EXHIBIT "A"

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON D.R. HORTON, INC. f/k/a C. RICHARD DOBSON BUILDERS, INC., Plaintiff, v. BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC; and BUILDERS FIRSTSOURCE, INC., and JOSEPH NACCARI, Individually and d/b/a MASTER FRAMERS, Defendants. JOSEPH NACCARI, Individually, and d/b/a MASTER FRAMERS, Third-Party Plaintiff, v. JAIME ARREGUIN d/b/a MAYA CONSTRUCTION, Third-Party Defendant.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT C/A NO. 2010-CP-10-10355 **ORDER GRANTING DEFENDANTS BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC, AND BUILDERS FIRSTSOURCE, INC. SUMMARY JUDGMENT**

This matter comes before the Court on Defendants Builders FirstSource-Southeast Group, LLC, and Builders FirstSource, Inc.'s (hereinafter collectively "BFS") Second Motion for Summary Judgment. A hearing on this motion was held on August 13, 2014. Plaintiff D.R. Horton, Inc., f/k/a C. Richard Dobson Builders, Inc., ("DRH"), and Defendant BFS appeared at the hearing through their respective counsel. After considering the entire record in this matter, including all motions, memoranda of law, deposition testimony submitted by the parties, exhibits submitted by the parties, and the arguments of counsel, the Court finds that BFS should be, and

hereby is, GRANTED SUMMARY JUDGMENT.

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

1. DRH was the general contractor for the construction of a single family residential home at 403 Milner Court, Charleston, South Carolina (the "Residence"). The Residence was constructed in 2001. BFS, as a subcontractor for DRH, provided and installed framing materials and windows at the Residence.

2. Prior to construction of the Residence, DRH and BFS entered into an Independent Contractor Agreement (the "Contract") that contains an indemnity agreement. The Contract was drafted by DRH.

3. In addition to acting as the general contractor, DRH also owned the Residence. DRH sold the Residence to Patricia Clark.

4. In 2008, Patricia Clark filed *Patricia Clark v. D.R. Horton, Inc.*, Case No. 2008-CP-08-1633, in the Circuit Court of Berkeley County, South Carolina (the "Homeowner's Suit"). The Homeowner's Suit alleged causes of action against DRH for negligence, breach of contract, breach of warranty, and violations of the South Carolina Unfair Trade Practices Act ("UTPA"). The complaint in the Homeowner's Suit alleged that the Residence was defective because of, among other things, improper installation of siding, improper installation of the exterior wall system, improper flashing, improper installation of a moisture barrier, improper water management system, improper installation of framing, improper installation of the concrete slab and driveway, improper installation of the roof and shingles, and improper installation of a gas hot water heater.

5. It is undisputed that some of the allegations in the complaint filed in the

Homeowner's Suit related to materials supplied and installed by BFS and other allegations in the complaint filed in the Homeowner's Suit were related to the work of others. BFS did not install the driveway, concrete slab, siding, roofing or hot water heater at the Residence.

6. While the parties disagree on whether DRH gave BFS oral notice of the Homeowner's Suit, it is undisputed that DRH did not provide BFS with any written notice or tender of defense for the Homeowner's Suit.

7. DRH filed a Motion to Compel Arbitration and to Stay the Homeowner's Suit and on April 1, 2009, the Berkeley County Circuit Court entered a consent Order Referring Claims to Arbitration whereby the Homeowner's Suit was referred to binding arbitration.

8. The Homeowner's Suit was arbitrated during a two day period on December 10th and 11th 2009. There is no transcript or other formal record of the evidence presented at the arbitration.

9. The parties to the Homeowner's Suit agreed to request an unreasoned arbitration award that would not contain findings of fact or conclusions of law. The arbitrator awarded Patricia Clark $150,000. Said award states that "Counsel for the parties have requested an Order containing a monetary award only." It does not indicate what amounts, if any, were awarded for specific defects. Nor does the award specify which of the causes of action asserted in the Homeowner's Suit were successful.

10. The record in this case indicates that DRH was represented by counsel at all times during the Homeowner's Suit and was advised by counsel that requesting an unreasoned arbitration award would make any future indemnity claim against BFS uncertain.

11. On February 26, 2010, the arbitration award was filed, confirmed and made a

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final judgment of the Berkeley County Circuit Court. (the "Judgment"). No party objected to the confirmation of the arbitration award.

12. On March 24, 2010, a Satisfaction of Judgment was entered in the Berkeley County Circuit Court indicating that DRH had satisfied the Judgment.

13. On December 17, 2010, DRH filed the instant action against BFS seeking contribution pursuant to S.C. Code Ann. § 15-38-10, et seq., and contractual indemnity. DRH alleges that BFS is responsible, in whole or in part, for the Judgment and for $155,717.05, in attorney's fees and costs associated with the defense of the Homeowner's Suit.

II. CONCLUSIONS OF LAW

A. BFS IS ENTITLED TO SUMMARY JUDGMENT ON DRH'S CLAIMS FOR CONTRIBUTION PURSUANT TO THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, § 15-38-10, et seq.

14. The statutory right of contribution among joint tortfeasors is in derogation of the common law and thus the South Carolina Contribution Among Tortfeasors Act must be strictly construed. *G & P Trucking v. Parks Auto Sales Service & Salvage, Inc.*, 357 S.C. 82, 87 (Ct.App. 2003). "Moreover, in a suit in which contribution is sought from a joint tortfeasor, the claimant obviously must prove facts sufficient under the statutes and the common law . . . to establish a right of contribution between wrongdoers." *Id.*

15. Here, there is no basis in the record to find that DRH has sustained tort liability. The plaintiff in the Homeowner's Suit alleged causes of action for breach of contract, breach of warranty, negligence and violations of the UTPA. The parties to the Homeowner's Suit requested an award from the arbitrator that does not specify the legal basis for his award of damages.

16. In order for a party who has litigated a case to judgment to maintain an action as a joint tortfeasor that party must have first been adjudicated to have committed a tort. *See* S.C. Code Ann. § 15-38-40(B)("*Once the issue of liability has been resolved* . . . a defendant has the right to seek contribution . . ."); *See also Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406 (2005)(No right of contribution against negligent employer because workers compensation laws prevent employer from being subject to tort liability). The record before the Court does not contain any finding of tort liability from the Homeowner's Suit and therefore DRH is not entitled to contribution. *See Jenkins v. Few*, 391 S.C. 209, 221 (Ct.App. 2010)("Because the verdict was a general verdict, it is impossible to determine how the jury allocated damages between civil conspiracy, conversion, and trespass to personal property. We will not speculate as to how the jury allocated damages.").

17. In addition to the absence of a finding of tort liability, there is no record evidence that the Judgment is attributable to defects in the materials supplied and installed by BFS. Because the arbitration award contains no findings of fact or conclusions of law, it is impossible for the Court to determine what defects the arbitrator found at the Residence.

18. Even if, somehow, DRH were able to establish its own tort liability, and that BFS's work was determined to be defective in the Homeowner's Suit, there is no way to determine what portion of the Judgment is related to said liability. BFS is not liable; jointly, severally, or otherwise, for defects in the work of other subcontractors employed by DRH at the Residence. Moreover, portions of the Judgment attributable to the work of others, and any portion of the Judgment attributable to BFS, are for different injuries to property, not "the same injury to . . . property." *See* S.C. Code Ann. § 15-38-20(A).

19. Any attempt to determine what portion of the Judgment is attributable to the joint negligence of BFS and DRH would be an exercise in impermissible guesswork. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 70-71 (Ct.App. 1999)(refusing to allow contribution when "The settlement agreement does not place a specific value on any potential claim . . ." and the court "cannot, therefore, determine whether [the party seeking contribution] paid more than its pro rata share of liability . . ."). *See Also Jenkins v. Few*, 391 S.C. 209, 221 (Ct.App. 2010)(refusing to speculate as to how jury allocated damages among various causes of action when defendant "contributed to drafting and agreed to use a general verdict form that did not include a separate damages award for each cause of action.").

20. As stated by the *Vermeer* Court, "[i]n this case the lack of apportionment may work a hardship . . . but it is one which he could have avoided by a properly drawn" award. *Vermeer* 336 S.C. at 70. The record indicates that DRH, with the advice of counsel, made a strategic decision to agree to an unreasoned arbitration award. Having failed to obtain a finding of tort liability or findings regarding what portions of the Residence were ultimately determined to be defective, DRH cannot now maintain this action for contribution.

B. BFS IS ENTITLED TO SUMMARY JUDGMENT ON DRH'S CLAIM FOR CONTRACTUAL INDEMNITY.

i. There is no evidence that any portion of the Judgment is attributable to materials supplied and installed by BFS.

21. Because the arbitration award contains no findings of fact or conclusions of law, there is no evidence that the Judgment is attributable to property damage caused by defects in the materials supplied and installed by BFS. Based on the record before the Court, DRH, as the Plaintiff, cannot meet its burden of proving that a Judgment was entered against it because of

property damage caused by defects in the materials supplied and installed by BFS.

ii. There is no evidence in the record indicating what portions of the Judgment are attributable to the work of others.

22. Even if DRH could prove that the arbitrator concluded that defects in the materials supplied and installed by BFS caused property damage at the Residence, it is impossible to determine what portion of the Judgment is attributable to said property damage. Because the parties to the arbitration did not request an award with findings of fact or conclusions of law, there is no record before the Court to indicate what portion of the Judgment is attributable to the various distinct defects alleged in the Homeowner's Suit.

23. The Contract does not require BFS to indemnify DRH for judgments based on defects in the work of others. *See* Contract ¶ 11 (requiring indemnification for "(I) A BREACH OF THE WARRANTIES . . . PROVIDED HEREIN BY CONTRACTOR; (II) THE WORK PERFORMED . . . BY CONTRACTOR).

24. Applicable law does not permit BFS to indemnify DRH for judgments based on defects in the work of others. *See* S.C. Code Ann. § 32-2-10 (prohibiting agreements whereby subcontractor agrees to indemnify general contractor for general contractor's sole negligence or the negligence of its "independent contractors.").

iii. The Contract provides that BFS has the right to defend any suit implicating its contractual indemnity obligations.

25. The plain language of the indemnity agreement provides that BFS "AGREES TO PROTECT, DEFEND, INDEMNIFY AND HOLD OWNER . . . FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTIONS, SUITS, OR OTHER LITIGATION . . ." The parties plainly agreed that BFS, not DRH, would

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defend any lawsuit alleging property damage caused by BFS's work. The Contract not only obligates BFS to defend any suits alleging property damage associated with defects in its work, it also gives BFS the right to defend any such claims. The Contract does not provide that DRH can defend itself, control the defense, select the attorneys of its choice, provide no notice to BFS, and nonetheless require BFS to indemnify it.

26. It is undisputed that DRH did not give BFS written notice of the Homeowner's Suit and did not tender the defense of the Homeowner's Suit to BFS. Because DRH undertook the defense of the Homeowner's Suit without providing BFS an opportunity to defend said suit, DRH cannot pursue indemnity under the Contract.

iv. The Contract provides that BFS will receive written notice of any suit implicating its contractual indemnity obligations.

27. "As a rule of construction, the Court must consider the entire contract between the parties to determine the meaning of its provisions. That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592 (1976). "A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used . . ." *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367 (1966).

28. Paragraph 19 of the Contract provides: "*Notices. All notices required pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of the Parties.*".

29. The indemnity provision in the Contract, upon which DRH relies in this case, provides that BFS will "protect" DRH against, and "defend" DRH from, allegations of property

damage caused by BFS's work. BFS cannot protect and defend DRH from lawsuits implicating BFS's work without being provided notice that a suit has been filed. Therefore, it is implied in the Contract that DRH will provide BFS with notice of any suit implicating its indemnity obligations. *See Commercial Credit Corp*, 247 S.C. at 367 ("In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.").

30. Other portions of the Contract also demonstrate that the parties intended that BFS should get notice of homeowner lawsuits implicating BFS's indemnity obligations. Indeed, with reference to the factual scenario presented in this case, the Contract provides that BFS "agrees to participate in, and be bound by, any arbitration proceeding between [DRH] and any third party relating to the Work . . ." Contract ¶ 22. Clearly, BFS must be given notice of the third-party suit in order to "participate in" the arbitration.

v. The implied covenant of good faith and fair dealing requires DRH to provide BFS with notice of any suit implicating its indemnity obligations.

31. "There exists in every contract an implied covenant of good faith and fair dealing." *Adams v. G. J. Creel and Sons, Inc.*, 320 S.C. 274, 277 (1995). Here, good faith and fair dealing require DRH to notify BFS of any lawsuit which DRH contends implicates BFS's indemnity obligations. DRH's actions in litigating the Homeowner's Suit without notifying BFS, in failing to make any transcript of the arbitration hearing, and in failing to request an award with factual findings and legal conclusions, all violate the implied covenant of good faith and fair dealing and prohibit DRH from requiring BFS to indemnify it for any portion of the Judgment or defense costs.

vi. DRH waived its right to contractual indemnification by failing to give BFS notice of the Homeowner's Suit and failing to request an award with factual findings and conclusions of law.

32. "Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive. Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute a waiver." *Freeman v. McBee*, 280 S.C. 490, 493 (Ct.App. 1984).

33. Here, DRH's failure to give BFS notice of the Homeowner's Suit is inconsistent with its assertion of a right to indemnity. In fact, the record reveals that DRH was informed by counsel that it should provide BFS with notice of the Homeowner's Suit and that DRH declined to provide BFS notice.

34. Additionally, DRH intentionally relinquished its right to indemnity by failing to request an arbitration award containing findings of fact and conclusions of law. The record reveals that DRH made a strategic decision not to request findings of fact or conclusions of law with the express purpose of making it difficult to determine what was decided in the Homeowner's Suit. Additionally, the decision not to request a reasoned award was made after being advised by counsel that an unreasoned award would make any future case against BFS uncertain.

35. The record conclusively indicates that DRH knowingly waived its right to seek indemnity from BFS.

vii. DRH is equitably estopped from seeking contractual indemnity.

36. "Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to

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equity." *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290 (Ct. App. 2012). "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *Southern Development Land and Golf Co., Ltd. v. South Carolina Public Service Authority*, 311 S.C. 29, 33 (1993). "Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." *Id.*

37. By DRH's own theory of this case, DRH had knowledge of a lawsuit alleging defects in BFS's work and implicating BFS's indemnity obligations. Rather than giving BFS written notice of the Homeowner's Suit, DRH remained silent. DRH's silence deprived BFS of the right to participate in discovery, to cross-examine witnesses at depositions, and to participate in the arbitration hearing. DRH is now equitably estopped from seeking indemnification from BFS.

viii. The indemnification clause in the Contract violates S.C. Code Ann. § 32-2-10.

38. In relevant part, the indemnity clause in the Contract provides that BFS will indemnify DRH for "ANY NEGLIGENT ACTION AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK, EVEN WHEN THE LOSS IS CAUSED BY THE FAULT OR NEGLIGENCE OF THE INDEMNITEE . . ."

39. The Contract purports to require BFS to indemnify DRH for DRH's own negligent acts or omissions "even when the loss is caused by the fault or negligence of" DRH. The clause violates S.C. Code Ann. § 32-2-10 and thus the "agreement" is "unenforceable." *See* S.C. Code Ann. § 32-2-10 ("a promise or agreement in connection with the . . . construction . . . of a building . . . purporting to indemnify the promisee, its independent contractors, agents,

employees, or indemnitees against liability for damages arising out of . . . damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable.).

40. The only caveat to the above rule, that a promisor (BFS), may agree to indemnify the promisee (DRH), in connection with "liability for damages resulting from the negligence, in whole or in part, of the promisor," has no application to DRH's attempt to require BFS to indemnify it for "liability for damages resulting from the negligence" of DRH's other independent contractors. The indemnity agreement is unenforceable.

ix. Having failed to obtain findings of fact and conclusions of law in the Homeowner's Suit, DRH cannot litigate the issue of what was decided in the Homeowner's Suit in this action.1

41. DRH cannot litigate, in this action, the issue of what portion of a judgment entered in a previous action is attributable to property damage caused by materials supplied and installed by BFS. Principles of waiver, the requirement of proving damages to a reasonable certainty, and collateral estoppel prevent DRH from maintaining an independent action in order to apportion the Judgment.

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1 Significantly, even if DRH were able to present competent evidence that some particular portion of the Judgment is attributable to property damage caused by defects in work performed by BFS, BFS, as a non-party without notice, would not be bound to pay that amount. *See Robins v. First Federal Sav. Bank*, 294 S.C. 219, 223 (Ct. App. 1987)("absent party's interests can rarely be legally bound by principles of res judicata in proceedings to which he was not a party."). There is a well-established procedure whereby an indemnitee may bind a nonparty indemnitor to the findings made in a suit against the indemnitee by a third-party. *See Black v. Patel*, 353 S.C. 76, fn 2 (Ct. App. 2002)("Vouching in is a common law 'procedural device by which a defendant may give notice of suit to a third party who is liable over to the defendant on the subject-matter of the suit, so that the third party will be bound by the court's decision.' The device has been largely replaced by third-party practice."). *See also* S.C. Code Ann. § 36-2-607(5)(recognizing "the common law procedural device of 'vouching in' a seller who is answerable over to a buyer for a breach of warranty or other obligation on which the buyer is being sued." (Citing *Mauldin v. Milford*, 127 S.C. 508, (1923); *Newell Contracting Co. v. Blankenship*, 130 S.C. 131 (1924)). Because BFS was not "vouched in" to the Homeowner's Suit, even if DRH could prove what portion of the Judgment was awarded for defects in BFS's work, BFS could require DRH to prove, from scratch, the existence of defects in BFS's work and the amount of damage caused thereby. *See* 47 Am.Jur.3d Judgments § 606 ("The effect of the omission of such notice and opportunity is that the judgment is not binding on the person liable over, who has the right to litigate every essential fact necessary to support the judgment.").

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42. "[A]n arbitration award is a final, binding award on the merits." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 494 (Ct.App. 2003). "[A]n arbitration award is conclusive and binding . . . as to all matters submitted to the arbitrators." *Id.* at 494. As stated above, in this case the arbitration award was made a final judgment of the Berkeley County Circuit Court.

43. Having fully litigated the Homeowner's Suit, without requesting findings of fact, DRH has waived the right to make those findings of fact in this case. The failure to request findings of fact in the Homeowner's Suit constitutes a waiver of a judicial ruling on those omitted factual issues. *See Moore v. Moore*, 360 S.C. 241, 257 (Ct.App. 2004)("Without a special verdict form, we cannot speculate as to what portion of the award the jury attributed to lost profit as opposed to other tort damages."); *Armstrong v. Collins*, 366 S.C. 204, 227 (Ct.App. 2005) ("Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages."). A litigant who has requested a ruling that does not include findings of fact cannot file a second independent action and ask a second trier of fact to determine what was decided by the first finder of fact.

44. "[I]n order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 570-571 (1971). Any attempt by a judge or jury in this action to determine what portion of the Judgment, if any, is attributable to property damage caused by products installed by BFS would be an exercise in rank guesswork and speculation.

45. Additionally, collateral estoppel prevents DRH from re-litigating issues decided

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in the Homeowner's Suit. In order to maintain its case, DRH must take the position that the issue of defects in BFS's work, and the amount of damage caused thereby, was actually litigated and decided in the Homeowner's Suit. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc.* v. SCDOT, 385 S.C. 550, 554 (Ct.App. 2009); *See also Crosby v. Prysmian Communications Cables and Systems USA, LLC*, 397 S.C. 101, 111 (Ct.App. 2011)(giving preclusive effect to findings of Workers Compensation Commission in subsequent retaliatory discharge litigation). "The doctrine of collateral estoppel prevents the relitigation of *issues*, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same." *Id.* at 556.

46. "As far back as 1982, our supreme court held the doctrine of collateral estoppel barred the plaintiff from relitigating an issue even though the defendant was not a party, or in privity with a party, to the initial action." *Id.* at 555. "[T]he identity of the parties, and their relationship to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel." *Id.*

47. Here, DRH necessarily contends that it has already litigated the issue of whether BFS's work was defective, and the damages caused thereby, in the Homeowner's Suit. DRH is collaterally estopped from litigating those issues anew in this case.

III. CONCLUSION

48. Pursuant to the Contract, and applicable law, DRH was required to give BFS notice of the Homeowner's Suit in order to trigger BFS's indemnity obligations. Further, DRH's

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complete failure to make any record of what was determined in the Homeowner's Suit precludes it from maintaining an action based on the Judgment. There is no basis in the Contract, or in any other applicable law, whereby BFS can be held responsible for portions of the Judgment or attorney's fees attributable to the fault of others. Furthermore, there is no evidence available whereby the Court can conclude what portion of the Judgment, if any, is attributable to property damage associated with the products installed by BFS. For all of the above reasons, BFS is hereby GRANTED SUMMARY JUDGMENT AS TO ALL OF DRH'S CLAIMS.

AND IT IS SO ORDERED.

The Honorable R. Markley Dennis, Jr.
Circuit Court Judge, Ninth Judicial Circuit

August 20, 2014

Charleston, South Carolina