the purpose of providing guidance for development of ranch-style condominium dwellings. The essence of the Development System that Franchisor licenses to its franchisees to use is its architectural plans and designs. The Development System includes, without limitation, plans for specially designed structures which appear from all four sides as single-family residences. As a part of the franchise and license granted in Article 3 hereof, Franchisor shall provide the materials and services described in Article 4 hereof to enable Franchisee to implement the Development System at the location or locations and within the area or areas as set forth in one or more Market Area Agreements (the "Market Area Agreements") each substantially in the form attached hereto as Exhibit "1".

1.2 Franchisee, being cognizant of the distinctive significance and value thereof, desires to make use of and to enjoy the benefits of Franchisor's Development System. Franchisee acknowledges that the success of its use of the Development System depends upon its strict adherence to Franchisor's uniform standards, procedures, and plans, as well as Franchisee's business abilities and other variables. Franchisee agrees to preserve in every way possible the integrity of Franchisor's materials, reputation, and goodwill. Franchisee acknowledges that execution of at least one Market Area Agreement is required at the same time as the execution of this Agreement.

Article 2

Definitions of Certain Terms

2.1 Each term set forth in this Section 2.1 shall have the meaning specified herein:

2.1.1 "Development System" shall mean Franchisor's method, pattern, documents, materials, know-how, knowledge, process, and procedure used for development, construction, and marketing of the residential, multi-family community using a unique architectural design, as well as other proprietary and confidential information, including copyrighted and patented material, and material for which the copyright registration or patent is pending, including, without limitation, all architectural plans and specifications for two- and four-unit buildings, architectural plans and specifications for the clubhouse, site planning guidelines, production management guidelines, financial planning guidelines, marketing materials and guidelines, and sample condominium association materials provided by Franchisor. The Development System shall be deemed to include any method, pattern, process, or procedure used by Franchisee during the term of this Agreement, along with any modifications or changes thereto.

2.1.2 "Franchisor" shall mean EPCON Communities Franchising, Inc., an Ohio corporation, and any assignee of, or successor in interest to, EPCON Communities Franchising, Inc.

2.1.3 "Franchisee" shall mean the party so defined in the preamble hereto and any successor in interest to, or permitted assignee or sublicensee of, Franchisee. Franchisee shall also be deemed to include any principals, officers, owners, and directors of Franchisee, any principals, officers, owners, and directors of an entity having an ownership interest in Franchisee, and any others with any ownership or control interest whatsoever in the entity so defined in the preamble, if such entity is other than a natural person.

2.1.4 "Marks" shall mean all distinguishing characteristics of the Development System, including, without limitation, the name and mark "EPCON Communities", together with such other trade names, service marks, trademarks, and trade symbols, emblems, signs, slogans, insignia and copyrights as Franchisor has adopted and

designated for use in connection with its Development System and as Franchisor may hereafter acquire or develop and designate for use in connection with the Development System.

2.1.5 "Project" shall mean all of the development of buildings or appurtenant structures and improvements on common contiguous grounds by Franchisee, or any successor in interest to, or permitted assignee or sublicensee of, Franchisee, using the Development System. Such development shall be defined as a Project without consideration of the elapsed time required for development of the Project or of the development, marketing, or legal "phase" thereof.

Article 3

Grant of Franchise

3.1 Franchisor hereby grants to Franchisee, and Franchisee hereby accepts, a franchise and license to utilize the Development System subject to the terms, restrictions, and conditions of this Agreement and to the terms, restrictions, and conditions of the Market Area Agreement(s). The grant of such franchise to Franchisee shall be on a non-exclusive basis, except to the extent that certain rights of exclusivity are granted to Franchisee under certain conditions within a particular area or areas pursuant to the terms of one or more Market Area Agreement(s). The term of this Agreement and the franchise it grants shall commence as of the date of execution of this Agreement by Franchisor as shown on Page 19 hereof and shall continue until termination of this Agreement and the franchise as specified in Article 12 hereof.

3.2 Franchisor further grants to Franchisee, subject to the terms and conditions herein contained, a nonexclusive license to use the Marks as provided in Section 5.9 and Article 6 hereof in connection with Franchisee's use of the Development System.

3.3 As provided in Section 1.2 hereof, Franchisee and Franchisor shall execute at least one Market Area Agreement at the time this Agreement is executed. Such Market Area Agreement shall specify a Market Area (as defined in the Market Area Agreement) and a location for Franchisee's initial Project.

3.4 In the event that Franchisee desires to develop an additional Project or Projects at another location or locations within the Market Area of an already-existing Market Area Agreement between Franchisor and Franchisee, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days of its receipt of Franchisee's written request, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such Project(s), such approval shall be effective as of the execution by Franchisee of a new Market Area Agreement or Agreements using Franchisor's then current form of Market Area Agreement, setting forth the new location(s) within the Market Area and the payment by Franchisee of the applicable Project Fee(s) pursuant to the provisions hereof.

3.5 In the event that Franchisee desires to develop a Project at a location within a new Market Area, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such Project, such approval shall be effective as of the execution by Franchisee of a new Market Area Agreement using Franchisor's then current form of Market Area Agreement, setting forth the new Market Area and the location of the Project therein, and the payment by Franchisee of the applicable Project Fee(s) pursuant to the provisions hereof.

3.6 In the event that Franchisee desires to obtain a reservation or "hold" on a new Market Area or Areas, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such reservations or "holds" on certain Market Areas, such approval shall be effective as of the execution by Franchisee of a Market Hold Agreement or Agreements (the "Market Hold Agreement(s)") using Franchisor's then current form of such agreement, the current form of which is attached hereto as Exhibit "4", and the payment by Franchisee of the applicable fee(s) as provided in the Market Hold Agreement(s).

3.7 Notwithstanding any other provisions of this Agreement to the contrary, Franchisor retains the right, in its sole discretion, itself or through subsidiaries or affiliated or related business entities, to use the Development System to construct Project(s) outside of Franchisee's Market Area and to franchise or license others to do so.

Article 4
Franchisor's Obligations

- 4.1 Franchisor agrees to provide, based upon Franchisor's most recently updated project plans, the following:
- 4.1.1 Unstamped architectural plans and specifications for two- and four-unit buildings, in a computer-assisted design ("CAD") format
 - 4.1.1.1 foundation plan
 - 4.1.1.2 floor plan
 - 4.1.1.3 roof plan with non-engineered truss drawings
 - 4.1.1.4 wall sections
 - 4.1.1.5 exterior elevations
 - 4.1.1.6 drawings or schedules for windows, doors, cabinets, shelving, and floor coverings
 - 4.1.1.7 plumbing plan
 - 4.1.1.8 electrical plan
 - 4.1.1.9 heating, venting, and air conditioning ("HVAC") plan
 - 4.1.1.10 drawings for entry guardhouse and fencing
 - 4.1.2 Unstamped architectural plans and specifications for a large and a small clubhouse, in a CAD format
 - 4.1.2.1 foundation plan
 - 4.1.2.2 floor plan
 - 4.1.2.3 roof plan with non-engineered truss drawings
 - 4.1.2.4 wall sections
 - 4.1.2.5 exterior elevations
 - 4.1.2.6 drawings or schedules for windows, doors, cabinets, shelving, and floor coverings
 - 4.1.2.7 plumbing plan
 - 4.1.2.8 electrical plan
 - 4.1.2.9 HVAC plan
 - 4.1.3 Site planning guidelines from two recent projects
 - 4.1.3.1 sample site plans
 - 4.1.3.2 sample landscape plans
 - 4.1.3.3 recommendations for locations of utilities, curbs, streets, drives, patios, sidewalks, and mounding
 - 4.1.4 Construction Specifications Manual, in a computer readable format.
 - 4.1.5 Construction Manual, in a computer readable format.
 - 4.1.6 Operations Manual, in a computer readable format.
 - 4.1.7 Marketing Manual and Materials, in a computer readable format.
 - 4.1.7.1 color renderings or photographs of units and clubhouse exteriors
 - 4.1.7.2 sample brochure
 - 4.1.7.3 Four (4) video presentations including The Condominium Lifestyle Sales Video, New Owners Video, New Buyers Orientation Video and How to Plan a Grand Opening Video
 - 4.1.8 Condominium Materials Manual, in a computer readable format.
 - 4.1.9 National Account Suppliers Manual, in a computer readable format.
 - 4.1.10 Sample Homeowners Manual.
 - 4.1.11 Sample Employer Handbook.
 - 4.1.12 Pre-Construction Community Manual.
 - 4.1.13 Consulting services
 - 4.1.13.1 Franchisor will provide twenty (20) hours of consulting services to Franchisee for Franchisee's first Project. Consulting may include, but is not limited to, advice on the areas of planning, financing, construction, and marketing.

- 4.1.13.2 Franchisor will provide up to twenty (20) hours of consulting services if Franchisee so requests for each subsequent Project. Consulting may include, but is not limited to, advice on the areas of planning, financing, construction, and marketing.
- 4.1.13.3 Consulting services will be provided to Franchisee either, at Franchisor's discretion, at the corporate offices of Franchisor, by telephone, or at Franchisee's place(s) of business.
- 4.1.13.4 Consulting services in excess of twenty (20) hours requested by Franchisee for a particular Project will be billed to Franchisee by Franchisor at \$200.00 per hour.

4.2 Franchisor represents that the architectural plans and other materials referenced above in Sections 4.1.1, 4.1.2, 4.1.3, and 4.1.4 and provided to Franchisee are substantially similar to those used by Franchisor's affiliate, EPCON Communities, Inc. in its developments. (Franchisee should refer to Article 8 hereof regarding its obligations concerning modifications to the Development System.)

4.3 In order to protect the reputation and goodwill of the Marks and to maintain uniform standards of development under the Marks, Franchisee shall conduct its operations hereunder in accordance with the Operations Manual, one copy of which Franchisee acknowledges having received on loan from Franchisor for the term of this Agreement. The Operations Manual shall at all times remain the sole property of Franchisor. Franchisee shall treat the Operations Manual, any other materials created for or approved for its use by Franchisor, and the information contained therein as confidential, and shall use all reasonable efforts to maintain such information as secret and confidential. Franchisee shall not at any time, without Franchisor's prior written consent, copy, duplicate, record, or otherwise reproduce the Operations Manual, in whole or in part, nor otherwise make the same available to any unauthorized person. Franchisor shall have the right to add to or otherwise modify the Operations Manual from time to time to reflect changes in authorized products and services, standards or product quality, and operations of Franchisor Projects. In the event of a dispute as to the contents of the Operations Manual, the master copy of the Operations Manual maintained by Franchisor at its principal place of business shall be controlling.

Article 5 Franchisee's Obligations

5.1 At any reasonable time during the term of this Agreement Franchisor's representative(s) may without prior notice enter upon the premises of any Project of Franchisee to observe the Project and the progress towards completion thereof and to assure the nature and quality of all Projects associated with the Marks and the EPCON Communities Works (as defined in Section 10.5 hereof). Upon such entry by Franchisor's representative(s), Franchisee shall cooperate in every way with such observation.

5.2 In consideration of Franchisor's covenants contained herein, Franchisee agrees to pay to Franchisor, in connection with each Project developed by Franchisee, a fee (the "Project Fee") the amount of which Project Fee shall be determined on a Project-by-Project basis as described below. The Project Fee for each Project shall be the total of each of the following component payments:

- (a) An Initial payment (the "Initial Payment") in the amount of Fifty Six Thousand Dollars (\$56,000). The Initial Payment shall be paid by Franchisee to Franchisor when this Agreement and an Initial Market Area Agreement are executed by Franchisee (for the first Project) or whenever a Market Area Agreement is executed by Franchisee (for Projects subsequent to the first Project). In addition to the Initial Payment (for the first Project) described in this Section 5.2(a), Franchisee shall make an additional one-time payment to Franchisor in the amount of Fifty Thousand Dollars (\$50,000.00). This payment shall be due and payable to Franchisor when this Agreement and an Initial Market Area Agreement are executed by Franchisee.
- (b) A second payment (the "Second Payment") in the amount resulting when the Initial Payment is subtracted from the total of the fees applicable to each unit of the Project up to and including sixty (60) units as determined by the "Unit Fee Table" set forth below. The Second Payment shall be paid by Franchisee to Franchisor no later than the occurrence of the earliest of (i) Franchisee's commencement of marketing and/or selling activities on or for the Project, (ii) Franchisee's commencement of any activity on the Project site that is a precursor to or involves grubbing or clearing land, land development or building construction, or (iii) the elapse of nine (9) months from the date Franchisee executes this Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project). Notwithstanding the provisions set forth above, the total of the Initial Payment and the Second Payment shall not be less than One Hundred Sixty Eight Thousand Dollars (\$168,000) for the first Project and shall not be less than One Hundred Sixty Eight Thousand Dollars (\$168,000) for each Project subsequent to the first Project.

- (c) A third payment (the "Third Payment") in an amount resulting when the Initial Payment and the Second Payment are subtracted from the total of the fees applicable to each unit of the Project up to and including one hundred (100) units, as determined by the "Unit Fee Table" set forth below. The Third Payment shall be paid by Franchisee to Franchisor upon the occurrence of the earlier of (i) Franchisee's commencement of construction of the foundation for the fifty-ninth (59th) unit of the Project or (ii) the elapse of eighteen (18) months from the date that Franchisee executes the Franchisee Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project).
- (d) A fourth payment (the "Fourth Payment") in an amount equal to the total of the fees applicable to each unit of the Project in excess of one hundred (100) units as determined by the Unit Fee Table set forth below. The Fourth Payment shall be paid by Franchisee to Franchisor upon the occurrence of the earlier of: (a) Franchisee's commencement of construction of the foundation for the ninety-ninth (99th) unit of the Project, or (b) the elapse of twenty-four (24) months from the date Franchisee executes this Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project).

UNIT FEE TABLE

FEE APPLICABLE
PER UNIT
\$2,800

The Fee Applicable per Unit shall increase on January 1st of each subsequent calendar year pursuant to a schedule providing for a \$300.00 increase each calendar year, beginning with calendar year 2007. For each Project developed under this Agreement, the applicable Fee Applicable per Unit shall be the fee for the calendar year within which occurs the later of payment of the Initial Payment for the Project or execution by Franchisor of the Market Area Agreement for the Project.

5.3 In connection with the first Project to be developed either by Franchisee or by a sublicensee of Franchisee hereunder, Franchisee (or the sublicensee) shall be obligated to execute, as maker, and to deliver to Franchisor, as payee, a promissory note in a principal amount equal to the Project Fee for said first Project, such note to be in substantially the form attached hereto as Exhibit "3".

5.4 If Franchisee fails to remit to Franchisor when due any payment required under the terms of this Agreement, Franchisee agrees to pay to Franchisor all of Franchisor's costs of collection of the amount(s) of such outstanding payments, including reasonable attorney's fees and disbursements, and interest on the unpaid amounts at the lesser of eighteen percent (18%) per annum or the highest rate statutorily permissible, for the period commencing on the date such amount(s) were due to be paid to Franchisor and ending on the date such amount(s) are received by Franchisor in finally collectible funds.

5.5 Franchisee shall provide to Franchisor at the time of execution of this Agreement copies of Exhibit "2" attached to this Agreement (the "Personal Covenants Document") executed by each of the principals, officers, owners and directors of Franchisee or any sublicensee and any other individuals or entities with any ownership or control interest whatsoever in Franchisee or any sublicensee, and, during the term of this Agreement, if a change occurs in the principals, officers, owners and/or directors of Franchisee or any sublicensee or in the other individuals or entities with an ownership or control interest in Franchisee or any sublicensee, Franchisee agrees that it will promptly deliver to Franchisor copies of the Personal Covenants Document executed by each of the new principals, officers, owners, or directors of Franchisee or other individuals or entities with an ownership or control interest in Franchisee or any sublicensee.

5.6 Additionally, Franchisee shall provide to Franchisor copies of the document included as Exhibit "2A" attached to this Agreement executed by each person who may be provided, either by Franchisee, Franchisor, or any sublicensee with more detailed information about the Development System than has been or will be disclosed to the general public, but whom is not otherwise subject to the requirements respecting the Personal Covenants Document set forth in Section 5.6 or to the provisions of the Personal Covenants Document. A copy of the document included as Exhibit "2A" shall be individually executed before any such person is provided access to all or any portion of the Development System. Franchisee's obligation to provide such executed copies of the document included as Exhibit "2A" to Franchisor shall be ongoing throughout the term of this Agreement.

5.7 If Franchisee is a corporation or other business entity, it shall have the following legend conspicuously printed on the face of each of its stock certificates or other certificates evidencing ownership:

The transfer of this [stock] certificate is subject to the terms and conditions of a certain Franchise Agreement with EPCON Communities Franchising, Inc. Reference is made to the provisions of such Agreement and to the governing documents of this [corporation].

5.8 Franchisee shall not employ or seek to employ any person who is employed by Franchisor, its agents or representatives, or by any other EPCON Communities franchisee, or otherwise directly or indirectly induce any such person to leave his or her employment without the specific written consent of Franchisor.

5.9 In order to further protect the Development System, the Marks and the goodwill associated therewith, Franchisee shall:

- (a) Except where prohibited by state law to the contrary, identify its Project(s) in its advertising as prescribed in Franchisor's Operations Manual, advertise under the Marks designated by Franchisor for use for that purpose and use such Marks without prefix or suffix, except where such use may conflict with a prior registration or use or may be required by applicable state law or regulation, in which event Franchisee shall operate and advertise under such other names as Franchisor has previously approved in writing. Franchisor shall have the right to restrict the use by Franchisee of Franchisee's business entity name or trade name in its advertising and promotional materials.
- (b) Feature and use the Marks solely in the manner prescribed by Franchisor.
- (c) Observe such reasonable requirements with respect to service mark, trade name, trademark and fictitious name registrations and copyright and patent ownership notices as Franchisor may, from time to time, direct in writing.
- (d) Comply with the provisions of Article 6 hereof.
- (e) Submit to Franchisor for approval at least fifteen (15) business days prior to the intended use samples of all advertising plans and materials that Franchisee intends to use that were not prepared by or approved previously by Franchisor. Such approval shall not be unreasonably withheld. If written disapproval is not received by Franchisee from Franchisor within ten (10) business days of the date that Franchisor receives Franchisee's advertising materials, Franchisor shall be deemed to have given the required approval. Upon thirty (30) days prior written notice, Franchisor can revoke its approval of any advertising or promotional materials previously approved, and, upon the expiration of such thirty (30) day period, Franchisee shall immediately cease use of such advertising or promotional material.

5.10 Franchisee shall, during the term of this Agreement, purchase, install, maintain and use in its operations under this Agreement a personal computer system having at least the minimum specifications and capabilities, and including at least the software, as specified by Franchisor in writing from time to time to its EPCON Communities franchisees. Franchisee understands that compliance with its obligations in this Section 5.10 may require it to purchase new hardware and software or upgrades to existing hardware and software, as specified by Franchisor in writing from time to time to its EPCON Communities franchisees.

5.11 Franchisee's covenants and obligations contained in this Agreement shall be construed as severable and independent and shall be interpreted and applied consistently with the requirements of reasonableness and equity. If all or any portion of any covenant is held unreasonable or unenforceable by a court or agency having valid jurisdiction, Franchisee expressly agrees to be bound by any lesser covenant included within the terms of such greater covenant that imposes the maximum duty permitted by law, as if the lesser included covenant were separately stated in and made a part of this Agreement.

5.12 On a schedule and at a location to be determined within its sole discretion, Franchisor will hold a series of initial franchisee training sessions for the benefit of Franchisee at a location selected by Franchisor in its sole discretion. Franchisee or a representative of Franchisee is required to attend each of the portions of the first such training session held by Franchisor after execution of this Agreement. Attendance at such training shall be at Franchisee's sole cost and expense. Franchisor reserves the right to charge a tuition fee for each attendee attending voluntary follow-up training sessions.

5.13 In the event that Franchisor holds an annual meeting or conference of the EPCON Communities franchisees, Franchisee or a representative of Franchisee's management satisfactory to Franchisor in its sole discretion shall attend all sessions of such meeting or conference, unless such attendance is excused by Franchisor in writing. Attendance at such meeting or conference shall be at Franchisee's sole cost and expense.

Article 6 Proprietary Marks

6.1 Franchisee's rights to use the Marks as granted in Section 3.2 hereof is limited to their use in connection with the development of the Project(s) as described herein, as set forth in the Operations Manual and as is prescribed in writing by Franchisor from time to time.

6.2 Franchisee acknowledges Franchisor's exclusive right, title and interest in and to the Marks (and all registrations granted therefor), along with the identification schemes, standards, specifications, operating procedures, and other concepts embodied in the Development System. Except as expressly provided by this Agreement, Franchisee shall acquire no right, title or interest therein or thereto (or to any confusingly similar variation thereof), and any and all goodwill associated with Development System and the Marks shall inure exclusively to Franchisor's benefit. Upon the expiration or termination of this Agreement, no monetary amount shall be assigned as attributable to any goodwill associated with Franchisee's use of the Development System or the Marks.

6.3 Franchisee acknowledges that the use of the Marks outside of the scope of this Agreement without Franchisor's prior written consent is an infringement of Franchisor's right, title and interest in and to the Marks. Franchisee expressly covenants that, during the term of this Agreement and after the expiration or termination hereof, Franchisee shall not, directly or indirectly, commit any act of infringement or contest, or aid in contesting, the validity or ownership of the Marks, or of confusingly similar trademarks or trade names, or take any other action in derogation thereof.

6.4 Franchisee shall promptly notify Franchisor of any use of the Marks or any colorable variation thereof by any person, persons, partnership, association, corporation, or other entity ("Person") other than Franchisor or any of its representatives and agents or other franchisees, or any other mark in which Franchisor has or claims a proprietary interest. Franchisee further agrees to notify Franchisor promptly of any litigation instituted by any Person against Franchisor or Franchisee involving the Marks. In the event that Franchisor, in its sole discretion, undertakes the defense, prosecution, or settlement of any litigation relating to the Marks, Franchisee agrees to execute any and all documents (including any registered user agreements and any documents required by governmental authorities to show the relationship between Franchisee and Franchisor) and to render such assistance as may, in the opinion of Franchisor, be reasonably necessary to preserve and extend the service mark rights relating to the Marks and to carry out such defense, prosecution, or settlement.

6.5 Franchisee shall not, without Franchisor's prior written consent, use the Marks as part of Franchisee's corporate or other legal name, or hold out or otherwise employ the Marks to perform any activity or to incur any obligation or indebtedness in such a manner as could reasonably result in making Franchisor liable therefor. Franchisee agrees not to seek registration or to claim ownership of any Marks, or of confusingly similar service marks or trade names.

6.6 Franchisee expressly acknowledges and agrees that this license to use the Marks is nonexclusive and that Franchisor has and retains the rights, among others:

- (a) To grant other franchises and licenses for the use of the Marks, in addition to those already granted to existing EPCON Communities franchisees and to Franchisee;
- (b) To develop and establish other systems and programs utilizing the same or similar Marks, or any other proprietary Marks, and to grant franchises and/or licenses therein without providing Franchisee any rights therein.

6.7 Franchisee shall not permit any third party to imprint the Marks on any products, materials, documents and supplies utilized by Franchisee in connection with the operation of its Project(s) without first obtaining the consent of Franchisor and causing such third party to execute a license agreement with Franchisor. Subject to the foregoing requirement, Franchisee shall affix the Marks in the manner prescribed by Franchisor to all advertising and promotional materials used in connection with each of Franchisee's Projects developed hereunder.

6.8 Franchisor is responsible for maintaining all registrations covering the Marks and renewing the registrations as required.

6.9 Franchisor retains the sole right to create a Web site using the Marks, "EPCONCommunities.com," and variations thereof and to register or use other domain names related or similar to any of the Marks. Prior to its creation of any Web site related in any manner to Franchisee's EPCON Communities business and pursuant to the approval process provided in Section 5.9(e) of this Agreement, Franchisee must obtain Franchisor's written approval.

of (and Franchisor shall have continuing approval rights regarding) the domain name for such Web site, the content of such Web site (including all framing employed) and use of any of the Marks in the content of such Web site. Franchisor retains the right to pre-approve Franchisee's use of linking between Franchisee's Web pages related in any manner to Franchisee's EPCON Communities business and all other Web sites. Within five (5) days of any written request by Franchisor, Franchisee shall (a) dismantle any links between Franchisee's Web pages related in any manner to Franchisee's EPCON Communities business and all other Web sites; and/or (b) remove any references on Franchisee's Web pages to the Marks. Further, Franchisee shall comply with Franchisor's guidelines, as published from time to time to the EPCON Communities franchise system, regarding the use by franchisees of Web sites related to franchisees' EPCON Communities businesses.

Article 7 Advertising and Promotion

7.1 Franchisor reserves the right, exercisable at any time, to require Franchisee to purchase and use prescribed sales brochures and other documents designed for prospective condominium buyers.

7.2 Franchisee shall cooperate with Franchisor in any and all advertising, promotional and marketing plans and campaigns established by Franchisor in its sole discretion.

7.3 All advertising, promotions and marketing carried out by Franchisee in any media shall be conducted in a dignified manner and shall conform to the standards and requirements prescribed by Franchisor and to the highest ethical standards of advertising. Thirty (30) days prior to publication, Franchisee shall submit to Franchisor, for its prior written approval (except with regard to prices to be charged), samples of all advertising and promotional plans and materials that Franchisee desires to use and that have not been prepared or previously approved by Franchisor. Such approval shall not be unreasonably withheld. Any materials submitted to Franchisor and not disapproved within thirty (30) days shall be deemed approved. Franchisor may upon thirty (30) days notice revoke its approval of any advertising and promotion previously approved.

7.4 At such time as Franchisor shall determine that a franchise system level advertising program would contribute to an increase in the goodwill associated with the EPCON Communities franchise system and the Marks, Franchisee, beginning upon the date of a written notice from Franchisor that such a program will be undertaken, shall begin to pay to Franchisor, or Franchisor's designee, an advertising fee ("Advertising Fee") as hereinafter described. The Advertising Fee during the remainder of the calendar year of the date of Franchisor's written notice shall be \$300 per condominium unit. Such Advertising Fee shall be payable to Franchisor at the same time that Franchisee pays to Franchisor all or any portion of a Project Fee. The number of condominium units for which the Advertising Fee shall be payable at any time shall be determined, as provided in Article 5 hereof, based upon the number of condominium units that are represented by the portion of the Project Fee due to be paid to Franchisor at the same time. Franchisor shall have the right, in its sole discretion, during each subsequent calendar year, to increase the Advertising Fee to an amount that is as much as one hundred three percent (103%) of the Advertising Fee applicable during the immediately preceding calendar year. The provisions of Section 5.4 of this Agreement are applicable to Advertising Fee payments. Franchisor shall have the right to spend Advertising Fees paid by Franchisee to the franchise system level advertising program for advertising to promote the EPCON Communities franchise system at any geographic level, including without limitation, local, regional and/or national, and in any communication medium, that Franchisor deems, in its sole discretion, to be advantageous to the franchise system or any part thereof.

Article 8 Uniformity of, and Modifications to, the Development System

8.1 Franchisee understands and acknowledges that the Development System is a complete and unified system for the construction, marketing and management of the Project(s) and that every detail of the Development System is important to the use thereof by Franchisee in order to maintain high and uniform standards, as well as to maximize the opportunity for the success of the Project(s). By accepting the franchise and license granted hereby, Franchisee is agreeing to utilize the entire Development System without modification thereto. Franchisee shall not deviate from or modify the Development System without the prior written approval of Franchisor.

8.2 Notwithstanding the foregoing, any changes or modifications made by Franchisee to the Development System or to any of its parts may be used by Franchisor for its benefit or for the benefit of any of its other franchisees, licensees or agents, and such changes or modifications shall become the property of Franchisor. However, nothing contained herein shall be construed to impose upon Franchisor an obligation to so adopt or use any such changes or modifications nor shall Franchisor be responsible for any payment to Franchisee therefor.

8.3 Franchisee acknowledges that deviation from and/or modification to the Development System does not abrogate its responsibility to comply with all terms of this Agreement, including but not limited to payment of amounts due to Franchisor as specified in Article 5 hereof. Franchisee's deviation from and/or modification to the Development System without the prior written approval of Franchisor, shall, however, terminate Franchisor's obligation to comply with Section 7 of the applicable Market Area Agreement(s), pursuant to which Franchisor, under certain conditions as set forth in said Section 7, agrees to refrain from itself constructing, and from granting to other licensees the right to construct, Projects within Franchisee's Market Area (as defined in the Market Area Agreement).

Article 9 **Development System Compliance**

9.1 Franchisor's affiliate, EPCON Communities, Inc., has used the Development System to assist it in obtaining permits and other governmental approvals under varying circumstances. Notwithstanding this, Franchisor does not warrant or represent herein, and hereby disclaims any such warranty and/or representation, express or implied, that the Development System will comply with any applicable building code requirements or any other applicable federal, state or local laws, or will be adequate for Franchisee's use in any way including, but not limited to, assisting Franchisee in obtaining permits and approval for Franchisee's Project(s). Franchisee (a) recognizes that the provisions of this limitation are a material factor in Franchisor's grant of the franchise and license for the amounts of the fee(s) provided hereunder, and (b) agrees that any accommodation to Franchisee by Franchisor shall not be taken to establish any liability of Franchisor or any contract term inconsistent herewith.

9.2 Franchisee understands and acknowledges that, due to the continual evolution of the plans, and the other materials referenced above, and the volume of detailed information and data contained therein, there are likely to be some inaccuracies and/or items subject to specific local or other requirements which will require correction, at Franchisee's expense, by Franchisee's architects, engineers, contractors, counsel and/or other professionals as work progresses. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, make any changes or modifications including, but not limited to, the seal or stamp of a registered architect, to the plans, specifications or any other part of the Development System used or proposed for use for or at its Project(s) which changes or modifications are necessitated by any applicable zoning and building codes, permit requirements, or any other federal, state or local laws, including, without limitation, licensing requirements for contractors, property managers and real estate salespersons, the formation and management of condominium associations, occupational health and safety on the construction site, housing finance, equal housing laws, the Fair Housing Act and the Americans with Disabilities Act, as well as the Accessibility Guidelines promulgated under each of these acts. Franchisee further acknowledges that it possesses sole responsibility hereunder to comply with all applicable laws in the marketing of condominium units in its projects, including, without limitation, the Fair Housing Act. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, have the seal or stamp of a registered architect affixed to said plans. No changes, however extensive, shall operate to relieve Franchisee of its obligations to make payments due to Franchisor pursuant to the terms of this Agreement.

9.3 Throughout the term hereof, Franchisor agrees to provide to Franchisee, upon Franchisee's request, modifications or improvements made by Franchisor to the architectural plans and specifications. Modifications and improvements to other areas of the Development System shall be provided to Franchisee at Franchisor's sole and absolute discretion. All such modifications and improvements to be provided to Franchisee shall be provided by Franchisor at no additional cost to Franchisee and shall be distributed not more often than once annually. Modifications and improvements so provided to Franchisee shall be for the standard Development System and will not be subject to further modification by Franchisee for any changes made by Franchisee pursuant to Section 8.2 above. Notwithstanding any provision hereof to the contrary, Franchisor reserves the right, within its sole discretion, to discontinue providing updated information to Franchisee respecting modifications and improvements to the Development System if Franchisee has substantially completed construction of all Projects hereunder and is not actively pursuing development of another Project.

Article 10
Confidentiality; Non-Disclosure; Proprietary Information

10.1 Franchisor and Franchisee acknowledge and agree that the Development System constitutes a "trade secret" as defined in Ohio Revised Code Section 1333.61, and, as such, is entitled to all rights and protection as are afforded to trade secrets under Ohio, and any other applicable, law.

10.2 Neither Franchisee nor any of Franchisee's affiliates, owners, agents, or employees shall communicate or otherwise divulge to, or use for the benefit of, any other person or entity, any information or knowledge, no matter how derived, concerning the Development System. Franchisee is granted the specific and limited right to divulge information respecting the Development System to those individuals who must have access thereto in order to develop any Projects which are the subject hereof. All information and knowledge provided by Franchisor to Franchisee, including by way of illustration but not of limitation, drawings, specifications, techniques, and written material, shall be deemed confidential for the purposes of this Agreement.

10.3 Franchisee acknowledges that the Development System, including any modifications or derivations of the Development System or any of its parts, remains the exclusive property of Franchisor, even after its use by Franchisee. Franchisee agrees that it shall not use the Development System, or any portion thereof, at any time, except in strict accordance with the terms of this Agreement and, after the termination of this Agreement it shall not use in any manner the Development System or any of its parts, or any system, plans, materials, or designs resembling in any way the Development System.

10.4 Franchisee shall include in all advertising, sales and other published literature relating to Franchisor's architectural work ("Buildings") licensed hereunder that the Buildings are covered by U.S. Design Patent Nos. 336,137; 342,576; 342,577; 343,459 and 396,298, and are used under license from EPCON Communities Franchising, Inc.

10.5 Franchisee acknowledges that the Buildings and all related illustrations, plans, blueprints, sketches, drawings, or any other tangible expression of the Buildings (the "EPCON Communities Works") are protected under the Architectural Works Copyright Act of 1990. Franchisee shall not build, license, transfer, reproduce or duplicate in any way the EPCON Communities Works except as expressly provided for in this Agreement. In the event that any documentation provided to Franchisee by Franchisor bears a copyright notice, Franchisee shall not remove such notice from said documentation, and such notice shall be retained or reproduced in its exact form on all authorized copies and versions of such documentation, both in machine and human readable language. Franchisee shall not distribute Franchisor's copyrighted documentation or the EPCON Communities Works to a third party, except as provided for in the Agreement or otherwise with specific written authorization from Franchisor.

10.6 Franchisee shall not, during the term of this Agreement, without the prior written consent of Franchisor, own, develop, construct or have any interest in any real estate development project involving single story multi-family residential buildings of two to four units or which is otherwise similar to an EPCON Communities Project; provided, however, that this provision shall not apply to the involvement by Franchisee in the development of other EPCON Communities Projects by other franchisee business entities, or to any ownership by Franchisee of less than three percent (3%) of the outstanding stock of any publicly held corporation.

Article 11
Completion of Project(s)

11.1 A Project shall be determined to be completed when either a temporary or permanent occupancy permit has been issued for all buildings within the Project.

11.2 Upon completion of the Project, Franchisee shall do the following:

11.2.1 Promptly notify Franchisor in writing that the Project is complete as defined in Section 11.1 above.

11.2.2 Promptly pay to Franchisor all sums owing or accrued. The sums shall include interest, any damages, costs, and expenses, including reasonable attorneys' fees and disbursements, incurred by Franchisor by reason of a default by Franchisee under the terms of this Agreement or any other agreement by and between Franchisor and Franchisee.

11.2.3 Immediately cease to use, in any manner whatsoever, the Development System, except as authorized under a Market Area Agreement or Agreements.

11.2.4 Within thirty (30) days of the sale of the last unit in a Project, Franchisee shall provide to Franchisor a complete report respecting the revenues and expenses of the Project in the form prescribed by Franchisor. Franchisee hereby grants to Franchisor its consent to disclose the information contained in such reports in Franchisor's Uniform Franchise Offering Circular and as required in the franchise sales disclosure process.

11.2.5 Notwithstanding anything contained herein, Franchisee's lender shall have the right to complete any Project which is the subject hereof, so long as (a) all fees and other amounts due Franchisor under this Agreement are timely paid in full; (b) such lender complies with the terms of this Agreement as such terms apply to and obligate Franchisee; and (c) such lender executes a Lender Assignment Agreement included as Exhibit 6, attached to this Agreement.

11.3 Franchisee agrees to use its best efforts to complete within a reasonable time each building begun in connection with any Project so that no building remains incomplete for more than one hundred fifty (150) days after commencement of construction of that building.

Article 12 Transfer by Franchisee

12.1 Franchisee understands and acknowledges that the rights and duties set forth in this Agreement are personal to Franchisee and that Franchisor has granted this EPCON Communities franchise in reliance on Franchisee's business skills, professional reputation and financial capability. Accordingly, neither Franchisee nor any shareholder, partner, member, (including shareholders, partners or members of entities that have an ownership interest in Franchisee), or any immediate or remote successor to any part of Franchisee's interest in this EPCON Communities franchise shall sell, assign, transfer, pledge or encumber, by operation of law or otherwise, this Agreement or the franchise or licensed rights granted hereunder or any ownership interest in Franchisee or any ownership interest in an entity owning an interest in Franchisee without the prior written consent of Franchisor. Such transfer, sale, assignment, pledge or encumbrance not having the written consent of Franchisor shall be null and void and shall constitute a material breach of this Agreement, for which Franchisor may then terminate this Agreement. Franchisor shall not unreasonably withhold its consent to a transfer of any interest in Franchisee or in this EPCON Communities franchise, provided, however, that prior to the time of transfer, Franchisor may, in its sole discretion, require that:

- (a) All of Franchisee's accrued monetary obligations to Franchisor and all other outstanding obligations related to the business franchised hereunder shall have been satisfied;
- (b) The transferor's right to receive compensation, pursuant to any agreement or agreements for the purchase of any interest in Franchisee or in the business franchised hereunder, shall be subordinate and secondary to Franchisor's rights to receive any outstanding monetary obligation or other outstanding obligations due from transferor or Franchisee pursuant to this Agreement, and whether arising before or after the transfer;
- (c) Franchisee shall have executed a general release in a form satisfactory to Franchisor, effective as of the date of transfer, of any and all claims against Franchisor and its officers, directors, shareholders, and employees in their corporate and individual capacities, including, without limitation, claims arising under federal, state and local laws, rules and ordinances.
- (d) The transferee franchisee shall enter into a written assumption, in a form satisfactory to Franchisor, assuming and agreeing to discharge all of Franchisee's obligations under this Agreement prior to and after the date of the assumption;
- (e) The transferee franchisee shall demonstrate to Franchisor's satisfaction that he or she, if an individual, its general partners, if it is a partnership, its members, if it is a limited liability company, and its officers, directors and principal shareholders, if it is a corporation, meet(s) educational and managerial standards; possess(es) good moral character, reputation, and credit rating; has the aptitude and ability to conduct the business franchised hereunder (as may be evidenced by prior related business experience or otherwise); and has adequate financial resources and capital to operate the business franchised hereunder;
- (f) The transferee franchisee shall execute the then-current standard form of EPCON Communities Franchise Agreement and other ancillary agreements as Franchisor may require for the business franchised hereunder for a term ending as provided in Section 3.1 of this Agreement; and

- (g) At transferee franchisee's expense, and upon such other terms and conditions as Franchisor may reasonably require, the transferee franchisee shall complete each of the initial training sessions then in effect for new franchisees.

12.2 If Franchisee is a corporation, partnership, limited liability company, or similar entity, the terms of Section 12.1 shall apply to any sale, resale, pledge, assignment, transfer or encumbrance of any voting stock of, or other ownership interest in, Franchisee.

12.3 In connection with any transfer for which Franchisor grants its consent as described in Section 12.1 hereof, Franchisee shall pay to Franchisor a transfer fee to cover Franchisor's actual costs, and due diligence, administrative, legal and other expenses respecting the transfer.

12.4 In the event that Franchisee proposes to transfer all of its interest in the Franchisor franchise granted pursuant hereto to a corporation, partnership, or limited liability company solely for the convenience of ownership, the provisions of Sections 12.1, 12.2, and 12.3 hereof shall not apply; provided that Franchisor's consent to such transfer may, in its sole discretion, be conditioned upon the following requirements:

- (a) The transferee entity shall be newly organized and its Articles of Incorporation and Bylaws (or comparable governing documents for entities other than corporations) shall provide that its activities are confined exclusively to operate the business franchised hereunder and activities related thereto;
- (b) Franchisee shall identify to Franchisor all of the stockholders, directors, officers, partners and/or members of the transferee entity;
- (c) Franchisee shall enter into an agreement, in a form satisfactory to Franchisor, unconditionally guaranteeing the full payment and performance of the transferee entity's obligations to Franchisor;
- (d) Each stock (or other ownership interest) certificate of the transferee entity shall have conspicuously endorsed upon its face the following legend:

"The transfer of this [type of certificate] certificate is subject to the terms and conditions of a certain Franchise Agreement executed with EPCON Communities Franchising, Inc. Reference is made to the provisions of such Agreement and to the governing documents of this [type of transferee entity]."
- (e) Copies of the transferee entity's governing documents, including any resolutions authorizing entry into this Agreement, shall be furnished to Franchisor for its approval prior to the transfer; and
- (f) The name of the transferee business entity shall not, without Franchisor's prior written approval, consist of or contain any of Franchisor's Marks or any colorable variation thereof or any other mark in which Franchisor has or claims a proprietary interest.

12.5 In the event that Franchisee desires to form a business entity having identical or substantively identical common ownership with Franchisee and to sublicense its rights and obligations hereunder to the new entity (the "Sublicensee") in order that the Sublicensee might develop a Project and, after receiving Franchisee's request in writing to do so and such information about the proposed sublicensing arrangement and the entities involved as Franchisor requests, Franchisor, in its sole discretion, consents to same, Franchisee may execute with the Sublicensee a Sublicense Agreement in the form attached hereto as Exhibit "5". Any such sublicense arrangement not having the written consent of Franchisor shall be null and void and shall constitute a material breach of this Agreement, for which Franchisor may then terminate this Agreement. Franchisor reserves the right hereunder not to consent to any sublicense arrangement proposed by Franchisee involving an entity not having identical or substantially identical common ownership with Franchisee. Franchisor may, in its sole discretion, require that, prior to the effective date of the Sublicense Agreement, (a) all of Franchisee's accrued monetary obligations to Franchisor shall have been satisfied, and (b) the Sublicensee entity possesses a good credit rating and has adequate financial resources and capital to develop a Project. The Sublicensee shall be required to execute with Franchisor a Market Area Agreement substantially in the form attached hereto as Exhibit "1" for the location proposed for Sublicensee's Project.

12.6 All materials required by federal or state law for any direct or indirect offer or sale of securities of Franchisee shall be submitted to Franchisor for review and consent, prior to their being filed with any government agency; and any materials to be used in any exempt offering shall be submitted to Franchisor for review and consent prior to their use. No such materials shall imply (by use of the Marks or otherwise) that Franchisor is participating as an

underwriter, issuer, or offeror of Franchisee's or Franchisor's securities. Any review by Franchisor of the offering materials or the information included therein will be conducted solely for the benefit of Franchisor to determine conformance with Franchisor's internal policies, and not to benefit or protect any other person. No investor should interpret such review by Franchisor as an approval, endorsement, acceptance, or adoption of any representation, warranty, covenant, or projection contained in the materials reviewed; and the offering documents shall include such legends and statements as Franchisor may specify, including, but not limited to, legends and statements which disclaim Franchisor's liability for, or involvement in, the transaction described in the offering documents. Franchisee and the other participants in the offering must agree in writing to fully indemnify Franchisor in connection with the offering in the form prescribed by Franchisor. For each proposed offering, Franchisee shall pay Franchisor a non-refundable fee of Ten Thousand Dollars (\$10,000), or such greater amount as may be necessary to reimburse Franchisor for its reasonable costs and expenses associated with reviewing the proposed offering, including, without limitation, legal and accounting fees and disbursements. Franchisee shall give Franchisor written notice at least sixty (60) days prior to the date of commencement of any offering covered by this Section 12.6. Any such offering shall comply with Franchisor's written policies adopted and announced by Franchisor from time to time. Franchisor hereby reserves its right in its sole discretion not to grant consent to Franchisee for such an offering, and, if such consent is withheld, Franchisee shall be prohibited hereunder from issuing such an offering. In the event of Franchisor's grant of consent respecting an offering described under this Section 12.6, the provisions of Section 5.7 of this Agreement shall not apply.

Article 13

Default; Termination

13.1 If Franchisee becomes insolvent or makes an assignment for the benefit of creditors, or if a petition in bankruptcy is filed by Franchisee, or such a petition is filed against Franchisee and either is consented to by Franchisee or is not dismissed within thirty (30) days, or if a bill in equity or other proceeding for the appointment of a receiver of Franchisee or other custodian for Franchisee's business or assets is filed and either is consented to by Franchisee or is not dismissed within thirty (30) days, or a receiver or other custodian of Franchisee's property or any part thereof is appointed by a court of competent authority, or if proceedings for composition with creditors under any state or federal law should be instituted by or against Franchisee or if the real or personal property of Franchisee shall be sold after levy thereupon by any sheriff, marshal, or constable, then upon the occurrence of any of such events, Franchisee shall be deemed to be in default under this Agreement and all rights granted by Franchisor hereunder shall thereupon terminate without any need for notice to Franchisee, and this Agreement shall thereupon be terminated.

13.2 Franchisee shall also be in default under this Agreement upon the occurrence of any of the following:

13.2.1 Franchisee fails, refuses, or neglects to pay when due to Franchisor any monies owed to Franchisor;

13.2.2 Franchisee fails to satisfactorily complete the initial training program to the satisfaction of Franchisor as set forth in Section 5.12 and fails to arrange for its representative to attend and complete such initial training program to the satisfaction of Franchisor;

13.2.3 Franchisee fails to furnish to Franchisor any report or information required under this Agreement;

13.2.4 Franchisee fails to develop its Projects and to operate hereunder in compliance with the terms of this Agreement, the applicable Market Area Agreement(s), the Operations Manual, the Development System and any quality or operations standards and guidelines issued in writing by Franchisor;

13.2.5 Franchisee fails, for a period of ten (10) days after receipt of notification of noncompliance, to comply with any federal, state or local law or regulation applicable to the operation of the development business franchised hereunder;

13.2.6 Any attempted transfer in violation of Article 12;

13.2.7 Any material misrepresentation by Franchisee relating to the acquisition of the franchise granted hereunder or any conduct by Franchisee that reflects materially and unfavorably upon the operation and reputation of Franchisee's development business franchised hereunder or upon Franchisor;

13.2.8 The conviction of Franchisee or its principals or officers of a felony or any other crime involving moral turpitude;

13.2.9 Franchisor makes a reasonable determination that the continued operation of the development business franchised hereunder or any Project developed hereunder by Franchisee will result in immediate danger to public health or safety and such default is not cured within three (3) days after notice from Franchisor to Franchisee;

13.2.10 Franchisor gives Franchisee a notice of default under this Section 13.2 after two previous defaults which have been cured after notice of default within the preceding twelve (12) month period;

13.2.11 The death of Franchisee, if Franchisee is an Individual;

13.2.12 Franchisee fails to comply with any of the obligations imposed upon Franchisee by this Agreement;

13.2.13 Franchisee communicates or divulges any information or knowledge concerning the Development System in violation of Article 10 hereof;

13.2.14 Franchisee fails to complete a Project as required under the terms of this Agreement.

13.3 Upon the occurrence of any of the events set forth in Section 13.2, Franchisor may, without prejudice to any other rights or remedies contained in this Agreement or provided by law or equity, terminate this Agreement. Such termination shall be effective thirty (30) days after written notice (or such longer period of notice as may be required by applicable state law) is given by Franchisor to Franchisee of any of the events set forth in Subsections 13.2.1, 13.2.3, 13.2.4, 13.2.5, 13.2.6, 13.2.12 or 13.2.14 of Section 13.2 if such defaults are not cured within the period. Such termination shall be effective immediately upon written notice upon the occurrence of the events set forth in Subsections 13.2.2, 13.2.7, 13.2.9, 13.2.10 or 13.2.13 of Section 13.2. Such termination shall be effective immediately without notice upon the occurrence of the events set forth in Subsections 13.2.8 or 13.2.11 of Section 13.2.

13.4 This Agreement shall automatically terminate on the later of (1) the date that is one year after the date of completion of Franchisee's last Project; or (2) the date that is one year after the expiration of Franchisee's last Market Hold Agreement with Franchisor.

13.5 Termination hereof shall not affect the obligations of Franchisee to pay all amounts due hereunder to Franchisor. Further, the obligations of Franchisee provided in Article 10 hereof, the remedies provided to Franchisor in Article 14 hereof, and the provisions of Sections 6.3, 20.2 and 20.3 hereof shall survive the termination of this Agreement.

13.6 Upon termination or expiration of this Agreement, Franchisee shall immediately terminate its use of the Marks, the EPCON Communities Works and the Development System and promptly return to Franchisor all materials provided to it by Franchisor.

13.7 For a period of three (3) years following the effective date of termination or expiration of this Agreement, whether by lapse of time or other cause, sale and/or assignment of the EPCON Communities franchise granted hereunder, Franchisee shall not, directly or indirectly, either as a principal, agent, employee, officer, director or member of any corporation or other business entity, as a partner or sole proprietor, or in any other way engage in the ownership, development or construction of any real estate development project involving single story multi-family residential buildings of two to four units within (a) ten (10) miles of the geographic border of any "Market Area" granted to any franchisee pursuant to any Market Area Agreement or other agreement that is effective between such franchisee and Franchisor, (b) ten (10) miles of the geographic border of any "Reserved Market Area" reserved for any franchisee or prospective franchisee under any Market Hold Agreement or other agreement that is in effect between such party and Franchisor, or (c) ten (10) miles of any real estate development project of EPCON Communities, Inc. or of any business entity affiliated with EPCON Communities, Inc. For the purposes of this Section 13.7 and Section 10.6 of this Agreement, the term "Franchisee" shall include any officer, director, shareholder, member or holder of an ownership interest in Franchisee, if Franchisee is a corporation, limited liability company or other business entity, and any partner of Franchisee, if Franchisee is a partnership.

Article 14 Remedies

14.1 Franchisor shall be entitled to any remedies available at law or in equity for any breach by Franchisee of any of Franchisee's covenants or obligations provided herein or provided in any Market Area Agreement.

14.2 Franchisee agrees that the existence of any claims of Franchisee against Franchisor, whether or not arising from this Agreement, shall not constitute a defense to the enforcement by Franchisor of the provisions of Article 5 hereof and/or the exercise by Franchisor of its rights under Article 13 hereof respecting Franchisee's noncompliance with the provisions of Article 5 hereof.

14.3 In the event that Franchisee breaches its covenants and obligations as provided in Sections 8.1 or 10.3 hereof (including without limitation the use by Franchisee of all or any portion of the Development System to develop a Project (or project) either not in compliance with this Agreement during its term or in any manner after the termination of this Agreement), Franchisee shall be obligated to pay to Franchisor liquidated damages in the following amounts: a fee of One Hundred Twenty Five Thousand Dollars (\$125,000) in connection with Franchisee's development of a Project (or project) of fifty (50) or fewer units and an additional fee of Two Thousand Five Hundred Dollars (\$2,500) per unit for each unit in a Project (or project) in excess of fifty (50) units, such fees to be separately applicable to each project developed by Franchisee in breach of Sections 8.3 or 10.3 hereof.

14.4 Franchisor shall be entitled, without bond, to the entry of temporary and permanent injunctions and orders of specific performance (a) enforcing the provisions of this Agreement relating to (i) Franchisee's use of the Development System and/or the Marks; (ii) any obligations of Franchisee surviving termination of this Agreement; or (iii) an assignment of this Agreement or the franchise and license granted hereunder or any ownership interest therein; and (b) as necessary to prohibit any act or omission by Franchisee or its employees that would constitute a violation of any applicable law, ordinance or regulation, or which is dishonest or misleading to Franchisor or the general public.

14.5 In the event a dispute arises under this Agreement, the prevailing party shall be entitled to receive its expenses, including attorneys' fees and disbursements and accounting fees and disbursements, in addition to any other relief to which it is found entitled.

Article 15 Independent Contractor

15.1 It is understood and agreed that Franchisee is an independent contractor and nothing in this Agreement shall create a partnership, employment or agency relationship between Franchisor and Franchisee or authorize Franchisee to make any contract, agreement, warranty or representation on Franchisor's behalf, or to incur any debt or other obligation in Franchisor's name, and that Franchisor shall in no event assume liability for, or be deemed liable hereunder as a result of, any such action, or by reason of any act or omission of Franchisee in any of its operations hereunder or any claim or judgment arising therefrom against Franchisor. Franchisee further acknowledges and agrees that Franchisor owes no fiduciary duty whatsoever to Franchisee.

Article 16 Indemnification and Insurance

16.1 Franchisee shall indemnify and hold harmless, to the fullest extent permitted by law, Franchisor, its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership, and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses or obligations including without limitation compensatory, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, Franchisee's ownership or operation of its business hereunder and/or its use or utilization of the Development System, including without limitation the use of any architectural plans and designs provided by Franchisor. In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving Franchisor, Franchisee shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at Franchisee's sole cost and expense or shall cause it to be resisted or defended by an insurer. Franchisee shall also make every reasonable effort to seek to have Franchisor dismissed or released from liability in the event of such action, suit, proceeding, investigation, inquiry, claim or demand. Franchisor shall have the right to resist and defend itself in and/or against any such action, suit, proceeding, investigation, inquiry, claim or demand, and, upon receipt of written notice from Franchisor of the amount expended by Franchisor in such defense, Franchisee shall, within ten business days of such receipt, reimburse Franchisor in full for the total amount of such expenses.

16.2 Franchisee shall, at all times during the term of this Agreement and at its own expense, keep in force by advance payment of premium general liability insurance in an amount not less than One Million Dollars (\$1,000,000.00) per occurrence and in the amount of not less than Two Million Dollars (\$2,000,000.00) annual aggregate, arising out of a single accident, and with a deductible or self-insured retention on any such policy of not greater than One Thousand Dollars (\$1,000.00), or such other amounts of coverage and self-insurance as Franchisor may specify from time to time, insuring Franchisee against any liability that may accrue by reason of the development by Franchisee of Project(s). All policies of insurance to be maintained by Franchisee shall contain a separate endorsement naming Franchisor as an additional insured, as its interest may appear. All insurance shall be placed with an insurance carrier or carriers with an A.M. Best's rating of "A" and an A.M. Best's Class rating of "xlv" or better or be otherwise approved in writing by Franchisor, and shall not be subject to cancellation except upon ten (10) days written notice to Franchisor. All policies of insurance, or certifications for insurance with a copy of the original policy attached, showing full compliance with the requirements of this covenant, shall at all times be kept on deposit with Franchisor. On an annual basis, Franchisee shall provide to Franchisor evidence in the form of a certificate of insurance that such insurance remains in full force and effect.

Article 17 Waiver

17.1 No failure of Franchisor to exercise any power or right reserved to it hereunder, or to insist upon strict compliance by Franchisee with any obligation, covenant, or condition herein, and no custom or practice of the parties in variance with the terms hereof, shall constitute a waiver of Franchisor's right to demand strict compliance with the terms hereof. Waiver by Franchisor of any particular default by Franchisee shall not affect or impair Franchisor's right with respect to any subsequent default of the same or of a different nature; nor shall any delay, waiver, forbearance, or omission of Franchisor to exercise any power or right arising out of any breach or default by Franchisee of any of the terms, provisions, or covenants hereof affect or impair Franchisor's rights, nor shall such constitute a waiver by Franchisor of any right hereunder or of the right to declare any subsequent breach or default. Subsequent acceptance by Franchisor of the payments due to it hereunder shall not be deemed a waiver by Franchisor of any preceding breach by Franchisee of any terms, covenants, conditions, or obligations of this Agreement.

Article 18 Notices

18.1 All notices, payments, or other communications required or permitted to be given or made under this Agreement to Franchisor or to Franchisee shall be given in writing and shall be deemed to have been given if delivered by hand or by certified mail, postage prepaid, or by telecopier or telex (with a hard copy to be sent within forty-eight (48) hours following such electronic transmissions), or by any commercially reasonable overnight courier service providing a receipt of delivery, effective upon receipt thereof at the addresses set forth below:

If to Franchisor, to:
EPCON Communities Franchising, Inc.
500 Stonehenge Parkway
Dublin, Ohio 43017-5067
Attn.: Edward A. Bacome and
Philip G. Fankhauser
Facsimile: 614-761-1155

If to Franchisee, to:
Fankhauser Property Group, Inc.
300 E. John Street, Suite 126
Matthews, North Carolina 28105
Attn: Brock Fankhauser
Facsimile: 704-844-0188

18.2 Either of Franchisor and Franchisee may, by notice given to the other from time to time and at any time, designate a different entity, individual, or address for making payments required to be made or for the giving of notices or other communications.

Article 19
Complete Agreement

19.1 This Agreement, and the documents referred to herein, including without limitation any and all promissory notes given by Franchisee to Franchisor and any and all Market Area Agreement(s) and Market Hold Agreement(s) by and between Franchisor and Franchisee, shall be the entire, full, and complete agreement between Franchisor and Franchisee concerning the subject matter hereof and thereof. This Agreement supersedes all prior agreements, no other representation (other than the most recent version of Franchisor's Franchise Offering Circular provided to Franchisee) having induced Franchisee to execute this Agreement. There are no representations, Inducements, promises, or Agreements, oral or otherwise, between the parties not embodied herein which are of any force or effect with reference to this Agreement and the subject matter hereof. No amendment, change or variance from this Agreement shall be binding on either party hereto unless executed in writing by each.

Article 20
Miscellaneous Provisions

20.1 Severability. Each article, section, provision, and term of this Agreement shall be considered severable, and if, for any reason, any article, section, provision, or term herein is determined to be invalid and contrary to or in conflict with any existing or future law or regulation, such shall not impair the operation thereof nor affect the remaining portion of this Agreement. This Agreement will continue to be given full force and effect and bind the parties hereto. Any invalid article, section, provision, or term shall be deemed not to be a part of this Agreement.

20.2 Choice of Law. Except to the extent governed by the U.S. Trademark Act of 1946, as amended, this Agreement shall be deemed to have been entered into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles.

20.3 Venue. Except to the extent prohibited by applicable state law to the contrary, Franchisor and Franchisee agree that any litigation or legal action to enforce or relating to this Agreement and the relationship of the parties hereunder shall be filed in the United States District Court for the Southern District in Columbus, Ohio, or the Common Pleas Court of Franklin County, Ohio, and each of Franchisor and Franchisee hereby consents to the jurisdiction of such courts.

20.4 Benefit. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective and legal representatives, successors and permitted assigns and/or sublicensees.

20.5 Joint and Several Obligations. If Franchisee consists of more than one person, their liability hereunder shall be deemed to be joint and several.

20.6 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

20.7 Pronouns. The number and gender of each pronoun used in this Agreement shall be construed to be such number and gender as context, circumstances, or its antecedent may require.

20.8 Captions. The articles and section headings and other captions contained in this Agreement are contained only for convenience of reference and do not define, limit, explain, or modify this Agreement or its interpretation, construction, or meaning, and are not to be construed as part of this Agreement.

Article 21
Further Acknowledgments by Franchisee

21.1 By its signature set forth below, Franchisee acknowledges that:

- (a) It has received the materials specified in Section 4.1 hereof.
- (b) It has conducted an independent investigation and financial assessment of the business contemplated by this Agreement and the Market Area(s) in which the Project(s) is/are to be located and recognizes that it involves business risks making the success of the venture largely dependent upon the business abilities of Franchisee as well as other variables. Franchisor expressly disclaims the making of, and Franchisee acknowledges that it has not received or relied upon, any representations, warranties or guarantees,

express or implied, as to the potential volume, profits or success of the business venture contemplated by this Agreement.

- (c) It has no knowledge of any representations by Franchisor, or its officers, directors, shareholders, employees, agents or servants, about the business contemplated by this Agreement that are contrary to the terms of this Agreement or the documents incorporated herein, and further represents to Franchisor, as an inducement to its entry into this Agreement, that it has made no misrepresentations in obtaining this Agreement.
- (d) It has received, read and understood this Agreement and the attachments hereto, if any, Franchisor has had fully and adequately explained the provisions of each to its satisfaction; and Franchisor has afforded it ample time and opportunity to consult with advisors of its own choosing about the potential benefits and risks of entering into this Agreement.
- (e) It has received Franchisor's Franchise Offering Circular for the state in which the franchise is to be located at the earlier of the first personal meeting or ten (10) business days prior to the execution of any agreements or the payment of any consideration to Franchisor.
- (f) It is aware of the fact that some franchisees may operate under different forms of agreements, and consequently, that Franchisor's obligations and rights in respect to its various franchisees may differ materially in certain circumstances.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have duly executed and delivered this Agreement.

Franchisee: Fankhauser Property Group, Inc.

Witnesses as to Fankhauser Property Group, Inc.

Signature Mary Layton
Name Printed Mary Layton

Signature _____
Name Printed _____

By: Brock L. Fankhauser Date: 3.23.06
Brock L. Fankhauser, President

Franchisor: EPCON Communities Franchising, Inc.

Witnesses:

Signature – Witness as to P. Thomas Rothrauff
Name Printed _____

Signature – Witness as to Edward A. Bacome
Name Printed _____

By: P. Thomas Rothrauff
P. Thomas Rothrauff, Vice President and General Manager sum

By: Edward A. Bacome
Edward A. Bacome, Vice President Director sum
Date: March 30, 2006

EXHIBIT "1"
(to Franchise Agreement)

MARKET AREA AGREEMENT

This Market Area Agreement (this "Market Area Agreement") is made by and between EPCON Communities Franchising, Inc., an Ohio corporation having its principal business offices in Dublin, Ohio (hereinafter referred to as "Franchisor"), and Fankhauser Property Group, Inc., a(n) North Carolina corporation having its principal business offices at 300 E. John Street, Suite 126, Matthews, North Carolina 28105 (hereinafter referred to as "Franchisee"), to be effective as of the date executed by Franchisor as set forth on Page 3 hereof.

Pursuant to the terms of the Franchise Agreement, dated March 30 2006 made by and between the parties hereto (the "Franchise Agreement"), Franchisor and Franchisee make the following agreement, intending to be legally bound thereby:

1. Each term set forth herein having initial capital letters shall have the meaning as set forth herein or, if not defined herein, as specified in the Franchise Agreement.
2. For purposes of this Market Area Agreement, the term "Market Area" is intended to include the smallest specific geographic area that will generate the most purchaser support (typically between 60% and 70%) for a development. The area included within the Market Area typically takes into consideration existing natural and man-made boundaries and socioeconomic conditions. The Market Area for this Market Area Agreement shall be as depicted on the map attached hereto as Exhibit "A" and incorporated herein for all purposes.
3. Franchisor, having granted to Franchisee a license to use the Development System pursuant to the terms and conditions of the Franchise Agreement, desires to further protect its materials, reputation, and goodwill and to geographically limit use by Franchisee of the Development System in an ordered and controlled manner. Franchisee acknowledges that such restrictions are essential to the success of the Project and the projects of other franchisees and licensees of Franchisor.
4. Franchisee agrees to fully implement the Development System only within the Market Area depicted on Exhibit "A" and at the location or address hereinafter specified:

The Market Area is an approximately 14 mile by 5½ mile area in and around Mecklenburg County, North Carolina and York and Lancaster Counties, South Carolina. The exact location of the Project is near the intersection of SR 98 and SR 160.

Proposed Name of Project: Stonecrest Villas

Projected Number of Units in the Project: Ninety (90) Units

Franchisee hereby acknowledges that Franchisor's review and expressed opinion about Franchisee's proposed location is only Franchisor's opinion respecting how the site meets Franchisor's criteria for locations for EPCON Communities Projects and is based upon Franchisor's limited information about Franchisee's Market Area. It does not constitute a representation, warranty, or an acknowledgment by Franchisor or any employee or agent of Franchisor that an EPCON Communities Project at the proposed location will be successful. The decision of Franchisee to proceed with the development of an EPCON Communities Project at the proposed location shall be at the sole discretion of Franchisee based upon its independent analysis, and Franchisee hereby acknowledges and agrees that it shall not have any claim of any nature against Franchisor and its employees and agents if the EPCON Communities Project does not perform in accordance with the expectations of Franchisee.

5. Franchisee shall commence construction of the Project referenced in Section 4 of this Market Area Agreement on or before the second anniversary of the effective date of this Market Area Agreement.

Pursuant to the terms of Article 5 of the Franchise Agreement, the latest dates by which each of the Second Payment, Third Payment and Fourth Payment could be paid by Franchisee to Franchisor in compliance with the Franchise Agreement are as follows:

Latest date and amount of First Payment: Twenty-Six Thousand Dollars (\$26,000) due at execution of Market Area Agreement

Latest date and amount of Second Payment: Thirty-Four Thousand One Hundred Dollars (\$34,100) due at execution of Market Area Agreement.

Latest date and amount of Third Payment: Thirty-Eight Thousand Dollars (\$38,000) due no later than January 30, 2008.

Latest date and amount of Fourth Payment: Not applicable

6. At such time as Franchisee desires to make use of the Development System, including the use of any modification or alteration thereof, at any other location (whether within the Market Area depicted on Exhibit "A" hereto or within a different Market Area) or for any other Project, Franchisee agrees to provide written notification to Franchisor as is further described in Sections 3.4 and 3.5 of the Franchise Agreement. In the event that Franchisor agrees to Franchisee's request, Franchisee agrees that it shall provide to Franchisor a separately executed Market Area Agreement and shall pay to Franchisor, for such use of the Development System at such location, amounts in compliance with the payment formula and schedule set forth in Article 5 of the Franchise Agreement.
7. Franchisee acknowledges that it shall not use or allow to be used the Development System anywhere except at location(s) within the Market Area(s) specified in this or other Market Area Agreement(s) executed by and between Franchisor and Franchisee. Franchisee further acknowledges that any unauthorized and unacknowledged use would be in violation of the terms of this Market Area Agreement and of the Franchise Agreement and agrees that any such breach shall afford to Franchisor each of the rights and remedies set forth in the Franchise Agreement.
8. During the term of the Franchise Agreement, Franchisor agrees to grant to no other licensee or franchisee the right to commence construction (nor to itself commence construction) of a Project utilizing the Development System within the Market Area depicted on Exhibit "A" hereto as long as Franchisee is and has at all times during the term of the Franchise Agreement been in full compliance with each of the conditions set forth below:
 - a. Franchisee fully complies with the provisions of the Franchise Agreement and this Market Area Agreement; and,
 - b. Franchisee, when so requested by Franchisor, notifies Franchisor in writing, within thirty (30) days of its receipt of Franchisor's request, that it will, and does, execute a new Market Area Agreement for a second or subsequent Project within the Market Area and pays to Franchisor the applicable fee provided by the Franchise Agreement such execution and payment each to take place within the above-referenced thirty (30) day period. Franchisor shall only make such a request of Franchisee after (i) Franchisee has completed construction of all buildings of the initial Project in the Market Area and (ii) another franchisee or potential franchisee has notified Franchisor that it is willing and able to execute a Market Area Agreement for a location within the same Market Area or when Franchisor itself desires to construct a Project within the same Market Area.
9. Upon the earliest to occur of (a) Franchisee fails to comply with any provisions of the preceding Section 8, (b) the date of completion of all buildings in the Project described above in Section 4, (c) Franchisee's failure to commence construction of the Project referenced in Section 4 of this Market Area Agreement on or before the second anniversary of the effective date of this Market Area Agreement, or (d) as applicable, (i) the third (3rd) anniversary of the effective date of this Market Area Agreement, for a Project of eighty (80) or fewer units, (ii) the fourth (4th) anniversary of the effective date of this Market Area Agreement for a Project of eighty one (81) to one hundred forty (140) units inclusive, or (iii) the fifth (5th) anniversary of the effective date of this Market Area Agreement for a Project of more than one hundred forty (140) units, any exclusivity rights which Franchisee may have in the Market Area shall immediately terminate, and Franchisor shall have the right to grant to any entity the license to use, or may itself use, the Development System within the Market Area set forth in Exhibit "A".
10. This Agreement shall automatically terminate on the effective date of any termination or expiration of the Franchise Agreement.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF the parties hereto, intending to be legally bound hereby, have duly executed and delivered this Market Area Agreement.

Witnesses as to Fankhauser Property Group, Inc.

Signature Mary Layton
Name Printed: Mary Layton

Signature _____
Name Printed: _____

Franchisee: Fankhauser Property Group, Inc.

By: Brock L. Fankhauser Date: 3.23.06
Brock L. Fankhauser, President

Witnesses as to Epcon Communities

Signature – Witness as to P. Thomas Rothrauff
Name Printed: _____

Signature – Witness as to Edward A. Bacome
Name Printed: _____

Franchisor: EPCON Communities Franchising, Inc.

By: P. Thomas Rothrauff
P. Thomas Rothrauff, ~~Vice President and General~~ Manager sm

By: Edward A. Bacome
Edward A. Bacome, ~~Vice President~~ Director sm
Date: March 30, 2006

EXHIBIT "A"
(to Market Area Agreement)

All within Mecklenburg County, North Carolina and York and Lancaster Counties, South Carolina

That area located and included in the following described boundary.

Beginning at the Intersection of I-485 and SR 16.

From that point in a southerly direction along SR 16 to its intersection with the Mecklenburg-Union County Line;

From that point in a southwesterly direction along the Mecklenburg-Union County Line to its intersection with the North Carolina-South Carolina State Line;

From that point in a northwesterly direction along the North Carolina-South Carolina State Line to its intersection with US 521;

From that point in a southwesterly direction along US 521 to its intersection with SR 160;

From that point in a westerly direction along SR 160 to its Intersection with SR 160/Bus US 21;

From that point in a northwesterly direction along SR 160/Bus US 21 until it becomes just SR 160 to its intersection with SR 49;

From that point in a southwesterly direction along SR 49 to its intersection with Gray Rock Road;

From that point in a westerly direction along Gray Rock Road to its intersection with Island Cove Road;

From that point in a southerly direction along Island Cove Road until it comes to the edge of the shore of Lake Wylie;

From that point in a westerly, then northwesterly direction along Lake Wylie until it comes to the North Carolina-South Carolina State Line;

From that point in a northeasterly direction along the North Carolina-South Carolina State Line to its Intersection with SR 1105;

From that point in a northwesterly direction along SR 1105 to its intersection with SR 1102;

From that point in a northeasterly direction along SR 1102 until it becomes Youngblood Road to its intersection with SR 49;

From that point in a northeasterly direction along SR 49 to its intersection with Nevada Boulevard;

From that point in a southeasterly direction along Nevada Boulevard until it dead-ends, then continue until the line comes to I-77/US 21;

From that point in a southerly direction along I-77/US 21 to its intersection with the North Carolina-South Carolina State Line;

From that point in a southeasterly direction along the North Carolina-South Carolina State Line to its intersection with SR 3637;

From that point in a northeasterly direction along SR 3637 until it becomes Dorman Road to its intersection with S. Lancaster Highway;

From that point in a northwesterly direction along S. Lancaster Highway to its intersection with Carolina Place Parkway;

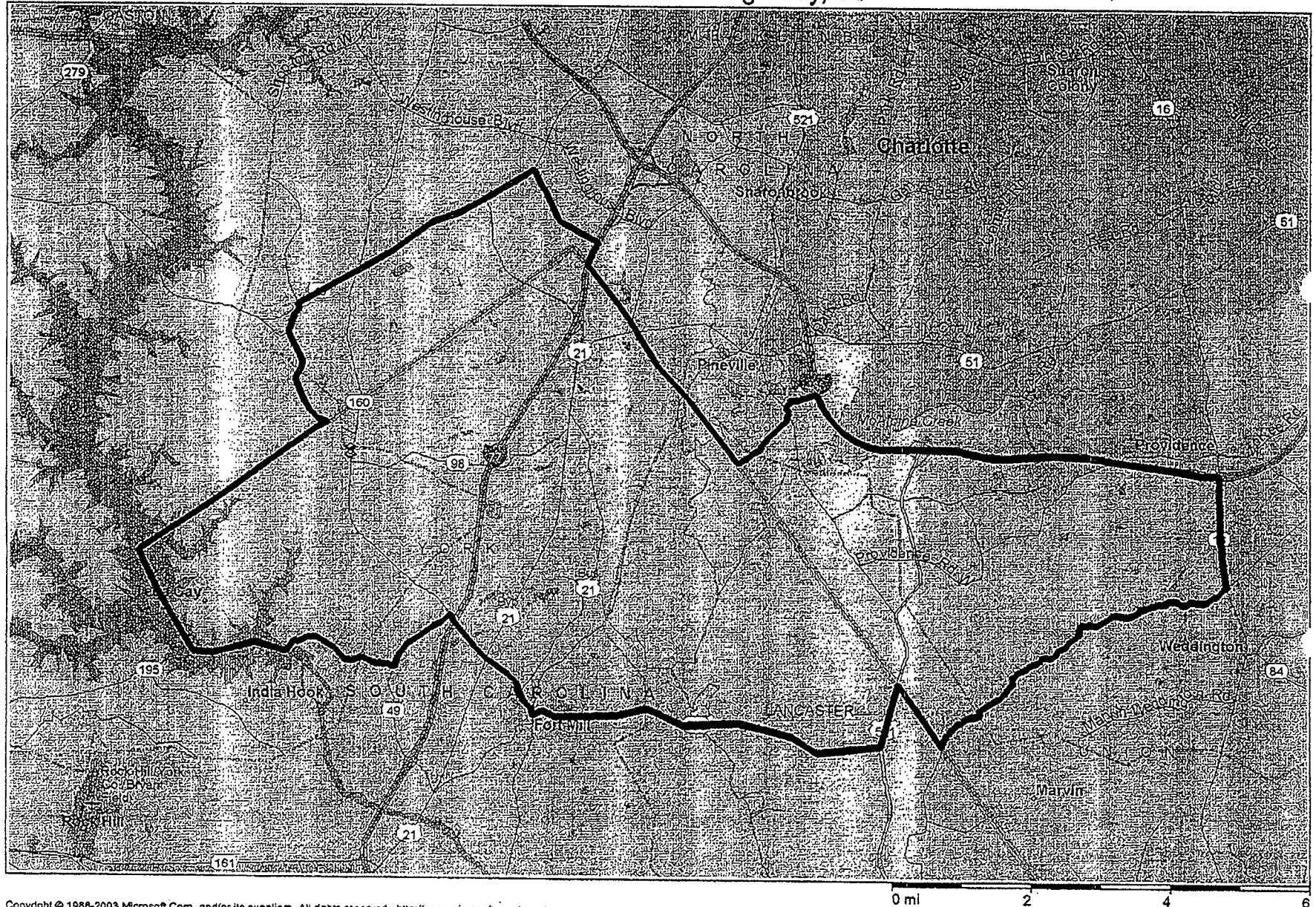
From that point in a northeasterly direction along Carolina Place Road to its Intersection with Park Road;

From that point in an easterly direction along Park Road to its intersection with I-485/US 521;

From that point in a southeasterly direction along I-485/US 521 until it becomes just I-485 to its intersection with SR 16, the point of the beginning.

And as depicted on the attached map as that area within the heavy dark line.

MA - Stonecrest Villas -Tega Cay, SC



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EXHIBIT B

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Juontonio Pinckney, *et al.*,)

Plaintiffs,)

vs.)

Epcon Communities, Inc.,)

Epcon Communities Franchising, Inc.,)

Brock L. Fankhauser, Fankhauser Property)

Group, Inc. and Stonecrest Villas of Tega)

Cay Home Owners Association, Inc.,)

Defendants.)

Fankhauser Prop. Group, Inc.,)

Third-Party Plaintiff,)

vs.)

Architectural Alliance, Ltd., Exterior)

Expressions of North Carolina, Inc.,)

Al-Mega Construction, Inc., Procar, Inc.,)

The Southeastern Group, Inc., Lucas Lawn)

and Landscape, Inc., and Jose Simenez,)

Individually and d/b/a M&L Roofing Co.,)

LLC and/or MB Roofing Company,)

Third-Party Defendants.)

Stonecrest Villas of Tega Cay)

Condominium Owners Association, Inc.,)

Third-Party Plaintiff,)

vs.)

Stonecrest Villas of Tega Cay, LLC and)

Epcon Communities Franchising, Inc.)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-46-2326

**AFFIDAVIT OF
JOEL D. RHOADES**

Exterior Expressions of North Carolina,	)
Inc.	)
	)
Fourth-Party Plaintiff,	)
	)
vs.	)
	)
Marcos Gonzalez,	)
	)
Fourth-Party Defendant.	)
	)
Procar, Inc. and Procar II, Inc.,	)
	)
Fourth-Party Plaintiffs,	)
	)
vs.	)
	)
Marcos Zertuche, David Carbajal,	)
Victorina Cortez, Balancos Construction	)
Co., Balanos Framing, Inc., Ricardo	)
Hernandez, and Silverio Cortez,	)
	)
Fourth-Party Defendants.	)
	)
Al-Mega Construction, Inc.,	)
	)
Fourth-Party Plaintiff,	)
	)
vs.	)
	)
Noe Perez, Juan Abundez Saucedo, and	)
Moisese Chavarra Hernandez,	)
	)
Fourth-Party Defendants.	)
	)

PERSONALLY APPEARED BEFORE ME, Mr. Joel D. Rhoades, who being duly sworn, hereby declares under penalty of perjury the following:

1. My name is Joel D. Rhoades, and I am an adult over the age of eighteen and competent to give this Affidavit.
2. This Affidavit is based upon my personal knowledge.

3. I am, and at all times relevant to the most recent operative amendment to the Complaint in the above-captioned action was, the Vice-President, Secretary, and General Counsel of Epcon Communities, Inc. ("ECI") and Epcon Communities Franchising, Inc. ("ECFI").

4. As Secretary of ECI and ECFI, I am familiar with the corporate records of both entities.

5. ECI and ECFI are separate legal entities under common ownership by shareholders who are natural individuals.

6. As an officer of ECI and ECFI, I have general knowledge, or access to knowledge, regarding the operations of ECI and ECFI, and I am familiar with the facts of the above-captioned action.

7. Neither ECI nor any of its employees had any involvement in the "Project," which consisted of the development, construction, marketing, sale, or maintenance of the condominium development in York County, South Carolina known as Stonecrest Villas of Tega Cay ("SVTC"), which Project is the subject of the above-captioned action.

8. ECI did not enter into any contracts pertaining to the Project, including without limitation, contracts for the sale of condominium units.

9. ECFI is the owner of intellectual property rights consisting of a proprietary condominium development system (the "Development System").

10. ECFI, pursuant to a Franchise Agreement dated March 30, 2006, licensed to Fankhauser Property Group, Inc. ("FPG") the rights to use the Development System in the Project.

11. With regard to the Project, ECFI was a mere licensor of intellectual property rights pursuant to a Franchise Agreement.

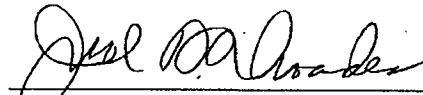
12. Neither ECFI nor any of its employees had any direct involvement in the Project.

13. ECFI did not enter into any other contracts with respect to the Project, including without limitation, contracts for the sale of condominium units.

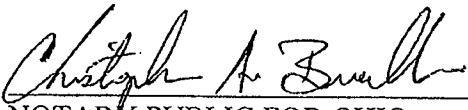
14. No representatives from ECI or ECFI visited the site of the Project during the development and construction thereof.

15. I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate to the best of my knowledge.

FURTHER THIS AFFIANT SAYETH NAUGHT.


Joel D. Rhoades

SWORN to before me this
22ND day of December, 2011


NOTARY PUBLIC FOR OHIO
My Commission Expires: NO EXPIRATION DATE



Christopher A. Buerkle, Attorney At Law
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Sec. 147.03 R.C.

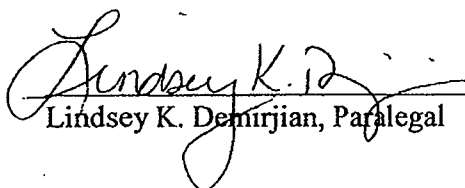
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify on January 9, 2012, a true and correct copy of *Defendant Epcon Communities, Inc.'s and Defendant/Third-Party Defendant Epcon Communities Franchising, Inc.'s Motion for Summary Judgment On Their Cross-Claims Against Fankhauser Property Group, Inc.* was served via US Mail and e-mail upon Graham P. Powell, Esquire, Attorney for Defendants Brock L. Fankhauser, Fankhauser Property Group, Inc. and Stonecrest Villas of Tega Cay, LLC, and via e-mail upon the remaining parties as follows:

J. Cameron Halford, Esquire Halford, Niemiec & Freeman, LLP 238 Rockmont Drive Fort Mill, SC 29708 <i>Attorney for Plaintiffs</i>	Bonum S. Wilson, III, Esquire Wilson & Heyward PO Box 13177 Charleston, SC 29422 D. Andrew Williams, Esquire Turner, Padget, Graham & Laffey, PA PO Box 1473 Columbia, SC 29202 <i>Attorneys for Third-Party Defendants Jose Simenez, Individually and d/b/a M&L Roofing Co., LLC and/or MB Roofing Company</i>
Curtis W. Dowling, Esquire Barnes Alford Stork & Johnson, LLP 1613 Main Street (29201) PO Box 8448 Columbia, SC 29202 <i>Attorney for Defendant and Third-Party Plaintiff Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.</i> Brett E. Dressler, Esquire Sellers Hinshaw Syers Dortch & Lyons, PA 301 S. McDowell Street Charlotte, NC 28204 <i>Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc. (Cross-Claims and Third-Party Complaint)</i>	Payton D. Hoover, Esquire Dean & Gibson, PLLC Cameron Brown Building, Suite 900 301 South McDowell Street Charlotte, NC 28204-2686 <i>Attorney for Lucas Lawn and Landscape, Inc.</i>

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 C.C.C.P. & GS
 YORK COUNTY, SC

Tracy T. Vann, Esquire Hamilton Martens & Ballou, LLC PO Box 10940 Rock Hill, SC 29731 <i>Attorney for Third-Party Defendant Al-Mega Construction, Inc.</i>	Thomas F. Dougall, Esquire Law Offices of Thomas F. Dougall 1700 Woodcreek Farms Road, Suite 100 Elgin, SC 29045 <i>Attorney for Third-Party Defendant Pro-Car, Inc.</i>
Sarah E. Wetmore, Esquire Carlock Copeland & Stair, LLP 40 Calhoun Street, Suite 400 Charleston, SC 29401-3001 <i>Attorney for Third-Party Defendant The Southeastern Group</i>	Christy E. Mahon, Esquire Sweeny Wingate & Barrow 1515 Lady Street Columbia, SC 29201 <i>Attorney for Third-Party Defendant and Fourth-Party Plaintiff Exterior Expressions of North Carolina, Inc.</i>
Brian C. Wolfe, Esquire Clawson & Staubes, LLC 756 Tyvola Road, Suite 130 Charlotte, NC 28217 <i>Attorney for Fourth-Party Defendant Marcos Gonzalez</i>	


Lindsey K. Demirjian, Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Juontonio Pinckney, *et al.*,

Plaintiffs,

vs.

Epcon Communities, Inc.,
Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property
Group, Inc. and Stonecrest Villas of Tega
Cay Home Owners Association, Inc.,

Defendants.

Fankhauser Prop. Group, Inc.,

Third-Party Plaintiff,

vs.

Architectural Alliance, Ltd., Exterior
Expressions of North Carolina, Inc.,
Al-Mega Construction, Inc., Procar, Inc.,
The Southeastern Group, Inc., Lucas Lawn
and Landscape, Inc., and Jose Simenez,
Individually and d/b/a M&L Roofing Co.,
LLC and/or MB Roofing Company,

Third-Party Defendants.

Stonecrest Villas of Tega Cay
Condominium Owners Association, Inc.,

Third-Party Plaintiff,

vs.

Stonecrest Villas of Tega Cay, LLC and
Epcon Communities Franchising, Inc.

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-46-2326

The Honorable John C. Hayes, III

**MEMORANDUM IN SUPPORT OF
EPCON COMMUNITIES, INC.'S AND
EPCON COMMUNITIES FRANCHISING,
INC.'S MOTION FOR SUMMARY
JUDGMENT ON THEIR CROSS-CLAIMS
AGAINST
FANKHAUSER PROPERTY GROUP, INC.**

FILED-RECEIVED
2012 MAR 22 AM 8:39
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

Exterior Expressions of North Carolina, Inc.)
)
)

Fourth-Party Plaintiff,)
)
)

vs.)
)
)

Marcos Gonzalez,)
)
)

Fourth-Party Defendant.)
)
)

Procar, Inc. and Procar II, Inc.,)
)
)

Fourth-Party Plaintiffs,)
)
)

vs.)
)
)

Marcos Zertuche, David Carbajal,)
Victorina Cortez, Balancos Construction)
Co., Balanos Framing, Inc., Ricardo)
Hernandez, and Silverio Cortez,)
)
)

Fourth-Party Defendants.)
)
)

Al-Mega Construction, Inc.,)
)
)

Fourth-Party Plaintiff,)
)
)

vs.)
)
)

Noe Perez, Juan Abundez Saucedo, and)
Moisese Chavarra Hernandez,)
)
)

Fourth-Party Defendants.)
)
)

In support of their Motion for Summary Judgment on their cross-claims against Fankhauser Property Group (FPG), Epcon Communities, Inc. (ECI) and Epcon Communities Franchising, Inc. (ECFI) state as follows:

STATEMENT OF UNDISPUTED FACTS

This matter arises from a condominium development project in York County, South Carolina known as Stonecrest Villas at Tega Cay (the "Project"). Defendant FPG possessed the rights to develop the Project pursuant to a Franchise Agreement and Market Area Agreement between FPG and ECFI dated March 30, 2006 (collectively, the "Franchise Agreement"), a copy of which was attached to ECI/ECFI's Motion for Summary Judgment as Exhibit A.¹ Under the Franchise Agreement, ECFI is franchisor and FPG is franchisee. (Exhibit A at 1.) The franchise granted to FPG consists of the right to use the Development System, as that term is defined in Section 2.1.1 of the Franchise Agreement. (Exhibit A, § 1.1, 1.2 and 2.1.1) Plaintiffs' allegations in this lawsuit arise from FPG's use of the Development System. Specifically, Section 2.1.1 of the Franchise Agreement defines "Development System" as:

[ECFI's] method, pattern documents, materials, know-how, knowledge, process, and procedure used for development, construction, and marketing of the residential, multi-family community using a unique architectural design, as well as other proprietary and confidential information, including copyrighted and patented material, and material for which the copyright registration or patent is pending, including, without limitation, all architectural plans and specifications for two- and four-unit buildings, architectural plans and specifications for the clubhouse, site planning guidelines, and sample condominium association materials provided by [ECFI]. The Development System shall be deemed to include any method, pattern, process, or procedure used by [FPG] during the term of this Agreement, along with any modifications or changes thereto.

ECI is a legal entity separate from ECFI, but which is under common ownership with ECFI. *See* Affidavit of Joel Rhoades dated December 22, 2011 filed as Exhibit B to ECI/ECFI's Motion for Summary Judgment ("Rhoades Affidavit"), ¶ 5.

The Project was built by FPG as general contractor. *See* March 7 FPG Depo. at 283:14 and 284:8. Brock Fankhauser, owner of FPG, was deposed March 6-8 in both his individual

¹ For the Court's convenience, a copy of Exhibits A and B to ECI/ECFI's Motion are attached as Exhibits A and B hereto.

capacity and as corporate designee of FPG. Cited portions of the deposition of FPG are attached hereto as Exhibit C, and cited portions of the deposition of Brock Fankhauser individually are attached hereto as Exhibit D. The individual units at the Project were marketed and sold to Plaintiffs by Stonecrest Villas of Tega Cay, LLC, of which Brock Fankhauser was the sole member. There is no evidence that either ECI or ECFI had any communications with a prospective purchaser prior to their purchase of a condominium at the Project. *See Fankhauser Depo. at 313: 3-11.* ECI was neither party to the Franchise Agreement nor involved in the development, construction, marketing or sale of the Project or any units therein. Rhoades Affidavit, ¶ 7. *See March 6 Fankhauser Depo. at 314:6-23 and March 7 FPG Depo. at 85:16-25.* ECFI's role with regard to the Project was a mere licensor of intellectual property rights under the Franchise Agreement. Rhoades Affidavit, ¶ 11. It did not engage any construction, marketing or sale of any homes in the Project, *See id.* ¶ 12.

Plaintiffs allege their units suffer from recurring water intrusion and construction defects. *See Complaint, ¶ 20.* Plaintiffs further allege the units do not conform to the plans and specifications and model home designs used to advertise, market and sell units in the Project. *Id.* *See Complaint, ¶¶ 21 and 22(g).*

FPG agreed in the Franchise Agreement to defend and indemnify ECI and ECFI for claims arising from FPG's use of the Development System. Section 16.1 of the Franchise Agreement provides as follows:

[FPG] shall indemnify and hold harmless, to the fullest extent permitted by law, [ECFI], its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership [i.e. ECI], and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation, or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in

connection with, [FPG's] ownership or operation of its business hereunder and/or its use or utilization of the Development System, including without limitation the use of any architectural plans and designs provided by [ECFI]. In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving [ECFI], [FPG] shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at [FPG's] sole cost and expense or shall cause it to be resisted or defended by an insurer. [FPG] shall also make every reasonable effort to seek to have [ECFI] dismissed or released from liability in the event of such action, suit, proceeding, investigation, inquiry, claim or demand. [ECFI] shall have the right to resist and defend itself in and/or against any such action, suit, proceeding, investigation, inquiry, claim or demand, and, upon receipt of written notice from [ECFI] of the amount expended by [ECFI] in such defense, [FPG] shall, within ten business days of such receipt, reimburse [ECFI] in full for the total amount of such expenses.

FPG admits that ECFI fulfilled all of its obligations under the Franchise Agreement. *See* March 8 FPG Depo at 15:15-19. In fact, FPG admits it is not aware of any facts to support FPG's failure to defend and indemnify ECI and ECFI in this matter. *See* March 8 FPG Depo 14:21-25 and 15:1-14. ECI/ECFI asks this Court to find as a matter of law, that FPG is obligated to defend and indemnify ECI and ECFI for the claims asserted against ECI and ECFI by individual Plaintiffs and Third-Party Plaintiff Stonecrest Villas Condominium Association, Inc. ("COA").

PROCEDURAL HISTORY

Plaintiffs filed their Third Amended Complaint on September 16, 2011. The Complaint asserts the following causes of action against ECI and ECFI: Rescission, Breach of Contract, Fraud and Misrepresentation, Breach of Express Warranty, Breach of Implied Warranty of Merchantability, Breach of Implied Warranty of Fitness for a Particular Purpose, Breach of Express Warranties, and Unfair Trade Practices. Third-Party Plaintiff COA asserted claims against ECFI also arising from allegedly defective construction. ECI and ECFI timely answered

the Complaint and Third-Party Complaint and, in their Answers, asserted cross-claims against FPG for contractual and equitable indemnity.

ECI and ECFI demanded FPG assume the defense and indemnify ECI and ECFI for costs incurred in connection with this matter as provided by Section 16.1 of the Franchise Agreement. FPG has thus far refused to indemnify ECI/ECFI or assume their defense in this matter. On January 9, 2012, ECI and ECFI served their Motion for Summary Judgment against FPG on their contractual and equitable indemnification claims against FPG.

STANDARD OF REVIEW

A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCF. Because this is a Motion for Summary Judgment, the facts are viewed in the light most favorable to FPG, the non-moving party. *See* Rule 56, SCRCF; *see also SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990) (noting standard for summary judgment).

A party opposing a Motion for Summary Judgment “may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule must set forth specific facts showing there is a genuine issue for trial.” Rule 56(e), SCRCF. “The purpose of summary judgment is to expedite the resolution of cases that do not require a fact finder.” *Shirley’s Iron Works, Inc. v. City of Union*, 387 S.C. 389, 397, 693 S.E.2d 1, 5 (Ct. App. 2010).

LEGAL ARGUMENT

For purposes of this Motion, ECI and ECFI accept the facts in the light most favorable to FPG, as FPG is the non-moving party. Even so, ECI and ECFI are entitled to summary judgment on their cross-claims against FPG, for the reasons stated below:

I. ECI and ECFI are Entitled to Summary Judgment on their Contractual Indemnification Claim against FPG.

Under the Franchise Agreement, FPG is contractually obligated to defend and indemnify ECI and ECFI for the claims asserted against them in this action. The claims asserted by Plaintiffs and Third-Party Plaintiffs all arise from and in connection with FPG's use of the Development System. There is no dispute that ECI is an entity affiliated with ECFI (Franchisor) through common ownership. See March 8 FPG Depo at 13:20-24. Moreover, there is no evidence of any independent negligence on the part of either ECI or ECFI. Rather, the claims in this case all arise from FPG's construction, marketing and sale of the condominiums at Stonecrest Villas of Tega Cay. The crux of the Plaintiffs' claims is that the condominiums were defectively constructed. The allegations against ECI and ECFI all arise from FPG's use of the Epcon Communities trade name, which was permitted under the Franchise Agreement, including the Market Area Agreement attached as Exhibit 1 to the Franchise Agreement. The claims in this case are precisely the type of claims the defense and indemnification provision in Section 16.1 of the Franchise Agreement was intended to address.

The crux of this action is alleged defective construction in the Project. It is undisputed that FPG served as the general contractor for the Project. To develop and construct the Project, FPG licensed the Development System from ECFI pursuant to the terms of the Franchise Agreement. Among other things, the Development System includes *unstamped* architectural

plans and specifications and site planning guidelines. *See* Franchise Agreement, ¶4.1. The Franchise Agreement specifically required FPG to have its own architect seal and stamp the plans provided to it under the Franchise Agreement. Specifically, Section 9.2 of the Franchise Agreement provides as follows:

Franchisee understands and acknowledges that, due to the continual evolution of the plans, and the other materials referenced above, and the volume of detailed information and data contained therein, there are likely to be some inaccuracies and/or items subject to specific local or other requirements which will require correction, at Franchisee's expense, by Franchisee's architects, engineers, contractors, counsel and/or other professionals as work progresses. **Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, make any changes or modifications including, but not limited to, the seal or stamp of a registered architect, to the plans, specifications, or any other part of the Development System used or proposed for use for or at its Project(s) which changes or modifications are necessitated by any applicable zoning and building codes, permit requirements, or any other federal, state or local laws, including, without limitation, licensing requirements for contractors, property managers and real estate salespersons, the formation and management of condominium associations, occupational health and safety on the construction site, housing finance, equal housing laws, the Fair Housing Act and the Americans with Disabilities Act, as well as the Accessibility Guidelines promulgated under each of these acts. Franchisee further acknowledges that it possesses sole responsibility hereunder to comply with all applicable laws in the marketing of condominium units in its projects, including, without limitation, the Fair Housing Act.** Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, have the seal or stamp of a registered architect affixed to said plans. No changes, however extensive, shall operate to relieve Franchisee of its obligations to make payments due to Franchisor pursuant to the terms of this Agreement.

Therefore, it is the responsibility of FPG under the Franchise Agreement to ensure the plans and specifications are stamped or sealed by a registered architect and that they comply with all applicable legal requirements. Plaintiffs have not alleged any construction defect claims against ECI or ECFI. *See* Complaint, Thirteenth Cause of Action. Rather, Plaintiffs allege "the construction practices employed by Defendants Fankhauser Property Group, Inc. and Brock L. Fankhauser were carried out in a negligent and un-workmanlike manner and constitute violations

of building code, the franchised Epon Developmental System, Epon [sic] plans, Epon specifications and recommended materials.” *Id.* at ¶6. Notably, FPG does not claim any defect in the Development System or any of the materials ECFI provided FPG pursuant to the Franchise Agreement.

Section 20.2 of the Franchise Agreement contains a choice of law provision which provides, in pertinent part, that the Franchise Agreement “shall be deemed to have been entered into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles.” Choice of law clauses are generally honored in South Carolina. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011)(citing *Nucor Corp. v. Bell*, 482 F.Supp.2d 714, 728 (D.S.C. 2007)).

“If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined.” *Corporate Protection Servs., Inc. v. Guardian Alarm of Ohio*, 2012 WL 439645 (Ohio App. 2012) at *3. In *Corporate Protection*, the court found that the plain language of the indemnification clause in the contract provided indemnification if the indemnitor’s deficient performance of the contract resulted in litigation and if the deficient performance of the contract caused the indemnitee to become indebted to third parties. *Id.* at *5. The indemnification clause in the Section 16.1 of the Franchise Agreement is clear. FPG is obligated to indemnify and defend ECFI and ECFI for any litigation and costs incurred relating to FPG’s use of the Development System in developing and constructing the Project. Ohio law generally allows enforcement of indemnity agreements. *Glaspell v. Ohio Edison Co.*, 505 N.E.2d 264 (Ohio 1987). South Carolina law also permits indemnity agreements. *Toomer v.*

Norfolk Southern Ry. Co., 344 S.C. 486, 490, 544 S.E.2d 634, 635 (Ct. App. 2001) (right to indemnity may arise by contract...or by operation of law as a matter of equity).

The *Glaspell* court overturned a ruling by the trial court that an indemnity clause in an agreement between two utility companies failed to express in clear and unequivocal terms that the indemnitor was required to indemnify the indemnitee for the indemnitee's own alleged negligence. In fully enforcing the indemnity clause, the Ohio Supreme Court held that a narrow construction of the clause was unnecessary when "assented to in a context of free and understanding negotiation." *Glaspell*, 505 N.E.2d at 266. In concluding that the negotiation was a true bargained-for exchange, the Court noted the following about the parties:

The parties in this case before us are commercial enterprises of sufficient size and quality as to presumably possess a high degree of sophistication in matters of contract. They all provide services to the public as their means of producing income and customarily rely on contracts. Each has the financial power to provide against loss by insurance or other means.

Id. at 267.

Based on the foregoing, ECI and ECFI are entitled to indemnification and defense from FPG in this matter under the terms of the Franchise Agreement. Both are commercial enterprises that freely entered into the Franchise Agreement containing the indemnity clause. Moreover, ECI and ECFI deny any negligence on their part in this lawsuit, and there is no evidence in the record that would support a finding of negligence by either ECI or ECFI.

FPG may argue that Ohio Revised Code §2305.31 prevents indemnification in this matter. O.R.C. §2305.31 is analogous to the prohibition on certain hold harmless clauses in construction contracts contained in S.C. Code Ann. §32-2-10. O.R.C. §2305.31 is inapposite to this case in two respects. First and foremost, the contract between ECFI and FPG is not a construction contract. It is a franchise agreement pursuant to which ECFI licensed to FPG the

right to use certain of ECFI's intellectual property. FPG then used such intellectual property as the basis for his development of the Project. Second, O.R.C. §2305.31 does not apply to the Franchise Agreement as it is not a contract or agreement in which ECFI or ECI hired FPG to perform work, as is explicitly required under the statute. Third, Brock L. Fankhauser's deposition testimony on behalf of himself and FPG established that neither ECFI nor ECI independently marketed or sold units in the Project. *See also* Affidavit of Joel Rhoades dated December 20, 2011 filed with ECI and ECFI's Motion for Summary Judgment. There is nothing in the record to establish any independent negligence on the part of ECI or ECFI. Therefore, there are no legal barriers to the enforcement of the indemnification clause in the Franchise Agreement, and ECI and ECFI are entitled to its enforcement against FPG to the fullest degree.

II. ECI and ECFI are Entitled to Summary Judgment on their Equitable Indemnification Claim against FPG.

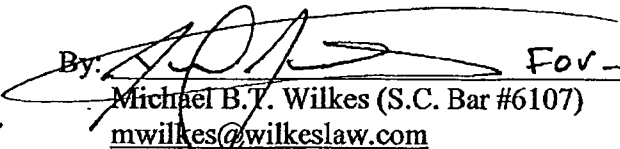
"According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." *Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). In this case, ECI and ECFI have been exposed to liability because of the alleged negligence of FPG. Plaintiffs have alleged that the Project was constructed in a defective manner. Plaintiffs, have not however, directed any construction defect allegations against ECI or ECFI. The allegations against ECI and ECFI essentially relate representations allegedly made to Plaintiffs during the sales process. However, Brock L. Fankhauser's own deposition testimony on behalf of himself and FPG establishes ECI and ECFI did not independently market or sell units in the Project. Therefore, nothing in the record establishes independent negligence of ECI

or ECFI. As such, ECI and ECFI are also entitled to equitable indemnification against FPG in this action. *Toomer v. Norfolk Southern Ry. Co.*, 344 S.C. 486, 491, 544 S.E.2d 634, 636 (Ct. App. 2001) (right to indemnity exists where one person is exposed to liability by the wrongful act of another in which he does not join).

CONCLUSION

For the foregoing reasons, ECI and ECFI are entitled to the entry of summary judgment on their claims of contractual and equitable indemnity against FPG.

March 20, 2012

By: 

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Attorneys for Epcon Communities, Inc. and
Epcon Communities Franchising, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify on March 20, 2012, a true and correct copy of *Memorandum in Support of Epcon Communities, Inc.'s and Epcon Communities Franchising, Inc.'s Motion to For Summary Judgment on its Cross-Claims Against Fankhauser Property Group, Inc.* was served via U.S. Mail and e-mail upon Morgan S. Templeton, Esquire and Graham P. Powell, Esquire, Attorneys for Defendant's Brock L. Fankhauser, Fankhauser Property Group, Inc. and Stonecrest Villas of Tega Cay, LLC, and via e-mail upon the remaining parties as follows:

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Curtis W. Dowling, Esquire Barnes Alford Stork & Johnson, LLP PO Box 8448 Columbia, SC 29202 <i>Attorney for Defendant and Third-Party Plaintiff Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.</i> Brett E. Dressler, Esquire Robert C. Dortch, Jr., Esquire Sellers Hinshaw Syers Dortch & Lyons, PA 301 S. McDowell Street Charlotte, NC 28204 <i>Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc. (Cross-Claims and Third-Party Complaint)</i>	Bonum S. Wilson, III, Esquire Wilson & Heyward PO Box 13177 Charleston, SC 29422 D. Andrew Williams, Esquire Turner, Padgett, Graham & Lane, PA PO Box 1473 Columbia, SC 29202 <i>Attorneys for Third-Party Defendants Jose Simenez, Individually and d/b/a M&L Roofing Co., LLC and/or MB Roofing Company</i>
Tracy T. Vann, Esquire Christi P. Cox, Esquire Hamilton Martens & Ballou, LLC PO Box 10940	Thomas F. Dougall, Esquire Law Offices of Thomas F. Dougall 1700 Woodcreek Farms Road, Suite 100 Elgin, SC 29045

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Stephanie Burton, Esquire Scott D. Spivey, Esquire Gibbs Burton, LLC 308 East St. John St. Spartanburg, SC 29302 <i>Attorneys for Architectural Alliance</i>	Elizabeth A. Martineau, Esquire Guiselle Mahon, Esquire Martineau King, PLLC PO Box 31188 Charlotte, NC 28231 <i>Attorneys for Noe Perez</i>

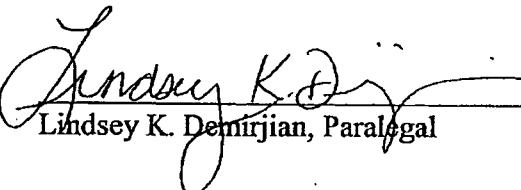

Lindsey K. Demirjian, Paralegal

EXHIBIT A

FRANCHISE AGREEMENT

This Franchise Agreement (this "Agreement") is made by and between EPCON Communities Franchising, Inc., an Ohio corporation having its principal business offices at 500 Stonehenge Parkway, Dublin, Ohio 43017 (hereinafter referred to as "Franchisor"), and Fankhauser Property Group, Inc., a(n) North Carolina corporation having its principal business offices at 300 E. John Street, Suite 126, Matthews, North Carolina 28105 (hereinafter referred to as "Franchisee"), to be effective as of the date executed by Franchisor as set forth on Page 19 hereof.

For and in consideration of the covenants and promises herein contained, Franchisor and Franchisee make the following agreement, intending to be legally bound thereby:

Article 1

The Development System and Franchisee's Acknowledgments

1.1 Franchisor, as a result of the expenditure of substantial time, effort, and money, has created a unique Development System (as hereinafter defined) for the purpose of providing guidance for development of ranch-style condominium dwellings. The essence of the Development System that Franchisor licenses to its franchisees to use is its architectural plans and designs. The Development System includes, without limitation, plans for specially designed structures which appear from all four sides as single-family residences. As a part of the franchise and license granted in Article 3 hereof, Franchisor shall provide the materials and services described in Article 4 hereof to enable Franchisee to implement the Development System at the location or locations and within the area or areas as set forth in one or more Market Area Agreements (the "Market Area Agreements") each substantially in the form attached hereto as Exhibit "1".

1.2 Franchisee, being cognizant of the distinctive significance and value thereof, desires to make use of and to enjoy the benefits of Franchisor's Development System. Franchisee acknowledges that the success of its use of the Development System depends upon its strict adherence to Franchisor's uniform standards, procedures, and plans, as well as Franchisee's business abilities and other variables. Franchisee agrees to preserve in every way possible the integrity of Franchisor's materials, reputation, and goodwill. Franchisee acknowledges that execution of at least one Market Area Agreement is required at the same time as the execution of this Agreement.

Article 2

Definitions of Certain Terms

2.1 Each term set forth in this Section 2.1 shall have the meaning specified herein:

2.1.1 "Development System" shall mean Franchisor's method, pattern, documents, materials, know-how, knowledge, process, and procedure used for development, construction, and marketing of the residential, multi-family community using a unique architectural design, as well as other proprietary and confidential information, including copyrighted and patented material, and material for which the copyright registration or patent is pending, including, without limitation, all architectural plans and specifications for two- and four-unit buildings, architectural plans and specifications for the clubhouse, site planning guidelines, production management guidelines, financial planning guidelines, marketing materials and guidelines, and sample condominium association materials provided by Franchisor. The Development System shall be deemed to include any method, pattern, process, or procedure used by Franchisee during the term of this Agreement, along with any modifications or changes thereto.

2.1.2 "Franchisor" shall mean EPCON Communities Franchising, Inc., an Ohio corporation, and any assignee of, or successor in interest to, EPCON Communities Franchising, Inc.

2.1.3 "Franchisee" shall mean the party so defined in the preamble hereto and any successor in interest to, or permitted assignee or sublicensee of, Franchisee. Franchisee shall also be deemed to include any principals, officers, owners, and directors of Franchisee, any principals, officers, owners, and directors of an entity having an ownership interest in Franchisee, and any others with any ownership or control interest whatsoever in the entity so defined in the preamble, if such entity is other than a natural person.

2.1.4 "Marks" shall mean all distinguishing characteristics of the Development System, including, without limitation, the name and mark "EPCON Communities", together with such other trade names, service marks, trademarks, and trade symbols, emblems, signs, slogans, insignia and copyrights as Franchisor has adopted and

designated for use in connection with its Development System and as Franchisor may hereafter acquire or develop and designate for use in connection with the Development System.

2.1.5 "Project" shall mean all of the development of buildings or appurtenant structures and improvements on common contiguous grounds by Franchisee, or any successor in interest to, or permitted assignee or sublicensee of, Franchisee, using the Development System. Such development shall be defined as a Project without consideration of the elapsed time required for development of the Project or of the development, marketing, or legal "phase" thereof.

Article 3 Grant of Franchise

3.1 Franchisor hereby grants to Franchisee, and Franchisee hereby accepts, a franchise and license to utilize the Development System subject to the terms, restrictions, and conditions of this Agreement and to the terms, restrictions, and conditions of the Market Area Agreement(s). The grant of such franchise to Franchisee shall be on a non-exclusive basis, except to the extent that certain rights of exclusivity are granted to Franchisee under certain conditions within a particular area or areas pursuant to the terms of one or more Market Area Agreement(s). The term of this Agreement and the franchise it grants shall commence as of the date of execution of this Agreement by Franchisor as shown on Page 19 hereof and shall continue until termination of this Agreement and the franchise as specified in Article 12 hereof.

3.2 Franchisor further grants to Franchisee, subject to the terms and conditions herein contained, a nonexclusive license to use the Marks as provided in Section 5.9 and Article 6 hereof in connection with Franchisee's use of the Development System.

3.3 As provided in Section 1.2 hereof, Franchisee and Franchisor shall execute at least one Market Area Agreement at the time this Agreement is executed. Such Market Area Agreement shall specify a Market Area (as defined in the Market Area Agreement) and a location for Franchisee's initial Project.

3.4 In the event that Franchisee desires to develop an additional Project or Projects at another location or locations within the Market Area of an already-existing Market Area Agreement between Franchisor and Franchisee, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days of its receipt of Franchisee's written request, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such Project(s), such approval shall be effective as of the execution by Franchisee of a new Market Area Agreement or Agreements using Franchisor's then current form of Market Area Agreement, setting forth the new location(s) within the Market Area and the payment by Franchisee of the applicable Project Fee(s) pursuant to the provisions hereof.

3.5 In the event that Franchisee desires to develop a Project at a location within a new Market Area, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such Project, such approval shall be effective as of the execution by Franchisee of a new Market Area Agreement using Franchisor's then current form of Market Area Agreement, setting forth the new Market Area and the location of the Project therein, and the payment by Franchisee of the applicable Project Fee(s) pursuant to the provisions hereof.

3.6 In the event that Franchisee desires to obtain a reservation or "hold" on a new Market Area or Areas, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such reservations or "holds" on certain Market Areas, such approval shall be effective as of the execution by Franchisee of a Market Hold Agreement or Agreements (the "Market Hold Agreement(s)") using Franchisor's then current form of such agreement, the current form of which is attached hereto as Exhibit "4", and the payment by Franchisee of the applicable fee(s) as provided in the Market Hold Agreement(s).

3.7 Notwithstanding any other provisions of this Agreement to the contrary, Franchisor retains the right, in its sole discretion, itself or through subsidiaries or affiliated or related business entities, to use the Development System to construct Project(s) outside of Franchisee's Market Area and to franchise or license others to do so.

Article 4
Franchisor's Obligations

- 4.1 Franchisor agrees to provide, based upon Franchisor's most recently updated project plans, the following:
- 4.1.1 Unstamped architectural plans and specifications for two- and four-unit buildings, in a computer-assisted design ("CAD") format
 - 4.1.1.1 foundation plan
 - 4.1.1.2 floor plan
 - 4.1.1.3 roof plan with non-engineered truss drawings
 - 4.1.1.4 wall sections
 - 4.1.1.5 exterior elevations
 - 4.1.1.6 drawings or schedules for windows, doors, cabinets, shelving, and floor coverings
 - 4.1.1.7 plumbing plan
 - 4.1.1.8 electrical plan
 - 4.1.1.9 heating, venting, and air conditioning ("HVAC") plan
 - 4.1.1.10 drawings for entry guardhouse and fencing
 - 4.1.2 Unstamped architectural plans and specifications for a large and a small clubhouse, in a CAD format
 - 4.1.2.1 foundation plan
 - 4.1.2.2 floor plan
 - 4.1.2.3 roof plan with non-engineered truss drawings
 - 4.1.2.4 wall sections
 - 4.1.2.5 exterior elevations
 - 4.1.2.6 drawings or schedules for windows, doors, cabinets, shelving, and floor coverings
 - 4.1.2.7 plumbing plan
 - 4.1.2.8 electrical plan
 - 4.1.2.9 HVAC plan
 - 4.1.3 Site planning guidelines from two recent projects
 - 4.1.3.1 sample site plans
 - 4.1.3.2 sample landscape plans
 - 4.1.3.3 recommendations for locations of utilities, curbs, streets, drives, patios, sidewalks, and mounding
 - 4.1.4 Construction Specifications Manual, in a computer readable format.
 - 4.1.5 Construction Manual, in a computer readable format.
 - 4.1.6 Operations Manual, in a computer readable format.
 - 4.1.7 Marketing Manual and Materials, in a computer readable format.
 - 4.1.7.1 color renderings or photographs of units and clubhouse exteriors
 - 4.1.7.2 sample brochure
 - 4.1.7.3 Four (4) video presentations including The Condominium Lifestyle Sales Video, New Owners Video, New Buyers Orientation Video and How to Plan a Grand Opening Video
 - 4.1.8 Condominium Materials Manual, in a computer readable format.
 - 4.1.9 National Account Suppliers Manual, in a computer readable format.
 - 4.1.10 Sample Homeowners Manual.
 - 4.1.11 Sample Employer Handbook.
 - 4.1.12 Pre-Construction Community Manual.
 - 4.1.13 Consulting services
 - 4.1.13.1 Franchisor will provide twenty (20) hours of consulting services to Franchisee for Franchisee's first Project. Consulting may include, but is not limited to, advice on the areas of planning, financing, construction, and marketing.

- 4.1.13.2 Franchisor will provide up to twenty (20) hours of consulting services if Franchisee so requests for each subsequent Project. Consulting may include, but is not limited to, advice on the areas of planning, financing, construction, and marketing.
- 4.1.13.3 Consulting services will be provided to Franchisee either, at Franchisor's discretion, at the corporate offices of Franchisor, by telephone, or at Franchisee's place(s) of business.
- 4.1.13.4 Consulting services in excess of twenty (20) hours requested by Franchisee for a particular Project will be billed to Franchisee by Franchisor at \$200.00 per hour.

4.2 Franchisor represents that the architectural plans and other materials referenced above in Sections 4.1.1, 4.1.2, 4.1.3, and 4.1.4 and provided to Franchisee are substantially similar to those used by Franchisor's affiliate, EPCON Communities, Inc. in its developments. (Franchisee should refer to Article 8 hereof regarding its obligations concerning modifications to the Development System.)

4.3 In order to protect the reputation and goodwill of the Marks and to maintain uniform standards of development under the Marks, Franchisee shall conduct its operations hereunder in accordance with the Operations Manual, one copy of which Franchisee acknowledges having received on loan from Franchisor for the term of this Agreement. The Operations Manual shall at all times remain the sole property of Franchisor. Franchisee shall treat the Operations Manual, any other materials created for or approved for its use by Franchisor, and the information contained therein as confidential, and shall use all reasonable efforts to maintain such information as secret and confidential. Franchisee shall not at any time, without Franchisor's prior written consent, copy, duplicate, record, or otherwise reproduce the Operations Manual, in whole or in part, nor otherwise make the same available to any unauthorized person. Franchisor shall have the right to add to or otherwise modify the Operations Manual from time to time to reflect changes in authorized products and services, standards or product quality, and operations of Franchisor Projects. In the event of a dispute as to the contents of the Operations Manual, the master copy of the Operations Manual maintained by Franchisor at its principal place of business shall be controlling.

Article 5 Franchisee's Obligations

5.1 At any reasonable time during the term of this Agreement Franchisor's representative(s) may without prior notice enter upon the premises of any Project of Franchisee to observe the Project and the progress towards completion thereof and to assure the nature and quality of all Projects associated with the Marks and the EPCON Communities Works (as defined in Section 10.5 hereof). Upon such entry by Franchisor's representative(s), Franchisee shall cooperate in every way with such observation.

5.2 In consideration of Franchisor's covenants contained herein, Franchisee agrees to pay to Franchisor, in connection with each Project developed by Franchisee, a fee (the "Project Fee") the amount of which Project Fee shall be determined on a Project-by-Project basis as described below. The Project Fee for each Project shall be the total of each of the following component payments:

- (a) An Initial payment (the "Initial Payment") in the amount of Fifty Six Thousand Dollars (\$56,000). The Initial Payment shall be paid by Franchisee to Franchisor when this Agreement and an Initial Market Area Agreement are executed by Franchisee (for the first Project) or whenever a Market Area Agreement is executed by Franchisee (for Projects subsequent to the first Project). In addition to the Initial Payment (for the first Project) described in this Section 5.2(a), Franchisee shall make an additional one-time payment to Franchisor in the amount of Fifty Thousand Dollars (\$50,000.00). This payment shall be due and payable to Franchisor when this Agreement and an Initial Market Area Agreement are executed by Franchisee.
- (b) A second payment (the "Second Payment") in the amount resulting when the Initial Payment is subtracted from the total of the fees applicable to each unit of the Project up to and including sixty (60) units as determined by the "Unit Fee Table" set forth below. The Second Payment shall be paid by Franchisee to Franchisor no later than the occurrence of the earliest of (i) Franchisee's commencement of marketing and/or selling activities on or for the Project, (ii) Franchisee's commencement of any activity on the Project site that is a precursor to or involves grubbing or clearing land, land development or building construction, or (iii) the elapse of nine (9) months from the date Franchisee executes this Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project). Notwithstanding the provisions set forth above, the total of the Initial Payment and the Second Payment shall not be less than One Hundred Sixty Eight Thousand Dollars (\$168,000) for the first Project and shall not be less than One Hundred Sixty Eight Thousand Dollars (\$168,000) for each Project subsequent to the first Project.

- (c) A third payment (the "Third Payment") in an amount resulting when the Initial Payment and the Second Payment are subtracted from the total of the fees applicable to each unit of the Project up to and including one hundred (100) units, as determined by the "Unit Fee Table" set forth below. The Third Payment shall be paid by Franchisee to Franchisor upon the occurrence of the earlier of (i) Franchisee's commencement of construction of the foundation for the fifty-ninth (59th) unit of the Project or (ii) the elapse of eighteen (18) months from the date that Franchisee executes the Franchisee Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project).
- (d) A fourth payment (the "Fourth Payment") in an amount equal to the total of the fees applicable to each unit of the Project in excess of one hundred (100) units as determined by the Unit Fee Table set forth below. The Fourth Payment shall be paid by Franchisee to Franchisor upon the occurrence of the earlier of: (a) Franchisee's commencement of construction of the foundation for the ninety-ninth (99th) unit of the Project, or (b) the elapse of twenty-four (24) months from the date Franchisee executes this Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project).

UNIT FEE TABLE

FEE APPLICABLE
PER UNIT
\$2,800

The Fee Applicable per Unit shall increase on January 1st of each subsequent calendar year pursuant to a schedule providing for a \$300.00 increase each calendar year, beginning with calendar year 2007. For each Project developed under this Agreement, the applicable Fee Applicable per Unit shall be the fee for the calendar year within which occurs the later of payment of the Initial Payment for the Project or execution by Franchisor of the Market Area Agreement for the Project.

5.3 In connection with the first Project to be developed either by Franchisee or by a sublicensee of Franchisee hereunder, Franchisee (or the sublicensee) shall be obligated to execute, as maker, and to deliver to Franchisor, as payee, a promissory note in a principal amount equal to the Project Fee for said first Project, such note to be in substantially the form attached hereto as Exhibit "3".

5.4 If Franchisee fails to remit to Franchisor when due any payment required under the terms of this Agreement, Franchisee agrees to pay to Franchisor all of Franchisor's costs of collection of the amount(s) of such outstanding payments, including reasonable attorney's fees and disbursements, and interest on the unpaid amounts at the lesser of eighteen percent (18%) per annum or the highest rate statutorily permissible, for the period commencing on the date such amount(s) were due to be paid to Franchisor and ending on the date such amount(s) are received by Franchisor in finally collectible funds.

5.5 Franchisee shall provide to Franchisor at the time of execution of this Agreement copies of Exhibit "2" attached to this Agreement (the "Personal Covenants Document") executed by each of the principals, officers, owners and directors of Franchisee or any sublicensee and any other individuals or entities with any ownership or control interest whatsoever in Franchisee or any sublicensee, and, during the term of this Agreement, if a change occurs in the principals, officers, owners and/or directors of Franchisee or any sublicensee or in the other individuals or entities with an ownership or control interest in Franchisee or any sublicensee, Franchisee agrees that it will promptly deliver to Franchisor copies of the Personal Covenants Document executed by each of the new principals, officers, owners, or directors of Franchisee or other individuals or entities with an ownership or control interest in Franchisee or any sublicensee.

5.6 Additionally, Franchisee shall provide to Franchisor copies of the document included as Exhibit "2A" attached to this Agreement executed by each person who may be provided, either by Franchisee, Franchisor, or any sublicensee with more detailed information about the Development System than has been or will be disclosed to the general public, but whom is not otherwise subject to the requirements respecting the Personal Covenants Document set forth in Section 5.6 or to the provisions of the Personal Covenants Document. A copy of the document included as Exhibit "2A" shall be individually executed before any such person is provided access to all or any portion of the Development System. Franchisee's obligation to provide such executed copies of the document included as Exhibit "2A" to Franchisor shall be ongoing throughout the term of this Agreement.

6.7 If Franchisee is a corporation or other business entity, it shall have the following legend conspicuously printed on the face of each of its stock certificates or other certificates evidencing ownership:

The transfer of this [stock] certificate is subject to the terms and conditions of a certain Franchise Agreement with EPCON Communities Franchising, Inc. Reference is made to the provisions of such Agreement and to the governing documents of this [corporation].

5.8 Franchisee shall not employ or seek to employ any person who is employed by Franchisor, its agents or representatives, or by any other EPCON Communities franchisee, or otherwise directly or indirectly induce any such person to leave his or her employment without the specific written consent of Franchisor.

5.9 In order to further protect the Development System, the Marks and the goodwill associated therewith, Franchisee shall:

- (a) Except where prohibited by state law to the contrary, identify its Project(s) in its advertising as prescribed in Franchisor's Operations Manual, advertise under the Marks designated by Franchisor for use for that purpose and use such Marks without prefix or suffix, except where such use may conflict with a prior registration or use or may be required by applicable state law or regulation, in which event Franchisee shall operate and advertise under such other names as Franchisor has previously approved in writing. Franchisor shall have the right to restrict the use by Franchisee of Franchisee's business entity name or trade name in its advertising and promotional materials.
- (b) Feature and use the Marks solely in the manner prescribed by Franchisor.
- (c) Observe such reasonable requirements with respect to service mark, trade name, trademark and fictitious name registrations and copyright and patent ownership notices as Franchisor may, from time to time, direct in writing.
- (d) Comply with the provisions of Article 6 hereof.
- (e) Submit to Franchisor for approval at least fifteen (15) business days prior to the intended use samples of all advertising plans and materials that Franchisee intends to use that were not prepared by or approved previously by Franchisor. Such approval shall not be unreasonably withheld. If written disapproval is not received by Franchisee from Franchisor within ten (10) business days of the date that Franchisor receives Franchisee's advertising materials, Franchisor shall be deemed to have given the required approval. Upon thirty (30) days prior written notice, Franchisor can revoke its approval of any advertising or promotional materials previously approved, and, upon the expiration of such thirty (30) day period, Franchisee shall immediately cease use of such advertising or promotional material.

5.10 Franchisee shall, during the term of this Agreement, purchase, install, maintain and use in its operations under this Agreement a personal computer system having at least the minimum specifications and capabilities, and including at least the software, as specified by Franchisor in writing from time to time to its EPCON Communities franchisees. Franchisee understands that compliance with its obligations in this Section 5.10 may require it to purchase new hardware and software or upgrades to existing hardware and software, as specified by Franchisor in writing from time to time to its EPCON Communities franchisees.

5.11 Franchisee's covenants and obligations contained in this Agreement shall be construed as severable and independent and shall be interpreted and applied consistently with the requirements of reasonableness and equity. If all or any portion of any covenant is held unreasonable or unenforceable by a court or agency having valid jurisdiction, Franchisee expressly agrees to be bound by any lesser covenant included within the terms of such greater covenant that imposes the maximum duty permitted by law, as if the lesser included covenant were separately stated in and made a part of this Agreement.

5.12 On a schedule and at a location to be determined within its sole discretion, Franchisor will hold a series of initial franchisee training sessions for the benefit of Franchisee at a location selected by Franchisor in its sole discretion. Franchisee or a representative of Franchisee is required to attend each of the portions of the first such training session held by Franchisor after execution of this Agreement. Attendance at such training shall be at Franchisee's sole cost and expense. Franchisor reserves the right to charge a tuition fee for each attendee attending voluntary follow-up training sessions.

5.13 In the event that Franchisor holds an annual meeting or conference of the EPCON Communities franchisees, Franchisee or a representative of Franchisee's management satisfactory to Franchisor in its sole discretion shall attend all sessions of such meeting or conference, unless such attendance is excused by Franchisor in writing. Attendance at such meeting or conference shall be at Franchisee's sole cost and expense.

Article 6
Proprietary Marks

6.1 Franchisee's rights to use the Marks as granted in Section 3.2 hereof is limited to their use in connection with the development of the Project(s) as described herein, as set forth in the Operations Manual and as is prescribed in writing by Franchisor from time to time.

6.2 Franchisee acknowledges Franchisor's exclusive right, title and interest in and to the Marks (and all registrations granted therefor), along with the identification schemes, standards, specifications, operating procedures, and other concepts embodied in the Development System. Except as expressly provided by this Agreement, Franchisee shall acquire no right, title or interest therein or thereto (or to any confusingly similar variation thereof), and any and all goodwill associated with Development System and the Marks shall inure exclusively to Franchisor's benefit. Upon the expiration or termination of this Agreement, no monetary amount shall be assigned as attributable to any goodwill associated with Franchisee's use of the Development System or the Marks.

6.3 Franchisee acknowledges that the use of the Marks outside of the scope of this Agreement without Franchisor's prior written consent is an infringement of Franchisor's right, title and interest in and to the Marks. Franchisee expressly covenants that, during the term of this Agreement and after the expiration or termination hereof, Franchisee shall not, directly or indirectly, commit any act of infringement or contest, or aid in contesting, the validity or ownership of the Marks, or of confusingly similar trademarks or trade names, or take any other action in derogation thereof.

6.4 Franchisee shall promptly notify Franchisor of any use of the Marks or any colorable variation thereof by any person, persons, partnership, association, corporation, or other entity ("Person") other than Franchisor or any of its representatives and agents or other franchisees, or any other mark in which Franchisor has or claims a proprietary interest. Franchisee further agrees to notify Franchisor promptly of any litigation instituted by any Person against Franchisor or Franchisee involving the Marks. In the event that Franchisor, in its sole discretion, undertakes the defense, prosecution, or settlement of any litigation relating to the Marks, Franchisee agrees to execute any and all documents (including any registered user agreements and any documents required by governmental authorities to show the relationship between Franchisee and Franchisor) and to render such assistance as may, in the opinion of Franchisor, be reasonably necessary to preserve and extend the service mark rights relating to the Marks and to carry out such defense, prosecution, or settlement.

6.5 Franchisee shall not, without Franchisor's prior written consent, use the Marks as part of Franchisee's corporate or other legal name, or hold out or otherwise employ the Marks to perform any activity or to incur any obligation or indebtedness in such a manner as could reasonably result in making Franchisor liable therefor. Franchisee agrees not to seek registration or to claim ownership of any Marks, or of confusingly similar service marks or trade names.

6.6 Franchisee expressly acknowledges and agrees that this license to use the Marks is nonexclusive and that Franchisor has and retains the rights, among others:

- (a) To grant other franchisees and licensees for the use of the Marks, in addition to those already granted to existing EPCON Communities franchisees and to Franchisee;
- (b) To develop and establish other systems and programs utilizing the same or similar Marks, or any other proprietary Marks, and to grant franchisees and/or licensees therein without providing Franchisee any rights therein.

6.7 Franchisee shall not permit any third party to imprint the Marks on any products, materials, documents and supplies utilized by Franchisee in connection with the operation of its Project(s) without first obtaining the consent of Franchisor and causing such third party to execute a license agreement with Franchisor. Subject to the foregoing requirement, Franchisee shall affix the Marks in the manner prescribed by Franchisor to all advertising and promotional materials used in connection with each of Franchisee's Projects developed hereunder.

6.8 Franchisor is responsible for maintaining all registrations covering the Marks and renewing the registrations as required.

6.9 Franchisor retains the sole right to create a Web site using the Marks, "EPCONCommunities.com," and variations thereof and to register or use other domain names related or similar to any of the Marks. Prior to its creation of any Web site related in any manner to Franchisee's EPCON Communities business and pursuant to the approval process provided in Section 5.9(e) of this Agreement, Franchisee must obtain Franchisor's written approval

of (and Franchisor shall have continuing approval rights regarding) the domain name for such Web site, the content of such Web site (including all framing employed) and use of any of the Marks in the content of such Web site. Franchisor retains the right to pre-approve Franchisee's use of linking between Franchisee's Web pages related in any manner to Franchisee's EPCON Communities business and all other Web sites. Within five (5) days of any written request by Franchisor, Franchisee shall (a) dismantle any links between Franchisee's Web pages related in any manner to Franchisee's EPCON Communities business and all other Web sites; and/or (b) remove any references on Franchisee's Web pages to the Marks. Further, Franchisee shall comply with Franchisor's guidelines, as published from time to time to the EPCON Communities franchise system, regarding the use by franchisees of Web sites related to franchisees' EPCON Communities businesses.

Article 7 Advertising and Promotion

7.1 Franchisor reserves the right, exercisable at any time, to require Franchisee to purchase and use prescribed sales brochures and other documents designed for prospective condominium buyers.

7.2 Franchisee shall cooperate with Franchisor in any and all advertising, promotional and marketing plans and campaigns established by Franchisor in its sole discretion.

7.3 All advertising, promotions and marketing carried out by Franchisee in any media shall be conducted in a dignified manner and shall conform to the standards and requirements prescribed by Franchisor and to the highest ethical standards of advertising. Thirty (30) days prior to publication, Franchisee shall submit to Franchisor, for its prior written approval (except with regard to prices to be charged), samples of all advertising and promotional plans and materials that Franchisee desires to use and that have not been prepared or previously approved by Franchisor. Such approval shall not be unreasonably withheld. Any materials submitted to Franchisor and not disapproved within thirty (30) days shall be deemed approved. Franchisor may upon thirty (30) days notice revoke its approval of any advertising and promotion previously approved.

7.4 At such time as Franchisor shall determine that a franchise system level advertising program would contribute to an increase in the goodwill associated with the EPCON Communities franchise system and the Marks, Franchisee, beginning upon the date of a written notice from Franchisor that such a program will be undertaken, shall begin to pay to Franchisor, or Franchisor's designee, an advertising fee ("Advertising Fee") as hereinafter described. The Advertising Fee during the remainder of the calendar year of the date of Franchisor's written notice shall be \$300 per condominium unit. Such Advertising Fee shall be payable to Franchisor at the same time that Franchisee pays to Franchisor all or any portion of a Project Fee. The number of condominium units for which the Advertising Fee shall be payable at any time shall be determined, as provided in Article 6 hereof, based upon the number of condominium units that are represented by the portion of the Project Fee due to be paid to Franchisor at the same time. Franchisor shall have the right, in its sole discretion, during each subsequent calendar year, to increase the Advertising Fee to an amount that is as much as one hundred three percent (103%) of the Advertising Fee applicable during the immediately preceding calendar year. The provisions of Section 5.4 of this Agreement are applicable to Advertising Fee payments. Franchisor shall have the right to spend Advertising Fees paid by Franchisee to the franchise system level advertising program for advertising to promote the EPCON Communities franchise system at any geographic level, including without limitation, local, regional and/or national, and in any communication medium, that Franchisor deems, in its sole discretion, to be advantageous to the franchise system or any part thereof.

Article 8 Uniformity of, and Modifications to, the Development System

8.1 Franchisee understands and acknowledges that the Development System is a complete and unified system for the construction, marketing and management of the Project(s) and that every detail of the Development System is important to the use thereof by Franchisee in order to maintain high and uniform standards, as well as to maximize the opportunity for the success of the Project(s). By accepting the franchise and license granted hereby, Franchisee is agreeing to utilize the entire Development System without modification thereto. Franchisee shall not deviate from or modify the Development System without the prior written approval of Franchisor.

8.2 Notwithstanding the foregoing, any changes or modifications made by Franchisee to the Development System or to any of its parts may be used by Franchisor for its benefit or for the benefit of any of its other franchisees, licensees or agents, and such changes or modifications shall become the property of Franchisor. However, nothing contained herein shall be construed to impose upon Franchisor an obligation to so adopt or use any such changes or modifications nor shall Franchisor be responsible for any payment to Franchisee therefor.

8.3 Franchisee acknowledges that deviation from and/or modification to the Development System does not abrogate its responsibility to comply with all terms of this Agreement, including but not limited to payment of amounts due to Franchisor as specified in Article 5 hereof. Franchisee's deviation from and/or modification to the Development System without the prior written approval of Franchisor, shall, however, terminate Franchisor's obligation to comply with Section 7 of the applicable Market Area Agreement(s), pursuant to which Franchisor, under certain conditions as set forth in said Section 7, agrees to refrain from itself constructing, and from granting to other licensees the right to construct, Projects within Franchisee's Market Area (as defined in the Market Area Agreement).

Article 9 Development System Compliance

9.1 Franchisor's affiliate, EPCON Communities, Inc., has used the Development System to assist it in obtaining permits and other governmental approvals under varying circumstances. Notwithstanding this, Franchisor does not warrant or represent herein, and hereby disclaims any such warranty and/or representation, express or implied, that the Development System will comply with any applicable building code requirements or any other applicable federal, state or local laws, or will be adequate for Franchisee's use in any way including, but not limited to, assisting Franchisee in obtaining permits and approval for Franchisee's Project(s). Franchisee (a) recognizes that the provisions of this limitation are a material factor in Franchisor's grant of the franchise and license for the amounts of the fee(s) provided hereunder, and (b) agrees that any accommodation to Franchisee by Franchisor shall not be taken to establish any liability of Franchisor or any contract term inconsistent herewith.

9.2 Franchisee understands and acknowledges that, due to the continual evolution of the plans, and the other materials referenced above, and the volume of detailed information and data contained therein, there are likely to be some inaccuracies and/or items subject to specific local or other requirements which will require correction, at Franchisee's expense, by Franchisee's architects, engineers, contractors, counsel and/or other professionals as work progresses. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, make any changes or modifications including, but not limited to, the seal or stamp of a registered architect, to the plans, specifications or any other part of the Development System used or proposed for use for or at its Project(s) which changes or modifications are necessitated by any applicable zoning and building codes, permit requirements, or any other federal, state or local laws, including, without limitation, licensing requirements for contractors, property managers and real estate salespersons, the formation and management of condominium associations, occupational health and safety on the construction site, housing finance, equal housing laws, the Fair Housing Act and the Americans with Disabilities Act, as well as the Accessibility Guidelines promulgated under each of these acts. Franchisee further acknowledges that it possesses sole responsibility hereunder to comply with all applicable laws in the marketing of condominium units in its projects, including, without limitation, the Fair Housing Act. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, have the seal or stamp of a registered architect affixed to said plans. No changes, however extensive, shall operate to relieve Franchisee of its obligations to make payments due to Franchisor pursuant to the terms of this Agreement.

9.3 Throughout the term hereof, Franchisor agrees to provide to Franchisee, upon Franchisee's request, modifications or improvements made by Franchisor to the architectural plans and specifications. Modifications and improvements to other areas of the Development System shall be provided to Franchisee at Franchisor's sole and absolute discretion. All such modifications and improvements to be provided to Franchisee shall be provided by Franchisor at no additional cost to Franchisee and shall be distributed not more often than once annually. Modifications and improvements so provided to Franchisee shall be for the standard Development System and will not be subject to further modification by Franchisee for any changes made by Franchisee pursuant to Section 8.2 above. Notwithstanding any provision hereof to the contrary, Franchisor reserves the right, within its sole discretion, to discontinue providing updated information to Franchisee respecting modifications and improvements to the Development System if Franchisee has substantially completed construction of all Projects hereunder and is not actively pursuing development of another Project.

Article 10
Confidentiality; Non-Disclosure; Proprietary Information

10.1 Franchisor and Franchisee acknowledge and agree that the Development System constitutes a "trade secret" as defined in Ohio Revised Code Section 1333.61, and, as such, is entitled to all rights and protection as are afforded to trade secrets under Ohio, and any other applicable, law.

10.2 Neither Franchisee nor any of Franchisee's affiliates, owners, agents, or employees shall communicate or otherwise divulge to, or use for the benefit of, any other person or entity, any information or knowledge, no matter how derived, concerning the Development System. Franchisee is granted the specific and limited right to divulge information respecting the Development System to those individuals who must have access thereto in order to develop any Projects which are the subject hereof. All information and knowledge provided by Franchisor to Franchisee, including by way of illustration but not of limitation, drawings, specifications, techniques, and written material, shall be deemed confidential for the purposes of this Agreement.

10.3 Franchisee acknowledges that the Development System, including any modifications or derivations of the Development System or any of its parts, remains the exclusive property of Franchisor, even after its use by Franchisee. Franchisee agrees that it shall not use the Development System, or any portion thereof, at any time, except in strict accordance with the terms of this Agreement and, after the termination of this Agreement it shall not use in any manner the Development System or any of its parts, or any system, plans, materials, or designs resembling in any way the Development System.

10.4 Franchisee shall include in all advertising, sales and other published literature relating to Franchisor's architectural work ("Buildings") licensed hereunder that the Buildings are covered by U.S. Design Patent Nos. 336,137; 342,576; 342,577; 343,459 and 396,298, and are used under license from EPCON Communities Franchising, Inc.

10.5 Franchisee acknowledges that the Buildings and all related illustrations, plans, blueprints, sketches, drawings, or any other tangible expression of the Buildings (the "EPCON Communities Works") are protected under the Architectural Works Copyright Act of 1990. Franchisee shall not build, license, transfer, reproduce or duplicate in any way the EPCON Communities Works except as expressly provided for in this Agreement. In the event that any documentation provided to Franchisee by Franchisor bears a copyright notice, Franchisee shall not remove such notice from said documentation, and such notice shall be retained or reproduced in its exact form on all authorized copies and versions of such documentation, both in machine and human readable language. Franchisee shall not distribute Franchisor's copyrighted documentation or the EPCON Communities Works to a third party, except as provided for in the Agreement or otherwise with specific written authorization from Franchisor.

10.6 Franchisee shall not, during the term of this Agreement, without the prior written consent of Franchisor, own, develop, construct or have any interest in any real estate development project involving single story multi-family residential buildings of two to four units or which is otherwise similar to an EPCON Communities Project; provided, however, that this provision shall not apply to the involvement by Franchisee in the development of other EPCON Communities Projects by other franchisee business entities, or to any ownership by Franchisee of less than three percent (3%) of the outstanding stock of any publicly held corporation.

Article 11
Completion of Project(s)

11.1 A Project shall be determined to be completed when either a temporary or permanent occupancy permit has been issued for all buildings within the Project.

11.2 Upon completion of the Project, Franchisee shall do the following:

11.2.1 Promptly notify Franchisor in writing that the Project is complete as defined in Section 11.1 above.

11.2.2 Promptly pay to Franchisor all sums owing or accrued. The sums shall include interest, any damages, costs, and expenses, including reasonable attorneys' fees and disbursements, incurred by Franchisor by reason of a default by Franchisee under the terms of this Agreement or any other agreement by and between Franchisor and Franchisee.

11.2.3 Immediately cease to use, in any manner whatsoever, the Development System, except as authorized under a Market Area Agreement or Agreements.

11.2.4 Within thirty (30) days of the sale of the last unit in a Project, Franchisee shall provide to Franchisor a complete report respecting the revenues and expenses of the Project in the form prescribed by Franchisor. Franchisee hereby grants to Franchisor its consent to disclose the information contained in such reports in Franchisor's Uniform Franchise Offering Circular and as required in the franchise sales disclosure process.

11.2.5 Notwithstanding anything contained herein, Franchisee's lender shall have the right to complete any Project which is the subject hereof, so long as (a) all fees and other amounts due Franchisor under this Agreement are timely paid in full; (b) such lender complies with the terms of this Agreement as such terms apply to and obligate Franchisee; and (c) such lender executes a Lender Assignment Agreement included as Exhibit 6, attached to this Agreement.

11.3 Franchisee agrees to use its best efforts to complete within a reasonable time each building begun in connection with any Project so that no building remains incomplete for more than one hundred fifty (150) days after commencement of construction of that building.

Article 12 Transfer by Franchisee

12.1 Franchisee understands and acknowledges that the rights and duties set forth in this Agreement are personal to Franchisee and that Franchisor has granted this EPCON Communities franchise in reliance on Franchisee's business skills, professional reputation and financial capability. Accordingly, neither Franchisee nor any shareholder, partner, member, (including shareholders, partners or members of entities that have an ownership interest in Franchisee), or any immediate or remote successor to any part of Franchisee's interest in this EPCON Communities franchise shall sell, assign, transfer, pledge or encumber, by operation of law or otherwise, this Agreement or the franchise or licensed rights granted hereunder or any ownership interest in Franchisee or any ownership interest in an entity owning an interest in Franchisee without the prior written consent of Franchisor. Such transfer, sale, assignment, pledge or encumbrance not having the written consent of Franchisor shall be null and void and shall constitute a material breach of this Agreement, for which Franchisor may then terminate this Agreement. Franchisor shall not unreasonably withhold its consent to a transfer of any interest in Franchisee or in this EPCON Communities franchise, provided, however, that prior to the time of transfer, Franchisor may, in its sole discretion, require that:

- (a) All of Franchisee's accrued monetary obligations to Franchisor and all other outstanding obligations related to the business franchised hereunder shall have been satisfied;
- (b) The transferor's right to receive compensation, pursuant to any agreement or agreements for the purchase of any interest in Franchisee or in the business franchised hereunder, shall be subordinate and secondary to Franchisor's rights to receive any outstanding monetary obligation or other outstanding obligations due from transferor or Franchisee pursuant to this Agreement, and whether arising before or after the transfer;
- (c) Franchisee shall have executed a general release in a form satisfactory to Franchisor, effective as of the date of transfer, of any and all claims against Franchisor and its officers, directors, shareholders, and employees in their corporate and individual capacities, including, without limitation, claims arising under federal, state and local laws, rules and ordinances;
- (d) The transferee franchisee shall enter into a written assumption, in a form satisfactory to Franchisor, assuming and agreeing to discharge all of Franchisee's obligations under this Agreement prior to and after the date of the assumption;
- (e) The transferee franchisee shall demonstrate to Franchisor's satisfaction that he or she, if an individual, its general partners, if it is a partnership, its members, if it is a limited liability company, and its officers, directors and principal shareholders, if it is a corporation, meet(s) educational and managerial standards; possess(es) good moral character, reputation, and credit rating; has the aptitude and ability to conduct the business franchised hereunder (as may be evidenced by prior related business experience or otherwise); and has adequate financial resources and capital to operate the business franchised hereunder;
- (f) The transferee franchisee shall execute the then-current standard form of EPCON Communities Franchise Agreement and other ancillary agreements as Franchisor may require for the business franchised hereunder for a term ending as provided in Section 3.1 of this Agreement; and

- (g) At transferee franchisee's expense, and upon such other terms and conditions as Franchisor may reasonably require, the transferee franchisee shall complete each of the initial training sessions then in effect for new franchisees.

12.2 If Franchisee is a corporation, partnership, limited liability company, or similar entity, the terms of Section 12.1 shall apply to any sale, resale, pledge, assignment, transfer or encumbrance of any voting stock of, or other ownership interest in, Franchisee.

12.3 In connection with any transfer for which Franchisor grants its consent as described in Section 12.1 hereof, Franchisee shall pay to Franchisor a transfer fee to cover Franchisor's actual costs, and due diligence, administrative, legal and other expenses respecting the transfer.

12.4 In the event that Franchisee proposes to transfer all of its interest in the Franchisor franchise granted pursuant hereto to a corporation, partnership, or limited liability company solely for the convenience of ownership, the provisions of Sections 12.1, 12.2, and 12.3 hereof shall not apply; provided that Franchisor's consent to such transfer may, in its sole discretion, be conditioned upon the following requirements:

- (a) The transferee entity shall be newly organized and its Articles of Incorporation and Bylaws (or comparable governing documents for entities other than corporations) shall provide that its activities are confined exclusively to operate the business franchised hereunder and activities related thereto;
- (b) Franchisee shall identify to Franchisor all of the stockholders, directors, officers, partners and/or members of the transferee entity;
- (c) Franchisee shall enter into an agreement, in a form satisfactory to Franchisor, unconditionally guaranteeing the full payment and performance of the transferee entity's obligations to Franchisor;
- (d) Each stock (or other ownership interest) certificate of the transferee entity shall have conspicuously endorsed upon its face the following legend:

"The transfer of this [type of certificate] certificate is subject to the terms and conditions of a certain Franchise Agreement executed with EPCON Communities Franchising, Inc. Reference is made to the provisions of such Agreement and to the governing documents of this [type of transferee entity]."

- (e) Copies of the transferee entity's governing documents, including any resolutions authorizing entry into this Agreement, shall be furnished to Franchisor for its approval prior to the transfer; and
- (f) The name of the transferee business entity shall not, without Franchisor's prior written approval, consist of or contain any of Franchisor's Marks or any colorable variation thereof or any other mark in which Franchisor has or claims a proprietary interest.

12.5 In the event that Franchisee desires to form a business entity having identical or substantively identical common ownership with Franchisee and to sublicense its rights and obligations hereunder to the new entity (the "Sublicensee") in order that the Sublicensee might develop a Project and, after receiving Franchisee's request in writing to do so and such information about the proposed sublicensing arrangement and the entities involved as Franchisor requests, Franchisor, in its sole discretion, consents to same, Franchisee may execute with the Sublicensee a Sublicense Agreement in the form attached hereto as Exhibit "6". Any such sublicense arrangement not having the written consent of Franchisor shall be null and void and shall constitute a material breach of this Agreement, for which Franchisor may then terminate this Agreement. Franchisor reserves the right hereunder not to consent to any sublicense arrangement proposed by Franchisee involving an entity not having identical or substantially identical common ownership with Franchisee. Franchisor may, in its sole discretion, require that, prior to the effective date of the Sublicense Agreement, (a) all of Franchisee's accrued monetary obligations to Franchisor shall have been satisfied, and (b) the Sublicensee entity possesses a good credit rating and has adequate financial resources and capital to develop a Project. The Sublicensee shall be required to execute with Franchisor a Market Area Agreement substantially in the form attached hereto as Exhibit "1" for the location proposed for Sublicensee's Project.

12.6 All materials required by federal or state law for any direct or indirect offer or sale of securities of Franchisee shall be submitted to Franchisor for review and consent, prior to their being filed with any government agency; and any materials to be used in any exempt offering shall be submitted to Franchisor for review and consent prior to their use. No such materials shall imply (by use of the Marks or otherwise) that Franchisor is participating as an

underwriter, issuer, or offeror of Franchisee's or Franchisor's securities. Any review by Franchisor of the offering materials or the information included therein will be conducted solely for the benefit of Franchisor to determine conformance with Franchisor's internal policies, and not to benefit or protect any other person. No investor should interpret such review by Franchisor as an approval, endorsement, acceptance, or adoption of any representation, warranty, covenant, or projection contained in the materials reviewed; and the offering documents shall include such legends and statements as Franchisor may specify, including, but not limited to, legends and statements which disclaim Franchisor's liability for, or involvement in, the transaction described in the offering documents. Franchisee and the other participants in the offering must agree in writing to fully indemnify Franchisor in connection with the offering in the form prescribed by Franchisor. For each proposed offering, Franchisee shall pay Franchisor a non-refundable fee of Ten Thousand Dollars (\$10,000), or such greater amount as may be necessary to reimburse Franchisor for its reasonable costs and expenses associated with reviewing the proposed offering, including, without limitation, legal and accounting fees and disbursements. Franchisee shall give Franchisor written notice at least sixty (60) days prior to the date of commencement of any offering covered by this Section 12.6. Any such offering shall comply with Franchisor's written policies adopted and announced by Franchisor from time to time. Franchisor hereby reserves its right in its sole discretion not to grant consent to Franchisee for such an offering, and, if such consent is withheld, Franchisee shall be prohibited hereunder from issuing such an offering. In the event of Franchisor's grant of consent respecting an offering described under this Section 12.6, the provisions of Section 5.7 of this Agreement shall not apply.

Article 13 Default; Termination

13.1 If Franchisee becomes insolvent or makes an assignment for the benefit of creditors, or if a petition in bankruptcy is filed by Franchisee, or such a petition is filed against Franchisee and either is consented to by Franchisee or is not dismissed within thirty (30) days, or if a bill in equity or other proceeding for the appointment of a receiver of Franchisee or other custodian for Franchisee's business or assets is filed and either is consented to by Franchisee or is not dismissed within thirty (30) days, or a receiver or other custodian of Franchisee's property or any part thereof is appointed by a court of competent authority, or if proceedings for composition with creditors under any state or federal law should be instituted by or against Franchisee or if the real or personal property of Franchisee shall be sold after levy thereupon by any sheriff, marshal, or constable, then upon the occurrence of any of such events, Franchisee shall be deemed to be in default under this Agreement and all rights granted by Franchisor hereunder shall thereupon terminate without any need for notice to Franchisee, and this Agreement shall thereupon be terminated.

13.2 Franchisee shall also be in default under this Agreement upon the occurrence of any of the following:

13.2.1 Franchisee fails, refuses, or neglects to pay when due to Franchisor any monies owed to Franchisor;

13.2.2 Franchisee fails to satisfactorily complete the initial training program to the satisfaction of Franchisor as set forth in Section 6.12 and fails to arrange for its representative to attend and complete such initial training program to the satisfaction of Franchisor;

13.2.3 Franchisee fails to furnish to Franchisor any report or information required under this Agreement;

13.2.4 Franchisee fails to develop its Projects and to operate hereunder in compliance with the terms of this Agreement, the applicable Market Area Agreement(s), the Operations Manual, the Development System and any quality or operations standards and guidelines issued in writing by Franchisor;

13.2.5 Franchisee fails, for a period of ten (10) days after receipt of notification of noncompliance, to comply with any federal, state or local law or regulation applicable to the operation of the development business franchised hereunder;

13.2.6 Any attempted transfer in violation of Article 12;

13.2.7 Any material misrepresentation by Franchisee relating to the acquisition of the franchise granted hereunder or any conduct by Franchisee that reflects materially and unfavorably upon the operation and reputation of Franchisee's development business franchised hereunder or upon Franchisor;

13.2.8 The conviction of Franchisee or its principals or officers of a felony or any other crime involving moral turpitude;

13.2.9 Franchisor makes a reasonable determination that the continued operation of the development business franchised hereunder or any Project developed hereunder by Franchisee will result in immediate danger to public health or safety and such default is not cured within three (3) days after notice from Franchisor to Franchisee;

13.2.10 Franchisor gives Franchisee a notice of default under this Section 13.2 after two previous defaults which have been cured after notice of default within the preceding twelve (12) month period;

13.2.11 The death of Franchisee, if Franchisee is an individual;

13.2.12 Franchisee fails to comply with any of the obligations imposed upon Franchisee by this Agreement;

13.2.13 Franchisee communicates or divulges any information or knowledge concerning the Development System in violation of Article 10 hereof;

13.2.14 Franchisee fails to complete a Project as required under the terms of this Agreement.

13.3 Upon the occurrence of any of the events set forth in Section 13.2, Franchisor may, without prejudice to any other rights or remedies contained in this Agreement or provided by law or equity, terminate this Agreement. Such termination shall be effective thirty (30) days after written notice (or such longer period of notice as may be required by applicable state law) is given by Franchisor to Franchisee of any of the events set forth in Subsections 13.2.1, 13.2.3, 13.2.4, 13.2.5, 13.2.6, 13.2.12 or 13.2.14 of Section 13.2 if such defaults are not cured within the period. Such termination shall be effective immediately upon written notice upon the occurrence of the events set forth in Subsections 13.2.2, 13.2.7, 13.2.9, 13.2.10 or 13.2.13 of Section 13.2. Such termination shall be effective immediately without notice upon the occurrence of the events set forth in Subsections 13.2.8 or 13.2.11 of Section 13.2.

13.4 This Agreement shall automatically terminate on the later of (1) the date that is one year after the date of completion of Franchisee's last Project; or (2) the date that is one year after the expiration of Franchisee's last Market Hold Agreement with Franchisor.

13.5 Termination hereof shall not affect the obligations of Franchisee to pay all amounts due hereunder to Franchisor. Further, the obligations of Franchisee provided in Article 10 hereof, the remedies provided to Franchisor in Article 14 hereof, and the provisions of Sections 6.3, 20.2 and 20.3 hereof shall survive the termination of this Agreement.

13.6 Upon termination or expiration of this Agreement, Franchisee shall immediately terminate its use of the Marks, the EPCON Communities Works and the Development System and promptly return to Franchisor all materials provided to it by Franchisor.

13.7 For a period of three (3) years following the effective date of termination or expiration of this Agreement, whether by lapse of time or other cause, sale and/or assignment of the EPCON Communities franchise granted hereunder, Franchisee shall not, directly or indirectly, either as a principal, agent, employee, officer, director or member of any corporation or other business entity, as a partner or sole proprietor, or in any other way engage in the ownership, development or construction of any real estate development project involving single story multi-family residential buildings of two to four units within (a) ten (10) miles of the geographic border of any "Market Area" granted to any franchisee pursuant to any Market Area Agreement or other agreement that is effective between such franchisee and Franchisor, (b) ten (10) miles of the geographic border of any "Reserved Market Area" reserved for any franchisee or prospective franchisee under any Market Hold Agreement or other agreement that is in effect between such party and Franchisor, or (c) ten (10) miles of any real estate development project of EPCON Communities, Inc. or of any business entity affiliated with EPCON Communities, Inc. For the purposes of this Section 13.7 and Section 10.6 of this Agreement, the term "Franchisee" shall include any officer, director, shareholder, member or holder of an ownership interest in Franchisee, if Franchisee is a corporation, limited liability company or other business entity, and any partner of Franchisee, if Franchisee is a partnership.

Article 14 Remedies

14.1 Franchisor shall be entitled to any remedies available at law or in equity for any breach by Franchisee of any of Franchisee's covenants or obligations provided herein or provided in any Market Area Agreement.

14.2 Franchisee agrees that the existence of any claims of Franchisee against Franchisor, whether or not arising from this Agreement, shall not constitute a defense to the enforcement by Franchisor of the provisions of Article 5 hereof and/or the exercise by Franchisor of its rights under Article 13 hereof respecting Franchisee's noncompliance with the provisions of Article 5 hereof.

14.3 In the event that Franchisee breaches its covenants and obligations as provided in Sections 8.1 or 10.3 hereof (including without limitation the use by Franchisee of all or any portion of the Development System to develop a Project (or project) either not in compliance with this Agreement during its term or in any manner after the termination of this Agreement), Franchisee shall be obligated to pay to Franchisor liquidated damages in the following amounts: a fee of One Hundred Twenty Five Thousand Dollars (\$125,000) in connection with Franchisee's development of a Project (or project) of fifty (50) or fewer units and an additional fee of Two Thousand Five Hundred Dollars (\$2,500) per unit for each unit in a Project (or project) in excess of fifty (50) units, such fees to be separately applicable to each project developed by Franchisee in breach of Sections 8.3 or 10.3 hereof.

14.4 Franchisor shall be entitled, without bond, to the entry of temporary and permanent injunctions and orders of specific performance (a) enforcing the provisions of this Agreement relating to (i) Franchisee's use of the Development System and/or the Marks; (ii) any obligations of Franchisee surviving termination of this Agreement; or (iii) an assignment of this Agreement or the franchise and license granted hereunder or any ownership interest therein; and (b) as necessary to prohibit any act or omission by Franchisee or its employees that would constitute a violation of any applicable law, ordinance or regulation, or which is dishonest or misleading to Franchisor or the general public.

14.5 In the event a dispute arises under this Agreement, the prevailing party shall be entitled to receive its expenses, including attorneys' fees and disbursements and accounting fees and disbursements, in addition to any other relief to which it is found entitled.

Article 15 **Independent Contractor**

15.1 It is understood and agreed that Franchisee is an independent contractor and nothing in this Agreement shall create a partnership, employment or agency relationship between Franchisor and Franchisee or authorize Franchisee to make any contract, agreement, warranty or representation on Franchisor's behalf, or to incur any debt or other obligation in Franchisor's name, and that Franchisor shall in no event assume liability for, or be deemed liable hereunder as a result of, any such action, or by reason of any act or omission of Franchisee in any of its operations hereunder or any claim or judgment arising therefrom against Franchisor. Franchisee further acknowledges and agrees that Franchisor owes no fiduciary duty whatsoever to Franchisee.

Article 16 **Indemnification and Insurance**

16.1 Franchisee shall indemnify and hold harmless, to the fullest extent permitted by law, Franchisor, its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership, and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses or obligations including without limitation compensatory, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, Franchisee's ownership or operation of its business hereunder and/or its use or utilization of the Development System, including without limitation the use of any architectural plans and designs provided by Franchisor. In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving Franchisor, Franchisee shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at Franchisee's sole cost and expense or shall cause it to be resisted or defended by an insurer. Franchisee shall also make every reasonable effort to seek to have Franchisor dismissed or released from liability in the event of such action, suit, proceeding, investigation, inquiry, claim or demand. Franchisor shall have the right to resist and defend itself in and/or against any such action, suit, proceeding, investigation, inquiry, claim or demand, and, upon receipt of written notice from Franchisor of the amount expended by Franchisor in such defense, Franchisee shall, within ten business days of such receipt, reimburse Franchisor in full for the total amount of such expenses.

16.2 Franchisee shall, at all times during the term of this Agreement and at its own expense, keep in force by advance payment of premium general liability insurance in an amount not less than One Million Dollars (\$1,000,000.00) per occurrence and in the amount of not less than Two Million Dollars (\$2,000,000.00) annual aggregate, arising out of a single accident, and with a deductible or self-insured retention on any such policy of not greater than One Thousand Dollars (\$1,000.00), or such other amounts of coverage and self-insurance as Franchisor may specify from time to time, insuring Franchisee against any liability that may accrue by reason of the development by Franchisee of Project(s). All policies of insurance to be maintained by Franchisee shall contain a separate endorsement naming Franchisor as an additional insured, as its interest may appear. All insurance shall be placed with an insurance carrier or carriers with an A.M. Best's rating of "A" and an A.M. Best's Class rating of "xlv" or better or be otherwise approved in writing by Franchisor, and shall not be subject to cancellation except upon ten (10) days written notice to Franchisor. All policies of insurance, or certifications for insurance with a copy of the original policy attached, showing full compliance with the requirements of this covenant, shall at all times be kept on deposit with Franchisor. On an annual basis, Franchisee shall provide to Franchisor evidence in the form of a certificate of insurance that such insurance remains in full force and effect.

Article 17 Waiver

17.1 No failure of Franchisor to exercise any power or right reserved to it hereunder, or to insist upon strict compliance by Franchisee with any obligation, covenant, or condition herein, and no custom or practice of the parties in variance with the terms hereof, shall constitute a waiver of Franchisor's right to demand strict compliance with the terms hereof. Waiver by Franchisor of any particular default by Franchisee shall not affect or impair Franchisor's right with respect to any subsequent default of the same or of a different nature; nor shall any delay, waiver, forbearance, or omission of Franchisor to exercise any power or right arising out of any breach or default by Franchisee of any of the terms, provisions, or covenants hereof affect or impair Franchisor's rights, nor shall such constitute a waiver by Franchisor of any right hereunder or of the right to declare any subsequent breach or default. Subsequent acceptance by Franchisor of the payments due to it hereunder shall not be deemed a waiver by Franchisor of any preceding breach by Franchisee of any terms, covenants, conditions, or obligations of this Agreement.

Article 18 Notices

18.1 All notices, payments, or other communications required or permitted to be given or made under this Agreement to Franchisor or to Franchisee shall be given in writing and shall be deemed to have been given if delivered by hand or by certified mail, postage prepaid, or by telecopier or telex (with a hard copy to be sent within forty-eight (48) hours following such electronic transmissions), or by any commercially reasonable overnight courier service providing a receipt of delivery, effective upon receipt thereof at the addresses set forth below:

if to Franchisor, to:
EPCON Communities Franchising, Inc.
600 Stonehenge Parkway
Dublin, Ohio 43017-5067
Attn.: Edward A. Bacome and
Philip G. Fankhauser
Facsimile: 614-761-1155

If to Franchisee, to:
Fankhauser Property Group, Inc.
300 E. John Street, Suite 128
Matthews, North Carolina 28105
Attn: Brook Fankhauser
Facsimile: 704-844-0188

18.2 Either of Franchisor and Franchisee may, by notice given to the other from time to time and at any time, designate a different entity, individual, or address for making payments required to be made or for the giving of notices or other communications.

Article 19
Complete Agreement

19.1 This Agreement, and the documents referred to herein, including without limitation any and all promissory notes given by Franchisee to Franchisor and any and all Market Area Agreement(s) and Market Hold Agreement(s) by and between Franchisor and Franchisee, shall be the entire, full, and complete agreement between Franchisor and Franchisee concerning the subject matter hereof and thereof. This Agreement supersedes all prior agreements, no other representation (other than the most recent version of Franchisor's Franchise Offering Circular provided to Franchisee) having induced Franchisee to execute this Agreement. There are no representations, inducements, promises, or Agreements, oral or otherwise, between the parties not embodied herein which are of any force or effect with reference to this Agreement and the subject matter hereof. No amendment, change or variance from this Agreement shall be binding on either party hereto unless executed in writing by each.

Article 20
Miscellaneous Provisions

20.1 Severability. Each article, section, provision, and term of this Agreement shall be considered severable, and if, for any reason, any article, section, provision, or term herein is determined to be invalid and contrary to or in conflict with any existing or future law or regulation, such shall not impair the operation thereof nor affect the remaining portion of this Agreement. This Agreement will continue to be given full force and effect and bind the parties hereto. Any invalid article, section, provision, or term shall be deemed not to be a part of this Agreement.

20.2 Choice of Law. Except to the extent governed by the U.S. Trademark Act of 1946, as amended, this Agreement shall be deemed to have been entered into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles.

20.3 Venue. Except to the extent prohibited by applicable state law to the contrary, Franchisor and Franchisee agree that any litigation or legal action to enforce or relating to this Agreement and the relationship of the parties hereunder shall be filed in the United States District Court for the Southern District in Columbus, Ohio, or the Common Pleas Court of Franklin County, Ohio, and each of Franchisor and Franchisee hereby consents to the jurisdiction of such courts.

20.4 Benefit. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective and legal representatives, successors and permitted assigns and/or sublicensees.

20.5 Joint and Several Obligations. If Franchisee consists of more than one person, their liability hereunder shall be deemed to be joint and several.

20.6 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

20.7 Pronouns. The number and gender of each pronoun used in this Agreement shall be construed to be such number and gender as context, circumstances, or its antecedent may require.

20.8 Captions. The articles and section headings and other captions contained in this Agreement are contained only for convenience of reference and do not define, limit, explain, or modify this Agreement or its interpretation, construction, or meaning, and are not to be construed as part of this Agreement.

Article 21
Further Acknowledgments by Franchisee

21.1 By its signature set forth below, Franchisee acknowledges that:

- (a) It has received the materials specified in Section 4.1 hereof.
- (b) It has conducted an independent investigation and financial assessment of the business contemplated by this Agreement and the Market Area(s) in which the Project(s) is/are to be located and recognizes that it involves business risks making the success of the venture largely dependent upon the business abilities of Franchisee as well as other variables. Franchisor expressly disclaims the making of, and Franchisee acknowledges that it has not received or relied upon, any representations, warranties or guarantees,

express or implied, as to the potential volume, profits or success of the business venture contemplated by this Agreement.

- (c) It has no knowledge of any representations by Franchisor, or its officers, directors, shareholders, employees, agents or servants, about the business contemplated by this Agreement that are contrary to the terms of this Agreement or the documents incorporated herein, and further represents to Franchisor, as an inducement to its entry into this Agreement, that it has made no misrepresentations in obtaining this Agreement.
- (d) It has received, read and understood this Agreement and the attachments hereto, if any, Franchisor has had fully and adequately explained the provisions of each to its satisfaction; and Franchisor has afforded it ample time and opportunity to consult with advisors of its own choosing about the potential benefits and risks of entering into this Agreement.
- (e) It has received Franchisor's Franchise Offering Circular for the state in which the franchise is to be located at the earlier of the first personal meeting or ten (10) business days prior to the execution of any agreements or the payment of any consideration to Franchisor.
- (f) It is aware of the fact that some franchisees may operate under different forms of agreements, and consequently, that Franchisor's obligations and rights in respect to its various franchisees may differ materially in certain circumstances.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have duly executed and delivered this Agreement.

Franchisee: Fankhauser Property Group, Inc.

Witnesses as to Fankhauser Property Group, Inc.

Signature Mary Layton
Name Printed Mary Layton

Signature _____
Name Printed _____

By: Brock L. Fankhauser Date: 3.23.06
Brock L. Fankhauser, President

Witnesses:

Signature - Witness as to P. Thomas Rothrauff
Name Printed _____

Signature - Witness as to Edward A. Bacome
Name Printed _____

Franchisor: EPCON Communities Franchising, Inc.

By: P. Thomas Rothrauff
P. Thomas Rothrauff, Vice President and General Manager

By: Edward A. Bacome
Edward A. Bacome, Vice President Director
Date: March 30, 2006

EXHIBIT "1"
(to Franchise Agreement)

MARKET AREA AGREEMENT

This Market Area Agreement (this "Market Area Agreement") is made by and between EPCON Communities Franchising, Inc., an Ohio corporation having its principal business offices in Dublin, Ohio (hereinafter referred to as "Franchisor"), and Fankhauser Property Group, Inc., a(n) North Carolina corporation having its principal business offices at 300 E. John Street, Suite 126, Matthews, North Carolina 28105 (hereinafter referred to as "Franchisee"), to be effective as of the date executed by Franchisor as set forth on Page 3 hereof.

Pursuant to the terms of the Franchise Agreement, dated March 30 2006 made by and between the parties hereto (the "Franchise Agreement"), Franchisor and Franchisee make the following agreement, intending to be legally bound thereby:

1. Each term set forth herein having initial capital letters shall have the meaning as set forth herein or, if not defined herein, as specified in the Franchise Agreement.
2. For purposes of this Market Area Agreement, the term "Market Area" is intended to include the smallest specific geographic area that will generate the most purchaser support (typically between 60% and 70%) for a development. The area included within the Market Area typically takes into consideration existing natural and man-made boundaries and socioeconomic conditions. The Market Area for this Market Area Agreement shall be as depicted on the map attached hereto as Exhibit "A" and incorporated herein for all purposes.
3. Franchisor, having granted to Franchisee a license to use the Development System pursuant to the terms and conditions of the Franchise Agreement, desires to further protect its materials, reputation, and goodwill and to geographically limit use by Franchisee of the Development System in an ordered and controlled manner. Franchisee acknowledges that such restrictions are essential to the success of the Project and the projects of other franchisees and licensees of Franchisor.
4. Franchisee agrees to fully implement the Development System only within the Market Area depicted on Exhibit "A" and at the location or address hereinafter specified:

The Market Area is an approximately 14 mile by 5 1/2 mile area in and around Mecklenburg County, North Carolina and York and Lancaster Counties, South Carolina. The exact location of the Project is near the intersection of SR 98 and SR 160.

Proposed Name of Project: Stonecrest Villas

Projected Number of Units in the Project: Ninety (90) Units

Franchisee hereby acknowledges that Franchisor's review and expressed opinion about Franchisee's proposed location is only Franchisor's opinion respecting how the site meets Franchisor's criteria for locations for EPCON Communities Projects and is based upon Franchisor's limited information about Franchisee's Market Area. It does not constitute a representation, warranty, or an acknowledgment by Franchisor or any employee or agent of Franchisor that an EPCON Communities Project at the proposed location will be successful. The decision of Franchisee to proceed with the development of an EPCON Communities Project at the proposed location shall be at the sole discretion of Franchisee based upon its independent analysis, and Franchisee hereby acknowledges and agrees that it shall not have any claim of any nature against Franchisor and its employees and agents if the EPCON Communities Project does not perform in accordance with the expectations of Franchisee.

5. Franchisee shall commence construction of the Project referenced in Section 4 of this Market Area Agreement on or before the second anniversary of the effective date of this Market Area Agreement.

Pursuant to the terms of Article 5 of the Franchise Agreement, the latest dates by which each of the Second Payment, Third Payment and Fourth Payment could be paid by Franchisee to Franchisor in compliance with the Franchise Agreement are as follows:

Latest date and amount of First Payment: Twenty-Six Thousand Dollars (\$26,000) due at execution of Market Area Agreement

Latest date and amount of Second Payment: Thirty-Four Thousand One Hundred Dollars (\$34,100) due at execution of Market Area Agreement.

Latest date and amount of Third Payment: Thirty-Eight Thousand Dollars (\$38,000) due no later than January 30, 2008.

Latest date and amount of Fourth Payment: Not applicable

6. At such time as Franchisee desires to make use of the Development System, including the use of any modification or alteration thereof, at any other location (whether within the Market Area depicted on Exhibit "A" hereto or within a different Market Area) or for any other Project, Franchisee agrees to provide written notification to Franchisor as is further described in Sections 3.4 and 3.5 of the Franchise Agreement. In the event that Franchisor agrees to Franchisee's request, Franchisee agrees that it shall provide to Franchisor a separately executed Market Area Agreement and shall pay to Franchisor, for such use of the Development System at such location, amounts in compliance with the payment formula and schedule set forth in Article 5 of the Franchise Agreement.
7. Franchisee acknowledges that it shall not use or allow to be used the Development System anywhere except at location(s) within the Market Area(s) specified in this or other Market Area Agreement(s) executed by and between Franchisor and Franchisee. Franchisee further acknowledges that any unauthorized and unacknowledged use would be in violation of the terms of this Market Area Agreement and of the Franchise Agreement and agrees that any such breach shall afford to Franchisor each of the rights and remedies set forth in the Franchise Agreement.
8. During the term of the Franchise Agreement, Franchisor agrees to grant to no other licensee or franchisee the right to commence construction (nor to itself commence construction) of a Project utilizing the Development System within the Market Area depicted on Exhibit "A" hereto as long as Franchisee is and has at all times during the term of the Franchise Agreement been in full compliance with each of the conditions set forth below:
 - a. Franchisee fully complies with the provisions of the Franchise Agreement and this Market Area Agreement; and,
 - b. Franchisee, when so requested by Franchisor, notifies Franchisor in writing, within thirty (30) days of its receipt of Franchisor's request, that it will, and does, execute a new Market Area Agreement for a second or subsequent Project within the Market Area and pays to Franchisor the applicable fee provided by the Franchise Agreement such execution and payment each to take place within the above-referenced thirty (30) day period. Franchisor shall only make such a request of Franchisee after (i) Franchisee has completed construction of all buildings of the initial Project in the Market Area and (ii) another franchisee or potential franchisee has notified Franchisor that it is willing and able to execute a Market Area Agreement for a location within the same Market Area or when Franchisor itself desires to construct a Project within the same Market Area.
9. Upon the earliest to occur of (a) Franchisee fails to comply with any provisions of the preceding Section 8, (b) the date of completion of all buildings in the Project described above in Section 4, (c) Franchisee's failure to commence construction of the Project referenced in Section 4 of this Market Area Agreement on or before the second anniversary of the effective date of this Market Area Agreement, or (d) as applicable, (i) the third (3rd) anniversary of the effective date of this Market Area Agreement, for a Project of eighty (80) or fewer units, (ii) the fourth (4th) anniversary of the effective date of this Market Area Agreement for a Project of eighty one (81) to one hundred forty (140) units inclusive, or (iii) the fifth (5th) anniversary of the effective date of this Market Area Agreement for a Project of more than one hundred forty (140) units, any exclusivity rights which Franchisee may have in the Market Area shall immediately terminate, and Franchisor shall have the right to grant to any entity the license to use, or may itself use, the Development System within the Market Area set forth in Exhibit "A".
10. This Agreement shall automatically terminate on the effective date of any termination or expiration of the Franchise Agreement.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF the parties hereto, intending to be legally bound hereby, have duly executed and delivered this Market Area Agreement.

Witnesses as to Fankhauser Property Group, Inc.

Signature Mary Layton
Name Printed: Mary Layton

Signature _____
Name Printed: _____

Franchisee: Fankhauser Property Group, Inc.

By: Brock L. Fankhauser Date: 3.23.06
Brock L. Fankhauser, President

Witnesses as to Epcon Communities

Signature - Witness as to P. Thomas Rothrauff
Name Printed: _____

Signature - Witness as to Edward A. Bacome
Name Printed: _____

Franchisor: EPCON Communities Franchising, Inc.

By: P. Thomas Rothrauff
P. Thomas Rothrauff, Vice President and General Manager

By: Edward A. Bacome
Edward A. Bacome, Vice President Director
Date: March 30, 2006

EXHIBIT "A"
(to Market Area Agreement)

All within Mecklenburg County, North Carolina and York and Lancaster Counties, South Carolina

That area located and included in the following described boundary.

Beginning at the intersection of I-485 and SR 16.

From that point in a southerly direction along SR 16 to its intersection with the Mecklenburg-Union County Line;

From that point in a southwesterly direction along the Mecklenburg-Union County Line to its intersection with the North Carolina-South Carolina State Line;

From that point in a northwesterly direction along the North Carolina-South Carolina State Line to its intersection with US 521;

From that point in a southwesterly direction along US 521 to its intersection with SR 160;

From that point in a westerly direction along SR 160 to its intersection with SR 160/Bus US 21;

From that point in a northwesterly direction along SR 160/Bus US 21 until it becomes just SR 160 to its intersection with SR 49;

From that point in a southwesterly direction along SR 49 to its intersection with Gray Rock Road;

From that point in a westerly direction along Gray Rock Road to its intersection with Island Cove Road;

From that point in a southerly direction along Island Cove Road until it comes to the edge of the shore of Lake Wylie;

From that point in a westerly, then northwesterly direction along Lake Wylie until it comes to the North Carolina-South Carolina State Line;

From that point in a northeasterly direction along the North Carolina-South Carolina State Line to its intersection with SR 1105;

From that point in a northwesterly direction along SR 1105 to its intersection with SR 1102;

From that point in a northeasterly direction along SR 1102 until it becomes Youngblood Road to its intersection with SR 49;

From that point in a northeasterly direction along SR 49 to its intersection with Nevada Boulevard;

From that point in a southeasterly direction along Nevada Boulevard until it dead-ends, then continue until the line comes to I-77/US 21;

From that point in a southerly direction along I-77/US 21 to its intersection with the North Carolina-South Carolina State Line;

From that point in a southeasterly direction along the North Carolina-South Carolina State Line to its intersection with SR 3637;

From that point in a northeasterly direction along SR 3637 until it becomes Dorman Road to its intersection with S. Lancaster Highway;

From that point in a northwesterly direction along S. Lancaster Highway to its intersection with Carolina Place Parkway;

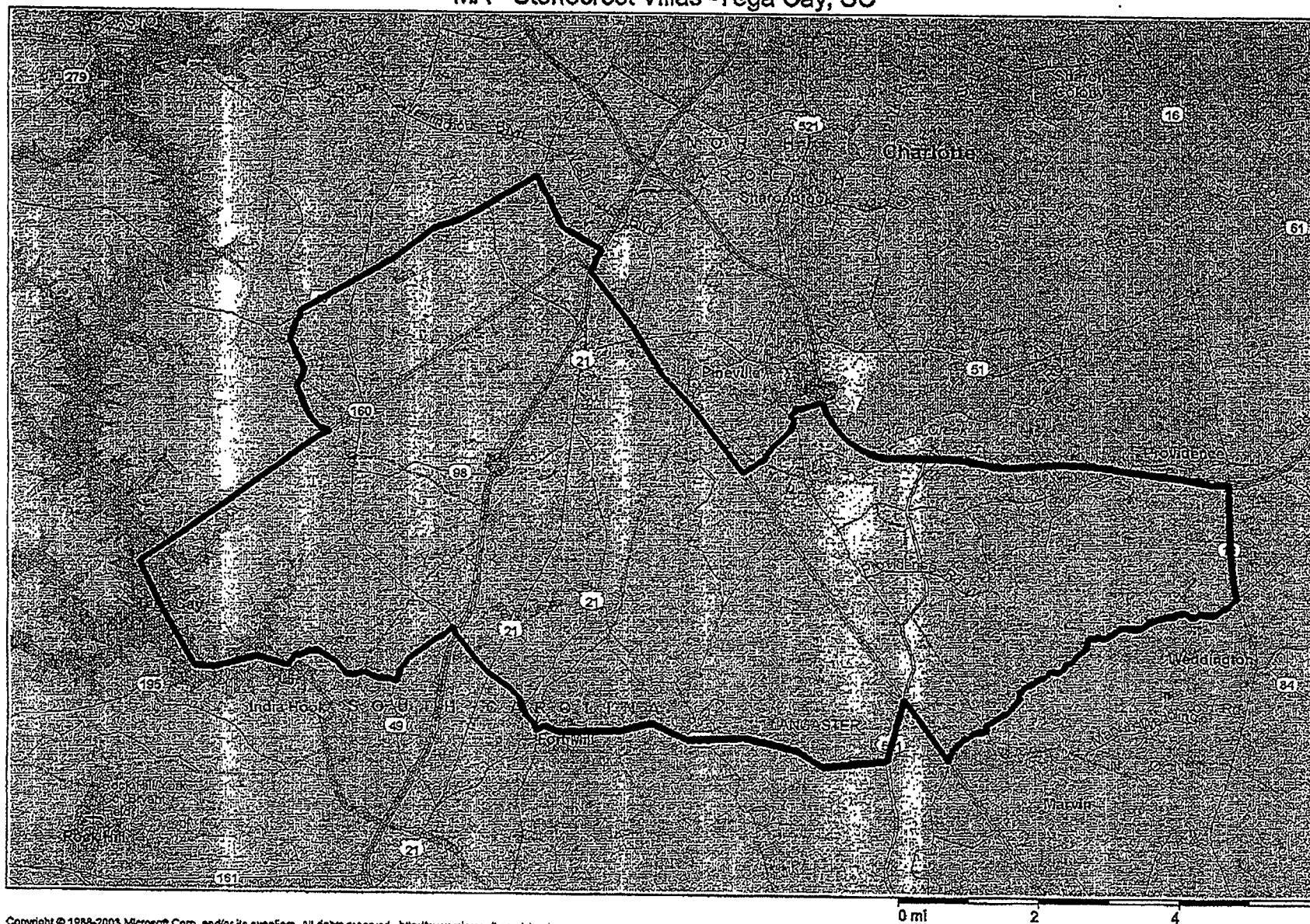
From that point in a northeasterly direction along Carolina Place Road to its intersection with Park Road;

From that point in an easterly direction along Park Road to its intersection with I-485/US 521;

From that point in a southeasterly direction along I-485/US 521 until it becomes just I-485 to its intersection with SR 16, the point of the beginning.

And as depicted on the attached map as that area within the heavy dark line.

MA - Stonecrest Villas -Tega Cay, SC



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EXHIBIT B

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Juontonio Pinckney, *et al.*,)

Plaintiffs,)

vs.)

Epcon Communities, Inc.,)

Epcon Communities Franchising, Inc.,)

Brock L. Fankhauser, Fankhauser Property)

Group, Inc. and Stonecrest Villas of Tega)

Cay Home Owners Association, Inc.,)

Defendants.)

Fankhauser Prop. Group, Inc.,)

Third-Party Plaintiff,)

vs.)

Architectural Alliance, Ltd., Exterior)

Expressions of North Carolina, Inc.,)

Al-Mega Construction, Inc., Procar, Inc.,)

The Southeastern Group, Inc., Lucas Lawn)

and Landscape, Inc., and Jose Simenez,)

Individually and d/b/a M&L Roofing Co.,)

LLC and/or MB Roofing Company,)

Third-Party Defendants.)

Stonecrest Villas of Tega Cay)

Condominium Owners Association, Inc.,)

Third-Party Plaintiff,)

vs.)

Stonecrest Villas of Tega Cay, LLC and)

Epcon Communities Franchising, Inc.)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-46-2326

**AFFIDAVIT OF
JOEL D. RHOADES**

Exterior Expressions of North Carolina,
Inc.)

Fourth-Party Plaintiff,)

vs.)

Marcos Gonzalez,)

Fourth-Party Defendant.)

Procar, Inc. and Procar II, Inc.,)

Fourth-Party Plaintiffs,)

vs.)

Marcos Zertuche, David Carbajal,
Victorina Cortez, Balancos Construction
Co., Balanos Framing, Inc., Ricardo
Hernandez, and Silverio Cortez,)

Fourth-Party Defendants.)

Al-Mega Construction, Inc.,)

Fourth-Party Plaintiff,)

vs.)

Noe Perez, Juan Abundez Saucedo, and
Moisese Chavarra Hernandez,)

Fourth-Party Defendants.)

PERSONALLY APPEARED BEFORE ME, Mr. Joel D. Rhoades, who being duly
sworn, hereby declares under penalty of perjury the following:

1. My name is Joel D. Rhoades, and I am an adult over the age of eighteen and
competent to give this Affidavit.

2. This Affidavit is based upon my personal knowledge.

3. I am, and at all times relevant to the most recent operative amendment to the Complaint in the above-captioned action was, the Vice-President, Secretary, and General Counsel of Epcon Communities, Inc. ("ECI") and Epcon Communities Franchising, Inc. ("ECFI").

4. As Secretary of ECI and ECFI, I am familiar with the corporate records of both entities.

5. ECI and ECFI are separate legal entities under common ownership by shareholders who are natural individuals.

6. As an officer of ECI and ECFI, I have general knowledge, or access to knowledge, regarding the operations of ECI and ECFI, and I am familiar with the facts of the above-captioned action.

7. Neither ECI nor any of its employees had any involvement in the "Project," which consisted of the development, construction, marketing, sale, or maintenance of the condominium development in York County, South Carolina known as Stonecrest Villas of Tega Cay ("SVTC"), which Project is the subject of the above-captioned action.

8. ECI did not enter into any contracts pertaining to the Project, including without limitation, contracts for the sale of condominium units.

9. ECFI is the owner of intellectual property rights consisting of a proprietary condominium development system (the "Development System").

10. ECFI, pursuant to a Franchise Agreement dated March 30, 2006, licensed to Fankhauser Property Group, Inc. ("FPG") the rights to use the Development System in the Project.

11. With regard to the Project, ECFI was a mere licensor of intellectual property rights pursuant to a Franchise Agreement.

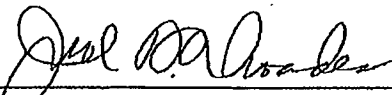
12. Neither ECFI nor any of its employees had any direct involvement in the Project.

13. ECFI did not enter into any other contracts with respect to the Project, including without limitation, contracts for the sale of condominium units.

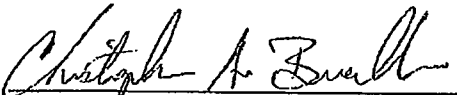
14. No representatives from ECI or ECFI visited the site of the Project during the development and construction thereof.

15. I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate to the best of my knowledge.

FURTHER THIS AFFIANT SAYETH NAUGHT.


Joel D. Rhoades

SWORN to before me this
22ND day of December, 2011


NOTARY PUBLIC FOR OHIO
My Commission Expires: NO EXPIRATION DATE



Christopher A. Buerkle, Attorney At Law
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Sec. 147.03 R.C.

EXHIBIT C

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

JUANTONIO PINCKNEY, ET AL)

PLAINTIFF,)

-VS-)

CA NO 2010-CP-46-2326

EPCON COMMUNITIES, INC.,)

ET AL,)

DEFENDANTS.)

(ROUGH DRAFT)

DEPOSITION OF BROCK FANKHAUSER (30-B-6)

FORT MILL, SOUTH CAROLINA

MARCH 7, 2010

Since this deposition is in rough draft form, please be aware that there may be a discrepancy regarding page and line number when compared to the final transcript. The uncertified rough draft may contain misspelled proper names, reporter's notes in asterisks, incorrect or missing Q/A symbols or punctuation. All such entries will be corrected in the final certified transcript. Rough draft is with the understanding that the rough draft is an uncertified copy.

Shirley Dallas-Gerrald, cvR-CM

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SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS
ROCK HILL, SOUTH CAROLINA
803-328-9640/TOLL FREE 1-877-871-6363

- 1 **A** **Correct.**
- 2 **Q** And is Epcon Communities, Inc. the company that
- 3 Phil Fankhauser and Mr. Bacome used to do their own
- 4 buildings.
- 5 **A** I don't know if that's the company they used to do
- 6 their own buildings.
- 7 **Q** Okay.
- 8 **A** They may form single purpose LLCs. I can't speak
- 9 as to the legal nature of what that company does.
- 10 **Q** You don't know what that company does, I gather,
- 11 Epcon Communities, Inc.?
- 12 **A** I know that Epcon Communities has a lot of
- 13 different companies, but I don't know what each of
- 14 the companies does, except for my knowledge of
- 15 Epcon Communities Franchising and what they do.
- 16 **Q** Okay. And it's fair to say -- because Epcon
- 17 Communities, Inc. is a -- the first, in fact, named
- 18 defendant in the lawsuit that Pinkney et. al. have
- 19 brought. It's fair to say that Epcon Communities,
- 20 Inc. has no relationship with Fankhauser Property
- 21 Group?
- 22 **A** That's safe to say.
- 23 **Q** And has no relationship to anything at Stonecrest
- 24 Villas of Tega Cay?
- 25 **A** **Correct.**

1 that's a little more useable than that. That would
2 be helpful.

3 **A** **(Indicating yes)**

4 **Q** Okay.

5 Whereupon - Document was marked as Deposition
6 Exhibit Number 132.

7 **Q** Let me hand you a document I've marked as Exhibit
8 132. Can you identify that document for me,
9 please?

10 **A** **It's an owner-contractor agreement.**

11 **Q** Between who and who?

12 **A** **Al-Mega Construction and Stonecrest Villas of Tega**
13 **Cay.**

14 **Q** And please look through the document, and tell me
15 whether this is the contract pursuant to which Al-
16 Mega Construction performed services on the
17 Stonecrest job.

18 **A** **It is.**

19 **Q** Now, I think you told us in your individual
20 deposition the form of contract was a form drafted
21 by Fankhauser Property Group?

22 **A** **Yes.**

23 **Q** And was generally used with most of the
24 subcontractors?

25 **A** **Yes.**

1 Q This particular document, Exhibit 132, on Page
2 Fankhauser Property Group 112, does that bear your
3 signature on behalf of Stonecrest Villas?

4 A Yes.

5 Q And was this agreement managed, for lack of a
6 better word, by Fankhauser Property Group as the
7 general contractor?

8 A Yes.

9 Q Attached to the document at Page 117, is that the
10 scope of work applicable to Al-Mega?

11 A Yes.

12 Q Okay. It indicates in Section 16.0B(1) that Al-
13 Mega is going to install the siding and trim for
14 the units and the clubhouse. Is that right?

15 A Yes.

16 Q And requires it to be done in accordance with the
17 drawings, manufacturer's installation instructions,
18 and related contract documents?

19 A Yes, it does.

20 Q Does this scope of work require Al-Mega to furnish
21 the siding?

22 A I guess if you looked at Section 2. That might be
23 the only section that explicitly states that.
24 Contractor shall provide all labor, equipment,
25 nails, staples, incidentals, and insurance. So if

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

JUANTONIO PINCKNEY, ET AL)

PLAINTIFF,)

-VS-)

CA NO 2010-CP-46-2326

EPCON COMMUNITIES, INC.,)

ET AL,)

DEFENDANTS.)

(ROUGH DRAFT)

DEPOSITION OF BROCK FANKHAUSER (30-B-6)

FORT MILL, SOUTH CAROLINA

MARCH 8, 2010

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Shirley Dallas-Gerrald, CVR-CM

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1 Communities Franchising had requested defense and
2 indemnification from Fankhauser Property Group?

3 A Yes.

4 Q Has Fankhauser Property Group yet agreed to defend
5 and indemnify Epcon Communities Franchising?

6 A I can't speak to whether that has occurred.

7 Q So you're not aware, one way or the other, whether
8 they have?

9 A I'm not aware.

10 Q Do you, as we sit here today, have any knowledge of
11 any reason Fankhauser Property Group should not
12 agree to defend and indemnify Epcon Communities
13 Franchising and Epcon Communities, Incorporated in
14 this case?

15 Mr. Powell - I'm going to object and instruct
16 the witness not to answer to the extent that
17 solicits an attorney/client privileged
18 communication. Otherwise, you can answer the
19 question.

20 A (No response)

21 Q Right. So just to clarify, I'm not looking for any
22 conversations that you've had with your attorney,
23 but I'm just looking for what you know personally,
24 as you sit here today. Are you aware of any facts
25 personally that lead you to believe that Fankhauser

1 Property Group is not a - - - should not defend and
2 indemnify Epcon Communities Franchising and Epcon
3 Communities, Incorporated against the allegations
4 in this case?

5 **A** I'm not sure that I'm prepared, in my capacity, to
6 answer that question, given the legal nature it
7 presents.

8 **Q** Well, I'm not asking you for any legal
9 interpretation. I'm just asking for any - - -

10 **A** It feels that way.

11 **Q** I'm asking for any facts that you're aware of, that
12 make you think that Fankhauser Property Group does
13 not need to defend or indemnify - - -

14 **A** No.

15 **Q** And as far as you are concerned as a representative
16 of Fankhauser Property Group, Epcon Communities
17 Franchising fulfilled all of its obligations under
18 the franchising agreement, isn't that right?

19 **A** Yes.

20 **Q** Now, in addition to the additional insured
21 obligations that Fankhauser required of its
22 subcontractors, Fankhauser Property Group also
23 obtained insurance that named Epcon Communities
24 Franchising as an additional insured, isn't that
25 correct?

Deposition of Brock Fankhauser

EXHIBIT D

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

JUANTONIO PINCKNEY, ET AL)

PLAINTIFF,)

-VS-)

CA NO 2010-CP-46-2326

EPCON COMMUNITIES, INC.,)

ET AL,)

DEFENDANTS.)

(ROUGH DRAFT)

DEPOSITION OF BROCK FANKHAUSER (INDIVIDUAL)

FORT MILL, SOUTH CAROLINA

MARCH 6, 2010

Since this deposition is in rough draft form, please be aware that there may be a discrepancy regarding page and line number when compared to the final transcript. The uncertified rough draft may contain misspelled proper names, reporter's notes in asterisks, incorrect or missing Q/A symbols or punctuation. All such entries will be corrected in the final certified transcript. Rough draft is with the understanding that the rough draft is an uncertified copy.

Shirley Dallas-Gerrald, cvR-CM

DALLAS REPORTING
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS
ROCK HILL, SOUTH CAROLINA
803-328-9640/TOLL FREE 1-877-871-6363

1 of Stonecrest Villas?

2 A I have no knowledge of that.

3 Q Do you have any personal knowledge of anyone from
4 either ECF or Epcon Communities, Incorporated, ever
5 having any communications with any purchasers prior
6 to -- any purchasers of a Stonecrest Villa prior to
7 the purchase of a home?

8 A That's unlikely, but I can't comment. I don't
9 speak for Epcon Communities or Epcon Communities
10 Franchising, and I don't know if they were
11 contacted by a prospective purchaser.

12 Q Are you aware of Epcon Communities, Incorporated,
13 having had any involvement at all in the Stonecrest
14 Villas of Tega Cay?

15 Mr. Halford - Object to the form of the
16 question based on the exhibits of record.

17 A I'm not sure I know what you mean by any
18 involvement. Could you rephrase the question?

19 Q Sure. Well, as I understand it, all of the
20 agreements and contracts that you had with any
21 Epcon entity were with ECF. I'm trying to
22 understand whether, to your knowledge, Epcon
23 Communities, Incorporated, was involved in any way
24 with Stonecrest Villas.

25 Mr. Halford - Same objection.

Deposition of Brock Fankhauser

1 **A** I don't have specific information about what
2 employees at Epcon Communities Franchising might be
3 employees of Epcon Communities, Incorporated. And
4 without some type of organizational chart or
5 structure, I could not answer that question.

6 **Q** My question's a little different. I'm not asking
7 whether there might have been an employee who had
8 involvement, who also happened to work for Epcon
9 Communities, Incorporated. What I'm asking is
10 whether the entity, Epcon Communities,
11 Incorporated, had any involvement with Stonecrest
12 Villas of Tega Cay.

13 Mr. Halford - Same objection.

14 **Q** You've testified that you had no contracts or
15 agreements with them, and you've testified that as
16 far as you understand, they were not involved in
17 the development or construction of the Stonecrest
18 Villas; is that correct?

19 **A** That's correct.

20 **Q** And to the best of your knowledge, Epcon
21 Communities, Incorporated was not involved in the
22 marketing of the Stonecrest Villas, were they?

23 **A** They were not.

24 Mr. Halford - Same objection for the record.

25 **Q** Do you personally have any reason to believe that

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Juontonio Pinckney, *et al.*,)

Plaintiffs,)

vs.)

Epcon Communities, Inc.,)

Epcon Communities Franchising, Inc.,)

Brock L. Fankhauser, Fankhauser Property)

Group, Inc. and Stonecrest Villas of Tega)

Cay Home Owners Association, Inc.,)

Defendants.)

Fankhauser Prop. Group, Inc.,)

Third-Party Plaintiff,)

vs.)

Architectural Alliance, Ltd., Exterior)

Expressions of North Carolina, Inc.,)

Al-Mega Construction, Inc., Procar, Inc.,)

The Southeastern Group, Inc., Lucas Lawn)

and Landscape, Inc., and Jose Simenez,)

Individually and d/b/a M&L Roofing Co.,)

LLC and/or MB Roofing Company,)

Third-Party Defendants.)

Stonecrest Villas of Tega Cay)

Condominium Owners Association, Inc.,)

Third-Party Plaintiff,)

vs.)

Stonecrest Villas of Tega Cay, LLC and)

Epcon Communities Franchising, Inc.)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-46-2326

The Honorable John C. Hayes, III

AMENDED

**MEMORANDUM IN SUPPORT OF
EPCON COMMUNITIES, INC.'S AND
EPCON COMMUNITIES FRANCHISING,
INC.'S MOTION FOR SUMMARY
JUDGMENT ON THEIR CROSS-CLAIMS
AGAINST
FANKHAUSER PROPERTY GROUP, INC.**

FILED-RECEIVED
2012 JUL 20 PM 3:21
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

Exterior Expressions of North Carolina,
Inc.)

Fourth-Party Plaintiff,)

vs.)

Marcos Gonzalez,)

Fourth-Party Defendant.)

Procar, Inc. and Procar II, Inc.,)

Fourth-Party Plaintiffs,)

vs.)

Marcos Zertuche, David Carbajal,
Victorina Cortez, Balancos Construction
Co., Balanos Framing, Inc., Ricardo
Hernandez, and Silverio Cortez,)

Fourth-Party Defendants.)

Al-Mega Construction, Inc.,)

Fourth-Party Plaintiff,)

vs.)

Noe Perez, Juan Abundez Saucedo, and
Moisese Chavarra Hernandez,)

Fourth-Party Defendants.)

Epcon Communities, Inc. (ECI) and Epcon Communities Franchising, Inc. (ECFI) submit this Amended Memorandum in support of their Motion for Summary Judgment on their cross-claims against Fankhauser Property Group (FPG), Epcon Communities, Inc. (ECI) and Epcon Communities Franchising, Inc. (ECFI) filed on January 10, 2012. ECI and ECFI submitted a

Memorandum in support of their Motion on March 20, 2012. The Motion and March 20, 2012 included an Affidavit of Joel D. Rhoades dated December 22, 2011. Subsequent discovery necessitated an amendment to the original affidavit, and ECI and ECFI have submitted an Amended Affidavit of Joel D. Rhoades dated July 18, 2012. In support of their Motion, ECI and ECFI state as follows:

STATEMENT OF UNDISPUTED FACTS

This matter arises from a condominium development project in York County, South Carolina known as Stonecrest Villas at Tega Cay (the "Project"). Defendant FPG possessed the rights to develop the Project pursuant to a Franchise Agreement and Market Area Agreement between FPG and ECFI dated March 30, 2006 (collectively, the "Franchise Agreement"), a copy of which was attached to ECI/ECFI's Motion for Summary Judgment as Exhibit A.¹ Under the Franchise Agreement, ECFI is franchisor and FPG is franchisee. (Exhibit A at 1.) The franchise granted to FPG consists of the right to use the Development System, as that term is defined in Section 2.1.1 of the Franchise Agreement. (Exhibit A, § 1.1, 1.2 and 2.1.1) Plaintiffs' allegations in this lawsuit arise from FPG's use of the Development System. Specifically, Section 2.1.1 of the Franchise Agreement defines "Development System" as:

[ECFI's] method, pattern documents, materials, know-how, knowledge, process, and procedure used for development, construction, and marketing of the residential, multi-family community using a unique architectural design, as well as other proprietary and confidential information, including copyrighted and patented material, and material for which the copyright registration or patent is pending, including, without limitation, all architectural plans and specifications for two- and four-unit buildings, architectural plans and specifications for the clubhouse, site planning guidelines, and sample condominium association materials provided by [ECFI]. The Development System shall be deemed to include any method, pattern, process, or procedure used by [FPG] during the term of this Agreement, along with any modifications or changes thereto.

¹ For the Court's convenience, a copy of Exhibit A to ECI/ECFI's Motion is attached as Exhibit A. Exhibit B to ECI/ECFI's Motion was the Affidavit of Joel D. Rhoades. That Exhibit B is superseded by the Amended Affidavit of Joel D. Rhoades attached hereto as Exhibit B to this Amended Memorandum.

ECI is a legal entity separate from ECFI, but which is under common ownership with ECFI. *See* Amended Affidavit of Joel D. Rhoades dated July 18, 2012 attached as Exhibit B hereto ("Rhoades Affidavit"), ¶ 5.

The Project was built by FPG as general contractor. *See* March 7 FPG Depo. at 283:14 and 284:8. Brock Fankhauser, owner of FPG, was deposed March 6-8 in both his individual capacity and as corporate designee of FPG. Cited portions of the deposition of FPG are attached hereto as Exhibit C, and cited portions of the deposition of Brock Fankhauser individually are attached hereto as Exhibit D. The individual units at the Project were marketed and sold to Plaintiffs by Stonecrest Villas of Tega Cay, LLC, of which Brock Fankhauser was the sole member. There is no evidence that either ECI or ECFI had any communications with a prospective purchaser prior to their purchase of a condominium at the Project. *See* Fankhauser Depo. at 313: 3-11. ECI was neither party to the Franchise Agreement nor involved in the development, construction, marketing or sale of the Project or any units therein. Rhoades Affidavit, ¶ 7. *See* March 6 Fankhauser Depo. at 314:6-23 and March 7 FPG Depo. at 85:16-25. ECFI's role with regard to the Project was a mere licensor of intellectual property rights under the Franchise Agreement. Rhoades Affidavit, ¶ 12. It did not engage in any construction, marketing or sale of any homes in the Project, *See id.* ¶ 8.

Plaintiffs allege their units suffer from recurring water intrusion and construction defects. *See* Complaint, ¶ 20. Plaintiffs further allege the units do not conform to the plans and specifications and model home designs used to advertise, market and sell units in the Project. *Id.* *See* Complaint, ¶¶ 21 and 22(g).

Importantly, despite the fact that experts for eight different parties in this case have issued reports and one Affidavit, not a single expert has stated that either ECI or ECFI breached

any standard of care in issuing the prototype plans. In fact, Plaintiffs' own expert, Dennis Hall testified in his May 15, 2012 deposition that he does not plan to offer any opinions at trial regarding either Epcon Communities, Inc. or Epcon Communities Franchising, Inc. Hall depo. at 405:15-25 – 406:1-3. The Hall deposition excerpts are attached hereto as Exhibit E. Mr. Hall testified that he has familiarity with prototype plans and knows of no requirement or standard that places a burden on a franchisor, such as ECFI, to make prototype plans consistent with the building code of a particular state before those plans are conveyed to a franchisee. Hall depo. at 411:8-14. Plaintiffs' expert reviewed Section 9.2 of the Franchise Agreement and testified that the language requiring the franchisee to have the plans reviewed and sealed by a registered architect was "typical of what [he] would expect a franchisee to do." Hall Tr. at 412:8-14. He is not aware of any requirements for ECFI to have made the prototype plans compliant with the South Carolina Building Code prior to licensing them to Fankhauser Property Group. Hall Tr. at 412:15-21.

FPG agreed in the Franchise Agreement to defend and indemnify ECI and ECFI for claims arising from FPG's use of the Development System. Section 16.1 of the Franchise Agreement provides as follows:

[FPG] shall indemnify and hold harmless, to the fullest extent permitted by law, [ECFI], its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership [i.e. ECI], and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation, or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, [FPG's] ownership or operation of its business hereunder and/or its use or utilization of the Development System, including without limitation the use of any architectural plans and designs provided by [ECFI]. In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving [ECFI], [FPG] shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at [FPG's]

sole cost and expense or shall cause it to be resisted or defended by an insurer. [FPG] shall also make every reasonable effort to seek to have [ECFI] dismissed or released from liability in the event of such action, suit, proceeding, investigation, inquiry, claim or demand. [ECFI] shall have the right to resist and defend itself in and/or against any such action, suit, proceeding, investigation, inquiry, claim or demand, and, upon receipt of written notice from [ECFI] of the amount expended by [ECFI] in such defense, [FPG] shall, within ten business days of such receipt, reimburse [ECFI] in full for the total amount of such expenses.

FPG admits that ECFI fulfilled all of its obligations under the Franchise Agreement. *See* March 8 FPG Depo at 15:15-19. In fact, FPG admits it is not aware of any facts to support FPG's failure to defend and indemnify ECI and ECFI in this matter. *See* March 8 FPG Depo 14:21-25 and 15:1-14. ECI/ECFI asks this Court to find as a matter of law, that FPG is obligated to defend and indemnify ECI and ECFI for the claims asserted against ECI and ECFI by individual Plaintiffs and Third-Party Plaintiff Stonecrest Villas Condominium Association, Inc. ("COA").

PROCEDURAL HISTORY

Plaintiffs filed their Third Amended Complaint on September 16, 2011. The Complaint asserts the following causes of action against ECI and ECFI: Rescission, Breach of Contract, Fraud and Misrepresentation, Breach of Express Warranty, Breach of Implied Warranty of Merchantability, Breach of Implied Warranty of Fitness for a Particular Purpose, Breach of Express Warranties, and Unfair Trade Practices. Third-Party Plaintiff COA asserted claims against ECFI also arising from allegedly defective construction. ECI and ECFI timely answered the Complaint and Third-Party Complaint and, in their Answers, asserted cross-claims against FPG for contractual and equitable indemnity.

ECI and ECFI demanded FPG assume the defense and indemnify ECI and ECFI for costs incurred in connection with this matter as provided by Section 16.1 of the Franchise Agreement.

FPG has thus far refused to indemnify ECI/ECFI or assume their defense in this matter. On January 9, 2012, ECI and ECFI served their Motion for Summary Judgment against FPG on their contractual and equitable indemnification claims against FPG.

STANDARD OF REVIEW

A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRPC. Because this is a Motion for Summary Judgment, the facts are viewed in the light most favorable to FPG, the non-moving party. *See* Rule 56, SCRPC; *see also SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990) (noting standard for summary judgment).

A party opposing a Motion for Summary Judgment “may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule must set forth specific facts showing there is a genuine issue for trial.” Rule 56(e), SCRPC. “The purpose of summary judgment is to expedite the resolution of cases that do not require a fact finder.” *Shirley’s Iron Works, Inc. v. City of Union*, 387 S.C. 389, 397, 693 S.E.2d 1, 5 (Ct. App. 2010).

LEGAL ARGUMENT

For purposes of this Motion, ECI and ECFI accept the facts in the light most favorable to FPG, as FPG is the non-moving party. Even so, ECI and ECFI are entitled to summary judgment on their cross-claims against FPG, for the reasons stated below:

I. ECI and ECFI are Entitled to Summary Judgment on their Contractual Indemnification Claim against FPG.

Under the Franchise Agreement, FPG is contractually obligated to defend and indemnify ECI and ECFI for the claims asserted against them in this action. The claims asserted by Plaintiffs and Third-Party Plaintiffs all arise from and in connection with FPG's use of the Development System. There is no dispute that ECI is an entity affiliated with ECFI (Franchisor) through common ownership. See March 8 FPG Depo at 13:20-24. Moreover, there is no evidence of any independent negligence on the part of either ECI or ECFI. Rather, the claims in this case all arise from FPG's construction, marketing and sale of the condominiums at Stonecrest Villas of Tega Cay. The crux of the Plaintiffs' claims is that the condominiums were defectively constructed. The allegations against ECI and ECFI all arise from FPG's use of the Epcon Communities trade name, which was permitted under the Franchise Agreement, including the Market Area Agreement attached as Exhibit 1 to the Franchise Agreement. The claims in this case are precisely the type of claims the defense and indemnification provision in Section 16.1 of the Franchise Agreement was intended to address.

The crux of this action is alleged defective construction in the Project. It is undisputed that FPG served as the general contractor for the Project. March 6 Fankhauser Depo. At 247:19-21. To develop and construct the Project, FPG licensed the Development System from ECFI pursuant to the terms of the Franchise Agreement. Among other things, the Development System includes *unstamped* architectural plans and specifications and site planning guidelines. See Franchise Agreement, ¶4.1. The Franchise Agreement specifically required FPG to have its own architect seal and stamp the plans provided to it under the Franchise Agreement. Specifically, Section 9.2 of the Franchise Agreement provides as follows:

Franchisee understands and acknowledges that, due to the continual evolution of the plans, and the other materials referenced above, and the volume of detailed information and data contained therein, there are likely to be some inaccuracies and/or items subject to specific local or other requirements which will require

correction, at Franchisee's expense, by Franchisee's architects, engineers, contractors, counsel and/or other professionals as work progresses. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, make any changes or modifications including, but not limited to, the seal or stamp of a registered architect, to the plans, specifications, or any other part of the Development System used or proposed for use for or at its Project(s) which changes or modifications are necessitated by any applicable zoning and building codes, permit requirements, or any other federal, state or local laws, including, without limitation, licensing requirements for contractors, property managers and real estate salespersons, the formation and management of condominium associations, occupational health and safety on the construction site, housing finance, equal housing laws, the Fair Housing Act and the Americans with Disabilities Act, as well as the Accessibility Guidelines promulgated under each of these acts. Franchisee further acknowledges that it possesses sole responsibility hereunder to comply with all applicable laws in the marketing of condominium units in its projects, including, without limitation, the Fair Housing Act. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, have the seal or stamp of a registered architect affixed to said plans. No changes, however extensive, shall operate to relieve Franchisee of its obligations to make payments due to Franchisor pursuant to the terms of this Agreement.

Therefore, it is the responsibility of FPG under the Franchise Agreement to ensure the plans and specifications are stamped or sealed by a registered architect and that they comply with all applicable legal requirements. Plaintiffs have not alleged any construction defect claims against ECI or ECFI. *See* Complaint, Thirteenth Cause of Action. Rather, Plaintiffs allege "the construction practices employed by Defendants Fankhauser Property Group, Inc. and Brock L. Fankhauser were carried out in a negligent and un-workmanlike manner and constitute violations of building code, the franchised Epcon Developmental System, Epon [sic] plans, Epcon specifications and recommended materials." *Id.* at ¶6. Notably, FPG does not claim any defect in the Development System or any of the materials ECFI provided FPG pursuant to the Franchise Agreement.

Section 20.2 of the Franchise Agreement contains a choice of law provision which provides, in pertinent part, that the Franchise Agreement "shall be deemed to have been entered

into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles.” Choice of law clauses are generally honored in South Carolina. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011)(citing *Nucor Corp. v. Bell*, 482 F.Supp.2d 714, 728 (D.S.C. 2007)).

“If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined.” *Corporate Protection Servs., Inc. v. Guardian Alarm of Ohio*, 2012 WL 439645 (Ohio App. 2012) at *3. In *Corporate Protection*, the court found that the plain language of the indemnification clause in the contract provided indemnification if the indemnitor’s deficient performance of the contract resulted in litigation and if the deficient performance of the contract caused the indemnitee to become indebted to third parties. *Id.* at *5. The indemnification clause in the Section 16.1 of the Franchise Agreement is clear. FPG is obligated to indemnify and defend ECFI and ECFI for any litigation and costs incurred relating to FPG’s use of the Development System in developing and constructing the Project. Ohio law generally allows enforcement of indemnity agreements. *Glaspell v. Ohio Edison Co.*, 505 N.E.2d 264 (Ohio 1987). South Carolina law also permits indemnity agreements. *Toomer v. Norfolk Southern Ry. Co.*, 344 S.C. 486, 490, 544 S.E.2d 634, 635 (Ct. App. 2001) (right to indemnity may arise by contract...or by operation of law as a matter of equity).

The *Glaspell* court overturned a ruling by the trial court that an indemnity clause in an agreement between two utility companies failed to express in clear and unequivocal terms that the indemnitor was required to indemnify the indemnitee for the indemnitee’s own alleged negligence. In fully enforcing the indemnity clause, the Ohio Supreme Court held that a narrow construction of the clause was unnecessary when “assented to in a context of free and

understanding negotiation.” *Glaspell*, 505 N.E.2d at 266. In concluding that the negotiation was a true bargained-for exchange, the Court noted the following about the parties:

The parties in this case before us are commercial enterprises of sufficient size and quality as to presumably possess a high degree of sophistication in matters of contract. They all provide services to the public as their means of producing income and customarily rely on contracts. Each has the financial power to provide against loss by insurance or other means.

Id. at 267.

Based on the foregoing, ECI and ECFI are entitled to indemnification and defense from FPG in this matter under the terms of the Franchise Agreement. Both are commercial enterprises that freely entered into the Franchise Agreement containing the indemnity clause. Moreover, ECI and ECFI deny any negligence on their part in this lawsuit, and there is no evidence in the record that would support a finding of negligence by either ECI or ECFI.

FPG may argue that Ohio Revised Code §2305.31 prevents indemnification in this matter. O.R.C. §2305.31 is analogous to the prohibition on certain hold harmless clauses in construction contracts contained in S.C. Code Ann. §32-2-10. O.R.C. §2305.31 is inapposite to this case in two respects. First and foremost, the contract between ECFI and FPG is not a construction contract. It is a franchise agreement pursuant to which ECFI licensed to FPG the right to use certain of ECFI’s intellectual property. FPG then used such intellectual property as the basis for his development of the Project. Second, O.R.C. §2305.31 does not apply to the Franchise Agreement as it is not a contract or agreement in which ECFI or ECI hired FPG to perform work, as is explicitly required under the statute. Third, Brock L. Fankhauser’s deposition testimony on behalf of himself and FPG established that neither ECFI nor ECI independently marketed or sold units in the Project. *See also* Affidavit of Joel Rhoades dated December 20, 2011 filed with ECI and ECFI’s Motion for Summary Judgment. There is nothing

in the record to establish any independent negligence on the part of ECI or ECFI. Therefore, there are no legal barriers to the enforcement of the indemnification clause in the Franchise Agreement, and ECI and ECFI are entitled to its enforcement against FPG to the fullest degree.

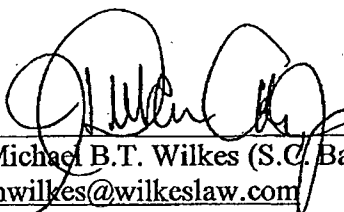
II. ECI and ECFI are Entitled to Summary Judgment on their Equitable Indemnification Claim against FPG.

“According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.” *Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). In this case, ECI and ECFI have been exposed to liability because of the alleged negligence of FPG. Plaintiffs have alleged that the Project was constructed in a defective manner. Plaintiffs, have not however, directed any construction defect allegations against ECI or ECFI. The allegations against ECI and ECFI essentially relate representations allegedly made to Plaintiffs during the sales process. However, Brock L. Fankhauser’s own deposition testimony on behalf of himself and FPG establishes ECI and ECFI did not independently market or sell units in the Project. Therefore, nothing in the record establishes independent negligence of ECI or ECFI. As such, ECI and ECFI are also entitled to equitable indemnification against FPG in this action. *Toomer v. Norfolk Southern Ry. Co.*, 344 S.C. 486, 491, 544 S.E.2d 634, 636 (Ct. App. 2001) (right to indemnity exists where one person is exposed to liability by the wrongful act of another in which he does not join).

CONCLUSION

For the foregoing reasons, ECI and ECFI are entitled to the entry of summary judgment on their claims of contractual and equitable indemnity against FPG.

July 20, 2012

By: 

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify on July 20, 2012, a true and correct copy of *Epcon Communities Franchising, Inc.'s Amended Memorandum in Support of its Motion to For Summary Judgment on its Cross-Claims Against Fankhauser Property Group, Inc.* was served via U.S. Mail and e-mail upon Morgan S. Templeton, Esquire and Graham P. Powell, Esquire, Attorneys for Defendant's Brock L. Fankhauser, Fankhauser Property Group, Inc. and Stonecrest Villas of Tega Cay, LLC, and via e-mail upon the remaining parties as follows:

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Curtis W. Dowling, Esquire Barnes Alford Stork & Johnson, LLP PO Box 8448 Columbia, SC 29202 <i>Attorney for Defendant and Third-Party Plaintiff Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.</i> Brett E. Dressler, Esquire Robert C. Dortch, Jr., Esquire Sellers Hinshaw Syers Dortch & Lyons, PA 301 S. McDowell Street Charlotte, NC 28204 <i>Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc. (Cross-Claims and Third-Party Complaint)</i>	Bonum S. Wilson, III, Esquire Wilson & Heyward PO Box 13177 Charleston, SC 29422 D. Andrew Williams, Esquire Turner, Padgett, Graham & Laney, PA PO Box 1473 Columbia, SC 29202 <i>Attorneys for Third-Party Defendants Jose Simenez, Individually and d/b/a M&L Roofing Co., LLC and/or MB Roofing Company</i>
Tracy T. Vann, Esquire Christi P. Cox, Esquire Hamilton Martens & Ballou, LLC PO Box 10940 Rock Hill, SC 29731 <i>Attorney for Third-Party Defendant Al-Mega</i>	Thomas F. Dougall, Esquire Law Offices of Thomas F. Dougall 1700 Woodcreek Farms Road, Suite 100 Elgin, SC 29045 <i>Attorney for Third-Party Defendant Pro-Car, Inc.</i>

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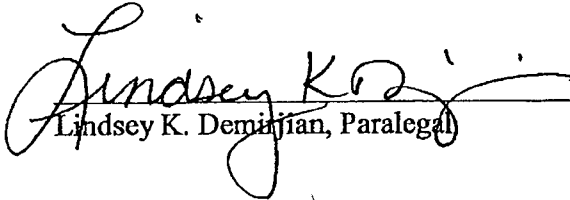

Lindsey K. Demigian, Paralegal

EXHIBIT A

FRANCHISE AGREEMENT

This Franchise Agreement (this "Agreement") is made by and between EPCON Communities Franchising, Inc., an Ohio corporation having its principal business offices at 600 Stonehenge Parkway, Dublin, Ohio 43017 (hereinafter referred to as "Franchisor"), and Fankhauser Property Group, Inc., a(n) North Carolina corporation having its principal business offices at 300 E. John Street, Suite 126, Matthews, North Carolina 28105 (hereinafter referred to as "Franchisee"), to be effective as of the date executed by Franchisor as set forth on Page 19 hereof.

For and in consideration of the covenants and promises herein contained, Franchisor and Franchisee make the following agreement, intending to be legally bound thereby:

Article 1

The Development System and Franchisee's Acknowledgments

1.1 Franchisor, as a result of the expenditure of substantial time, effort, and money, has created a unique Development System (as hereinafter defined) for the purpose of providing guidance for development of ranch-style condominium dwellings. The essence of the Development System that Franchisor licenses to its franchisees to use is its architectural plans and designs. The Development System includes, without limitation, plans for specially designed structures which appear from all four sides as single-family residences. As a part of the franchise and license granted in Article 3 hereof, Franchisor shall provide the materials and services described in Article 4 hereof to enable Franchisee to implement the Development System at the location or locations and within the area or areas as set forth in one or more Market Area Agreements (the "Market Area Agreements") each substantially in the form attached hereto as Exhibit "1".

1.2 Franchisee, being cognizant of the distinctive significance and value thereof, desires to make use of and to enjoy the benefits of Franchisor's Development System. Franchisee acknowledges that the success of its use of the Development System depends upon its strict adherence to Franchisor's uniform standards, procedures, and plans, as well as Franchisee's business abilities and other variables. Franchisee agrees to preserve in every way possible the integrity of Franchisor's materials, reputation, and goodwill. Franchisee acknowledges that execution of at least one Market Area Agreement is required at the same time as the execution of this Agreement.

Article 2

Definitions of Certain Terms

2.1 Each term set forth in this Section 2.1 shall have the meaning specified herein:

2.1.1 "Development System" shall mean Franchisor's method, pattern, documents, materials, know-how, knowledge, process, and procedure used for development, construction, and marketing of the residential, multi-family community using a unique architectural design, as well as other proprietary and confidential information, including copyrighted and patented material, and material for which the copyright registration or patent is pending, including, without limitation, all architectural plans and specifications for two- and four-unit buildings, architectural plans and specifications for the clubhouse, site planning guidelines, production management guidelines, financial planning guidelines, marketing materials and guidelines, and sample condominium association materials provided by Franchisor. The Development System shall be deemed to include any method, pattern, process, or procedure used by Franchisee during the term of this Agreement, along with any modifications or changes thereto.

2.1.2 "Franchisor" shall mean EPCON Communities Franchising, Inc., an Ohio corporation, and any assignee of, or successor in interest to, EPCON Communities Franchising, Inc.

2.1.3 "Franchisee" shall mean the party so defined in the preamble hereto and any successor in interest to, or permitted assignee or sublicensee of, Franchisee. Franchisee shall also be deemed to include any principals, officers, owners, and directors of Franchisee, any principals, officers, owners, and directors of an entity having an ownership interest in Franchisee, and any others with any ownership or control interest whatsoever in the entity so defined in the preamble, if such entity is other than a natural person.

2.1.4 "Marks" shall mean all distinguishing characteristics of the Development System, including, without limitation, the name and mark "EPCON Communities", together with such other trade names, service marks, trademarks, and trade symbols, emblems, signs, slogans, insignia and copyrights as Franchisor has adopted and

designated for use in connection with its Development System and as Franchisor may hereafter acquire or develop and designate for use in connection with the Development System.

2.1.5 "Project" shall mean all of the development of buildings or appurtenant structures and improvements on common contiguous grounds by Franchisee, or any successor in interest to, or permitted assignee or sublicensee of, Franchisee, using the Development System. Such development shall be defined as a Project without consideration of the elapsed time required for development of the Project or of the development, marketing, or legal "phase" thereof.

Article 3 Grant of Franchise

3.1 Franchisor hereby grants to Franchisee, and Franchisee hereby accepts, a franchise and license to utilize the Development System subject to the terms, restrictions, and conditions of this Agreement and to the terms, restrictions, and conditions of the Market Area Agreement(s). The grant of such franchise to Franchisee shall be on a non-exclusive basis, except to the extent that certain rights of exclusivity are granted to Franchisee under certain conditions within a particular area or areas pursuant to the terms of one or more Market Area Agreement(s). The term of this Agreement and the franchise it grants shall commence as of the date of execution of this Agreement by Franchisor as shown on Page 19 hereof and shall continue until termination of this Agreement and the franchise as specified in Article 12 hereof.

3.2 Franchisor further grants to Franchisee, subject to the terms and conditions herein contained, a nonexclusive license to use the Marks as provided in Section 5.9 and Article 6 hereof in connection with Franchisee's use of the Development System.

3.3 As provided in Section 1.2 hereof, Franchisee and Franchisor shall execute at least one Market Area Agreement at the time this Agreement is executed. Such Market Area Agreement shall specify a Market Area (as defined in the Market Area Agreement) and a location for Franchisee's initial Project.

3.4 In the event that Franchisee desires to develop an additional Project or Projects at another location or locations within the Market Area of an already-existing Market Area Agreement between Franchisor and Franchisee, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days of its receipt of Franchisee's written request, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such Project(s), such approval shall be effective as of the execution by Franchisee of a new Market Area Agreement or Agreements using Franchisor's then current form of Market Area Agreement, setting forth the new location(s) within the Market Area and the payment by Franchisee of the applicable Project Fee(s) pursuant to the provisions hereof.

3.5 In the event that Franchisee desires to develop a Project at a location within a new Market Area, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such Project, such approval shall be effective as of the execution by Franchisee of a new Market Area Agreement using Franchisor's then current form of Market Area Agreement, setting forth the new Market Area and the location of the Project therein, and the payment by Franchisee of the applicable Project Fee(s) pursuant to the provisions hereof.

3.6 In the event that Franchisee desires to obtain a reservation or "hold" on a new Market Area or Areas, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such reservations or "holds" on certain Market Areas, such approval shall be effective as of the execution by Franchisee of a Market Hold Agreement or Agreements (the "Market Hold Agreement(s)") using Franchisor's then current form of such agreement, the current form of which is attached hereto as Exhibit "4", and the payment by Franchisee of the applicable fee(s) as provided in the Market Hold Agreement(s).

3.7 Notwithstanding any other provisions of this Agreement to the contrary, Franchisor retains the right, in its sole discretion, itself or through subsidiaries or affiliated or related business entities, to use the Development System to construct Project(s) outside of Franchisee's Market Area and to franchise or license others to do so.

Article 4
Franchisor's Obligations

4.1 Franchisor agrees to provide, based upon Franchisor's most recently updated project plans, the following:

- 4.1.1 Unstamped architectural plans and specifications for two- and four-unit buildings, in a computer-assisted design ("CAD") format**
 - 4.1.1.1 foundation plan
 - 4.1.1.2 floor plan
 - 4.1.1.3 roof plan with non-engineered truss drawings
 - 4.1.1.4 wall sections
 - 4.1.1.5 exterior elevations
 - 4.1.1.6 drawings or schedules for windows, doors, cabinets, shelving, and floor coverings
 - 4.1.1.7 plumbing plan
 - 4.1.1.8 electrical plan
 - 4.1.1.9 heating, venting, and air conditioning ("HVAC") plan
 - 4.1.1.10 drawings for entry guardhouse and fencing
- 4.1.2 Unstamped architectural plans and specifications for a large and a small clubhouse, in a CAD format**
 - 4.1.2.1 foundation plan
 - 4.1.2.2 floor plan
 - 4.1.2.3 roof plan with non-engineered truss drawings
 - 4.1.2.4 wall sections
 - 4.1.2.5 exterior elevations
 - 4.1.2.6 drawings or schedules for windows, doors, cabinets, shelving, and floor coverings
 - 4.1.2.7 plumbing plan
 - 4.1.2.8 electrical plan
 - 4.1.2.9 HVAC plan
- 4.1.3 Site planning guidelines from two recent projects**
 - 4.1.3.1 sample site plans
 - 4.1.3.2 sample landscape plans
 - 4.1.3.3 recommendations for locations of utilities, curbs, streets, drives, patios, sidewalks, and mounding
- 4.1.4 Construction Specifications Manual, in a computer readable format.**
- 4.1.5 Construction Manual, in a computer readable format.**
- 4.1.6 Operations Manual, in a computer readable format.**
- 4.1.7 Marketing Manual and Materials, in a computer readable format.**
 - 4.1.7.1 color renderings or photographs of units and clubhouse exteriors
 - 4.1.7.2 sample brochure
 - 4.1.7.3 Four (4) video presentations including The Condominium Lifestyle Sales Video, New Owners Video, New Buyers Orientation Video and How to Plan a Grand Opening Video
- 4.1.8 Condominium Materials Manual, in a computer readable format.**
- 4.1.9 National Account Suppliers Manual, in a computer readable format.**
- 4.1.10 Sample Homeowners Manual.**
- 4.1.11 Sample Employer Handbook.**
- 4.1.12 Pre-Construction Community Manual.**
- 4.1.13 Consulting services**
 - 4.1.13.1 Franchisor will provide twenty (20) hours of consulting services to Franchisee for Franchisee's first Project. Consulting may include, but is not limited to, advice on the areas of planning, financing, construction, and marketing.

- 4.1.13.2 Franchisor will provide up to twenty (20) hours of consulting services if Franchisee so requests for each subsequent Project. Consulting may include, but is not limited to, advice on the areas of planning, financing, construction, and marketing.
- 4.1.13.3 Consulting services will be provided to Franchisee either, at Franchisor's discretion, at the corporate offices of Franchisor, by telephone, or at Franchisee's place(s) of business.
- 4.1.13.4 Consulting services in excess of twenty (20) hours requested by Franchisee for a particular Project will be billed to Franchisee by Franchisor at \$200.00 per hour.

4.2 Franchisor represents that the architectural plans and other materials referenced above in Sections 4.1.1, 4.1.2, 4.1.3, and 4.1.4 and provided to Franchisee are substantially similar to those used by Franchisor's affiliate, EPCON Communities, Inc. in its developments. (Franchisee should refer to Article 8 hereof regarding its obligations concerning modifications to the Development System.)

4.3 In order to protect the reputation and goodwill of the Marks and to maintain uniform standards of development under the Marks, Franchisee shall conduct its operations hereunder in accordance with the Operations Manual, one copy of which Franchisee acknowledges having received on loan from Franchisor for the term of this Agreement. The Operations Manual shall at all times remain the sole property of Franchisor. Franchisee shall treat the Operations Manual, any other materials created for or approved for its use by Franchisor, and the information contained therein as confidential, and shall use all reasonable efforts to maintain such information as secret and confidential. Franchisee shall not at any time, without Franchisor's prior written consent, copy, duplicate, record, or otherwise reproduce the Operations Manual, in whole or in part, nor otherwise make the same available to any unauthorized person. Franchisor shall have the right to add to or otherwise modify the Operations Manual from time to time to reflect changes in authorized products and services, standards or product quality, and operations of Franchisor Projects. In the event of a dispute as to the contents of the Operations Manual, the master copy of the Operations Manual maintained by Franchisor at its principal place of business shall be controlling.

Article 5 Franchisee's Obligations

5.1 At any reasonable time during the term of this Agreement Franchisor's representative(s) may without prior notice enter upon the premises of any Project of Franchisee to observe the Project and the progress towards completion thereof and to assure the nature and quality of all Projects associated with the Marks and the EPCON Communities Works (as defined in Section 10.5 hereof). Upon such entry by Franchisor's representative(s), Franchisee shall cooperate in every way with such observation.

5.2 In consideration of Franchisor's covenants contained herein, Franchisee agrees to pay to Franchisor, in connection with each Project developed by Franchisee, a fee (the "Project Fee") the amount of which Project Fee shall be determined on a Project-by-Project basis as described below. The Project Fee for each Project shall be the total of each of the following component payments:

- (a) An initial payment (the "Initial Payment") in the amount of Fifty Six Thousand Dollars (\$56,000). The Initial Payment shall be paid by Franchisee to Franchisor when this Agreement and an Initial Market Area Agreement are executed by Franchisee (for the first Project) or whenever a Market Area Agreement is executed by Franchisee (for Projects subsequent to the first Project). In addition to the Initial Payment (for the first Project) described in this Section 5.2(a), Franchisee shall make an additional one-time payment to Franchisor in the amount of Fifty Thousand Dollars (\$50,000.00). This payment shall be due and payable to Franchisor when this Agreement and an Initial Market Area Agreement are executed by Franchisee.
- (b) A second payment (the "Second Payment") in the amount resulting when the Initial Payment is subtracted from the total of the fees applicable to each unit of the Project up to and including sixty (60) units as determined by the "Unit Fee Table" set forth below. The Second Payment shall be paid by Franchisee to Franchisor no later than the occurrence of the earliest of (i) Franchisee's commencement of marketing and/or selling activities on or for the Project, (ii) Franchisee's commencement of any activity on the Project site that is a precursor to or involves grubbing or clearing land, land development or building construction, or (iii) the elapse of nine (9) months from the date Franchisee executes this Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project). Notwithstanding the provisions set forth above, the total of the Initial Payment and the Second Payment shall not be less than One Hundred Sixty Eight Thousand Dollars (\$168,000) for the first Project and shall not be less than One Hundred Sixty Eight Thousand Dollars (\$168,000) for each Project subsequent to the first Project.

- (c) A third payment (the "Third Payment") in an amount resulting when the Initial Payment and the Second Payment are subtracted from the total of the fees applicable to each unit of the Project up to and including one hundred (100) units, as determined by the "Unit Fee Table" set forth below. The Third Payment shall be paid by Franchisee to Franchisor upon the occurrence of the earlier of (i) Franchisee's commencement of construction of the foundation for the fifty-ninth (59th) unit of the Project or (ii) the elapse of eighteen (18) months from the date that Franchisee executes the Franchise Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project).
- (d) A fourth payment (the "Fourth Payment") in an amount equal to the total of the fees applicable to each unit of the Project in excess of one hundred (100) units as determined by the Unit Fee Table set forth below. The Fourth Payment shall be paid by Franchisee to Franchisor upon the occurrence of the earlier of: (a) Franchisee's commencement of construction of the foundation for the ninety-ninth (99th) unit of the Project, or (b) the elapse of twenty-four (24) months from the date Franchisee executes this Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project).

UNIT FEE TABLE

FEE APPLICABLE
PER UNIT
\$2,800

The Fee Applicable per Unit shall increase on January 1st of each subsequent calendar year pursuant to a schedule providing for a \$300.00 increase each calendar year, beginning with calendar year 2007. For each Project developed under this Agreement, the applicable Fee Applicable per Unit shall be the fee for the calendar year within which occurs the later of payment of the Initial Payment for the Project or execution by Franchisor of the Market Area Agreement for the Project.

5.3 In connection with the first Project to be developed either by Franchisee or by a sublicensee of Franchisee hereunder, Franchisee (or the sublicensee) shall be obligated to execute, as maker, and to deliver to Franchisor, as payee, a promissory note in a principal amount equal to the Project Fee for said first Project, such note to be in substantially the form attached hereto as Exhibit "3".

5.4 If Franchisee fails to remit to Franchisor when due any payment required under the terms of this Agreement, Franchisee agrees to pay to Franchisor all of Franchisor's costs of collection of the amount(s) of such outstanding payments, including reasonable attorney's fees and disbursements, and interest on the unpaid amounts at the lesser of eighteen percent (18%) per annum or the highest rate statutorily permissible, for the period commencing on the date such amount(s) were due to be paid to Franchisor and ending on the date such amount(s) are received by Franchisor in finally collectible funds.

5.5 Franchisee shall provide to Franchisor at the time of execution of this Agreement copies of Exhibit "2" attached to this Agreement (the "Personal Covenants Document") executed by each of the principals, officers, owners and directors of Franchisee or any sublicensee and any other individuals or entities with any ownership or control interest whatsoever in Franchisee or any sublicensee, and, during the term of this Agreement, if a change occurs in the principals, officers, owners and/or directors of Franchisee or any sublicensee or in the other individuals or entities with an ownership or control interest in Franchisee or any sublicensee, Franchisee agrees that it will promptly deliver to Franchisor copies of the Personal Covenants Document executed by each of the new principals, officers, owners, or directors of Franchisee or other individuals or entities with an ownership or control interest in Franchisee or any sublicensee.

5.6 Additionally, Franchisee shall provide to Franchisor copies of the document included as Exhibit "2A" attached to this Agreement executed by each person who may be provided, either by Franchisee, Franchisor, or any sublicensee with more detailed information about the Development System than has been or will be disclosed to the general public, but whom is not otherwise subject to the requirements respecting the Personal Covenants Document set forth in Section 5.8 or to the provisions of the Personal Covenants Document. A copy of the document included as Exhibit "2A" shall be individually executed before any such person is provided access to all or any portion of the Development System. Franchisee's obligation to provide such executed copies of the document included as Exhibit "2A" to Franchisor shall be ongoing throughout the term of this Agreement.

5.7 If Franchisee is a corporation or other business entity, it shall have the following legend conspicuously printed on the face of each of its stock certificates or other certificates evidencing ownership:

The transfer of this [stock] certificate is subject to the terms and conditions of a certain Franchise Agreement with EPCON Communities Franchising, Inc. Reference is made to the provisions of such Agreement and to the governing documents of this [corporation].

5.8 Franchisee shall not employ or seek to employ any person who is employed by Franchisor, its agents or representatives, or by any other EPCON Communities franchisee, or otherwise directly or indirectly induce any such person to leave his or her employment without the specific written consent of Franchisor.

5.9 In order to further protect the Development System, the Marks and the goodwill associated therewith, Franchisee shall:

- (a) Except where prohibited by state law to the contrary, identify its Project(s) in its advertising as prescribed in Franchisor's Operations Manual, advertise under the Marks designated by Franchisor for use for that purpose and use such Marks without prefix or suffix, except where such use may conflict with a prior registration or use or may be required by applicable state law or regulation, in which event Franchisee shall operate and advertise under such other names as Franchisor has previously approved in writing. Franchisor shall have the right to restrict the use by Franchisee of Franchisee's business entity name or trade name in its advertising and promotional materials.
- (b) Feature and use the Marks solely in the manner prescribed by Franchisor.
- (c) Observe such reasonable requirements with respect to service mark, trade name, trademark and fictitious name registrations and copyright and patent ownership notices as Franchisor may, from time to time, direct in writing.
- (d) Comply with the provisions of Article 6 hereof.
- (e) Submit to Franchisor for approval at least fifteen (15) business days prior to the intended use samples of all advertising plans and materials that Franchisee intends to use that were not prepared by or approved previously by Franchisor. Such approval shall not be unreasonably withheld. If written disapproval is not received by Franchisee from Franchisor within ten (10) business days of the date that Franchisor receives Franchisee's advertising materials, Franchisor shall be deemed to have given the required approval. Upon thirty (30) days prior written notice, Franchisor can revoke its approval of any advertising or promotional materials previously approved, and, upon the expiration of such thirty (30) day period, Franchisee shall immediately cease use of such advertising or promotional material.

5.10 Franchisee shall, during the term of this Agreement, purchase, install, maintain and use in its operations under this Agreement a personal computer system having at least the minimum specifications and capabilities, and including at least the software, as specified by Franchisor in writing from time to time to its EPCON Communities franchisees. Franchisee understands that compliance with its obligations in this Section 5.10 may require it to purchase new hardware and software or upgrades to existing hardware and software, as specified by Franchisor in writing from time to time to its EPCON Communities franchisees.

5.11 Franchisee's covenants and obligations contained in this Agreement shall be construed as severable and independent and shall be interpreted and applied consistently with the requirements of reasonableness and equity. If all or any portion of any covenant is held unreasonable or unenforceable by a court or agency having valid jurisdiction, Franchisee expressly agrees to be bound by any lesser covenant included within the terms of such greater covenant that imposes the maximum duty permitted by law, as if the lesser included covenant were separately stated in and made a part of this Agreement.

5.12 On a schedule and at a location to be determined within its sole discretion, Franchisor will hold a series of initial franchisee training sessions for the benefit of Franchisee at a location selected by Franchisor in its sole discretion. Franchisee or a representative of Franchisee is required to attend each of the portions of the first such training session held by Franchisor after execution of this Agreement. Attendance at such training shall be at Franchisee's sole cost and expense. Franchisor reserves the right to charge a tuition fee for each attendee attending voluntary follow-up training sessions.

5.13 In the event that Franchisor holds an annual meeting or conference of the EPCON Communities franchisees, Franchisee or a representative of Franchisee's management satisfactory to Franchisor in its sole discretion shall attend all sessions of such meeting or conference, unless such attendance is excused by Franchisor in writing. Attendance at such meeting or conference shall be at Franchisee's sole cost and expense.

Article 6
Proprietary Marks

6.1 Franchisee's rights to use the Marks as granted in Section 3.2 hereof is limited to their use in connection with the development of the Project(s) as described herein, as set forth in the Operations Manual and as is prescribed in writing by Franchisor from time to time.

6.2 Franchisee acknowledges Franchisor's exclusive right, title and interest in and to the Marks (and all registrations granted therefor), along with the identification schemes, standards, specifications, operating procedures, and other concepts embodied in the Development System. Except as expressly provided by this Agreement, Franchisee shall acquire no right, title or interest therein or thereto (or to any confusingly similar variation thereof), and any and all goodwill associated with Development System and the Marks shall inure exclusively to Franchisor's benefit. Upon the expiration or termination of this Agreement, no monetary amount shall be assigned as attributable to any goodwill associated with Franchisee's use of the Development System or the Marks.

6.3 Franchisee acknowledges that the use of the Marks outside of the scope of this Agreement without Franchisor's prior written consent is an infringement of Franchisor's right, title and interest in and to the Marks. Franchisee expressly covenants that, during the term of this Agreement and after the expiration or termination hereof, Franchisee shall not, directly or indirectly, commit any act of infringement or contest, or aid in contesting, the validity or ownership of the Marks, or of confusingly similar trademarks or trade names, or take any other action in derogation thereof.

6.4 Franchisee shall promptly notify Franchisor of any use of the Marks or any colorable variation thereof by any person, persons, partnership, association, corporation, or other entity ("Person") other than Franchisor or any of its representatives and agents or other franchisees, or any other mark in which Franchisor has or claims a proprietary interest. Franchisee further agrees to notify Franchisor promptly of any litigation instituted by any Person against Franchisor or Franchisee involving the Marks. In the event that Franchisor, in its sole discretion, undertakes the defense, prosecution, or settlement of any litigation relating to the Marks, Franchisee agrees to execute any and all documents (including any registered user agreements and any documents required by governmental authorities to show the relationship between Franchisee and Franchisor) and to render such assistance as may, in the opinion of Franchisor, be reasonably necessary to preserve and extend the service mark rights relating to the Marks and to carry out such defense, prosecution, or settlement.

6.5 Franchisee shall not, without Franchisor's prior written consent, use the Marks as part of Franchisee's corporate or other legal name, or hold out or otherwise employ the Marks to perform any activity or to incur any obligation or indebtedness in such a manner as could reasonably result in making Franchisor liable therefor. Franchisee agrees not to seek registration or to claim ownership of any Marks, or of confusingly similar service marks or trade names.

6.6 Franchisee expressly acknowledges and agrees that this license to use the Marks is nonexclusive and that Franchisor has and retains the rights, among others:

- (a) To grant other franchises and licenses for the use of the Marks, in addition to those already granted to existing EPCON Communities franchisees and to Franchisee;
- (b) To develop and establish other systems and programs utilizing the same or similar Marks, or any other proprietary Marks, and to grant franchises and/or licenses therein without providing Franchisee any rights therein.

6.7 Franchisee shall not permit any third party to imprint the Marks on any products, materials, documents and supplies utilized by Franchisee in connection with the operation of its Project(s) without first obtaining the consent of Franchisor and causing such third party to execute a license agreement with Franchisor. Subject to the foregoing requirement, Franchisee shall affix the Marks in the manner prescribed by Franchisor to all advertising and promotional materials used in connection with each of Franchisee's Projects developed hereunder.

6.8 Franchisor is responsible for maintaining all registrations covering the Marks and renewing the registrations as required.

6.9 Franchisor retains the sole right to create a Web site using the Marks, "EPCONCommunities.com," and variations thereof and to register or use other domain names related or similar to any of the Marks. Prior to its creation of any Web site related in any manner to Franchisee's EPCON Communities business and pursuant to the approval process provided in Section 5.9(e) of this Agreement, Franchisee must obtain Franchisor's written approval

of (and Franchisor shall have continuing approval rights regarding) the domain name for such Web site, the content of such Web site (including all framing employed) and use of any of the Marks in the content of such Web site. Franchisor retains the right to pre-approve Franchisee's use of linking between Franchisee's Web pages related in any manner to Franchisee's EPCON Communities business and all other Web sites. Within five (5) days of any written request by Franchisor, Franchisee shall (a) dismantle any links between Franchisee's Web pages related in any manner to Franchisee's EPCON Communities business and all other Web sites; and/or (b) remove any references on Franchisee's Web pages to the Marks. Further, Franchisee shall comply with Franchisor's guidelines, as published from time to time to the EPCON Communities franchise system, regarding the use by franchisees of Web sites related to franchisees' EPCON Communities businesses.

Article 7 Advertising and Promotion

7.1 Franchisor reserves the right, exercisable at any time, to require Franchisee to purchase and use prescribed sales brochures and other documents designed for prospective condominium buyers.

7.2 Franchisee shall cooperate with Franchisor in any and all advertising, promotional and marketing plans and campaigns established by Franchisor in its sole discretion.

7.3 All advertising, promotions and marketing carried out by Franchisee in any media shall be conducted in a dignified manner and shall conform to the standards and requirements prescribed by Franchisor and to the highest ethical standards of advertising. Thirty (30) days prior to publication, Franchisee shall submit to Franchisor, for its prior written approval (except with regard to prices to be charged), samples of all advertising and promotional plans and materials that Franchisee desires to use and that have not been prepared or previously approved by Franchisor. Such approval shall not be unreasonably withheld. Any materials submitted to Franchisor and not disapproved within thirty (30) days shall be deemed approved. Franchisor may upon thirty (30) days notice revoke its approval of any advertising and promotion previously approved.

7.4 At such time as Franchisor shall determine that a franchise system level advertising program would contribute to an increase in the goodwill associated with the EPCON Communities franchise system and the Marks, Franchisee, beginning upon the date of a written notice from Franchisor that such a program will be undertaken, shall begin to pay to Franchisor, or Franchisor's designee, an advertising fee ("Advertising Fee") as hereinafter described. The Advertising Fee during the remainder of the calendar year of the date of Franchisor's written notice shall be \$300 per condominium unit. Such Advertising Fee shall be payable to Franchisor at the same time that Franchisee pays to Franchisor all or any portion of a Project Fee. The number of condominium units for which the Advertising Fee shall be payable at any time shall be determined, as provided in Article 6 hereof, based upon the number of condominium units that are represented by the portion of the Project Fee due to be paid to Franchisor at the same time. Franchisor shall have the right, in its sole discretion, during each subsequent calendar year, to increase the Advertising Fee to an amount that is as much as one hundred three percent (103%) of the Advertising Fee applicable during the immediately preceding calendar year. The provisions of Section 5.4 of this Agreement are applicable to Advertising Fee payments. Franchisor shall have the right to spend Advertising Fees paid by Franchisee to the franchise system level advertising program for advertising to promote the EPCON Communities franchise system at any geographic level, including without limitation, local, regional and/or national, and in any communication medium, that Franchisor deems, in its sole discretion, to be advantageous to the franchise system or any part thereof.

Article 8 Uniformity of, and Modifications to, the Development System

8.1 Franchisee understands and acknowledges that the Development System is a complete and unified system for the construction, marketing and management of the Project(s) and that every detail of the Development System is important to the use thereof by Franchisee in order to maintain high and uniform standards, as well as to maximize the opportunity for the success of the Project(s). By accepting the franchise and license granted hereby, Franchisee is agreeing to utilize the entire Development System without modification thereto. Franchisee shall not deviate from or modify the Development System without the prior written approval of Franchisor.

8.2 Notwithstanding the foregoing, any changes or modifications made by Franchisee to the Development System or to any of its parts may be used by Franchisor for its benefit or for the benefit of any of its other franchisees, licensees or agents, and such changes or modifications shall become the property of Franchisor. However, nothing contained herein shall be construed to impose upon Franchisor an obligation to so adopt or use any such changes or modifications nor shall Franchisor be responsible for any payment to Franchisee therefor.

8.3 Franchisee acknowledges that deviation from and/or modification to the Development System does not abrogate its responsibility to comply with all terms of this Agreement, including but not limited to payment of amounts due to Franchisor as specified in Article 6 hereof. Franchisee's deviation from and/or modification to the Development System without the prior written approval of Franchisor, shall, however, terminate Franchisor's obligation to comply with Section 7 of the applicable Market Area Agreement(s), pursuant to which Franchisor, under certain conditions as set forth in said Section 7, agrees to refrain from itself constructing, and from granting to other licensees the right to construct, Projects within Franchisee's Market Area (as defined in the Market Area Agreement).

Article 9 Development System Compliance

9.1 Franchisor's affiliate, EPCON Communities, Inc., has used the Development System to assist it in obtaining permits and other governmental approvals under varying circumstances. Notwithstanding this, Franchisor does not warrant or represent herein, and hereby disclaims any such warranty and/or representation, express or implied, that the Development System will comply with any applicable building code requirements or any other applicable federal, state or local laws, or will be adequate for Franchisee's use in any way including, but not limited to, assisting Franchisee in obtaining permits and approval for Franchisee's Project(s). Franchisee (a) recognizes that the provisions of this limitation are a material factor in Franchisor's grant of the franchise and license for the amounts of the fee(s) provided hereunder, and (b) agrees that any accommodation to Franchisee by Franchisor shall not be taken to establish any liability of Franchisor or any contract term inconsistent herewith.

9.2 Franchisee understands and acknowledges that, due to the continual evolution of the plans, and the other materials referenced above, and the volume of detailed information and data contained therein, there are likely to be some inaccuracies and/or items subject to specific local or other requirements which will require correction, at Franchisee's expense, by Franchisee's architects, engineers, contractors, counsel and/or other professionals as work progresses. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, make any changes or modifications including, but not limited to, the seal or stamp of a registered architect, to the plans, specifications or any other part of the Development System used or proposed for use for or at its Project(s) which changes or modifications are necessitated by any applicable zoning and building codes, permit requirements, or any other federal, state or local laws, including, without limitation, licensing requirements for contractors, property managers and real estate salespersons, the formation and management of condominium associations, occupational health and safety on the construction site, housing finance, equal housing laws, the Fair Housing Act and the Americans with Disabilities Act, as well as the Accessibility Guidelines promulgated under each of these acts. Franchisee further acknowledges that it possesses sole responsibility hereunder to comply with all applicable laws in the marketing of condominium units in its projects, including, without limitation, the Fair Housing Act. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, have the seal or stamp of a registered architect affixed to said plans. No changes, however extensive, shall operate to relieve Franchisee of its obligations to make payments due to Franchisor pursuant to the terms of this Agreement.

9.3 Throughout the term hereof, Franchisor agrees to provide to Franchisee, upon Franchisee's request, modifications or improvements made by Franchisor to the architectural plans and specifications. Modifications and improvements to other areas of the Development System shall be provided to Franchisee at Franchisor's sole and absolute discretion. All such modifications and improvements to be provided to Franchisee shall be provided by Franchisor at no additional cost to Franchisee and shall be distributed not more often than once annually. Modifications and improvements so provided to Franchisee shall be for the standard Development System and will not be subject to further modification by Franchisee for any changes made by Franchisee pursuant to Section 8.2 above. Notwithstanding any provision hereof to the contrary, Franchisor reserves the right, within its sole discretion, to discontinue providing updated information to Franchisee respecting modifications and improvements to the Development System if Franchisee has substantially completed construction of all Projects hereunder and is not actively pursuing development of another Project.

Article 10
Confidentiality; Non-Disclosure; Proprietary Information

10.1 Franchisor and Franchisee acknowledge and agree that the Development System constitutes a "trade secret" as defined in Ohio Revised Code Section 1333.61, and, as such, is entitled to all rights and protection as are afforded to trade secrets under Ohio, and any other applicable, law.

10.2 Neither Franchisee nor any of Franchisee's affiliates, owners, agents, or employees shall communicate or otherwise divulge to, or use for the benefit of, any other person or entity, any information or knowledge, no matter how derived, concerning the Development System. Franchisee is granted the specific and limited right to divulge information respecting the Development System to those individuals who must have access thereto in order to develop any Projects which are the subject hereof. All information and knowledge provided by Franchisor to Franchisee, including by way of illustration but not of limitation, drawings, specifications, techniques, and written material, shall be deemed confidential for the purposes of this Agreement.

10.3 Franchisee acknowledges that the Development System, including any modifications or derivations of the Development System or any of its parts, remains the exclusive property of Franchisor, even after its use by Franchisee. Franchisee agrees that it shall not use the Development System, or any portion thereof, at any time, except in strict accordance with the terms of this Agreement and, after the termination of this Agreement it shall not use in any manner the Development System or any of its parts, or any system, plans, materials, or designs resembling in any way the Development System.

10.4 Franchisee shall include in all advertising, sales and other published literature relating to Franchisor's architectural work ("Buildings") licensed hereunder that the Buildings are covered by U.S. Design Patent Nos. 336,137; 342,576; 342,577; 343,459 and 396,298, and are used under license from EPCON Communities Franchising, Inc.

10.5 Franchisee acknowledges that the Buildings and all related illustrations, plans, blueprints, sketches, drawings, or any other tangible expression of the Buildings (the "EPCON Communities Works") are protected under the Architectural Works Copyright Act of 1990. Franchisee shall not build, license, transfer, reproduce or duplicate in any way the EPCON Communities Works except as expressly provided for in this Agreement. In the event that any documentation provided to Franchisee by Franchisor bears a copyright notice, Franchisee shall not remove such notice from said documentation, and such notice shall be retained or reproduced in its exact form on all authorized copies and versions of such documentation, both in machine and human readable language. Franchisee shall not distribute Franchisor's copyrighted documentation or the EPCON Communities Works to a third party, except as provided for in the Agreement or otherwise with specific written authorization from Franchisor.

10.6 Franchisee shall not, during the term of this Agreement, without the prior written consent of Franchisor, own, develop, construct or have any interest in any real estate development project involving single story multi-family residential buildings of two to four units or which is otherwise similar to an EPCON Communities Project; provided, however, that this provision shall not apply to the involvement by Franchisee in the development of other EPCON Communities Projects by other franchisee business entities, or to any ownership by Franchisee of less than three percent (3%) of the outstanding stock of any publicly held corporation.

Article 11
Completion of Project(s)

11.1 A Project shall be determined to be completed when either a temporary or permanent occupancy permit has been issued for all buildings within the Project.

11.2 Upon completion of the Project, Franchisee shall do the following:

11.2.1 Promptly notify Franchisor in writing that the Project is complete as defined in Section 11.1 above.

11.2.2 Promptly pay to Franchisor all sums owing or accrued. The sums shall include interest, any damages, costs, and expenses, including reasonable attorneys' fees and disbursements, incurred by Franchisor by reason of a default by Franchisee under the terms of this Agreement or any other agreement by and between Franchisor and Franchisee.

11.2.3 Immediately cease to use, in any manner whatsoever, the Development System, except as authorized under a Market Area Agreement or Agreements.

11.2.4 Within thirty (30) days of the sale of the last unit in a Project, Franchisee shall provide to Franchisor a complete report respecting the revenues and expenses of the Project in the form prescribed by Franchisor. Franchisee hereby grants to Franchisor its consent to disclose the information contained in such reports in Franchisor's Uniform Franchise Offering Circular and as required in the franchise sales disclosure process.

11.2.5 Notwithstanding anything contained herein, Franchisee's lender shall have the right to complete any Project which is the subject hereof, so long as (a) all fees and other amounts due Franchisor under this Agreement are timely paid in full; (b) such lender complies with the terms of this Agreement as such terms apply to and obligate Franchisee; and (c) such lender executes a Lender Assignment Agreement included as Exhibit 6, attached to this Agreement.

11.3 Franchisee agrees to use its best efforts to complete within a reasonable time each building begun in connection with any Project so that no building remains incomplete for more than one hundred fifty (150) days after commencement of construction of that building.

Article 12 Transfer by Franchisee

12.1 Franchisee understands and acknowledges that the rights and duties set forth in this Agreement are personal to Franchisee and that Franchisor has granted this EPCON Communities franchise in reliance on Franchisee's business skills, professional reputation and financial capability. Accordingly, neither Franchisee nor any shareholder, partner, member, (including shareholders, partners or members of entities that have an ownership interest in Franchisee), or any immediate or remote successor to any part of Franchisee's interest in this EPCON Communities franchise shall sell, assign, transfer, pledge or encumber, by operation of law or otherwise, this Agreement or the franchise or licensed rights granted hereunder or any ownership interest in Franchisee or any ownership interest in an entity owning an interest in Franchisee without the prior written consent of Franchisor. Such transfer, sale, assignment, pledge or encumbrance not having the written consent of Franchisor shall be null and void and shall constitute a material breach of this Agreement, for which Franchisor may then terminate this Agreement. Franchisor shall not unreasonably withhold its consent to a transfer of any interest in Franchisee or in this EPCON Communities franchise, provided, however, that prior to the time of transfer, Franchisor may, in its sole discretion, require that:

- (a) All of Franchisee's accrued monetary obligations to Franchisor and all other outstanding obligations related to the business franchised hereunder shall have been satisfied;
- (b) The transferor's right to receive compensation, pursuant to any agreement or agreements for the purchase of any interest in Franchisee or in the business franchised hereunder, shall be subordinate and secondary to Franchisor's rights to receive any outstanding monetary obligation or other outstanding obligations due from transferor or Franchisee pursuant to this Agreement, and whether arising before or after the transfer;
- (c) Franchisee shall have executed a general release in a form satisfactory to Franchisor, effective as of the date of transfer, of any and all claims against Franchisor and its officers, directors, shareholders, and employees in their corporate and individual capacities, including, without limitation, claims arising under federal, state and local laws, rules and ordinances.
- (d) The transferee franchisee shall enter into a written assumption, in a form satisfactory to Franchisor, assuming and agreeing to discharge all of Franchisee's obligations under this Agreement prior to and after the date of the assumption;
- (e) The transferee franchisee shall demonstrate to Franchisor's satisfaction that he or she, if an individual, its general partners, if it is a partnership, its members, if it is a limited liability company, and its officers, directors and principal shareholders, if it is a corporation, meet(s) educational and managerial standards; possess(es) good moral character, reputation, and credit rating; has the aptitude and ability to conduct the business franchised hereunder (as may be evidenced by prior related business experience or otherwise); and has adequate financial resources and capital to operate the business franchised hereunder;
- (f) The transferee franchisee shall execute the then-current standard form of EPCON Communities Franchise Agreement and other ancillary agreements as Franchisor may require for the business franchised hereunder for a term ending as provided in Section 3.1 of this Agreement; and

- (g) At transferee franchisee's expense, and upon such other terms and conditions as Franchisor may reasonably require, the transferee franchisee shall complete each of the initial training sessions then in effect for new franchisees.

12.2 If Franchisee is a corporation, partnership, limited liability company, or similar entity, the terms of Section 12.1 shall apply to any sale, resale, pledge, assignment, transfer or encumbrance of any voting stock of, or other ownership interest in, Franchisee.

12.3 In connection with any transfer for which Franchisor grants its consent as described in Section 12.1 hereof, Franchisee shall pay to Franchisor a transfer fee to cover Franchisor's actual costs, and due diligence, administrative, legal and other expenses respecting the transfer.

12.4 In the event that Franchisee proposes to transfer all of its interest in the Franchisor franchise granted pursuant hereto to a corporation, partnership, or limited liability company solely for the convenience of ownership, the provisions of Sections 12.1, 12.2, and 12.3 hereof shall not apply; provided that Franchisor's consent to such transfer may, in its sole discretion, be conditioned upon the following requirements:

- (a) The transferee entity shall be newly organized and its Articles of Incorporation and Bylaws (or comparable governing documents for entities other than corporations) shall provide that its activities are confined exclusively to operate the business franchised hereunder and activities related thereto;
- (b) Franchisee shall identify to Franchisor all of the stockholders, directors, officers, partners and/or members of the transferee entity;
- (c) Franchisee shall enter into an agreement, in a form satisfactory to Franchisor, unconditionally guaranteeing the full payment and performance of the transferee entity's obligations to Franchisor;
- (d) Each stock (or other ownership interest) certificate of the transferee entity shall have conspicuously endorsed upon its face the following legend:

"The transfer of this [type of certificate] certificate is subject to the terms and conditions of a certain Franchise Agreement executed with EPCON Communities Franchising, Inc. Reference is made to the provisions of such Agreement and to the governing documents of this [type of transferee entity]."

- (e) Copies of the transferee entity's governing documents, including any resolutions authorizing entry into this Agreement, shall be furnished to Franchisor for its approval prior to the transfer; and
- (f) The name of the transferee business entity shall not, without Franchisor's prior written approval, consist of or contain any of Franchisor's Marks or any colorable variation thereof or any other mark in which Franchisor has or claims a proprietary interest.

12.5 In the event that Franchisee desires to form a business entity having identical or substantially identical common ownership with Franchisee and to sublicense its rights and obligations hereunder to the new entity (the "Sublicensee") in order that the Sublicensee might develop a Project and, after receiving Franchisee's request in writing to do so and such information about the proposed sublicensing arrangement and the entities involved as Franchisor requests, Franchisor, in its sole discretion, consents to same, Franchisee may execute with the Sublicensee a Sublicense Agreement in the form attached hereto as Exhibit "6". Any such sublicense arrangement not having the written consent of Franchisor shall be null and void and shall constitute a material breach of this Agreement, for which Franchisor may then terminate this Agreement. Franchisor reserves the right hereunder not to consent to any sublicense arrangement proposed by Franchisee involving an entity not having identical or substantially identical common ownership with Franchisee. Franchisor may, in its sole discretion, require that, prior to the effective date of the Sublicense Agreement, (a) all of Franchisee's accrued monetary obligations to Franchisor shall have been satisfied, and (b) the Sublicensee entity possesses a good credit rating and has adequate financial resources and capital to develop a Project. The Sublicensee shall be required to execute with Franchisor a Market Area Agreement substantially in the form attached hereto as Exhibit "4" for the location proposed for Sublicensee's Project.

12.6 All materials required by federal or state law for any direct or indirect offer or sale of securities of Franchisee shall be submitted to Franchisor for review and consent, prior to their being filed with any government agency; and any materials to be used in any exempt offering shall be submitted to Franchisor for review and consent prior to their use. No such materials shall imply (by use of the Marks or otherwise) that Franchisor is participating as an

underwriter, issuer, or offeror of Franchisee's or Franchisor's securities. Any review by Franchisor of the offering materials or the information included therein will be conducted solely for the benefit of Franchisor to determine conformance with Franchisor's internal policies, and not to benefit or protect any other person. No investor should interpret such review by Franchisor as an approval, endorsement, acceptance, or adoption of any representation, warranty, covenant, or projection contained in the materials reviewed; and the offering documents shall include such legends and statements as Franchisor may specify, including, but not limited to, legends and statements which disclaim Franchisor's liability for, or involvement in, the transaction described in the offering documents. Franchisee and the other participants in the offering must agree in writing to fully indemnify Franchisor in connection with the offering in the form prescribed by Franchisor. For each proposed offering, Franchisee shall pay Franchisor a non-refundable fee of Ten Thousand Dollars (\$10,000), or such greater amount as may be necessary to reimburse Franchisor for its reasonable costs and expenses associated with reviewing the proposed offering, including, without limitation, legal and accounting fees and disbursements. Franchisee shall give Franchisor written notice at least sixty (60) days prior to the date of commencement of any offering covered by this Section 12.6. Any such offering shall comply with Franchisor's written policies adopted and announced by Franchisor from time to time. Franchisor hereby reserves its right in its sole discretion not to grant consent to Franchisee for such an offering, and, if such consent is withheld, Franchisee shall be prohibited hereunder from issuing such an offering. In the event of Franchisor's grant of consent respecting an offering described under this Section 12.6, the provisions of Section 5.7 of this Agreement shall not apply.

Article 13

Default; Termination

13.1 If Franchisee becomes insolvent or makes an assignment for the benefit of creditors, or if a petition in bankruptcy is filed by Franchisee, or such a petition is filed against Franchisee and either is consented to by Franchisee or is not dismissed within thirty (30) days, or if a bill in equity or other proceeding for the appointment of a receiver of Franchisee or other custodian for Franchisee's business or assets is filed and either is consented to by Franchisee or is not dismissed within thirty (30) days, or a receiver or other custodian of Franchisee's property or any part thereof is appointed by a court of competent authority, or if proceedings for composition with creditors under any state or federal law should be instituted by or against Franchisee or if the real or personal property of Franchisee shall be sold after levy thereupon by any sheriff, marshal, or constable, then upon the occurrence of any of such events, Franchisee shall be deemed to be in default under this Agreement and all rights granted by Franchisor hereunder shall thereupon terminate without any need for notice to Franchisee, and this Agreement shall thereupon be terminated.

13.2 Franchisee shall also be in default under this Agreement upon the occurrence of any of the following:

13.2.1 Franchisee fails, refuses, or neglects to pay when due to Franchisor any monies owed to Franchisor;

13.2.2 Franchisee fails to satisfactorily complete the initial training program to the satisfaction of Franchisor as set forth in Section 6.12 and fails to arrange for its representative to attend and complete such initial training program to the satisfaction of Franchisor;

13.2.3 Franchisee fails to furnish to Franchisor any report or information required under this Agreement;

13.2.4 Franchisee fails to develop its Projects and to operate hereunder in compliance with the terms of this Agreement, the applicable Market Area Agreement(s), the Operations Manual, the Development System and any quality or operations standards and guidelines issued in writing by Franchisor;

13.2.5 Franchisee fails, for a period of ten (10) days after receipt of notification of noncompliance, to comply with any federal, state or local law or regulation applicable to the operation of the development business franchised hereunder;

13.2.6 Any attempted transfer in violation of Article 12;

13.2.7 Any material misrepresentation by Franchisee relating to the acquisition of the franchise granted hereunder or any conduct by Franchisee that reflects materially and unfavorably upon the operation and reputation of Franchisee's development business franchised hereunder or upon Franchisor;

13.2.8 The conviction of Franchisee or its principals or officers of a felony or any other crime involving moral turpitude;

13.2.9 Franchisor makes a reasonable determination that the continued operation of the development business franchised hereunder or any Project developed hereunder by Franchisee will result in immediate danger to public health or safety and such default is not cured within three (3) days after notice from Franchisor to Franchisee;

13.2.10 Franchisor gives Franchisee a notice of default under this Section 13.2 after two previous defaults which have been cured after notice of default within the preceding twelve (12) month period;

13.2.11 The death of Franchisee, if Franchisee is an individual;

13.2.12 Franchisee fails to comply with any of the obligations imposed upon Franchisee by this Agreement;

13.2.13 Franchisee communicates or divulges any information or knowledge concerning the Development System in violation of Article 10 hereof;

13.2.14 Franchisee fails to complete a Project as required under the terms of this Agreement.

13.3 Upon the occurrence of any of the events set forth in Section 13.2, Franchisor may, without prejudice to any other rights or remedies contained in this Agreement or provided by law or equity, terminate this Agreement. Such termination shall be effective thirty (30) days after written notice (or such longer period of notice as may be required by applicable state law) is given by Franchisor to Franchisee of any of the events set forth in Subsections 13.2.1, 13.2.3, 13.2.4, 13.2.5, 13.2.6, 13.2.12 or 13.2.14 of Section 13.2 if such defaults are not cured within the period. Such termination shall be effective immediately upon written notice upon the occurrence of the events set forth in Subsections 13.2.2, 13.2.7, 13.2.9, 13.2.10 or 13.2.13 of Section 13.2. Such termination shall be effective immediately without notice upon the occurrence of the events set forth in Subsections 13.2.8 or 13.2.11 of Section 13.2.

13.4 This Agreement shall automatically terminate on the later of (1) the date that is one year after the date of completion of Franchisee's last Project; or (2) the date that is one year after the expiration of Franchisee's last Market Hold Agreement with Franchisor.

13.5 Termination hereof shall not affect the obligations of Franchisee to pay all amounts due hereunder to Franchisor. Further, the obligations of Franchisee provided in Article 10 hereof, the remedies provided to Franchisor in Article 14 hereof, and the provisions of Sections 6.3, 20.2 and 20.3 hereof shall survive the termination of this Agreement.

13.6 Upon termination or expiration of this Agreement, Franchisee shall immediately terminate its use of the Marks, the EPCON Communities Works and the Development System and promptly return to Franchisor all materials provided to it by Franchisor.

13.7 For a period of three (3) years following the effective date of termination or expiration of this Agreement, whether by lapse of time or other cause, sale and/or assignment of the EPCON Communities franchise granted hereunder, Franchisee shall not, directly or indirectly, either as a principal, agent, employee, officer, director or member of any corporation or other business entity, as a partner or sole proprietor, or in any other way engage in the ownership, development or construction of any real estate development project involving single story multi-family residential buildings of two to four units within (a) ten (10) miles of the geographic border of any "Market Area" granted to any franchisee pursuant to any Market Area Agreement or other agreement that is effective between such franchisee and Franchisor, (b) ten (10) miles of the geographic border of any "Reserved Market Area" reserved for any franchisee or prospective franchisee under any Market Hold Agreement or other agreement that is in effect between such party and Franchisor, or (c) ten (10) miles of any real estate development project of EPCON Communities, Inc. or of any business entity affiliated with EPCON Communities, Inc. For the purposes of this Section 13.7 and Section 10.6 of this Agreement, the term "Franchisee" shall include any officer, director, shareholder, member or holder of an ownership interest in Franchisee, if Franchisee is a corporation, limited liability company or other business entity, and any partner of Franchisee, if Franchisee is a partnership.

Article 14 Remedies

14.1 Franchisor shall be entitled to any remedies available at law or in equity for any breach by Franchisee of any of Franchisee's covenants or obligations provided herein or provided in any Market Area Agreement.

14.2 Franchisee agrees that the existence of any claims of Franchisee against Franchisor, whether or not arising from this Agreement, shall not constitute a defense to the enforcement by Franchisor of the provisions of Article 5 hereof and/or the exercise by Franchisor of its rights under Article 13 hereof respecting Franchisee's noncompliance with the provisions of Article 6 hereof.

14.3 In the event that Franchisee breaches its covenants and obligations as provided in Sections 8.1 or 10.3 hereof (including without limitation the use by Franchisee of all or any portion of the Development System to develop a Project (or project) either not in compliance with this Agreement during its term or in any manner after the termination of this Agreement), Franchisee shall be obligated to pay to Franchisor liquidated damages in the following amounts: a fee of One Hundred Twenty Five Thousand Dollars (\$125,000) in connection with Franchisee's development of a Project (or project) of fifty (50) or fewer units and an additional fee of Two Thousand Five Hundred Dollars (\$2,500) per unit for each unit in a Project (or project) in excess of fifty (50) units, such fees to be separately applicable to each project developed by Franchisee in breach of Sections 8.3 or 10.3 hereof.

14.4 Franchisor shall be entitled, without bond, to the entry of temporary and permanent injunctions and orders of specific performance (a) enforcing the provisions of this Agreement relating to (i) Franchisee's use of the Development System and/or the Marks; (ii) any obligations of Franchisee surviving termination of this Agreement; or (iii) an assignment of this Agreement or the franchise and license granted hereunder or any ownership interest therein; and (b) as necessary to prohibit any act or omission by Franchisee or its employees that would constitute a violation of any applicable law, ordinance or regulation, or which is dishonest or misleading to Franchisor or the general public.

14.5 In the event a dispute arises under this Agreement, the prevailing party shall be entitled to receive its expenses, including attorneys' fees and disbursements and accounting fees and disbursements, in addition to any other relief to which it is found entitled.

Article 16 Independent Contractor

16.1 It is understood and agreed that Franchisee is an independent contractor and nothing in this Agreement shall create a partnership, employment or agency relationship between Franchisor and Franchisee or authorize Franchisee to make any contract, agreement, warranty or representation on Franchisor's behalf, or to incur any debt or other obligation in Franchisor's name, and that Franchisor shall in no event assume liability for, or be deemed liable hereunder as a result of, any such action, or by reason of any act or omission of Franchisee in any of its operations hereunder or any claim or judgment arising therefrom against Franchisor. Franchisee further acknowledges and agrees that Franchisor owes no fiduciary duty whatsoever to Franchisee.

Article 16 Indemnification and Insurance

16.1 Franchisee shall indemnify and hold harmless, to the fullest extent permitted by law, Franchisor, its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership, and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses or obligations including without limitation compensatory, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, Franchisee's ownership or operation of its business hereunder and/or its use or utilization of the Development System, including without limitation the use of any architectural plans and designs provided by Franchisor. In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving Franchisor, Franchisee shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at Franchisee's sole cost and expense or shall cause it to be resisted or defended by an insurer. Franchisee shall also make every reasonable effort to seek to have Franchisor dismissed or released from liability in the event of such action, suit, proceeding, investigation, inquiry, claim or demand. Franchisor shall have the right to resist and defend itself in and/or against any such action, suit, proceeding, investigation, inquiry, claim or demand, and, upon receipt of written notice from Franchisor of the amount expended by Franchisor in such defense, Franchisee shall, within ten business days of such receipt, reimburse Franchisor in full for the total amount of such expenses.

16.2 Franchisee shall, at all times during the term of this Agreement and at its own expense, keep in force by advance payment of premium general liability insurance in an amount not less than One Million Dollars (\$1,000,000.00) per occurrence and in the amount of not less than Two Million Dollars (\$2,000,000.00) annual aggregate, arising out of a single accident, and with a deductible or self-insured retention on any such policy of not greater than One Thousand Dollars (\$1,000.00), or such other amounts of coverage and self-insurance as Franchisor may specify from time to time, insuring Franchisee against any liability that may accrue by reason of the development by Franchisee of Project(s). All policies of insurance to be maintained by Franchisee shall contain a separate endorsement naming Franchisor as an additional insured, as its interest may appear. All insurance shall be placed with an insurance carrier or carriers with an A.M. Best's rating of "A" and an A.M. Best's Class rating of "xlv" or better or be otherwise approved in writing by Franchisor, and shall not be subject to cancellation except upon ten (10) days written notice to Franchisor. All policies of insurance, or certifications for insurance with a copy of the original policy attached, showing full compliance with the requirements of this covenant, shall at all times be kept on deposit with Franchisor. On an annual basis, Franchisee shall provide to Franchisor evidence in the form of a certificate of insurance that such insurance remains in full force and effect.

Article 17 Waiver

17.1 No failure of Franchisor to exercise any power or right reserved to it hereunder, or to insist upon strict compliance by Franchisee with any obligation, covenant, or condition herein, and no custom or practice of the parties in variance with the terms hereof, shall constitute a waiver of Franchisor's right to demand strict compliance with the terms hereof. Waiver by Franchisor of any particular default by Franchisee shall not affect or impair Franchisor's right with respect to any subsequent default of the same or of a different nature; nor shall any delay, waiver, forbearance, or omission of Franchisor to exercise any power or right arising out of any breach or default by Franchisee of any of the terms, provisions, or covenants hereof affect or impair Franchisor's rights, nor shall such constitute a waiver by Franchisor of any right hereunder or of the right to declare any subsequent breach or default. Subsequent acceptance by Franchisor of the payments due to it hereunder shall not be deemed a waiver by Franchisor of any preceding breach by Franchisee of any terms, covenants, conditions, or obligations of this Agreement.

Article 18 Notices

18.1 All notices, payments, or other communications required or permitted to be given or made under this Agreement to Franchisor or to Franchisee shall be given in writing and shall be deemed to have been given if delivered by hand or by certified mail, postage prepaid, or by telecopier or telex (with a hard copy to be sent within forty-eight (48) hours following such electronic transmissions), or by any commercially reasonable overnight courier service providing a receipt of delivery, effective upon receipt thereof at the addresses set forth below:

If to Franchisor, to:
EPCON Communities Franchising, Inc.
600 Stonehenge Parkway
Dublin, Ohio 43017-5067
Attn.: Edward A. Bacome and
Phillip G. Fankhauser
Facsimile: 614-761-1155

If to Franchisee, to:
Fankhauser Property Group, Inc.
300 E. John Street, Suite 120
Matthews, North Carolina 28106
Attn: Brook Fankhauser
Facsimile: 704-844-0188

18.2 Either of Franchisor and Franchisee may, by notice given to the other from time to time and at any time, designate a different entity, individual, or address for making payments required to be made or for the giving of notices or other communications.

Article 19
Complete Agreement

19.1 This Agreement, and the documents referred to herein, including without limitation any and all promissory notes given by Franchisee to Franchisor and any and all Market Area Agreement(s) and Market Hold Agreement(s) by and between Franchisor and Franchisee, shall be the entire, full, and complete agreement between Franchisor and Franchisee concerning the subject matter hereof and thereof. This Agreement supersedes all prior agreements, no other representation (other than the most recent version of Franchisor's Franchise Offering Circular provided to Franchisee) having induced Franchisee to execute this Agreement. There are no representations, inducements, promises, or Agreements, oral or otherwise, between the parties not embodied herein which are of any force or effect with reference to this Agreement and the subject matter hereof. No amendment, change or variance from this Agreement shall be binding on either party hereto unless executed in writing by each.

Article 20
Miscellaneous Provisions

20.1 Severability. Each article, section, provision, and term of this Agreement shall be considered severable, and if, for any reason, any article, section, provision, or term herein is determined to be invalid and contrary to or in conflict with any existing or future law or regulation, such shall not impair the operation thereof nor affect the remaining portion of this Agreement. This Agreement will continue to be given full force and effect and bind the parties hereto. Any invalid article, section, provision, or term shall be deemed not to be a part of this Agreement.

20.2 Choice of Law. Except to the extent governed by the U.S. Trademark Act of 1946, as amended, this Agreement shall be deemed to have been entered into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles.

20.3 Venue. Except to the extent prohibited by applicable state law to the contrary, Franchisor and Franchisee agree that any litigation or legal action to enforce or relating to this Agreement and the relationship of the parties hereunder shall be filed in the United States District Court for the Southern District in Columbus, Ohio, or the Common Pleas Court of Franklin County, Ohio, and each of Franchisor and Franchisee hereby consents to the jurisdiction of such courts.

20.4 Benefit. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective and legal representatives, successors and permitted assigns and/or sublicensees.

20.5 Joint and Several Obligations. If Franchisee consists of more than one person, their liability hereunder shall be deemed to be joint and several.

20.6 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

20.7 Pronouns. The number and gender of each pronoun used in this Agreement shall be construed to be such number and gender as context, circumstances, or its antecedent may require.

20.8 Captions. The articles and section headings and other captions contained in this Agreement are contained only for convenience of reference and do not define, limit, explain, or modify this Agreement or its interpretation, construction, or meaning, and are not to be construed as part of this Agreement.

Article 21
Further Acknowledgments by Franchisee

21.1 By its signature set forth below, Franchisee acknowledges that:

- (a) It has received the materials specified in Section 4.1 hereof.
- (b) It has conducted an independent investigation and financial assessment of the business contemplated by this Agreement and the Market Area(s) in which the Project(s) is/are to be located and recognizes that it involves business risks making the success of the venture largely dependent upon the business abilities of Franchisee as well as other variables. Franchisor expressly disclaims the making of, and Franchisee acknowledges that it has not received or relied upon, any representations, warranties or guarantees.

express or implied, as to the potential volume, profits or success of the business venture contemplated by this Agreement.

- (c) It has no knowledge of any representations by Franchisor, or its officers, directors, shareholders, employees, agents or servants, about the business contemplated by this Agreement that are contrary to the terms of this Agreement or the documents incorporated herein, and further represents to Franchisor, as an inducement to its entry into this Agreement, that it has made no misrepresentations in obtaining this Agreement.
- (d) It has received, read and understood this Agreement and the attachments hereto, if any, Franchisor has had fully and adequately explained the provisions of each to its satisfaction; and Franchisor has afforded it ample time and opportunity to consult with advisors of its own choosing about the potential benefits and risks of entering into this Agreement.
- (e) It has received Franchisor's Franchise Offering Circular for the state in which the franchise is to be located at the earlier of the first personal meeting or ten (10) business days prior to the execution of any agreements or the payment of any consideration to Franchisor.
- (f) It is aware of the fact that some franchisees may operate under different forms of agreements, and consequently, that Franchisor's obligations and rights in respect to its various franchisees may differ materially in certain circumstances.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have duly executed and delivered this Agreement.

Franchisee: Fankhauser Property Group, Inc.

Witnesses as to Fankhauser Property Group, Inc.

Signature Mary Layton
Name Printed Mary Layton

Signature _____
Name Printed _____

By: Brock L. Fankhauser Date: 3.23.06
Brock L. Fankhauser, President

Franchisor: EPCON Communities Franchising, Inc.

Witnesses:

Signature - Witness as to P. Thomas Rothrauff
Name Printed _____

Signature - Witness as to Edward A. Bacome
Name Printed _____

By: P. Thomas Rothrauff
P. Thomas Rothrauff, Vice-President and General Manager

By: Edward A. Bacome
Edward A. Bacome, Vice-President Director
Date: March 30, 2006

EXHIBIT "1"
(to Franchise Agreement)

MARKET AREA AGREEMENT

This Market Area Agreement (this "Market Area Agreement") is made by and between EPCON Communities Franchising, Inc., an Ohio corporation having its principal business offices in Dublin, Ohio (hereinafter referred to as "Franchisor"), and Fankhauser Property Group, Inc., a(n) North Carolina corporation having its principal business offices at 300 E. John Street, Suite 126, Matthews, North Carolina 28105 (hereinafter referred to as "Franchisee"), to be effective as of the date executed by Franchisor as set forth on Page 3 hereof.

Pursuant to the terms of the Franchise Agreement, dated March 30 2006 made by and between the parties hereto (the "Franchise Agreement"), Franchisor and Franchisee make the following agreement, intending to be legally bound thereby:

1. Each term set forth herein having initial capital letters shall have the meaning as set forth herein or, if not defined herein, as specified in the Franchise Agreement.
2. For purposes of this Market Area Agreement, the term "Market Area" is intended to include the smallest specific geographic area that will generate the most purchaser support (typically between 60% and 70%) for a development. The area included within the Market Area typically takes into consideration existing natural and man-made boundaries and socioeconomic conditions. The Market Area for this Market Area Agreement shall be as depicted on the map attached hereto as Exhibit "A" and incorporated herein for all purposes.
3. Franchisor, having granted to Franchisee a license to use the Development System pursuant to the terms and conditions of the Franchise Agreement, desires to further protect its materials, reputation, and goodwill and to geographically limit use by Franchisee of the Development System in an ordered and controlled manner. Franchisee acknowledges that such restrictions are essential to the success of the Project and the projects of other franchisees and licensees of Franchisor.
4. Franchisee agrees to fully implement the Development System only within the Market Area depicted on Exhibit "A" and at the location or address hereinafter specified:

The Market Area is an approximately 14 mile by 5 1/2 mile area in and around Mecklenburg County, North Carolina and York and Lancaster Counties, South Carolina. The exact location of the Project is near the intersection of SR 98 and SR 160.

Proposed Name of Project: Stonecrest Villas

Projected Number of Units in the Project: Ninety (90) Units

Franchisee hereby acknowledges that Franchisor's review and expressed opinion about Franchisee's proposed location is only Franchisor's opinion respecting how the site meets Franchisor's criteria for locations for EPCON Communities Projects and is based upon Franchisor's limited information about Franchisee's Market Area. It does not constitute a representation, warranty, or an acknowledgment by Franchisor or any employee or agent of Franchisor that an EPCON Communities Project at the proposed location will be successful. The decision of Franchisee to proceed with the development of an EPCON Communities Project at the proposed location shall be at the sole discretion of Franchisee based upon its independent analysis, and Franchisee hereby acknowledges and agrees that it shall not have any claim of any nature against Franchisor and its employees and agents if the EPCON Communities Project does not perform in accordance with the expectations of Franchisee.

5. Franchisee shall commence construction of the Project referenced in Section 4 of this Market Area Agreement on or before the second anniversary of the effective date of this Market Area Agreement.

Pursuant to the terms of Article 6 of the Franchise Agreement, the latest dates by which each of the Second Payment, Third Payment and Fourth Payment could be paid by Franchisee to Franchisor in compliance with the Franchise Agreement are as follows:

Latest date and amount of First Payment: Twenty-Six Thousand Dollars (\$26,000) due at execution of Market Area Agreement

Latest date and amount of Second Payment: Thirty-Four Thousand One Hundred Dollars (\$34,100) due at execution of Market Area Agreement.

Latest date and amount of Third Payment: Thirty-Eight Thousand Dollars (\$38,000) due no later than January 30, 2008.

Latest date and amount of Fourth Payment: Not applicable

6. At such time as Franchisee desires to make use of the Development System, including the use of any modification or alteration thereof, at any other location (whether within the Market Area depicted on Exhibit "A" hereto or within a different Market Area) or for any other Project, Franchisee agrees to provide written notification to Franchisor as is further described in Sections 3.4 and 3.5 of the Franchise Agreement. In the event that Franchisor agrees to Franchisee's request, Franchisee agrees that it shall provide to Franchisor a separately executed Market Area Agreement and shall pay to Franchisor, for such use of the Development System at such location, amounts in compliance with the payment formula and schedule set forth in Article 6 of the Franchise Agreement.
7. Franchisee acknowledges that it shall not use or allow to be used the Development System anywhere except at location(s) within the Market Area(s) specified in this or other Market Area Agreement(s) executed by and between Franchisor and Franchisee. Franchisee further acknowledges that any unauthorized and unacknowledged use would be in violation of the terms of this Market Area Agreement and of the Franchise Agreement and agrees that any such breach shall afford to Franchisor each of the rights and remedies set forth in the Franchise Agreement.
8. During the term of the Franchise Agreement, Franchisor agrees to grant to no other licensee or franchisee the right to commence construction (nor to itself commence construction) of a Project utilizing the Development System within the Market Area depicted on Exhibit "A" hereto as long as Franchisee is and has at all times during the term of the Franchise Agreement been in full compliance with each of the conditions set forth below:
 - a. Franchisee fully complies with the provisions of the Franchise Agreement and this Market Area Agreement; and,
 - b. Franchisee, when so requested by Franchisor, notifies Franchisor in writing, within thirty (30) days of its receipt of Franchisor's request, that it will, and does, execute a new Market Area Agreement for a second or subsequent Project within the Market Area and pays to Franchisor the applicable fee provided by the Franchise Agreement such execution and payment each to take place within the above-referenced thirty (30) day period. Franchisor shall only make such a request of Franchisee after (i) Franchisee has completed construction of all buildings of the initial Project in the Market Area and (ii) another franchisee or potential franchisee has notified Franchisor that it is willing and able to execute a Market Area Agreement for a location within the same Market Area or when Franchisor itself desires to construct a Project within the same Market Area.
9. Upon the earliest to occur of (a) Franchisee fails to comply with any provisions of the preceding Section 8, (b) the date of completion of all buildings in the Project described above in Section 4, (c) Franchisee's failure to commence construction of the Project referenced in Section 4 of this Market Area Agreement on or before the second anniversary of the effective date of this Market Area Agreement, or (d) as applicable, (i) the third (3rd) anniversary of the effective date of this Market Area Agreement, for a Project of eighty (80) or fewer units, (ii) the fourth (4th) anniversary of the effective date of this Market Area Agreement for a Project of eighty one (81) to one hundred forty (140) units inclusive, or (iii) the fifth (5th) anniversary of the effective date of this Market Area Agreement for a Project of more than one hundred forty (140) units, any exclusivity rights which Franchisee may have in the Market Area shall immediately terminate, and Franchisor shall have the right to grant to any entity the license to use, or may itself use, the Development System within the Market Area set forth in Exhibit "A".
10. This Agreement shall automatically terminate on the effective date of any termination or expiration of the Franchise Agreement.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF the parties hereto, intending to be legally bound hereby, have duly executed and delivered this Market Area Agreement.

Witnesses as to Fankhauser Property Group, Inc.

Signature Mary Layton
Name Printed: Mary Layton

Signature _____
Name Printed: _____

Franchisee: Fankhauser Property Group, Inc.

By: B. Fankhauser Date: 3.23.06
Brook L. Fankhauser, President

Witnesses as to Epcor Communities

Signature - Witness as to P. Thomas Rothrauff
Name Printed: _____

Signature - Witness as to Edward A. Bacome
Name Printed: _____

Franchisor: EPCOR Communities Franchising, Inc.

By: P. Rothrauff
P. Thomas Rothrauff, Vice President and General Manager SM

By: Edward A. Bacome
Edward A. Bacome, Vice President Director SM
Date: March 30, 2006

EXHIBIT "A"
(to Market Area Agreement)

All within Mecklenburg County, North Carolina and York and Lancaster Counties, South Carolina

That area located and included in the following described boundary.

Beginning at the intersection of I-485 and SR 16.

From that point in a southerly direction along SR 16 to its intersection with the Mecklenburg-Union County Line;

From that point in a southwesterly direction along the Mecklenburg-Union County Line to its intersection with the North Carolina-South Carolina State Line;

From that point in a northwesterly direction along the North Carolina-South Carolina State Line to its intersection with US 521;

From that point in a southwesterly direction along US 521 to its intersection with SR 160;

From that point in a westerly direction along SR 160 to its intersection with SR 160/Bus US 21;

From that point in a northwesterly direction along SR 160/Bus US 21 until it becomes just SR 160 to its intersection with SR 49;

From that point in a southwesterly direction along SR 49 to its intersection with Gray Rock Road;

From that point in a westerly direction along Gray Rock Road to its intersection with Island Cove Road;

From that point in a southerly direction along Island Cove Road until it comes to the edge of the shore of Lake Wylie;

From that point in a westerly, then northwesterly direction along Lake Wylie until it comes to the North Carolina-South Carolina State Line;

From that point in a northeasterly direction along the North Carolina-South Carolina State Line to its intersection with SR 1105;

From that point in a northwesterly direction along SR 1105 to its intersection with SR-1102;

From that point in a northeasterly direction along SR 1102 until it becomes Youngblood Road to its intersection with SR 49;

From that point in a northeasterly direction along SR 49 to its intersection with Nevada Boulevard;

From that point in a southeasterly direction along Nevada Boulevard until it dead-ends, then continue until the line comes to I-77/US 21;

From that point in a southerly direction along I-77/US 21 to its intersection with the North Carolina-South Carolina State Line;

From that point in a southeasterly direction along the North Carolina-South Carolina State Line to its intersection with SR 3637;

From that point in a northeasterly direction along SR 3637 until it becomes Dorman Road to its intersection with S. Lancaster Highway;

From that point in a northwesterly direction along S. Lancaster Highway to its intersection with Carolina Place Parkway;

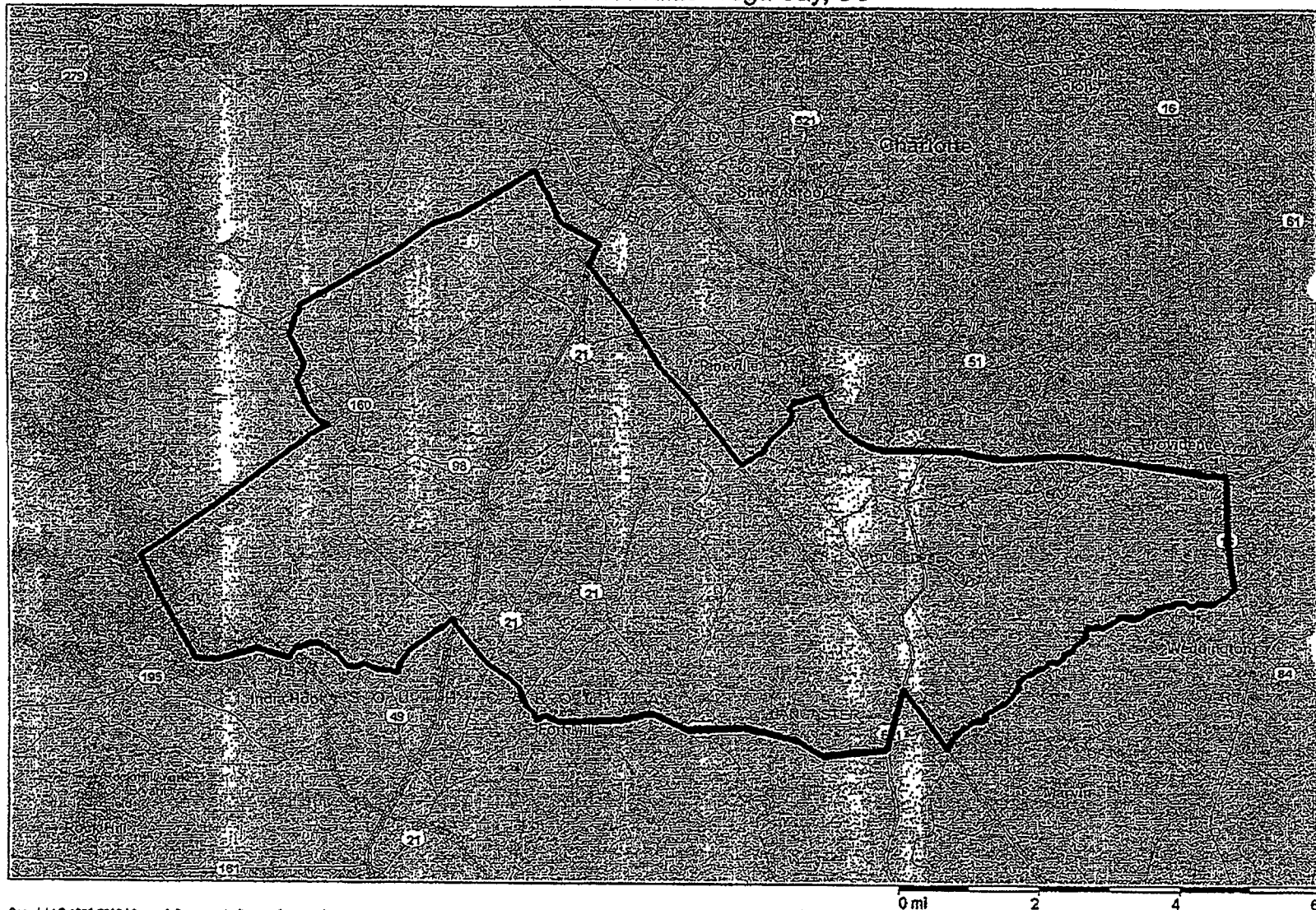
From that point in a northeasterly direction along Carolina Place Road to its intersection with Park Road;

From that point in an easterly direction along Park Road to its intersection with I-485/US 521;

From that point in a southeasterly direction along I-485/US 521 until it becomes just I-485 to its intersection with SR 16, the point of the beginning.

And as depicted on the attached map as that area within the heavy dark line.

MA - Stonecrest Villas -Tega Cay, SC



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 (Statistics Canada and/or Geomatics Canada), all rights reserved.

EXHIBIT B

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Juontonio Pinckney, *et al.*,)

Plaintiffs,)

vs.)

Epcon Communities, Inc.,)

Epcon Communities Franchising, Inc.,)

Brock L. Fankhauser, Fankhauser Property)

Group, Inc. and Stonecrest Villas of Tega)

Cay Home Owners Association, Inc.,)

Defendants.)

Fankhauser Prop. Group, Inc.,)

Third-Party Plaintiff,)

vs.)

Architectural Alliance, Ltd., Exterior)

Expressions of North Carolina, Inc.,)

Al-Mega Construction, Inc., Procar, Inc.,)

The Southeastern Group, Inc., Lucas Lawn)

and Landscape, Inc., and Jose Simenez,)

Individually and d/b/a M&L Roofing Co.,)

LLC and/or MB Roofing Company,)

Third-Party Defendants.)

Stonecrest Villas of Tega Cay)

Condominium Owners Association, Inc.,)

Third-Party Plaintiff,)

vs.)

Stonecrest Villas of Tega Cay, LLC and)

Epcon Communities Franchising, Inc.)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2010-CP-46-2326

**AMENDED
AFFIDAVIT OF
JOEL D. RHOADES**

Exterior Expressions of North Carolina,
Inc.)

Fourth-Party Plaintiff,)

vs.)

Marcos Gonzalez,)

Fourth-Party Defendant.)

Procar, Inc. and Procar II, Inc.,)

Fourth-Party Plaintiffs,)

vs.)

Marcos Zertuche, David Carbajal,
Victorina Cortez, Balancos Construction
Co., Balanos Framing, Inc., Ricardo
Hernandez, and Silverio Cortez,)

Fourth-Party Defendants.)

Al-Mega Construction, Inc.,)

Fourth-Party Plaintiff,)

vs.)

Noe Perez, Juan Abundez Saucedo, and
Moisese Chavarra Hernandez,)

Fourth-Party Defendants.)

PERSONALLY APPEARED BEFORE ME, Mr. Joel D. Rhoades, who being duly
sworn, hereby declares under penalty of perjury the following:

1. My name is Joel D. Rhoades, and I am an adult over the age of eighteen and
competent to give this Affidavit.

2. This Affidavit is based upon my personal knowledge and amends the previous affidavit I gave in this matter dated December 22, 2011.

3. I am, and at all times relevant to the most recent operative amendment to the Complaint in the above-captioned action was, the Vice-President, Secretary, and General Counsel of Epcon Communities, Inc. ("ECI") and Epcon Communities Franchising, Inc. ("ECFI").

4. As Secretary of ECI and ECFI, I am familiar with the corporate records of both entities.

5. ECI and ECFI are separate legal entities under common ownership by shareholders who are natural individuals.

6. As an officer of ECI and ECFI, I have general knowledge, or access to knowledge, regarding the operations of ECI and ECFI, and I am familiar with the facts of the above-captioned action.

7. Neither ECI nor any of its employees had any involvement in the "Project," which consisted of the development, construction, marketing, sale, or maintenance of the condominium development in York County, South Carolina known as Stonecrest Villas of Tega Cay ("SVTC"), which Project is the subject of the above-captioned action. To the extent any employee ever visited the Stonecrest site, it would have been a courtesy visit performed in conjunction with other business the ECI employee had in the area. At no time did ECI supervise or engage in construction at the Stonecrest project.

8. In my prior affidavit, I stated that no ECFI employees had ever visited the Stonecrest site during construction. However, subsequent to executing that affidavit, ECFI located a folder that contained hard copies of site visit reports conducted by ECFI sales, business

and construction consultants. Based upon these documents, I now believe ECFI employees did visit the Stonecrest site during construction. These employees provided consultation, review of business practices and advice to the franchisee as documented in the reports produced. At no time did ECFI supervise or engage in construction at the Stonecrest project.

9. ECI did not enter into any contracts pertaining to the Project, including without limitation, contracts for the sale of condominium units.

10. ECFI is the owner of intellectual property rights consisting of a proprietary condominium development system (the "Development System").

11. ECFI, pursuant to a Franchise Agreement (as subsequently amended) and Market Area Agreement dated March 30, 2006, licensed to Fankhauser Property Group, Inc. ("FPG") the rights to use the Development System in the Project. ECFI did not enter into any other contracts with respect to the Project, including without limitation, contracts for the sale of condominium units.

12. With regard to the Project, ECFI was a mere licensor of intellectual property rights pursuant to a Franchise Agreement.

13. "Epcon Communities" is a registered trademark owned by ECFI, and FPG's use of that trademark was governed by the Franchise Agreement between ECFI and FPG. Similarly, the pinwheel logo that is used in conjunction with the Epcon Communities trade name is a registered trademark owned by ECFI, and FPG's use of that trademark was governed by the Franchise Agreement between ECFI and FPG.

14. Neither ECI nor ECFI received any funds from any purchaser of condominiums in the Project.

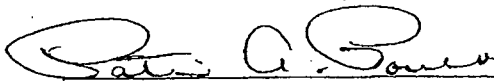
15. Neither ECI nor ECFI deposited in any account controlled by either entity funds paid by purchasers of condominiums in the Project.

16. I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate to the best of my knowledge.

FURTHER THIS AFFIANT SAYETH NAUGHT.


Joel D. Rhoades

SWORN to before me this
18th day of July, 2012



NOTARY PUBLIC FOR OHIO

My Commission Expires: _____

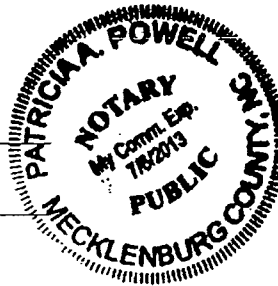


EXHIBIT C

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

JUANTONIO PINCKNEY, ET AL)

)
PLAINTIFF,)

-VS-)

) CA NO 2010-CP-46-2326
)

EPCON COMMUNITIES, INC.,)

ET AL,)

)
DEFENDANTS.)
)

(ROUGH DRAFT)

DEPOSITION OF BROCK FANKHAUSER (30-B-6)

FORT MILL, SOUTH CAROLINA

MARCH 7, 2010

Since this deposition is in rough draft form, please be aware that there may be a discrepancy regarding page and line number when compared to the final transcript. The uncertified rough draft may contain misspelled proper names, reporter's notes in asterisks, incorrect or missing Q/A symbols or punctuation. All such entries will be corrected in the final certified transcript. Rough draft is with the understanding that the rough draft is an uncertified copy.

Shirley Dallas-Gerrald, cvR-CM

DALLAS REPORTING
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS
ROCK HILL, SOUTH CAROLINA
803-328-9640/TOLL FREE 1-877-871-6363

- 1 **A** **Correct.**
- 2 **Q** And is Epcon Communities, Inc. the company that
- 3 Phil Fankhauser and Mr. Bacome used to do their own
- 4 buildings.
- 5 **A** I don't know if that's the company they used to do
- 6 their own buildings.
- 7 **Q** Okay.
- 8 **A** They may form single purpose LLCs. I can't speak
- 9 as to the legal nature of what that company does.
- 10 **Q** You don't know what that company does, I gather,
- 11 Epcon Communities, Inc.?
- 12 **A** I know that Epcon Communities has a lot of
- 13 different companies, but I don't know what each of
- 14 the companies does, except for my knowledge of
- 15 Epcon Communities Franchising and what they do.
- 16 **Q** Okay. And it's fair to say -- because Epcon
- 17 Communities, Inc. is a -- the first, in fact, named
- 18 defendant in the lawsuit that Pinkney et. al. have
- 19 brought. It's fair to say that Epcon Communities,
- 20 Inc. has no relationship with Fankhauser Property
- 21 Group?
- 22 **A** That's safe to say.
- 23 **Q** And has no relationship to anything at Stonecrest
- 24 Villas of Tega Cay?
- 25 **A** **Correct.**

- 1 that's a little more useable than that. That would
2 be helpful.
- 3 **A** **(Indicating yes)**
- 4 **Q** Okay.
- 5 Whereupon - Document was marked as Deposition
6 Exhibit Number 132.
- 7 **Q** Let me hand you a document I've marked as Exhibit
8 132. Can you identify that document for me,
9 please?
- 10 **A** **It's an owner-contractor agreement.**
- 11 **Q** Between who and who?
- 12 **A** **Al-Mega Construction and Stonecrest Villas of Tega**
13 **Cay.**
- 14 **Q** And please look through the document, and tell me
15 whether this is the contract pursuant to which Al-
16 Mega Construction performed services on the
17 Stonecrest job.
- 18 **A** **It is.**
- 19 **Q** Now, I think you told us in your individual
20 deposition the form of contract was a form drafted
21 by Fankhauser Property Group?
- 22 **A** **Yes.**
- 23 **Q** And was generally used with most of the
24 subcontractors?
- 25 **A** **Yes.**

- 1 Q This particular document, Exhibit 132, on Page
2 Fankhauser Property Group 112, does that bear your
3 signature on behalf of Stonecrest Villas?
- 4 A Yes.
- 5 Q And was this agreement managed, for lack of a
6 better word, by Fankhauser Property Group as the
7 general contractor?
- 8 A Yes.
- 9 Q Attached to the document at Page 117, is that the
10 scope of work applicable to Al-Mega?
- 11 A Yes.
- 12 Q Okay. It indicates in Section 16.0B(1) that Al-
13 Mega is going to install the siding and trim for
14 the units and the clubhouse. Is that right?
- 15 A Yes.
- 16 Q And requires it to be done in accordance with the
17 drawings, manufacturer's installation instructions,
18 and related contract documents?
- 19 A Yes, it does.
- 20 Q Does this scope of work require Al-Mega to furnish
21 the siding?
- 22 A I guess if you looked at Section 2. That might be
23 the only section that explicitly states that.
24 Contractor shall provide all labor, equipment,
25 nails, staples, incidentals, and insurance. So if

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

JUANTONIO PINCKNEY, ET AL)

PLAINTIFF,)

-VS-)

CA NO 2010-CP-46-2326

EPCON COMMUNITIES, INC.,)

ET AL,)

DEFENDANTS.)

(ROUGH DRAFT)

DEPOSITION OF BROCK FANKHAUSER (30-B-6)

FORT MILL, SOUTH CAROLINA

MARCH 8, 2010

Since this deposition is in rough draft form, please be aware that there may be a discrepancy regarding page and line number when compared to the final transcript. The uncertified rough draft may contain misspelled proper names, reporter's notes in asterisks, incorrect or missing Q/A symbols or punctuation. All such entries will be corrected in the final certified transcript. Rough draft is with the understanding that the rough draft is an uncertified copy.

Shirley Dallas-Gerrald, CVR-CM

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1 Communities Franchising had requested defense and
2 indemnification from Fankhauser Property Group?

3 A Yes.

4 Q Has Fankhauser Property Group yet agreed to defend
5 and indemnify Epcon Communities Franchising?

6 A I can't speak to whether that has occurred.

7 Q So you're not aware, one way or the other, whether
8 they have?

9 A I'm not aware.

10 Q Do you, as we sit here today, have any knowledge of
11 any reason Fankhauser Property Group should not
12 agree to defend and indemnify Epcon Communities
13 Franchising and Epcon Communities, Incorporated in
14 this case?

15 Mr. Powell - I'm going to object and instruct
16 the witness not to answer to the extent that
17 solicits an attorney/client privileged
18 communication. Otherwise, you can answer the
19 question.

20 A (No response)

21 Q Right. So just to clarify, I'm not looking for any
22 conversations that you've had with your attorney,
23 but I'm just looking for what you know personally,
24 as you sit here today. Are you aware of any facts
25 personally that lead you to believe that Fankhauser

Deposition of Brock Fankhauser

1 Property Group is not a - - - should not defend and
2 indemnify Epcon Communities Franchising and Epcon
3 Communities, Incorporated against the allegations
4 in this case?

5 A I'm not sure that I'm prepared, in my capacity, to
6 answer that question, given the legal nature it
7 presents.

8 Q Well, I'm not asking you for any legal
9 interpretation. I'm just asking for any - - -

10 A It feels that way.

11 Q I'm asking for any facts that you're aware of, that
12 make you think that Fankhauser Property Group does
13 not need to defend or indemnify - - -

14 A No.

15 Q And as far as you are concerned as a representative
16 of Fankhauser Property Group, Epcon Communities
17 Franchising fulfilled all of its obligations under
18 the franchising agreement, isn't that right?

19 A Yes.

20 Q Now, in addition to the additional insured
21 obligations that Fankhauser required of its
22 subcontractors, Fankhauser Property Group also
23 obtained insurance that named Epcon Communities
24 Franchising as an additional insured, isn't that
25 correct?

Deposition of Brock Fankhauser

EXHIBIT D

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

JUANTONIO PINCKNEY, ET AL)

)
PLAINTIFF,)

-VS-)

) CA NO 2010-CP-46-2326
)

EPCON COMMUNITIES, INC.,)

ET AL,)

)
DEFENDANTS.)
)

(ROUGH DRAFT)

DEPOSITION OF BROCK FANKHAUSER (INDIVIDUAL)

FORT MILL, SOUTH CAROLINA

MARCH 6, 2010

Since this deposition is in rough draft form, please be aware that there may be a discrepancy regarding page and line number when compared to the final transcript. The uncertified rough draft may contain misspelled proper names, reporter's notes in asterisks, incorrect or missing Q/A symbols or punctuation. All such entries will be corrected in the final certified transcript. Rough draft is with the understanding that the rough draft is an uncertified copy.

Shirley Dallas-Gerrald, cvR-CM

DALLAS REPORTING
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS
ROCK HILL, SOUTH CAROLINA
803-328-9640/TOLL FREE 1-877-871-6363

1 of Stonecrest Villas?

2 A I have no knowledge of that.

3 Q Do you have any personal knowledge of anyone from
4 either ECF or Epcon Communities, Incorporated, ever
5 having any communications with any purchasers prior
6 to -- any purchasers of a Stonecrest Villa prior to
7 the purchase of a home?

8 A That's unlikely, but I can't comment. I don't
9 speak for Epcon Communities or Epcon Communities
10 Franchising, and I don't know if they were
11 contacted by a prospective purchaser.

12 Q Are you aware of Epcon Communities, Incorporated,
13 having had any involvement at all in the Stonecrest
14 Villas of Tega Cay?

15 Mr. Halford - Object to the form of the
16 question based on the exhibits of record.

17 A I'm not sure I know what you mean by any
18 involvement. Could you rephrase the question?

19 Q Sure. Well, as I understand it, all of the
20 agreements and contracts that you had with any
21 Epcon entity were with ECF. I'm trying to
22 understand whether, to your knowledge, Epcon
23 Communities, Incorporated, was involved in any way
24 with Stonecrest Villas.

25 Mr. Halford - Same objection.

Deposition of Brock Fankhauser

1 A I don't have specific information about what
2 employees at Epcon Communities Franchising might be
3 employees of Epcon Communities, Incorporated. And
4 without some type of organizational chart or
5 structure, I could not answer that question.

6 Q My question's a little different. I'm not asking
7 whether there might have been an employee who had
8 involvement, who also happened to work for Epcon
9 Communities, Incorporated. What I'm asking is
10 whether the entity, Epcon Communities,
11 Incorporated, had any involvement with Stonecrest
12 Villas of Tega Cay.

13 Mr. Halford - Same objection.

14 Q You've testified that you had no contracts or
15 agreements with them, and you've testified that as
16 far as you understand, they were not involved in
17 the development or construction of the Stonecrest
18 Villas; is that correct?

19 A That's correct.

20 Q And to the best of your knowledge, Epcon
21 Communities, Incorporated was not involved in the
22 marketing of the Stonecrest Villas, were they?

23 A They were not.

24 Mr. Halford - Same objection for the record.

25 Q Do you personally have any reason to believe that

Deposition of Brock Fankhauser

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Juantonio Pinckney, et al.,

Plaintiffs,

vs.

Epcon Communities, Inc., Epcon
Communities Franchising, Inc., Brock L.
Fankhauser, Fankhauser Property Group,
Inc., Stonecrest Villas of Tega Cay, LLC,
and Stonecrest Villas of Tega Cay
Home Owners Association, Inc.,

Defendants.

Fankhauser Property Group, Inc.,

Third-Party Plaintiff,

vs.

Architectural Alliance, Ltd., Exterior
Expressions of North Carolina, Inc.,
Al-Mega Construction, Inc., Procar, Inc.,
Procar II, Inc., The Southeastern Group, Inc.,
Lucas Lawn and Landscape, Inc., and
German & Garrett, Inc.,

Third-Party Defendants.

Stonecrest Villas of Tega Cay
Condominium Owners Association, Inc.,

Third-Party Plaintiff,

vs.

Stonecrest Villas of Tega Cay, LLC and
Epcon Communities Franchising, Inc.,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CONSOLIDATED CIVIL ACTION
NO. 2010-CP-46-2326

FANKHAUSER PROPERTY GROUP, INC.'S
MEMORANDUM IN OPPOSITION TO
THE MOTIONS FOR SUMMARY JUDGMENT
OF EPCON COMMUNITIES, INC. AND
EPCON COMMUNITIES FRANCHISING, INC.

FILED-RECEIVED
2012 JUL 27 AM 10:44
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

Exterior Expressions of North Carolina, Inc.,

Fourth-Party Plaintiff,

vs.

Marcos González,

Fourth-Party Defendant.

Procar, Inc. and Procar II, Inc.,

Fourth-Party Plaintiffs,

vs.

Marcó Zertuche, David Carbajal, Victorina
Cortez, Balanos Construction Co., Balanos
Framing, Inc., Ricardo Hernandez, and
Silverio Cortez,

Fourth-Party Defendants.

Al-Mega Construction, Inc.,

Fourth-Party Plaintiff,

vs.

Noe Perez, Juan Abundez Saucedo, and
Moises Chavarra Hernandez,

Fourth-Party Defendants.

TO: MICHAEL B.T. WILKES, ESQUIRE, MELISSA M. NICHOLS, ESQUIRE, AND J.
DERHAM COLE, JR., ESQUIRE, ATTORNEYS FOR EPCON COMMUNITIES, INC. AND
EPCON COMMUNITIES FRANCHISING, INC.:

Fankhauser Property Group, Inc. ("FPG") submits this memorandum of law in opposition to the motion for summary judgment filed by Epcon Communities, Inc. ("ECI") and Epcon Communities Franchising, Inc. ("ECFT") (collectively "Epcon"). For the following reasons, Epcon's motion should be

denied.

I. Summary Judgment Standard

“Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Toomer v. Norfolk S. Ry. Co., 544 S.E.2d 634, 635 (S.C. Ct. App. 2001) (citing SCRCP 56(c); Mosteller v. County of Lexington, 520 S.E.2d 620 (S.C. 1999); Young v. South Carolina Dep’t of Corrections, 511 S.E.2d 413 (S.C. Ct. App. 1999)). “It is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law.” Id. (citing Carolina Alliance for Fair Employment v. South Carolina Dep’t of Labor, Licensing, & Regulation, 523 S.E.2d 795 (S.C. Ct. App. 1999)). “All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.” Id. (citing Young, 511 S.E.2d at 415).

II. Law and Analysis

A. Epcon’s motion should be denied because Plaintiffs and the Association assert causes of action against Epcon allegedly arising out of Epcon’s conduct independent of FPG

This court should deny Epcon’s motion for summary judgment because the Plaintiffs have asserted causes of action directly against ECI and ECFI and the Stonecrest Villas of Tega Cay Condominium Owners Association, Inc. (“Association”) has asserted causes of action directly against ECFI pertaining to alleged conduct independent of any alleged conduct by FPG. Therefore, the causes of action asserted in this lawsuit fall outside of the indemnification provision at issue. If ECI and ECFI maintain that there is no evidence of any wrongdoing on the part of ECI or ECFI, then ECI and ECFI should move for summary judgment and have the court find as such as a matter of law as to the claims asserted by the Plaintiffs and the claims asserted by the Association that allegedly arise out of the direct

conduct of ECI and ECFI.¹

Under Ohio law,² "Indemnity agreements must be interpreted in the same manner as other contracts." Portsmouth Ins. Agency v. Med. Mut. of Ohio, 934 N.E.2d 940, 944 (Ohio Ct. App. 2009).³

¹ECI and ECFI have filed a motion to dismiss the Plaintiffs' claims pursuant to SCRCP 12(b)(6). Given the submission of an affidavit by the Plaintiffs, the court could convert this motion to a motion for summary judgment. See ECI/ECFI Memorandum in Support of Motion to Dismiss at 4. Upon information and belief, if ECI/ECFI prevail on their motion to dismiss/motion for summary judgment as to Plaintiffs' claims, ECI/ECFI's motion for summary judgment as to FPG with respect to Plaintiffs' claims is moot. ECFI has filed a motion for summary judgment as to the Association's claims. Upon information and belief, if ECFI prevails on its motion for summary judgment as to the Association's claims, ECFI's motion for summary judgment as to FPG with respect to the Association's claims is moot.

²The franchise agreement between FPG and ECFI provides in Section 20.2 that "this Agreement shall be deemed to have been entered into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles." See Franchise Agreement, Exhibit A. Under Ohio Revised Code § 2305.31:

A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees has hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and is void.

O.R.C. § 2305.31 (emphasis added). FPG agrees with ECFI that the Ohio statute does not operate to preclude enforcement of the franchise agreement at issue because the franchise agreement does not involve ECFI hiring FPG to perform any work.

³ECI/ECFI cite the Ohio case of Corporate Prot. Servs., Inc. v. Guardian Alarm of Ohio, No. L-10-1317, 2012 WL 439645 (Ohio Ct. App. February 10, 2012) for the proposition that the court enforced an indemnity provision (and, presumably, that the court here should enforce the indemnity provision). Like many cases involving interpretation of different contracts and different indemnity provisions, there is nothing in the Corporate Prot. Servs. case that provides any guidance here as the facts of the case and indemnity provision at issue are distinguishable.

Likewise, under South Carolina law, "A contract of indemnity will be construed in accordance with the rules of construction for contracts generally." Campbell v. Beacon Manufacturing Co., 438 S.E.2d 271, 272 (S.C. Ct. App. 1993) (citing Federal Pacific Elec. v. Carolina Production Enterprises, 378 S.E.2d 56, 57 (S.C. Ct. App. 1989)). ECFI and FPG entered into a franchise agreement on or about March 30, 2006. A copy of the franchise agreement is attached hereto as Exhibit A. Under Article 16 of the franchise agreement:

Franchisee shall indemnify and hold harmless, to the fullest extent permitted by law, Franchisor, its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership, and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses or obligations including without limitation compensatory, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, Franchisee's ownership or operation of its business hereunder and/or its use of utilization of the Development System.

As set forth in the indemnity provision, FPG is required to indemnify ECFI if a lawsuit is filed against ECFI pertaining to (1) FPG's ownership or operation of its business under the agreement; (2) FPG's use of the Development System;⁴ or (3) both. In this case, the Plaintiffs and the

Corporate Prot. Servs., Inc., 2012 WL 439645 at *4 (setting forth indemnity provision at issue).

⁴Under Section 2.1.1 of the franchise agreement: "Development System" shall mean Franchisor's method, pattern, documents, materials, know-how, knowledge, process, and procedure used for development, construction, and marketing of the residential, multi-family community using a unique architectural design, as well as other proprietary and confidential information, including copyrighted and patented material, and material for which the copyright registration or patent is pending, including, without limitation, all architectural plans and specifications for two- and four-unit buildings, architectural plans and specifications for the clubhouse, site planning guidelines, production management guidelines, financial planning

Association have elected to assert various causes of actions against Epcon that may or may not be viable. However, these allegations – whether meritorious or not – do not fall under the purview of the indemnity provision between ECFI and FPG. The allegations against ECI and ECFI do not pertain to FPG's alleged use of the Development System. Rather, the allegations raised in the lawsuit pertain to alleged independent acts or omissions on the part of ECI and ECFI.

Specifically, the Plaintiffs have asserted causes of action against both ECI and ECFI⁵ for rescission, breach of contract, fraud/misrepresentation, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and violation of the South Carolina Unfair Trade Practices Act.⁶ Additionally, the Association has asserted a single claim against ECFI for breach of express warranties.⁷ By way of example and not limitation, as set forth in the Plaintiffs' most recent Complaint, the Plaintiffs have alleged the following in their cause of action for "rescission":

That despite actual knowledge of flooring and foundation defects

guidelines, marketing materials and guidelines, and sample condominium association materials provided by Franchisor. The Development System shall be deemed to include any method, pattern, process, or procedure used by Franchisee during the term of this Agreement, along with any modifications or changes thereto.

⁵Plaintiffs' Third Amended Complaint filed September 16, 2011, incorporated by reference.

⁶The Plaintiffs' Complaint may also include a cause of action for breach of contract accompanied by fraudulent act as there is a reference to "Epcon" and "Defendants" though neither ECI nor ECFI are specifically listed in the heading for this particular cause of action. As pled, some causes of action are unclear as to which Defendants the Plaintiffs reference. For example, in the cause of action for rescission, portions of this cause of action appear to pertain to FPG while others pertain to Epcon and others.

⁷Association Answer, Cross-claim, and Third Party Complaint, filed on or about October 25, 2011.

by Epcon principal Philip Fankhauser, Epcon Communities and Epcon Communities Franchising, Inc., knowingly and willfully permitted further contracts and sale by Fankhauser, FPG, and Stonecrest Villas of Tega Cay, LLC of homes whose construction by FPG materially deviated from Epcon plans, specifications, materials and designs.

That Epcon Communities and Epcon Communities Franchising, Inc. willfully and deliberately failed to enforce Franchise Agreement terms and conditions upon Fankhauser and FPG, Inc. as Epcon franchisee, resulting in construction of homes that deviate from Epcon plans, models, specifications, building code, and which now suffer reoccurring water intrusion and mold.⁸

Similarly, the Plaintiffs allege in their cause of action for breach of contract that "Epcon and ECF, Inc. fail[ed] to enforce strict compliance upon Epcon builder Fankhauser with Franchise Agreement terms, conditions, and restrictions."⁹ The breach of contract action also purportedly incorporates by reference prior allegations. FPG makes no representations regarding any of Plaintiffs' allegations against ECI or ECFI for purposes of this motion except that the allegations do not pertain to FPG's use of the Development System under the franchise agreement. As Epcon correctly points out, no Plaintiff entered into any contract with Epcon and, therefore, there would be nothing to rescind even if the Plaintiffs' allegations were true.¹⁰ That being said, the Plaintiffs base their action for rescission, in part, on alleged conduct by Epcon rather than conduct by FPG in asserting this cause of action against Epcon. In this instance, the alleged

⁸Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 6, ¶¶ 16-17.

⁹Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 13, ¶ 4(a).

¹⁰Memorandum in Support of Epcon Communities, Inc.'s and Epcon Communities Franchising, Inc.'s Motion to Dismiss Plaintiffs' Claims at 5. Further, it is unclear how the Plaintiffs would recover against FPG as neither FPG nor Epcon were parties to any agreement with any Plaintiff.

conduct is Epcon's alleged failure to enforce its own franchise agreement. Epcon's alleged conduct does not fall under FPG's ownership/operation of its business under the agreement nor FPG's use of the Development System as provided in the indemnity provision and, therefore, FPG is not required to indemnify Epcon with regard to Plaintiffs' claims against Epcon.

As another example, the Plaintiffs' cause of action for breach of express warranty against Epcon alleges:

Defendants Epcon, ECF, Inc., Fankhauser, FPG, Inc. and Stonecrest HOA knew, or should have known, of the need to fully disclose to potential purchasers the defects each known (sic) water intrusion problems to exist within the condominium's property; yet failed to disclosed (sic) and materially concealed the same and continue to market and sell the properties despite defects for cash to innocent purchasers for value, including Vicari unit 830.¹¹ . . .

Defendant Epcon Communities permitted and by affirmative representation and display of Epcon sales literature, videos, and model condominiums representing (sic) to Plaintiffs that they the were purchasing an Epcon home in terms of value, quality and workmanship. Said representations were materially false.¹²

Here again, FPG makes no representations about whether Epcon owed the Plaintiffs any legal

¹¹Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 26, ¶ 14. Plaintiffs' first cause of action for breach of express warranties against all Defendants and tenth cause of action overall.

¹²Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 32, ¶ 13(a). Plaintiffs' second cause of action for breach of express warranties against all Defendants and fourteenth cause of action overall. Plaintiffs incorrectly allege that ECI and ECFI were sellers of condominiums in the cause of action for breach of implied warranty of merchantability and the basis for the Plaintiffs' claims for breach of implied warranty of fitness for a particular purpose to the extent they are directed to ECI and ECFI are less clear. Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 27-28. Plaintiffs' allegations against ECI and ECFI specifically are also unclear under the UTPA cause of action as the Plaintiffs direct multiple allegations therein against "Defendants" while referencing multiple alleged instances of supposed unfair trade practices, including those pertaining to advertising. *Id.* at 33-36.

duty or whether Epcon had any alleged knowledge of any alleged conditions as set forth in the Plaintiffs' Complaint. However, in the event (however unlikely) that Epcon made any direct representations to any Plaintiff for purposes of the Plaintiffs' allegations against Epcon for breach of express warranty, any such representations would not have been related to FPG's ownership/operation of its business under the franchise agreement nor FPG's use of the Development System, which would be required to trigger the indemnity provision. As such, FPG is not required to indemnify Epcon with regard to Plaintiffs' cause of action against Epcon for breach of express warranty.

Additionally, the Plaintiffs allege in their cause of action for "fraud and misrepresentation" the following:

That Epcon, by and through its employees, agents, independent contractors, and affiliates, including Brock L. Fankhauser 'an Epcon Communities' developer, represented the dwellings to be constructed and ultimately sold to Plaintiffs to be quality Epcon homes built pursuant to Epcon architectural plans, designs, guidelines and specifications, free from defects. Said representation were *materially false*

Plaintiffs are informed and believe that Epcon Communities and ECF, Inc., pursuant to Franchise Agreement (sic), had the absolute right to enforce strict adherence to Epcon Developmental System (sic), including architectural guidelines, blueprints, material use, and specifications used by builder Brock L. Fankhauser and FPG, Inc.

Plaintiffs are informed and believe that Epcon and ECF, Inc. knowingly failed to do so, resulting in builder deviations from the Epcon Developmental system, Epcon plans, and Epcon specifications as published by Epcon or its affiliate Epcon Communities Franchising, Inc.¹³

¹³Plaintiffs' Third Amended Complaint filed September 16, 2011, p. 18, ¶¶ 8, 19-20.

As with the allegations addressed above, the Plaintiffs argue that Epcon acted or failed to act rather than alleging that Epcon is responsible through some act of FPG arising out of FPG's business operations or FPG's use of the Development System.

With regard to the Association's claims directed towards ECFI, the claims pertain to alleged conduct of ECFI independent of any alleged conduct by FPG. According to the Association:

Third-Party Defendant Epcon Communities has been building condominium communities for more than 20 years. Epcon represents itself to have a successful history of condominium developments throughout the United States. Third-Party Defendant Epcon Communities marketed and represented that Stonecrest Villas of Tega Cay was an Epcon Community and was an exceptional community. Being part of an Epcon Community, Third-Party Defendant Epcon Communities represented and warranted that the construction in the community would result in buildings with zero defects and a high level of quality. Third-Party Defendant Epcon Communities represented and warranted that Stonecrest Villas at Tega Cay was part of Epcon Communities QualityMark warranty program. The specific objectives of warranty program are:

- a. to produce a high quality product
- b. identify defects in the buildings at a time when it is appropriate for Epcon Communities' contractors and subcontractors to respond
- c. identify and correct deficiencies before occupancy occurs
- d. to endure that the quality of the construction meets Epcon Communities' alleged standard of excellence.

Third-Party Defendant Epcon Communities represented and warranted that the construction would be thoroughly inspected, including mechanical, structural and cosmetic items. Third-Party Defendant Epcon Communities represented and warranted that the construction would be maintenance free. The clubhouse and common elements in Stonecrest Villas at Tega Cay were part of the construction that was warranted by Third-Party Defendant Epcon Communities. Third-Party Defendant Epcon Communities

breached its warranties in that, among other things:

- a. Failed to construct Stonecrest Villas, including the clubhouse and common elements, in such a manner as to result in zero defects and a high level of quality;
- b. It failed to identify defects at a time when its contractors and subcontractors can address the defect before occupancy occurs;
- c. It failed to thoroughly inspect the construction, including mechanical, structural and cosmetic items;
- d. It failed to construct Stonecrest Villas, including the clubhouse and common elements in such a manner that it was maintenance free.

As a result of Third-Party Defendant Epcon Communities' breach of its warranties, the Improvements and their components are not fit for the particular purpose for which they were intended, and the structural components of the Improvements are not fit to prevent water intrusion into individual unit owners' residences or the Common Elements.¹⁴

The Association's claim against ECFI for breach of express warranties does not reference FPG. Rather, the Association maintains that ECFI made certain representations as part of its warranty program but breached its warranty program causing damage to the Association. *Id.* Again, without reference to whether the Association may recover against ECFI, the indemnity provision in the franchise agreement would not require indemnity where the Association's allegations pertain to alleged representations by ECFI directly to the Association and/or homeowners versus any alleged conduct by FPG.

Because the Plaintiffs' Complaint and the Association's Third-Party Complaint, on their face, pertain to alleged conduct by ECI and ECFI and not by FPG, this court should deny the motion for summary judgment as to contractual indemnity. Again, FPG makes no representations regarding

¹⁴ Association Answer, Cross-claim, and Third Party Complaint, pp. 34-36, ¶¶ 67-77.

such claims except that the claims do not fall under the indemnification provision of the franchise agreement. ECI and ECFI do not argue that FPG is contractually required to indemnify either entity under the franchise agreement for any alleged conduct by ECI and ECFI.¹⁵ The Plaintiffs include multiple causes of action in the Complaint against FPG without including any allegations against Epcon, including breach of fiduciary duty, equitable action for accounting, conversion, civil conspiracy, and "construction defect." Likewise, the Association asserts causes of action directly against FPG for alleged conduct by FPG. With respect to other causes of action, as set forth above, the Plaintiffs and Association assert claims against Epcon resulting from Epcon's own conduct (again whether or not potentially viable). As such, these claims do not arise out of the "Development System" nor the franchise agreement and, therefore, Epcon's motion for summary judgment should be denied.

B. ECI and ECFI's motion for summary judgment on the equitable indemnity claims should be denied because neither entity has been exposed to liability based on wrongdoing by FPG

ECI and ECFI's motion for summary judgment on their claim for equitable indemnity should be denied because the requisite relationship is lacking and ECI/ECFI are not exposed to any liability based on any wrongdoing by FPG. "In general, indemnity may be defined as a 'form of compensation in which a first party is liable to pay a second party for a loss or damage the second

¹⁵"[M]ost courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." Federal Pacific Elec. v. Carolina Production Enterprises, 378 S.E.2d 56, 57 (S.C. Ct. App. 1989) (citing University Plaza Shopping Center, Inc. v. Stewart, 272 So.2d 507 (Fla. 1973); Cox v. E.I. Du Pont de Nemours and Company, 39 F.R.D. 47 (W.D.S.C. 1965); Annot., 4 A.L.R.4th at 801-02); (citing Murray v. The Texas Co., 174 S.E. 231, 232 (S.C. 1934) ("[A] provision [in] a contract relieving one of the parties thereto from liability for ... its own negligence should be clear and explicit.")).

party incurs to a third party.” Rock Hill Tel. Co., Inc. v. Globe Communications, Inc., 611 S.E.2d 235, 237 (S.C. 2005) (citing First Gen. Servs. of Charleston, Inc. v. Miller, 445 S.E.2d 446, 449 (1994)). “The right to indemnity arises by operation of law ‘in cases of imputed fault or where some special relationship exists between the first and second parties.’” Id. “According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.” Stuck v. Pioneer Logging Machinery, Inc., 301 S.E.2d 552, 553 (S.C. 1983). “Under South Carolina law, there can be no indemnity among mere joint tortfeasors.” Id. “Parties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them.” Scott by McClure v. Fruehauf Corp., 396 S.E.2d 354, 358 (S.C. 1990). In this case, ECFI likely has the necessary “special relationship” with FPG sufficient to support a claim for equitable indemnity with respect to matters that arise out of the franchise agreement between ECFI and FPG.¹⁶ However, as set forth above, the allegations brought by the Plaintiffs and the Association against ECFI and ECI pertain to their direct conduct rather than conduct by FPG. ECI has no relationship with FPG sufficient to establish a cause of action against FPG for equitable indemnity. As ECI and ECFI indicate in their memorandum, “Plaintiffs, have not however, directed any construction defect allegations against ECI or ECFI. The allegations against ECI and ECFI essentially relate representations [sic] allegedly made to Plaintiffs

¹⁶The claim for equitable indemnity is not ripe because neither ECFI nor ECI have suffered any injury.

during the sales process.”¹⁷ ECI and ECFI go on to state that there is no evidence that ECI and ECFI directly marketed or sold any units in the project. FPG agrees. It follows that there is no evidence to support a claim that ECI/ECFI are exposed to liability by virtue of any conduct by FPG sufficient to support a claim for equitable indemnity. Stuck, 301 S.E.2d at 553.¹⁸

With respect to the matters alleged by the Plaintiffs and the Association against ECI and ECFI pertaining to alleged conduct by ECI/ECFI, these allegations pertain to alleged conduct by ECI/ECFI in which FPG did not join – the opposite of what ECI/ECFI are required to show in order to support a claim for equitable indemnification. These allegations also fall outside of any agreement between ECFI and FPG sufficient for ECFI to show that the requisite “special relationship” exists to support a claim for equitable indemnification while there is none whatsoever between ECI and FPG. “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-S. Mgmt. Co., Inc., 673 S.E.2d 801, 803 (2009). Again, FPG makes no representations regarding these claims except to the extent that ECI/ECFI would attempt to hold FPG responsible for these claims under an equitable indemnity theory. To that extent, FPG simply states that passing judgment on the veracity of any of the Plaintiffs’ statements to date is the province of the jury. If there is a scintilla of evidence from which a jury might conclude that ECI and/or ECFI were negligent with respect to the claims brought by the Plaintiffs/Association, the same is true and

¹⁷ECI/ECFI Memorandum in Support of Motion for Summary Judgment at 11.

¹⁸There is also no evidence that FPG marketed or sold any units.

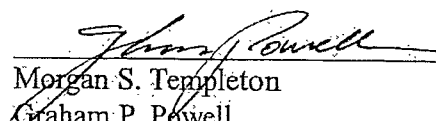
prohibits any summary judgment against FPG under any equitable indemnity theory.¹⁹

WHEREFORE Defendant Fankhauser Property Group, Inc. respectfully requests that this court deny the motions for summary judgment filed by Defendants Epcon Communities, Inc. and Epcon Communities Franchising, Inc. based on the law and authorities set forth above, together with such other and further relief as this court may deem just and proper.

Dated this 26th day of July, 2012.

Respectfully submitted,

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Villas of Tega Cay, LLC

¹⁹To that end and that end only, FPG incorporates by reference the Plaintiffs' Return to ECI/ECFI's Motion to Dismiss filed March 20, 2012, Affidavit of Thea-Eve Vicari, and any additional affidavits filed by Plaintiffs as referenced in the Plaintiffs' memorandum.

CERTIFICATE OF SERVICE

The undersigned employee of WALL TEMPLETON & HALDRUP, P.A. hereby certifies that on this 26th day of July, 2012, she served a copy of Fankhauser Property Group, Inc.'s Memorandum in Opposition to the Motions for Summary Judgment of Epcon Communities, Inc. and Epcon Communities Franchising, Inc. upon counsel for all by electronic mail, following this business's ordinary practice, with which she is readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited with the United States Postal Service in the ordinary course of business and addressed to the persons hereinafter named, at the places and addresses stated below, which are the last known addresses:

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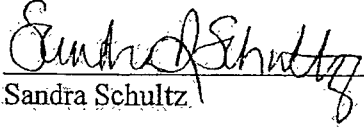
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EXHIBIT

A

FRANCHISE AGREEMENT

This Franchise Agreement (this "Agreement") is made by and between EPCON Communities Franchising, Inc., an Ohio corporation having its principal business offices at 500 Stonehenge Parkway, Dublin, Ohio 43017 (hereinafter referred to as "Franchisor"), and Farkhauser Property Group, Inc., a(n) North Carolina corporation having its principal business offices at 300 E. John Street, Suite 126, Matthews, North Carolina 28105 (hereinafter referred to as "Franchisee"), to be effective as of the date executed by Franchisor as set forth on Page 19 hereof.

For and in consideration of the covenants and promises herein contained, Franchisor and Franchisee make the following agreement, intending to be legally bound thereby:

Article 1

The Development System and Franchisee's Acknowledgments

1.1 Franchisor, as a result of the expenditure of substantial time, effort, and money, has created a unique Development System (as hereinafter defined) for the purpose of providing guidance for development of ranch-style condominium dwellings. The essence of the Development System that Franchisor licenses to its franchisees to use is its architectural plans and designs. The Development System includes, without limitation, plans for specially designed structures which appear from all four sides as single-family residences. As a part of the franchise and license granted in Article 3 hereof, Franchisor shall provide the materials and services described in Article 4 hereof to enable Franchisee to implement the Development System at the location or locations and within the area or areas as set forth in one or more Market Area Agreements (the "Market Area Agreements") each substantially in the form attached hereto as Exhibit "1".

1.2 Franchisee, being cognizant of the distinctive significance and value thereof, desires to make use of and to enjoy the benefits of Franchisor's Development System. Franchisee acknowledges that the success of its use of the Development System depends upon its strict adherence to Franchisor's uniform standards, procedures, and plans, as well as Franchisee's business abilities and other variables. Franchisee agrees to preserve in every way possible the integrity of Franchisor's materials, reputation, and goodwill. Franchisee acknowledges that execution of at least one Market Area Agreement is required at the same time as the execution of this Agreement.

Article 2

Definitions of Certain Terms

2.1 Each term set forth in this Section 2.1 shall have the meaning specified herein:

2.1.1 "Development System" shall mean Franchisor's method, pattern, documents, materials, know-how, knowledge, process, and procedure used for development, construction, and marketing of the residential, multi-family community using a unique architectural design, as well as other proprietary and confidential information, including copyrighted and patented material, and material for which the copyright registration or patent is pending, including, without limitation, all architectural plans and specifications for two- and four-unit buildings, architectural plans and specifications for the clubhouse, site planning guidelines, production management guidelines, financial planning guidelines, marketing materials and guidelines, and sample condominium association materials provided by Franchisor. The Development System shall be deemed to include any method, pattern, process, or procedure used by Franchisee during the term of this Agreement, along with any modifications or changes thereto.

2.1.2 "Franchisor" shall mean EPCON Communities Franchising, Inc., an Ohio corporation, and any assignee of, or successor in interest to, EPCON Communities Franchising, Inc.

2.1.3 "Franchisee" shall mean the party so defined in the preamble hereto and any successor in interest to, or permitted assignee or sublicensee of, Franchisee. Franchisee shall also be deemed to include any principals, officers, owners, and directors of Franchisee, any principals, officers, owners, and directors of an entity having an ownership interest in Franchisee, and any others with any ownership or control interest whatsoever in the entity so defined in the preamble, if such entity is other than a natural person.

2.1.4 "Marks" shall mean all distinguishing characteristics of the Development System, including, without limitation, the name and mark "EPCON Communities", together with such other trade names, service marks, trademarks, and trade symbols, emblems, signs, slogans, insignia and copyrights as Franchisor has adopted and

designated for use in connection with its Development System and as Franchisor may hereafter acquire or develop and designate for use in connection with the Development System.

2.1.5 "Project" shall mean all of the development of buildings or appurtenant structures and improvements on common contiguous grounds by Franchisee, or any successor in interest to, or permitted assignee or sublicensee of, Franchisee, using the Development System. Such development shall be defined as a Project without consideration of the elapsed time required for development of the Project or of the development, marketing, or legal "phase" thereof.

Article 3 Grant of Franchise

3.1 Franchisor hereby grants to Franchisee, and Franchisee hereby accepts, a franchise and license to utilize the Development System subject to the terms, restrictions, and conditions of this Agreement and to the terms, restrictions, and conditions of the Market Area Agreement(s). The grant of such franchise to Franchisee shall be on a non-exclusive basis, except to the extent that certain rights of exclusivity are granted to Franchisee under certain conditions within a particular area or areas pursuant to the terms of one or more Market Area Agreement(s). The term of this Agreement and the franchise it grants shall commence as of the date of execution of this Agreement by Franchisor as shown on Page 19 hereof and shall continue until termination of this Agreement and the franchise as specified in Article 12 hereof.

3.2 Franchisor further grants to Franchisee, subject to the terms and conditions herein contained, a nonexclusive license to use the Marks as provided in Section 5.9 and Article 6 hereof in connection with Franchisee's use of the Development System.

3.3 As provided in Section 1.2 hereof, Franchisee and Franchisor shall execute at least one Market Area Agreement at the time this Agreement is executed. Such Market Area Agreement shall specify a Market Area (as defined in the Market Area Agreement) and a location for Franchisee's initial Project.

3.4 In the event that Franchisee desires to develop an additional Project or Projects at another location or locations within the Market Area of an already-existing Market Area Agreement between Franchisor and Franchisee, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days of its receipt of Franchisee's written request, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such Project(s), such approval shall be effective as of the execution by Franchisee of a new Market Area Agreement or Agreements using Franchisor's then current form of Market Area Agreement, setting forth the new location(s) within the Market Area and the payment by Franchisee of the applicable Project Fee(s) pursuant to the provisions hereof.

3.5 In the event that Franchisee desires to develop a Project at a location within a new Market Area, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such Project, such approval shall be effective as of the execution by Franchisee of a new Market Area Agreement using Franchisor's then current form of Market Area Agreement, setting forth the new Market Area and the location of the Project therein, and the payment by Franchisee of the applicable Project Fee(s) pursuant to the provisions hereof.

3.6 In the event that Franchisee desires to obtain a reservation or "hold" on a new Market Area or Areas, Franchisee shall provide to Franchisor a written request with respect thereto. Franchisor shall, within thirty (30) days, provide notice to Franchisee of its decision respecting Franchisee's request, such decision to be within the sole discretion of Franchisor. If Franchisor grants approval to Franchisee for such reservations or "holds" on certain Market Areas, such approval shall be effective as of the execution by Franchisee of a Market Hold Agreement or Agreements (the "Market Hold Agreement(s)") using Franchisor's then current form of such agreement, the current form of which is attached hereto as Exhibit "4", and the payment by Franchisee of the applicable fee(s) as provided in the Market Hold Agreement(s).

3.7 Notwithstanding any other provisions of this Agreement to the contrary, Franchisor retains the right, in its sole discretion, itself or through subsidiaries or affiliated or related business entities, to use the Development System to construct Project(s) outside of Franchisee's Market Area and to franchise or license others to do so.

Article 4
Franchisor's Obligations

4.1 Franchisor agrees to provide, based upon Franchisor's most recently updated project plans, the following:

- 4.1.1 Unstamped architectural plans and specifications for two- and four-unit buildings, in a computer-assisted design ("CAD") format
 - 4.1.1.1 foundation plan
 - 4.1.1.2 floor plan
 - 4.1.1.3 roof plan with non-engineered truss drawings
 - 4.1.1.4 wall sections
 - 4.1.1.5 exterior elevations
 - 4.1.1.6 drawings or schedules for windows, doors, cabinets, shelving, and floor coverings
 - 4.1.1.7 plumbing plan
 - 4.1.1.8 electrical plan
 - 4.1.1.9 heating, venting, and air conditioning ("HVAC") plan
 - 4.1.1.10 drawings for entry guardhouse and fencing
- 4.1.2 Unstamped architectural plans and specifications for a large and a small clubhouse, in a CAD format
 - 4.1.2.1 foundation plan
 - 4.1.2.2 floor plan
 - 4.1.2.3 roof plan with non-engineered truss drawings
 - 4.1.2.4 wall sections
 - 4.1.2.5 exterior elevations
 - 4.1.2.6 drawings or schedules for windows, doors, cabinets, shelving, and floor coverings
 - 4.1.2.7 plumbing plan
 - 4.1.2.8 electrical plan
 - 4.1.2.9 HVAC plan
- 4.1.3 Site planning guidelines from two recent projects
 - 4.1.3.1 sample site plans
 - 4.1.3.2 sample landscape plans
 - 4.1.3.3 recommendations for locations of utilities, curbs, streets, drives, patios, sidewalks, and mounding
- 4.1.4 Construction Specifications Manual, in a computer readable format.
- 4.1.5 Construction Manual, in a computer readable format.
- 4.1.6 Operations Manual, in a computer readable format.
- 4.1.7 Marketing Manual and Materials, in a computer readable format.
 - 4.1.7.1 color renderings or photographs of units and clubhouse exteriors
 - 4.1.7.2 sample brochure
 - 4.1.7.3 Four (4) video presentations including The Condominium Lifestyle Sales Video, New Owners Video, New Buyers Orientation Video and How to Plan a Grand Opening Video
- 4.1.8 Condominium Materials Manual, in a computer readable format.
- 4.1.9 National Account Suppliers Manual, in a computer readable format.
- 4.1.10 Sample Homeowners Manual.
- 4.1.11 Sample Employer Handbook.
- 4.1.12 Pre-Construction Community Manual.
- 4.1.13 Consulting services
 - 4.1.13.1 Franchisor will provide twenty (20) hours of consulting services to Franchisee for Franchisee's first Project. Consulting may include, but is not limited to, advice on the areas of planning, financing, construction, and marketing.

- 4.1.13.2 Franchisor will provide up to twenty (20) hours of consulting services if Franchisee so requests for each subsequent Project. Consulting may include, but is not limited to, advice on the areas of planning, financing, construction, and marketing.
- 4.1.13.3 Consulting services will be provided to Franchisee either, at Franchisor's discretion, at the corporate offices of Franchisor, by telephone, or at Franchisee's place(s) of business.
- 4.1.13.4 Consulting services in excess of twenty (20) hours requested by Franchisee for a particular Project will be billed to Franchisee by Franchisor at \$200.00 per hour.

4.2 Franchisor represents that the architectural plans and other materials referenced above in Sections 4.1.1, 4.1.2, 4.1.3, and 4.1.4 and provided to Franchisee are substantially similar to those used by Franchisor's affiliate, EPCON Communities, Inc. in its developments. (Franchisee should refer to Article 8 hereof regarding its obligations concerning modifications to the Development System.)

4.3 In order to protect the reputation and goodwill of the Marks and to maintain uniform standards of development under the Marks, Franchisee shall conduct its operations hereunder in accordance with the Operations Manual, one copy of which Franchisee acknowledges having received on loan from Franchisor for the term of this Agreement. The Operations Manual shall at all times remain the sole property of Franchisor. Franchisee shall treat the Operations Manual, any other materials created for or approved for its use by Franchisor, and the information contained therein as confidential, and shall use all reasonable efforts to maintain such information as secret and confidential. Franchisee shall not at any time, without Franchisor's prior written consent, copy, duplicate, record, or otherwise reproduce the Operations Manual, in whole or in part, nor otherwise make the same available to any unauthorized person. Franchisor shall have the right to add to or otherwise modify the Operations Manual from time to time to reflect changes in authorized products and services, standards or product quality, and operations of Franchisor Projects. In the event of a dispute as to the contents of the Operations Manual, the master copy of the Operations Manual maintained by Franchisor at its principal place of business shall be controlling.

Article 5 Franchisee's Obligations

5.1 At any reasonable time during the term of this Agreement Franchisor's representative(s) may without prior notice enter upon the premises of any Project of Franchisee to observe the Project and the progress towards completion thereof and to assure the nature and quality of all Projects associated with the Marks and the EPCON Communities Works (as defined in Section 10.5 hereof). Upon such entry by Franchisor's representative(s), Franchisee shall cooperate in every way with such observation.

5.2 In consideration of Franchisor's covenants contained herein, Franchisee agrees to pay to Franchisor, in connection with each Project developed by Franchisee, a fee (the "Project Fee") the amount of which Project Fee shall be determined on a Project-by-Project basis as described below. The Project Fee for each Project shall be the total of each of the following component payments:

- (a) An initial payment (the "Initial Payment") in the amount of Fifty Six Thousand Dollars (\$56,000). The Initial Payment shall be paid by Franchisee to Franchisor when this Agreement and an initial Market Area Agreement are executed by Franchisee (for the first Project) or whenever a Market Area Agreement is executed by Franchisee (for Projects subsequent to the first Project). In addition to the Initial Payment (for the first Project) described in this Section 5.2(a), Franchisee shall make an additional one-time payment to Franchisor in the amount of Fifty Thousand Dollars (\$50,000.00). This payment shall be due and payable to Franchisor when this Agreement and an initial Market Area Agreement are executed by Franchisee.
- (b) A second payment (the "Second Payment") in the amount resulting when the Initial Payment is subtracted from the total of the fees applicable to each unit of the Project up to and including sixty (60) units as determined by the "Unit Fee Table" set forth below. The Second Payment shall be paid by Franchisee to Franchisor no later than the occurrence of the earliest of (i) Franchisee's commencement of marketing and/or selling activities on or for the Project, (ii) Franchisee's commencement of any activity on the Project site that is a precursor to or involves grubbing or clearing land, land development or building construction, or (iii) the elapse of nine (9) months from the date Franchisee executes this Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project). Notwithstanding the provisions set forth above, the total of the Initial Payment and the Second Payment shall not be less than One Hundred Sixty Eight Thousand Dollars (\$168,000) for the first Project and shall not be less than One Hundred Sixty Eight Thousand Dollars (\$168,000) for each Project subsequent to the first Project.

- (c) A third payment (the "Third Payment") in an amount resulting when the Initial Payment and the Second Payment are subtracted from the total of the fees applicable to each unit of the Project up to and including one hundred (100) units, as determined by the "Unit Fee Table" set forth below. The Third Payment shall be paid by Franchisee to Franchisor upon the occurrence of the earlier of (i) Franchisee's commencement of construction of the foundation for the fifty-ninth (59th) unit of the Project or (ii) the elapse of eighteen (18) months from the date that Franchisee executes the Franchisee Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project);
- (d) A fourth payment (the "Fourth Payment") in an amount equal to the total of the fees applicable to each unit of the Project in excess of one hundred (100) units as determined by the Unit Fee Table set forth below. The Fourth Payment shall be paid by Franchisee to Franchisor upon the occurrence of the earlier of: (a) Franchisee's commencement of construction of the foundation for the ninety-ninth (99th) unit of the Project, or (b) the elapse of twenty-four (24) months from the date Franchisee executes this Agreement (for the first Project) or the Market Area Agreement (for Projects subsequent to the first Project).

UNIT FEE TABLE

FEE APPLICABLE
PER UNIT
\$2,800

The Fee Applicable per Unit shall increase on January 1st of each subsequent calendar year pursuant to a schedule providing for a \$300.00 increase each calendar year, beginning with calendar year 2007. For each Project developed under this Agreement, the applicable Fee Applicable per Unit shall be the fee for the calendar year within which occurs the later of payment of the Initial Payment for the Project or execution by Franchisor of the Market Area Agreement for the Project.

5.3 In connection with the first Project to be developed either by Franchisee or by a sublicensee of Franchisee hereunder, Franchisee (or the sublicensee) shall be obligated to execute, as maker, and to deliver to Franchisor, as payee, a promissory note in a principal amount equal to the Project Fee for said first Project, such note to be in substantially the form attached hereto as Exhibit "3".

5.4 If Franchisee fails to remit to Franchisor when due any payment required under the terms of this Agreement, Franchisee agrees to pay to Franchisor all of Franchisor's costs of collection of the amount(s) of such outstanding payments, including reasonable attorney's fees and disbursements, and interest on the unpaid amounts at the lesser of eighteen percent (18%) per annum or the highest rate statutorily permissible, for the period commencing on the date such amount(s) were due to be paid to Franchisor and ending on the date such amount(s) are received by Franchisor in finally collectible funds.

5.5 Franchisee shall provide to Franchisor at the time of execution of this Agreement copies of Exhibit "2" attached to this Agreement (the "Personal Covenants Document") executed by each of the principals, officers, owners and directors of Franchisee or any sublicensee and any other individuals or entities with any ownership or control interest whatsoever in Franchisee or any sublicensee, and, during the term of this Agreement, if a change occurs in the principals, officers, owners and/or directors of Franchisee or any sublicensee or in the other individuals or entities with an ownership or control interest in Franchisee or any sublicensee, Franchisee agrees that it will promptly deliver to Franchisor copies of the Personal Covenants Document executed by each of the new principals, officers, owners, or directors of Franchisee or other individuals or entities with an ownership or control interest in Franchisee or any sublicensee.

5.6 Additionally, Franchisee shall provide to Franchisor copies of the document included as Exhibit "2A" attached to this Agreement executed by each person who may be provided, either by Franchisee, Franchisor, or any sublicensee with more detailed information about the Development System than has been or will be disclosed to the general public, but whom is not otherwise subject to the requirements respecting the Personal Covenants Document set forth in Section 5.6 or to the provisions of the Personal Covenants Document. A copy of the document included as Exhibit "2A" shall be individually executed before any such person is provided access to all or any portion of the Development System. Franchisee's obligation to provide such executed copies of the document included as Exhibit "2A" to Franchisor shall be ongoing throughout the term of this Agreement.

5.7 If Franchisee is a corporation or other business entity, it shall have the following legend conspicuously printed on the face of each of its stock certificates or other certificates evidencing ownership

The transfer of this [stock] certificate is subject to the terms and conditions of a certain Franchise Agreement with EPCON Communities Franchising, Inc. Reference is made to the provisions of such Agreement and to the governing documents of this [corporation].

5.8 Franchisee shall not employ or seek to employ any person who is employed by Franchisor, its agents or representatives, or by any other EPCON Communities franchisee, or otherwise directly or indirectly induce any such person to leave his or her employment without the specific written consent of Franchisor.

5.9 In order to further protect the Development System, the Marks and the goodwill associated therewith, Franchisee shall:

- (a) Except where prohibited by state law to the contrary, identify its Project(s) in its advertising as prescribed in Franchisor's Operations Manual, advertise under the Marks designated by Franchisor for use for that purpose and use such Marks without prefix or suffix, except where such use may conflict with a prior registration or use or may be required by applicable state law or regulation, in which event Franchisee shall operate and advertise under such other names as Franchisor has previously approved in writing. Franchisor shall have the right to restrict the use by Franchisee of Franchisee's business entity name or trade name in its advertising and promotional materials.
- (b) Feature and use the Marks solely in the manner prescribed by Franchisor.
- (c) Observe such reasonable requirements with respect to service mark, trade name, trademark and fictitious name registrations and copyright and patent ownership notices as Franchisor may, from time to time, direct in writing.
- (d) Comply with the provisions of Article 6 hereof.
- (e) Submit to Franchisor for approval at least fifteen (15) business days prior to the intended use samples of all advertising plans and materials that Franchisee intends to use that were not prepared by or approved previously by Franchisor. Such approval shall not be unreasonably withheld. If written disapproval is not received by Franchisee from Franchisor within ten (10) business days of the date that Franchisor receives Franchisee's advertising materials, Franchisor shall be deemed to have given the required approval. Upon thirty (30) days prior written notice, Franchisor can revoke its approval of any advertising or promotional materials previously approved, and, upon the expiration of such thirty (30) day period, Franchisee shall immediately cease use of such advertising or promotional material.

5.10 Franchisee shall, during the term of this Agreement, purchase, install, maintain and use in its operations under this Agreement a personal computer system having at least the minimum specifications and capabilities, and including at least the software, as specified by Franchisor in writing from time to time to its EPCON Communities franchisees. Franchisee understands that compliance with its obligations in this Section 5.10 may require it to purchase new hardware and software or upgrades to existing hardware and software, as specified by Franchisor in writing from time to time to its EPCON Communities franchisees.

5.11 Franchisee's covenants and obligations contained in this Agreement shall be construed as severable and independent and shall be interpreted and applied consistently with the requirements of reasonableness and equity. If all or any portion of any covenant is held unreasonable or unenforceable by a court or agency having valid jurisdiction, Franchisee expressly agrees to be bound by any lesser covenant included within the terms of such greater covenant that imposes the maximum duty permitted by law, as if the lesser included covenant were separately stated in and made a part of this Agreement.

5.12 On a schedule and at a location to be determined within its sole discretion, Franchisor will hold a series of initial franchisee training sessions for the benefit of Franchisee at a location selected by Franchisor in its sole discretion. Franchisee or a representative of Franchisee is required to attend each of the portions of the first such training session held by Franchisor after execution of this Agreement. Attendance at such training shall be at Franchisee's sole cost and expense. Franchisor reserves the right to charge a tuition fee for each attendee attending voluntary follow-up training sessions.

5.13 In the event that Franchisor holds an annual meeting or conference of the EPCON Communities franchisees, Franchisee or a representative of Franchisee's management satisfactory to Franchisor in its sole discretion shall attend all sessions of such meeting or conference, unless such attendance is excused by Franchisor in writing. Attendance at such meeting or conference shall be at Franchisee's sole cost and expense.

Article 6
Proprietary Marks

6.1 Franchisee's rights to use the Marks as granted in Section 3.2 hereof is limited to their use in connection with the development of the Project(s) as described herein, as set forth in the Operations Manual and as is prescribed in writing by Franchisor from time to time.

6.2 Franchisee acknowledges Franchisor's exclusive right, title and interest in and to the Marks (and all registrations granted therefor), along with the identification schemes, standards, specifications, operating procedures, and other concepts embodied in the Development System. Except as expressly provided by this Agreement, Franchisee shall acquire no right, title or interest therein or thereto (or to any confusingly similar variation thereof), and any and all goodwill associated with Development System and the Marks shall inure exclusively to Franchisor's benefit. Upon the expiration or termination of this Agreement, no monetary amount shall be assigned as attributable to any goodwill associated with Franchisee's use of the Development System or the Marks.

6.3 Franchisee acknowledges that the use of the Marks outside of the scope of this Agreement without Franchisor's prior written consent is an infringement of Franchisor's right, title and interest in and to the Marks. Franchisee expressly covenants that, during the term of this Agreement and after the expiration or termination hereof, Franchisee shall not, directly or indirectly, commit any act of infringement or contest, or aid in contesting, the validity or ownership of the Marks, or of confusingly similar trademarks or trade names, or take any other action in derogation thereof.

6.6 Franchisee expressly acknowledges and agrees that this license to use the Marks is nonexclusive and that Franchisor has and retains the rights, among others:

- (a) To grant other franchises and licenses for the use of the Marks, in addition to those already granted to existing EPCON Communities, franchisees and to Franchisee;

Article 7
Advertising and Promotion

7.1 Franchisor reserves the right, exercisable at any time, to require Franchisee to purchase sales brochures and other documents designed for prospective condominium buyers.

Article 8
Uniformity of, and Modifications to, the Development System

8.1 Franchisee understands and acknowledges that the Development System is a complete and unified system for the construction, marketing and management of the Project(s) and that every detail of the Development System is important to the use thereof by Franchisee in order to maintain high and uniform standards, as well as to maximize the opportunity for the success of the Project(s). By accepting the franchise and license granted hereby, Franchisee is agreeing to utilize the entire Development System without modification thereto. Franchisee shall not deviate from or modify the Development System without the prior written approval of Franchisor.

8.2 Notwithstanding the foregoing, any changes or modifications made by Franchisee to the Development System or to any of its parts may be used by Franchisor for its benefit or for the benefit of any of its other franchisees, licensees or agents, and such changes or modifications shall become the property of Franchisor. However, nothing contained herein shall be construed to impose upon Franchisor an obligation to so adopt or use any such changes or modifications nor shall Franchisor be responsible for any payment to Franchisee therefor.

8.3 Franchisee acknowledges that deviation from and/or modification to the Development System does not abrogate its responsibility to comply with all terms of this Agreement, including but not limited to payment of amounts due to Franchisor as specified in Article 5 hereof. Franchisee's deviation from and/or modification to the Development System without the prior written approval of Franchisor, shall, however, terminate Franchisor's obligation to comply with Section 7 of the applicable Market Area Agreement(s), pursuant to which Franchisor, under certain conditions as set forth in said Section 7, agrees to refrain from itself constructing, and from granting to other licensees the right to construct, Projects within Franchisee's Market Area (as defined in the Market Area Agreement).

Article 9 Development System Compliance

9.1 Franchisor's affiliate, EPCON Communities, Inc., has used the Development System to assist it in obtaining permits and other governmental approvals under varying circumstances. Notwithstanding this, Franchisor does not warrant or represent herein, and hereby disclaims any such warranty and/or representation, express or implied, that the Development System will comply with any applicable building code requirements or any other applicable federal, state or local laws, or will be adequate for Franchisee's use in any way including, but not limited to, assisting Franchisee in obtaining permits and approval for Franchisee's Project(s). Franchisee (a) recognizes that the provisions of this limitation are a material factor in Franchisor's grant of the franchise and license for the amounts of the fee(s) provided hereunder, and (b) agrees that any accommodation to Franchisee by Franchisor shall not be taken to establish any liability of Franchisor or any contract term inconsistent herewith.

9.2 Franchisee understands and acknowledges that, due to the continual evolution of the plans, and the other materials referenced above, and the volume of detailed information and data contained therein, there are likely to be some inaccuracies and/or items subject to specific local or other requirements which will require correction, at Franchisee's expense, by Franchisee's architects, engineers, contractors, counsel and/or other professionals as work progresses. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, make any changes or modifications including, but not limited to, the seal or stamp of a registered architect, to the plans, specifications or any other part of the Development System used or proposed for use for or at its Project(s) which changes or modifications are necessitated by any applicable zoning and building codes, permit requirements, or any other federal, state or local laws, including, without limitation, licensing requirements for contractors, property managers and real estate salespersons, the formation and management of condominium associations, occupational health and safety on the construction site, housing finance, equal housing laws, the Fair Housing Act and the Americans with Disabilities Act, as well as the Accessibility Guidelines promulgated under each of these acts. Franchisee further acknowledges that it possesses sole responsibility hereunder to comply with all applicable laws in the marketing of condominium units in its projects, including, without limitation, the Fair Housing Act. Franchisee acknowledges that it possesses sole responsibility hereunder to, and agrees that it shall, at its sole cost and expense, have the seal or stamp of a registered architect affixed to said plans. No changes, however extensive, shall operate to relieve Franchisee of its obligations to make payments due to Franchisor pursuant to the terms of this Agreement.

9.3 Throughout the term hereof, Franchisor agrees to provide to Franchisee, upon Franchisee's request, modifications or improvements made by Franchisor to the architectural plans and specifications. Modifications and improvements to other areas of the Development System shall be provided to Franchisee at Franchisor's sole and absolute discretion. All such modifications and improvements to be provided to Franchisee shall be provided by Franchisor at no additional cost to Franchisee and shall be distributed not more often than once annually. Modifications and improvements so provided to Franchisee shall be for the standard Development System and will not be subject to further modification by Franchisee for any changes made by Franchisee pursuant to Section 8.2 above. Notwithstanding any provision hereof to the contrary, Franchisor reserves the right, within its sole discretion, to discontinue providing updated information to Franchisee respecting modifications and improvements to the Development System if Franchisee has substantially completed construction of all Projects hereunder and is not actively pursuing development of another Project.

Article 10
Confidentiality; Non-Disclosure; Proprietary Information

10.1 Franchisor and Franchisee acknowledge and agree that the Development System constitutes a "trade secret" as defined in Ohio Revised Code Section 1333.61, and, as such, is entitled to all rights and protection as are afforded to trade secrets under Ohio, and any other applicable, law.

10.2 Neither Franchisee nor any of Franchisee's affiliates, owners, agents, or employees shall communicate or otherwise divulge to, or use for the benefit of, any other person or entity, any information or knowledge, no matter how derived, concerning the Development System. Franchisee is granted the specific and limited right to divulge information respecting the Development System to those individuals who must have access thereto in order to develop any Projects which are the subject hereof. All information and knowledge provided by Franchisor to Franchisee, including by way of illustration but not of limitation, drawings, specifications, techniques, and written material, shall be deemed confidential for the purposes of this Agreement.

10.3 Franchisee acknowledges that the Development System, including any modifications or derivations of the Development System or any of its parts, remains the exclusive property of Franchisor, even after its use by Franchisee. Franchisee agrees that it shall not use the Development System, or any portion thereof, at any time, except in strict accordance with the terms of this Agreement and, after the termination of this Agreement it shall not use in any manner the Development System or any of its parts, or any system, plans, materials, or designs resembling in any way the Development System.

10.4 Franchisee shall include in all advertising, sales and other published literature relating to Franchisor's architectural work ("Buildings") licensed hereunder that the Buildings are covered by U.S. Design Patent Nos. 338,137; 342,576; 342,577; 343,459 and 396,298, and are used under license from EPCON Communities Franchising, Inc.

10.5 Franchisee acknowledges that the Buildings and all related illustrations, plans, blueprints, sketches, drawings, or any other tangible expression of the Buildings (the "EPCON Communities Works") are protected under the Architectural Works Copyright Act of 1990. Franchisee shall not build, license, transfer, reproduce or duplicate in any way the EPCON Communities Works except as expressly provided for in this Agreement. In the event that any documentation provided to Franchisee by Franchisor bears a copyright notice, Franchisee shall not remove such notice from said documentation, and such notice shall be retained or reproduced in its exact form on all authorized copies and versions of such documentation, both in machine and human readable language. Franchisee shall not distribute Franchisor's copyrighted documentation or the EPCON Communities Works to a third party, except as provided for in the Agreement or otherwise with specific written authorization from Franchisor.

10.6 Franchisee shall not, during the term of this Agreement, without the prior written consent of Franchisor, own, develop, construct or have any interest in any real estate development project involving single story multi-family residential buildings of two to four units or which is otherwise similar to an EPCON Communities Project; provided, however, that this provision shall not apply to the involvement by Franchisee in the development of other EPCON Communities Projects by other franchisee business entities, or to any ownership by Franchisee of less than three percent (3%) of the outstanding stock of any publicly held corporation.

Article 11
Completion of Project(s)

11.1 A Project shall be determined to be completed when either a temporary or permanent occupancy permit has been issued for all buildings within the Project.

11.2 Upon completion of the Project, Franchisee shall do the following:

11.2.1 Promptly notify Franchisor in writing that the Project is complete as defined in Section 11.1 above.

11.2.2 Promptly pay to Franchisor all sums owing or accrued. The sums shall include interest, any damages, costs, and expenses, including reasonable attorneys' fees and disbursements, incurred by Franchisor by reason of a default by Franchisee under the terms of this Agreement or any other agreement by and between Franchisor and Franchisee.

11.2.3 Immediately cease to use, in any manner whatsoever, the Development System, except as authorized under a Market Area Agreement or Agreements.

11.2.4 Within thirty (30) days of the sale of the last unit in a Project, Franchisee shall provide to Franchisor a complete report respecting the revenues and expenses of the Project in the form prescribed by Franchisor. Franchisee hereby grants to Franchisor its consent to disclose the information contained in such reports in Franchisor's Uniform Franchise Offering Circular and as required in the franchise sales disclosure process.

11.2.5 Notwithstanding anything contained herein, Franchisee's lender shall have the right to complete any Project which is the subject hereof, so long as (a) all fees and other amounts due Franchisor under this Agreement are timely paid in full; (b) such lender complies with the terms of this Agreement as such terms apply to and obligate Franchisee; and (c) such lender executes a Lender Assignment Agreement included as Exhibit 6, attached to this Agreement.

11.3 Franchisee agrees to use its best efforts to complete within a reasonable time each building begun in connection with any Project so that no building remains incomplete for more than one hundred fifty (150) days after commencement of construction of that building.

Article 12 Transfer by Franchisee

12.1 Franchisee understands and acknowledges that the rights and duties set forth in this Agreement are personal to Franchisee and that Franchisor has granted this EPCON Communities franchise in reliance on Franchisee's business skills, professional reputation and financial capability. Accordingly, neither Franchisee nor any shareholder, partner, member, (including shareholders, partners or members of entities that have an ownership interest in Franchisee), or any immediate or remote successor to any part of Franchisee's interest in this EPCON Communities franchise shall sell, assign, transfer, pledge or encumber, by operation of law or otherwise, this Agreement or the franchise or licensed rights granted hereunder or any ownership interest in Franchisee or any ownership interest in an entity owning an interest in Franchisee without the prior written consent of Franchisor. Such transfer, sale, assignment, pledge or encumbrance not having the written consent of Franchisor shall be null and void and shall constitute a material breach of this Agreement, for which Franchisor may then terminate this Agreement. Franchisor shall not unreasonably withhold its consent to a transfer of any interest in Franchisee or in this EPCON Communities franchise, provided, however, that prior to the time of transfer, Franchisor may, in its sole discretion, require that:

- (a) All of Franchisee's accrued monetary obligations to Franchisor and all other outstanding obligations related to the business franchised hereunder shall have been satisfied;
- (b) The transferor's right to receive compensation, pursuant to any agreement or agreements for the purchase of any interest in Franchisee or in the business franchised hereunder, shall be subordinate and secondary to Franchisor's rights to receive any outstanding monetary obligation or other outstanding obligations due from transferor or Franchisee pursuant to this Agreement, and whether arising before or after the transfer;
- (c) Franchisee shall have executed a general release in a form satisfactory to Franchisor, effective as of the date of transfer, of any and all claims against Franchisor and its officers, directors, shareholders, and employees in their corporate and individual capacities, including, without limitation, claims arising under federal, state and local laws, rules and ordinances;
- (d) The transferee franchisee shall enter into a written assumption, in a form satisfactory to Franchisor, assuming and agreeing to discharge all of Franchisee's obligations under this Agreement prior to and after the date of the assumption;
- (e) The transferee franchisee shall demonstrate to Franchisor's satisfaction that he or she, if an individual, its general partners, if it is a partnership, its members, if it is a limited liability company, and its officers, directors and principal shareholders, if it is a corporation, meet(s) educational and managerial standards; possess(es) good moral character, reputation, and credit rating, has the aptitude and ability to conduct the business franchised hereunder (as may be evidenced by prior related business experience or otherwise); and has adequate financial resources and capital to operate the business franchised hereunder;
- (f) The transferee franchisee shall execute the then-current standard form of EPCON Communities Franchise Agreement and other ancillary agreements as Franchisor may require for the business franchised hereunder for a term ending as provided in Section 3.1 of this Agreement; and

- (g) At transferee franchisee's expense, and upon such other terms and conditions as Franchisor may reasonably require, the transferee franchisee shall complete each of the initial training sessions then in effect for new franchisees.

12.2 If Franchisee is a corporation, partnership, limited liability company, or similar entity, the terms of Section 12.1 shall apply to any sale, resale, pledge, assignment, transfer or encumbrance of any voting stock of, or other ownership interest in, Franchisee.

12.3 In connection with any transfer for which Franchisor grants its consent as described in Section 12.1 hereof, Franchisee shall pay to Franchisor a transfer fee to cover Franchisor's actual costs, and due diligence, administrative, legal and other expenses respecting the transfer.

12.4 In the event that Franchisee proposes to transfer all of its interest in the Franchisor franchise granted pursuant hereto to a corporation, partnership, or limited liability company solely for the convenience of ownership, the provisions of Sections 12.1, 12.2, and 12.3 hereof shall not apply; provided that Franchisor's consent to such transfer may, in its sole discretion, be conditioned upon the following requirements:

- (a) The transferee entity shall be newly organized and its Articles of Incorporation and Bylaws (or comparable governing documents for entities other than corporations) shall provide that its activities are confined exclusively to operate the business franchised hereunder and activities related thereto;
- (b) Franchisee shall identify to Franchisor all of the stockholders, directors, officers, partners and/or members of the transferee entity;
- (c) Franchisee shall enter into an agreement, in a form satisfactory to Franchisor, unconditionally guaranteeing the full payment and performance of the transferee entity's obligations to Franchisor;
- (d) Each stock (or other ownership interest) certificate of the transferee entity shall have conspicuously endorsed upon its face the following legend:

"The transfer of this [type of certificate] certificate is subject to the terms and conditions of a certain Franchise Agreement executed with EPCON Communities Franchising, Inc. Reference is made to the provisions of such Agreement and to the governing documents of this [type of transferee entity]."

- (e) Copies of the transferee entity's governing documents, including any resolutions authorizing entry into this Agreement, shall be furnished to Franchisor for its approval prior to the transfer; and
- (f) The name of the transferee business entity shall not, without Franchisor's prior written approval, consist of or contain any of Franchisor's Marks or any colorable variation thereof or any other mark in which Franchisor has or claims a proprietary interest.

12.5 In the event that Franchisee desires to form a business entity having identical or substantively identical common ownership with Franchisee and to sublicense its rights and obligations hereunder to the new entity (the "Sublicensee") in order that the Sublicensee might develop a Project and, after receiving Franchisee's request in writing to do so and such information about the proposed sublicensing arrangement and the entities involved as Franchisor requests, Franchisor, in its sole discretion, consents to same, Franchisee may execute with the Sublicensee a Sublicense Agreement in the form attached hereto as Exhibit "5". Any such sublicense arrangement not having the written consent of Franchisor shall be null and void and shall constitute a material breach of this Agreement, for which Franchisor may then terminate this Agreement. Franchisor reserves the right hereunder not to consent to any sublicense arrangement proposed by Franchisee involving an entity not having identical or substantially identical common ownership with Franchisee. Franchisor may, in its sole discretion, require that, prior to the effective date of the Sublicense Agreement, (a) all of Franchisee's accrued monetary obligations to Franchisor shall have been satisfied, and (b) the Sublicensee entity possesses a good credit rating and has adequate financial resources and capital to develop a Project. The Sublicensee shall be required to execute with Franchisor a Market Area Agreement substantially in the form attached hereto as Exhibit "1" for the location proposed for Sublicensee's Project.

12.6 All materials required by federal or state law for any direct or indirect offer or sale of securities of Franchisee shall be submitted to Franchisor for review and consent, prior to their being filed with any government agency; and any materials to be used in any exempt offering shall be submitted to Franchisor for review and consent prior to their use. No such materials shall imply (by use of the Marks or otherwise) that Franchisor is participating as an

underwriter, issuer, or offeror of Franchisee's or Franchisor's securities. Any review by Franchisor of the offering materials or the information included therein will be conducted solely for the benefit of Franchisor to determine conformance with Franchisor's internal policies, and not to benefit or protect any other person. No investor should interpret such review by Franchisor as an approval, endorsement, acceptance, or adoption of any representation, warranty, covenant, or projection contained in the materials reviewed; and the offering documents shall include such legends and statements as Franchisor may specify, including, but not limited to, legends and statements which disclaim Franchisor's liability for, or involvement in, the transaction described in the offering documents. Franchisee and the other participants in the offering must agree in writing to fully indemnify Franchisor in connection with the offering in the form prescribed by Franchisor. For each proposed offering, Franchisee shall pay Franchisor a non-refundable fee of Ten Thousand Dollars (\$10,000), or such greater amount as may be necessary to reimburse Franchisor for its reasonable costs and expenses associated with reviewing the proposed offering, including, without limitation, legal and accounting fees and disbursements. Franchisee shall give Franchisor written notice at least sixty (60) days prior to the date of commencement of any offering covered by this Section 12.6. Any such offering shall comply with Franchisor's written policies adopted and announced by Franchisor from time to time. Franchisor hereby reserves its right in its sole discretion not to grant consent to Franchisee for such an offering, and, if such consent is withheld, Franchisee shall be prohibited hereunder from issuing such an offering. In the event of Franchisor's grant of consent respecting an offering described under this Section 12.6, the provisions of Section 5.7 of this Agreement shall not apply.

Article 13 Default; Termination

13.1 If Franchisee becomes insolvent or makes an assignment for the benefit of creditors, or if a petition in bankruptcy is filed by Franchisee, or such a petition is filed against Franchisee and either is consented to by Franchisee or is not dismissed within thirty (30) days, or if a bill in equity or other proceeding for the appointment of a receiver of Franchisee or other custodian for Franchisee's business or assets is filed and either is consented to by Franchisee or is not dismissed within thirty (30) days, or a receiver or other custodian of Franchisee's property or any part thereof is appointed by a court of competent authority, or if proceedings for composition with creditors under any state or federal law should be instituted by or against Franchisee or if the real or personal property of Franchisee shall be sold after levy thereupon by any sheriff, marshal, or constable, then upon the occurrence of any of such events, Franchisee shall be deemed to be in default under this Agreement and all rights granted by Franchisor hereunder shall thereupon terminate without any need for notice to Franchisee, and this Agreement shall thereupon be terminated.

13.2 Franchisee shall also be in default under this Agreement upon the occurrence of any of the following:

13.2.1 Franchisee fails, refuses, or neglects to pay when due to Franchisor any monies owed to Franchisor;

13.2.2 Franchisee fails to satisfactorily complete the initial training program to the satisfaction of Franchisor as set forth in Section 5.12 and fails to arrange for its representative to attend and complete such initial training program to the satisfaction of Franchisor;

13.2.3 Franchisee fails to furnish to Franchisor any report or information required under this Agreement;

13.2.4 Franchisee fails to develop its Projects and to operate hereunder in compliance with the terms of this Agreement, the applicable Market Area Agreement(s), the Operations Manual, the Development System and any quality or operations standards and guidelines issued in writing by Franchisor;

13.2.5 Franchisee fails, for a period of ten (10) days after receipt of notification of noncompliance, to comply with any federal, state or local law or regulation applicable to the operation of the development business franchised hereunder;

13.2.6 Any attempted transfer in violation of Article 12;

13.2.7 Any material misrepresentation by Franchisee relating to the acquisition of the franchise granted hereunder or any conduct by Franchisee that reflects materially and unfavorably upon the operation and reputation of Franchisee's development business franchised hereunder or upon Franchisor;

13.2.8 The conviction of Franchisee or its principals or officers of a felony or any other crime involving moral turpitude;

13.2.9 Franchisor makes a reasonable determination that the continued operation of the development business franchised hereunder or any Project developed hereunder by Franchisee will result in immediate danger to public health or safety and such default is not cured within three (3) days after notice from Franchisor to Franchisee;

13.2.10 Franchisor gives Franchisee a notice of default under this Section 13.2 after two previous defaults which have been cured after notice of default within the preceding twelve (12) month period;

13.2.11 The death of Franchisee, if Franchisee is an individual;

13.2.12 Franchisee fails to comply with any of the obligations imposed upon Franchisee by this Agreement;

13.2.13 Franchisee communicates or divulges any information or knowledge concerning the Development System in violation of Article 10 hereof;

13.2.14 Franchisee fails to complete a Project as required under the terms of this Agreement.

13.3 Upon the occurrence of any of the events set forth in Section 13.2, Franchisor may, without prejudice to any other rights or remedies contained in this Agreement or provided by law or equity, terminate this Agreement. Such termination shall be effective thirty (30) days after written notice (or such longer period of notice as may be required by applicable state law) is given by Franchisor to Franchisee of any of the events set forth in Subsections 13.2.1, 13.2.3, 13.2.4, 13.2.5, 13.2.6, 13.2.12 or 13.2.14 of Section 13.2 if such defaults are not cured within the period. Such termination shall be effective immediately upon written notice upon the occurrence of the events set forth in Subsections 13.2.2, 13.2.7, 13.2.9, 13.2.10 or 13.2.13 of Section 13.2. Such termination shall be effective immediately without notice upon the occurrence of the events set forth in Subsections 13.2.8 or 13.2.11 of Section 13.2.

13.4 This Agreement shall automatically terminate on the later of (1) the date that is one year after the date of completion of Franchisee's last Project; or (2) the date that is one year after the expiration of Franchisee's last Market Hold Agreement with Franchisor.

13.5 Termination hereof shall not affect the obligations of Franchisee to pay all amounts due hereunder to Franchisor. Further, the obligations of Franchisee provided in Article 10 hereof, the remedies provided to Franchisor in Article 14 hereof, and the provisions of Sections 6.3, 20.2 and 20.3 hereof shall survive the termination of this Agreement.

13.6 Upon termination or expiration of this Agreement, Franchisee shall immediately terminate its use of the Marks, the EPCON Communities Works and the Development System and promptly return to Franchisor all materials provided to it by Franchisor.

13.7 For a period of three (3) years following the effective date of termination or expiration of this Agreement, whether by lapse of time or other cause, sale and/or assignment of the EPCON Communities franchise granted hereunder, Franchisee shall not, directly or indirectly, either as a principal, agent, employee, officer, director or member of any corporation or other business entity, as a partner or sole proprietor, or in any other way engage in the ownership, development or construction of any real estate development project involving single story multi-family residential buildings of two to four units within (a) ten (10) miles of the geographic border of any "Market Area" granted to any franchisee pursuant to any Market Area Agreement or other agreement that is effective between such franchisee and Franchisor, (b) ten (10) miles of the geographic border of any "Reserved Market Area" reserved for any franchisee or prospective franchisee under any Market Hold Agreement or other agreement that is in effect between such party and Franchisor, or (c) ten (10) miles of any real estate development project of EPCON Communities, Inc. or of any business entity affiliated with EPCON Communities, Inc. For the purposes of this Section 13.7 and Section 10.6 of this Agreement, the term "Franchisee" shall include any officer, director, shareholder, member or holder of an ownership interest in Franchisee, if Franchisee is a corporation, limited liability company or other business entity, and any partner of Franchisee, if Franchisee is a partnership.

Article 14 Remedies

14.1 Franchisor shall be entitled to any remedies available at law or in equity for any breach by Franchisee of any of Franchisee's covenants or obligations provided herein or provided in any Market Area Agreement.

14.2 Franchisee agrees that the existence of any claims of Franchisee against Franchisor, whether or not arising from this Agreement, shall not constitute a defense to the enforcement by Franchisor of the provisions of Article 5 hereof and/or the exercise by Franchisor of its rights under Article 13 hereof respecting Franchisee's noncompliance with the provisions of Article 5 hereof.

14.3 In the event that Franchisee breaches its covenants and obligations as provided in Sections 8.1 or 10.3 hereof (including without limitation the use by Franchisee of all or any portion of the Development System to develop a Project (or project) either not in compliance with this Agreement during its term or in any manner after the termination of this Agreement), Franchisee shall be obligated to pay to Franchisor liquidated damages in the following amounts: a fee of One Hundred Twenty Five Thousand Dollars (\$125,000) in connection with Franchisee's development of a Project (or project) of fifty (50) or fewer units and an additional fee of Two Thousand Five Hundred Dollars (\$2,500) per unit for each unit in a Project (or project) in excess of fifty (50) units, such fees to be separately applicable to each project developed by Franchisee in breach of Sections 8.3 or 10.3 hereof.

14.4 Franchisor shall be entitled, without bond, to the entry of temporary and permanent injunctions and orders of specific performance: (a) enforcing the provisions of this Agreement relating to (i) Franchisee's use of the Development System and/or the Marks; (ii) any obligations of Franchisee surviving termination of this Agreement; or (iii) an assignment of this Agreement or the franchise and license granted hereunder or any ownership interest therein; and (b) as necessary to prohibit any act or omission by Franchisee or its employees that would constitute a violation of any applicable law, ordinance or regulation, or which is dishonest or misleading to Franchisor or the general public.

14.5 In the event a dispute arises under this Agreement, the prevailing party shall be entitled to receive its expenses, including attorneys' fees and disbursements and accounting fees and disbursements, in addition to any other relief to which it is found entitled.

Article 15 Independent Contractor

15.1 It is understood and agreed that Franchisee is an independent contractor and nothing in this Agreement shall create a partnership, employment or agency relationship between Franchisor and Franchisee or authorize Franchisee to make any contract, agreement, warranty or representation on Franchisor's behalf, or to incur any debt or other obligation in Franchisor's name, and that Franchisor shall in no event assume liability for, or be deemed liable hereunder as a result of, any such action, or by reason of any act or omission of Franchisee in any of its operations hereunder or any claim or judgment arising therefrom against Franchisor. Franchisee further acknowledges and agrees that Franchisor owes no fiduciary duty whatsoever to Franchisee.

Article 16 Indemnification and Insurance

16.1 Franchisee shall indemnify and hold harmless, to the fullest extent permitted by law, Franchisor, its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership, and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses or obligations including without limitation compensatory, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, Franchisee's ownership or operation of its business hereunder and/or its use or utilization of the Development System, including without limitation the use of any architectural plans and designs provided by Franchisor. In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving Franchisor, Franchisee shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at Franchisee's sole cost and expense or shall cause it to be resisted or defended by an insurer. Franchisee shall also make every reasonable effort to seek to have Franchisor dismissed or released from liability in the event of such action, suit, proceeding, investigation, inquiry, claim or demand. Franchisor shall have the right to resist and defend itself in and/or against any such action, suit, proceeding, investigation, inquiry, claim or demand, and, upon receipt of written notice from Franchisor of the amount expended by Franchisor in such defense, Franchisee shall, within ten business days of such receipt, reimburse Franchisor in full for the total amount of such expenses.

10.2 Franchisee shall, at all times during the term of this Agreement and at its own expense, keep in force by advance payment of premium general liability insurance in an amount not less than One Million Dollars (\$1,000,000.00) per occurrence and in the amount of not less than Two Million Dollars (\$2,000,000.00) annual aggregate, arising out of a single accident, and with a deductible or self-insured retention on any such policy of not greater than One Thousand Dollars (\$1,000.00), or such other amounts of coverage and self-insurance as Franchisor may specify from time to time; insuring Franchisee against any liability that may accrue by reason of the development by Franchisee of Project(s). All policies of insurance to be maintained by Franchisee shall contain a separate endorsement naming Franchisor as an additional insured, as its interest may appear. All insurance shall be placed with an insurance carrier or carriers with an A.M. Best's rating of "A" and an A.M. Best's Class rating of "XIV" or better or be otherwise approved in writing by Franchisor, and shall not be subject to cancellation except upon ten (10) days written notice to Franchisor. All policies of insurance, or certifications for insurance with a copy of the original policy attached, showing full compliance with the requirements of this covenant, shall at all times be kept on deposit with Franchisor. On an annual basis, Franchisee shall provide to Franchisor evidence in the form of a certificate of insurance that such insurance remains in full force and effect.

Article 17 Waiver

17.1 No failure of Franchisor to exercise any power or right reserved to it hereunder, or to insist upon strict compliance by Franchisee with any obligation, covenant, or condition herein, and no custom or practice of the parties in variance with the terms hereof, shall constitute a waiver of Franchisor's right to demand strict compliance with the terms hereof. Waiver by Franchisor of any particular default by Franchisee shall not affect or impair Franchisor's right with respect to any subsequent default of the same or of a different nature; nor shall any delay, waiver, forbearance, or omission of Franchisor to exercise any power or right arising out of any breach or default by Franchisee of any of the terms, provisions, or covenants hereof affect or impair Franchisor's rights, nor shall such constitute a waiver by Franchisor of any right hereunder or of the right to declare any subsequent breach or default. Subsequent acceptance by Franchisor of the payments due to it hereunder shall not be deemed a waiver by Franchisor of any preceding breach by Franchisee of any terms, covenants, conditions, or obligations of this Agreement.

Article 18 Notices

18.1 All notices, payments, or other communications required or permitted to be given or made under this Agreement to Franchisor or to Franchisee shall be given in writing and shall be deemed to have been given if delivered by hand or by certified mail, postage prepaid, or by telecopier or telex (with a hard copy to be sent within forty-eight (48) hours following such electronic transmissions), or by any commercially reasonable overnight courier service providing a receipt of delivery, effective upon receipt thereof at the addresses set forth below:

If to Franchisor, to:
EPCON Communities Franchising, Inc.
500 Stonehenge Parkway
Dublin, Ohio 43017-5067
Attn: Edward A. Bacoma and
Philip G. Fankhauser
Facsimile: 614-761-1155

If to Franchisee, to:
Fankhauser Property Group, Inc.
300 E. John Street, Suite 126
Matthews, North Carolina 28105
Attn: Brock Fankhauser
Facsimile: 704-844-0188

18.2 Either of Franchisor and Franchisee may, by notice given to the other from time to time and at any time, designate a different entity, individual, or address for making payments required to be made or for the giving of notices or other communications.

Article 19
Complete Agreement

19.1 This Agreement, and the documents referred to herein, including without limitation any and all promissory notes given by Franchisee to Franchisor and any and all Market Area Agreement(s) and Market Hold Agreement(s) by and between Franchisor and Franchisee, shall be the entire, full, and complete agreement between Franchisor and Franchisee concerning the subject matter hereof and thereof. This Agreement supersedes all prior agreements, no other representation (other than the most recent version of Franchisor's Franchise Offering Circular provided to Franchisee) having induced Franchisee to execute this Agreement. There are no representations, inducements, promises, or Agreements, oral or otherwise, between the parties not embodied herein which are of any force or effect with reference to this Agreement and the subject matter hereof. No amendment, change or variance from this Agreement shall be binding on either party hereto unless executed in writing by each.

Article 20
Miscellaneous Provisions

20.1 Severability. Each article, section, provision, and term of this Agreement shall be considered severable, and if, for any reason, any article, section, provision, or term herein is determined to be invalid and contrary to or in conflict with any existing or future law or regulation, such shall not impair the operation thereof nor affect the remaining portion of this Agreement. This Agreement will continue to be given full force and effect and bind the parties hereto. Any invalid article, section, provision, or term shall be deemed not to be a part of this Agreement.

20.2 Choice of Law. Except to the extent governed by the U.S. Trademark Act of 1946, as amended, this Agreement shall be deemed to have been entered into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles.

20.3 Venue. Except to the extent prohibited by applicable state law to the contrary, Franchisor and Franchisee agree that any litigation or legal action to enforce or relating to this Agreement and the relationship of the parties hereunder shall be filed in the United States District Court for the Southern District in Columbus, Ohio, or the Common Pleas Court of Franklin County, Ohio, and each of Franchisor and Franchisee hereby consents to the jurisdiction of such courts.

20.4 Benefit. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective and legal representatives, successors and permitted assigns and/or sublicensees.

20.5 Joint and Several Obligations. If Franchisee consists of more than one person, their liability hereunder shall be deemed to be joint and several.

20.6 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

20.7 Pronouns. The number and gender of each pronoun used in this Agreement shall be construed to be such number and gender as context, circumstances, or its antecedent may require.

20.8 Captions. The articles and section headings and other captions contained in this Agreement are contained only for convenience of reference and do not define, limit, explain, or modify this Agreement or its interpretation, construction, or meaning, and are not to be construed as part of this Agreement.

Article 21
Further Acknowledgments by Franchisee

21.1 By its signature set forth below, Franchisee acknowledges that:

- (a) It has received the materials specified in Section 4.1 hereof.
- (b) It has conducted an independent investigation and financial assessment of the business contemplated by this Agreement and the Market Area(s) in which the Project(s) is/are to be located and recognizes that it involves business risks making the success of the venture largely dependent upon the business abilities of Franchisee as well as other variables. Franchisor expressly disclaims the making of, and Franchisee acknowledges that it has not received or relied upon, any representations, warranties or guarantees.

express or implied, as to the potential volume, profits or success of the business venture contemplated by this Agreement.

- (c) It has no knowledge of any representations by Franchisor, or its officers, directors, shareholders, employees, agents or servants, about the business contemplated by this Agreement that are contrary to the terms of this Agreement or the documents incorporated herein, and further represents to Franchisor, as an inducement to its entry into this Agreement, that it has made no misrepresentations in obtaining this Agreement.
- (d) It has received, read and understood this Agreement and the attachments hereto, if any, Franchisor has had fully and adequately explained the provisions of each to its satisfaction; and Franchisor has afforded it ample time and opportunity to consult with advisors of its own choosing about the potential benefits and risks of entering into this Agreement.
- (e) It has received Franchisor's Franchise Offering Circular for the state in which the franchise is to be located at the earlier of the first personal meeting or ten (10) business days prior to the execution of any agreements or the payment of any consideration to Franchisor.
- (f) It is aware of the fact that some franchisees may operate under different forms of agreements, and consequently, that Franchisor's obligations and rights in respect to its various franchisees may differ materially in certain circumstances.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have duly executed and delivered this Agreement.

Franchisee: Fankhauser Property Group, Inc.

Witnesses as to Fankhauser Property Group, Inc.

Signature Mary Layton

Name Printed Mary Layton

Signature _____

Name Printed _____

By: Brock L. Fankhauser
Brock L. Fankhauser, President

Date: 3.23.06

Franchisor: EPCON Communities Franchising, Inc.

Witnesses:

Signature - Witness as to P. Thomas Rothrauff

Name Printed _____

By: P. Thomas Rothrauff
P. Thomas Rothrauff, Vice President and General Manager

Signature - Witness as to Edward A. Bacome

Name Printed _____

By: Edward A. Bacome
Edward A. Bacome, Vice President Director

Date: March 30, 2006

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Juontonio Pinckney, et al.,

Plaintiff,

vs.

Brock L. Fankhauser, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-46-2326

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney: J. Cameron Halford Bar No. _____ Address: 238 Rockmont Drive, Fort Mill SC 29708 Phone: (803) 547-6618 Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Graham P. Powell Bar No. _____ Address: P.O. Box 1200, Charleston SC 29402 Phone: (843) 329-9500 Fax (843) 329-9501 E-mail: _____ Other: _____
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: <u>Motion to Alter or Amend</u> Estimated Time Needed: 15 Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☐ Plaintiff / ☒ Defendant October 12, 2012 Date submitted	
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$ 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions. Name of Court Reporter: _____ ☐ Other: _____ FILED-RECEIVED 2012 OCT 16 PM 1:56 DAVID STANTON CLERK, C.P., S.C. YORK COUNTY, SC	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Juantonio Pinckney, et al.,

Plaintiffs,

vs.

Epcon Communities, Inc., Epcon
Communities Franchising, Inc., Brock L.
Fankhauser, Fankhauser Property Group,
Inc., Stonecrest Villas of Tega Cay, LLC,
and Stonecrest Villas of Tega Cay
Home Owners Association, Inc.,

Defendants.

Fankhauser Property Group, Inc.,

Third-Party Plaintiff,

vs.

Architectural Alliance, Ltd., Exterior
Expressions of North Carolina, Inc.,
Al-Mega Construction, Inc., Procar, Inc.,
Procar-II, Inc., The Southeastern Group, Inc.,
Lucas Lawn and Landscape, Inc., and
German & Garrett, Inc.,

Third-Party Defendants.

Stonecrest Villas of Tega Cay
Condominium Owners Association, Inc.,

Third-Party Plaintiff,

vs.

Stonecrest Villas of Tega Cay, LLC and
Epcon Communities Franchising, Inc.,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CONSOLIDATED CIVIL ACTION
NO. 2010-CP-46-2326

**FANKHAUSER PROPERTY GROUP,
INC.'S MOTION TO ALTER OR
AMEND ORDER GRANTING
IN PART EPCON COMMUNITIES
FRANCHISING, INC. AND EPCON
COMMUNITIES, INC.'S MOTION
FOR SUMMARY JUDGEMENT**

FILED-RECEIVED
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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

_____		)
Exterior Expressions of North Carolina, Inc.,		)
	Fourth-Party Plaintiff,	)
		)
vs.		)
		)
Marcos Gonzalez,		)
	Fourth-Party Defendant.	)
_____		)
Procar, Inc. and Procar II, Inc.,		)
	Fourth-Party Plaintiffs,	)
		)
vs.		)
		)
Marco Zertuche, David Carbajal, Victorina		)
Cortez, Balanos Construction Co., Balanos		)
Framing, Inc., Ricardo Hernandez, and		)
Silverio Cortez,		)
	Fourth-Party Defendants.	)
_____		)
Al-Mega Construction, Inc.,		)
	Fourth-Party Plaintiff,	)
		)
vs.		)
		)
Noe Perez, Juan Abundez Saucedo, and		)
Moises Chavarra Hernandez,		)
	Fourth-Party Defendants.	)
_____		)

Defendant/Third Party Plaintiff, Fankhauser Property Group, Inc. ("FPG"), by and through its undersigned attorneys, hereby moves this court to reconsider its order granting in part the Motion for Summary Judgment filed by Epcon Communities, Inc. ("ECI") and Epcon Communities Franchising, Inc. ("ECFI") (collectively "Epcon") with respect to Epcon's cross claim against FPG

for contractual indemnification pursuant to SCRCP 59(e). For the following reasons, FPG respectfully requests that the court revisit and/or rule upon the following:

1) The order does not address FPG's argument that the Plaintiffs' claims and Association's claims against Epcon arise out of Epcon's own alleged conduct. FPG argued that the allegations of the Plaintiffs and the Association – whether meritorious or not – do not fall under the purview of the indemnity provision between ECFI and FPG. Specifically, under the indemnity agreement, FPG is required to indemnify ECFI if a lawsuit is filed against ECFI pertaining to (1) FPG's ownership or operation of its business under the agreement; (2) FPG's use of the Development System; or (3) both. The order does not address FPG's argument that the allegations against ECI and ECFI do not pertain to FPG's alleged use of the Development System. Rather, the allegations raised in the lawsuit pertain to alleged independent acts or omissions on the part of ECI and ECFI. The order states that "The indemnity clause . . . broadly provides, in the court's opinion, for indemnification for any all claims to which Epcon has been exposed by virtue of conduct which in any way relates to the Franchise Agreement." Order at 7. The order does not say whose conduct – Epcon's or FPG's. This finding is distinct from any finding that addresses the argument that FPG raised, i.e. that FPG cannot be responsible for indemnifying Epcon with respect to allegations that do not arise by virtue of any conduct by FPG that does not relate to the Franchise Agreement.

As such, FPG respectfully requests that the court alter or amend its order:

- (a) Finding that FPG is not required to indemnify Epcon with respect to allegations raised against Epcon that pertain to Epcon's own alleged conduct; or
- (b) In the alternative, that the court make a specific finding that the indemnity agreement requires that FPG indemnify Epcon with respect to Epcon's own conduct, if this is the

intent of the order, with specific reference to the language in the Franchise Agreement that would require that FPG indemnify Epcon for allegations raised against Epcon pertaining to Epcon's own conduct, if this is the holding of the court.

(2) The order does not address FPG's argument that the indemnity provision does not apply to the allegations raised against Epcon. Specifically, the order references only Paragraph 4 of Plaintiffs' Sixth Cause of Action, and does so by referencing an allegation made by the Plaintiffs against FPG rather than Epcon. See Order at 8. Clearly, FPG is only required to indemnify Epcon to the extent that there are claims raised against Epcon that would trigger the indemnity provision, and allegations against FPG are exactly that, i.e. allegations against FPG. The order does not address FPG's argument that each cause of action asserted against Epcon pertains to Epcon's own conduct. As such, FPG respectfully requests that the court alter or amend its order:

- (a) Applying the indemnity provision to each cause of action asserted by the Plaintiffs and the Association against Epcon, and finding that FPG is not required to indemnify Epcon; or
- (b) In the alternative, that the court apply the indemnity provision to each cause of action asserted by the Plaintiffs and the Association against Epcon (or, at a minimum, provide an example of any cause of action asserted against Epcon and apply the indemnity provision to the cause of action asserted) in reaching the conclusion that the claims against Epcon require that FPG indemnify Epcon.

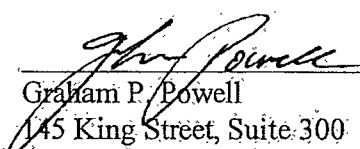
WHEREFORE, for the reasons set forth above, Defendant/Third-Party Plaintiff Fankhauser Property Group, Inc. respectfully requests that this court alter or amend its order granting in part Epcon Communities, Inc. and Epcon Communities Franchising, Inc.'s Motion for Summary Judgment.

Judgment.

Dated this 12th day of October, 2012.

Respectfully,

WALL TEMPLETON & HALDRUP, P.A.


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Post Office Box 1200

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Telephone: 843.329.9500

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Attorneys for Defendants Brock L. Fankhauser,
Fankhauser Property Group, Inc., and Stonecrest Villas
of Tega Cay, LLC

CERTIFICATE OF SERVICE

The undersigned employee of WALL TEMPLETON & HALDRUP, P.A. hereby certifies that on this 12th day of October, 2012, she served a copy of Fankhauser Property Group, Inc.'s **Motion to Alter or Amend Order Granting in Part Epecon Communities, Inc. and Epecon Communities Franchising, Inc.'s Motion for Summary Judgement** upon counsel for Epecon Communities, Inc. and Epecon Communities Franchising, Inc. by United States Mail and upon counsel for all others by electronic mail, by placing a copy in a postpaid envelope for collection and processing for mailing, following this business's ordinary practice, with which she is readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited with the United States Postal Service in the ordinary course of business to the addresses set forth below, in Charleston, South Carolina.

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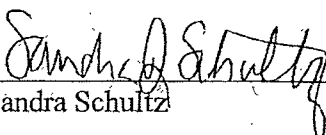
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Sandra Schultz

State of South Carolina.,) In the Common Pleas Court
) of York
)
County of York.) Case No.: 2010-CP-46-02326

Juontonio Pinckney.)
)
Plaintiff.,)
)
-vs-) Transcript of Record
)
Brock L. Fankhouser.,) Motion for Summary Judgment
et al.,) On Cross-Claim for
) Indemnification
Defendants.)

)
) July, 30, 2012
) York, South Carolina

B E F O R E:

Honorable John C. Hayes, III, Judge.

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I-N-D-E-X

WITNESS

BY:

PAGE NO.

No Witnesses were examined.

E-X-H-I-B-I-T-S

NO.

DESCRIPTION

ID.

EVD.

No Exhibits were received into the record.

1 (ON THE RECORD IN THE MATTER OF JUONTONIO PINCKNEY
2 VERSUS BROCK L. FANKHOUSER, MOTION FOR SUMMARY JUDGMENT ON
3 CROSS CLAIM FOR INDEMNIFICATION BY MR. DERHAM COLE, JUNIOR,
4 AT 12:17 P.M..)

5 MR. COLE: Thank you, Your Honor, may it please the
6 Court.

7 This is ECI and ECFI's Motion for Summary Judgment on
8 their cross-claim against FPG, and those cross-claims are
9 for contractual and equitable indemnity. I will begin with
10 the contractual equity indemnity claim.

11 We've had a lot of discussion of the franchise
12 agreement and our motion against the plaintiffs and the
13 franchise agreement with - between ECFI and FPG contains an
14 indemnification provision, a broad indemnification
15 provision in Section 16.1, and I won't read the whole thing
16 unless, Your Honor, would like me to, but it provides that
17 FPG will indemnify ECFI in it's affiliated entities which
18 would include ECI to the fullest extent permitted by law
19 for judgments and cost that may have been incurred by ECFI
20 or ECI arising directly or indirectly from as a result of
21 or in connection with FPG's ownership or operation of it's
22 business here under or it's use or utilization of the
23 development system, including without limitation the use of
24 any architectural plans and designs provided by ECFI.

25 It goes on, in the event that any law suit is asserted

1 in connection with FPG's use of the development system
2 under the franchise agreement then FPG will resist and
3 defend such actions suit a proceeding at FPG's expense and
4 further it will upon written notice from ECFI of the amount
5 expended FPG will within ten business days of the receipt
6 of the notice reimburse ECFI in full for the total amount
7 of such expenses.

8 And ECFI and ECI have made such demands at least on a
9 couple of occasions earlier this year which were denied by
10 FPG and it's insurers but - and they opposed this motion -
11 but even in deposition testimony FPG admitted that ECFI has
12 fulfilled all of it's obligations under the franchise
13 agreement and that it is not aware of any facts to support
14 FPG's failure to defend and indemnify ECI and ECFI in this
15 matter. So we're here with this motion to ask the Court to
16 enforce that indemnification clause in the franchise
17 agreement.

18 There is also, there is a choice of law clause at
19 issue in this franchise agreement as well and it provides
20 that Ohio law will govern the terms of the agreement in
21 relationship between ECFI and FPG. I don't believe Mr.
22 Powell contest that. And I don't believe that he would
23 contest that the generally speaking under South Carolina or
24 Ohio law indemnity agreements are enforceable. His
25 contention is that because the plaintiff's have alleged

1 what he calls separate and independent causes of action
2 against ECI and ECFI, then the indemnity provision in the
3 franchise agreement does not apply. But I would point out
4 to the Court that while there are causes of action in which
5 FPG is named in the plaintiff's complaint, there are no -
6 There are no causes of action asserted against ECI and ECFI
7 in which FPG and or Brock Fankhouser or Stone Crest Villa's
8 of Tega Cay has not been - has not been named. So we
9 certainly - And due to the nature of the indemnity
10 provision itself, we certainly believe that ECI and ECFI
11 have been brought into this law suit at least indirectly
12 and perhaps directly as a result of FPG's use of the
13 development system under the franchise agreement in
14 relation to Stone Crest Villa's of Tega Cay project.

15 Mr. Powell further raises the issue in his brief that
16 you know that unless explicit some South Carolina cases
17 simplified that unless explicitly stated an indemnitor is
18 not obligated to indemnify an indemnitee for accidents of
19 negligence. We certainly - You know we contend neither ECI
20 nor ECFI were negligent in any respect as it pertains to
21 any of the issues raised in this law suit. But even if
22 they were found to do so there is an Ohio case called
23 *Glasco versus Ohio Edison Company* where the higher Ohio
24 Supreme Court held that a narrow construction of an
25 indemnity clause is unnecessary when a suit in the context

1 of a free and understanding no negotiation. The Court
2 further went on to note about the parties, "the parties in
3 this case before us are commercial enterprises of
4 sufficient size and quality as to presumably because that
5 is a high degree of sophistication in matters of contract.
6 They all provide services to the public as their means of
7 producing income and customarily rely on contracts. Each
8 has the financial power to provide it's loss by insurance
9 or other means."

10 Well that's exactly the case here. Two commercial
11 parties that customarily deal in contracts and FPG
12 certainly has entered into many subcontracts in - with
13 respect to this project and other projects with which it -
14 that it has developed over the years.

15 You know they presumably had the financial power to
16 procure insurance as well so the - So under Ohio law which
17 governs this agreement, there is - even if assuming for the
18 sake of argument there is some independent act of
19 negligence on the part of ECI or ECFI which we certainly
20 deny, there is no bearer to the court enforcing this
21 indemnification provision. And in deed, we think it is
22 drafted such that the Court shouldn't so...

23 But ECI and ECFI have also asserted a cross-claim for
24 equitable indemnification which is stated in the *Stuck*
25 *versus Pioneer Logging Machinery* case as a right of

1 indemnity then exist whenever the relation between the
2 parties is such that either in law or equity there is an
3 obligation to indemnify the other as where one person is
4 exposed to liability by the wrongful act of another in
5 which he is not joined.

6 But the crux of the claims in this case are - you know
7 are construction fake claims. In his deposition - Brock
8 Fankhouser in his FPG 30(b)6 deposition admits that there
9 is no - there was no breach of any agreement by ECI or ECFI
10 and that there is no evidence that ECI or ECFI were
11 involved in the construction, sale or, marketing of the
12 Stone crest Development. And so we contend there is no
13 independent negligence on the part of ECI Or ECFI and so if
14 we would be entitled to equitable indemnity but if not
15 equitable then certainly the contractual indemnity claims
16 which would provide coverage for any judgement against the
17 parties, but also for the assumption of the defense and the
18 reimbursement for any cost incurred today in defense of
19 this lawsuit.

20 THE COURT: You lost me a little bit there toward the
21 end because you moved for summary judgment as to FPG's
22 indemnity claim, then you moved into your cross-claim for
23 indemnity, if I understood your argument.

24 MR. COLE: Your Honor, it's our motion for summary
25 judgment on our - on both --

1 THE COURT: On both, okay.

2 MR. COLE: Both contractual --

3 THE COURT: Okay. I got you. Okay.

4 MR. COLE: Yes, sir. Thank you, Your Honor.

5 MR. POWELL: Your Honor, may I approach?

6 THE COURT: Yes, sir.

7 MR. POWELL: Your Honor, I've handed up FPG's
8 Memorandum in Opposition to ECFI and ECI's Motion for
9 Partial Summary Judgment. I won't read each cause of
10 action that has been asserted by the plaintiff's against
11 either ECI or ECFI to the Court but essentially what I've
12 done in the Memorandum in Opposition is copy and pasted the
13 allegations in those complaints, those seven causes of
14 action asserted by the individual plaintiff's as against
15 ECFI and ECI. And the single cause of action that the COA
16 as asserted against ECFI.

17 The causes of action asserted by the plaintiff's and
18 the COA against ECFI and ECI do not have to do with the
19 subject matter of the indemnification provision which
20 requires FPG to indemnify ECFI out of any causes of action
21 dealing with the development system. Those would be for
22 example construction defect issues. In fact ECFI's
23 Memorandum concedes that it's not being sued by the
24 plaintiff's or by the COA for anything that has to do with
25 construction of these projects.

1 What the allegations pertain to, and FPG is, Your
2 Honor heard argument from Mr. Halford on behalf of the
3 plaintiff's as it pertains to ECFI and ECI this morning,
4 and Mr. Cole's opposition to those arguments. What - And
5 frankly kind of difficult when you review the causes of
6 action pled by the plaintiff's to figure out exactly what
7 it is they are trying to get at ECFI and ECI for. But what
8 it appears to be is ECFI's failure to enforce it's own
9 franchise agreement, it's failure to keep a watchful eye
10 over it's franchisee which is not conduct that is alleged
11 against FPG, its conduct alleged against ECFI.

12 They I believe argue, they being the plaintiff's and
13 the COA, that various employees of ECFI and or ECI came
14 down to the project, they made inspections, maybe Mr.
15 Fankhouser and Philip Fankhouser who is a share holder in
16 ECI got an email and was supposed to do or not to do
17 something in response to that email, which was directed to
18 Mr. Philip Fankhouser who is a shareholder of ECI and ECFI.
19 But this alleged conduct is not conduct by FPG. And FPG
20 expresses no representations or arguments as to whether or
21 not the plaintiff's causes of action against ECFI and ECI
22 have any merit or ultimately apply. But what they don't do
23 is allege anything against ECFI or ECI that arises out of
24 the development system, just the construction of the
25 projects, which is the subject matter of the contractual

1 indemnification provision.

2 And again the causes of action are set forth in the
3 memorandum but the allegations are made against ECFI and
4 ECI directly for conduct that they did or failed to do and
5 not that arising from any action or inaction of FPG.

6 With regard to the equitable indemnification cause of
7 action, no judgment has been entered against either of
8 these entities to date. And as the court is aware in order
9 to recover for equitable indemnity you have to be held
10 responsible or liable or some other parties conduct in
11 which you did not join. Here, again for the same reasons,
12 the conduct that is alleged by the plaintiffs and by the
13 COA against ECFI and ECI, are things that they supposedly
14 did or didn't do. Whether they hold water is for you, with
15 respect to those other motions, or for the jury for another
16 day. But these are not allegations where the plaintiff's
17 and the COA are attempting to hold ECFI or ECI responsible
18 for something that FPG did or did not do.

19 Essentially where equitable indemnity requires some
20 judgment against you for conduct in which you did not join
21 what we have here is the complete opposite in terms of the
22 way the pleadings are phrased and the allegations are
23 situated as against ECI and ECFI. It's conduct that ECI
24 and ECFI allegedly did or did not do; not the conduct
25 against FPG in which ECI and ECFI did not join. For those

1 reasons, Your Honor, set forth more fully in the Memorandum
2 in Opposition to the Motion for Summary Judgment, we
3 believe that ECFI and ECI's motion should be denied.

4 THE COURT: Mr. Cole.

5 MR. COLE: Your Honor, just briefly on the contractual
6 indemnification provision of the franchise agreement.

7 The indemnification obligation isn't triggered solely
8 as a result of the conduct of FPG. That's why the language
9 that says any action superceding, et cetera, arising
10 directly or indirectly from, as a result of, or in
11 connection with FPG's ownership or operation of it's
12 business hereunder, or it's use or utilization of the
13 development system. The reason this law suit is instituted
14 is there are allegations that the project wasn't adequately
15 constructed. There is water intrusion.

16 We wouldn't - we wouldn't be here and ECI and ECFI
17 wouldn't be involved in a law suit had it not been for
18 those allegations and that's what - that's why the
19 indemnification provision is drafted broadly and includes
20 indirect claims. It doesn't have to be solely directly
21 related although the provision provides for that for FPG's
22 conduct. We have been brought into this law suit for
23 reasons that FPG is responsible for under the development
24 system. The development system is defined in a franchise
25 agreement. It's a long paragraph under 2.1 that I won't

1 read but it's not only just construction methods but it's
2 marketing materials, know how, et cetera, construction,
3 marketing of residential multi-family community, using a
4 architectural design and other proprietary confidential
5 information including copy writing and patented materials.
6 So it encompasses a broad range of things that FPG is
7 franchisee under the franchise agreement, is permitted to
8 use in the construction development and marketing of the
9 project. So for that reason we contend that it's at least
10 an indirect connection to the franchise's activities which
11 should trigger the indemnification and reimbursement to the
12 defense, the assumption of the defense's position in 16.1.

13 MR. POWELL: By way of a very brief example, Your
14 Honor, and one of the causes of action that is cited in
15 Memorandum in Opposition is plaintiff's cause of action for
16 rescission. As you heard Mr. Cole referenced this morning in
17 response to or in support of their motion for Motion to
18 Dismiss and now a Motion for Summary Judgment as to the
19 plaintiff's claims. How can ECFI be a defendant in a cause
20 of action for rescission when they're not even a party to the
21 contract of sale as between EC - as between Stone Crest and
22 the plaintiff's who purchased? How can that be? Same
23 thing is true of FPG. FPG is not a party to any of those
24 contracts. They were the general contracts on the project,
25 Stone Crest was a party to those contracts. So again the

1 plaintiff's cause of action may not hold any water and may
2 not have any merit but to the extent they say that ECFI
3 came down and their employees made representations to us
4 and they did so and so forth they failed to enforce
5 provisions of their own franchise agreement. It's not
6 conduct that is alleged by the plaintiff's or the COA
7 directed to FPG, it's directed directly against ECI and
8 ECIF. Thank you, Judge.

9 THE COURT: Why don't we try and break for lunch. We
10 still got several motions to take care of. We got other
11 things this afternoon, if we don't get to them they'll just
12 have to move over to some other time.

13 I see we got at least four more matters. Defendant
14 Fankhouser's Motion to Amend, ECI's Summary Judgment, as to
15 Third Party Complaint, Stone Crest Villa's Motion for
16 Relief to file Supplemental Complaint and a Motion to
17 Compel.

18 A. Your Honor, didn't you rule on the Motion to Compel?

19 THE COURT: I thought I did. This is listed as a
20 Motion to Compel, but is that the same motion as to
21 determination --

22 MR. HALFORD: It is not, Your Honor.

23 THE COURT: The way this is worded it looks like it's
24 different. What's the motion to Compel? What needs to be
25 compelled?

1 MR. HALFORD: Judge, what we would be addressing is
2 that we would go into some detail financial records of the
3 COA as it relates to the master of Stone Crest Property
4 association which has been disclosed or not disclosed
5 rather. Basically where I understand where all these
6 parties are saying where's the money, and that's our
7 question too. I would argue at the appropriate time.

8 THE COURT: No, the reason why Motions to Compel we
9 generally encourage everybody to work them out and I
10 thought over lunch if the parties that are at odds on that
11 issue could maybe reach a mutual understanding then we
12 won't have to hear that, but if they can't then we'll hear
13 it. That's why I wanted to move to that one.

14 MR. POWELL: Your Honor, one more thing. The
15 plaintiff's filed a Motion for Partial Summary Judgment on
16 Breach of Fiduciary Duty Claims which I think may have been
17 taken up in reverse earlier when the COA addressed those
18 claims, but Mr. Halford still plans on going forward.
19 That's another motion for Your Honor today is the
20 plaintiff's motion for Partial Summary Judgment as to
21 Breach of Fiduciary Duties owed by Brock Fankhouser
22 individually and Stone Crest Villas, LLC., as the developer
23 if they plan to go forward.

24 MR. HALFORD: We would absolutely plan to go forward.

25 THE COURT: Where is - Where does that fall on my

1 list?

2 MR. POWELL: The motion I think is directed both
3 against the COA and Mr. Fankhouser and Stone Crest, as I
4 indicated that may be why it didn't get taken up earlier.

5 No I didn't answer your question - -

6 THE COURT: We'll deal with all of them.

7 All right, we'll break until two o'clock.

8 (COURT IN LUNCH RECESS AT 12:39 P.M.)

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CERTIFICATE OF REPORTER

State of South Carolina)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 30th day of July, 2012.

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

Wanda Nelson
Wanda Nelson, CVR
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 2-20 / 2013