

EXHIBIT A
(Appellant's Motion to Strike)

RECEIVED

FEB 07 2017

SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2015-CP-08-1213

RECEIVED

JAN 27 2017

SC Court of Appeals

Christopher Duvall and Natalie Duvall, ... Plaintiffs,

v.

The Ryland Group, Inc., ... Defendant,

And

The Ryland Group, Inc. Third-Party Plaintiff,

v.

Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon

Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company, Inc.

a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss,

Inc. d/b/a Carolina Truss Systems, Inc., ... Third-Party Defendants,

Of which The Ryland Group, Inc. is the Appellant,

And

Of which Christopher Duvall and Natalie Duvall, Land Site Services, Inc.,

Carolina Consulting Engineers, Inc., and Stark Truss Company, Inc. a/k/a

Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a

Carolina Truss Systems, Inc. are Respondents.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents Christopher Duvall and Natalie Duvall propose the following be included in the Record if Appeal:

Orders:

1. Consent Order allowing The Ryland Group, Inc. to Amended Answer, filed December 4, 2015;
2. Order granting The Ryland Group, Inc.'s Motion to Compel, filed January 21, 2016;

Pleadings:

3. Complaint, filed May 20, 2015;
4. Motion to Amend The Ryland Group, Inc.'s Answers to Plaintiffs' Complaint, filed November 12, 2015;
5. The Ryland Group, Inc.'s Amended Answer and Third-Party Complaint, filed December 10, 2015;
6. The Ryland Group, Inc.'s Motion to Compel Against Plaintiffs, filed December 31, 2015;
7. The Ryland Group, Inc.'s Motion to Compel Arbitration, filed March 17, 2016;
8. The Ryland Group, Inc.'s Memorandum of Law in Support of its Motion to Compel Arbitration, filed March 17, 2016;
9. Affidavit of Michael Boyle, including all Exhibits thereto, filed March 17, 2016;
10. Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, filed April 29, 2016;
11. Motion to Compel, filed by Defendant Land Site Services, Inc. on June 8, 2016;
12. Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Reconsider, Amend, and/or alter Order Denying its Motion to Compel Arbitration, filed August 3, 2016.

Transcripts:

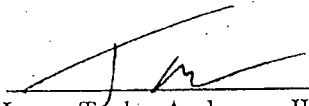
13. Transcript of Record of hearing on The Ryland Group, Inc.'s Motion to to Compel Arbitration, June 27, 2016.

Discovery:

14. Defendant The Ryland Group, Inc.'s Answers to Plaintiffs' Interrogatories, dated December 4, 2015;
15. Defendant The Ryland Group, Inc.'s Responses to Plaintiffs' Request for Production, dated December 4, 2015;
16. Defendant Land Site Services, Inc.'s First Set of Interrogatories to Plaintiffs, dated December 10, 2015;
17. Defendant Land Site Services, Inc.'s First Requests for Production of Documents to Plaintiffs, dated December 10, 2015;
18. Stark Truss Company, Inc.'s Interrogatories Plaintiffs, dated January 19, 2016;
19. Stark Truss Company, Inc.'s Requests to Produce to Plaintiffs, dated January 19, 2016;
20. Stark Truss Company, Inc.'s Subpoena to Volkmar Consulting Services, LLC, dated March 2, 2016;
21. Stark Truss Company, Inc.'s Subpoena to R-K Engineers, dated March 2, 2016;
22. Stark Truss Company, Inc.'s Subpoena to Applied Building Sciences, dated March 2, 2016;
23. Stark Truss Company, Inc.'s Subpoena to Thornhill Inspections d/b/a HouseMaster, dated April 22, 2016;
24. Stark Truss Company, Inc.'s Subpoena to Russell Appraisal Services, Inc., dated April 22, 2016;
25. Stark Truss Company, Inc.'s Subpoena to Hawk Construction of Charleston, Inc., dated April 22, 2016.

I hereby certify that this Designation of Matter to be included in the Record On Appeal contains no matter which is irrelevant to this appeal.

January 25, 2017



James Taylor Anderson, III
Kernodle Coleman
P. O. Box 13897
Charleston, SC 29422-3387
(843) 795-7800
tanderson@kernodlslaw.com
Attorney for Respondents
Christopher Duvall and Natalie Duvall

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2015-CP-08-1213

RECEIVED

JAN 27 2017

SC Court of Appeals

Christopher Duvall and Natalie Duvall, ... Plaintiffs,

v.

The Ryland Group, Inc., ... Defendant,

And

The Ryland Group, Inc. Third-Party Plaintiff,

v.

Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon
Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company, Inc.

a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss,

Inc. d/b/a Carolina Truss Systems, Inc., ... Third-Party Defendants,

Of which The Ryland Group, Inc. is the Appellant,

And

Of which Christopher Duvall and Natalie Duvall, Land Site Services, Inc.,

Carolina Consulting Engineers, Inc., and Stark Truss Company, Inc. a/k/a

Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a

Carolina Truss Systems, Inc. are Respondents.

CERTIFICATE OF SERVICE

RECEIVED

FEB 07 2017

SC Court of Appeals

The undersigned hereby certifies that on January 25, 2017 he served a copy of the *Initial Brief of Respondents Christopher Duvall and Natalie Duvall* by depositing the same in the U.S. Mail, First Class postage prepaid, and addressed to the following:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Attorney for Appellant The Ryland Group

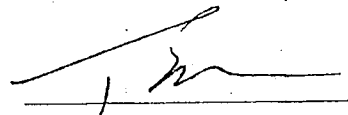
John E. Rogers, II, Esquire
C. Reed Teague, Esquire
The Ward Law Firm, PA
P.O. Box 5663
Spartanburg, SC 29304
Attorneys Respondent Land Site Services, Inc.

R. Michael Ethridge, Esquire
Robert B. Hawk, Esquire
Matthew T. Hemingway, Esquire
Carlock, Copeland & Stair, LLP
40 Calhoun St, Suite 400
Charleston, SC 29401
Attorneys for Respondent Carolina Consulting Engineers, Inc.

Mark S. Barrow, Esquire
Christy E. Mahon, Esquire
Sweeny, Wingate & Barrow, PA
1515 Lady Street
P.O. Box 12129
Columbia, SC 29211
**Attorneys Respondent Stark Truss Company, Inc. a/k/a Stark Truss Company
of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc.**

Kevin W. Mims, Esquire
Caroline C. McIntosh, Esquire
Luzuriaga Mims, LLP
50 Immigration St., Suite 200
Charleston, SC 29403
Attorneys Respondent AC Construction, Inc.

Patrick T. Morrissey, Esquire
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
Attorneys Respondent AC Construction, Inc.



James Taylor Anderson, III

EXHIBIT B
(Appellant's Motion to Strike)

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-08-1213

Christopher Duvall and Natalie Duvall,

☒ Plaintiffs,

vs.

The Ryland Group, Inc.

☐ Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

check box above indicating submitting party

Plaintiff's Attorney:
James Taylor Anderson, III, Esquire (SC Bar #77217)
Address:
Kernodle Coleman
P.O. Box 13897
Charleston, SC 29422-3897
Phone: (843) 795-7800 Fax: (843) 795-3032
Email: tanderson@kernodlclaw.com Other:

Defendant's Attorney:
Thomas C. Hildebrand, Jr., Esquire
Olésya V. Vaskevich, Esquire
Address:
200 Meeting St., Ste 301
Phone: (843) 727-2653 Fax:
Email: tomhildebrand@parkerpoe.com
Other: olesyavaskevich@parkerpoe.com

- ☒ **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: Motion to Compel
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

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: TBM

Date Filed: _____

- ☐ **MOTION FEE COLLECTED: \$** 25.00
☐ **CONTESTED - AMOUNT DUE: \$** _____

SCCA 233 (11/2003)

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED
2016 MAR 31 PM 2:51

25.00
JTA

aw/s

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

CHRIS DUVALL and NATALIE,
DUVALL

Plaintiffs,

v.

THE RYLAND GROUP, INC.,

Defendant.

THE RYLAND GROUP, INC.,

Third-Party Plaintiff,

v.

LAND SITE SERVICES, INC.,
CAROLINA CONSULTING SERVICES,
INC., HIGDON CONCRETE, LLC, A.C.
CONSTRUCTION, INC., and STARK
TRUSS COMPANY, INC. a/k/a STARL
TRUSS COMPANY OF SUMMERVILLE,
LTD. a/k/a STARL TRUSS, INC. d/b/a
CAROLINA TRUSS SYSTEMS, INC.

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-08-1213

**PLAINTIFFS' MOTION TO COMPEL
DEFENDANT TO RESPOND TO
DISCOVERY**

[RULE 40 (a) (2) PRIORITY MATTER]

FILED
2016 MAR 31 PM 2:51
MARY F. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

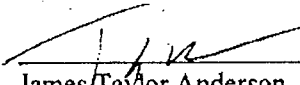
PLEASE TAKE NOTICE that Plaintiffs, Chris Duvall and Natalie Duvall ("Plaintiffs") will move, pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, for an Order compelling Defendant, The Ryland Group (Ryland), to fully respond to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production, heretofore served on October 6, 2015, (attached as Exhibit A and Exhibit B, respectfully), and for an award of all attorney's fees and costs incurred in connection with this motion, and such other relief as the Court made deem

appropriate, on the grounds that Ryland's responses to Plaintiffs dated December 4, 2015 failed to fully respond to the aforesaid discovery as required by the South Carolina Rules of Civil Procedure.

The undersigned hereby certifies and affirms in accordance with Rule 11 of the South Carolina Rules of Civil Procedure that prior to filing the instant motion, he consulted with opposing counsel and attempted in good faith to resolve the matter contained in said motion as evidenced by the correspondence attached as Exhibit C. This Motion is supported by South Carolina statutory and case law and the South Carolina Rules of Civil Procedure, along with any memoranda, affidavits, deposition testimony, and documentary evidence submitted prior to the hearing on this matter.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

KERNODLE COLEMAN

By: 

James Taylor Anderson, III
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422
(843) 795-7800
(843) 795-3032 Fax
tanderson@kernodlelaw.com

ATTORNEYS FOR PLAINTIFFS

March 24, 2016

Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, *Plaintiffs' Motion to Compel* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class to:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
**ATTORNEY FOR DEFENDANT/3rd
PARTY PLAINTIFF THE RYLAND GROUP**

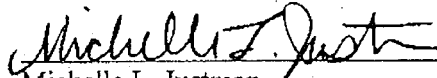
John E. Rogers, II, Esquire
C. Reed Teague, Esquire
The Ward Law Firm, PA
P.O. Box 5663
Spartanburg, SC 29304
**ATTORNEYS FOR 3rd-PARTY DEFENDANT
LAND SITE SERVICES, INC.**

James E. Scott, IV, Esquire
Perry Buckner, Esquire
Camden Hodge, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
**ATTORNEYS FOR 3rd PARTY DEFENDANT
CAROLINA CONSULTING ENGINEERS, INC.**

Mark S. Barrow, Esquire
Christy E. Mahon, Esquire
Sweeny, Wingate & Barrow, PA
1515 Lady Street
P.O. Box 12129
Columbia, SC 29211
**ATTORNEYS FOR 3RD PARTY DEFENDANT
STARK TRUSS COMPANY, INC. a/k/a STARK
TRUSS COMPANY OF SUMMERVILLE,
LTD. a/k/a STARK TRUSS, INC. d/b/a
CAROLINA TRUSS SYSTEMS, INC.**

Kevin W. Mims, Esquire
Caroline C. McIntosh, Esquire
Luzuriaga Mims, LLP
50 Immigration St., Suite 200
Charleston, SC 29403
**ATTORNEYS FOR 3RD PARTY DEFENDANT AC
CONSTRUCTION, INC.**

KERNODLE COLEMAN


Michelle L. Justman

March 28, 2016
Charleston, South Carolina

FILED
2016 MAR 31 PM 2:51
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

TSM

EXHIBIT A

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

CHRISTOPHER DUVALL and NATALIE)
DUVALL)

Plaintiffs,)

v.)

THE RYLAND GROUP, INC.,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-08- 1213

PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANT

Plaintiffs Christopher and Natalie Duvall ("Homeowners"), herewith requests that Defendant The Ryland Group, Inc. ("Ryland") answer the following Interrogatories, under oath, pursuant to the South Carolina Rules of Civil Procedure within thirty (30) days:

INSTRUCTIONS

1. You are under a continuing duty to correct any response to any Interrogatory, either incorrect or incomplete at the time it was made, as soon as the fact that the response was incorrect or incomplete is learned.
2. If you refuse to answer or object to any Interrogatory, in whole or in part, state clearly the basis for such refusal or objection. If a privilege or objection is claimed, identify the privilege or objection and state the specific basis under which the privilege or objection is claimed. If you withhold otherwise responsive documents from production under claim of privilege or objection, please identify any withheld documents in a privilege log by title or description, author, recipient(s), date, and state the specific basis for your claim of privilege or objection.
3. If any document that is responsive to an Interrogatory was, but is no longer, in existence or in your possession or control, state whether it:
 - (a) is missing or lost;
 - (b) has been destroyed;

- (c) has been transferred, voluntarily or involuntarily, to others; or
- (d) has been otherwise disposed of.

For each instance, explain the circumstances surrounding such disposition, including the identity of the person(s) who authorized and/or effected the destruction, transfer or disposition of the document(s), the approximate date of disposition, and, if known, the present location and custodian of the document(s).

DEFINITIONS

1. Unless indicated otherwise, "you," or "your," or "party," when used herein, refers to Defendant Ryland, above named, and anyone acting on its behalf, including counsel.
2. The term "person," when used herein, means any natural person, individual, corporation, partnership or association, firm, bank, savings and loan association, and all other business or governmental entities.
3. The term "communication," when used herein, means any statement or utterance, whether written or oral, made by any means by one person to another or in the presence of another, or any document delivered or sent from one person to another.
4. The term "relating to" or "referring to," when used herein, means consisting of, regarding, relevant to, reflecting, describing, concerning, or factually connected with the matter discussed.
5. The term "document," when used herein, means all originals of any nature whatsoever, identical copies, and all non-identical copies thereof, pertaining to any medium upon which intelligence or information is recorded in your possession, custody, or control regardless of where located.
6. Whenever these interrogatories request Ryland to "identify" a natural person, Ryland shall specify:
 - (a) the person's full name;
 - (b) his/her present employer and position or title; and
 - (c) present business and home address and telephone numbers.

If the current business or home address and telephone numbers are unknown, Ryland shall furnish the last known business or home address and telephone numbers.

7. Whenever these Interrogatories request Ryland to "identify" an entity other than a natural person, Ryland shall specify:

- (a) the name of the entity, and
- (b) its present business address.

8. Whenever these Interrogatories request Ryland to "identify" documents, Ryland shall state:

- (a) the type of document (e.g., letter, memorandum, telegram);
- (b) its author and originators;
- (c) its date or dates;
- (d) all addressees and recipients;
- (e) its present location or custodian; and
- (f) its subject matter or topic.

Also state whether such documents are in Ryland's possession, and when, how, and from whom Ryland initially obtained the documents. In lieu of a full identification of any document, the document may be furnished to Plaintiff, clearly specifying to which Interrogatory that document is responsive. Documents to be identified and/or produced shall include those in the possession, custody, and control of Ryland and all other documents of which Ryland has knowledge.

9. Whenever these Interrogatories request Ryland to "identify" a communication, Ryland shall indicate:

- (a) the date and place where they were made;
- (b) identify the person or persons who participated in the communication, in addition to all the persons present;
- (c) the nature and substance of the communication; and
- (d) indicate the medium of communication.

If the communication was written, reported, or referred to in any document, identify or produce the document.

INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to have knowledge concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.
3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

4. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.
5. If you identified an expert witness in response to the above interrogatory, please state whether or not any of these expert witnesses has provided a written report. If so, please attach a copy of any such report.
6. For each person known to the parties or counsel to have knowledge concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.
7. If the defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and pleading reflecting the correct information.
8. Describe in detail any inspections, investigations, testing and/or other analysis performed by you or at your behest with respect to any alleged construction defects or foundation issues at 1502 Marsh Reed Court, Hanahan, Berkeley County, South Carolina (the "Home"), or any other matters alleged in the Complaint and/or other pleadings in this matter, and with respect to each such inspection, investigation, testing, and/or analysis, state who performed such inspection, investigation, testing, and/or analysis; when such inspection, investigation, testing, and/or analysis was performed; at whose request or direction such inspection, investigation, testing, and/or analysis was performed; and the result or findings of such inspection, investigation, testing, and/or analysis.
9. Provide a detailed account of any complaints, formal or informal, received by Ryland, regarding any alleged construction issue, construction defect, punch list item, or warranty item at

the Home. As part of your Answer please provide the dates of all such complaints, identify the person making each complaint, and identify any and all records associated with each said complaint.

10. For the past ten ("10") years, provide a detailed account of any complaints, formal or informal, received by Ryland in connection with foundation problems, ground settlement problems, or cracks in concrete foundations at The Reserve at Tanner Plantation.

11. For the past ten ("10") years, provide a detailed account of any complaints, formal or informal, received by Ryland in connection with foundation problems, ground settlement problems, or cracks in concrete foundations within 1 mile of the Home.

12. Do you contend that any person or entity other than you, is, or may be, liable in whole or in part for the claims asserted against you in this lawsuit? If so, state the full name and address of each person or entity, the legal basis for your contention, the facts or evidence upon which your contention is based, and whether or not you have notified each such person or entity of your contention.

13. Please list the names, addresses and telephone numbers of any expert witnesses whom you propose to use in the trial of this case and provide the following information:

- a. The subject matter as to which each such person has been retained or specifically employed by you;
- b. The expert's profession, occupation, employer, and field of expertise;
- c. The substance of the facts and opinions about which each alleged expert is expected to testify and a summary of the grounds for each opinion (attach to your answers to these Interrogatories a report of the experts listed above which contains the information sought by this request);
- d. The dates and location of each test, analysis or examination relating to this litigation conducted by each person or persons listed above and the examiner's conclusion as to the results of the test, analysis, or examination; and

- e. Whether you have ever employed the alleged expert or experts listed above as expert witnesses or as litigation consultants in other matters. If so, indicate the dates, the name of each case, the court, and the term number where appropriate.
14. State the date(s) when Ryland first became aware of any cracking in the concrete foundation and/or sheetrock at the Home.
15. Give a detailed description of the analysis and/or investigation conducted by Ryland and/or Billy Barnes in connection with Homeowners' September 2013, warranty request and Billy Barnes' September 2013 visit to the Home. As part of your Answer please give a detailed description of the results of any such analysis and/or investigation.
16. Identify each and every lawsuit or other legal action in which Ryland has been involved or is currently involved as a plaintiff, defendant, or witness, involving any property located in Hanahan, South Carolina. For each such lawsuit, identify the role of Ryland, whether plaintiff, defendant, witness, or deponent, and identify the court, jurisdiction, case number, final disposition (if the case has concluded), and nature of the case.
17. Identify all subcontractors used by Ryland in the construction of the Home. For each such subcontractor please provide the name, address, telephone number and scope of work performed.
18. Identify with specificity any and all industry standards you contend are applicable to this matter.
19. Please give a detailed description of Ryland's policies concerning when a homeowner, rather than Ryland, should incur the cost of investigating construction issues/defects discovered during the Ryland warranty period.
20. Please give a detailed description of why Ryland requested that the Homeowners hire an engineer to investigate the construction issues/defects at the Home. As part of your Answer, please

identify each and every person involved in Ryland's decision to request that Homeowner's hire an engineer to investigate the construction issues/defects at the Home.

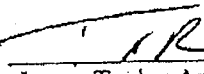
21. Has Ryland observed any condition at the Home that it believes constitutes a construction defect and/or a condition that should be repaired? If your Answer is "yes," please list each such construction defect and/or a condition.

22. For any affirmative defense you raise in your defensive pleadings, please state fully and with specificity the factual basis for each such defense and identify by name, address, and phone number all persons who have knowledge or information that supports each such defense.

23. Do you contend that there has been an insufficiency of service of process upon you in this case? If so, give a detailed explanation of how you were served and how that service was insufficient.

The foregoing Interrogatories are to be regarded as continuing and you are requested to provide promptly, by way of supplemental answers thereto, such additional information as may hereafter be obtained by you or any person or organization on your behalf, which will augment or otherwise modify any answers now given to the foregoing Interrogatories.

KERNODLE ROOT + COLEMAN

By: 

James Taylor Anderson, III
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422
(843) 795-7800
(843) 795-3032 Fax
tanderson@kernodlelaw.com

ATTORNEYS FOR PLAINTIFFS

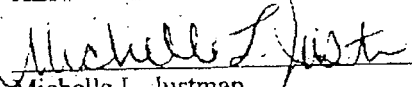
October 6, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, *Plaintiffs' First Set of Interrogatories to Defendant* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class to:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
ATTORNEY FOR DEFENDANT

KERNODLE ROOT + COLEMAN


Michelle L. Justman

October 16, 2015
Charleston, South Carolina

EXHIBIT B

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

CHRISTOPHER DUVALL and NATALIE)
DUVALL)

Plaintiffs,)

v.)

THE RYLAND GROUP, INC.,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-08- 1213

PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION TO DEFENDANT

Plaintiffs Christopher and Natalie Duvall ("Homeowners") pursuant to South Carolina Rule of Civil Procedure 34, hereby requests that Defendant The Ryland Group, Inc. ("Ryland") produce for inspection and copying, within thirty (30) days from the date of this request, at the offices of Kernodle, Root & Coleman, 914 Folly Road, Suite 2, Charleston, South Carolina 29412, and permit the attorneys for Homeowners to inspect, copy or photograph the following documents or things which may be in the possession, custody or control of Ryland or its attorneys.

If in responding to these Requests for Production, Ryland withholds production of any document on the ground that it is privileged, please state with respect to each such document:

- (a) the type of document involved, and a general description of its contents;
- (b) the name, business and residence addresses, telephone numbers, and position of the individual from whom the document emanated;
- (c) the name, business and residence addresses, telephone numbers, and position of each individual to whom the document or a copy thereof was sent;
- (d) the date of the document;
- (e) the privilege upon which Ryland relies in withholding the document;

RECEIVED
FEB 07 2017

SC Court of Appeals

- (f) the facts upon which Ryland relies in support of its claim that the document is privileged; and
- (g) the names, business and residence addresses, telephone numbers, and positions or occupations of individuals known or believed by Ryland to have knowledge concerning the factual basis for Ryland's assertion of privilege with regard to the document.

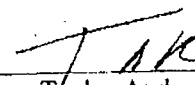
REQUEST FOR PRODUCTION

1. All documents and statements identified in Ryland's response to Homeowners' First Set of Interrogatories to Ryland.
2. All photographs, emails, motion pictures, videotapes, audio cassettes, drawings, plats, sketches, diagrams, specifications, details, reports, statements, affidavits, records, forms, writings, notes, memoranda, written messages, contracts, blueprints, or other documents or tangible things in possession, custody or control of Ryland or its agents, employees or managers that relate to any claim or defense in this case.
3. All plans, drawings, or blue prints for 1502 Marsh Reed Court, Hanahan, Berkeley County, South Carolina (the "Home").
4. Copies of any correspondence or communications between Ryland and Homeowners.
5. Copies of any correspondence or communications between Ryland and any previous owner of the Home.
6. All documents provided to Volkmar Consulting Services, LLC, or mentioned in Volkmar Consulting Services, LLC's August 6, 2015, "Report of Site Visit."
7. Copies of any correspondence or communication between Ryland and any other entity related to the matters at issue in this suit.

8. All documents generated as part of Homeowners' September 2013, warranty request and/or Billy Barnes' September 2013 visit to the Home.
9. All written policies or procedures concerning when a homeowner, rather than Ryland, should incur the cost of investigating construction issues/defects discovered during the Ryland warranty period.
10. All emails between or amongst any Ryland employees mentioning the House, Homeowner's 2013 warranty request, or any other matter relevant to the allegations of the Complaint.
11. All written policies or procedures concerning Ryland's handling of warranty claims.
12. All written policies, procedures or documents concerning Ryland's responsibility for warranty claims made by homeowners during the warranty period, when suit is not filed until after the warranty period.
13. All statements of witnesses or other persons, whether written, oral, taped, summarized or otherwise reproduced in any manner, relating to the events alleged in the Complaint.
14. All documents, statements, reports, summaries, letters, memoranda or other information provided, reviewed or prepared by any expert witnesses or investigator retained or consulted by you in connection with this matter, whether or not you intend to call the expert or investigator as a witness.
15. All advertisements, brochures, informational or promotional materials, whether stored electronically or in hard copy, related to the Home.
16. For the past ten ("10") years, provide a copy of all documents associated with any complaints, formal or informal, received by Ryland in connection with foundation problems, ground settlement problems, or cracks in concrete foundations at The Reserve at Tanner Plantation.

17. For the past ten ("10") years, provide a copy of all documents associated with any complaints, formal or informal, received by Ryland in connection with foundation problems, ground settlement problems, or cracks in concrete foundations within 1 mile of the Home.
18. A copy of any insurance policies potentially providing coverage for Homeowners' claims.
19. Produce the complete construction file for the Home.
20. Produce the complete warranty file for the Home.

KERNODLE ROOT + COLEMAN

By: 

James Taylor Anderson, III
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422
(843) 795-7800
(843) 795-3032 Fax
tanderson@kernodlelaw.com

ATTORNEYS FOR PLAINTIFFS

October 6, 2015

Charleston, South Carolina

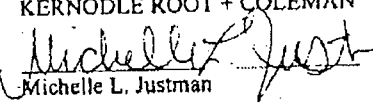
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, *Plaintiffs' First Requests for Production to Defendant* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class to:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
ATTORNEY FOR DEFENDANT

October 14, 2015
Charleston, South Carolina

KERNODLE ROOT + COLEMAN


Michelle L. Justman

KERNODLE
COLEMAN

James Taylor Anderson, III
tanderson@kernodlelaw.com

March 14, 2016

VIA EMAIL AND US MAIL

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401

RE: Christopher Duvall and Natalie Duvall v. The Ryland Group, Inc., *et al*
Berkeley County / Case No.: 2015- CP-08- 1213
Our File No. 77-35

Dear Thomas and Olesya:

I am in receipt of Defendant The Ryland Group, Inc.'s Answers to Plaintiffs' Interrogatories and Defendant the Ryland Group, Inc.'s Responses to Plaintiffs' Request for Production. I am writing to point out major deficiencies with Ryland's discovery responses.

**DEFICIENCIES WITH DEFENDANT THE RYLAND GROUP, INC.'S RESPONSES TO
PLAINTIFFS' REQUEST FOR PRODUCTION**

In September of 2013, Plaintiffs made a warranty claim relating to cracking in the foundation and walls at their home. Plaintiffs had extensive email correspondence with Billy Barnes, of Ryland, and provided Mr. Barnes with a report from Hawk Construction. Mr. Barnes indicated that the Hawk Construction report was provided to Ryland's "Main Office," for evaluation. Additionally, Mr. Barnes indicated that he had "ordered the file" for the Duvalls' home from "offsite" to check "compaction issues."

Unless I have overlooked something, Ryland has produced no emails at all between Mr. Barnes and the Duvalls, or between Mr. Barnes and any other Ryland personnel. Ryland did not produce the Hawk Construction report which was provided to Ryland by the Duvalls. According to Mr. Barnes the Hawk Construction report was provided to "Ryland management," but no email transmitting that report to "Ryland Management" has been produced, and no internal emails regarding Ryland's evaluation of that report have been produced. No correspondence has been produced regarding Mr. Barnes' "ordering" the construction file for the Duvalls' home and his "checking" the soil compaction at the Duvalls' home. All of these documents are responsive to Plaintiffs' First Requests for Production to Defendant.

**Please immediately produce all emails sent by, or received by, bbarnes@ryland.com,
for September and October of 2013. Additionally, please immediately produce all**

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
March 14, 2016
Page 2

correspondence, reports, analysis or communications of any kind related to the Hawk Construction report or Billy Barnes' request for soil compaction data related to the Duvalls' home.

After reviewing Ryland's document production, I have also seen no photographs, measurements, notes, reports or communications of any kind related to the Duvalls' 2013 warranty claim or Billy Barnes' 2013, inspection of the Duvalls' home. Please immediately produce all such documentation. To the extent Ryland is withholding any documentation (including electronic documentation), please immediately produce a detailed privilege log.¹

The Duvalls' Request for Production No. 11 requests "All written policies or procedures concerning Ryland's handling of warranty claims." No such documents have been produced. Please produce all Ryland policies, procedures, handbooks, memorandum, or directives relating to how Ryland personnel are to handle warranty claims from homeowners.

DEFICIENCIES WITH DEFENDANT THE RYLAND GROUP, INC.'S ANSWERS TO PLAINTIFFS' INTERROGATORIES

Turning to The Ryland Group, Inc.'s Answers to Plaintiffs' Interrogatories, Ryland's answer to Interrogatory No. 1 does not even list Billy Barnes, the only Ryland employee who visited the home prior to this lawsuit, as a witness. Please immediately provide all current contact information for Billy Barnes.

Next, Interrogatory No. 10, requests, for the past 10 years, any complaints related to foundation problems in Tanner Plantation. This is a narrowly tailored interrogatory limited to the at-issue neighborhood and the at-issue construction defect. The conditions in the area are an important issue in this suit and other foundation issues in the area are obviously reasonably calculated to lead to the discovery of admissible evidence. Please immediately and fully answer Interrogatory No. 10.

Interrogatory No. 15, asks for a detailed description of Ryland's investigation of the Duvalls' 2013, warranty request and Billy Barnes' 2013, visit to the home. Ryland's answer directs the Duvalls' to Ryland's document production. However, Ryland's documents do not contain any description of the investigation conducted in response to the Duvalls' warranty claim and do not contain any description of Billy Barnes' investigation. Please immediately and fully answer Interrogatory No. 15.

¹No documents or information related to the Duvalls' 2013, warranty claim are privileged so I trust Ryland is not claiming a privilege related to what should have been a routine warranty investigation performed years prior to litigation. However, given Ryland's complete failure to produce documents related to its 2013 warranty investigation, and out of an abundance of caution, please immediately produce a detailed and complete privilege log.

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
March 14, 2016
Page 3

RYLAND'S PERIODIC SITE VISITS

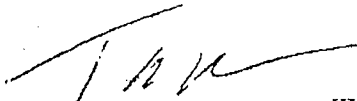
Per Judge Nicholson's order, Ryland conducted a site visit on March 7, 2016. Ryland's engineering expert took multiple measurements at the home. My understanding is that Ryland will continue to make these periodic visits. **Please supplement Ryland's discovery responses after each such visit so that the Duvalls will have the measurements taken by Ryland's experts.**

COLUMBIA NATIONAL RISK RETENTION GROUP, INC.

Please confirm that Ryland does not consider Columbia National Risk Retention Group, Inc., as an appropriate party to this case and that Ryland will not raise any defense to liability based on Columbia National Risk Retention Group, Inc.'s absence from the case. If Ryland intends to raise any defense to liability based on Columbia National Risk Retention Group, Inc.'s being the appropriate defendant I need to amend the complaint to add that entity.

Please accept this letter as the Duvalls' attempt, pursuant to SCRCF 11, to resolve this matter prior to filing a Motion to Compel. In order to avoid a Motion to Compel please provide the requested information within ten (10) days of your receipt of this letter. Please feel free to call me with any questions or concerns.

KERNODLE COLEMAN



James Taylor Anderson, III

JTAM/mj

KERNODLE
COLEMAN

James Taylor Anderson, III
tanderson@kernodlelaw.com

March 28, 2016

The Honorable Mary P. Brown
Berkeley County Clerk of Court
300 California Avenue
Moncks Corner, SC 29461

RE: Chris Duvall and Natalie Duvall v. The Ryland Group, Inc. AND The Ryland Group, Inc.
v. Land Site Services, Inc., Carolina Consulting Services, Inc., Higdon Concrete, LLC, A.C.
Construction, Inc., and Stark Truss Company, Inc. ak/a Stark Truss Company of
Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc.
Berkeley County / Case No.: 2015-CP-08-1213
KC File No.: 77-35

Dear Ms. Brown:

Enclosed for filing please find an original and one (1) copy of Plaintiffs' Motion to Compel against Defendant, The Ryland Group, Inc. in the above referenced matter. Also enclosed is a Motion and Order Information Form and Cover Sheet, together with our firm check in the amount of \$25.00 in payment of the required fee. Upon filing, please return date-stamped copy of the Motion to me in the envelope provided for your convenience.

Thank you for your assistance in this matter. Should you have questions or require additional information, please don't hesitate to contact me.

KERNODLE COLEMAN



James Taylor Anderson, III

JTAIII/mlj
Enclosures

cc: Thomas C. Hildebrand, Jr., Esquire / Olesya V. Vaskevich, Esquire
John E. Rogers, II, Esquire / C. Reed Teague, Esquire
Mark S. Barrow, Esquire / Christy E. Mahon, Esquire
James E. Scott, IV, Esquire / Perry Buckner, Esquire / Camden Hodge, Esquire
Kevin W. Mims, Esquire / Caroline C. McIntosh, Esquire

Common Pleas

Clerk : Mary P. Brown
300 B California Avenue
Moncks Corner, SC 29461
(843) 719-4400

Received From: Anderson, James Taylor III
914 Folly Road, Suite 2
Charleston, SC 29412

Date: 3/31/2016
Receipt #: 6067247
Clerk: c08tmurphy

Paying for: Duvall, Christopher

Transaction Type: Payment

Reference #: 21837

Payment Type: Check \$25.00

Comment:
Non-Refundable

Total Paid: \$25.00

Case #	Caption	Previous Balance	Amount Paid	Balance Due
2015CP0801213	Christopher Duvall , plaintiff, et al VS The Ryland Group, Inc , defendant, et al	\$25.00	\$25.00	\$0.00
Total Cases: 1		\$25.00	\$25.00	\$0.00

EXHIBIT C
(Appellant's Motion to Strike)

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-08-1213

Christopher Duvall and Natalie Duvall,)

☒ Plaintiffs,)

vs.)

The Ryland Group, Inc.)

☐ Defendant.)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

2016 AUG -3 AM 9:08
MAFEE P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED
DC

check box above indicating submitting party

Plaintiff's Attorney:
James Taylor Anderson, III, Esquire (SC Bar #77217)
Address:
Kernodle Coleman
P.O. Box 13897
Charleston, SC 29422-3897
Phone: (843) 795-7800 Fax: (843) 795-3032
Email: janderson@kernodlclaw.com Other:

Defendant's Attorney:
Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Address:
200 Meeting St., Ste 301
Phone: (843) 727-2653 Fax:
Email: tomhildebrand@parkerpoe.com
Other: olesyavaskevich@perkerpoe.com

☒ 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: Motion to Compel

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

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: KE Date Filed: _____

☒ MOTION FEE COLLECTED: \$ 25.00

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

JTA
\$25.00

ps/s

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-08-1213

CHRIS DUVALL and NATALIE,
DUVALL)

Plaintiffs,)

v.)

THE RYLAND GROUP, INC.,)

Defendant.)

**PLAINTIFFS' MOTION TO COMPEL
DEFENDANT TO RESPOND TO
DISCOVERY**

[RULE 40 (a) (2) PRIORITY MATTER]

THE RYLAND GROUP, INC.,)

Third-Party Plaintiff,)

v.)

LAND SITE SERVICES, INC.,)
CAROLINA CONSULTING SERVICES,)
INC., HIGDON CONCRETE, LLC, A.C.)
CONSTRUCTION, INC., and STARK)
TRUSS COMPANY, INC. a/k/a STARL)
TRUSS COMPANY OF SUMMERVILLE,)
LTD. a/k/a STARL TRUSS, INC. d/b/a)
CAROLINA TRUSS SYSTEMS, INC.)

Third-Party Defendants.)

FILED
2016 AUG -3 AM 9:08
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

PLEASE TAKE NOTICE that Plaintiffs, Chris Duvall and Natalie Duvall ("Plaintiffs") will move, pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, for an Order compelling Defendant, The Ryland Group (Ryland), to fully respond to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production, heretofore served on October 6, 2015, (attached as Exhibit A and Exhibit B, respectfully), and for an award of all attorney's fees and costs incurred in connection with this motion, and such other relief as the Court made deem

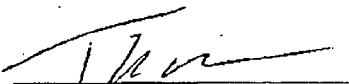
appropriate, on the grounds that Ryland's responses to Plaintiffs dated December 4, 2015 failed to fully respond to the aforesaid discovery as required by the South Carolina Rules of Civil Procedure.

The undersigned hereby certifies and affirms in accordance with Rule 11 of the South Carolina Rules of Civil Procedure that prior to filing the instant motion, he consulted with opposing counsel and attempted in good faith to resolve the matter contained in said motion as evidenced by the correspondence attached as Exhibit C. This Motion is supported by South Carolina statutory and case law and the South Carolina Rules of Civil Procedure, along with any memoranda, affidavits, deposition testimony, and documentary evidence submitted prior to the hearing on this matter.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

KERNODLE COLEMAN

By:


James Taylor Anderson, III
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422
(843) 795-7800
(843) 795-3032 Fax
tanderson@kernodlelaw.com

ATTORNEYS FOR PLAINTIFFS

July 27, 2016

Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, *Plaintiffs' Motion to Compel* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class to:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
**ATTORNEY FOR DEFENDANT/3rd
PARTY PLAINTIFF THE RYLAND GROUP**

John E. Rogers, II, Esquire
C. Reed Teague, Esquire
The Ward Law Firm, PA
P.O. Box 5663
Spartanburg, SC 29304
**ATTORNEYS FOR 3rd PARTY DEFENDANT
LAND SITE SERVICES, INC.**

James E. Scott, IV, Esquire
Perry Buckner, Esquire
Camden Hodge, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
**ATTORNEYS FOR 3rd PARTY DEFENDANT
CAROLINA CONSULTING ENGINEERS, INC.**

Mark S. Barrow, Esquire
Christy E. Mahon, Esquire
Sweeny, Wingate & Barrow, PA
1515 Lady Street
P.O. Box 12129
Columbia, SC 29211
**ATTORNEYS FOR 3RD PARTY DEFENDANT
STARK TRUSS COMPANY, INC. a/k/a STARK
TRUSS COMPANY OF SUMMERVILLE
LTD. a/k/a STARK TRUSS, INC. d/b/a
CAROLINA TRUSS SYSTEMS, INC.**

Kevin W. Mims, Esquire
Caroline C. McIntosh, Esquire
Luzuriaga Mims, LLP
50 Immigration St., Suite 200
Charleston, SC 29403
**ATTORNEYS FOR 3RD PARTY DEFENDANT AC
CONSTRUCTION, INC.**

KERNODLE COLEMAN


Michelle L. Justman

July 21, 2016
Charleston, South Carolina

FILED
2016 AUG -3 AM 9:08
CLERK OF COURT
BERKELEY COUNTY, SC

EXHIBIT A

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

CHRISTOPHER DUVALL and NATALIE)
DUVALL)

Plaintiffs,)

v.)

THE RYLAND GROUP, INC.,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-08- 1213

PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANT

Plaintiffs Christopher and Natalie Duvall ("Homeowners"), herewith requests that Defendant The Ryland Group, Inc. ("Ryland") answer the following Interrogatories, under oath, pursuant to the South Carolina Rules of Civil Procedure within thirty (30) days:

INSTRUCTIONS

1. You are under a continuing duty to correct any response to any Interrogatory, either incorrect or incomplete at the time it was made, as soon as the fact that the response was incorrect or incomplete is learned.
2. If you refuse to answer or object to any Interrogatory, in whole or in part, state clearly the basis for such refusal or objection. If a privilege or objection is claimed, identify the privilege or objection and state the specific basis under which the privilege or objection is claimed. If you withhold otherwise responsive documents from production under claim of privilege or objection, please identify any withheld documents in a privilege log by title or description, author, recipient(s), date, and state the specific basis for your claim of privilege or objection.
3. If any document that is responsive to an Interrogatory was, but is no longer, in existence or in your possession or control, state whether it:
 - (a) is missing or lost;
 - (b) has been destroyed;

- (c) has been transferred, voluntarily or involuntarily, to others; or
- (d) has been otherwise disposed of.

For each instance, explain the circumstances surrounding such disposition, including the identity of the person(s) who authorized and/or effected the destruction, transfer or disposition of the document(s), the approximate date of disposition, and, if known, the present location and custodian of the document(s).

DEFINITIONS

1. Unless indicated otherwise, "you," or "your," or "party," when used herein, refers to Defendant Ryland, above named, and anyone acting on its behalf, including counsel.
2. The term "person," when used herein, means any natural person, individual, corporation, partnership or association, firm, bank, savings and loan association, and all other business or governmental entities.
3. The term "communication," when used herein, means any statement or utterance, whether written or oral, made by any means by one person to another or in the presence of another, or any document delivered or sent from one person to another.
4. The term "relating to" or "referring to," when used herein, means consisting of, regarding, relevant to, reflecting, describing, concerning, or factually connected with the matter discussed.
5. The term "document," when used herein, means all originals of any nature whatsoever, identical copies, and all non-identical copies thereof, pertaining to any medium upon which intelligence or information is recorded in your possession, custody, or control regardless of where located.
6. Whenever these interrogatories request Ryland to "identify" a natural person, Ryland shall specify:
 - (a) the person's full name;
 - (b) his/her present employer and position or title; and
 - (c) present business and home address and telephone numbers.

RECEIVED

FEB 07 2017

SC Court of Appeals

If the current business or home address and telephone numbers are unknown, Ryland shall furnish the last known business or home address and telephone numbers.

7. Whenever these Interrogatories request Ryland to "identify" an entity other than a natural person, Ryland shall specify:

- (a) the name of the entity, and
- (b) its present business address.

8. Whenever these Interrogatories request Ryland to "identify" documents, Ryland shall state:

- (a) the type of document (e.g., letter, memorandum, telegram);
- (b) its author and originators;
- (c) its date or dates;
- (d) all addressees and recipients;
- (e) its present location or custodian; and
- (f) its subject matter or topic.

Also state whether such documents are in Ryland's possession, and when, how, and from whom Ryland initially obtained the documents. In lieu of a full identification of any document, the document may be furnished to Plaintiff, clearly specifying to which Interrogatory that document is responsive. Documents to be identified and/or produced shall include those in the possession, custody, and control of Ryland and all other documents of which Ryland has knowledge.

9. Whenever these Interrogatories request Ryland to "identify" a communication, Ryland shall indicate:

- (a) the date and place where they were made;
- (b) identify the person or persons who participated in the communication, in addition to all the persons present;
- (c) the nature and substance of the communication; and
- (d) indicate the medium of communication.

If the communication was written, reported, or referred to in any document, identify or produce the document.

INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to have knowledge concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.
3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

4. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.
5. If you identified an expert witness in response to the above interrogatory, please state whether or not any of these expert witnesses has provided a written report. If so, please attach a copy of any such report.
6. For each person known to the parties or counsel to have knowledge concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.
7. If the defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and pleading reflecting the correct information.
8. Describe in detail any inspections, investigations, testing and/or other analysis performed by you or at your behest with respect to any alleged construction defects or foundation issues at 1502 Marsh Reed Court, Hanahan, Berkeley County, South Carolina (the "Home"), or any other matters alleged in the Complaint and/or other pleadings in this matter, and with respect to each such inspection, investigation, testing, and/or analysis, state who performed such inspection, investigation, testing, and/or analysis; when such inspection, investigation, testing, and/or analysis was performed; at whose request or direction such inspection, investigation, testing, and/or analysis was performed; and the result or findings of such inspection, investigation, testing, and/or analysis.
9. Provide a detailed account of any complaints, formal or informal, received by Ryland, regarding any alleged construction issue, construction defect, punch list item, or warranty item at

the Home. As part of your Answer please provide the dates of all such complaints, identify the person making each complaint, and identify any and all records associated with each said complaint.

10. For the past ten ("10") years, provide a detailed account of any complaints, formal or informal, received by Ryland in connection with foundation problems, ground settlement problems, or cracks in concrete foundations at The Reserve at Tanner Plantation.

11. For the past ten ("10") years, provide a detailed account of any complaints, formal or informal, received by Ryland in connection with foundation problems, ground settlement problems, or cracks in concrete foundations within 1 mile of the Home.

12. Do you contend that any person or entity other than you, is, or may be, liable in whole or in part for the claims asserted against you in this lawsuit? If so, state the full name and address of each person or entity, the legal basis for your contention, the facts or evidence upon which your contention is based, and whether or not you have notified each such person or entity of your contention.

13. Please list the names, addresses and telephone numbers of any expert witnesses whom you propose to use in the trial of this case and provide the following information:

- a. The subject matter as to which each such person has been retained or specifically employed by you;
- b. The expert's profession, occupation, employer, and field of expertise;
- c. The substance of the facts and opinions about which each alleged expert is expected to testify and a summary of the grounds for each opinion (attach to your answers to these Interrogatories a report of the experts listed above which contains the information sought by this request);
- d. The dates and location of each test, analysis or examination relating to this litigation conducted by each person or persons listed above and the examiner's conclusion as to the results of the test, analysis, or examination; and

- e. Whether you have ever employed the alleged expert or experts listed above as expert witnesses or as litigation consultants in other matters. If so, indicate the dates, the name of each case, the court, and the term number where appropriate.
14. State the date(s) when Ryland first became aware of any cracking in the concrete foundation and/or sheetrock at the Home.
15. Give a detailed description of the analysis and/or investigation conducted by Ryland and/or Billy Barnes in connection with Homeowners' September 2013, warranty request and Billy Barnes' September 2013 visit to the Home. As part of your Answer please give a detailed description of the results of any such analysis and/or investigation.
16. Identify each and every lawsuit or other legal action in which Ryland has been involved or is currently involved as a plaintiff, defendant, or witness, involving any property located in Hanahan, South Carolina. For each such lawsuit, identify the role of Ryland, whether plaintiff, defendant, witness, or deponent, and identify the court, jurisdiction, case number, final disposition (if the case has concluded), and nature of the case.
17. Identify all subcontractors used by Ryland in the construction of the Home. For each such subcontractor please provide the name, address, telephone number and scope of work performed.
18. Identify with specificity any and all industry standards you contend are applicable to this matter.
19. Please give a detailed description of Ryland's policies concerning when a homeowner, rather than Ryland, should incur the cost of investigating construction issues/defects discovered during the Ryland warranty period.
20. Please give a detailed description of why Ryland requested that the Homeowners hire an engineer to investigate the construction issues/defects at the Home. As part of your Answer, please

identify each and every person involved in Ryland's decision to request that Homcowner's hire an engineer to investigate the construction issues/defects at the Home.

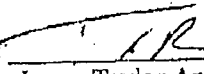
21. Has Ryland observed any condition at the Home that it believes constitutes a construction defect and/or a condition that should be repaired? If your Answer is "yes," please list each such construction defect and/or a condition.

22. For any affirmative defense you raise in your defensive pleadings, please state fully and with specificity the factual basis for each such defense and identify by name, address, and phone number all persons who have knowledge or information that supports each such defense.

23. Do you contend that there has been an insufficiency of service of process upon you in this case? If so, give a detailed explanation of how you were served and how that service was insufficient.

The foregoing Interrogatories are to be regarded as continuing and you are requested to provide promptly, by way of supplemental answers thereto, such additional information as may hereafter be obtained by you or any person or organization on your behalf, which will augment or otherwise modify any answers now given to the foregoing Interrogatories.

KERNODLE ROOT + COLEMAN

By: 

James Taylor Anderson, III
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422
(843) 795-7800
(843) 795-3032 Fax
tanderson@kernodlelaw.com

ATTORNEYS FOR PLAINTIFFS

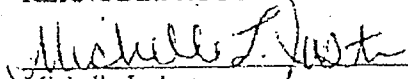
October 6, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, *Plaintiffs' First Set of Interrogatories to Defendant* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class to:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
ATTORNEY FOR DEFENDANT

KERNODLE ROOT + COLEMAN


Michelle L. Justman

October 16, 2015
Charleston, South Carolina

EXHIBIT B

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

CHRISTOPHER DUVALL and NATALIE
DUVALL)

Plaintiffs,)

v.)

THE RYLAND GROUP, INC.,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-08- 1213

PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION TO DEFENDANT

Plaintiffs Christopher and Natalie Duvall ("Homeowners") pursuant to South Carolina Rule of Civil Procedure 34, hereby requests that Defendant The Ryland Group, Inc. ("Ryland") produce for inspection and copying, within thirty (30) days from the date of this request, at the offices of Kernodle, Root & Coleman, 914 Folly Road, Suite 2, Charleston, South Carolina 29412, and permit the attorneys for Homeowners to inspect, copy or photograph the following documents or things which may be in the possession, custody or control of Ryland or its attorneys.

If in responding to these Requests for Production, Ryland withholds production of any document on the ground that it is privileged, please state with respect to each such document:

- (a) the type of document involved, and a general description of its contents;
- (b) the name, business and residence addresses, telephone numbers, and position of the individual from whom the document emanated;
- (c) the name, business and residence addresses, telephone numbers, and position of each individual to whom the document or a copy thereof was sent;
- (d) the date of the document;
- (e) the privilege upon which Ryland relies in withholding the document;

- (f) the facts upon which Ryland relies in support of its claim that the document is privileged; and
- (g) the names, business and residence addresses, telephone numbers, and positions or occupations of individuals known or believed by Ryland to have knowledge concerning the factual basis for Ryland's assertion of privilege with regard to the document.

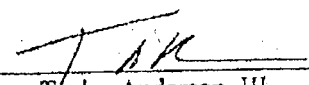
REQUEST FOR PRODUCTION

1. All documents and statements identified in Ryland's response to Homeowners' First Set of Interrogatories to Ryland.
2. All photographs, emails, motion pictures, videotapes, audio cassettes, drawings, plats, sketches, diagrams, specifications, details, reports, statements, affidavits, records, forms, writings, notes, memoranda, written messages, contracts, blueprints, or other documents or tangible things in possession, custody or control of Ryland or its agents, employees or managers that relate to any claim or defense in this case.
3. All plans, drawings, or blue prints for 1502 Marsh Reed Court, Hanahan, Berkeley County, South Carolina (the "Home").
4. Copies of any correspondence or communications between Ryland and Homeowners.
5. Copies of any correspondence or communications between Ryland and any previous owner of the Home.
6. All documents provided to Volkmar Consulting Services, LLC, or mentioned in Volkmar Consulting Services, LLC's August 6, 2015, "Report of Site Visit."
7. Copies of any correspondence or communication between Ryland and any other entity related to the matters at issue in this suit.

8. All documents generated as part of Homeowners' September 2013, warranty request and/or Billy Barnes' September 2013 visit to the Home.
9. All written policies or procedures concerning when a homeowner, rather than Ryland, should incur the cost of investigating construction issues/defects discovered during the Ryland warranty period.
10. All emails between or amongst any Ryland employees mentioning the House, Homeowner's 2013 warranty request, or any other matter relevant to the allegations of the Complaint.
11. All written policies or procedures concerning Ryland's handling of warranty claims.
12. All written policies, procedures or documents concerning Ryland's responsibility for warranty claims made by homeowners during the warranty period, when suit is not filed until after the warranty period.
13. All statements of witnesses or other persons, whether written, oral, taped, summarized or otherwise reproduced in any manner, relating to the events alleged in the Complaint.
14. All documents, statements, reports, summaries, letters, memoranda or other information provided, reviewed or prepared by any expert witnesses or investigator retained or consulted by you in connection with this matter, whether or not you intend to call the expert or investigator as a witness.
15. All advertisements, brochures, informational or promotional materials, whether stored electronically or in hard copy, related to the Home.
16. For the past ten ("10") years, provide a copy of all documents associated with any complaints, formal or informal, received by Ryland in connection with foundation problems, ground settlement problems, or cracks in concrete foundations at The Reserve at Tanner Plantation.

17. For the past ten ("10") years, provide a copy of all documents associated with any complaints, formal or informal, received by Ryland in connection with foundation problems, ground settlement problems, or cracks in concrete foundations within 1 mile of the Home.
18. A copy of any insurance policies potentially providing coverage for Homeowners' claims.
19. Produce the complete construction file for the Home.
20. Produce the complete warranty file for the Home.

KERNODLE ROOT + COLEMAN

By: 

James Taylor Anderson, III
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422
(843) 795-7800
(843) 795-3032 Fax
tanderson@kernodlelaw.com

ATTORNEYS FOR PLAINTIFFS

October 6, 2015

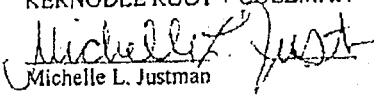
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, *Plaintiffs' First Requests for Production to Defendant* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class to:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
ATTORNEY FOR DEFENDANT

KERNODLE ROOT + COLEMAN


Michelle L. Justman

October 10, 2015
Charleston, South Carolina

KERNODLE
COLEMAN

James Taylor Anderson, III
tanderson@kernodlelaw.com

March 14, 2016

VIA EMAIL AND US MAIL

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401

RE: Christopher Duvall and Natalie Duvall v. The Ryland Group, Inc., *et al*
Berkeley County / Case No.: 2015- CP-08- 1213
Our File No. 77-35

Dear Thomas and Olesya:

I am in receipt of Defendant The Ryland Group, Inc.'s Answers to Plaintiffs' Interrogatories and Defendant the Ryland Group, Inc.'s Responses to Plaintiffs' Request for Production. I am writing to point out major deficiencies with Ryland's discovery responses.

DEFICIENCIES WITH DEFENDANT THE RYLAND GROUP, INC.'S RESPONSES TO
PLAINTIFFS' REQUEST FOR PRODUCTION

In September of 2013, Plaintiffs made a warranty claim relating to cracking in the foundation and walls at their home. Plaintiffs had extensive email correspondence with Billy Barnes, of Ryland, and provided Mr. Barnes with a report from Hawk Construction. Mr. Barnes indicated that the Hawk Construction report was provided to Ryland's "Main Office," for evaluation. Additionally, Mr. Barnes indicated that he had "ordered the file" for the Duvalls' home from "offsite" to check "compaction issues."

Unless I have overlooked something, Ryland has produced no emails at all between Mr. Barnes and the Duvalls, or between Mr. Barnes and any other Ryland personnel. Ryland did not produce the Hawk Construction report which was provided to Ryland by the Duvalls. According to Mr. Barnes the Hawk Construction report was provided to "Ryland management," but no email transmitting that report to "Ryland Management" has been produced, and no internal emails regarding Ryland's evaluation of that report have been produced. No correspondence has been produced regarding Mr. Barnes' "ordering" the construction file for the Duvalls' home and his "checking" the soil compaction at the Duvalls' home. All of these documents are responsive to Plaintiffs' First Requests for Production to Defendant.

Please immediately produce all emails sent by, or received by, bbarnes@ryland.com, for September and October of 2013. Additionally, please immediately produce all

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
March 14, 2016
Page 2

correspondence, reports, analysis or communications of any kind related to the Hawk Construction report or Billy Barnes' request for soil compaction data related to the Duvalls' home.

After reviewing Ryland's document production, I have also seen no photographs, measurements, notes, reports or communications of any kind related to the Duvalls' 2013 warranty claim or Billy Barnes' 2013, inspection of the Duvalls' home. Please immediately produce all such documentation. To the extent Ryland is withholding any documentation (including electronic documentation), please immediately produce a detailed privilege log.¹

The Duvalls' Request for Production No. 11 requests "All written policies or procedures concerning Ryland's handling of warranty claims." No such documents have been produced. Please produce all Ryland policies, procedures, handbooks, memorandum, or directives relating to how Ryland personnel are to handle warranty claims from homeowners.

DEFICIENCIES WITH DEFENDANT THE RYLAND GROUP, INC.'S ANSWERS TO PLAINTIFFS' INTERROGATORIES

Turning to The Ryland Group, Inc.'s Answers to Plaintiffs' Interrogatories, Ryland's answer to Interrogatory No. 1 does not even list Billy Barnes, the only Ryland employee who visited the home prior to this lawsuit, as a witness. Please immediately provide all current contact information for Billy Barnes.

Next, Interrogatory No. 10, requests, for the past 10 years, any complaints related to foundation problems in Tanner Plantation. This is a narrowly tailored interrogatory limited to the at-issue neighborhood and the at-issue construction defect. The conditions in the area are an important issue in this suit and other foundation issues in the area are obviously reasonably calculated to lead to the discovery of admissible evidence. Please immediately and fully answer Interrogatory No. 10.

Interrogatory No. 15, asks for a detailed description of Ryland's investigation of the Duvalls' 2013, warranty request and Billy Barnes' 2013, visit to the home. Ryland's answer directs the Duvalls' to Ryland's document production. However, Ryland's documents do not contain any description of the investigation conducted in response to the Duvalls' warranty claim and do not contain any description of Billy Barnes' investigation. Please immediately and fully answer Interrogatory No. 15.

¹No documents or information related to the Duvalls' 2013, warranty claim are privileged so I trust Ryland is not claiming a privilege related to what should have been a routine warranty investigation performed years prior to litigation. However, given Ryland's complete failure to produce documents related to its 2013 warranty investigation, and out of an abundance of caution, please immediately produce a detailed and complete privilege log.

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
March 14, 2016
Page 3

RYLAND'S PERIODIC SITE VISITS

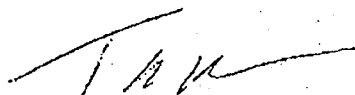
Per Judge Nicholson's order, Ryland conducted a site visit on March 7, 2016. Ryland's engineering expert took multiple measurements at the home. My understanding is that Ryland will continue to make these periodic visits. Please supplement Ryland's discovery responses after each such visit so that the Duvalls will have the measurements taken by Ryland's experts.

COLUMBIA NATIONAL RISK RETENTION GROUP, INC.

Please confirm that Ryland does not consider Columbia National Risk Retention Group, Inc., as an appropriate party to this case and that Ryland will not raise any defense to liability based on Columbia National Risk Retention Group, Inc.'s absence from the case. If Ryland intends to raise any defense to liability based on Columbia National Risk Retention Group, Inc.'s being the appropriate defendant I need to amend the complaint to add that entity.

Please accept this letter as the Duvalls' attempt, pursuant to SCRCP 11, to resolve this matter prior to filing a Motion to Compel. In order to avoid a Motion to Compel please provide the requested information within ten (10) days of your receipt of this letter. Please feel free to call me with any questions or concerns.

KERNODLE COLEMAN



James Taylor Anderson, III

JTAM/mj

914 Folly Road, Suite 2
P.O. Box 13897
Charleston, SC 29422-3897
Phone (843) 795-7800
Fax (843) 795-3032

**KERNODLE
COLEMAN**
ATTORNEYS AT LAW

James Taylor Anderson, III
tanderson@kernodlelaw.com

July 27, 2016

The Honorable Mary P. Brown
Berkeley County Clerk of Court
300 California Avenue
Moncks Corner, SC 29461

RE: Chris Duvall and Natalie Duvall v. The Ryland Group, Inc. AND The Ryland Group, Inc.
v. Land Site Services, Inc., Carolina Consulting Services, Inc., Higdon Concrete, LLC, A.C.
Construction, Inc., and Stark Truss Company, Inc. ak/a Stark Truss Company of
Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc.
Berkeley County / Case No.: 2015-CP-08-1213
KC File No.: 77-35

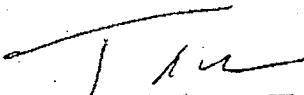
Dear Ms. Brown:

Enclosed for filing, please find an original and one (1) copy of *Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Reconsider, Amend and/or Alter Order Denying its Motion to Compel Arbitration* in the above referenced matter. Kindly file the original and return a date-stamped copy of the Memorandum to me in the envelope provided for your convenience.

Also Enclosed for filing, please find an original and one (1) copy of Plaintiffs' *Motion to Compel* against Defendant, The Ryland Group, Inc. in the above referenced matter. Also enclosed is a Motion and Order Information Form and Cover Sheet, together with our firm check in the amount of \$25.00 in payment of the required fee. Upon filing, please return date-stamped copy of the Motion to me in the envelope provided for your convenience.

Thank you for your assistance in this matter. Should you have any questions or require additional information, please do not hesitate to contact me.

KERNODLE COLEMAN



James Taylor Anderson, III

JTAIII/mlj
Enclosures

kernodlelaw.com



The Honorable Mary P. Brown

July 27, 2016

Page 2

cc: Thomas C. Hildebrand, Jr., Esquire / Olesya V. Vaskevich, Esquire
John E. Rogers, II, Esquire / C. Reed Teague, Esquire
Mark S. Barrow, Esquire / Christy E. Mahon, Esquire
James E. Scott, IV, Esquire / Perry Buckner, Esquire / Camden Hodge, Esquire
Kevin W. Mims, Esquire / Caroline C. McIntosh, Esquire
Patrick T. Morrissey, Esquire

Common Pleas

Clerk : Mary P. Brown
300 B California Avenue
Moncks Corner, SC 29461
Phone:(843) 719-4400 Fax:(843) 719-4509

Received From: Anderson, James Taylor III
914 Folly Road, Suite 2
Charleston, SC 29412

Date: 8/ 3/2016
Receipt #: 6069543
Clerk: c08kclarke

Paying for: Duvall, Christopher

Transaction Type: Payment

Reference #: 22130

Payment Type: Check \$25.00

Comment:
Non-Refundable

Total Paid: \$25.00

You may check the status of your Berkeley case at:

<http://www.sccourts.org/caseSearch/>

Case #	Caption	Previous Balance	Amount Paid	Balance Due
2015CP0801213	Christopher Duvall , plaintiff, et al VS The Ryland Group, Inc , defendant, et al	\$25.00	\$25.00	\$0.00
Total Cases: 1		\$25.00	\$25.00	\$0.00

EXHIBIT D
(Appellant's Motion to Strike)

RECEIVED
FEB 07 2017
SC Court of Appeals



Berkeley County 9th Judicial Circuit Public Index



[Berkeley County Home Page](#) [South Carolina Judicial Department Home Page](#) [SC.GOV Home Page](#)

Switch View

Christopher Duvall , plaintiff, et al VS The Ryland Group, Inc , defendant, et al					
Case Number:	2015CP0801213	Court Agency:	Common Pleas	Filed Date:	05/20/2015
Case Type:	Common Pleas	Case Sub Type:	Constructions 100	File Type:	Jury
Status:	Appeal	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:		Disposition Date:		Disposition Judge:	
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Duvall, Christopher	Amended Consent Order for Substiution of Counsel	Filing		10/18/2016-15:32		
Duvall, Christopher	Consent Order for Substitution of Counsel	Filing		09/21/2016-14:52		
Duvall, Christopher	Service/Proof Of	Filing		09/01/2016-15:49		
Duvall, Christopher	Notice Of Appeal	Filing		09/01/2016-15:49		
Anderson, James Taylor III	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		
Vaskevich, Olesya Vladimirovna	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		
Rogers, John Elliott II	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		
Barrow, Mark Steven	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		
Scott, James Edward IV	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		
Buckner, Perry McPherson IV	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		
Mims, Kevin W.	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		
McIntosh, Caroline Coward	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		
Morrissey, Patrick T.	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		

Hildebrand, Thomas C. Jr.	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/18/2016-10:56		
Hildebrand, Thomas C. Jr.	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
McIntosh, Caroline Coward	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
Morrissey, Patrick T.	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
Scott, James Edward IV	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
Buckner, Perry McPherson IV	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
Mims, Kevin W.	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
Barrow, Mark Steven	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
Rogers, John Elliott II	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
Vaskevich, Olesya Vladimirovna	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
Anderson, James Taylor III	8/29/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		08/17/2016-16:55		
Duvall, Christopher	Motion To Compel Defendant To Respond To Discovery	Motion		08/03/2016-09:13	08/30/2016-09:13	
Duvall, Christopher	Service/Certificate Of Service	Filing		08/03/2016-09:11		
Duvall, Natalie	Service/Certificate Of Service	Filing		08/03/2016-09:11		
Duvall, Natalie	Memorandum In Opposition To Ryland Group Inc.'s	Filing		08/03/2016-09:10		
Duvall, Christopher	Memorandum In Opposition To Ryland Group Inc.'s	Filing		08/03/2016-09:10		
Duvall, Christopher	Letter/Letter	Filing		08/01/2016-09:42		
Duvall, Christopher	Order/Other	Order		07/29/2016-14:23		
Duvall, Christopher	Letter/Letter	Filing		07/27/2016-10:56		
Land Site Services Inc.	Service/Certificate Of Service	Filing		07/13/2016-14:34		
Stark Truss Company Inc.	Service/Certificate Of Service	Filing		07/13/2016-14:34		
Stark Truss Company Of Summerville LLD	Service/Certificate Of Service	Filing		07/13/2016-14:34		
Stark Truss Inc.	Service/Certificate Of Service	Filing		07/13/2016-14:34		
Stark Truss Inc.	Response To Ryland Groups Motion To Alter Or Amend The Court	Filing		07/13/2016-14:32		
Stark Truss Company Of Summerville LLD	Response To Ryland Groups Motion To Alter Or Amend The Court	Filing		07/13/2016-14:32		
		Filing				

Stark Truss Company Inc.	Response To Ryland Groups Motion To Alter Or Amend The Court			07/13/2016-14:32		
Land Site Services Inc.	Response To Ryland Groups Motion To Alter Or Amend The Court	Filing		07/13/2016-14:32		
The Ryland Group, Inc	Service/Certificate Of Service	Filing		07/08/2016-09:20		
The Ryland Group, Inc	Motion/Reconsider	Motion		07/08/2016-09:19		
Duvall, Christopher	Order/Form 4	Order		06/30/2016-14:21		
Stark Truss Company Inc.	Memorandum In Opposition To Rylands Group Motion To Compel	Filing		06/27/2016-11:19		
Stark Truss Company Inc.	Affidavit/Affidavit of (Mike Dyer)	Filing		06/22/2016-11:17		
Rogers, John Elliott II	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Rogers, John Elliott II	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Rogers, John Elliott II	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Barrow, Mark Steven	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Barrow, Mark Steven	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Barrow, Mark Steven	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Mims, Kevin W.	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Mims, Kevin W.	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Mims, Kevin W.	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Buckner, Perry McPherson IV	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Buckner, Perry McPherson IV	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Buckner, Perry McPherson IV	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Scott, James Edward IV	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Scott, James Edward IV	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Scott, James Edward IV	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Morrissey, Patrick T.	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Morrissey, Patrick T.	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Morrissey, Patrick T.	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
McIntosh, Caroline Coward	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
		Action				

McIntosh, Caroline Coward	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication			06/14/2016-12:10		
McIntosh, Caroline Coward	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Anderson, James Taylor III	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Anderson, James Taylor III	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Anderson, James Taylor III	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Vaskevich, Olesya Vladimirovna	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Vaskevich, Olesya Vladimirovna	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Vaskevich, Olesya Vladimirovna	6/27/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		06/14/2016-12:10		
Land Site Services Inc.	Service/Certificate Of Service	Filing		06/08/2016-13:45		
Land Site Services Inc.	Motion/Compel	Motion		06/08/2016-13:43	06/16/2016-13:43	
Duvall, Natalie	Service/Certificate Of Service	Filing		04/29/2016-14:08		
Duvall, Christopher	Service/Certificate Of Service	Filing		04/29/2016-14:08		
Duvall, Christopher	Memorandum In Opposition To Motion To Compel Arbitration	Filing		04/29/2016-14:07		 
Duvall, Natalie	Memorandum In Opposition To Motion To Compel Arbitration	Filing		04/29/2016-14:07		
A.C. Construction Inc.	Certificate/Certificate Of Mailing	Filing		04/25/2016-09:40		
A.C. Construction Inc.	Answer/Answer	Filing		04/25/2016-09:40		
A.C. Construction Inc.	Service/Certificate Of Service	Filing		04/04/2016-15:13		
A.C. Construction Inc.	Notice/Notice of Appearance	Filing		04/04/2016-15:13		
Duvall, Christopher	Service/Certificate Of Service	Filing		03/31/2016-14:57		
Duvall, Christopher	Motion/Compel	Motion		03/31/2016-14:57	06/27/2016-14:57	
A.C. Construction Inc.	Certificate/Certificate Of Mailing	Filing		03/28/2016-10:46		
A.C. Construction Inc.	Notice/Notice of Appearance	Filing		03/28/2016-10:45		
Carolina Consulting Engineers Inc.	Service/Certificate Of Service	Filing		03/28/2016-10:33		
		Filing				

Carolina Consulting Engineers Inc.	Answer/Answer To The Ryland Group Third Party Complaint			03/28/2016-10:33		
Higdon Concrete LLC	Service/Affidavit Of Service S/C	Filing		03/18/2016-14:36		
A.C. Construction Inc.	Service/Affidavit Of Service S/C	Filing		03/18/2016-14:36		
The Ryland Group, Inc	Affidavit of Michael Boyle	Filing		03/17/2016-12:23		
The Ryland Group, Inc	Service/Certificate Of Service	Filing		03/17/2016-12:23		
The Ryland Group, Inc	Memo/Memo in Support	Filing		03/17/2016-12:23		
The Ryland Group, Inc	Service/Certificate Of Service	Filing		03/17/2016-12:22		
The Ryland Group, Inc	Motion/Compel Arbitration	Motion		03/17/2016-12:22	06/30/2016-12:22	   
Stark Truss Company Inc.	Service/Affidavit Of Service S/C	Filing		02/10/2016-13:39		
Carolina Consulting Engineers Inc.	Service/Affidavit Of Service S/C	Filing		02/10/2016-13:38		
The Ryland Group, Inc	Order Granting Motion to Compel	Order		01/21/2016-16:09		
Carolina Truss Systems Inc.	Service/Certificate Of Service	Filing		01/21/2016-14:18		
Stark Truss Inc.	Service/Certificate Of Service	Filing		01/21/2016-14:18		
Stark Truss Company Inc.	Service/Certificate Of Service	Filing		01/21/2016-14:18		
Stark Truss Company Of Summerville LLD	Service/Certificate Of Service	Filing		01/21/2016-14:18		
Stark Truss Inc.	Answer/Answer To Third Party Complaint	Filing		01/21/2016-14:17		
Stark Truss Company Of Summerville LLD	Answer/Answer To Third Party Complaint	Filing		01/21/2016-14:17		
Stark Truss Company Inc.	Answer/Answer To Third Party Complaint	Filing		01/21/2016-14:17		
Carolina Truss Systems Inc.	Answer/Answer To Third Party Complaint	Filing		01/21/2016-14:17		
Land Site Services Inc.	Service/Certificate Of Service	Filing		01/19/2016-15:21		
Land Site Services Inc.	Answer/Answer To Third-Party Complaint Of Ryland Group	Filing		01/19/2016-15:20		
Vaskevich, Olesya Vladimirovna	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-15:37		
Vaskevich, Olesya Vladimirovna	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-15:37		
		Action				

Rogers, John Elliott II	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication			12/31/2015-15:37		
Rogers, John Elliott II	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-15:37		
Anderson, James Taylor III	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-15:37		
Anderson, James Taylor III	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-15:37		
Anderson, James Taylor III	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-14:46		
Anderson, James Taylor III	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-14:46		
Rogers, John Elliott II	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-14:46		
Rogers, John Elliott II	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-14:46		
Vaskevich, Olesya Vladimirovna	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-14:46		
Vaskevich, Olesya Vladimirovna	1/11/2016_MOTHEA_Roster/Notice of Motions Roster Publication	Action		12/31/2015-14:46		
The Ryland Group, Inc	Service/Certificate Of Service	Filing		12/31/2015-12:04		
The Ryland Group, Inc	Motion/Compel	Motion		12/31/2015-12:03		
Land Site Services Inc.	Service/Acceptance Of Service	Filing		12/21/2015-09:16		
The Ryland Group, Inc	Answer/Amended Answer/Third-Party Complaint	Filing		12/10/2015-08:10		
The Ryland Group, Inc	Third-Party Summons	Filing		12/10/2015-08:09		
The Ryland Group, Inc	Consent Order Allowing the Amended Answer of	Filing		12/04/2015-11:44		
The Ryland Group, Inc	Service/Certificate Of Service	Filing		11/12/2015-16:30		
The Ryland Group, Inc	Motion to Amend Answer	Motion		11/12/2015-16:29	12/04/2015-16:29	  
The Ryland Group, Inc	Service/Certificate Of Service	Filing		07/28/2015-10:42		
The Ryland Group, Inc	Answer/Answer	Filing		07/28/2015-10:35		
Duvall, Christopher	Filing/Case File	Filing		05/22/2015-15:33		
Duvall, Christopher	ADR/Alternative Dispute Resolution (Workflow)	Action		05/20/2015-12:33		
Duvall, Christopher	Summons & Complaint	Filing		05/20/2015-12:33		
Duvall, Christopher	Filing/Case File	Filing		05/20/2015-10:30		

CMSWeb 6.1 © 2013 South Carolina Judicial Department • All rights reserved

EXHIBIT E

(Appellant's Motion to Strike)

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Christopher Duvall and Natalie Duvall,
Plaintiffs,

vs.

The Ryland Group, Inc.
Defendant.

The Ryland Group, Inc.,
Third-Party Plaintiff,

vs.

Land Site Services, Inc., Carolina
Consulting Engineers, Inc., Higdon
Concrete, LLC, A.C. Construction, Inc.,
and Stark Truss Company, Inc. a/k/a
Stark Truss Company of Summerville,
Ltd. a/k/a Stark Truss, Inc. d/b/a
Carolina Truss Systems, Inc.,
Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2015-CP-08-01213

FILED
2016 APR 29 PM 12:51
CLERK OF COURT
BERKELEY COUNTY

) **CHRISTOPHER AND NATALIE DUVALL'S**
) **MEMORANDUM IN OPPOSITION TO**
) **THE RYLAND GROUP, INC.'S MOTION TO**
) **COMPEL ARBITRATION**

Plaintiffs Christopher and Natalie Duvall (the "Duvalls") respectfully submit by their undersigned attorneys, the following Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, and show this Court that Defendant The Ryland Group, Inc., has waived any right to compel arbitration by conducting extensive discovery, including ongoing Court Ordered discovery. Further, even absent waiver, the at-issue arbitration provision does not comply with the South Carolina Arbitration Act, is unconscionable and unenforceable.

ATA

I. INTRODUCTION:

The Ryland Group, Inc. ("Ryland") constructed 1502 Marsh Reed Court, Hanahan, South Carolina, (the "Home") in 2006. Ryland provided a ten year transferrable written warranty (the "Warranty") to the original purchasers of the Home. In 2008 the Duvalls purchased the Home and the Warranty transferred to the Duvalls.

The Duvalls did not purchase the Home from Ryland and were not parties to the "Agreement of Sale dated February 12, 2006," attached as Exhibit "A" to the Affidavit of Michael Boyle¹. There is no colorable argument that the Duvalls are bound by any arbitration agreement contained in the February 12, 2006, "Agreement of Sale." The February 12, 2006, Agreement of Sale is irrelevant to the issues before this Court.

The Duvalls also did not sign the Warranty attached as Exhibit "B" to the Affidavit of Michael Boyle. Indeed, the Warranty Enrollment Form that Ryland contends was signed by the original purchasers does not even mention arbitration. (See Exhibit "B" to Affidavit of Michael Boyle). The arbitration provisions in the Warranty are not signed by the Duvalls or the original purchasers. Ryland contends that principles of equitable estoppel require the Duvalls to arbitrate their claims against Ryland.²

¹ The Affidavit of Michael Boyle was filed by Ryland on March 17, 2016. For purposes of this memo the Duvalls will cite to the Warranty attached as Exhibit B to said Affidavit. However, that copy of the Warranty contains some addendum that were not included in the Warranty provided to the Duvalls.

² While the end result is the same no matter what law applies, it is worth noting that it is well established in South Carolina that residential real estate sales do not involve interstate commerce and are not governed by the Federal Arbitration Act. See *Bradley v. Brentwood Homes, Inc.* 398 S.C. 447 (2012) (recognizing "intrastate nature of the sale and purchase of residential real estate" and "well-established real estate exception to the FAA"). The arbitration provisions at-issue in this case are not mentioned on the first page of the Warranty and are therefore invalid under South Carolina law. See S.C. Code Ann. § 15-48-10(a) ("Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.")

In October of 2013, the Duvalls made a warranty claim based on extensive cracking in the foundation and walls at the Home. Ryland sent a representative to the Home who fraudulently represented to the Duvalls that the problems were merely "cosmetic" in nature. Ryland denied the Duvalls' warranty claim.

On May 20, 2015, the Duvalls filed this action against Ryland. After the case was filed Ryland's counsel requested and received an expert report detailing the problems at the Home. On July 9, 2015, Ryland conducted an extensive investigation of the Home for the purposes of discovery. This site visit involved the Duvalls allowing Ryland's expert engineers, Mr. Thomas E. Vokmar, P.E., Mr. Robert C. Young, Jr., P.E., and Mr. Tyler Armentrout, all of Volkmar Consulting Services, LLC, onto the property, along with Ryland representative Mr. Mike Boyle and counsel for Ryland. During this July 9, 2015, discovery visit, Ryland conducted a walk through investigation, spoke with Christopher Duvall regarding the problems with the Home, obtained photographs, used a level to take measurements of the floors at the Home, and conducted a survey of the lot "to determine relative ground surface elevations" at the Home. Additionally, Ryland "performed five (5) hand auger borings with DCP testing to determine the soil consistency at one foot intervals." (See Exhibit 1).

On November 12, 2015, Ryland filed a Motion to Amend The Ryland Group, Inc.'s Answer to Plaintiff's Complaint, and sought to assert claims in this Court against Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company (hereinafter collectively the "Third-Party Defendants"). Based on representations made by Ryland's counsel that Ryland would not seek to compel arbitration, the Duvalls consented to Ryland's asserting claims against

the Third-Parties. On December 4, 2015, a Consent Order Allowing the Amended Answer of the Ryland Group, Inc., was entered and on December 10, 2015, Ryland filed The Ryland Group, Inc.'s Amended Answer to Plaintiffs' Complaint and Third-Party Complaint whereby it asserted claims against the Third-Party Defendants.

The Third-Party Defendants added to this case by Ryland have filed answers, have served interrogatories and requests for production on the Duvalls (which the Duvalls have answered), and have served 6 subpoenas on non-parties. Ryland has not objected to the Third-Parties' conduct of discovery and has received 108 pages of documents from the Duvalls through discovery. On December 4, 2015, Ryland served Defendant the Ryland Group, Inc.'s Answers to Plaintiffs' Interrogatories and Defendant the Ryland Group, Inc.'s Responses to Plaintiffs' Request for Production.

On December 14, 2015, Ryland served the Duvalls with Defendant The Ryland Group, Inc.'s Request for Production to the Plaintiffs. (Exhibit 2). Said Request for Production sought "authorization to place crack monitors into the cracks in the masonry on the home and to then leave them in place and undisturbed for the remainder of this litigation." (See Exhibit 2). The Duvalls objected to Ryland's request to affix "crack monitors" to the Home. (See Exhibit 3).

On December 31, 2015, Ryland filed The Ryland Group, Inc.'s Motion to Compel Against Plaintiffs, affirmatively availing itself of the judicial power of this Court. (Exhibit 4). Said Motion to Compel sought "an Order compelling Plaintiffs to allow Ryland's request for authorization to install crack monitors at the residence which is the subject of this litigation." The Motion to Compel came on for a hearing before the

Honorable Judge J.C. Nicholson on January 11, 2016. On that date Ryland, through counsel, requested that this Court order the Duvalls to allow Ryland to place measuring devices on the Home.³ Given Ryland's representations that "crack monitors" were necessary for it to properly defend this matter, Judge Nicholson ordered that Ryland "should be, and hereby is, authorized to place a reasonable number of monitors at any exterior cracks in the residence. Plaintiffs shall provide Defendant Ryland with reasonable access and with 24 hours notice to check the crack monitors on a reasonably periodic basis, but no more than 45 days between visits and also within one month of trial." (See Exhibit 5).⁴

Pursuant to the Order Granting Motion to Compel Ryland visited the home on January 28, 2016, and had its engineers affix monitors to the Home. On March 7, 2016, Ryland availed itself of the Court ordered opportunity to visit the Home and access its "crack monitors." On March 16, 2016, nine days after a Court ordered visit to the Home to retrieve data from its "crack monitors," Ryland filed the instant The Ryland Group, Inc.'s Notice of Motion and Motion to Compel Arbitration. Apparently, based on information Ryland gained during Court ordered discovery, Ryland has made a strategic decision to seek to compel arbitration.

Although Ryland refuses to provide the Duvalls with the data gathered from the Court Ordered crack monitors installed at the Home, Ryland has not removed the Court

³ Significantly, the discovery sought by Ryland is not available under the American Arbitration Association Consumer Rules, which would likely be applicable to any arbitration in this matter. See *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551 (Cl. App. 2003)(Upholding trial court's denial of motion to compel arbitration when evidence indicated that defendant "availed itself of discovery tools unavailable in arbitration, thereby prejudicing [plaintiff] by obtaining information . . . it might not have been able to otherwise obtain).

⁴ Ryland actually attempted to obtain a court order allowing it to place crack monitors throughout the *interior* of Plaintiffs' home but the Court refused to grant such an order.

Ordered crack monitors. Rather, while attempting to force the Duvalls to arbitrate, Ryland continues to conduct discovery via the Court Ordered crack monitors affixed to the Duvalls' home.

II. RYLAND HAS WAIVED ARBITRATION.

Ryland has taken advantage of the opportunity to conduct extensive discovery in this matter. Most importantly, Ryland has affirmatively sought and received the Court's assistance in obtaining discovery. Ryland sought - and received - a Court Order requiring the Duvalls to allow it to affix "crack monitors" to the Home, and requiring the Duvalls to allow Ryland access to those "crack monitors" at least every 45 days and within 1 month of trial. Nine days after collecting data from the Court Ordered "crack monitors," and after evaluating that data, Ryland has now decided that a jury should not hear this matter.

Having affirmatively taken advantage of the judicial systems' power to compel discovery, Ryland cannot now have the Court order Plaintiffs to arbitration. See *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 127 (Ct. App. 2007) ("To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took 'advantage of the judicial system by engaging in discovery.'"); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551 (Ct. App. 2003) (Upholding trial court's denial of motion to compel discovery when evidence indicated that defendant "availed itself of discovery tools unavailable in arbitration, thereby prejudicing [plaintiff] by obtaining information . . . it might not have been able to otherwise obtain).

Legal Standards

"It is generally held that the right to enforce an arbitration clause may be waived." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665 (Ct. App. 1999). "Determining whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125-126 (Ct. App. 2007).

"In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665 (Ct. App. 1999).

Generally, the factors our courts consider to determine if a party waived its right to compel arbitration are: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126 (Ct. App. 2007).

a. Whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration.

With regard to the first factor, "what is 'a substantial length of time' varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration." *Rhodes*, *supra* at 126. Here, Ryland waited nearly ten months after this action was filed to move to compel arbitration. Delays of less than a year give rise to waiver when accompanied by

substantial discovery. See *Rhodes* supra, (ten month delay between initiation of action and motion to compel arbitration resulted in waiver when extensive discovery conducted.).

b. Whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration.

Ryland conducted substantial discovery prior to seeking to compel arbitration. Perhaps most importantly, Ryland obtained Court ordered discovery prior to deciding it would move to compel arbitration. Compare *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125 (Ct. App. 2007) (refusing to compel arbitration when moving party "sought the circuit court's assistance in executing out-of-state subpoenas . . ."), with *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612 (2003)(upholding trial court's grant of motion to compel arbitration when the "parties had not availed themselves of the court's assistance.").

Since the Duvalls initiated this action Ryland has conducted three site inspections (one pursuant to a request by Ryland's counsel and two pursuant to Court Order); has taken extensive measurements of the Home, has conducted soil borings and taken soil samples from the property, has sought and received an order compelling discovery, and has affixed and monitored "crack monitors" at the House. While Ryland continues to keep the results of its Court Ordered site inspections secret, counsel for the Duvalls was also informed by Ryland's engineer that he used a "Swiss Hammer" to obtain data regarding the Duvalls' home during the Court Ordered March 7, 2016, site inspection.

Additionally, Ryland is responsible for the Third-Parties' presence in this litigation and has, without objection, benefited from the discovery conducted by the Third-Parties.

The Third-Parties have served discovery on the Duvalls and the Duvalls have answered and produced 108 pages of documents - to all parties - in response to said discovery. Rather than objecting to the Third-Parties' discovery to the Duvalls, Ryland has received the Duvalls' answers and document production. The Third-Parties have also served 6 subpoenas on non-parties.

c. Whether the non-moving party was prejudiced by the delay in seeking arbitration.

This factor overwhelmingly establishes that Ryland has waived its right to compel arbitration.

To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took advantage of the judicial system by engaging in discovery. This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken advantage of the judicial system, prejudice will likely not exist, and the law would favor arbitration; (2) if the parties conduct significant discovery, then the party seeking arbitration has taken advantage of the judicial system, prejudice will likely exist, and the law would disfavor arbitration. Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.

Under this analysis, it is difficult to conceive of how a party more "significantly" participates in discovery than by seeking, and receiving, a Court Order requiring physical attachment of monitoring devices to the Home of a litigant. Not only was this discovery order sought by Ryland, Ryland actually did affix monitoring devices to the Duvalls' home and has visited the Home for the purpose of monitoring the devices. Now, apparently concerned with the results of its Court ordered monitoring program, Ryland has belatedly decided it should move to compel arbitration.

The South Carolina Courts have declined to compel arbitration when a party delays filing a motion to compel in order to gather information it may not be able to gather in arbitration. See *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551 (Ct. App. 2003)(Upholding trial court's denial of motion to compel arbitration when evidence indicated that defendant "availed itself of discovery tools unavailable in arbitration, thereby prejudicing [plaintiff] by obtaining information . . . it might not have been able to otherwise obtain).

Here, Ryland has sought, and obtained, discovery unavailable in arbitration. Ryland seeks to compel arbitration before the American Arbitration Association. This case, which involves a home warranty, would be subject to the American Arbitration Association's Consumer Arbitration Rules. (See AAA Consumer Arbitration Rules, R-1, attached hereto as Exhibit 6, stating that AAA Consumer Arbitration Rules are applied to cases involving "Warranties (home, automobile, product)"). Under the AAA Consumer Arbitration Rules, discovery is limited to the exchange of documents. (See AAA Consumer Arbitration Rules, R-22 Exchange of Information between the Parties, stating that the AAA Consumer Arbitration Rules ordinarily only allow for the exchange of documents and information and the identification of witnesses).

Ryland requested that this Court order the Duvalls to conduct discovery that would not be available in arbitration. That is an unequivocal waiver. Ryland cannot "have its cake and eat it to," by being allowed to take advantage of Court ordered discovery and then nonetheless have the case compelled to arbitration.

III. The Dispute Resolution Procedure in the Ryland Home Warranty Program Insured Limited Warranty is Unconscionable.⁵

The Warranty is a somewhat confusing document. It purports to be "insured" and administered by a "Claims Administrator," "Columbia National Risk Retention Group, Inc." (hereinafter "CN"). Pursuant to the dispute resolution procedure CN will "review and mediate" any claims under the Warranty. (See Warranty at Section B-5(c)). Although the Warranty portrays CN as a third-party "Claims administrator," who will mediate disputes between homeowners and Ryland, upon information and belief, CN is a division of Ryland. The first mention of arbitration in the Warranty appears on the 4th page where it states "This agreement includes procedures for *informal settlement of disputes*, including mediation and binding arbitration. . . ." (emphasis added). The actual dispute resolution procedures begin at Section B-5 and cover 3 type written pages.

Under South Carolina law, the dispute resolution procedures in the Warranty are unconscionable. South Carolina Courts will not enforce arbitration agreements that are part of an unconscionable dispute resolution procedure. See *Smith v. D.R. Horton, Inc.* 403 S.C. 10 (2013).

The Warranty is a contract of adhesion. "[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or

⁵ Importantly, regardless of whether the arbitration procedure in the Warranty is unconscionable, it is not binding on the Duvalls. Not only did the Duvalls not sign any arbitration agreement applicable to the Warranty, neither did the original purchasers. The Warranty Enrollment Form, which Ryland contends was signed by the original purchasers, does not mention arbitration. With regard to the Warranty, Ryland does not even have a valid signed arbitration agreement with the original purchasers, much less a basis to require the Duvalls to arbitrate through "equitable estoppel."

leave-it' basis with terms that are not negotiable." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27 (2007).

In South Carolina, when an arbitration clause in a contract of adhesion attempts to waive important rights, the arbitration clause is unenforceable. See *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 15 (2013)(upholding trial court's finding that arbitration clause was unconscionable when home warranty attempted to "disclaim implied warranties" and waive "important remedies," and limit monetary damages.). Here, the first page of the Warranty purports to disclaim liability for consequential and incidental damages. The first page of the Warranty also disclaims the "housing merchant implied warranty or any other warranties, express or implied . . ." Section B-3(a) of the Warranty gives Ryland the unilateral right to eliminate liability for monetary damages altogether by unilaterally electing to repair the Home. Under South Carolina law, a homebuilders attempt to completely shield itself from monetary damages is unconscionable. See *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 15 (2013) (finding arbitration provision unconscionable when homebuilder "claimed it could not be liable for monetary damages of any kind."). The Warranty prohibits compensation for "costs of shelter, transportation, food, moving and storage" and "other incidental expenses related to relocation during repairs."

The most egregious provision in the Warranty is Section B-6, which reads as follows:

If You institute arbitration proceedings or litigation against Us or CN for any obligation arising or claimed to have arisen under this Agreement before giving the proper notices and opportunities to cure warranty defects or before finishing the mediation process, as provided under this Agreement, You agree to indemnify US and CN, as appropriate, for all costs and expenses of such arbitration, including reasonable attorney's fees,

regardless of whether You have an otherwise legitimate claim under this Agreement.⁶

The Warranty seeks to discourage homeowners from making "otherwise legitimate" warranty claims by exposing them to financial devastation if they incorrectly navigate the complicated dispute resolution process outlined in the Warranty or fail to participate in the sham mediation procedure administered by CN. Under this procedure homeowners are prohibited from filing suit to challenge the validity of the arbitration procedure itself. If a homeowner does file a lawsuit and challenge the arbitration procedure, Ryland purports to have the right to force that homeowner to pay Ryland's attorneys' fees "regardless of whether" the homeowner has "an otherwise legitimate claim under" the Warranty. Ryland purports to have the right to financially destroy any homeowner who brings a lawsuit to determine the enforceability of the at-issue arbitration provision, *regardless of whether the homeowners' home is falling apart*. This provision prevents South Carolina homeowners from accessing the Courts to determine the validity of an arbitration provision, is unconscionable, and unenforceable.

Additionally, under Section B-5(g) of the Warranty the arbitrator has the ability to award attorney's fees and costs ***against the homeowner***. There is no provision that the homeowner's warranty claim must be brought in bad faith or be frivolous in order to expose the homeowner to liability for attorney's fees and costs. If the homeowner makes a claim under the Warranty, and ultimately loses, the homeowner faces the prospect of being liable for tens of thousands (or more likely hundreds of thousands) of dollars in

⁶ This provision likely violates S.C. Code Ann. § 32-2-10, "Hold harmless in certain construction contracts" as it purports to require a homeowner to indemnify a general contractor for the general contractor's negligent construction.

attorneys' fees and arbitration fees. A home is the biggest investment a family will likely ever make. It is inconceivable that Ryland puts homeowners in the position of facing financial devastation for attempting to address construction defects in their homes.

Courts from around the country have invalidated arbitration provisions requiring unsuccessful consumers to pay the prevailing corporation's attorney's fees. See *DeVito v. Autos Direct Online, Inc.*, 37 N.E.3d 194, 203-205 (2015-Ohio-3336) ("Loser Pays" provision in consumer arbitration provision is unconscionable. "The prospect of incurring these onerous costs and fees has the chilling effect of stopping cold a substantial number of potential claimants from seeking to vindicate their statutory rights . . . for most persons who would utilize this disguised remedy, an adverse ruling could spell financial disaster. . . . We further conclude the loser-pays provision, which requires the nonprevailing party to pay attorney fees even if the consumer has not filed the action in bad faith, is against public policy.") (Exhibit 8); See also *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash.2d 598, 606, 293 P.3d 1197, 1201 (Wash. 2013) ("Because the 'loser pays' provision serves to benefit only [Defendant] and, contrary to the legislature's intent, effectively chills [the consumer's] ability to bring suit . . . it is one-sided and overly harsh. Therefore, we hold it to be substantively unconscionable.").

The punitive nature of Section B-5(g) and Section B-6 would require homeowners to risk financial ruin in order to address construction defects in their homes. Ryland would be free to simply ignore all warranty requests (as they ignored the Duvalls) and dare homeowners to file suit. This is unconscionable and against public policy.

IV. CONCLUSION

Ryland has participated in discovery, obtained a Court Order requiring the Duvalls to allow it to attach monitoring devices to the Home, conducted Court Ordered testing at the Home, and has filed multiple claims in this Court against the Third-Parties. Ryland has clearly waived arbitration.

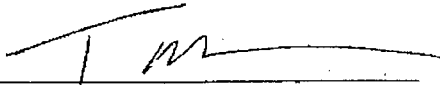
Additionally, the only arbitration agreement that even arguably applies to this action is the Warranty that the Duvalls did not sign. The Warranty does not meet the requirements of S.C. Code Ann. § 15-48-10(a). The Warranty disclaims all implied Warranties; disclaims liability for consequential or incidental damages; allows Ryland to escape monetary damages all together by electing to attempt repair; requires a homeowner who fails to comply with the complicated dispute resolution scheme to indemnify Ryland for litigation and arbitration expenses; and requires the unsuccessful homeowner to pay Ryland's attorneys' fees and expenses of litigation. The dispute resolution provisions in the Warranty are unconscionable.

For all of the above reasons the Duvalls pray that this Court DENY Rylands' Motion to Compel Arbitration.

SIGNATURE ON FOLLOWING PAGE

KERNODLE COLEMAN

By:


James Taylor Anderson, III
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422-3897
(843) 795-7800
(843) 795-3032 Fax
tanderson@kernodlelaw.com

ATTORNEYS FOR PLAINTIFFS

April 27, 2016

Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, *Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class to:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poé Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
**ATTORNEY FOR DEFENDANT/3rd
PARTY PLAINTIFF THE RYLAND GROUP**

John E. Rogers, II, Esquire
C. Reed Teague, Esquire
The Ward Law Firm, PA
P.O. Box 5663
Spartanburg, SC 29304
**ATTORNEYS FOR 3rd-PARTY DEFENDANT
LAND SITE SERVICES, INC.**

James E. Scott, IV, Esquire
Perry Buckner, Esquire
Camden Hodge, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
**ATTORNEYS FOR 3rd PARTY DEFENDANT
CAROLINA CONSULTING ENGINEERS, INC.**

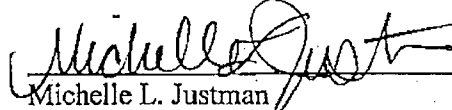
Mark S. Barrow, Esquire
Christy E. Mahon, Esquire
Sweeny, Wingate & Barrow, PA
1515 Lady Street
P.O. Box 12129
Columbia, SC 29211
**ATTORNEYS FOR 3RD PARTY DEFENDANT
STARK TRUSS COMPANY, INC. a/k/a STARK
TRUSS COMPANY OF SUMMERVILLE,
LTD. a/k/a STARK TRUSS, INC. d/b/a
CAROLINA TRUSS SYSTEMS, INC.**

Kevin W. Mims, Esquire
Caroline C. McIntosh, Esquire
Luzuriaga Mims, LLP
50 Immigration St., Suite 200
Charleston, SC 29403
**ATTORNEYS FOR 3RD PARTY DEFENDANT AC
CONSTRUCTION, INC.**

FILED
APR 29 PM 12:57
CLERK OF COURT
SOUTH CAROLINA

April 21, 2016
Charleston, South Carolina

KERNODLE COLEMAN


Michelle L. Justman

**VOLKMAR
CONSULTING
SERVICES, LLC**
Environmental • Facilities • Materials

August 6, 2015

Mr. Thomas C. Hildebrand, Jr.
Partner

Parker Poe Attorneys & Counselors at Law
200 Meeting Street
Charleston, SC 29401-3156
Transmitted Via Email: tomhildebrand@parkerpoe.com

Subject: Report of Site Visit
1502 Marsh Reed Court
Hanahan, South Carolina
VCS Project Number 15-2333

Dear Mr. Hildebrand:

We are pleased to submit this report of our observations for the subject site. The purpose of this assessment was to document the conditions at 1502 Marsh Reed Court (herein referred to as 'subject site') relative to cracking in the concrete slab. This report presents our understanding of the project, a summary of our observations, an evaluation of the data, and our general recommendations.

PROJECT INFORMATION

Our understanding of the project is based on a brief telephone conversation with you, our recent site visit, and our experience with similar projects.

The subject site is a one-story, wood framed single family residential structure (with a finished room over the garage - F.R.O.G.). According to Ryland personnel, the home was purchased new by the original owners (Thomas & Ginger Czajkowski) and the construction was completed in approximately 2006. David C. & Natalie L. Duvall are listed as the current owners on the Berkeley County Property Card and reportedly purchased the home in January 2009 according to the Berkeley County Tax Assessor.

VCS understands that the current homeowners noticed cracking of the master bedroom drywall, located on the left side of the house (referenced as facing the house from the street), in approximately November 2013. The homeowners notified Ryland concerning the damage, which Ryland assessed as not warranty covered issues. Subsequently, the homeowners contracted Applied Building Sciences, Inc. (ABS) to perform a site visit concerning the cracking.

VCS has been provided with a copy of their report, titled 'Duval Residence'; dated April 27, 2015. The ABS report states that the cracking in the slab and master bedroom drywall exceed the *South Carolina Residential Construction Standards* (SCRCS); specifically the *Drywall and Plaster Standards* (which allow for cracks up to 1/16" in width) and the *Masonry & Concrete*

PO BOX 2485 • GOOSE CREEK • SOUTH CAROLINA • 29445
(843) 718-1032 • FAX (843) 718-1033
INFO@VOLKMARCONSULTING.COM

Ryland 00139

Standards (which allow for cracks up to 5/16-inch wide with vertical differences across the crack edges of 5/16-inch). The ABS report concluded that 'the observed cracking of the drywall and slab on-grade are structurally significant. The 1-1/2" floor elevation difference across the master bedroom is excessive and is out of tolerance for slab construction as set forth by typical construction standards'. Based on the preliminary information collected, the observed cracking and nail pops in the drywall, the cracking of the slab on-grade, and the excessive floor slope in the master bedroom, are all most likely caused by foundation differential settlement..... If left unmitigated, further differential settlement of the slab will negatively affect the serviceability (i.e. comfort of the occupants) of the building and could eventually cause the home to be uninhabitable.' The construction standard referenced in the text quoted above is 'ACI 117 specifications for Tolerance for Concrete Construction Materials, and ACI 302.1R Guide for Concrete Floor and Slab Construction.'

VCS has also been provided with the following information from Ryland Homes:

- Copy of the 'Certificate of Occupancy' dated September 18, 2006 and the 'Letter of Acceptance for HUD Approved 10-Year Warranty', assigned to Thomas and Ginger Czajkowski; dated September 22, 2006;
- House Plans titled 'Ryland Homes-Brunswick Americana Series', prepared by R-K Engineers, and dated March 1, 2005. These drawings have been marked in handwriting as 'The Reserve-Lot 74-1502 Marsh Reed Court', presumably by Ryland personnel during the process of choosing options with the original buyer. The drawings state the foundation have been designed with an allowable soils bearing capacity of 2000 pounds per square foot (psf);
- A copy of a 'Pre-start Conference Checklist' dated May-22, 2006 and a copy of a 'Pre-Settlement Checklist', dated September 14, 2006. Each of these documents is signed by Rob Perrill from Ryland and the buyer, Ginger Czajkowski;
- A copy of an 'Original Trades List' for Chris Duvall, dated June 3, 2015;
- Copies of a 'Final Survey', prepared by Trico Engineering; dated September 19, 2006; a 'Foundation Survey showing Lot 74'; also prepared by Trico Engineering; dated June 20, 2006; and, a copy of a 'Plot Plan'; prepared by Trico Engineering, dated December 1, 2006; revised February 21, 2006.
- Copies of testing reports as follows, each prepared by Carolina Consulting Engineers Inc. (CCE): 'Report of Subgrade Observation', dated February 22, 2006, documenting the subgrade elevation observed was 36 inches below the finished soil subgrade elevation. The report further states the exposed soils were tan, brown, slightly silty sandy soils; 'Report of Field Density Testing', dated March, 14, 2006, documenting the test results at the 'front left residence corner', and 'back right residence corner', were compacted to 95 and 98 percent of the modified proctor, respectively; and 'Report of Hand Auger Borings', dated April 28, 2006, documenting the 'front right residence corner' testing encountered sandy soils and clayey sand soils with dynamic cone penetrometer (DCP) values (average of the last two readings) ranging from 7 to 11.5; and the 'back left residence corner' testing encountered the same soil types with average DCP values ranging from 6 to 11. The report conclude that the foundation soil are capable of supporting a net bearing pressure of 2500 psf;
- Copies of 'Service Requests' listed in the order they were supplied to VCS:
 - November 27, 2006, 4 pages (for Czajkowski);
 - December 12, 2006 (for Czajkowski);
 - March 12, 2007, 2 pages (for Czajkowski);
 - August 3, 2007 (for Czajkowski);

- November 5, 2013 (for Duvall)-which is noted as follows-'Inspect crack in control joint, drywall cracks and crown molding separations all in the master bedroom to determine warrantability.' No additional information concerning the inspection was noted on the form. This is the first mention of cracking in this area on any of the forms; and,
- A copy of 'Warranty Service Request Form for Tom & Ginger Czajkowski', dated November 1, 2006.

PROCEDURES

The purpose of this assessment was to document the conditions around the subject site relative to the cracking and provide our recommendations/conclusions concerning the likely cause/origin of the cracking. Additionally, VCS was asked to review the aforementioned ABS report.

Mr. Thomas E. Volkmar, P.E.; Mr. Robert C. Young, Jr., P.E.; and, Mr. Tyler Armentrout; of Volkmar Consulting Services, LLC (VCS) visited the site on July 9, 2015. Mr. Mike Boyle with Ryland and Mr. Tom Hildebrand were present; as was Mr. Duvall (with legal representation) and provided access to the home.

During the site visit, VCS personnel conducted a walk through, and obtained photographs of noteworthy observations. VCS personnel used a 6-foot level for use on the floors and walls; an acrylic, translucent crack width gauge measured in millimeters (1-inch equals approximately 25.4-mm; 0.5-inch equals approximately 12.7-mm; 5/16-inch equals approximately 7.9-mm); and, a Stanley FatMax® survey level and rod to determine relative ground surface elevations along the left side of the house and a portion of the rear.

FIELD WORK/OBSERVATIONS

The directions (left, right) used throughout this report are referenced as facing the building/subject site from the front. Below are noteworthy observations and a summary of data obtained:

- VCS personnel performed five (5) hand auger borings with DCP testing to determine the soil consistency at one foot intervals. The borings were positioned around the house as shown on the attached Figure 1, 'Site Plan'. The hand auger borings were advanced by manually twisting a bucket style auger into the soil to the test depth. The penetrometer's conical point was first seated 2-inches to penetrate loose cuttings and then driven two additional 1-3/4-inch increments with blows from a 15 pound hammer falling 20-inches. ASTM Special Publication #399 indicates the use of the DCP as follows: *"The dynamic penetrometer described in this paper was developed primarily as a verification or control penetrometer to check individual foundations during construction where a subsurface investigation has been made utilizing standard split spoon penetration methods, and laboratory shear strength and consolidation tests and analyses have been performed on undisturbed samples. A secondary use is the field investigation of subsurface conditions for lightly loaded structures where local experience from previous field investigations and laboratory analysis have established narrow limits of the strength parameters and consistencies; here again it is a verification tool to be used for an economical foundation analysis."*
- VCS also obtained selected bulk, grab sample from the auger borings and submitted them to our laboratory for classification testing. The testing included the natural moisture content, percent passing the #200 sieve; and Atterberg Limits.

- VCS used the Stanley FatMax® survey level and rod to determine relative ground surface elevations along the right side of the house, at 10-foot intervals outward for 15-feet, and a portion of the rear, from the left rear corner to the center of the patio. The data is depicted on the attached Figure 2.
- VCS personnel walked the master bedroom and bathroom, the living and dining rooms, the kitchen, and the attic. During our walkthrough, VCS observed cracking of the left wall of the master bedroom, and several joints of the wall to ceiling trim. VCS also noted an area in the kitchen linoleum that appeared to be reflecting a crack in the underlying concrete slab (the linoleum was not removed so no crack was observed). The cracks in the master bedroom were measured using the acrylic crack width gauge to be approximately 2-mm (approximately 3/32-inch). The 6-foot level indicated the floor in the master bedroom was slightly sloping towards the rear. However, the carpeting may cause the level reading to be erroneous. No cracking was noted in the den or living room.
- VCS noted the left side of the exterior slab contained a control joint with cracking 13-feet from the rear of the house; and approximately 18-feet from the front of the house. VCS measured the cracks to be about 4.0-mm (approximately 5/32-inch); and, 1.5 to 2.0-mm wide (approximately 1/16 to 3/32-inch and less), respectively.
- VCS also noted the rear screened porch contained cracking with measured widths of between 2.5 and 3.0- mm; (approx. 7/64 and 1/8-inch). There were no discernable vertical elevation differences between the crack edges.
- VCS noted the edge of the rear yard contained a retaining wall at the property line. The wall was measured to have a maximum height of approximately 3-feet and tapered at the ends.

PROFESSIONAL OPINIONS AND RECOMMENDATIONS

The following sections present our general recommendations for the subject site.

- The DCP values obtained during our site work ranged from 3 to 20 plus. The lowest values were encountered in Boring HA-3 with DCP values ranging from 3 to 7. VCS compared the DCP data from the CCE report to our current data and noted the left rear corner of the house contained slightly lower DCP values.
- The soil classification testing indicated the soils from the ground surface to approximately 3-feet below the ground surface (bgs) would be classified using the Unified Soils Classification System (USCS) as clayey sand (SC). Only Boring HA-1 encountered sandy clay soils, at 3-feet bgs to 5-feet, that would be classified using the USCS as CL. Groundwater was not encountered during our field work.
- Our survey data used an assumed elevation of 100.00 feet as a benchmark (storm sewer manhole in the driveway). VCS determined there is a maximum of 3-feet of topographic relief (1V:5H) from the edge of the house out 15-feet, at the rear left corner of the house. However, in this area, the data shows the majority of the elevation change occurs beyond 5-feet from the edge of the house.
- VCS reviewed the relevant ACI standards discussed in the ABS report and the only reference to specifications concerning floor levelness/flatness discussed are for concrete within the initial 72 hours after placement. There are no specifications or tolerances for cracking, except the language in ACI 332R-84, *Guide to Residential Cast-in-Place Concrete*, Section 2.1, that states '...The required characteristics are governed by the intended use of the concrete, the conditions expected to be encountered at the time of placement, and the environmental factors affecting the use of the product.'
- VCS also reviewed the standards in the SCRCS and noted that Chapter I, Applicable Time Limits, assigns a 2-year time limit to the Drywall and Plaster standards, and an 8-year time

limit to the Masonry and Concrete standards. In regards to the Masonry and Concrete Standards, it should be noted they only apply to the following areas:

- The construction of a basement which may be either cast-in-place (poured) concrete or concrete block masonry installed on footings.
- The placing (pouring) of flat slab areas consisting of footings, basement and garage floors, stoops, patios, walks or drives.
- The veneering of the exterior of some structures with brick, stone or other masonry products.
- The construction of fireplaces and chimneys.
- As discussed in the ABS report, the SCRCS Masonry and Concrete Standards dictates that *'Cracks in garage slabs in excess of 5/16" in width or 5/16 " in vertical displacement shall be repaired.'* VCS did not measure any crack at the subject site to equal or exceed 5/16-inch (approximately 7.9-mm).
- Based on our observations at the time of our visit, the reported and observed cracking of the concrete slab in the master bedroom appears to be due to normal shrinkage cracking of the concrete slab exacerbated by an anomaly at the rear left corner of the house that may have caused slight differential movement.
- Slab movement is anticipated in the structural design and is typically a total of 1-inch with differential movement contributing approximately $\frac{1}{2}$ of the total movement. As the original positions of the as-built conditions were not documented (and are not typically documented for residential construction), VCS has no methods for quantifying total nor differential movement. Movement in excess of the above design values would likely result in more severe cracking, window failures, door failures, etc. than observed during our site visit.
- In most cases, slight movement of the slab dissipates over time until the affected soils achieve significant consolidation, and in the predominately sandy soils, the time period is typical measured in months rather than years. It is likely the anomaly, discussed above, occurred relatively soon after construction and it is our preliminary opinion it will likely have no further impact on the house. To confirm this preliminary opinion, VCS recommends that a crack gauge be placed over the largest crack, along the exterior left side of the slab, located 13-feet from the left rear corner of the house. The crack gauge should be regularly monitored over a period of 6-months to verify that significant consolidation has occurred and provide VCS data to further evaluate our opinions.
- Shrinkage cracking occurs when excess water of convenience, not used to hydrate cement, evaporates resulting in the concrete shrinking slightly. Restraint to shrinking, provided by the subgrade, reinforcement, or other portions of the structure, causes tensile stresses to develop in the hardened concrete. In many situations, shrinkage cracking during curing is inevitable and control joints are routinely used to direct the locations of the shrinkage cracks. Occasionally, shrinkage cracks do not follow the control joints. ACI 302.1R-04 *Guide for Concrete Floor Slab and Slab Construction* indicates that "some random cracking should be expected; a reasonable level might be random visible cracks to occur in 0 to 3% of the floor slab".
- VCS reviewed the provided structural drawings and noted the drywall distresses in the left wall of the master bedroom are positioned where a structural loading point is located. The associated drywall distresses may be related to the position of fasteners with particular structural elements of the loading point.
- If additional settlement or conditions different from those contained within this report are encountered, please contact VCS to evaluate.
- VCS should be present to document any remedial activities.

SUMMARY

- Based on our observations at the time of our visit, the areas of reported and observed cracking (which are within the recognized tolerances), likely resulted from the anomaly that we believe has reached significant consolidation, is likely caused by normal shrinkage cracking of the concrete slab and not of structural concern. To confirm this preliminary opinion, VCS recommends a crack gauge be installed across the cracking at the left rear corner, as discussed within the report.

REPORT QUALIFICATION

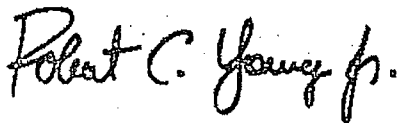
Our evaluation of the conditions is based on our understanding of the site and project information and the data obtained in our assessment, on the date of our visit. In evaluating the field and laboratory data, we examined previous correlations between data in building conditions similar to those at this site. The discovery of any differing conditions at the subject site, which deviate from the data outlined in this assessment, should be reported to us for our evaluation.

This report and all information attached is intended for use by our Client and is not intended to be used for any purpose by others unless specifically agreed to by VCS in writing. This assessment was performed using the degree of skill and care ordinarily exercised under similar conditions by reputable members of VCS's profession practicing in the same or similar locality at the time of performance. No other warranty, express or implied, is made or intended and the same are specifically disclaimed.

CLOSING

We appreciate the opportunity to be of service. If you have any questions concerning this report, please contact us at (843) 718-1032.

Sincerely,
VOLKMAR CONSULTING SERVICES, LLC



Robert C. Young Jr., P.E.
Operations Manager/Senior Engineer
SC Registration Number 17664

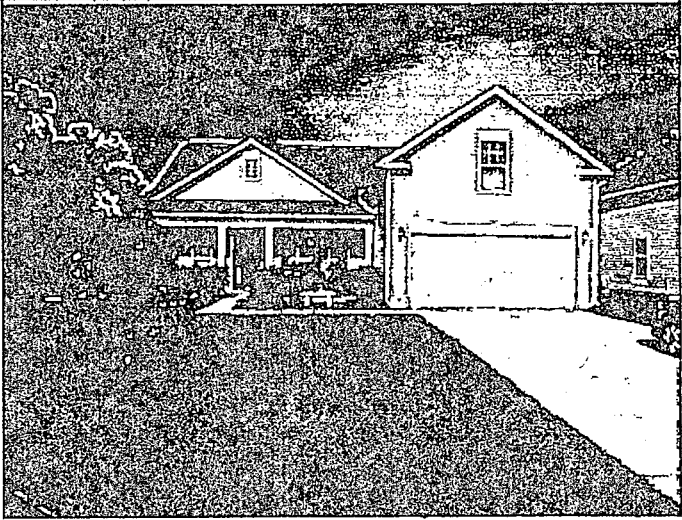


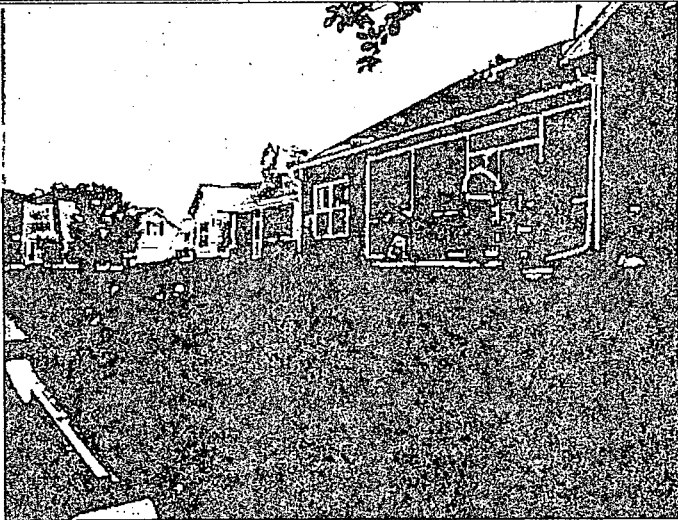
Thomas E. Volkmar, PE
President/Principal Engineer
SC Registration Number 27827

Attachments: Photographs
 Figures 1 and 2
 Auger Boring Logs with Laboratory Results

ATTACHMENTS

1502 Marsh Reed Court	PHOTOGRAPH SHEET #1	PROJECT #: 15-2333
-----------------------	---------------------	--------------------

Photograph #1	Description
	Typical view of the front of the house.
	Photograph Taken: July 9, 2015

Photograph #2	Description
	Typical view of the rear of the house, from the left rear property corner. Note the retaining wall (red arrow).
	Photograph Taken: July 9, 2015

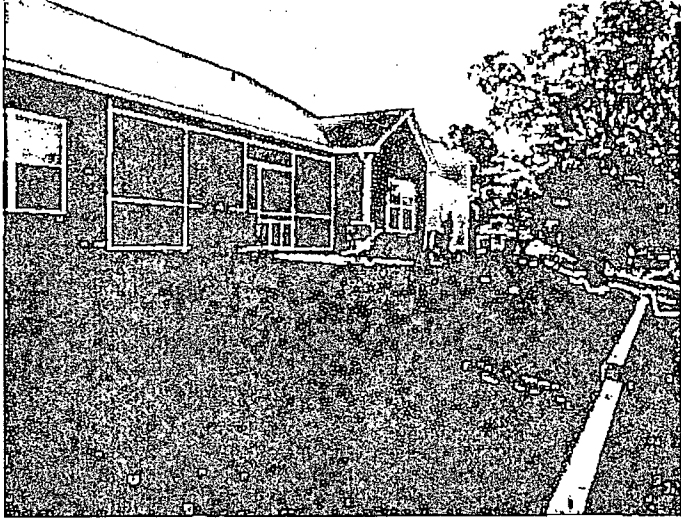
RECEIVED

FEB 07 2017

SC Court of Appeals

Ryland 00146

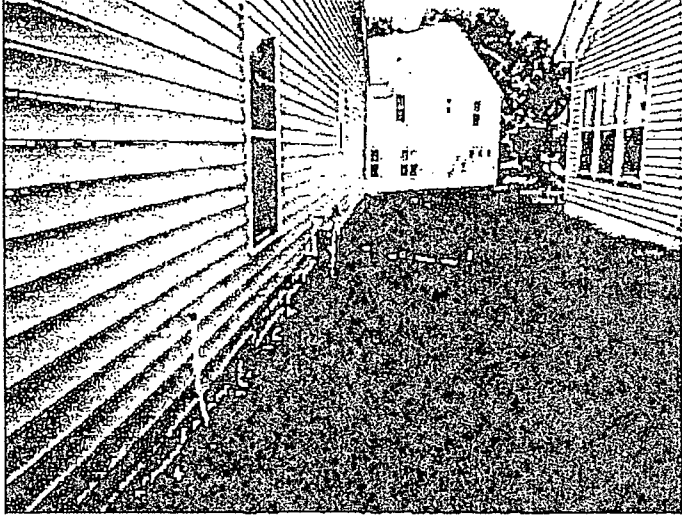
1502 Marsh Reed Court	PHOTOGRAPH SHEET #2	PROJECT #: 15-2333
-----------------------	---------------------	--------------------

Photograph #3	Description
	Typical view of the rear of the house, from the right rear property corner. Note the retaining wall (red arrow).
	Photograph Taken: July 9, 2015

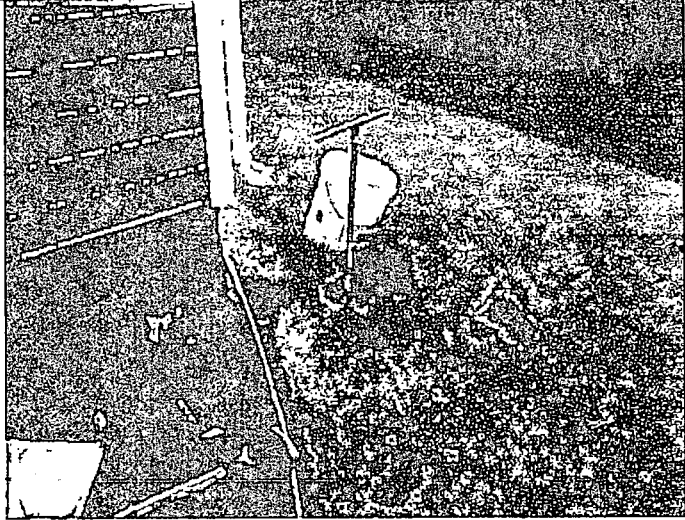
Photograph #4	Description
	Typical view of the left side of the house/site from the front left property corner.
	Photograph Taken: July 9, 2015

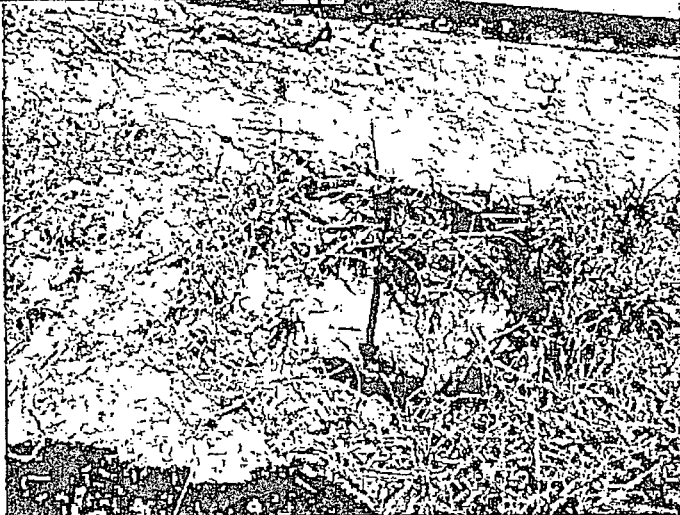
1502 Marsh Reed Court	PHOTOGRAPH SHEET #3	PROJECT #: 15-2333
-----------------------	---------------------	--------------------

Photograph #5	Description
	Typical view of the right side of the house/site from the front right property corner.
	Photograph Taken: July 9, 2015

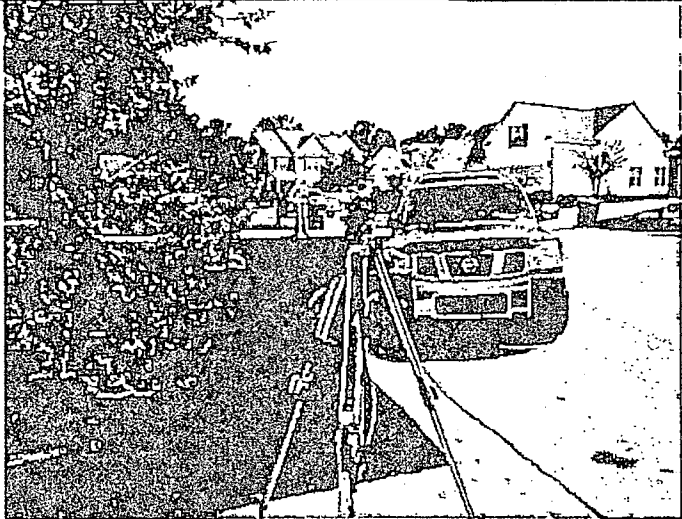
Photograph #6	Description
	A view of the right side of the subject site.
	Photograph Taken: July 9, 2015

1502 Marsh Reed Court	PHOTOGRAPH SHEET #4	PROJECT #: 15-2333
-----------------------	---------------------	--------------------

Photograph #7	Description
	A view of the auger borings with DCP testing. This is HA-3, located at the left rear corner of the house.
	Photograph Taken: July 9, 2015

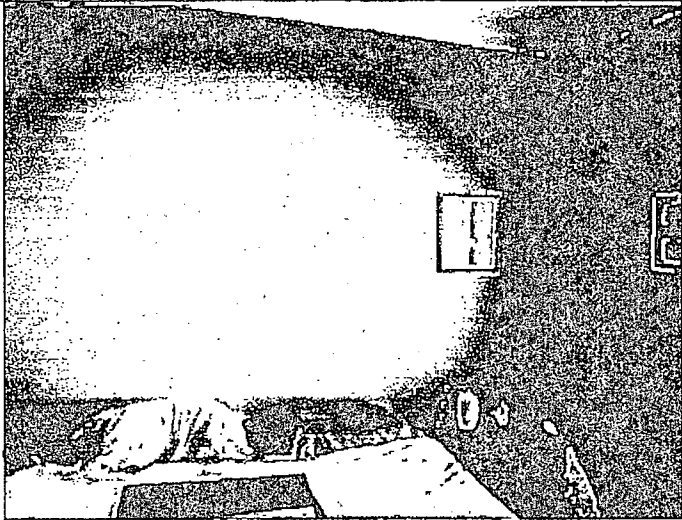
Photograph #8	Description
	A view of the test hole excavated along the left side of the house to determine the thickness of the footing. The measurement of the red arrow was approximately 2-feet.
	Photograph Taken: July 9, 2015

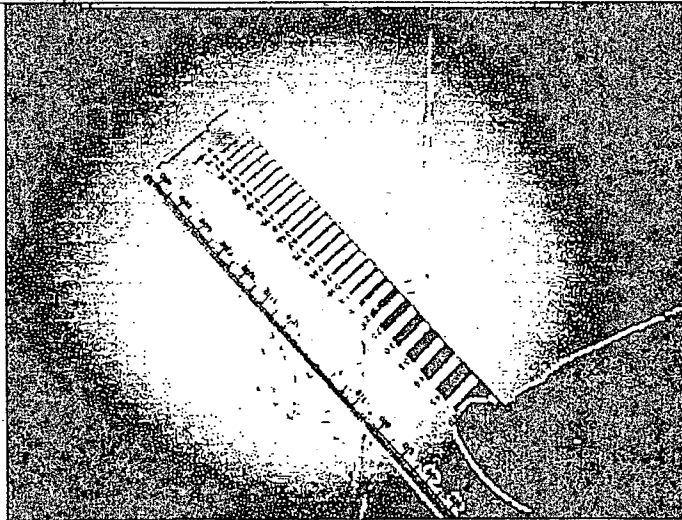
1502 Marsh Reed Court	PHOTOGRAPH SHEET #5	PROJECT #: 15-2333
-----------------------	---------------------	--------------------

Photograph #9	Description
	A view of the survey instrument setup and temporary benchmark used (manhole in the driveway (background)).
	Photograph Taken: July 9, 2015

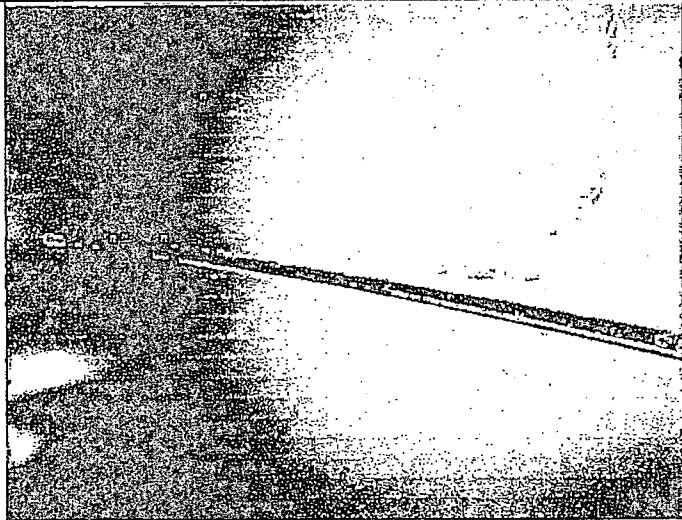
Photograph #10	Description
	A view of the survey underway along the left side of the house. Elevations were obtained at the edge of the house, at 10-foot intervals, and outward every 10-feet to 15-feet.
	Photograph Taken: July 9, 2015

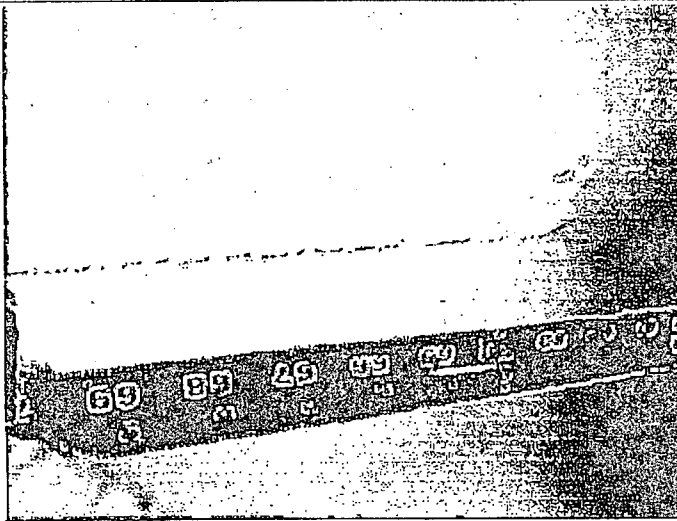
1502 Marsh Reed Court	PHOTOGRAPH SHEET #6	PROJECT #: 15-2333
-----------------------	---------------------	--------------------

Photograph #11	Description
	A view of the master bedroom, right side wall, where cracking is occurring.
	Photograph Taken: July 9, 2015

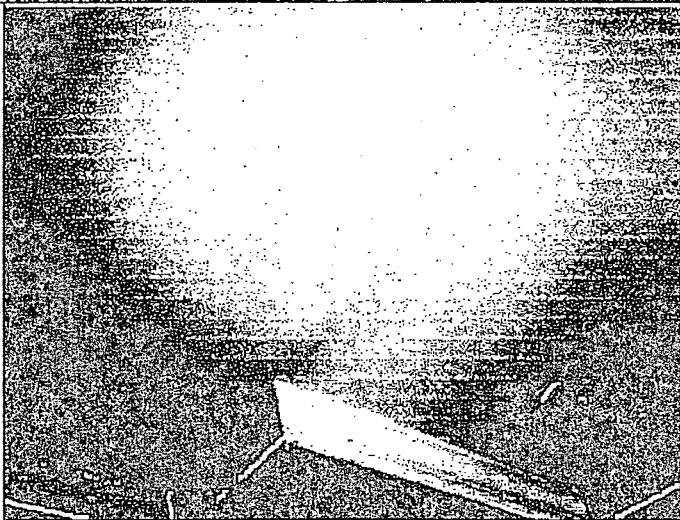
Photograph #12	Description
	A close-up view of the previous photo. A view of cracking of the left side wall in the master bedroom. The measured width is 2.0-mm (approximately 3/32-inch)
	Photograph Taken: July 9, 2015

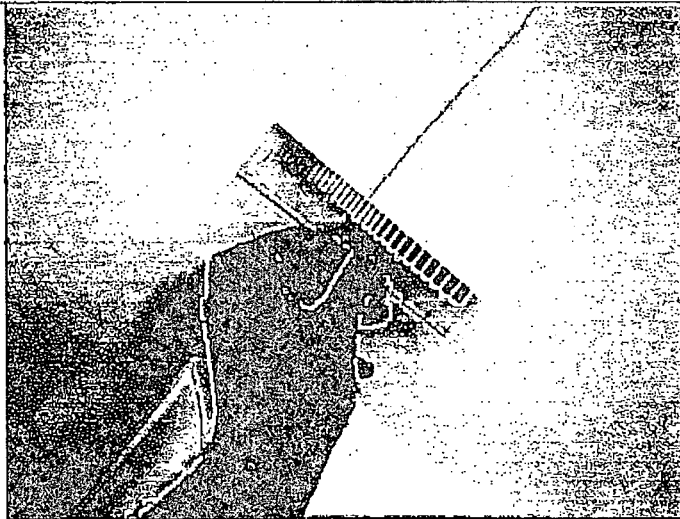
1502 Marsh Reed Court	PHOTOGRAPH SHEET #7	PROJECT #: 15-2333
-----------------------	---------------------	--------------------

Photograph #13	Description
	Another view of the cracking in the master bedroom right side wall.
	Photograph Taken: July 9, 2015

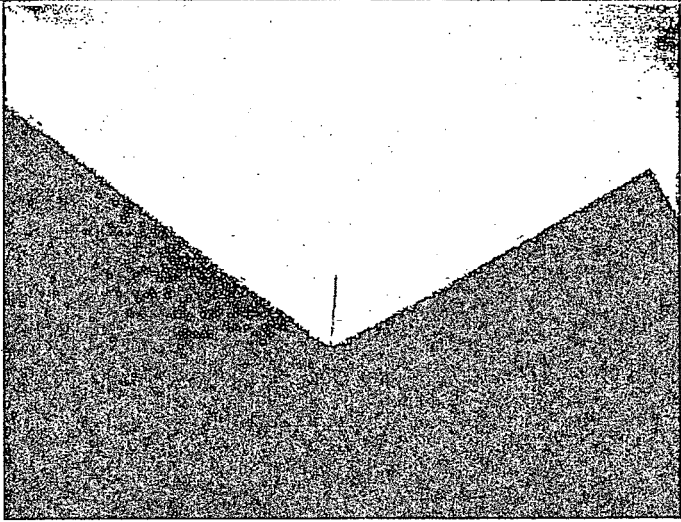
Photograph #14	Description
	A close-up view of the previous photo. The cracking starts approximately 5-feet from the rear wall of the house.
	Photograph Taken: July 9, 2015

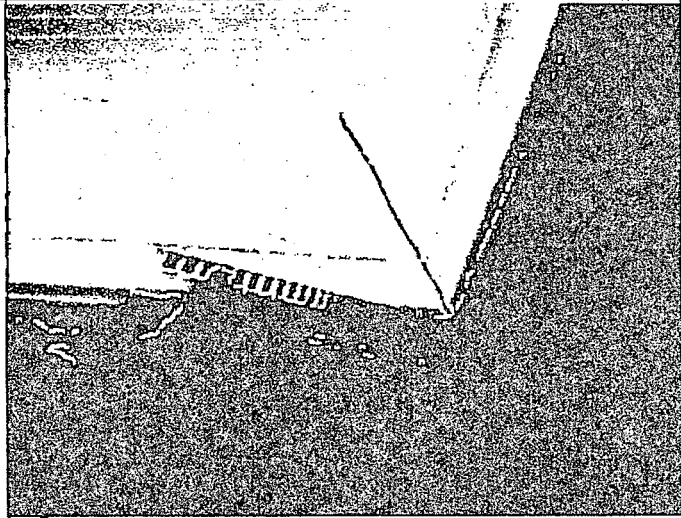
1502 Marsh Reed Court	PHOTOGRAPH SHEET #8	PROJECT #: 15-2333
-----------------------	---------------------	--------------------

Photograph #15	Description
	A view of the ceiling crack in the master bedroom.
	Photograph Taken: July 9, 2015

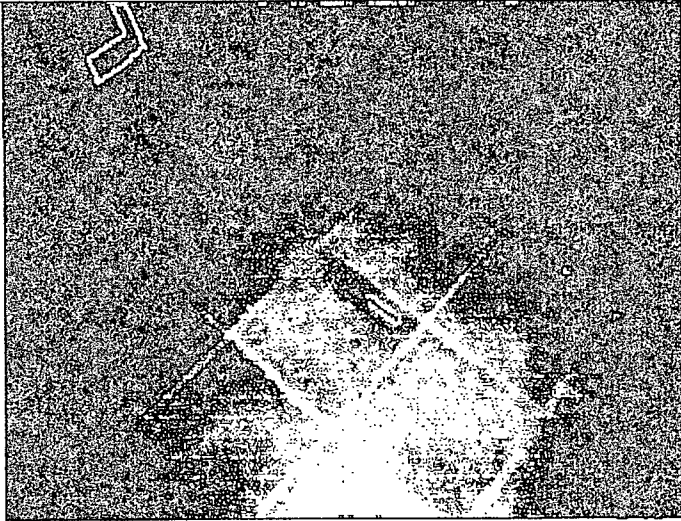
Photograph #16	Description
	A view of cracking on the ceiling in the master bedroom. The measured width is 0.95 mm (approximately 3/64")
	Photograph Taken: July 9, 2015

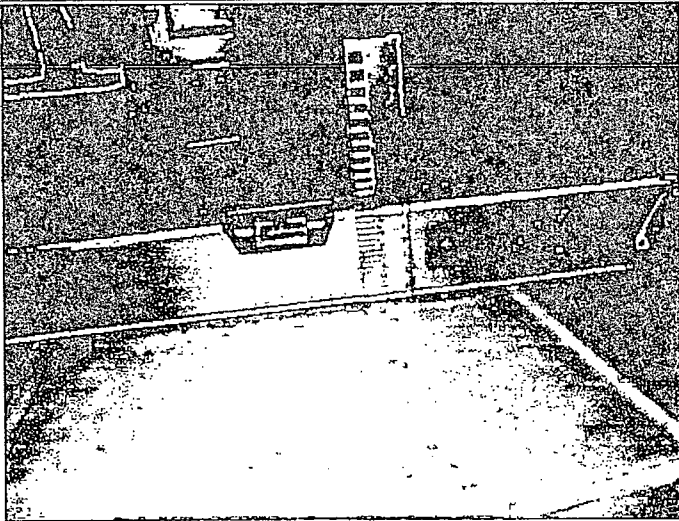
1502 Marsh Reed Court	PHOTOGRAPH SHEET #9	PROJECT #: 15-2333
-----------------------	---------------------	--------------------

Photograph #17	Description
	A view of the crown molding joint separation in the master bedroom.
	Photograph Taken: July 9, 2015

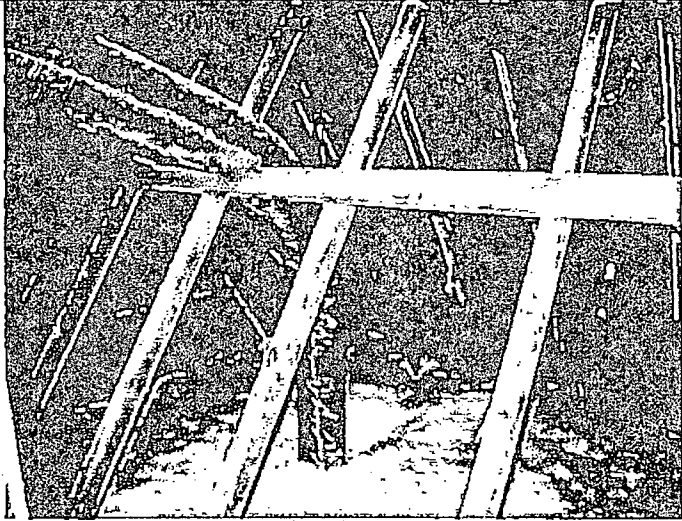
Photograph #18	Description
	Another view of the crown molding joint separation in the master bedroom.
	Photograph Taken: July 9, 2015

1502 Marsh Reed Court	PHOTOGRAPH SHEET #10	PROJECT #: 15-2333
-----------------------	----------------------	--------------------

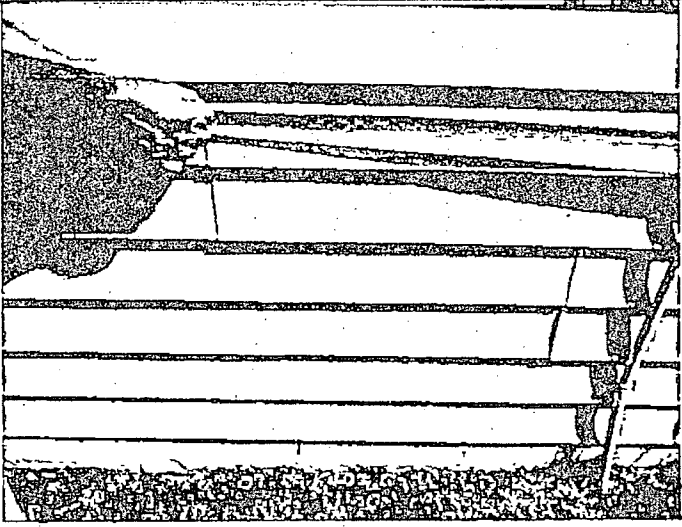
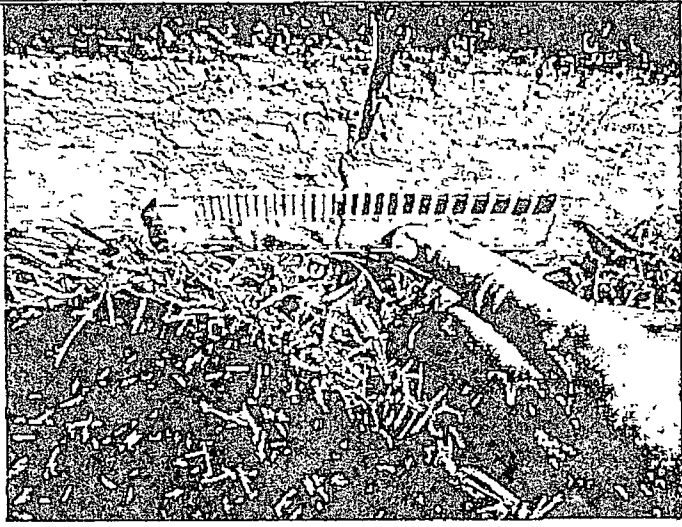
Photograph #19	Description
	A view of the approximate area in the kitchen where the linoleum covers an apparent slab crack.
	Photograph Taken: February 10, 2014

Photograph #20	Description
	Another view of the approximate area in the kitchen where the linoleum covers an apparent slab crack.
	Photograph Taken: February 10, 2014

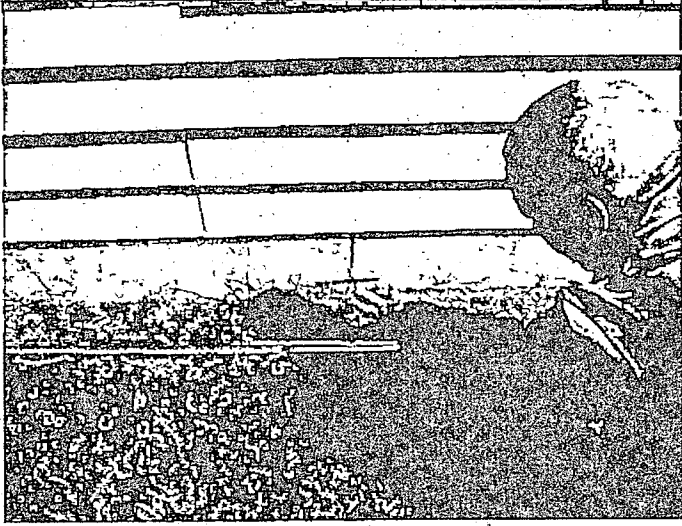
1502 Marsh Reed Court	PHOTOGRAPH SHEET #11	PROJECT #: 15-2333
-----------------------	----------------------	--------------------

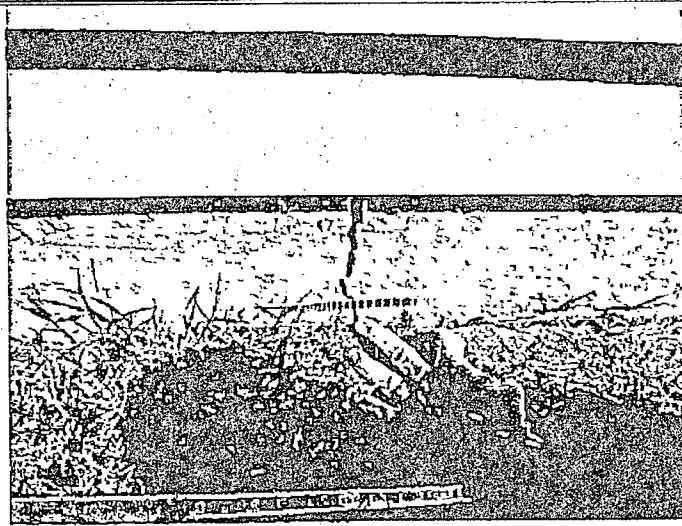
Photograph #21	Description
	A view of the roof trusses in the attic, over the master bedroom.
	Photograph Taken: July 9, 2015

Photograph #22	Description
	Another view of the roof trusses in the attic, over the master bedroom.
	Photograph Taken: July 9, 2015

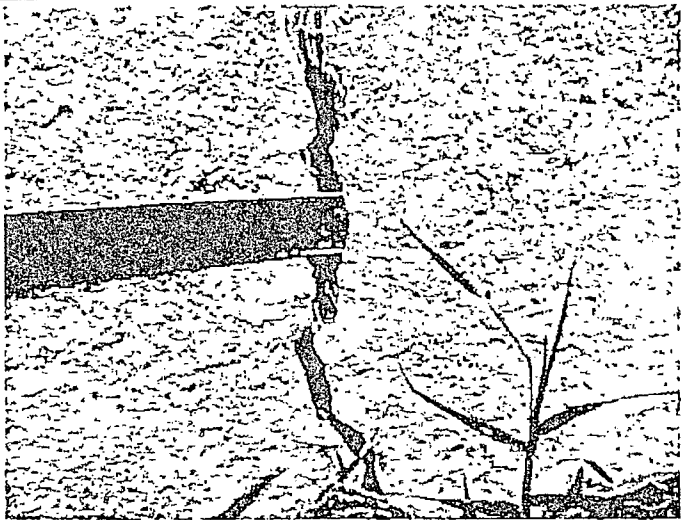
1502 Marsh Reed Court	PHOTOGRAPH SHEET #12	PROJECT #: 15-2333
Photograph #23		Description
		A view of the <u>control joint</u> and cracking on the exterior 18-foot from the left front corner.
		Photograph Taken: July 9, 2015
Photograph #24		Description
		Close-up of the previous photo. A view of the <u>control joint</u> and cracking on the exterior 18-foot from the left front corner (measured at 1.5 to 2.0- mm wide; approximately 1/16 to 3/32-inch).
		Photograph Taken: July 9, 2015

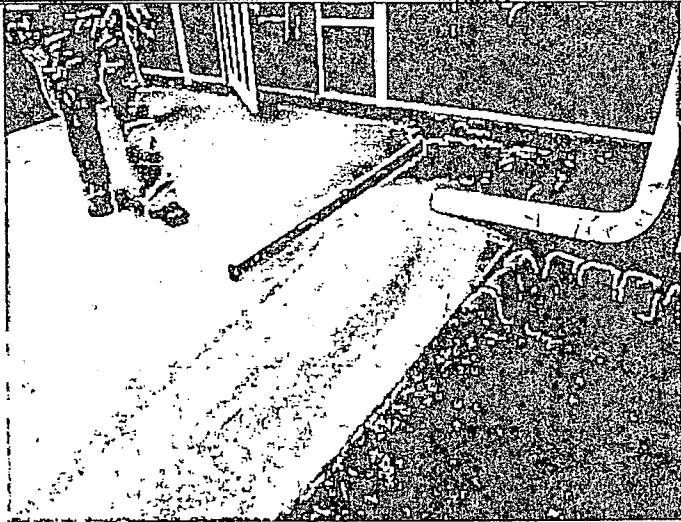
1502 Marsh Reed Court	PHOTOGRAPH SHEET #13	PROJECT #: 15-2333
-----------------------	----------------------	--------------------

Photograph #25	Description
	A view of the <u>control joint and cracking</u> on the exterior 13-foot from the left rear corner.
	Photograph Taken: July 9, 2015

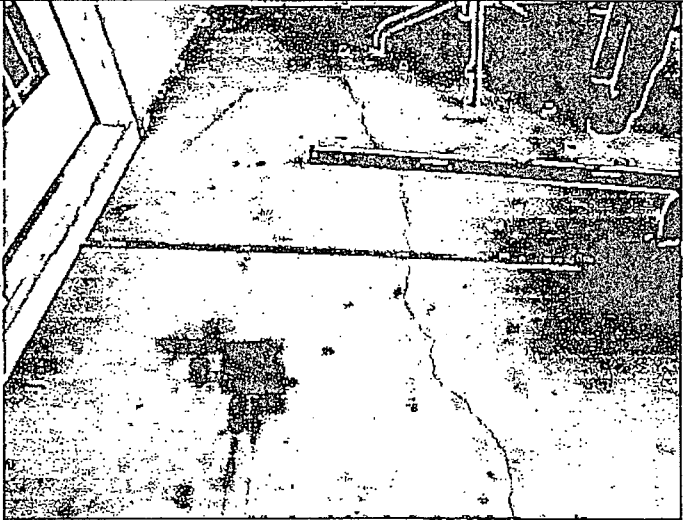
Photograph #26	Description
	Close-up of the previous photo. A view of the <u>control joint and cracking</u> on the exterior 13-foot from the left rear corner (measured at 4.0 mm; approximately 5/32" wide).
	Photograph Taken: July 9, 2015

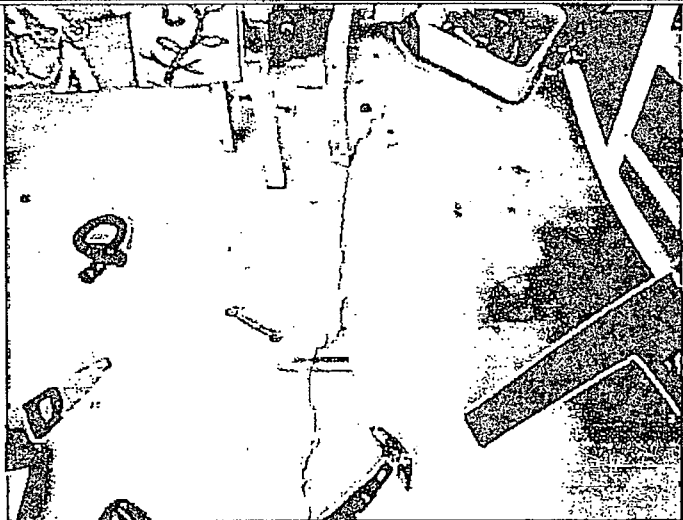
1502 Marsh Reed Court	PHOTOGRAPH SHEET #14	PROJECT #: 15-2333
-----------------------	----------------------	--------------------

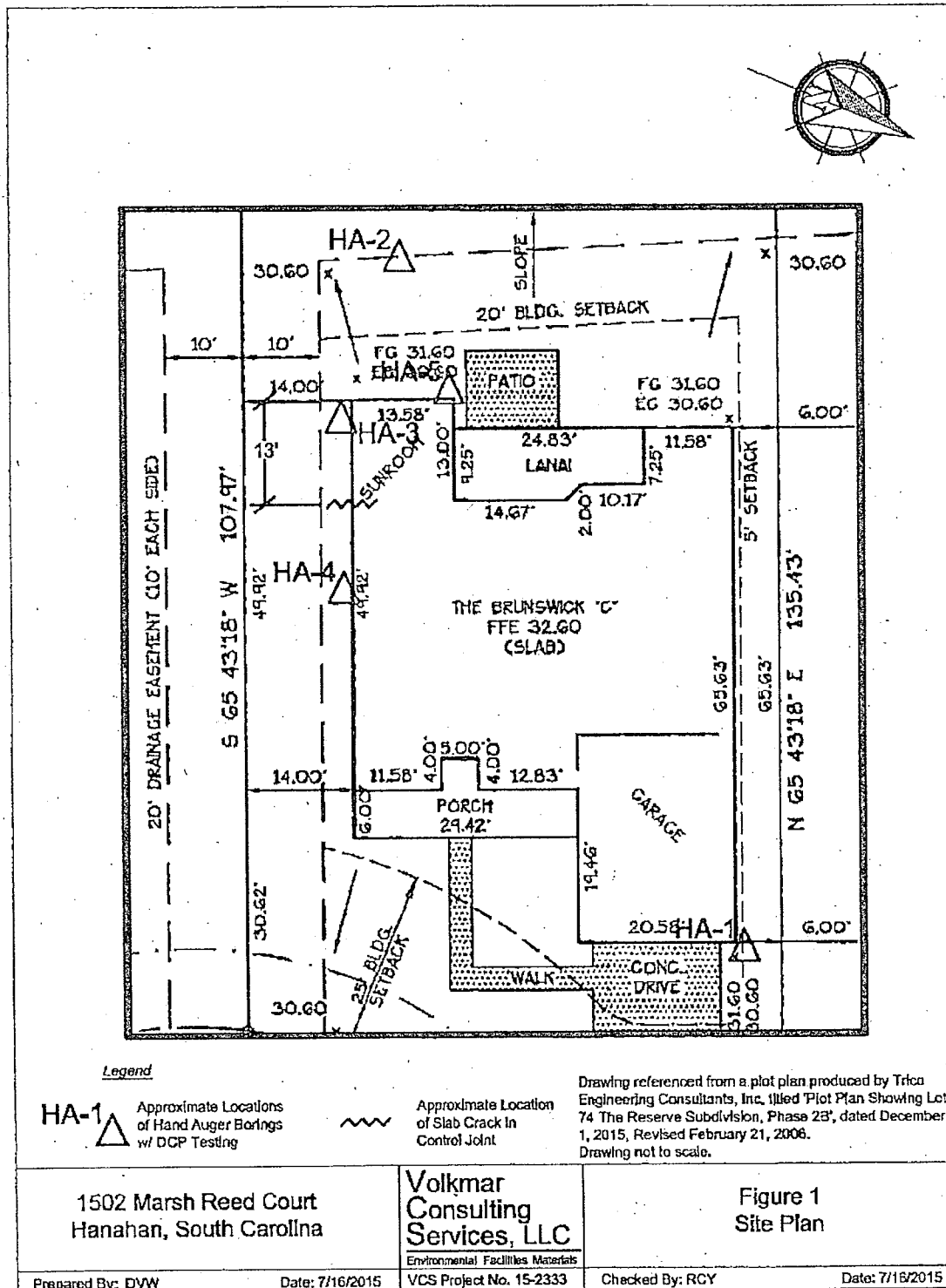
Photograph #27	Description
	A photo from the ABS report dated April 27, 2015. The report states this crack is 5/16" (approximately 7.9 mm) or greater. This same crack is shown in Photo 26, it is located on the exterior, 13-feet from the left rear corner.
Photo 8 – The crack extending from the control joint has widened significantly.	Photograph Taken: April 16, 2015 by ABS

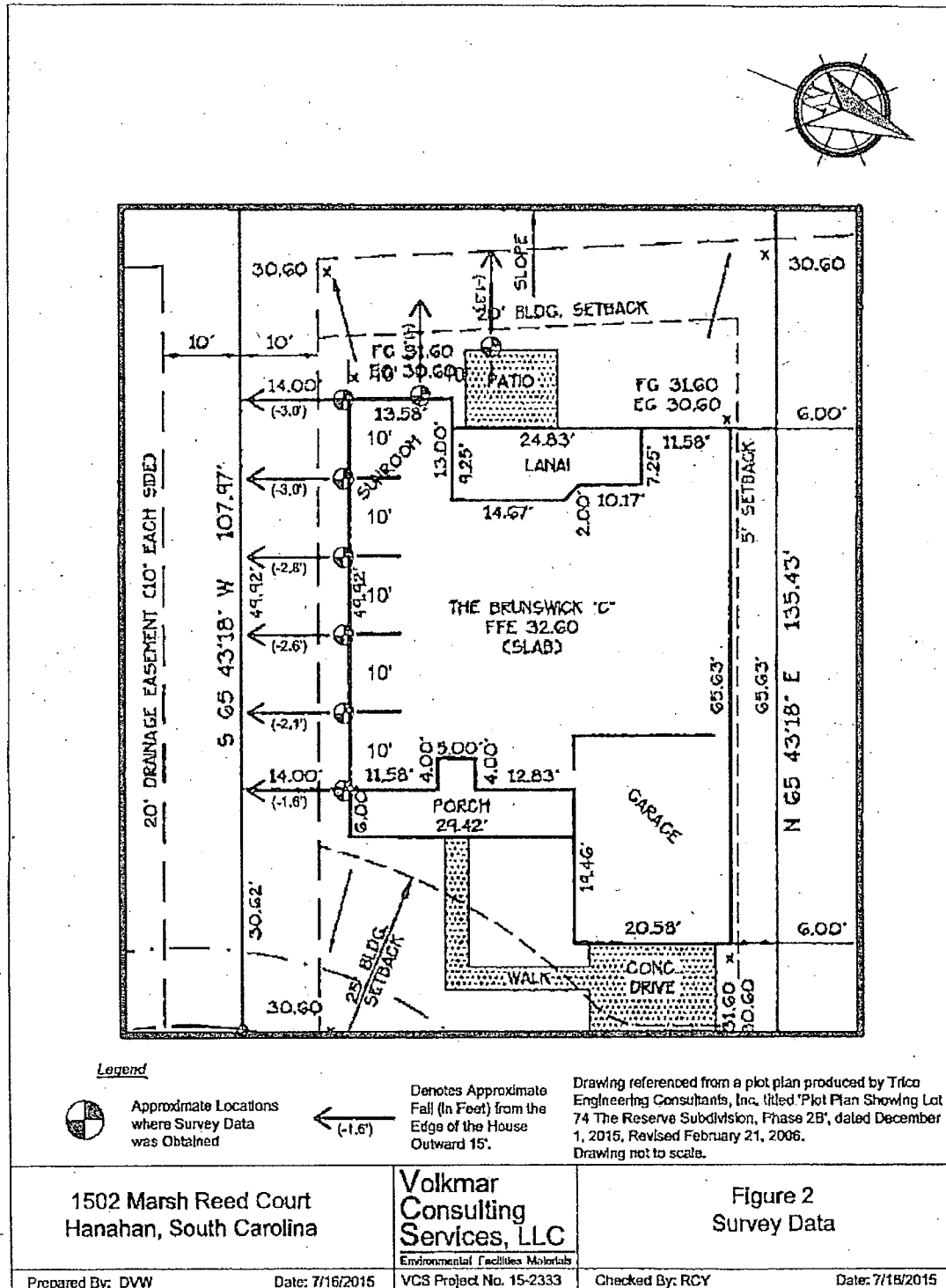
Photograph #28	Description
	A view of the rear patio.
	Photograph Taken: July 9, 2015

1502 Marsh Reed Court	PHOTOGRAPH SHEET #15	PROJECT #: 15-2333
-----------------------	----------------------	--------------------

Photograph #29	Description
	A view of the cracking on the rear porch.
Photograph Taken: July 9, 2015	

Photograph 30	Description
	A view of the cracking on the rear porch (measured at between 2.5 and 3.0-mm; approximately 7/64 and 1/8-inch) wide.
Photograph Taken: July 9, 2015	





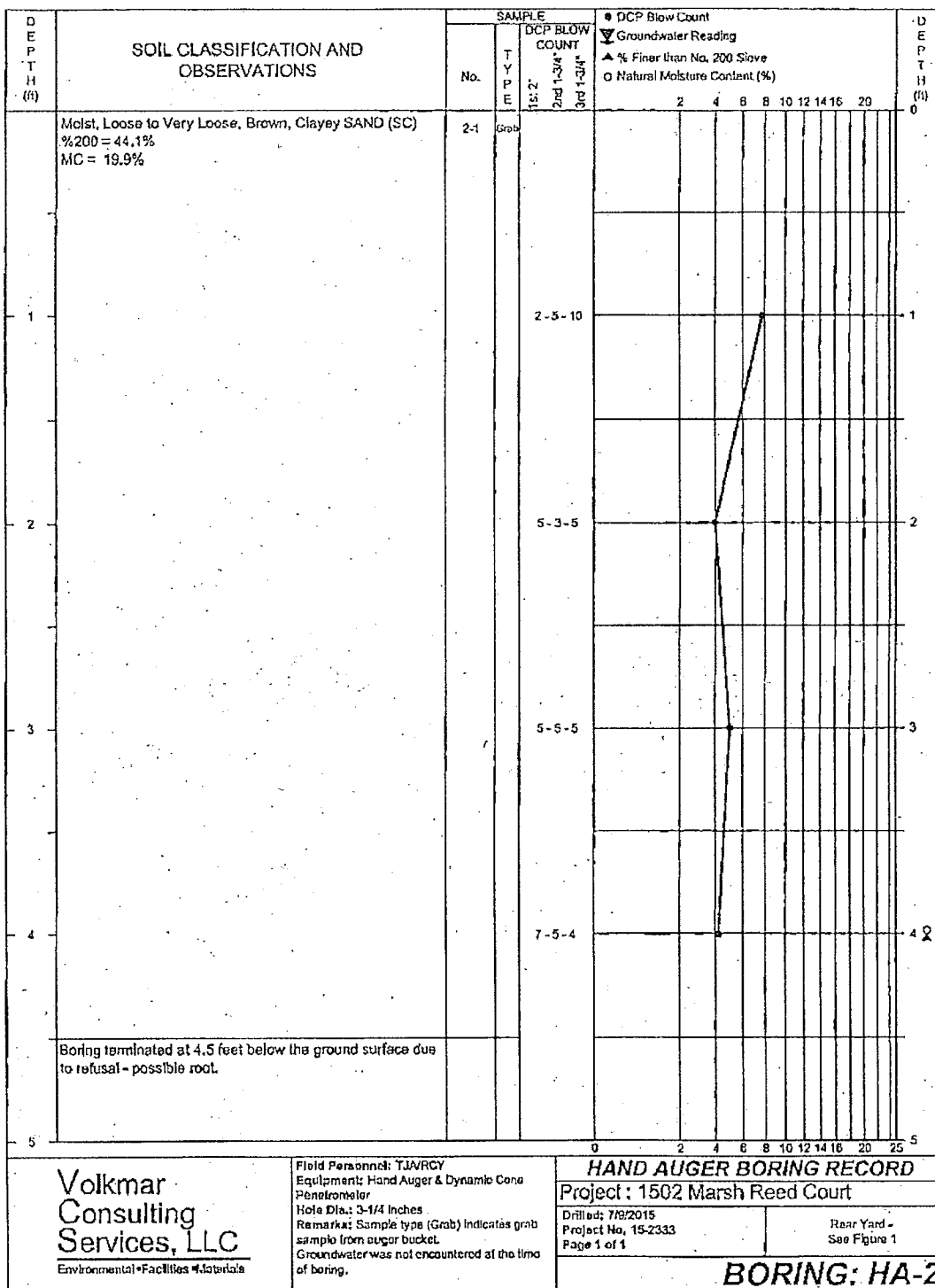
RECEIVED

FEB 07 2017 Ryland 00162

SC Court of Appeals

DEPTH (ft)	SOIL CLASSIFICATION AND OBSERVATIONS	SAMPLE			DCP BLOW COUNT											DEPTH (ft)	
		No.	TYPE		1st 1-1 1/2'	2nd 1-3/4'	3rd 1-3/4'	2	4	6	8	10	12	14	16		20
0	Molst, Very Firm to Loose, Brown, Clayey SAND (SC)	1-1	Grab														0
1																	1
2																	2
3	Molst, Firm to Stiff, Orange and Red, Sandy CLAY (CL) %200 = 66.1% MC = 22.2% PI = 27 PL = 23 LL = 50	1-2	Grab														3
4																	4
5	Boring terminated at 5.0 feet below the ground surface.																5

Volkmar Consulting Services, LLC Environmental • Facilities • Materials	Field Personnel: TJA/RCY Equipment: Hand Auger & Dynamic Cone Penetrometer Hole Dia: 3-1 1/4 inches Remarks: Sample type (Grab) indicates grab sample from auger bucket. Groundwater was not encountered at the time of boring.	HAND AUGER BORING RECORD Project: 1502 Marsh Reed Court Dated: 7/9/2015 Project No. 15-2333 Page 1 of 1		Front Right Corner - See Figure 1
	BORING: HA-1			



DEPTH (ft)	SOIL CLASSIFICATION AND OBSERVATIONS	SAMPLE			DCP BLOW COUNT													DEPTH (ft)
		No.	TYPE		1st 2"	2nd 1-3/4"	3rd 1-3/4"	2	4	6	8	10	12	14	16	20		
0	Molst, Very Loose to Loose, Brown and Orange, Clayey SAND (SC) %200 = 38.6% MC = 18.3%	3-1	Grab															0
1																		1
2																		2
3																		3
4																		4
5	Boring terminated at 5.0 feet below the ground surface.																	5

Volkmar Consulting Services, LLC Environmental • Facilities • Materials	Field Personnel: TJ/RCY Equipment: Hand Auger & Dynamic Cone Penetrometer Hole Dia.: 3-1/4 inches Remarks: Sample type (Grab) indicates grab sample from auger bucket. Groundwater was not encountered at the time of boring.	HAND AUGER BORING RECORD Project : 1502 Marsh Reed Court Drilled: 7/8/2015 Project No. 15-2333 Page 1 of 1		Rear Left Corner - See Figure 1
	BORING: HA-3			

REPORT OF ENVIRONMENTAL ASSESSMENT
1502 MARSH REED COURT, HANAHAN, SOUTH CAROLINA

AUGUST 6, 2015
VCS PROJECT 15-2333

DEPTH (ft)	SOIL CLASSIFICATION AND OBSERVATIONS	SAMPLE			DCP BLOW COUNT	* DCP Blow Count ▽ Groundwater Reading ▲ % Finer than No. 200 Sieve ○ Natural Moisture Content (%)	DEPTH (ft)
		No.	TYPE	1st 2'			
0	Moist, Very Firm to Loose, Brown, Clayey SAND (SC)	4-1	Grab				0
1				20+			1
2				12-12-13			2
3				11-10-10			3
4				12-12-12			4
5	Boring terminated at 5.0 feet below the ground surface.			12-8-7			5

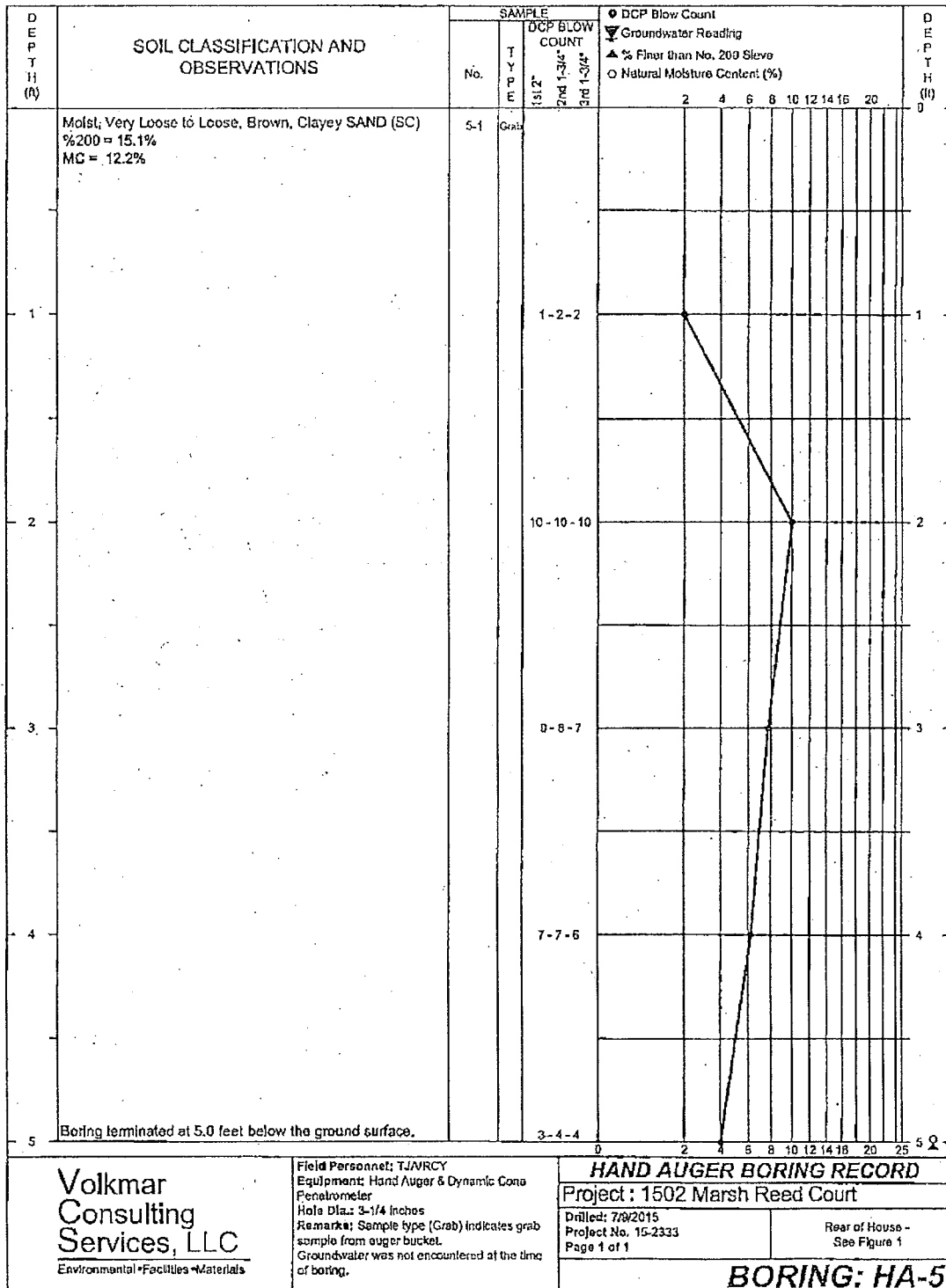
Volkmar Consulting Services, LLC
Environmental • Facilities • Materials

Field Personnel: TJA/RCY
Equipment: Hand Auger & Dynamic Cone Penetrometer
Hole Dia.: 3-1/4 Inches
Remarks: Sample type (Grab) indicates grab sample from auger bucket.
Groundwater was not encountered at the time of boring.

HAND AUGER BORING RECORD
Project : 1502 Marsh Reed Court
Drilled: 7/9/2015
Project No. 15-2333
Page 1 of 1

Left Side of House -
See Figure 1

BORING: HA-4



STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Christopher Duvall and Natalie Duvall,

Plaintiffs,

vs.

The Ryland Group, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL DISTRICT

Case No.: 2015-CP-08-1213

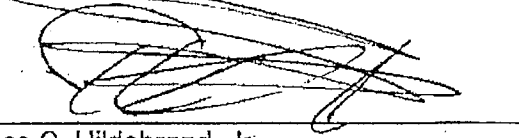
DEFENDANT THE RYLAND GROUP,
INC.'S REQUEST FOR PRODUCTION
TO THE PLAINTIFFS

TO: THE PLAINTIFFS CHRISTOPHER DUVALL AND NATALIE DUVALL AND THEIR
ATTORNEY JAMES TAYLOR ANDERSON, III, ESQUIRE:

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, the Defendant The Ryland Group, Inc. ("Ryland"), by and through its undersigned counsel, hereby serve upon counsel for Plaintiffs the following Requests for Production of materials and documents to be answered in the manner required under the South Carolina Rules of Civil Procedure within thirty (30) days of service, exclusive of the date of service, which responses are to be served upon the undersigned. These Requests shall be deemed continuing and to require supplemental responses if Plaintiffs obtain further documents or materials at any time between the date of production and the conclusion of trial.

1. Defendant requests authorization to place crack monitors into the cracks in the masonry on the home and to then leave them in place and undisturbed for the remainder of this litigation.

PARKER POE ADAMS & BERNSTEIN LLP
200 Meeting Street, Suite 301
Charleston, SC 29401



By: _____
Thomas C. Hildebrand, Jr.
843.727.2653 (direct dial)
tomhildebrand@parkerpoe.com

Olesya V. Vaskevich
843.727.2642 (direct dial)
olesyavaskevich@parkerpoe.com

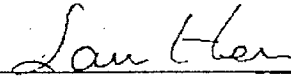
Attorneys for Defendant The Ryland Group,
Inc.

December 14, 2015

CERTIFICATE OF SERVICE

This is to certify that a copy of Defendant The Ryland Group, Inc.'s Requests for Production to Plaintiffs has been served upon the following counsel of record by electronic mail and by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 14th day of December, 2015.

James Taylor Anderson, III, Esq.
Kernodle Root + Coleman
PO Box 13897
Charleston, SC 29422
tanderson@kernodlelaw.com



Lauren Heuss, Legal Professional Assistant
PARKER POE ADAMS & BERNSTEIN, LLC
200 Meeting Street, Suite 301
Charleston, SC 29401-2240

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

COUNTY OF BERKELEY

) CASE NO. 2015-CP-08-1213

CHRIS DUVAL and NATALIE,
DUVAL

Plaintiffs,

V.

THE RYLAND GROUP, INC.,

Defendant.

**AFFIDAVIT OF CHRIS
DUVALL**

THE RYLAND GROUP, INC.,

Third-Party Plaintiff,

Y.

LAND SITE SERVICES, INC.,
CAROLINA CONSULTING SERVICES,
INC., HIGDON CONCRETE, LLC, A.C.
CONSTRUCTION, INC., and STARK
TRUSS COMPANY, INC. a/k/a STARK
TRUSS COMPANY OF SUMMERVILLE,
LTD. a/k/a STARK TRUSS, INC. d/b/a
CAROLINA TRUSS SYSTEMS, INC.

Third-Party Defendants.

PERSONALLY APPEARED before me, Christopher Duvall, who first being duly sworn,

deposes and says:

1. I am an adult and under no disability that would prevent me from giving truthful testimony.

2. I, along with my wife Natalie Duvall, own the home located at 1502 Marsh Reed Court, Hanahan, Berkeley County, South Carolina. Myself and my wife are the Plaintiffs in the above captioned case.

3. During the year 2013, I noticed cracking in the sheetrock and foundation of my home.

4. In September of 2013, Mr. Billy Barnes, of Ryland, visited my home and indicated that the cracking was "cosmetic" and did not need to be repaired.

5. Mr. Barnes was the only Ryland employee to visit my home in response to my concerns about cracking in the sheetrock and foundation of my home. He did not perform any testing at the home, did not install any "crack monitors," and did not conduct any soils sampling.

6. After myself and my wife filed this lawsuit in May of 2015, Ryland conducted a site visit that included multiple engineers, a lawyer, and a Ryland manager. At this site visit Ryland took soils samples from multiple locations, conducted a land survey, and took extensive measurements inside my home.

7. In November of 2015, Ryland requested that myself and my wife allow Ryland to place "crack monitors" at multiple locations around our home.

8. I did not agree to allow Ryland to install crack monitors around the home. Ryland had an ample opportunity to fully investigate this matter prior to my having to obtain an attorney and I did not want to have crack monitors installed on my home. I did not want my home to be known in the neighborhood as the home with crack monitors installed on a defective slab and I did not want the crack monitors to interfere with my family's full use and enjoyment of our home.

9. Ryland obtained a court order requiring me and my wife to allow Ryland to place multiple monitoring devices on my home.

10. Because I was compelled by Court Order, on January 28, 2016, I allowed Ryland access to my home for the purpose of installing crack monitors. Ryland did, in fact, install the Court Ordered crack monitors at 3 locations on my home.

11. One of the Court Ordered crack monitors is on my family's screened-in back porch, where my young children often play. Since the crack monitor has been installed on my family's screened-in back porch, if I allow my children on the back porch at all, I have to closely watch them and keep them away from the Court Ordered crack monitor. Absent a Court Order, I would not have allowed Ryland to place a crack monitor in this location.

12. Because I was compelled by Court Order, on Monday, March 7, 2016, I again allowed Ryland access to my home for purposes of conducting a Court Ordered inspection of the crack monitors Ryland had installed on my home.

13. As of the date of this Affidavit, I am under Court Order requiring myself and my wife to keep the crack monitors on our home for the purpose of allowing Ryland to collect data. Ryland continues to maintain crack monitors on my home and has not indicated that I should remove the crack monitors. FURTHER AFFIANT SAYETH NOT.


CHRIS DUVALL

SWORN to before me this 6 day
of April, 2016.


Notary Public of South Carolina
My Commission Expires: 07/14/19

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Christopher Duvall and Natalie Duvall,

Plaintiffs,

vs.

The Ryland Group, Inc.

Defendant.

The Ryland Group, Inc.,

Third-Party Plaintiff,

vs.

Land Site Services, Inc., Carolina
 Consulting Engineers, Inc., Higdon
 Concrete, LLC, A.C. Construction, Inc.,
 and Stark Truss Company, Inc. a/k/a
 Stark Truss Company of Summerville,
 Ltd. a/k/a Stark Truss, Inc. d/b/a
 Carolina Truss Systems, Inc.,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-08-01213

2015 DEC 31 PM 12:00
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY

THE RYLAND GROUP, INC.'S MOTION TO
 COMPEL AGAINST PLAINTIFFS

Pursuant to Rules 34 and 37 of the South Carolina Rules of Civil Procedure, the Defendant and Third-Party Plaintiff The Ryland Group, Inc. (hereinafter "Ryland"), by and through their undersigned counsel, respectfully moves the Court for an Order compelling the Plaintiffs Christopher Duvall and Natalie Duvall ("Plaintiffs") to allow Ryland's request for authorization to install crack monitors at the residence which is the subject of this litigation. In support of its Motion, Ryland shows the following:

1. By way of telephone communications with Plaintiffs' counsel, Ryland's counsel repeatedly has requested that Plaintiffs agree to the placement of the crack

monitors at the subject residence. On December 1, 2015, Plaintiffs' counsel rejected Ryland's request to install crack monitors by way of electronic correspondence to Ryland's counsel. A copy of this electronic correspondence is attached hereto as Exhibit A.

2. Ryland served its Request for Production on Plaintiffs by U.S. Mail and by electronic mail on December 14, 2015. A copy of Ryland's Request for Production is attached hereto as Exhibit B.

3. Rules 26 and 34 of the South Carolina Rules of Civil Procedure allow Ryland to serve on Plaintiffs a request "to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)."

4. On December 22, 2015, Plaintiffs' counsel responded to Ryland's Request for Production by way of electronic correspondence and again rejected Ryland's request to install crack monitors. A copy of this electronic correspondence is attached hereto as Exhibit C.

5. To date, Ryland has not received authorization to install crack monitors at the residence which is the subject of this litigation from Plaintiffs.

WHEREFORE, Ryland respectfully requests an Order compelling Plaintiffs to allow Ryland's request for authorization to install crack monitors at the residence which is the subject of this litigation.

PARKER POE ADAMS & BERNSTEIN LLP
200 Meeting Street, Suite 301
Charleston, SC 29401

By: Olesya Vaskevich
Thomas C. Hildebrand, Jr.
843.727.2653 (direct dial)
tomhildebrand@parkerpoe.com

Olesya V. Vaskevich
843.727.2692 (direct dial)
olesyavaskevich@parkerpoe.com

Attorneys for Defendant and Third-Party
Plaintiff The Ryland Group, Inc.

December 29, 2015

CERTIFICATE OF SERVICE

This is to certify that a copy of The Ryland Group, Inc.'s Motion to Compel Against Plaintiffs has been served upon the following counsel of record by electronic mail and by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 29th day of December, 2015.

James Taylor Anderson, III, Esq.
Kernodle Root + Coleman
PO Box 13897
Charleston, SC 29422
tanderson@kernodlelaw.com

John E. Rogers, II
The Ward Law Firm
233 S. Pine Street
Spartanburg, SC 29302
jrogers@wardlawfirm.com

2015 DEC 31 PM 12:06
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

San He

Lauren Heuss, Legal Professional Assistant
PARKER POE ADAMS & BERNSTEIN, LLC
200 Meeting Street, Suite 301
Charleston, SC 29401-2240

EXHIBIT

A

Vaskevich, Olesya V.

From: Taylor Anderson <tanderson@kernodelaw.com>
Sent: Tuesday, December 01, 2015 9:47 AM
To: Hildebrand, Jr., Thomas C.
Cc: Vaskevich, Olesya V.
Subject: Duvall v. Ryland

Tom, the Duvalls are not agreeable to Ryland installing crack monitors at their home. Ryland was afforded an opportunity, prior to any lawyer involvement, and during the warranty period, to fully investigate the foundation and wall cracking at the Duvalls' home. At that time Ryland determined that there were no warrantable problems at the home. Ryland did not ask to install any crack monitors at that time.

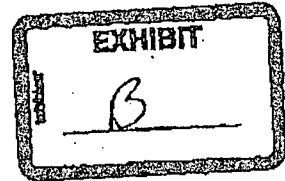
After suit was filed Ryland requested another visit to the home to investigate the foundation and wall cracking. On July 9, 2015, the Duvalls again made their home available for Ryland's inspection. Ryland personnel, accompanied by three professionals from Volkmar Consulting Services, LLC, performed an inspection of the Duvalls' home. The inspection included the cracked foundation, the drywall cracking in the master bedroom, the floor issues in the kitchen, and an investigation of the attic space. Ryland's engineers also dug holes at various locations around the home to collect soil samples.

The Duvalls have fulfilled their obligation to allow Ryland to inspect the home. Ryland has filed a Motion to Amend the Ryland Group, Inc.'s Answer to Plaintiff's Complaint in order to add Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company as Third-Party Defendants. These newly added Third-Party Defendants have a right to inspect the home and the Duvalls will make the home available for inspection. Ryland, of course, can also attend the Third-Party Defendants' site inspection. However, the Duvalls do not want Ryland to attach monitors to their home. The Duvalls' home will be stigmatized enough by having multiple site inspections and the neighbors watching engineers dig holes around the home. The Duvalls do not want monitors affixed to the home.

Ryland was told of the cracking in 2013, and has been afforded multiple opportunities to inspect. It should have a record of the width of the cracks from each inspection. Ryland can compare its previous measurements to any measurements at future inspections. Crack monitors should not be necessary.

Thank you and please feel free to let me know if you have any questions or concerns.

Taylor



Thomas C. Hildebrand, Jr.
Partner
Telephone 843.727.2653
Direct Fax 843.727.2680
tomhildebrand@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

December 14, 2015

VIA EMAIL AND US MAIL

James Taylor Anderson, III, Esq.
Kernodle Root & Coleman
PO Box 13897
Charleston, SC 29422-3897

Re: Christopher Duvall and Natalie Duvall v. The Ryland Group, Inc.
Case No.: 2015-CP-08-01213

Dear Taylor:

Enclosed please find Defendant The Ryland Group, Inc.'s Request for Production to the Plaintiffs in the above-referenced matter.

With best regards,

Yours very truly,

A handwritten signature in cursive script, appearing to read "Tom".

Thomas C. Hildebrand, Jr.

TCHJr/lah
Enclosure

PPAB 3015815v1

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Christopher Duvall and Natalie Duvall,

Plaintiffs,

vs.

The Ryland Group, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL DISTRICT

Case No.: 2015-CP-08-1213

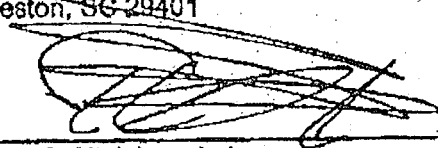
DEFENDANT THE RYLAND GROUP,
INC.'S REQUEST FOR PRODUCTION
TO THE PLAINTIFFS

TO: THE PLAINTIFFS CHRISTOPHER DUVALL AND NATALIE DUVALL AND THEIR
ATTORNEY JAMES TAYLOR ANDERSON, III, ESQUIRE:

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, the Defendant The Ryland Group, Inc. ("Ryland"), by and through its undersigned counsel, hereby serve upon counsel for Plaintiffs the following Requests for Production of materials and documents to be answered in the manner required under the South Carolina Rules of Civil Procedure within thirty (30) days of service, exclusive of the date of service, which responses are to be served upon the undersigned. These Requests shall be deemed continuing and to require supplemental responses if Plaintiffs obtain further documents or materials at any time between the date of production and the conclusion of trial.

1. Defendant requests authorization to place crack monitors into the cracks in the masonry on the home and to then leave them in place and undisturbed for the remainder of this litigation.

PARKER POE ADAMS & BERNSTEIN LLP
200 Meeting Street, Suite 301
Charleston, SC 29401

By: 

Thomas C. Hildebrand, Jr.
843.727.2653 (direct dial)
tomhildebrand@parkerpoe.com

Olesya V. Vaskevich
843.727.2642 (direct dial)
olesyavaskevich@parkerpoe.com

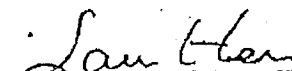
Attorneys for Defendant The Ryland Group,
Inc.

December 14, 2015

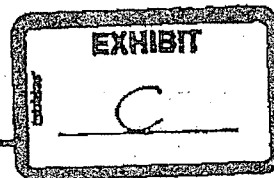
CERTIFICATE OF SERVICE

This is to certify that a copy of Defendant The Ryland Group, Inc.'s Requests for Production to Plaintiffs has been served upon the following counsel of record by electronic mail and by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 14th day of December, 2015.

James Taylor Anderson, III, Esq.
Kernodle Root + Coleman
PO Box 13897
Charleston, SC 29422
tanderson@kernodlerlaw.com



Lauren Heuss, Legal Professional Assistant
PARKER POE ADAMS & BERNSTEIN, LLC
200 Meeting Street, Suite 301
Charleston, SC 29401-2240



Vaskevich, Olesya V.

From: Taylor Anderson <tanderson@kernodlelaw.com>
Sent: Tuesday, December 22, 2015 3:45 PM
To: Hildebrand, Jr., Thomas C.
Cc: Heuss, Lauren A.; Gouin, Kelly J.; Vaskevich, Olesya V.
Subject: RE: Duvall v. The Ryland Group, Inc.

Hey Tom, sorry for the delayed response.

Our position is unchanged. The Duvalls do not authorize Ryland to place crack monitors on their home.

From: Hildebrand, Jr., Thomas C. [mailto:tomhildebrand@parkerpoe.com]
Sent: Monday, December 14, 2015 10:30 AM
To: 'tanderson@kernodlelaw.com' <tanderson@kernodlelaw.com>
Cc: Heuss, Lauren A. <laurenheuss@parkerpoe.com>; Gouin, Kelly J. <kellygouin@parkerpoe.com>; Vaskevich, Olesya V. <olesyavaskevich@parkerpoe.com>
Subject: Duvall v. The Ryland Group, Inc.

Taylor,

I have drafted the attached request to place crack monitors as a formality. You have already advised me of your position on this issue as noted in your email of December 1 (attached). If you simply want to respond to this email stating that your position is unchanged, that will be fine as your formal response and no other formality will be necessary. Thank you. Regards, Tom.

Thomas C. Hildebrand, Jr.
Partner



200 Meeting Street | Suite 301 | Charleston, SC 29401-3156
Office: 843.727.2653 | Fax: 843.727.2680 | map

Visit our website at
www.parkerpoe.com

PRIVILEGED AND CONFIDENTIAL: This electronic message and any attachments are confidential property of the sender. The information is intended only for the use of the person to whom it was addressed. Any other interception, copying, accessing, or disclosure of this message is prohibited. The sender takes no responsibility for any unauthorized reliance on this message. If you have received this message in error, please immediately notify the sender and purge the message you received. Do not forward this message without permission.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

CASE NO.: 2015-CP-08-01213

Christopher Duvall and Natalie Duvall,

Plaintiffs,

vs.

The Ryland Group, Inc.

Defendant.

The Ryland Group, Inc.,

Third-Party Plaintiff,

vs.

Land Site Services, Inc., Carolina
 Consulting Engineers, Inc., Higdon
 Concrete, LLC, A.C. Construction, Inc.,
 and Stark Truss Company, Inc. a/k/a
 Stark Truss Company of Summerville,
 Ltd. a/k/a Stark Truss, Inc. d/b/a
 Carolina Truss Systems, Inc.,

Third-Party Defendants.

ORDER GRANTING MOTION TO COMPEL

FILED
 16 JAN 21 AM 9:29
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, S.C.

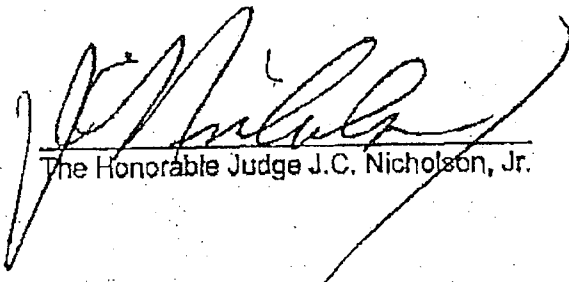
This matter comes before the Court by Motion to Compel filed by The Ryland Group, Inc. ("Ryland") on December 31, 2015. A hearing was held on Monday, January 11, 2016. Appearing for the Plaintiffs was their counsel, James Taylor Anderson, III. Appearing for the Defendant The Ryland Group, Inc. was its attorney Thomas C. Hildebrand, Jr.

Ryland moved to compel the Plaintiffs to allow Ryland to place crack monitors at the residence.. Plaintiffs claim that cracks have developed in the residence that have continued to expand, and will cause further damage if they expand in the future. I find

that Defendant should be, and hereby is, authorized to place a reasonable number of monitors at any exterior cracks in the residence. Plaintiffs shall provide Defendant Ryland with reasonable access ^{AND w/ 24 HRS. NOTICE} to check the crack monitors on a reasonably periodic basis, but no more than 45 days between visits and also within one month of trial.

AND IT IS SO ORDERED.

1/19, 2016


The Honorable Judge J.C. Nicholson, Jr.

CONSUMER

Consumer Arbitration Rules



AMERICAN ARBITRATION ASSOCIATION®

Available online at adr.org/consumer

Rules Amended and Effective September 1, 2014

Cost of Arbitration Effective January 1, 2016

Table of Contents

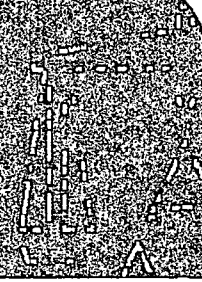
Consumer Arbitration Rules	6
Introduction	6
About the AAA	6
The Arbitrator	7
The AAA's Consumer Arbitration Rules	7
Availability of Mediation through Mediation.org	7
Administrative Fees	7
Arbitrator's Fees	8
Notification	8
Filing a Case and Initial AAA Administrative Steps	9
R-1. Applicability (When the AAA Applies These Rules)	9
R-2. Starting Arbitration under an Arbitration Agreement in a Contract	11
R-3. Agreement to Arbitrate When There is No AAA Arbitration Clause	13
R-4. AAA Administrative Fees	13
R-5. Neutral Arbitrator's Compensation	14
R-6. Depositing Neutral Arbitrator's Compensation with the AAA	14
R-7. Expenses	14
R-8. Changes of Claim	14
R-9. Small Claims Option for the Parties	15
R-10. Administrative Conference with the AAA	15
R-11. Fixing of Locale (the city, county, state, territory and/or country where the arbitration will take place)	15
R-12. Business Notification and Publicly-Accessible Consumer Clause Registry	16
R-13. AAA and Delegation of Duties	17
R-14. Jurisdiction	17
Appointing the Arbitrator	18
R-15. National Roster of Arbitrators	18
R-16. Appointment from National Roster	18
R-17. Number of Arbitrators	18
R-18. Disclosure	18
R-19. Disqualification of Arbitrator	19
R-20. Vacancies	19

Pre-Hearing Preparation	20
R-21. Preliminary Management Hearing with the Arbitrator	20
R-22. Exchange of Information between the Parties	20
R-23. Enforcement Powers of the Arbitrator	20
R-24. Written Motions (except for Dispositive Motions—see R-33)	21
R-25. Representation of a Party	21
R-26. Setting the Date, Time, and Place (the physical site of the hearing within the designated locale) of Hearing	22
R-27. Written Record of Hearing	22
R-28. Interpreters	22
R-29. Documents-Only Procedure	23
Hearing Procedures	24
R-30. Attendance at Hearings	24
R-31. Oaths	24
R-32. Conduct of Proceedings	24
R-33. Dispositive Motions	25
R-34. Evidence	25
R-35. Evidence by Affidavit and Post-Hearing Filing of Documents or Other Evidence	25
R-36. Inspection or Investigation	25
R-37. Interim Measures (a preliminary decision made by the arbitrator involving part or all of the issue(s) in dispute in the arbitration)	26
R-38. Postponements	26
R-39. Arbitration in the Absence of a Party or Representative	26
Conclusion of the Hearing	27
R-40. Closing of Hearing	27
R-41. Reopening of Hearing	27
R-42. Time of Award	27
R-43. Form of Award	27
R-44. Scope of Award	28
R-45. Award upon Settlement	28
R-46. Delivery of Award to Parties	28
R-47. Modification of Award for Clerical, Typographical, or Mathematical Errors.	29

Post Hearing	30
R-48. Release of Documents for Judicial Proceedings	30
R-49. Applications to Court and Exclusion of Liability	30
General Procedural Rules	31
R-50. Waiver of Rules	31
R-51. Extensions of Time	31
R-52. Serving of Notice and AAA and Arbitrator Communications	31
R-53. Interpretation and Application of Rules	32
R-54. Remedies for Nonpayment	32
R-55. Declining or Ceasing Arbitration	32
Costs of Arbitration [including AAA Administrative Fees]	33
(i) Filing Fees	34
(ii) Neutral Arbitrator's Compensation	34
(iii) Refund Schedule	35
(iv) Hearing Fees	35
(v) Hearing Room Rental	35
(vi) Abeyance Fee	35
(vii) Expenses	35
(viii) Consumer Clause Review and Registry Fee	36
Procedures for the Resolution of Disputes through Document Submission	37
D-1. Applicability	37
D-2. Preliminary Management Hearing	37
D-3. Removal from the Procedures	37
D-4. Time of Award	38

Glossary of Terms	39
Administrator.....	39
ADR Agreement	39
ADR Process.....	39
ADR Program.....	39
Arbitration	39
Arbitration Agreement	40
Arbitrator	40
Case Administrator	40
Claimant	40
Demand for Arbitration (also referred to as "Demand").....	40
Documents-Only Arbitration	41
Independent ADR Institution	41
In-Person Hearing	41
Mediation	41
Neutral	41
Party	41
Parties.....	42
Opposing Party.....	42
Respondent.....	42
Telephone Hearing	42

Consumer Arbitration Rules



Introduction

Millions of consumer purchases take place each year. Occasionally, these transactions lead to disagreements between consumers and businesses. These disputes can be resolved by arbitration. Arbitration is usually faster and cheaper than going to court.

The American Arbitration Association® ("AAA®," "the Association") applies the *Consumer Arbitration Rules* ("Rules") to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA has the discretion to apply or not to apply the *Consumer Arbitration Rule*, and the parties are able to bring any disputes concerning the application or non-application of the Rules to the attention of the arbitrator. Consumers and businesses are permitted to seek relief in a small claims court for disputes or claims within the scope of the small claims court's jurisdiction. These Rules were drafted and designed to be consistent with the minimum due process principles of the *Consumer Due Process Protocol*.

About the AAA

The administrator's role is to manage the administrative aspects of the arbitration, such as the appointment of the arbitrator, preliminary decisions about where hearings might take place, and handling the fees associated with the arbitration. As administrator, however, the AAA does not decide the merits of a case or make any rulings on issues such as what documents must be shared with each side. Because the AAA's role is only administrative, the AAA cannot overrule or change an arbitrator's decisions or rulings. The administrator will comply with any court orders issued from litigation involving the parties to the dispute.

The American Arbitration Association, founded in 1926, is a neutral, independent, and private not-for-profit organization. We offer a broad range of conflict management services to businesses, organizations, and individuals. We also provide education, training, and publications focused on methods for settling disputes out of court.

The Arbitrator

Except where the parties to a case reach their own settlement, the arbitrator will make the final, binding decision called the Award on the dispute and render it in writing. The Arbitrator makes all the procedural decisions on a case not made by the Administrator or not decided jointly by the parties. The arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law or laws that apply to the case.

Arbitrators are neutral and independent decision makers who are not employees of the AAA. Once appointed to a case, an arbitrator may not be removed by one party without the other party's consent or unless the Administrator determines an arbitrator should be removed and replaced by another arbitrator chosen by the Administrator in a manner described in these Rules.

The AAA's Consumer Arbitration Rules

The AAA has developed the *Consumer Arbitration Rules* for consumers and businesses that want to have their disagreements resolved through arbitration.

Availability of Mediation through Mediation.org

Mediation in consumer disputes is also available to help parties resolve their disputes. Parties interested in participating in mediation may find a mediator through **www.mediation.org**.

Administrative Fees

The Association charges a fee for its services under these Rules. A fee schedule is included at the end of these Rules in the Costs of Arbitration section.

Arbitrator's Fees

Arbitrators are paid for the time they spend resolving disputes. The business makes deposits as outlined in the fee schedule in the Costs of Arbitration section of these Rules. Unused deposits are refunded at the end of the case.

Notification

A business intending to incorporate these Rules or to refer to the dispute resolution services of the AAA in a consumer alternative dispute resolution ("ADR") plan should, at least 30 days prior to the planned effective date of the program,

- notify the Association of its intention to do so, and
- provide the Association with a copy of the consumer dispute resolution plan.

If a business does not comply with this requirement, the Association reserves the right to withhold its administrative services. For more information, please see R-12 below.

Filing a Case and Initial AAA Administrative Steps

R-1. Applicability (When the AAA Applies These Rules)

- (a) The parties shall have made these *Consumer Arbitration Rules* ("Rules") a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA"), and
- 1) have specified that these *Consumer Arbitration Rules* shall apply;
 - 2) have specified that the *Supplementary Procedures for Consumer-Related Disputes* shall apply, which have been amended and renamed the *Consumer Arbitration Rules*;
 - 3) the arbitration agreement is contained within a consumer agreement, as defined below, that does not specify a particular set of rules; or
 - 4) the arbitration agreement is contained within a consumer agreement, as defined below, that specifies a particular set of rules other than the *Consumer Arbitration Rules*.

When parties have provided for the AAA's rules or AAA administration as part of their consumer agreement, they shall be deemed to have agreed that the application of the AAA's rules and AAA administration of the consumer arbitration shall be an essential term of their consumer agreement.

The AAA defines a consumer agreement as an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use.

Examples of contracts that typically meet the criteria for application of these Rules, if the contract is for personal or household goods or services and has an arbitration provision, include, but are not limited to the following:

- Credit card agreements
- Telecommunications (cell phone, ISP, cable TV) agreements
- Leases (residential, automobile)
- Automobile and manufactured home purchase contracts
- Finance agreements (car loans, mortgages, bank accounts)
- Home inspection contracts
- Pest control services

- Moving and storage contracts
- Warranties (home, automobile, product)
- Legal funding
- Health and fitness club membership agreements
- Travel services
- Insurance policies
- Private school enrollment agreements

Examples of contracts that typically do not meet the criteria for application of these Rules, should the contract contain an arbitration provision, include, but are not limited to the following:

- Home construction and remodeling contracts
- Real estate purchase and sale agreements
- Condominium or homeowner association by-laws
- Business insurance policies (including crop insurance)
- Commercial loan and lease agreements
- Commercial guaranty agreements

- (b) When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these Rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.
- (c) The consumer and the business may agree to change these Rules. If they agree to change the Rules, they must agree in writing. If the consumer and the business want to change these Rules after the appointment of the arbitrator, any changes may be made only with the approval of the arbitrator.
- (d) The AAA administers consumer disputes that meet the due process standards contained in the *Consumer Due Process Protocol* and the *Consumer Arbitration Rules*. The AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*. Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

RECEIVED
FEB 07 2017
SC Court of Appeals

- (e) The AAA has the initial authority to apply or not to apply the *Consumer Arbitration Rules*. If either the consumer or the business disagrees with the AAA's decision, the objecting party must submit the objection by the due date for filing an answer to the demand for arbitration. If an objection is filed, the arbitrator shall have the authority to make the final decision on which AAA rules will apply.
- (f) If, within 30 days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration for 30 days to permit the party to obtain a stay of arbitration from the court.
- (g) Where no disclosed claims or counterclaims exceed \$25,000, the dispute shall be resolved by the submission of documents only/desk arbitration (see R-29 and the *Procedures for the Resolution of Disputes through Document Submission* below). Any party, however, may ask for a hearing. The arbitrator also may decide that a hearing is necessary.

R-2. Starting Arbitration under an Arbitration Agreement in a Contract

- (a) Arbitration filed under an arbitration agreement naming the AAA shall be started in the following manner:
 - (1) The party who starts the arbitration (referred to as the "claimant" throughout the arbitration) must contact, in writing, the party that the case is filed against (referred to as the "respondent" throughout the arbitration) that it wishes to arbitrate a dispute. This written contact is referred to as the Demand for Arbitration ("Demand"). The Demand must do the following:
 - Briefly explain the dispute
 - List the names and addresses of the consumer and the business, and, if known, the names of any representatives of the consumer and the business
 - Specify the amount of money in dispute, if applicable
 - Identify the requested location for the hearing if an in-person hearing is requested
 - State what the claimant wants
 - (2) The claimant must also send one copy of the Demand to the AAA at the same time the demand is sent to the respondent. When sending a Demand to the AAA, the claimant must also send the following:
 - A copy of the arbitration agreement contained in the contract and/or agreement and/or purchase document
 - The proper filing fee; the amount of the filing fee can be found in the Costs of Arbitration section at the end of these Rules.

- (3) If the arbitration is pursuant to a court order, the claimant must send one copy of the Demand to the AAA at the same time the Demand is sent to the respondent. When sending a demand to the AAA, the claimant must also send the following:

- A copy of the court order
- A copy of the arbitration agreement contained in the contract and/or agreement and/or purchase document
- The proper filing fee

The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party either to make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.

The claimant may file by mail. The mailing address of the AAA's Case Filing Services is:

American Arbitration Association
Case Filing Services
1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043

Or, the claimant may file online using AAA WebFile: <https://www.adr.org>

Or, the claimant may file at any of the AAA's offices.

- (b) The AAA will send a written notice letting the consumer and the business know the Demand for Arbitration has been received.
- (c) The respondent may submit a written response to the Demand, known as an "answer," which describes how the respondent responds to the claimant's claim. The answer must be sent to the AAA within 14 calendar days after the date the AAA notifies the parties that the Demand for Arbitration was received and all filing requirements were met. The answer must be
- in writing,
 - sent to the AAA, and
 - sent to the claimant at the same time.
- (d) The respondent may also file a counterclaim, which is the respondent filing a Demand against the claimant. If the respondent has a counterclaim, the counterclaim must briefly explain the dispute, specify the amount of money involved, and state what the respondent wants.

- (e) If no answer is filed within 14 calendar days, the AAA will assume that the respondent does not agree with the claim filed by the claimant. The case will move forward after 14 days regardless of whether an answer is filed.
- (f) When sending a Demand or an answer, the consumer and the business are encouraged to provide enough details to make the dispute clear to the arbitrator.

R-3. Agreement to Arbitrate When There is No AAA Arbitration Clause

If the consumer and business do not have an arbitration agreement or their arbitration agreement does not name the AAA, the parties may agree to have the AAA arbitrate their dispute. To start the arbitration, the parties must send the AAA a submission agreement, which is an agreement to arbitrate their case with the AAA, signed by the consumer and the business (email communications between all parties to a dispute reflecting an agreement to arbitrate also is acceptable). The submission agreement must

- be in writing (electronic communication is acceptable);
- be signed by both parties;
- briefly explain the dispute;
- list the names and addresses of the consumer and the business;
- specify the amount of money involved;
- specify the requested location for the hearing if an in-person hearing is requested; and
- state the solution sought.

The parties should send one copy of the submission agreement to the AAA. They must also send the proper filing fees. A fee schedule can be found in the Costs of Arbitration section at the end of these Rules.

R-4. AAA Administrative Fees

As a not-for-profit organization, the AAA charges fees to compensate it for the cost of providing administrative services. The fee schedule in effect when the case is filed shall apply for all fees charged during the administration of the case. The AAA may, in the event of the consumer's extreme hardship, defer or reduce the consumer's administrative fees.

AAA fees shall be paid in accordance with the Costs of Arbitration section found at the end of these Rules.

R-5. Neutral Arbitrator's Compensation

- (a) Arbitrators serving under these Rules shall be compensated at a rate established by the AAA.
- (b) Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.
- (c) Arbitrator compensation shall be paid in accordance with the Costs of Arbitration section found at the end of these Rules.

R-6. Depositing Neutral Arbitrator's Compensation with the AAA

The AAA may require the parties to deposit in advance of any hearings such sums of money as it decides are necessary to cover the expense of the arbitration, including the arbitrator's fee, and shall render an accounting to the parties and return any unused money at the conclusion of the case.

R-7. Expenses

Unless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses.

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne in accordance with the Costs of Arbitration section found at the end of these Rules.

R-8. Changes of Claim

Once a Demand has been filed, any new claims or counterclaims, or changes to the claim or counterclaim, must be made in writing and sent to the AAA. The party making the new or different claim or counterclaim shall send a copy to the opposing party. As with the original Demand or counterclaim, a party shall have 14 calendar days from the date the AAA notifies the parties it received the new or different claim or counterclaim to file an answering statement with the AAA.

If an arbitrator has already been appointed, a new or different claim or counterclaim may only be considered if the arbitrator allows it.

R-9. Small Claims Option for the Parties

If a party's claim is within the jurisdiction of a small claims court, either party may choose to take the claim to that court instead of arbitration as follows:

- (a) The parties may take their claims to small claims court without first filing with the AAA.
- (b) After a case is filed with the AAA, but before the arbitrator is formally appointed to the case by the AAA, a party can send a written notice to the opposing party and the AAA that it wants the case decided by a small claims court. After receiving this notice, the AAA will administratively close the case.
- (c) After the arbitrator is appointed, if a party wants to take the case to small claims court and notifies the opposing party and the AAA, it is up to the arbitrator to determine if the case should be decided in arbitration or if the arbitration case should be closed and the dispute decided in small claims court.

R-10. Administrative Conference with the AAA

At the request of any party or if the AAA should so decide, the AAA may have a telephone conference with the parties and/or their representatives. The conference may address issues such as arbitrator selection, the possibility of a mediated settlement, exchange of information before the hearing, timing of the hearing, the type of hearing that will be held, and other administrative matters.

R-11. Fixing of Locale (the city, county, state, territory and/or country where the arbitration will take place)

If an in-person hearing is to be held and if the parties do not agree to the locale where the hearing is to be held, the AAA initially will determine the locale of the arbitration. If a party does not agree with the AAA's decision, that party can ask the arbitrator, once appointed, to make a final determination. The locale determination will be made after considering the positions of the parties, the circumstances of the parties and the dispute, and the *Consumer Due Process Protocol*.

R-12. Business Notification and Publicly-Accessible Consumer Clause Registry

Beginning September 1, 2014, a business that provides for or intends to provide for these Rules or another set of AAA Rules in a consumer contract (as defined in R-1) should

1. notify the AAA of the existence of such a consumer contract or of its intention to do so at least 30 days before the planned effective date of the contract.
2. provide the AAA a copy of the arbitration agreement.

Upon receiving the arbitration agreement, the AAA will review the agreement for material compliance with due process standards contained in the *Consumer Due Process Protocol* and the *Consumer Arbitration Rules* (see Rule 1(d)). There is a nonrefundable fee to conduct this initial review and maintain a publicly-available clause registry, which is detailed in the Costs of Arbitration section found at the end of these Rules. Any subsequent changes, additions, deletions, or amendments to a currently-registered arbitration agreement must be resubmitted for review and a review fee will be assessed at that time. The AAA will decline to administer consumer arbitrations arising out of that arbitration agreement where the business fails to pay the review fee.

If a business does not submit its arbitration agreement for review and a consumer arbitration then is filed with the AAA, the AAA will conduct an expedited review at that time. Along with any other filing fees that are owed for that case, the business also will be responsible for paying the nonrefundable review and Registry fee (including any fee for expedited review at the time of filing) for this initial review, which is detailed in the Costs of Arbitration section found at the end of these Rules. The AAA will decline to administer consumer arbitrations arising out of that arbitration agreement if the business declines to pay the review and Registry fee.

After the AAA reviews the submitted consumer clause, receives the annual consumer registry fee, and determines it will administer consumer-related disputes filed pursuant to the consumer clause, the business will be included on the publicly-accessible Consumer Clause Registry. This Consumer Clause Registry maintained by the AAA will contain the name of the business, the address, and the consumer arbitration clause, along with any related documents as deemed necessary by the AAA. The AAA's review of a consumer arbitration clause and determination whether or not to administer arbitrations pursuant to

that clause is only an administrative determination by the AAA and cannot be relied upon or construed as a legal opinion or advice regarding the enforceability of the arbitration clause. Consumer arbitration agreements may be registered at: www.adr.org/consumerclauseregistry or via email at consumerreview@adr.org.

For more information concerning the Consumer Clause Registry, please visit the AAA's website at www.adr.org/consumerclauseregistry.

The Registry fee to initially review a business's agreement and maintain the clause registry list is a yearly, non-refundable fee for the business's arbitration agreement. Any different arbitration agreements submitted by the same business or its subsidiaries must be submitted for review and are subject to the current review fee.

If the AAA declines to administer a case due to the business's non-compliance with this notification requirement, the parties may choose to submit their dispute to the appropriate court.

R-13. AAA and Delegation of Duties

When the consumer and the business agree to arbitrate under these Rules or other AAA rules, or when they provide for arbitration by the AAA and an arbitration is filed under these Rules, the parties also agree that the AAA will administer the arbitration. The AAA's administrative duties are set forth in the parties' arbitration agreement and in these Rules. The AAA will have the final decision on which office and which AAA staff members will administer the case. Arbitrations administered under these Rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-14. Jurisdiction

- (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
- (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

Appointing the Arbitrator

R-15. National Roster of Arbitrators

The AAA maintains a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators from this National Roster to resolve the parties' dispute(s).

R-16. Appointment from National Roster

- (a) If the parties have not appointed an arbitrator and have not agreed to a process for appointing the arbitrator, immediately after the filing of the submission agreement or the answer, or after the deadline for filing the answer, the AAA will administratively appoint an arbitrator from the National Roster.
- (b) If the parties' arbitration agreement provides for three or more arbitrators and they have not appointed the arbitrators and have not agreed to a process for appointing the arbitrators, immediately after the filing of the submission agreement or the answer, or after the deadline for filing the answer, the AAA will administratively appoint the arbitrators from the National Roster. The AAA will appoint the chairperson.
- (c) Arbitrator(s) serving under these Rules will be neutral and must meet the standards of R-19 with respect to being impartial and independent.

R-17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators and the parties do not agree on the number, the dispute shall be heard and decided by one arbitrator.

R-18. Disclosure

- (a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, must provide information to the AAA of any circumstances likely to raise justifiable doubt as to whether the arbitrator can remain impartial or independent. This disclosure of information would include
 - (1) any bias;
 - (2) any financial interest in the result of the arbitration;
 - (3) any personal interest in the result of the arbitration; or
 - (4) any past or present relationship with the parties or their representatives.

Such obligation to provide disclosure information remains in effect throughout the arbitration. A failure on the part of a party or a representative to comply with the

requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-50.

- (b) If the AAA receives such information from the arbitrator or another source, the AAA will communicate the information to the parties. If the AAA decides it is appropriate, it will also communicate the information to the arbitrator and others.
- (c) In order to encourage disclosure by arbitrators, disclosing such information does not mean that the arbitrator considers the disclosed information will likely affect his or her ability to be impartial or independent.

R-19. Disqualification of Arbitrator

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties carefully and in good faith. The AAA may disqualify an arbitrator who shows
 - (1) partiality or lack of independence;
 - (2) inability or refusal to perform his or her duties with diligence and in good faith; or
 - (3) any grounds for disqualification provided by applicable law.
- (b) If a party objects to the continued service of an arbitrator, or if the AAA should so decide to raise the issue of whether the arbitrator should continue on the case, the AAA will decide if the arbitrator should be disqualified. After gathering the opinions of the parties, the AAA will decide and that decision shall be final and conclusive.

R-20. Vacancies

If for any reason an arbitrator cannot or is unwilling to perform the duties of the office, the AAA may declare the office vacant. Any vacancies shall be filled based on the original procedures used to appoint the arbitrator. If a substitute arbitrator is appointed, the substitute arbitrator will decide if it is necessary to repeat all or part of any prior ruling or hearing.

Pre-Hearing Preparation

R-21. Preliminary Management Hearing with the Arbitrator

- (a) If any party asks for, or if the AAA or the arbitrator decides to hold one, the arbitrator will schedule a preliminary management hearing with the parties and/or their representatives as soon as possible. The preliminary management hearing will be conducted by telephone unless the arbitrator decides an in-person preliminary management hearing is necessary.
- (b) During the preliminary management hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of issues and claims, scheduling of the hearings, and any other preliminary matters.
- (c) The arbitrator shall promptly issue written orders that state the arbitrator's decisions made during or as a result of the preliminary management hearing. The arbitrator may also conduct additional preliminary management hearings if the need arises.

R-22. Exchange of Information between the Parties

- (a) If any party asks or if the arbitrator decides on his or her own, keeping in mind that arbitration must remain a fast and economical process, the arbitrator may direct
 - 1) specific documents and other information to be shared between the consumer and business, and
 - 2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing.
- (b) Any exhibits the parties plan to submit at the hearing need to be shared between the parties at least five business days before the hearing, unless the arbitrator sets a different exchange date.
- (c) No other exchange of information beyond what is provided for in section (a) above is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process.
- (d) The arbitrator has authority to resolve any disputes between the parties about exchanging information.

R-23. Enforcement Powers of the Arbitrator

The arbitrator may issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient, and economical resolution of the case, including, but not limited to:

- (a) an order setting the conditions for any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing in order to preserve such confidentiality;

- (b) to the extent the exchange of information takes place pursuant to R-22, imposing reasonable search limitations for electronic and other documents if the parties are unable to agree;
- (c) allocating costs of producing documentation, including electronically-stored documentation;
- (d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and
- (e) issuing any other enforcement orders that the arbitrator is empowered to issue under applicable law.

R-24. Written Motions (except for Dispositive Motions—see R-33)

The arbitrator may consider a party's request to file a written motion (except for Dispositive Motions—see R-33) only after the parties and the arbitrator conduct a conference call to attempt to resolve the issue that gives rise to the proposed motion. Only after the parties and the arbitrator hold the call may the arbitrator consider a party's request to file a written motion. The arbitrator has the sole discretion to allow or deny the filing of a written motion and his or her decision is final.

R-25. Representation of a Party

Any party may participate in the arbitration without representation, or may be represented by counsel or other authorized representative, unless such choice is prohibited by applicable law. A party intending to be represented shall give the opposing party and the AAA the name, address, and contact information of the representative at least three business days before the hearing where that representative will first appear in the case. It will be considered proper notice if a representative files the arbitration demand or answer or responds for a party during the course of the arbitration.

While parties do not need an attorney to participate in arbitration, arbitration is a final, legally-binding process that may impact a party's rights. As such, parties may want to consider consulting an attorney.

R-26. Setting the Date, Time, and Place (the physical site of the hearing within the designated locale) of Hearing

The arbitrator will set the date, time, and place for each hearing within the locale as determined in R-11. A hearing may be by telephone or in person. For their part, the parties commit to

- (1) respond promptly to the arbitrator when he or she asks what dates the parties are available to have the hearings;
- (2) cooperate in the scheduling of the hearing on the earliest possible date; and
- (3) follow the hearing schedule set up by the arbitrator.

The AAA will send a notice of the hearing to the parties at least 10 days before the hearing date, unless the parties agree to a different time frame.

R-27. Written Record of Hearing

- (a) If a party wants a written record of the hearing, that party must make such arrangement directly with a stenographer (court reporter) and notify the opposing parties, the AAA, and the arbitrator of these arrangements at least three business days before the hearing. The party or parties who request the written record shall pay the cost of the service.
- (b) No other type of recording will be allowed unless the parties agree or the arbitrator directs a different form of recording.
- (c) The arbitrator may resolve disputes between the parties over who will pay the costs of the written record or other type of recording.
- (d) The parties can agree or the arbitrator may decide that the transcript (written record) is the official record of the hearing. If it is the official record of the hearing, the transcript must be given to the arbitrator and made available to all the parties so that it can be reviewed. The date, time, and place of the inspection will be decided by the arbitrator.

R-28. Interpreters

If a party wants an interpreter present for any part of the process, that party must make arrangements directly with the interpreter and shall pay for the costs of the service.

R-29. Documents-Only Procedure

Disputes may be resolved by submission of documents and without in-person or telephonic hearings. For cases being decided by the submission of documents only, the *Procedures for the Resolution of Disputes through Document Submission* (found at the end of these Rules) shall supplement these Rules. These Procedures will apply where no disclosed claims or counterclaims exceed \$25,000 (see R-1(g)), unless any party requests an in-person or telephonic hearing or the arbitrator decides that a hearing is necessary.

Hearing Procedures

R-30. Attendance at Hearings

The arbitrator and the AAA will keep information about the arbitration private except to the extent that a law provides that such information shall be shared or made public. The parties and their representatives in the arbitration are entitled to attend the hearings. The arbitrator will determine any disputes over whether a non-party may attend the hearing.

R-31. Oaths

Before starting the hearing, each arbitrator may take an oath of office and, if required by law, shall do so. If the arbitrator determines that witnesses shall testify under oath, then the arbitrator will direct the oath be given by a duly-qualified person.

R-32. Conduct of Proceedings

- (a) The claimant must present evidence to support its claim. The respondent must then present evidence to support its defense. Witnesses for each party also must answer questions from the arbitrator and the opposing party. The arbitrator may change this procedure, as long as each party has the right to be heard and is given a fair opportunity to present its case.
- (b) When the arbitrator decides it is appropriate, the arbitrator may also allow the parties to present evidence in alternative ways, including web conferencing, Internet communication, and telephonic conferences. All procedures must provide the parties with a full and equal opportunity to present any evidence that the arbitrator decides is material and relevant to deciding the dispute. If the alternative ways to present evidence involve witnesses, those ways may include that the witness submit to direct and cross-examination questioning.
- (c) The arbitrator will use his or her discretion to resolve the dispute as quickly as possible and may direct the parties to present the evidence in a certain order, or may split the proceedings into multiple parts and direct the parties in the presentation of evidence.
- (d) The hearing generally will not exceed one day. However, if a party shows good cause, the arbitrator may schedule additional hearings within seven calendar days after the initial day of hearing.
- (e) The parties may agree in writing to waive oral hearings.

R-33. Dispositive Motions

The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

- (a) The parties may offer relevant and material evidence and must produce any evidence the arbitrator decides is necessary to understand and decide the dispute. Following the legal rules of evidence shall not be necessary. All evidence should be taken in the presence of the arbitrator and all of the parties, unless any of the parties is absent, in default, or has waived the right to be present.
- (b) The arbitrator shall determine what evidence will be admitted, what evidence is relevant, and what evidence is material to the case. The arbitrator may also exclude evidence that the arbitrator decides is cumulative or not relevant.
- (c) The arbitrator shall consider applicable principles of legal privilege, such as those that involve the confidentiality of communications between a lawyer and a client.
- (d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so on the request of any party or on the arbitrator's own determination. If a party requests the arbitrator sign a subpoena, that party shall copy the request to the other parties in the arbitration at the same time it is provided to the arbitrator.

R-35. Evidence by Affidavit and Post-Hearing Filing of Documents or Other Evidence

- (a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit rather than in-person testimony but will give this evidence only such credence as the arbitrator decides is appropriate. The arbitrator will consider any objection to such evidence made by the opposing party.
- (b) If the parties agree or the arbitrator decides that documents or other evidence need to be submitted to the arbitrator after the hearing, those documents or other evidence will be filed with the AAA so that they can be sent to the arbitrator. All parties will be given the opportunity to review and respond to these documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to inspect property or conduct an investigation in connection with the arbitration will request that the AAA inform the parties. The arbitrator will set the date and time of the inspection and investigation, and

the AAA will notify the parties. Any party who would like to be present at the inspection or investigation may attend. If one or all parties are not present at the inspection or investigation, the arbitrator will make an oral or written report to the parties and allow them an opportunity to comment.

R-37. Interim Measures (a preliminary decision made by the arbitrator involving part or all of the issue(s) in dispute in the arbitration)

- (a) The arbitrator may grant whatever interim measures he or she decides are necessary, including granting an injunction and ordering that property be protected.
- (b) Such interim measures may take the form of an interim award, and the arbitrator may require a security payment for the costs of such measures.
- (c) When making a decision on an interim measure, the arbitrator may grant any remedy, relief, or outcome that the parties could have received in court.
- (d) A party to an arbitration agreement under these Rules may instead file in state or federal court for interim relief. Applying to the court for this type of relief, including temporary restraining orders, is consistent with the agreement to arbitrate and will not be considered a waiver of the right to arbitrate.

R-38. Postponements

The arbitrator may postpone any hearing

- (a) if requested by a party, and the party shows good cause for the postponement;
- (b) if all parties agree to a postponement;
- (c) on his or her own decision.

R-39. Arbitration in the Absence of a Party or Representative

The arbitration may proceed even if any party or representative is absent, so long as proper notice was given and that party or representative fails to appear or obtain a postponement from the arbitrator. An award cannot be made only because of the default of a party. The arbitrator shall require the party who participates in the hearing to submit the evidence needed by the arbitrator to make an award.

Conclusion of the Hearing

R-40. Closing of Hearing

The arbitrator must specifically ask all parties whether they have any further proofs to offer or witnesses to be heard. When the arbitrator receives negative replies or he or she is satisfied that the record is complete, the arbitrator will declare the hearing closed.

If briefs or other written documentation are to be filed by the parties, the hearing shall be declared closed as of the final date set by the arbitrator. Absent agreement of the parties, the time that the arbitrator has to make the award begins upon the closing of the hearing. The AAA may extend the time limit for the rendering of the award only in unusual and extreme circumstances.

R-41. Reopening of Hearing

If a party requests, or if the arbitrator decides to do so, the hearing may be reopened at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. If the arbitrator reopens the hearing, he or she shall have 30 days from the closing of the reopened hearing within which to make an award.

R-42. Time of Award

The award shall be issued promptly by the arbitrator and, unless the parties agree differently or the law indicates a different time frame, no later than 30 calendar days from the date the hearing is closed, or, if the case is a documents-only procedure, 14 calendar days from the date the arbitrator set for his or her receipt of the final statements and proofs. The AAA may extend the time limit for the rendering of the award only in unusual and extreme circumstances.

R-43. Form of Award

- (a) Any award shall be in writing and executed in the form and manner required by law.
- (b) The award shall provide the concise written reasons for the decision unless the parties all agree otherwise. Any disagreements over the form of the award shall be decided by the arbitrator.

RECEIVED

FEB 07 2017

SC Court of Appeals

- (c) The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award.

R-44. Scope of Award

- (a) The arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law(s) that applies to the case.
- (b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and divide up the fees, expenses, and compensation related to such award as the arbitrator decides is appropriate, subject to the provisions and limitations contained in the Costs of Arbitration section.
- (c) The arbitrator may also allocate compensation, expenses as defined in sections (v) and (vii) of the Costs of Arbitration section, and administrative fees (which include Filing and Hearing Fees) to any party upon the arbitrator's determination that the party's claim or counterclaim was filed for purposes of harassment or is patently frivolous.
- (d) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-4, R-5, and R-7 in favor of any party, subject to the provisions and limitations contained in the Costs of Arbitration section.

R-45. Award upon Settlement

If the parties settle their dispute at any point during the arbitration and at the parties' request, the arbitrator may lay out the terms of the settlement in a "consent award" (an award drafted and signed by the arbitrator that reflects the settlement terms of the parties). A consent award must include a division of the arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses. Consent awards will not be made available to the public per Rule 43(c) unless the parties agree otherwise.

R-46. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-47. Modification of Award for Clerical, Typographical, or Mathematical Errors

- (a) Within 20 days after the award is transmitted, any party, upon notice to the opposing parties, may contact the AAA and request that the arbitrator correct any clerical, typographical, or mathematical errors in the award. The arbitrator has no power to re-determine the merits of any claim already decided.
- (b) The opposing parties shall be given 10 days to respond to the request. The arbitrator shall make a decision on the request within 20 days after the AAA transmits the request and any responses to the arbitrator.
- (c) If applicable law provides a different procedural time frame, that procedure shall be followed.

Post Hearing

R-48. Release of Documents for Judicial Proceedings

The AAA shall give a party certified copies of any records in the AAA's possession that may be required in judicial proceedings relating to the arbitration, except for records determined by the AAA to be privileged or confidential. The party will have to pay a fee for this service.

R-49. Applications to Court and Exclusion of Liability

- (a) No court or judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to an arbitration under these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these Rules shall be deemed to have consented that neither the AAA, AAA employees, nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.
- (e) Parties to an arbitration under these Rules may not call the arbitrator, the AAA, or any AAA employee as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA, and AAA employees are not competent to and may not testify as witnesses in any such proceeding.

General Procedural Rules

R-50. Waiver of Rules

If a party knows that any of these Rules have not been followed, it must object in writing before proceeding with arbitration or it will lose its right to object that the rule has not been followed.

R-51. Extensions of Time

The parties may agree to change any period of time provided for in the Rules, except that any such modification that negatively affects the efficient resolution of the dispute is subject to review and approval by the arbitrator. The AAA or the arbitrator may for good cause extend any period of time in these Rules, except as set forth in R-42. The AAA will notify the parties of any extension.

R-52. Serving of Notice and AAA and Arbitrator Communications

- (a) Any papers or notices necessary for the initiation or continuation of an arbitration under these Rules, or for the entry of judgment on any award made under these Rules, may be served on a party by mail or email addressed to the party or its representative at the last-known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.
- (b) The AAA, the arbitrator, and the parties also may use overnight delivery, electronic facsimile transmission (fax), or electronic mail (email) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be sent by other methods of communication.
- (c) Unless directed differently by the AAA or by the arbitrator, any documents and all written communications submitted by any party to the AAA or to the arbitrator also shall be sent at the same time to all parties to the arbitration.
- (d) A failure to provide the other parties with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained within those communications.
- (e) A party and/or someone acting on behalf of a party cannot have any communications with an arbitrator or a potential arbitrator about the arbitration outside of the presence of the opposing party. All such communications shall be conducted through the AAA.
- (f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or its representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

R-54. Remedies for Nonpayment

- (a) If arbitrator compensation or administrative charges have not been paid in full, the AAA may inform the parties so that one of them may forward the required payment.
- (b) Once the AAA informs the parties that payments have not been received, a party may request an order from the arbitrator directing what measures might be taken in light of a party's nonpayment.

Such measures may include limiting a party's ability to assert or pursue its claim. However, a party shall never be precluded from defending a claim or counterclaim. The arbitrator must provide the party opposing a request for relief with the opportunity to respond prior to making any determination. In the event that the arbitrator grants any request for relief that limits any party's participation in the arbitration, the arbitrator will require the party who is making a claim and who has made appropriate payments to submit the evidence required to make an award.

- (c) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.
- (d) If arbitrator compensation or AAA administrative fees remain unpaid after a determination to suspend an arbitration due to nonpayment, the arbitrator has the authority to terminate the proceedings. Such an order shall be in writing and signed by the arbitrator. The impact of the termination for nonpayment of the Consumer Clause Registry fee is the removal from the "Registered" section of the Registry.

R-55. Declining or Ceasing Arbitration

The AAA in its sole discretion may decline to accept a Demand for Arbitration or stop the administration of an ongoing arbitration due to a party's improper conduct, including threatening or harassing behavior towards any AAA staff, an arbitrator, or a party or party's representative.

Costs of Arbitration (including AAA Administrative Fees)*

Arbitrator compensation is not included as part of the administrative fees charged by the AAA. Arbitrator compensation is based on a rate established by the AAA as set forth below. If a Preliminary Management Hearing is held by the arbitrator, the arbitrator is entitled to one-half the arbitration compensation rate for a full hearing day or a documents-only hearing. Once evidentiary hearings are held, the arbitrator is entitled to the full-day rate of compensation. The business shall pay the arbitrator's compensation unless the consumer, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation. Arbitrator compensation, expenses as defined in sections (v) and (vii) below, and administrative fees (which include Filing and Hearing Fees) are not subject to reallocation by the arbitrator(s) except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.

** Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA at 1-800-778-7879, if you have any questions regarding the waiver of administrative fees. (Effective January 1, 2003)*

Party	Desk Arbitration	In-Person or Telephonic Hearing – Single Arbitrator	In-Person or Telephonic Hearing – Three Or More Arbitrators
Consumer	Filing Fee—\$200 (nonrefundable)	Filing Fee—\$200 (nonrefundable)	Filing Fee—\$200 (nonrefundable)
Business	Filing Fee—\$1,700 Arbitrator Compensation—\$750 per case	Filing Fee—\$1,700 Hearing Fee—\$500 Arbitrator Compensation—\$1,500 per hearing day	Filing Fee—\$2,200 Hearing Fee—\$500 Arbitrator Compensation—\$1,500 per hearing day per arbitrator

(i) Filing Fees

In cases before a single arbitrator, a nonrefundable filing fee capped in the amount of \$200 is payable in full by the consumer when a case is filed, unless the parties' agreement provides that the consumer pay less. A partially refundable fee in the amount of \$1,700 is payable in full by the business, unless the parties' agreement provides that the business pay more. This fee is due from the business once the consumer has met the filing requirements.

In cases before three or more arbitrators, a nonrefundable filing fee capped in the amount of \$200 is payable in full by the consumer when a case is filed, unless the parties' agreement provides that the consumer pay less. A partially refundable fee in the amount of \$2,200 is payable in full by the business, unless the parties' agreement provides that the business pay more. This fee is due from the business once the consumer has met the filing requirements.

There shall be no filing fee charged for a counterclaim.

The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules and which may be required by the parties' agreement or stipulation.

(ii) Neutral Arbitrator's Compensation

Arbitrators serving on a case with an in-person or telephonic hearing will receive compensation at a rate of \$1,500 per day.

Arbitrators serving on a case with a desk arbitration/documents-only hearing will receive compensation at a rate of \$750 per case.

The AAA reserves the right to raise the daily or per-case arbitrator compensation rate because of the complexity of the case or for processes and procedures beyond those provided for in these Rules and which may be required by the parties' requests, agreement, or stipulation (1) at the time of the AAA's initiation of the case; (2) upon the addition of a new party; (3) when a change of claim is made and, if necessary, approved by the arbitrator(s); (4) or if circumstances arise during the course of the case due to the complexity of issues and submissions by the parties. Any determination by the AAA on compensation rates is in the sole discretion of the AAA and such decision is final and binding on the parties and arbitrator.

(iii) Refund Schedule

Once the claimant has met the filing requirements, refunds to the business will be calculated as follows:

- if the case is settled or withdrawn within 30 calendar days, 50% of the filing fee will be refunded to the business.

However, no refund of the filing fee will be made once an arbitrator has been appointed and no refunds will be made on awarded cases. The date the claimant's filing requirements are met is the date used to calculate any refund of filing fees. If the matter is settled or withdrawn prior to receipt of filing fees from the business, the AAA will bill the business in accordance with this refund schedule.

(iv) Hearing Fees

For telephonic hearings or in-person hearings held, an additional administrative fee of \$500 is payable by the business.

There is no AAA hearing fee for the initial Administrative Conference (see R-10).

(v) Hearing Room Rental

The hearing fees described above do not cover the rental of hearing rooms. The AAA maintains rental hearing rooms in most offices for the convenience of the parties. Check with the administrator for availability and rates. Hearing room rental fees will be borne by the business.

(vi) Abeyance Fee

Parties on cases held as inactive for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the opposing party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed. All filing requirements, including payment of filing fees, must be met before a matter may be placed in abeyance.

(vii) Expenses

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne by the business.

(viii) Consumer Clause Review and Registry Fee

Please note that all fees described below are nonrefundable.

For businesses submitting a clause, the cost of reviewing the clause and maintaining that clause on the Registry is \$500. A yearly Registry fee of \$500 will be charged to maintain each clause on the Registry for each calendar year thereafter.

If the AAA receives a demand for consumer arbitration from an arbitration clause that was not previously submitted to the AAA for review and placement on the Registry, the business will incur an additional \$250 fee to conduct an expedited review of the clause.

Any subsequent changes, additions, deletions, or amendments to currently registered arbitration agreement must be resubmitted for review and a review fee of \$500 will assessed at that time.

Procedures for the Resolution of Disputes through Document Submission

D-1. Applicability

- (a) In any case, regardless of claim size, the parties may agree to waive in-person/telephonic hearings and resolve the dispute through submission of documents to one arbitrator. Such agreement should be confirmed in writing no later than the deadline for the filing of an answer.
- (b) Where no disclosed claims or counterclaims exceed \$25,000, the dispute shall be resolved by these Procedures, unless a party asks for a hearing or the arbitrator decides that a hearing is necessary.
- (c) If one party makes a request to use the *Procedures for the Resolution of Disputes through Document Submission* (Procedures) and the opposing party is unresponsive, the arbitrator shall have the power to determine whether to proceed under the Procedures. If both parties seek to use the Procedures after the appointment of an arbitrator, the arbitrator must also consent to the process.
- (d) When parties agree to these Procedures, the procedures in Sections D-1 through D-4 of these Rules shall supplement other portions of these rules which are not in conflict with the Procedures.

D-2. Preliminary Management Hearing

Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator shall convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

D-3. Removal from the Procedures

- (a) The arbitrator has the discretion to remove the case from the Procedures if the arbitrator determines that an in-person or telephonic hearing is necessary.
- (b) If the parties agree to in-person or telephonic hearings after a previous agreement to proceed under the Procedures, the arbitrator shall conduct such hearings. If a party seeks to have in-person or telephonic hearings after agreeing to the Procedures, but there is not agreement among the parties to proceed with in-person or telephonic hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

D-4. Time of Award

- (a) The arbitrator shall establish the date for either final written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing, and the time for the rendering of the award shall commence on that day as well.
- (b) The arbitrator shall render the award within 14 calendar days from the date the hearing is closed.
- (c) The award is subject to all other provisions of these Rules that pertain to awards.

Glossary of Terms

Administrator

The Administrator's role is to manage the administrative aspects of the arbitration, such as the appointment of the arbitrator, to make preliminary decisions about where hearings might take place, and to handle the fees associated with the arbitration. As Administrator, however, the Administrator does not decide the merits of a case or make any rulings on issues such as what documents must be shared with each side. Because the Administrator's role is only administrative, the Administrator cannot overrule or change an arbitrator's decisions or rulings. The Administrator will comply with any court orders issued from litigation involving the parties to the dispute.

ADR Agreement

An ADR Agreement is an agreement between a business and a consumer to submit disputes to mediation, arbitration, or other ADR processes.

ADR Process

An ADR (Alternative Dispute Resolution) Process is a method of resolving a dispute other than by court litigation. Mediation and Arbitration are the most widely used ADR processes.

ADR Program

An ADR Program is any program or service set up or used by a business to resolve disputes out of court.

Arbitration

In arbitration, the parties submit disputes to an impartial person (the arbitrator) for a decision. Each party can present evidence to the arbitrator. Arbitrators do not have to follow the Rules of Evidence used in court.

Arbitrators decide cases with written decisions or "awards." An award is usually binding on the parties. A court may enforce an arbitration award and the court's review of arbitration awards is limited.

Arbitration Agreement

An arbitration agreement is a contract between parties to settle their disputes by binding arbitration. It is typically found in the parties' contract in a section entitled "Arbitration" or "Dispute Resolution." It gives the parties information about how they are choosing to settle any disputes that they might have.

Arbitrator

Arbitrators are neutral and independent decision makers who are not employees of the administrator. Except where the parties to a case reach their own settlement, the Arbitrator will make the final, binding decision on the dispute and render it in writing, called the Award. The Arbitrator makes all the procedural decisions on a case not made by the administrator or not decided jointly by the parties. The Arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law(s) that applies to the case.

Once appointed to a case, an Arbitrator may not be removed by one party without the other party's consent or unless the administrator determines an Arbitrator should be removed and replaced by another Arbitrator chosen by the administrator in a manner described in these Rules.

Case Administrator

The Case Administrator is the AAA's employee assigned to handle the administrative aspects of the case. He or she does not decide the case. He or she manages the case's administrative steps, such as exchanging documents, matching schedules, and setting up hearings. The Case Administrator is the parties' contact point for almost all aspects of the case outside of any hearings.

Claimant

A Claimant is the party who files the claim or starts the arbitration. Either the consumer or the business may be the Claimant.

Demand for Arbitration (also referred to as "Demand")

The written document created by the claimant that informs the respondent that it wishes to arbitrate a dispute. This document provides basic information about the dispute, the parties involved and what the claimant wants as a result of the arbitration.

Documents-Only Arbitration

In a Documents-Only Arbitration, the parties submit their arguments and evidence to the arbitrator in writing. The arbitrator then makes an award based only on the documents. No in-person or telephone hearing is held.

Independent ADR Institution

An Independent ADR Institution is an organization that provides independent and impartial administration of ADR programs for consumers and businesses. The American Arbitration Association is an Independent ADR Institution.

In-Person Hearing

During an In-Person Hearing, the parties and the arbitrator meet in a conference room or office and the parties present their evidence in a process that is similar to going to court. However, an In-Person Hearing is not as formal as going to court.

Mediation

In Mediation, an impartial person (the mediator) helps the parties try to settle their dispute by reaching an agreement together. A mediator's role is to help the parties come to an agreement. A mediator does not arbitrate or decide the outcome.

Neutral

A "Neutral" is a mediator, arbitrator, or other independent, impartial person selected to serve as the independent third party in an ADR process.

Party

The party is the person(s) or business that is involved in the dispute in the arbitration process. Usually, these are the people or businesses that have an arbitration agreement between them that specifies that a dispute should be resolved by arbitration.

Parties

Parties are all the separate individuals, businesses, or organizations involved in the arbitration.

Opposing Party

The opposing party is the other party that is on the opposite side of the arbitration from you. If you are the claimant, the Opposing Party is the respondent. If you are the respondent, the Opposing Party is the claimant. If you are the consumer, the Opposing Party is the business. If you are the business, the Opposing Party is the consumer.

Respondent

The respondent is the party against whom the claim is filed. If a Respondent states a claim in arbitration, it is called a counterclaim. Either the consumer or the business may be the Respondent.

Telephone Hearing

In a Telephone Hearing, the parties have the opportunity to tell the arbitrator about their case during a conference call. They also present their evidence to the arbitrator during the call. Often this is done after the parties have sent in documents for the arbitrator to review.



AMERICAN ARBITRATION ASSOCIATION®

800.778.7879 | website@mail@adr.org | adr.org

37 N.E.3d 194
Court of Appeals of Ohio,
Eighth District, Cuyahoga County.

Laura DeVITO, Plaintiff-Appellant

v.

AUTOS DIRECT ONLINE, INC., Defendant-Appellee.

No. 100831.

Aug. 20, 2015.

Synopsis

Background: Automobile purchaser brought action against vendor alleging Consumer Sales Practices Act and fraud claims after vendor allegedly delivered automobile with mechanical problems it had represented would be repaired. The Court of Common Pleas, Cuyahoga County, No. CV-13-811164, granted vendor's motion to stay proceedings pending arbitration. Purchaser appealed.

Holdings: The Court of Appeals, en banc, Tim McCormack, J., held that:

[1] arbitration provision requiring non-prevailing party to pay costs was unconscionable;

[2] provision was against public policy; but

[3] the Court of Appeals would not invalidate entire arbitration agreement.

Affirmed as modified.

Eileen T. Gallagher and Melody J. Stewart, JJ., concurred in judgment only.

Mary J. Boyle, J., concurred in judgment only and filed opinion in which Frank D. Celebrezze, Jr., A.J., joined.

Mary Eileen Kilbane, J., dissented and filed opinion in which Larry A. Jones, Sr., Kathleen Ann Keough, Eileen A. Gallagher, and Anita Laster Mays, JJ. joined.

West Headnotes (26)

[1] **Alternative Dispute Resolution** ⇌ Arbitration favored; public policy

The arbitration process is a favored method to settle disputes. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[2] **Alternative Dispute Resolution** ⇌ Contractual or consensual basis

Arbitration is a matter of contract. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[3] **Contracts** ⇌ Unconscionable Contracts

When an agreement is made under circumstances or terms that are so one-sided that the exchange of promises is involuntary, the law regards it as unfair or unconscionable to enforce the contract. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[4] **Contracts** ⇌ Unconscionable Contracts

The notion of unconscionability includes an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[5] **Contracts** ⇌ Procedural unconscionability

Contracts ⇌ Substantive unconscionability

The doctrine of unconscionability embodies two concepts: (1) "substantive unconscionability," which is unfair and unreasonable contract terms, and (2) "procedural unconscionability" or "bargaining naughtiness," which is individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[6] **Contracts** ⇌ Burden of proof; presumptions

The party claiming unconscionability of an agreement bears the burden of proving that the agreement is both substantively and procedurally unconscionable. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[7] **Appeal and Error** ⇌ Cases Triable in Appellate Court

A determination of whether a written agreement is unconscionable is an issue of law, and is reviewed de novo. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[8] **Contracts** ⇌ Substantive unconscionability

Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[9] **Contracts** ⇌ Substantive unconscionability

When a contractual term is so one-sided as to oppress or unfairly surprise a party, the contractual term is said to be substantively unconscionable. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[10] **Contracts** ⇌ Procedural unconscionability

Contracts ⇌ Substantive unconscionability

When a party has such superior bargaining power that the other party lacks a meaningful choice to enter into the contract, the contract is said to be procedurally unconscionable. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[11] **Contracts** ⇌ Procedural unconscionability

Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, including age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[12] **Contracts** ⇌ Procedural unconscionability

The crucial question for whether a contract is procedurally unconscionable is whether a party, considering his education or lack of it, had a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[13] **Contracts** ⇌ Procedural unconscionability

Contracts ⇌ Substantive unconscionability

Most cases of unconscionability in a contract involve a combination of procedural and substantive unconscionability, and if more of one is present, then less of the other is required. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[14] **Alternative Dispute Resolution** ⇌ Evidence

A party who seeks to avoid enforcement of an arbitration provision in a contract on grounds that the provision is unconscionable bears the burden of demonstrating that the agreement is both procedurally and substantively unconscionable. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[15] **Alternative Dispute Resolution ⇌ Unconscionability**

Arbitration provision in contract between automobile vendor and purchaser requiring non-prevailing party to pay all arbitration costs and expenses, including reasonable attorney's fees, was unconscionable; provision was substantively unconscionable as costs of arbitration process were not disclosed and even most diligent consumers would have had difficult time accurately assessing their exposure, and provision was procedurally unconscionable as it was tucked into a take-it-or-leave-it, preprinted, boilerplate arbitration agreement sent in an e-mail to purchaser among a stack of documents. (Per McCormack, J., with two judges concurring and four judges concurring in result.) R.C. § 1345.01 et seq.

Cases that cite this headnote

[16] **Contracts ⇌ Adhesion contracts; standardized contracts**

An "adhesion contract" is a standardized form contract prepared by one party, and offered to the weaker party, usually a consumer, who has no realistic choice as to the contract terms. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[17] **Contracts ⇌ Signing in ignorance of contents in general**

If a person can read and is not prevented from reading what he signs, he alone is responsible for reading what he signs. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[18] **Contracts ⇌ Signing in ignorance of contents in general**

Generally a consumer who is competent to contract and signs a contract without reading it is bound by its terms. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[19] **Alternative Dispute Resolution ⇌ Validity**

Arbitration provision in contract between automobile vendor and purchaser requiring non-prevailing party to pay all arbitration costs and expenses, including reasonable attorney's fees, even if purchaser had not filed an action against vendor in bad faith, was against public policy; provision attempted to modify or rewrite Consumer Sales Practices Act rule which allowed a prevailing defendant to obtain reasonable attorney fees only when a consumer's action was groundless and a consumer filed or maintained it in bad faith, statute reflected strong public policy that a consumer who brought a good faith claim against a supplier would not have to pay supplier's attorney fees even if consumer lost his or her claim, and provision nullified statutory protection to consumers. (Per McCormack, J., with two judges concurring and four judges concurring in result.) R.C. § 1345.09(F).

Cases that cite this headnote

[20] **Contracts ⇌ Public Policy in General**

A court may refuse to enforce a contract when it violates public policy. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[21] **Contracts ⇌ Public Policy in General**

Analysis of whether a court should refuse to enforce a contract for violating public policy requires the court to consider the impact of such arrangements upon society as a whole. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[22] **Contracts ⇌ Public Policy in General**

A contract injurious to the interests of the state will not be enforced. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[23] **Alternative Dispute Resolution ⇌ Impeachment or Vacation**

Provision in arbitration clause of contract stating that the decision of the arbitrators shall be "final and binding" did not modify state law regarding vacating or modifying arbitration awards; the very definition of arbitration requires a final and binding agreement. (Per McCormack, J., with two judges concurring and four judges concurring in result.) R.C. §§ 2711.10, 2711.11.

Cases that cite this headnote

[24] **Alternative Dispute Resolution ⇌ Severability**

Court of Appeals would not invalidate entire arbitration agreement between automobile vendor and purchaser that contained provision, which was unconscionable and against public policy, requiring non-prevailing party to pay all arbitration costs and expenses including reasonable attorney's fees, but rather would strike provision and would allow the non-offending terms to remain enforceable; state policy encouraged arbitration, arbitration was openly agreed to by parties, and arbitration agreement was otherwise enforceable once noxious provision was eliminated. (Per McCormack, J., with two judges concurring and four judges concurring in result.) R.C. § 2711.01(A).

Cases that cite this headnote

[25] **Alternative Dispute Resolution ⇌ Construction in favor of arbitration**

Alternative Dispute Resolution ⇌ Evidence

A strong presumption exists in favor of utilizing legally-balanced arbitration when a claim falls within the scope of an arbitration provision; because of this strong presumption, all doubts should be resolved in its favor. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

[26] **Alternative Dispute Resolution ⇌ Hearing and determination in general**

While inherently unfair language in an arbitration agreement can and should be stricken, there is no authority inherent in the Court of Appeals to carte blanche strike down an otherwise valid arbitration agreement. (Per McCormack, J., with two judges concurring and four judges concurring in result.)

Cases that cite this headnote

Attorneys and Law Firms

*197 Ronald L. Burdge, Elizabeth A. Wells, Burdge Law Office, Dayton, OH, for appellant.

*198 David A. Corrado, Law Offices of David A. Corrado, Cleveland, OH, for appellee.

Before EN BANC Court.

Opinion

TIM MCCORMACK, J.

{¶ 1} The heart of the matter that we decide in this en banc decision is a classic contract question: did the disputing parties herein have a meeting of the minds about each of the terms of the written agreement that is before us? Or conversely, is this a purported agreement that in part or full is no agreement at all because one party was incapable of agreeing to a key term? Were certain terms so egregiously hidden or purposefully obfuscated as to preclude mutual agreement? Further, we address whether all, part, or none of the purported agreement remains standing as a result of the relationship of its divisible sections.

{¶ 2} Guided by basic contract principles and Ohio's strong presumption in favor of arbitration, we determine in this conflict that the loser-pays provision of the subject arbitration agreement is unconscionable and against public policy. That provision is hereby excised from this arbitration agreement. The non-offending terms of the arbitration agreement remain enforceable.

{¶ 3} Plaintiff-appellant, Laura DeVito, purchased a used 2008 Infiniti online from defendant-appellee, Autos Direct Online, Inc. ("ADO"). DeVito alleged that when the vehicle was delivered to her, mechanical problems that were to be fixed had not been fixed as promised by ADO. She then brought Consumer Sales Practices Act ("CSPA") and fraud claims against ADO. The trial court granted ADO's motion to stay the proceedings pending arbitration. On appeal, DeVito argues the arbitration agreement is invalid. A provision in the arbitration agreement of particular interest that she highlighted is the loser-pays provision. This provision mandates that the consumer pay all arbitration costs and expenses, including attorney fees, should the consumer fail to prevail.

{¶ 4} In a recent decision from this court, *Hedeen v. Autos Direct Online, Inc.*, 2014-Ohio-4200, 19 N.E.3d 957 (8th Dist.), which involved an identical arbitration agreement, the majority of the panel found the entire arbitration agreement invalid because of the inclusion of the loser-pays provision. The panel found the provision to be against public policy.

{¶ 5} Pursuant to App.R. 26 and Loc.App.R. 26(B), this court sua sponte considers the present appeal en banc. We conclude that the loser-pays provision is invalid because it is both unconscionable and against public policy. We do, however, agree with the dissent in *Hedeen* that, absent the offending loser-pays provision, the arbitration agreement is otherwise valid and enforceable. Therefore, we affirm the judgment of the trial court staying the proceedings pending arbitration. The loser-pays provision is stricken from the arbitration agreement.

I. Factual and Procedural Background

{¶ 6} In 2013, Devito purchased a 2008 Infiniti online. She alleged that before purchasing the vehicle, she had a mechanic inspect the vehicle, which inspection revealed several mechanical problems. She asserted that, as part of the deal, ADO agreed to have all the identified problems repaired. She alleged that, before the sale, ADO represented to her that all the problems had been repaired and she purchased the vehicle based on ADO's representation. However, when the vehicle was delivered to her in Massachusetts, some of the mechanical problems had not been fixed.

*199 {¶ 7} After being frustrated in her ability to resolve the issues with ADO, Devito brought Consumer Sales Practices Act and fraud claims, among other causes of action, against ADO. ADO moved the trial court to stay the proceedings and refer the matter to arbitration pursuant to the arbitration agreement signed by Devito.

{¶ 8} Before the sale was effectuated, ADO sales staff emailed Devito a stack of documents, among which was the arbitration agreement. According to Devito, she was unaware of the existence of the document; no one from ADO told her about arbitration or provided arbitration rules or procedures; and she was rushed through the sales paperwork under the impression the vehicle would be re-listed if the signed sales papers were not returned immediately.

{¶ 9} Devito opposed ADO's motion to stay pending arbitration. Of particular interest in this appeal is the following paragraph in the arbitration agreement:

The arbitration shall be filed and held in the County of Cuyahoga, State of Ohio. The arbitration shall be through a panel of three (3) arbitrators; one appointed by us, one appointed by you and the third chosen from the AAA list of arbitrators by those two (2) appointed arbitrators. The arbitrators shall apply relevant law. The decision of the arbitrators shall be final and binding on all parties to the proceedings. *The non-prevailing party shall pay, and the arbitrators shall award the prevailing party's arbitration costs and expenses, including reasonable attorney's fees.*

(Emphasis added.)

{¶ 10} The trial court granted ADO's motion and stayed proceedings pending arbitration. On appeal, Devito claims the trial court abused its discretion by granting ADO's motion to stay proceedings.¹

{¶ 11} We find the loser-pays provision unenforceable as it is substantively and procedurally unconscionable, and is further against public policy. With the removal of this offending provision, the arbitration agreement is otherwise enforceable. Therefore, we affirm the trial court's decision staying the proceedings pending arbitration, but excise the loser-pays provision from the arbitration agreement.

II. Arbitration as Favored Dispute Resolution Mechanism

[1] {¶ 12} It is well settled that the arbitration process is a favored method to settle disputes. Both the Ohio General Assembly and the courts have expressed a strong public policy favoring arbitration. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 15. Arbitration is favored because it provides the parties " 'with a relatively expeditious and economical means of resolving a dispute.' " *200 " *Id.*, quoting *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 712, 590 N.E.2d 1242 (1992).

[2] {¶ 13} Arbitration is a matter of contract. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). The elements of a contract are voluntary offer and acceptance, supported by valid consideration. *Noroski v. Fallet*, 2 Ohio St.3d 77, 79, 442 N.E.2d 1302 (1982).

III. Unconscionability: Substantive and Procedural

[3] [¶ 14] When, however, an agreement is made under circumstances or terms that are so one-sided that the exchange of promises is involuntary, the law regards it as unfair or "unconscionable" to enforce the contract. The Supreme Court of the United States has defined an unconscionable agreement as one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Thonen v. McNeil-Akron, Inc.*, 661 F.Supp. 1252 (N.D. Ohio 1986), quoting *Hume v. United States*, 132 U.S. 406, 411, 10 S.Ct. 134, 33 L.Ed. 393 (1889).

[4] [5] [¶ 15] The notion of unconscionability includes "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 33, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993). The doctrine embodies two concepts:

(1) unfair and unreasonable contract terms, i.e., "substantive unconscionability," and (2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, i.e., "procedural unconscionability," or, * * * "bargaining naughtiness."

Collins v. Click Camera & Video, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2d Dist. 1993).

[6] [7] [¶ 16] The party claiming unconscionability of an agreement bears the burden of proving that the agreement is both substantively and procedurally unconscionable. *Taylor Bldg.* at ¶ 33. A determination of whether a written agreement is unconscionable is an issue of law, and we review de novo. *Id.* at ¶ 34.

[8] [9] [¶ 17] Substantive unconscionability goes to the terms of the contract. *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553, ¶ 7 (9th Dist.). "Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable." *Collins* at 834, 621 N.E.2d 1294. When a contractual term is "so one-sided as to oppress or unfairly surprise" a party, the contractual term is said to be substantively unconscionable. *Neubrandner v. Dean Witter Reynolds, Inc.*, 81 Ohio App.3d 308, 311-312, 610 N.E.2d 1089 (9th Dist. 1992). Essentially, it goes to the unfairness or unreasonableness of the contractual terms. *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, 822 N.E.2d 841, ¶ 13 (9th Dist.).

[¶ 18] For assessing substantive unconscionability, the courts have considered factors such as: "the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Collins*, 86 Ohio App.3d at 834, 621 N.E.2d 1294, citing *Fotomat Corp. of Florida v. Chanda*, 464 So.2d 626 (Fla.App. 1985), and *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St.2d 147, 375 N.E.2d 410 (1978).

[10] [11] [12] [¶ 19] Regarding procedural unconscionability, when a party has such superior bargaining power that the other party lacks a "meaningful choice" to enter into the contract, the contract is said to be procedurally unconscionable. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 33. The courts have also characterized it as a lack of voluntary meeting of the minds due to the circumstances surrounding the execution of the contract. *Collins* at 834, 621 N.E.2d 1294.

Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, e.g., "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible * * *."

Collins at 834, 621 N.E.2d 1294, quoting *Johnson v. Mobil Oil Corp.*, 415 F.Supp. 264 (E.D. Michigan 1976). The crucial question is whether a party, considering his education or lack of it, had a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print. *Lake Ridge Academy*, 66 Ohio St.3d at 383, 613 N.E.2d 183.

[13] [14] {¶ 20} A finding of unconscionability requires both procedural and substantive unconscionability, although procedural and substantive aspects of unconscionability are often integrally related. Most cases of unconscionability involve a combination of procedural and substantive unconscionability, and if more of one is present, then less of the other is required; "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required." (Citation omitted.) 1 E. Allan Farnsworth, *Farnsworth on Contracts*, § 4.28, at 585 (3d Ed.2004). A party who seeks to avoid enforcement of an arbitration provision in a contract on grounds that the provision is unconscionable bears the burden of demonstrating that the agreement is both procedurally and substantively unconscionable. *Taylor Bldg.* at ¶ 33. Whether a written contract is unconscionable is an issue of law. *Id.* at ¶ 34. As such, we review the issue de novo. *Id.* at ¶ 36.

{¶ 21} Finally, reviewing the instant consumer dispute, we bear in mind that this dispute involves the purchase of a vehicle. The Ohio courts have acknowledged that consumer transactions involving modern day necessities such as automobiles deserve especially close scrutiny before an arbitration clause is enforced. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 44 (9th Dist.); *Battle v. Bill Swad Chevrolet, Inc.*, 140 Ohio App.3d 185, 192, 746 N.E.2d 1167 (10th Dist.2000).

The AAA Rules and Procedures

{¶ 22} The arbitration agreement does not set forth applicable rules or costs of arbitration but simply refers the consumer to the rules of the American Arbitration Association ("AAA"). We therefore find it necessary to delve deeply into the voluminous rules and procedure to discern the resultant costs governing the instant consumer dispute.

{¶ 23} Our review of the AAA rules reflects a set of elaborate rules and procedures ("Commercial Arbitration Rules and Mediation Procedures") for commercial arbitration,² and a separate set of streamlined *202 rules and procedures for consumer disputes ("Consumer-Related Disputes Supplementary Procedures"). Whereas commercial arbitration may use one or three arbitrators, consumer arbitration would typically utilize the expedited procedures and one arbitrator. AAA C-1(b) and E-4(a). The rules, however, permit three arbitrators to hear a consumer dispute; when three arbitrators are used, commercial rules and procedures govern the arbitration.³

{¶ 24} Furthermore, while in commercial arbitration the fees and expenses are borne equally by the parties (but subject to assessment by the arbitrator when appropriate),⁴ in consumer arbitration the business pays the arbitrators' compensation and expenses, regardless of whether one or three arbitrators are involved; furthermore, the business's responsibility is not subject to reallocation by the arbitrator(s) (unless the consumer's claim is filed for harassment or is patently frivolous). AAA Consumer-Related Disputes Supplementary Procedures, p. 12.⁵

{¶ 25} The instant arbitration agreement requires three arbitrators. It would therefore be governed by commercial rules and procedures. Regardless, the business is required to pay for the fees and expenses of the arbitration.⁶

Inclusion of Loser-Pays Provision Renders the Arbitration Agreement Substantively and Procedurally Unconscionable

[15] {¶ 26} The loser-pays provision embedded in this arbitration agreement sharply departs from the established consumer-related disputes procedures as it shifts the financial burden to the consumer. A consumer who files a nonfrivolous but ultimately losing claim is only required to pay a \$200 filing fee under the AAA rules. By contrast, such a consumer, under the offending loser-pays provision, bears the burden of paying all costs and expenses of arbitration.

{¶ 27} The undisclosed, unlisted costs of the process under the loser-pays provision would result in prohibitive assessed costs for almost all vehicle buyers, most certainly for an average consumer household—the filing and hearing fees and arbitrators'

compensations alone total \$7,000 under the consumer fee schedule for a three-arbitrator panel. Beyond that, the consumer is also to pay for the attorney fees.

{¶ 28} Although the arbitration agreement refers to the rules of the AAA, even *203 the most diligent consumer who on his or her own initiative obtains the rules from the AAA and reads them would have a most difficult time accurately assessing his or her exposure. The AAA's rules include two sets of rules: the 50-page "Commercial Arbitration Rules and Mediation Procedures," and the 14-page "Consumer-Related Disputes Supplementary Procedures." The filing and arbitrator fees for a three-panel consumer arbitration are listed on the last page of the 64-page document.

{¶ 29} It is also notable that the loser-pays provision even disturbs the balance provided for in the AAA rules relative to assigning responsibility for attorney fees. Under the loser-pays provision, should the arbitrators find no merit to the consumer's claim, she must also pay ADO's attorney fees. Such an award is within the arbitrator's discretion under the AAA rules, but mandatory under the loser-pays provision.⁷

{¶ 30} For an especially aware consumer, the prospect of incurring these onerous costs and fees has the chilling effect of stopping cold a substantial number of potential claimants from seeking to vindicate their statutory rights under the CSPA. "[P]ractically speaking, a potential litigant, in making a decision on whether to bring a claim, 'will be inclined to err on the side of caution, especially when the worst-case scenario would mean not only losing on their substantive claims but also the imposition of the costs of the arbitration.' " *Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 41, quoting *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 665 (6th Cir.2003). Under ADO's loser-pays term, the risk of financial blunt trauma to a consumer is real. A fair reading of this imbalanced loser-pays provision shows that it is intended to intimidate consumers away from pursuing their CSPA claims. Arbitration is a favored dispute resolution method because it provides the parties with "a relatively expeditious and economical means of resolving a dispute." *Hayes*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, at ¶ 15. Ironically, for most persons who would utilize this disguised remedy, an adverse ruling could spell financial disaster.

{¶ 31} The built-in, grossly imbalanced unfairness of the loser-pays terms, the altering of the industry standard, the inability of a diligent consumer to readily discern the extent of potential future liability renders ADO's arbitration agreement substantively unconscionable, when the loser-pays provision is embedded.

[16] {¶ 32} This loser-pays provision, if included, rendered the agreement procedurally unconscionable as well. An adhesion contract is "a standardized form contract prepared by one party, and offered to the weaker party, usually a consumer, who has no realistic choice as to the contract terms." *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 48 (citing *Black's Law Dictionary* 342 (8th Ed.2004)). The loser-pays provision is tucked into a take-it-or-leave-it, preprinted, boilerplate arbitration agreement sent in an email to the vehicle purchaser among a stack of documents. As such, it is adhesive. There was little meaningful, face-to-face opportunity for understanding, negotiating, or altering the terms.

{¶ 33} The Supreme Court of Ohio has held that the presumption in favor of arbitration should be substantially weaker *204 when there are strong indications that an agreement appears to be adhesive in nature. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 473, 700 N.E.2d 859 (1998). Given the adhesive nature of this arbitration agreement and especially the undisclosed costs a consumer will incur for in good faith bringing a valid but losing claim, it is difficult to imagine or to conclude that a true voluntary meeting of the minds existed regarding the loser-pays provision.

[17] [18] {¶ 34} We are acutely aware of the principle that "[i]f a person can read and is not prevented from reading what he signs, he alone is responsible for reading what he signs." (Citation omitted.) *Haller v. Borrer Corp.*, 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990). We also recognize that generally a consumer who is competent to contract and signs a contract without reading it is bound by its terms. Here, however, a diligent reading of the loser-pays provision would not inform or illuminate the consumer as to its actual effect. The provision itself does not put the diligent, reading consumer on notice to the extent of the burdensome costs and fees of a three-arbitrator panel that the losing party will be assessed. It is simply unreasonable. It is

wrong to expect a consumer purchasing a vehicle online to research and decipher thoroughly the complex AAA commercial and consumer rules and procedures in order to know the potential costs of arbitration should she fail to prevail.

{¶ 35} The undisclosed costs and fees of the arbitration process imposed here by the loser-pays clause should the arbitrators rule in ADO's favor would likely exceed the cost of many of the vehicles subject to this form of arbitration, some modestly priced new vehicles, or many used vehicles. Can any fair reading of this loser-pays clause convince one that a purchaser could have known and intended to enter into such an onerous arrangement? The financial exposure set up by the clause would blindsides most households. It is simply contrary to legal doctrine and precedent to hold out the loser-pays clause as a valid contractual obligation. Truly, there is not a meeting of the minds, when vital financial liability information is absent from the page. For these reasons, the inclusion of the subject loser-pays provision rendered this aspect of the arbitration agreement procedurally unconscionable as well.

Public Policy

[19] {¶ 36} We further conclude the loser-pays provision, which requires the nonprevailing party to pay attorney fees even if the consumer has not filed the action in bad faith, is against public policy.

[20] [21] [22] {¶ 37} A court may refuse to enforce a contract when it violates public policy. *Marsh v. Lampert*, 129 Ohio App.3d 685, 687, 718 N.E.2d 997 (12th Dist.1998), citing *Garretson v. S.D. Myers, Inc.*, 72 Ohio App.3d 785, 788, 596 N.E.2d 512 (9th Dist.1991). Unlike the unconscionability analysis, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. *Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 63. A contract injurious to the interests of the state will not be enforced, *King v. King*, 63 Ohio St. 363, 372, 59 N.E. 111 (1900). As stated in 17 Ohio Jurisprudence 3d, Contracts, Section 94, at 528 (1980),

Public policy is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like. Again, public policy is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, *205 contracts which bring about results which the law seeks to prevent are unenforceable as against public policy. Moreover, actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations.

(Footnote omitted.)

{¶ 38} Here, this pernicious form of the loser-pays provision, which mandates that the nonprevailing consumer pay attorney fees, attempts to modify or rewrite the rule for attorney fees under Chapter 1345, Ohio's CSPA. R.C. 1345.09(F) states:

The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed and limited pursuant to section 1345.092 of the Revised Code, if either of the following apply:

- (1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;
- (2) The supplier has knowingly committed an act or practice that violates this chapter.

{¶ 39} Under the statute, when the plaintiff consumer prevails, he or she may obtain an award of reasonable attorney fees when the defendant knowingly violated the CSPA. When the defendant is the prevailing party, however, it may obtain an award of reasonable attorney fees only when the consumer's action is groundless and the consumer files or maintains it in bad faith.

{¶ 40} The CSPA reflects a strong public policy that consumers who bring good faith claims against suppliers will not have to pay the supplier's attorney fees, even if the consumer loses his or her claim against the supplier. ADO's loser-pays provision, requiring the consumer who brings a good-faith claim but fails to prevail to pay ADO's attorney fees, effectively nullifies this statutory protection provided to the consumers by the CSPA. It seeks to intimidate consumers from pursuing their statutory claims through arbitration. For these reasons, we find the loser-pays provision against the public policy embodied in the CSPA.

[23] {¶ 41} Based on the foregoing analysis, this court finds that the inclusion of the loser-pays provision rendered ADO's arbitration agreement unconscionable and also against public policy.⁸

Conclusion

[24] [25] {¶ 42} The consumer has appealed to this court to use the offending loser-pays language put forth by ADO to invalidate the entire arbitration agreement. We will not do so. A strong presumption exists in favor of utilizing legally-balanced arbitration when a claim falls within the scope of an arbitration provision. *206 *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203. Because of this strong presumption, "all doubts should be resolved in its favor." *Hayes*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, at ¶ 15, citing *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18. Ohio's policy of encouraging arbitration is reflected in the Ohio Arbitration Act, codified in Chapter 2711 of the Ohio Revised Code. R.C. 2711.01(A) provides that an arbitration agreement in a written contract "shall be valid, irrevocable, and enforceable, except upon grounds that exist in law or equity for the revocation of any contract."

[26] {¶ 43} Ohio law establishes a balance for the parties as it relates to rights and responsibilities in the arbitration process. While inherently unfair language can and should be stricken, there is no authority inherent in this court to carte blanche strike down an otherwise valid arbitration agreement. Arbitration openly agreed to by the parties is strongly supported by statute and court precedent. The arbitration agreement is otherwise enforceable once the noxious provision is eliminated from the agreement. *See Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 36. We will not overreach by attempting to invalidate the entire arbitration agreement when excision of the offending portion will suffice.

{¶ 44} We conclude that the loser-pays provision of the subject arbitration contract is unconscionable and against public policy. That provision is hereby excised from the arbitration contract. The non-offending terms of the contract remain enforceable.

{¶ 45} The judgment of the trial court staying proceedings pending arbitration is affirmed as modified.

SEAN C. GALLAGHER, J., and PATRICIA ANN BLACKMON, J., CONCUR.

EILEEN T. GALLAGHER, J., and MELODY J. STEWART, J., CONCUR IN JUDGMENT ONLY.

MARY J. BOYLE J., CONCURS IN JUDGMENT ONLY WITH SEPARATE OPINION with FRANK D. CELEBREZZE, JR., A.J., CONCURRING.

MARY EILEEN KILBANE, J., DISSENTS WITH SEPARATE OPINION with LARRY A. JONES, SR., J., KATHLEEN ANN KEOUGH, J., EILEEN A. GALLAGHER, J., and ANITA LASTER MAYS, J., CONCURRING.

MARY J. BOYLE, J., CONCURRING IN JUDGMENT ONLY.

{¶ 46} I agree with the majority of the en banc court that the loser-pays provision is against public policy and that by removing the offending loser-pays provision, the remaining arbitration agreement is valid and enforceable.

{¶ 47} I respectfully disagree, however, with the majority's conclusion that the loser-pays provision is unconscionable. This is because "a party challenging a contract as unconscionable must prove 'a quantum' of both procedural and substantive unconscionability." *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 52. As set forth in the following analysis, it is my view that the arbitration clause in this case was not procedurally unconscionable and, therefore, DeVito's unconscionability argument fails.

{¶ 48} I further disagree with the dissenting opinion that the loser-pays provision renders the entire arbitration agreement unenforceable. Essentially, my view in this case is consistent with my dissenting *207 opinion in *Hedeen*, 2014-Ohio-4200, 19 N.E.3d 957. In *Hedeen*, I agreed with the majority that the loser-pays provision was not unconscionable because the plaintiff did not establish that the arbitration agreement was procedurally unconscionable, but that it was against public policy. But I disagreed with the majority that the loser-pays provision invalidated the entire arbitration agreement. It was my view in *Hedeen*, as it is now, that by removing the offending loser-pays provision, the remaining arbitration agreement is valid and enforceable.

{¶ 49} Therefore, I concur in judgment only with the majority opinion.

Procedural Unconscionability

{¶ 50} In *Taylor Bldg.*, the Supreme Court set forth the factors when determining whether a contract is procedurally unconscionable:

Procedural unconscionability considers the circumstances surrounding the contracting parties' bargaining, such as the parties' "age, education, intelligence, business acumen and experience, * * * who drafted the contract, * * * whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question." [*Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834, 621 N.E.2d 1294 (2d Dist.1993)]. "Factors which may contribute to a finding of unconscionability in the bargaining process [i.e., procedural unconscionability] include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors." Restatement of the Law 2d, Contracts (1981), Section 208, Comment d.

Taylor Bldg., 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 43.

{¶ 51} The determination of whether a contractual provision is procedurally unconscionable is fact-dependant and requires an analysis of the circumstances of the particular case before the court. *Schaeffer v. Jim Brown, Inc.*, 11th Dist., 2015-Ohio-1994, 33 N.E.3d 96, ¶ 12, citing *Bayes v. Merle's Metro Builders*, 11th Dist. Lake No. 2007-L-067, 2007-Ohio-7125, 2007 WL 4564404, ¶ 6.

{¶ 52} In finding that procedural unconscionability exists in this case, the majority continually emphasizes factors that go to substantive unconscionability (the unfairness of the loser-pays provision), not procedural unconscionability. But the majority does not analyze the procedural unconscionability factors because it summarily finds that "a consumer" (meaning a consumer *in general*, rather than DeVito) could never be expected to decipher the "complex AAA commercial and consumer rules and procedures in order to know the potential costs of arbitration should she fail to prevail." But procedural unconscionability is a fact-sensitive question, and thus, courts must look to the specific consumer entering into the contract, which in this case is DeVito.

{¶ 53} In this case, DeVito graduated from high school and had previously worked for many years as a real estate appraiser. For the previous 11 years (before the filing of her case), she had been homeschooling her son.

{¶ 54} The arbitration agreement in this case was set forth on a single full page; it *208 was not hidden in the middle of the contract, nor was it in fine print. DeVito signed the arbitration agreement at the bottom of the page; she did not just initial it. At the top of the page, in all capital letters and in bold print, it states: "AGREEMENT TO ARBITRATE." At the end of the agreement, near the bottom of the page just above DeVito's signature, it states in capital letters:

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ THIS ARBITRATION AGREEMENT. THE PARTIES UNDERSTAND AND AGREE THAT THEY ARE GIVING UP THE RIGHT TO SEEK REMEDY IN A COURT OF LAW, INCLUDING FORGOING THE RIGHT TO A JURY TRIAL, AND THEY UNDERSTAND THAT THE RIGHTS TO APPEAL OR CHANGE AN ARBITRATION AWARD IN COURT ARE SIGNIFICANTLY LIMITED.

{¶ 55} DeVito avers that when the documents were emailed to her, she felt as if she had to rush to sign them because ADO was "threatening to re-list the vehicle online." But receiving an email is not the same as someone standing over a person rushing him or her through the process. She was purchasing a \$23,000 vehicle; she had a duty to read what she was signing.

{¶ 56} DeVito further argues that her ADO salesperson did not explain the arbitration agreement to her. But the law does not require him to do so. *See ABM Farms v. Woods*, 81 Ohio St.3d 498, 503, 692 N.E.2d 574 (1998). In *ABM Farms*, the defendant argued that the terms of the arbitration agreement were not explained to her. The Supreme Court explained:

At the center of [the defendant's] allegation of fraudulent inducement is the naked truth that she did not read the contract. It drives a stake into the heart of her claim. "A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed." *McAdams v. McAdams*, 80 Ohio St. 232, 240-241, 88 N.E. 542, 544 (1909). *See, also, Upton v. Tribilcock*, 91 U.S. 45, 50, 23 L.Ed. 203, 205 (1875) ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written"). The legal and common-sensical axiom that one must read what one signs survives this case. To find for [the defendant] would destroy that standard.

ABM Farms at 503, 692 N.E.2d 574.

{¶ 57} The majority asserts that "even the most diligent consumer who on his or her own initiative obtains the rules from the AAA and reads them would have a most difficult time accurately assessing his or her own exposure." I disagree. DeVito was purchasing a vehicle online. She clearly had the wherewithal and know how to explore the internet. The AAA rules are readily accessible. And although the AAA rules may be "voluminous" and "elaborate" as the majority states, they are not complex.

{¶ 58} DeVito further asserts that the contract is procedurally unconscionable because it was drafted by ADO, and she was not able to negotiate the terms of it. A contract of adhesion is one in a standardized form that is prepared by one party and offered to the weaker party, usually a consumer, who has no realistic choice as to the contract terms. *Taylor Bldg.*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 49. "To be sure, an arbitration *209 clause in a consumer contract with some characteristics of an adhesion contract 'necessarily engenders more reservations than an arbitration clause in a different setting,' such as a collective bargaining agreement or a commercial contract between two businesses." *Id.* at ¶ 49, quoting *Williams*, 83 Ohio St.3d 464, 472, 700 N.E.2d 859 (1998). But according to the Ohio Supreme Court:

[E]ven a contract of adhesion is not in all instances unconscionable per se. As the Seventh Circuit recently observed in rejecting a claim that an arbitration clause was unconscionable, "few consumer contracts are negotiated one clause at a time." *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir.2004). Indeed, so-called "form contracts" can provide advantages to consumers. "Forms reduce transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices[.]" *Id.*

Taylor Bldg. at ¶ 49.

{¶ 59} Devito claims that she “was given the impression” that if she wanted to purchase the vehicle, she had to sign all of the documents that were emailed to her “without making any changes.” But there is no evidence that she attempted to negotiate or alter any of the terms of the agreement.

{¶ 60} After reviewing the arbitration agreement at issue, as well as Devito's affidavit, it is my view that Devito did not meet her burden of establishing that the arbitration agreement was procedurally unconscionable. There is simply no evidence in this case that the bargaining process was so oppressive as to remove meaningful choice on Devito's part.

{¶ 61} Moreover, there are many, many “‘alternative sources of supply’” when it comes to purchasing a vehicle. *Taylor Bldg.* at ¶ 43, quoting *Collins*, 86 Ohio App.3d at 834, 621 N.E.2d 1294 (one factor to consider in a procedural unconscionability analysis is “whether there were alternate sources of supply for the goods in question”). Indeed, car dealerships are ubiquitous.

Dissenting Opinion

{¶ 62} I also respectfully disagree with the dissenting opinion in this case that the loser-pays provision renders the entire arbitration agreement unenforceable. The dissent states that the arbitration agreement “improperly imposes” the AAA's commercial rules for a consumer dispute. But there is nothing improper about this under the AAA rules. Indeed, it is explicitly permissible. Specifically, the consumer rules state that for consumer disputes, “[t]he Expedited Procedures will be used unless there are three arbitrators. In such cases, the Commercial Dispute Resolution Procedures Apply.” But this does not negatively impact Devito in any way. Under the commercial rules, that only means that the regular procedures would apply (because the rules for “large, complex cases” are only applicable when a claim over \$500,000 is involved).⁹ Thus, by requiring three arbitrators (and removing the loser-pays provision), it is only ADO that is negatively impacted, as further explained below.

{¶ 63} The dissent further states that “Devito is liable for the costs of commercial arbitration, which is ten times more than the cost of arbitration for consumer disputes.” Without the loser-pays provision, however, this is simply not true.

*210 {¶ 64} In the “Administrative Fee Schedule” of the AAA's commercial rules, the fees and costs of commercial arbitration are set forth. This section specifically states, however, that “[i]n an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes.” This section then states, “[p]lease refer to “Section C–8 of the Supplementary Procedures for Consumer–Related Disputes when filing a consumer-related claim.”

{¶ 65} “Section C–8” of the AAA's consumer rules sets forth the costs of arbitration for consumer-related disputes. Whether one or three arbitrators are used, the consumer pays the same—a \$200 filing fee. It is the business that is responsible for the remaining costs, including a filing fee of \$1,500 or \$2,000 (depending on how many arbitrators are used), a \$500 hearing fee, and the arbitrator or arbitrators' compensation.

{¶ 66} It is clear from reading the AAA commercial and consumer rules that the extensive fees and costs of commercial arbitration—that the dissent refers to—do not apply to consumers. Thus, by removing the loser-pays provision, Devito is only responsible for a \$200 filing fee.

{¶ 67} Thus, I would hold that the loser-pays provision is against public policy and that by removing it from the arbitration agreement, the remaining arbitration agreement is enforceable.

MARY EILEEN KILBANE, J., DISSENTING:

{¶ 68} I respectfully dissent. For the reasons set forth below, I would find that the entire arbitration clause is unconscionable and, therefore, unenforceable.

{¶ 69} While arbitration is encouraged as a method of dispute resolution and a presumption favoring arbitration arises when the claim in dispute falls within the arbitration provision, the circumstances surrounding *Devito* and *Hedeen*¹⁰ are unique in that they both involve the same unconscionable arbitration clause drafted by the same defendant—ADO. In both cases, ADO made material representations regarding the condition of the vehicles it had for sale. Devito and Hedeen relied on these representations to purchase their respective vehicles, only to later discover that ADO falsely represented the condition of the vehicles causing them thousands of dollars in repairs. Devito and Hedeen each filed complaints against ADO, alleging causes of action for breach of contract, violations of the Motor Vehicle Sales Rule and the Ohio CSPA, and fraud and deceit. After making these material misrepresentations to both Hedeen and Devito, ADO sought to tether each of them to the arbitration clause by moving to stay the proceedings at the trial court. To add insult to injury, ADO sought to enforce arbitration, relying on an arbitration clause the majority has found to be unconscionable and against public policy because of the terms of ADO's loser-pays provision, yet still enforceable.

{¶ 70} In November 2012, Hedeen purchased a used 2011 Mercedes-Benz online from ADO for \$28,000. Prior to purchasing the vehicle, her ADO salesman represented to her that the vehicle had never been in an accident. Relying on ADO's representations, Hedeen purchased the vehicle. Upon receiving the vehicle, Hedeen discovered that it was in fact in a serious accident where it sustained over \$20,000 in damages, and over \$7,000 in damages of which had never been repaired.

{¶ 71} In May 2013, Devito purchased a used 2008 Infiniti QX56 online from ADO *211 for \$22,100. Prior to her purchase, Devito had the vehicle inspected at an Infiniti car dealership. The inspection revealed that the vehicle needed several mechanical repairs. As part of the purchase agreement, ADO agreed to complete all of the necessary repairs of the vehicle. ADO further represented that it had in fact completed all of the repairs. When Devito received the vehicle, she discovered that the agreed-to repairs had not been completed as ADO represented. The estimated cost to repair Devito's vehicle was approximately \$3,000.¹¹

{¶ 72} In *Hedeen*, 2014-Ohio-4200, 19 N.E.3d 957, this court did not find the arbitration clause unconscionable, but rather found that the loser-pays provision is against public policy, which rendered the entire arbitration clause unenforceable. Whereas in the instant case, the majority has found that the arbitration clause is both procedurally and substantially unconscionable and violates public policy. A finding of this magnitude necessitates that the entire arbitration clause is rendered unenforceable. See *Post v. ProCare Auto. Serv. Solutions*, 8th Dist. Cuyahoga No. 87646, 2007-Ohio-2106, 2007 WL 1290091 (where this court stated "as a matter of law, an arbitration clause is not enforceable if it is found to be unconscionable"). *Id.* at ¶ 11, citing *Olah v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga No. 86132, 2006-Ohio-694, 2006 WL 350204, citing *Williams*, 83 Ohio St.3d at 471, 700 N.E.2d 859. Instead, the majority has chosen to retain part of the arbitration clause, but strike the offending portion—the loser-pays provision.

{¶ 73} In discussing the loser-pays provision of ADO's arbitration agreement, the majority acknowledges that the provision drafted by ADO imposes the AAA rules for a commercial dispute in a consumer transaction. Rather than using a single arbitrator as set forth in the AAA rules for consumer disputes, the commercial disputes rules require a panel of three arbitrators, with their fees totaling approximately \$15,000. Whereas, the rules for consumer disputes typically require a single arbitrator, which may be paid \$1,500 per day. Hedeen and Devito could be required to pay ten times more in fees under the agreement as written by ADO. This undisclosed disparity in cost is grossly significant and, in some cases, could result in the consumers paying more for arbitration than for their vehicle. Even more troubling, nothing in ADO's arbitration clause puts the consumer on notice of the extent of the potentially significant costs and fees of the arbitration process. The majority concludes there is no meeting of the minds as to the loser-pays provision because vital terms are missing from the arbitration clause. Yet, the majority's remedy is only to remove the offending portion—the loser-pays provision.

{¶ 74} In its analysis, the majority cites to and upholds ADO's arbitration clause without the offending loser-pays provision. In *Eagle*, the consumer purchased a used car from the defendant-car dealer. She was told by a salesperson, who had reviewed

her financial information, that she did not qualify for a purchase of a used car. The dealer informed her that she *212 would nevertheless be able to purchase a new car and represented to her that she would be better off purchasing the new car because it was a good automobile with an excellent warranty. After having serious problems with the car, until the point where the car stopped running altogether, the consumer filed suit. The car dealer moved to compel arbitration pursuant to the arbitration clause contained in the purchase agreement, stating that arbitration was to be conducted by the National Arbitration Forum ("NAF") in accordance with the NAF's Code of Procedure. The consumer challenged the validity of the arbitration clause, asserting that it was unconscionable and, thus, unenforceable. The Ninth District Court of Appeals agreed, finding several deficiencies within the clause and remanding the case to the trial court for a jury trial. *Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 85.

{¶ 75} In looking at the arbitration clause, the *Eagle* court noted that R.C. 1302.15(A) permits courts to strike the offending portion of an unconscionable contract provision. *Id.* at ¶ 36, citing *Lightning Rod Mut. Ins. Co. v. Saffle*, 9th Dist. Summit No. 15134, 1991 WL 476511 (Nov. 6, 1991), citing the Restatement of the Law 2d, Contracts, Section 107 (1981). However, the *Eagle* court still found the arbitration clause was unenforceable in its entirety. *Id.* at ¶ 85. It did not choose to strike the offending portion.

{¶ 76} Likewise, in the instant case, I would find the circumstances compel a finding that unconscionability permeates the entire arbitration clause, rendering it unenforceable in its entirety. DeVito bought a used vehicle from ADO that needed several mechanical repairs. As part of the purchase agreement, ADO agreed to complete all of the necessary repairs of the vehicle. ADO further represented that it in fact completed all of the repairs. When DeVito received the vehicle, she discovered that the repairs had not been completed as ADO represented. The estimated cost to repair the vehicle was approximately \$3,000. Now ADO wants to enforce arbitration relying on an unconscionable clause that improperly imposes the AAA rules for a commercial dispute in a consumer transaction, and possibly costing DeVito ten times more in fees.

[T]he presumption in favor of arbitration should be substantially weaker in a case * * * when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.

Williams, 83 Ohio St.3d at 473, 700 N.E.2d 859.

{¶ 77} Moreover, by removing only the offending portion of the unconscionable arbitration clause, the majority has effectively stripped away any redress consumers have in court and any rights consumers have to the remedies afforded in consumer protections statutes. By signing ADO's arbitration agreement, DeVito waived the right to sue ADO in court. This agreement, however, is based on an unconscionable arbitration clause that was entered into with no meeting of the minds. As a result, enforcing this unconscionable provision against DeVito would constitute a violation of her due process right to redress under Ohio Constitution, Article I, Section 16, which provides that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

{¶ 78} In addition, consumer protections statutes were enacted to protect against *213 the commission of unfair, deceptive, or unconscionable acts or practices by sellers in the consumer transaction context. *Eagle*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, at ¶ 24. The public policy behind consumer protection statutes is frustrated when a car dealer makes a material misrepresentation to the consumer, which the consumer relies upon. Then the car dealer binds the consumer to arbitration by using an unconscionable arbitration clause that prevents the consumer from exercising the remedies provided by these statutes. See *Schaefer v. Allstate Ins. Co.*, 10th Dist. Franklin No. 90 AP-178, 1991 WL 19175, *3 (Feb. 12, 1991). As this court stated in *Hedeen*:

"Public policy is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like. Again, public policy

is that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy. Moreover, actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations. (Footnotes omitted.)"

Hedeen, 2014-Ohio-4200, 19 N.E.3d 957, at ¶ 45, quoting 17 Ohio Jurisprudence 3d, Contracts, Section 94 (1980), "When an arbitration clause vanquishes the remedial purpose of a statute by imposing arbitration costs and preventing actions from being brought by consumers, the arbitration clause should be held unenforceable." *Eagle* at ¶ 68.

{¶ 79} For the majority to conclude that there is no meeting of the minds and allow ADO to make material misrepresentations to these buyers and then tether the consumer to an unconscionable arbitration clause renders the arbitration clause wholly in ADO's favor. To add insult to injury, DeVito is liable for the costs of commercial arbitration, which is ten times more than the cost of arbitration for consumer disputes. This inequity was not an intended consequence of the public policy in favor of arbitration. ADO's one-sided contract clause is injurious to the interests of the state, is against public policy, and prevents the consumer from exercising the constitutional right to redress in court. *See Hedeen* at ¶ 49, citing *Eagle* at ¶ 74.

{¶ 80} Accordingly, I would find that the arbitration clause is unenforceable in its entirety.

All Citations

37 N.E.3d 194, 2015 -Ohio- 3336

Footnotes

- 1 Appellant raises three issues for our review under her single assignment of error.
 1. Whether the trial court abused its discretion when it granted appellee's motion to stay proceedings pending arbitration where ADO's form arbitration clause is unconscionable and unenforceable.
 2. Whether the trial court abused its discretion when it granted appellee's motion to stay proceedings pending arbitration where ADO's form arbitration clause includes a "loser pay provision" which is illusory, attempts to modify the CSPA, violates public policy and the CSPA, and misrepresents to a consumer his or her rights under the CSPA.
 3. Whether the trial court abused its discretion when it granted appellee's motion to stay proceedings pending arbitration where ADO's form arbitration clause includes a "final and binding provision" which attempts to modify the Ohio arbitration rules, violates public policy and the CSPA, and misrepresents to a consumer his or her rights under Ohio law.
- 2 The AAA's Commercial Arbitration Rules and Mediation Procedures shows three tiers of procedures: regular, expedited, or complex. One or three arbitrators may be used for commercial litigation. AAA R-16(a); AAA E-4(a); and AAA L-2(a). The parties, however, are permitted to vary the applicable procedures by written agreement. AAA R-1(a).
- 3 Section C-1(b) of the "Supplementary Procedures for the Resolution of Consumer-Related disputes" states that, for consumer disputes, "[t]he Expedited Procedures will be used unless there are three arbitrators. In such cases, the Commercial Dispute Resolution Procedures shall apply."
- 4 AAA R-54 states: "All [expenses except for witnesses' fees] * * * shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties."
- 5 In section (vii) of the "Consumer-Related Disputes Supplementary Procedures," a fee schedule shows that when three arbitrators are used in a consumer arbitration, the business will pay a filing fee of \$2,000, a hearing fee of \$500, and \$1,500 per hearing day per arbitrator; the consumer's financial responsibility is limited to a \$200 filing fee.
- 6 DeVito, however, contends that if the commercial procedures apply, her costs, should she lose, would be the fees charged to commercial parties: an initial filing fee of \$975, a final fee of \$300, and the three arbitrators' fees estimated at \$15,000 (based on 15 hours at a rate of \$300 per hour).
- 7 Subsection (d) of R-47 of AAA Commercial Arbitration Rules and Mediation Procedures states: "The award of the arbitrator(s) may include: * * * an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." (Emphasis added.)

- 8 DeVito also claims the arbitration agreement is unenforceable because its "final and binding" provision attempts to modify Ohio law under R.C. 2711.10 and 2711.11. We find no merit to this claim. Those two statutes set forth when a court may vacate or modify an arbitration award, respectively. R.C. 2711.13 provides that after an award in an arbitration proceeding is made, either party may file a motion for an order vacating or modifying the award as prescribed in R.C. 2711.10 and 2711.11. In *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932, 775 N.E.2d 475, the Ohio Supreme Court explained that " '[f]or a dispute resolution procedure to be classified as "arbitration," the decision rendered must be final, binding and without any qualification or condition as to the finality of an award.' " *Id.* at ¶ 10, quoting *Schaefer*, 63 Ohio St.3d at 711, 590 N.E.2d 1242. Therefore, the very definition of arbitration requires a "final and binding" award. The arbitration agreement does not modify R.C. 2711.10 or 2711.11.
- 9 As the majority points out, under the AAA commercial rules, there are three tiers of procedures: expedited, regular, or complex.
- 10 *Hedeen*, 2014-Ohio-4200, 19 N.E.3d 957.
- 11 Both purchase agreements contained an "AS IS" provision stating that the "dealer assumes no responsibility for any repairs to the vehicle regardless of any oral statements about the vehicle." While applicable in the context of home warranty claims, it is worth noting that an "as is" clause cannot be relied upon to bar a claim for fraudulent misrepresentation or fraudulent concealment. *Kern v. Buehrer*, 8th Dist. Cuyahoga No. 97836, 2012-Ohio-4057, 2012 WL 3862170, ¶ 5, citing *Brewer v. Brothers*, 82 Ohio App.3d 148, 151, 611 N.E.2d 492 (12th Dist.1992).

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

914 Folly Road, Suite 2
P.O. Box 13897
Charleston, SC 29422-3897
Phone (843) 795-7800
Fax (843) 795-3032

**KERNODLE
COLEMAN**
ATTORNEYS AT LAW

James Taylor Anderson, III
tanderson@kernodlelaw.com

April 27, 2016

The Honorable Mary P. Brown
Berkeley County Clerk of Court
300 California Avenue
Moncks Corner, SC 29461

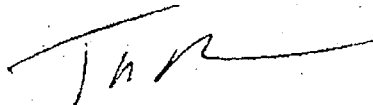
RE: Chris Duvall and Natalie Duvall v. The Ryland Group, Inc. AND The Ryland Group, Inc.
v. Land Site Services, Inc., Carolina Consulting Services, Inc., Higdon Concrete, LLC, A.C.
Construction, Inc., and Stark Truss Company, Inc. ak/a Stark Truss Company of
Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc.
Berkeley County / Case No.: 2015-CP-08-1213
KC File No.: 77-35

Dear Ms. Brown:

Enclosed for filing, please find an original and one (1) copy of *Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration* in the above referenced matter. Kindly file the original and return a date-stamped copy of the Memorandum to me in the envelope provided for your convenience.

Thank you for your assistance in this matter. Should you have any questions or require additional information, please do not hesitate to contact me.

KERNODLE COLEMAN



James Taylor Anderson, III

JTAlII/mlj
Enclosures

cc: Thomas C. Hildebrand, Jr., Esquire / Olesya V. Vaskevich, Esquire
John E. Rogers, II, Esquire / C. Reed Teague, Esquire
Mark S. Barrow, Esquire / Christy E. Mahon, Esquire
James E. Scott, IV, Esquire / Perry Buckner, Esquire / Camden Hodge, Esquire
Kevin W. Mims, Esquire / Caroline C. McIntosh, Esquire

kernodlelaw.com



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) THE NINTH JUDICIAL CIRCUIT

Christopher Duvall and Natalie Duvall) Civil Action No.: 2015-CP-08-01213

Plaintiff,

v.

The Ryland Group, Inc.

Defendant.

The Ryland Group, Inc.

STARK TRUSS COMPANY, INC. A/K/A
STARK TRUSS COMPANY OF
SUMMERVILLE, LTD., A/K/A STARK
TRUSS, INC. D/B/A CAROLINA TRUSS
SYSTEMS, INC. AND LAND SITE
SERVICES' MEMORANDUM OF LAW IN
OPPOSITION TO THE RYLAND GROUP'S
MOTION TO COMPEL ARBITRATION

Third Party Plaintiff,

v.

Land Site Services, Inc., Carolina
Consulting Engineers, Inc., Higdon
Concrete, LLC, A.C. Construction,
Inc., and Stark Truss Company, Inc.
a/k/a Stark Truss Company of
Summerville, Ltd., a/k/a Stark Truss,
Inc. d/b/a Carolina Truss Systems, Inc.

Third Party Defendants.

COMES NOW Third Party Defendants Land Site Services, Inc. ("Land Site") and Stark
Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd., a/k/a Stark Truss, Inc.

d/b/a Carolina Truss Systems, Inc. ("Stark") submitting this Memorandum of Law in Support of their Opposition to The Ryland Group's ("Ryland") Motion to Compel Arbitration.

FACTS

The subject home was completed on September 18, 2006. Ryland thereafter sold it to the original purchasers. Plaintiffs purchased the home on December 31, 2008 from the original purchasers. Plaintiffs brought the instant suit against Ryland on May 20, 2015, alleging numerous structural defects, including, but not limited to, cracking in the home's foundation. Ryland brought a Third-Party Complaint against three of its subcontractors, including Land Site and Stark, based on their alleged respective work done and/or materials provided for the job.

Ryland alleges that Land Site and Stark entered into identical Subcontractor Agreements with Ryland. (Alleged Subcontractor Agreement between Ryland and Stark, July 5, 2002, attached as Exhibit 1). Stark denies the applicability of the alleged contract. Ryland has produced in discovery and referenced in its supporting memorandum an alleged Subcontractor Agreement with Land Site dated June 19, 2002, and an alleged Subcontractor Agreement with Stark dated July 5, 2002 claiming that these alleged Subcontractor Agreements govern the parties' relationship with respect to Plaintiffs' house. (Alleged Subcontract Agreement between Ryland and Land Site, June 19, 2002, attached as Exhibit 2). There is no mention of Plaintiffs' house in these alleged Agreements, which predate construction of the home by four years. Ryland also produced and referenced a Scope of Work for Clearing, Grading, Backfill & Excavation executed on October 23, 2006, which postdates the subject home's completion. (Scope of Work between Ryland and Land Site, October 23, 2006, attached as Exhibit 3). Stark and Landsite therefore both take the position that the alleged Subcontractor Agreements do not apply, and Landsite further argues that the Scope of Work does not govern Ryland and Land

Site's relationship with respect to Plaintiffs' home, and therefore cannot serve as the basis for Ryland's motion to compel arbitration.

Assuming for purposes of this memorandum only, however, that these documents apply to Landsite and Stark, the arbitration language on which Ryland relies provides as follows:

Except in the event that either party is sued by someone other than a party hereto or it would be appropriate for complete resolution of the issues for either party to cross-claim against the other party in a legal action not initiated by either of the parties hereto, any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof shall be settled by binding arbitration conducted by a neutral arbitrator.

Id. ¶ 16.

ARGUMENT

When a party files a motion to compel arbitration, the Court must determine the applicability and enforceability of the arbitration clause at issue to the parties. *See BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206-07 (2014). Courts determine the existence and applicability of an arbitration agreement by applying ordinary principles that govern contract formulation. *See Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). The arbitration clauses in Ryland's alleged Subcontractor Agreements with Land Site and Stark (1) are not applicable or enforceable against Land Site or Stark based upon their plain language; (2) are not governed by the Federal Arbitration Act (FAA), and (3) and are not in compliance with the South Carolina Uniform Arbitration Act (UAA).

I. THE PLAIN LANGUAGE OF THE ARBITRATION CLAUSE IN THE ALLEGED SUBCONTRACTOR AGREEMENTS EXPLICITLY EXCLUDES THE SUBJECT ACTION FROM ARBITRATION.

The plain and unambiguous language of the arbitration clauses in the alleged Subcontractor Agreements explicitly excludes Ryland's claims against Land Site and Stark from arbitration under the facts of this case.

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). General contract principles apply in evaluating the enforceability of an arbitration clause. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007); *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 258-59, 743 S.E.2d 868, 873 (Ct. App. 2013). If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)).

The arbitration clause at issue begins as follows: **"Except in the event that either party is sued by someone other than a party hereto or it would be appropriate for complete resolution of the issues for either party to cross-claim against the other party in a legal action not initiated by either of the parties hereto, any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof shall be settled by binding arbitration conducted by a neutral arbitrator."** (Emphasis added). The arbitration clause contains two independent exclusions: (1) If either party has been sued by someone other than a party to the

Subcontract Agreement OR (2) if it would be appropriate for complete resolution for either party to file cross-claims in a legal action not initiated by either party to the Subcontractor Agreement.

The first exclusion precludes arbitration in this case. The homeowners filed this suit against Ryland. They did not sue Land Site or Stark. The homeowners are not parties to Ryland's alleged Subcontractor Agreements with Land Site and Stark. Because Ryland has been sued by someone other than a party to the alleged Subcontractor Agreements, the arbitration clause does not apply.

Ryland did not alter the character of the lawsuit by filing its Third-Party Complaint against Land Site and Stark. This action remain "a legal action not initiated by either of the parties" to the alleged Subcontractor Agreement. In addition, Ryland has asserted claims not just for breach of contract and contractual indemnity but also for equitable indemnity, breach of warranty, and negligence.

Therefore, the arbitration clause in the alleged Subcontractor Agreements plainly, clearly, and unambiguously excludes Ryland's claims from arbitration.

II. THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO RYLAND'S ALLEGED SUBCONTRACTOR AGREEMENTS WITH LAND SITE AND STARK.

As discussed below, the alleged agreements with Land Site and Stark clearly do not meet the requirements of the South Carolina Uniform Arbitration Act (the "UAA"), and therefore the only way Ryland can compel arbitration is if the matter is subject to the FAA. Even if the alleged Subcontractor Agreements did not preclude arbitration based on their own unambiguous language, the FAA does not apply.

The applicability and enforcement section of the FAA provides:

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

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

9 U.S.C.A. § 2 (emphasis added).

In order for the FAA to apply and govern, the alleged Subcontractor Agreement must evidence foreign or interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 454, 730 S.E.2d 312, 315-16 (2012). “Despite [the] expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration.” *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 591, 553 S.E.2d at 115-16. Further, the FAA does not require arbitration where the parties do not agree to do so, “nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement.” *Id.* at 591-92, 553 S.E.2d at 116. In other words, the primary goal of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms, and not to impose the terms of the FAA when the parties have agreed otherwise. *Id.* at 592, 553 S.E.2d at 116 (citations omitted).

Ryland agrees that they did not expressly state or agree that the construction and sale involved interstate commerce but Ryland makes the blanket statement that “South Carolina courts essentially accept it as a given that construction involves interstate commerce.” *See* Memorandum of Ryland p.8 (“Even if Ryland and the original purchasers, and by extension the Plaintiffs, did not expressly agree that the construction and sale of the residence involved interstate commerce, South Carolina courts essentially accept it as a given that construction involves interstate commerce.”). This is not true. South Carolina Courts conduct a fact intensive inquiry to determine whether the construction involved interstate commerce. Ryland cites *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977), but that Court

held that in determining whether the FAA applied they must determine if there is a written provision for arbitration in the contract, **if the contract evidences a transaction involving commerce**, if the Court is satisfied that the issue involved in suit is referable to arbitration under the written agreement, and if the applicant for the stay is not in default in proceeding with such arbitration. *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. at 637, 239 S.E.2d at 650. The Court then went on to specifically examine whether or not the "contracts evidence a transaction involving commerce." *Id.*

The Court then went on to make that factual determination and found the following:

Initially, the specifications of Lafaye are replete with references to equipment and materials to be furnished from outside South Carolina. The following corporations and their locations are found at the designated pages of Lafaye's specifications:

1. Master Builders Co., Cleveland, Ohio p. 3-9
2. Finestone Corporation., Detroit, Michigan p. 7-5
3. Tnemec Co., Inc., North Kansas City, Missouri p. 9-16
4. L & M Surco, Atlanta, Georgia p. 9-13
5. Master Mechanics Co., Cleveland, Ohio p. 9-16
6. Desco Chemical Co., Inc., Buffalo, New York p. 9-16
7. Vitricon, Inc., Woodside, New York p. 9-16
8. Armstrong Cork Co., Lancaster, Pa. p. 2-4
9. W. S. Tyler Co., Cleveland, Ohio p. 14-10
10. Globe Van Dorn, Milwaukee, Wis. p. 19-10
11. Otis Elevator Co., New York, N.Y. p. 14-10
12. Danlstrom Metallic Door Co., Jamestown, N.Y. p. 14-13
13. Noonan-Laing, Inc., York, Pa. p. 3-1

Moreover, the following pages of the specifications refer to manufacturers, products and trade names which are certainly sufficient to put EHC on notice that materials and equipment from outside South Carolina would be used in the construction of the Finlay House: pp. 3-1, 3-10, 3-13, 3-15, 3-16, 4-2, 5-7, 5-9, 7-2, 7-3, 7-4, 8-2, 8-5, 9-8, 9-10, 9-19, 10-1, 10-5, 10-6, 11-1, 11-2, 12-2, 12-4, 14-5, 15A-5, 15A-6, 15A-7, 15A-9, 15A-10, 15A-13, 15A-15, 15A-16, 15B-9, 15B-11, 15B-12, 15B-13, 15B-15, 15B-16, 15B-19, 15B-24, 15B-25, 16-5, 16-7, 16-9. FHA Form 2328, dated July 22, 1971, is a part of the contract documents which lists the contractor's cost breakdown and names all subcontractors involved in the construction of the Finlay House. The following out-of-state subcontractors are listed on this document: Acoustics, Inc.; Truzillo Construction; Miles Plastering Co.; Westinghouse Electric Corp.

In light of the foregoing, the contract documents "evidence transactions in commerce" on their face. As an additional ground for holding that the contracts between the parties evidence transactions in commerce, one need only consider the nature of the project and the actual work performed in fulfillment of the contractual obligations. It would be virtually impossible to construct an eighteen (18) story apartment building between 1971 and 1973 with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina. The affidavit of J. D. McCall, Jr., President of Lafaye indicates that shop drawings from all over the country were utilized by the architects to prepare the specifications prior to July 22, 1971. The affidavit of Robert L. Sumwalt, Jr., Senior Vice President of McCrory, indicates that labor, supplies and materials from all over the country were utilized in the construction of the Finlay House.

Episcopal Housing Corp. v. Fed. Ins. Co., 269 S.C. at 639-40, 239 S.E.2d at 651-51.

None of this is the case here. This case involves the clearing and preparation of land and the supplying of roof trusses for a single-family home in 2006, all of which occurred in South Carolina. The alleged agreements did not state that the arbitration was to be pursuant to the FAA and did not even mention the FAA at all.

Ryland asserts that the claims against the subcontractors "implicate" interstate commerce. Ryland then asserts that Ryland has provided specific instances of the involvement of interstate commerce in the construction of the subject residence and then refers to the affidavit of Michael Boyle. The only alleged "facts" by Ryland as to interstate commerce by Ryland are its allegations that 1) the Stark entities are Ohio corporations and the payment to Stark for its work and materials provided for the subject residence was acquired across state lines as payment was sent to Canton, Ohio; 2) The Ryland Group, Inc. who executed the agreement with the original purchasers is incorporated in Maryland (*see* Ryland's Exhibit A); 3) the Mortgage for the subject residence signed by the original purchasers was organized under the laws of Pennsylvania (*see* Ryland's Exhibit D); and 4) "interstate communications and products that were manufactured

outside the State of South Carolina were used relative to the construction and sale of the residence.”

None of the above either alone or taken together are sufficient to establish interstate commerce and are not sufficient to establish that the FAA would apply. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 456, 730 S.E.2d at 317 (“adher[ing] to the view that the development of real estate is an inherently intrastate transaction”); *id.* at 458, 730 S.E.2d at 317–18 (noting the FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce); *id.* at 459, 730 S.E.2d at 318 (stating if ancillary factors in the purchase agreement for a residential home, such as out-of-state financing or a national warranty, were enough to constitute interstate commerce, “then every transaction that involved these ancillary factors would be subject to the FAA”).

Although Ryland asserts that the Ryland Group, Inc. who executed the agreement with the original purchasers is incorporated in Maryland, Exhibit A to Ryland’s Memorandum clearly shows, the contract is with Ryland Homes Charleston Division with an address of 3955 Faber Place, Suite 100, North Charleston, SC.29405 as the Seller. Even Ryland cannot point out anything in the agreement which in any way references interstate commerce. The mortgage is not sufficient. See *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 318, 730 S.E.2d at 459 (Bradley’s use of a North Carolina branch of JPMorgan Chase Bank & Co., a national financial institution, also did not bring the sale of the home within interstate commerce as the use of this lender was tangential to the performance of the Agreement). And the blanket statement that interstate communications and products that were manufactured outside the State of South Carolina were used relative to the construction and sale of the residence is insufficient to establish anything without the requisite facts to establish such an assertion.

As to the allegations as to Stark, these are unfounded and provide no basis for the establishment of interstate commerce. *See* Affidavit of Mike Dyer attached as Exhibit 4. Upon information and belief, Stark Truss Company, Inc. purchased the assets only of Carolina Truss Systems, Inc. effective July 31, 2002. The business and plant was located in Summerville, South Carolina. Stark initially operated the business under the name of Stark Truss Company of Summerville, LTD dba Carolina Truss Systems. Upon information and belief, Stark changed the name to Carolina Total Supply around perhaps 2006 and it operated under that name for approximately one (1) year. Then the name was changed to Stark Truss Company, Inc. permanently. Regardless of the name, the business and plant were located in Summerville, South Carolina. The Job name was Lot 74 The Reserve with a delivery address of 1502 Marsh Reed Court, Goose Creek, SC in Berkeley County. The roof trusses would have been built in the Summerville, South Carolina Plant. The roof trusses at issue would have been manufactured within the State of South Carolina. The alleged contract attached as Exhibit G to Ryland's Memorandum is with Carolina Truss with an address of PO Box 1049, Summerville, SC with a phone number of 843-875-0550. The alleged contract is signed by Michael Redman, a then employee of Carolina Truss, who was located within South Carolina and never worked at any other location and had no responsibilities at any other location other than in the State of South Carolina. The trusses were quoted, ordered, sold, designed, manufactured, and delivered in the State of South Carolina. The only involvement of the company outside the State of South Carolina was the accounting performed by the corporate headquarters in Ohio. This accounting process in no way had any involvement in the transaction which included the customer relations, communication, fulfillment and manufacturing related to the job which all occurred in the State of South Carolina. All of Ryland's communications with the sales, design and manufacturing for

the products in question would have been conducted entirely within the State of South Carolina. Although Ryland may have sent a check to Canton, Ohio, all of the manufacturing, delivery, and supply of any materials were solely within the State of South Carolina. Exhibit H to Ryland's Memorandum clearly lists the address for Carolina Truss Systems in Summerville, South Carolina with delivery in South Carolina from South Carolina with a sold to as Ryland Homes in South Carolina. In summary, this order was made in South Carolina and fulfilled in South Carolina. Affidavit of Mike Dyer.

Therefore, there is no factual basis to find that the transactions involving this single family residence involve interstate commerce such that the FAA applies. Ryland asserts that "South Carolina courts essentially accept it as given that construction involves interstate commerce" under *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977).¹ However, the court in *Episcopal* recognized that specific documents in that case showed transactions involving interstate commerce on their face. *Id.* at 638, 239 S.E.2d at 650. The court noted over 40 specific references in the contract to out-of-state equipment, materials, manufacturers, subcontractors, and products. *Id.* at 639-40, 239 S.E.2d at 651. "The contract documents 'evidence transactions in commerce' on their face." *Id.* at 640, 239 S.E.2d at 652.

The alleged Subcontractor Agreements at issue in this case do not evidence interstate commerce. The alleged contracts contain no mention of any out-of-state equipment, materials, manufacturers, or products. Therefore, the FAA does not apply.

¹ Ryland also asserts that the FAA is binding in state courts and supersedes inconsistent state law under *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 611, 586 S.E.2d 571, 584 (2003). *Toler's* held the FAA applied and the contract evidenced interstate commerce in the construction of a condominium complex when the lower court took judicial notice of the fact the agreement involved interstate commerce and neither party took issue with that finding. *Id.* It was therefore the law of the case and not examined by the Court.

Moreover, the Supreme Court of South Carolina “has continued to adhere to the view that the development of real estate is an *inherently intrastate transaction*.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 456, 730 S.E.2d at 317; *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 595, 553 S.E.2d at 117-18 (2001) (emphasis added). The court in *Bradley* held that the sale of a home does not involve interstate, but intrastate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 459-60, 730 S.E.2d at 317-18. The court arrived at this conclusion even though: (1) the terms of the agreement specified that any warranty claim be submitted to a national warranty office in Georgia; (2) the house was constructed using materials, subcontractors, and suppliers from outside of South Carolina; and (3) the home buyer was financed by a North Carolina lender. *Id.* at 456, 730 S.E.2d at 316.

In *Bradley v. Brentwood Homes, Inc.*, *supra*, Bradley and Brentwood Homes entered into a Home Purchase Agreement (the “Agreement”) for the purchase of a home located in North Myrtle Beach, South Carolina. In the Agreement, Bradley and his wife were designated as the purchasers and Brentwood Homes was designated as the seller. Pursuant to the Agreement, Bradley agreed to purchase a completed dwelling wherein Brentwood Homes acted as a seller of the completed dwelling rather than as a contractor for the construction of the dwelling. The closing of the home took place on March 2, 2007. On July 31, 2009, Bradley initiated a lawsuit against Brentwood Homes in which he alleged numerous **construction defects** in the dwelling. In his Complaint, Bradley identified causes of action for fraud, negligence, and breach of implied warranty. Brentwood Homes moved to compel arbitration. Brentwood Homes claimed the Agreement “on its face involves interstate commerce” as it provides that the Seller will purchase a warranty from 2–10 HBW Warranty, or such other national warranty, and that claims would be submitted to the East Region of 2–10 HBW, which is located in Tucker,

Georgia. Additionally, Brentwood Homes supplemented its motion with affidavits to establish that the home purchase was financed by a North Carolina branch of JPMorgan Chase Bank & Co., and that Brentwood Homes "used subcontractors, materials and suppliers from outside of the State of South Carolina" in the construction of Bradley's home.

The Court held that to ascertain whether an arbitration agreement implicates interstate commerce and the FAA, "the court must examine the agreement, the complaint, and the surrounding facts." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 455, 730 S.E.2d at 316. The Court found that there was insufficient evidence to establish interstate commerce and the FAA did not apply.

This Court must determine whether the alleged Subcontractor Agreements evidence transactions involving interstate commerce. This question is answered by looking at the essential character of the alleged Subcontractor Agreement. *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316. Here, Ryland has failed to reference in any part of the alleged Subcontractor Agreements with Land Site and Stark any information that evidences a transaction involving interstate commerce. The alleged contracts between Land Site and Ryland and Stark and Ryland do not in any way evidence interstate commerce, and Ryland cannot try to use any of its own dealings with other parties to establish that these alleged contracts involve interstate commerce.

Ryland relies only on its conclusory allegations that the alleged Subcontractor Agreements "contemplated the use of materials manufactured outside the state of South Carolina" and could not be performed "without the use of materials in interstate commerce."²

² The quoted text Ryland relies on in its assertion comes from *Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002), and not from the alleged Subcontractor Agreements. There is no provision in the alleged Subcontractor Agreements stating that the parties' work could not be completed without materials from interstate commerce.

However, Ryland has not identified any specific materials in the alleged Subcontractor Agreements or any reference in the alleged Agreements evidencing interstate commerce.

In addition, for the contract at issue between Ryland and the Plaintiffs, the FAA still would not apply because that suit centers on the purchase of the house which is exactly analogous to *Bradley v. Brentwood Homes, Inc., supra*. The Plaintiff's claims against Ryland are exactly on point with *Bradley*. The Plaintiffs have sued Ryland in regard to claims arising from the warranty that springs from the sale of the residence and therefore the FAA would not apply to those claims or any alleged subcontractor agreements. *Bradley v. Brentwood Homes, Inc., supra* (a builder-vendor's contract solely for the sale of a single-family house does not involve interstate commerce even if out-of-state materials, subcontractors and financing was used; hence, the FAA does not apply).

Accordingly, the FAA does not apply, and the Court should deny Ryland's Motion to Compel Arbitration.

III. THE ARBITRATION CLAUSE FROM THE ALLEGED SUBCONTRACTOR AGREEMENTS IS UNENFORCEABLE BECAUSE IT IS NOT IN COMPLIANCE WITH THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

South Carolina's Uniform Arbitration Act (UAA) requires:

(a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter *shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.*

S.C. Code Ann. § 15-48-10 (emphasis added).

These elements are to be strictly adhered to in order to satisfy the notice requirements. *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 589, 553 S.E.2d at 114. No other variation is acceptable. *See Zabinski v. Bright Acres Assocs., supra.*

Ryland's alleged Subcontractor Agreements with Land Site and Stark do not meet the requirements of the UAA. The arbitration clauses in the respective alleged Subcontractor Agreements are not capitalized, bolded, underlined, or rubber stamped. Moreover, the arbitration clauses are buried on the third page of the alleged agreement. These arbitration clauses do not comply with the explicit requirements of the UAA. Accordingly, the alleged Subcontractor Agreements identified by Ryland are not subject to arbitration.

IV. RYLAND HAS WAIVED ANY ALLEGED RIGHT TO COMPEL ARBITRATION.

Land Site and Stark join in the arguments by Plaintiffs that Ryland has waived any alleged right to arbitration.

V. RYLAND'S DISPUTE RESOLUTION PROCEDURE ALLEGEDLY WITH THE HOMEOWNER IS UNCONSCIONABLE.

Land Site and Stark join in the arguments by Plaintiffs that the dispute resolution procedure in Ryland's Home Warranty Program Insured Limited Warranty is unconscionable.

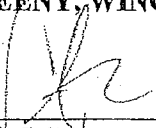
CONCLUSION

The arbitration clauses in Ryland's alleged Subcontractor Agreements with Land Site and Stark are not applicable or enforceable against Land Site or Stark based upon their plain language. The provision in the alleged contracts simply does not provide for arbitration in this matter. The FAA is not applicable because the alleged agreements did not involve interstate commerce. Finally, the arbitration provision in the alleged agreements is not in compliance with the South Carolina Uniform Arbitration Act, and therefore is not enforceable under the Act.

For the aforementioned reasons, Third-Party Defendants Land Site and Stark respectfully request that this Court deny Ryland's Motion to Compel Arbitration.

Respectfully submitted,

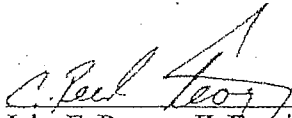
SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow
Christy E. Mahon
Sweeney, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211

**ATTORNEYS FOR THIRD-PARTY
DEFENDANTS STARK TRUSS COMPANY,
INC. A/K/A STARK TRUSS COMPANY OF
SUMMERVILLE, LTD., A/K/A STARK
TRUSS, INC. D/B/A CAROLINA TRUSS
SYSTEMS, INC.**

THE WARD LAW FIRM, PA

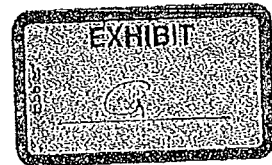


John E. Rogers, II, Esquire
C. Reed Teague, Esquire
The Ward Law Firm, PA
P.O. Box 5663
Spartanburg, SC 29304

**ATTORNEYS FOR THIRD-PARTY
DEFENDANT LAND SITE SERVICES, INC.**

Columbia, South Carolina

EXHIBIT 1



THE RYLAND GROUP, INC.
SUBCONTRACTOR AGREEMENT
GENERAL TERMS

SUBCONTRACTOR: Carolina Truss RYLAND DIVISIONS: 449
Address: PO Box 10494 Greenville SC (Insert all divisions for which work
Phone No.: 843 875 8550 29484 is performed under this contract)
Effective Date: _____

This Subcontractor Agreement ("Agreement") shall govern the relationship between Subcontractor and THE RYLAND GROUP, INC. ("RYLAND") for any project ("Project") on which Subcontractor provides services to Ryland. The description of any work ("Work") to be performed on any Project, any specifics regarding the Work, rules and regulations regarding the Work and the price ("Price") shall be contained on bid sheets, proposals, drawings, specifications, scopes of work, site plans and other documentation governing the Work (collectively, the "Documents"). All Documents are incorporated hereto by reference and made a part hereof. The Documents shall be identified as being subject to this Agreement.

Subcontractor and Ryland agree as follows:

1. (a) Subcontractor shall complete the Work in strict conformity with generally accepted building practices and the Documents. All materials incorporated into the Work shall be new, and the Work shall be completed in a good and workmanlike manner free from defects.
(b) Subcontractor has examined the Documents and is fully aware of their provisions.
(c) Subcontractor represents, warrants and covenants that the Documents are complete and sufficient to enable Subcontractor to determine the Price, to construct the Work and otherwise to fulfill its obligations hereunder. Subcontractor has visited the site and examined the conditions affecting the Work.
(d) Subcontractor has satisfied itself as to the location of all utilities that may affect or interfere with the Work and agrees to protect all utilities and keep them operational at all times.

2. Time is of the essence. Subcontractor shall begin the Work on the date designated by Ryland and shall proceed diligently to complete the Work in accordance with the schedule set by Ryland without delays to Ryland or to other subcontractors.

3. (a) Subcontractor is an independent contractor. Subcontractor is not an employee of Ryland for any purpose.
(b) Subcontractor is responsible for the manner, method and means of accomplishing the Work; hiring, training, disciplining, firing and scheduling its own employees; withholding appropriate amounts for federal, state and local taxes; and providing fringe benefits to employees, including, but not limited to, workers' compensation benefits. Ryland shall not be liable for any such items. Ryland does not have the right to cause Subcontractor to take any disciplinary action against its employees except as specifically provided in this Agreement or to assign work to any of Subcontractor's employees.
(c) Ryland reserves the right to (1) inspect all Work to determine, in good faith, whether the Work has been satisfactorily completed, (2) control access to each Ryland work site, (3) schedule Work in a logical sequence or to avoid disturbances, and (4) stop Work for safety reasons or to insure conformity of end product with contracted for results.

4. (a) Ryland shall pay Subcontractor [weekly] [biweekly] [monthly] [by autopsy] so long as Subcontractor is not in default upon written certification by Ryland's Homebuilding Supervisor that the portion of the Work for which payment has been requested has been completed satisfactorily. Payment shall be in accordance with the Price set forth in the Documents. Subcontractor agrees to provide notice of price increases to Ryland for the longer of completion of current backlog or 120 days. Payment for additions or extra work will be made only pursuant to advance written change orders, which may include purchase order, signed by the purchasing manager of Ryland.

- (b) Ryland, in its sole discretion, may retain any payment or portion thereof and/or offset such amounts against future payments due to Subcontractor to assure satisfactory completion of the Work and all service work arising therefrom or to compensate Ryland for any damages Ryland suffers as a result of Subcontractor's default of this Agreement. Any retentions shall be paid to the Subcontractor upon satisfactory final completion of any Work and/or service work applicable for the warranty period.

- (c) Subcontractor shall submit to Ryland with Subcontractor's request for payment, executed lien waivers in the form attached as Addendum 1 from Subcontractor and all persons and entities furnishing any labor, equipment, materials or services on the Project in any way concerning or relating to Subcontractor's Work, including, without limitation Subcontractor's employees, suppliers, subcontractors, agents and officers ("Subcontractor's Agents"). Upon completion of the Work on any Project Subcontractor shall deliver to Ryland a Final Waiver and Release of Lien in form attached as Addendum 2 executed by Subcontractor and each of Subcontractor's Agents. If any of Subcontractor's Agents files or maintains any such lien or claim after payment by Ryland to Subcontractor, Subcontractor agrees to cause such lien and claim to be satisfied, removed or discharged at its own expense by bond, payment or otherwise within ten (10) days from the day of filing thereof. Upon Subcontractor's failure to satisfy, remove or discharge the lien or claim, Ryland shall have the right, in addition to all other rights and remedies provided under the Agreement or by law, to cause such lien or claim to be satisfied, removed or discharged by whatever means Ryland chooses, at the entire cost and expense of the Subcontractor, including without limitation, legal fees. To the maximum extent permitted by law, Subcontractor agrees to indemnify, protect and save harmless Ryland from and against any and all such liens and claims and actions brought or judgments rendered thereon, and from and against any and all loss, damages, liability, costs and expenses, including legal fees, which Ryland may sustain or incur in connection therewith.

- (d) Subcontractor shall be in default if any demand is made on Ryland for amounts due to Subcontractor's Agents, and Ryland shall have the right to withhold such amounts claimed out of any payments due to the Subcontractor.

5. INSURANCE.

- (a) Ryland requires that Subcontractor maintain minimum insurance coverages as detailed on Addendum 3. All insurance policies required shall (1) not contain endorsements that restrict limits of liability to additional insureds; and (2) have coverages forms acceptable to Ryland. If requested, Subcontractor shall provide certified copies of all such policies to Ryland within 30 days of such request.

- (b) Subcontractor shall maintain all required insurance coverage in force until completion of Work. Subcontractor shall maintain Products and Completed Operations Insurance coverage, including required endorsements, in force until expiration of the applicable statute of limitations relating to latent defects in construction of or improvements to real property.

- (c) The use of self-insured retentions or deductibles in excess of \$5,000 is not allowed. Subcontractor is fully responsible for payment of any self-insured retentions or deductibles.

OTS / mme
Subcontractor's Initials

(b) The insurance requirements shall not limit Subcontractor's obligations under this Agreement or Subcontractor's indemnification, warranty obligations or other liability in any manner. The requirements merely represent the minimum amounts of insurance coverage required to be maintained by Subcontractor.

(c) Subcontractor shall provide evidence of the renewal of policies required 30 days in advance of the expiration of any such policy.

(d) If Subcontractor fails to secure and maintain the required insurance, Ryland shall have the right (without any obligation to do so, however) to secure same in the name and for the account of the Subcontractor, in which event the Subcontractor shall pay the costs thereof and furnish upon demand all information that may be required in connection therewith.

6. TO THE MAXIMUM EXTENT PERMITTED BY LAW, SUBCONTRACTOR SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND RYLAND, ITS OFFICERS, DIRECTORS, EMPLOYEES, SUPPLIERS AND AGENTS ("RYLAND'S AGENTS") AND THE PROPERTY OF RYLAND, INCLUDING ANY PROJECT COVERED BY THIS AGREEMENT, FROM ANY AND ALL CLAIMS, COSTS, LOSSES, DAMAGES, FINES, PENALTIES, FEES AND OTHER COSTS, INCLUDING, BUT NOT LIMITED TO, ATTORNEYS' FEES AND DISPUTE RELATED COSTS (COLLECTIVELY, "SUCH COSTS"), TO THE EXTENT THAT SUCH COSTS ARISE OUT OF OR ARE INCIDENTAL TO OR RESULT FROM (A) THE PERFORMANCE OF THE WORK OR SUBCONTRACTOR'S FAILURE TO ENFORCE THE DRUG AND ALCOHOL ADDENDUM AND ARE ATTRIBUTABLE TO BODILY INJURY, PERSONAL INJURY, SICKNESS, DISEASE OR DEATH OF ANY PERSON, INCLUDING ANY INJURY OR DEATH OF AN EMPLOYEE OR OWNER OF SUBCONTRACTOR, OR INJURY TO, DESTRUCTION, DAMAGE TO OR DESTRUCTION OF THE WORK OR OF ANY PROPERTY; OR (B) SUBCONTRACTOR'S OR SUBCONTRACTOR'S AGENTS FAILURE TO COMPLY WITH THE LEGAL REQUIREMENTS AND (A) OR (B) IS CAUSED BY ANY ACT OR OMISSION OF SUBCONTRACTOR OR ANYONE ACTING FOR, ON BEHALF OF OR THROUGH OR REPRESENTING SUBCONTRACTOR OR SUBCONTRACTOR'S AGENT. SUBCONTRACTOR SHALL SO INDEMNIFY, HOLD HARMLESS AND DEFEND RYLAND AND RYLAND'S AGENTS FROM SUCH COSTS AND EVEN THOUGH IT IS ALLEGED OR FOUND THAT ANY NEGLIGENCE ACT OR OMISSION, OR WRONGFUL ACT OF RYLAND OR RYLAND'S AGENTS ALSO CAUSED OR CONTRIBUTED TO SUCH COSTS WITHOUT REGARD TO WHETHER THE EXTENT OF ANY SUCH ALLEGED NEGLIGENCE ACT OR OMISSION, OR WRONGFUL ACT OF RYLAND OR RYLAND'S AGENTS IS GREATER OR LESSER THAN ANY ALLEGED NEGLIGENCE ACT OR OMISSION, OR WRONGFUL ACT OF SUBCONTRACTOR OR SUBCONTRACTOR'S AGENTS. THIS INDEMNIFICATION IS NOT INTENDED TO COVER THE NEGLIGENCE OR WILLFUL MISCONDUCT OF RYLAND OR RYLAND'S AGENTS. SUBCONTRACTOR AGREES THAT A PORTION OF THE PRICE HAS BEEN PAID TO THE SUBCONTRACTOR AS SPECIFIC CONSIDERATION FOR THE INDEMNIFICATIONS REQUIRED OR GIVEN IN ACCORDANCE WITH THIS AGREEMENT AND THAT ALL INDEMNIFICATIONS, WARRANTIES, GUARANTEES AND OBLIGATIONS GIVEN IN ACCORDANCE WITH THIS AGREEMENT OR THE DOCUMENTS SHALL SURVIVE FINAL PAYMENT, COMPLETION AND ACCEPTANCE OF THE WORK AND TERMINATION OR COMPLETION OF THIS AGREEMENT, UNDER NO CIRCUMSTANCES SHALL THE INSURANCE REQUIREMENTS AND LIMITS SET FORTH IN THIS AGREEMENT BE CONSTRUED TO LIMIT SUBCONTRACTOR'S INDEMNIFICATION OBLIGATIONS OR OTHER LIABILITY HEREUNDER. SUBCONTRACTOR WAIVES ANY RIGHTS OF SUBROGATION AGAINST RYLAND AND SHALL REQUIRE SUBCONTRACTOR'S AGENTS TO WAIVE SUBROGATION RIGHTS AGAINST RYLAND.

7. Subcontractor warrants and represents that it is familiar with and covenants to comply with all laws, regulations and rulings of all federal, state, county and municipal jurisdictions and agencies applicable to this Agreement and to the Work, including, without limitation, OSHA, state occupational safety and health laws, workers' compensation laws, minimum wage and overtime laws, employment discrimination laws, building codes and all regulations and rules promulgated thereunder (collectively, the "Legal Requirements"). Subcontractor shall maintain all records required for compliance with the Legal Requirements and will indemnify and save Ryland harmless from any damage, fine or penalty which may be assessed against Ryland and any attorneys' fees and other costs incurred by Ryland by reason of the breach or alleged breach of this section by Subcontractor or Subcontractor's Agents.

(a) At all times, Subcontractor shall:

(1) conduct, operate and maintain a safe, clean and healthful workplace;

(2) provide to its employees the protective clothing, equipment, training and safety devices necessary to ensure compliance with relevant Legal Requirements; and

(3) abide by the Drug and Alcohol Addendum 4.

(b) To the maximum extent permitted by law, Ryland may withhold from payment to Subcontractor the full amount of any fine, damages or penalty assessed or proposed to be assessed against Ryland by local, state or federal authorities as well as a sum sufficient to cover any attorneys' fees and costs that are incurred by Ryland as a result of Subcontractor's or Subcontractor's Agents failure to comply with applicable Legal Requirements. When any such amounts are actually assessed and paid by Ryland, Ryland will release to Subcontractor any excess withheld.

(c) Either Subcontractor or Ryland may contest responsibility for Subcontractor's or Subcontractor's Agents failure to comply with applicable Legal Requirements. Subcontractor shall reimburse Ryland up to the full amount of any legal costs and expenses that Ryland may incur to contest responsibility which relates to Subcontractor's or Subcontractor's Agents failure to comply with applicable Legal Requirements.

(d) COMPLIANCE WITH APPLICABLE OCCUPATIONAL SAFETY AND HEALTH STANDARDS IS AN EXPRESS CONDITION OF WORK UNDER THIS AGREEMENT.

(e) Addendum 5 applies to all FTA approved Projects.

8. All Work shall be performed by qualified tradespersons. Ryland reserves the right to reject any materials or Work which do not, in Ryland's opinion, comply with the terms of this Agreement. All materials shall be installed in accordance with applicable Legal Requirements and manufacturer's specifications or recommendations.

9. Subcontractor agrees, at its expense, (a) to remedy any defect in the Work due to faulty or unacceptable material or workmanship, (b) to repair or replace any Work not in compliance with the Documents, and (c) to pay any expenses and costs, including legal fees and dispute resolution costs, incurred by Ryland as a result of (i) such defect or (ii) any personal injury or damage to other property caused by Subcontractor or Subcontractor's Agents. Subcontractor shall fully cooperate with Ryland in responding to any warranty claims. All warranties made by Ryland to its homeowner, whether under the Ryland warranty or applicable law, are, to the extent applicable, deemed made by Subcontractor to Ryland.

10. Subcontractor agrees, at the request of Ryland, to take delivery or assume custody of materials purchased by Ryland from manufacturers. Risk of loss of all material and equipment supplied by, delivered to or under the custody of the Subcontractor shall be upon the Subcontractor until the Work reaches final completion and is accepted by Ryland.

CIS/MA
Subcontractor's Initials

11. Subcontractor shall keep the jobsite free of accumulations of trash and debris. At the conclusion of daily work on any housing unit, Subcontractor shall remove all trash and debris caused by its operations and leave the site broom clean.

12. Subcontractor shall abide by all directives which Ryland may publish from time to time.

13. If Subcontractor fails to perform any of its obligations hereunder, Subcontractor shall be in default. If such default is not cured within two (2) days after oral or written notice, then Ryland may pursue any remedy or combination of remedies available at law or equity, including, without limitation: (a) terminating this Agreement; (b) applying any retentions or other amounts due to Subcontractor to cure Subcontractor's defaults or compensate Ryland for damages suffered; (c) taking any action necessary to perform the Work by other means, in which case Subcontractor shall upon demand reimburse Ryland for any amounts expended by Ryland to complete the Work in excess of the Price together with interest from the date paid by Ryland to the date reimbursed by Subcontractor at the rate of eighteen percent (18%) per annum or the maximum amount permitted under applicable law; and (d) pursuing an action for damages and recovery of all costs and expenses, including legal fees, incurred by Ryland in enforcing this Agreement. All remedies shall be cumulative and not exclusive.

14. Ryland may terminate Subcontractor's performance under this Agreement at any time, at the sole option of Ryland and for Ryland's own convenience. In such event, Subcontractor will turn over all equipment and materials ordered, purchased for, or delivered to the Project, and Ryland will pay the Subcontractor any amounts due based on the percentage of completion of the Subcontractor's Work that is in compliance with this Agreement and the Price for Work actually accomplished and equipment and materials supplied to the Project, ~~excluding any payment for unearned profit and overhead.~~ The payments for percentage completion shall be Subcontractor's sole remedy under this Agreement at law or in equity. Subcontractor will facilitate transfer of the Work to Ryland by assigning its rights under subcontracts and purchase orders.

15. Subcontractor shall fully cooperate and coordinate performance of the Work with the work of Ryland and other subcontractors of Ryland. Ryland may suspend or reschedule the Work in its discretion. Subcontractor shall not be entitled to any damages or additional compensation for any delay caused by rescheduling or suspension of the Work other than an equivalent extension of time to perform.

16. Except in the event that either party is sued by someone other than a party hereto or it would be appropriate for complete resolution of the issues for either party to cross-claim against the other party in a legal action not instituted by either of the parties hereto, any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof shall be settled by binding arbitration conducted by a neutral arbitrator. If the parties do not mutually agree on an arbitrator, the arbitrator shall be selected by the American Arbitration Association at its offices closest to the construction site where the dispute arose. The arbitration shall be conducted according to the American Arbitration Association Construction Arbitration Rules unless other procedures are agreed upon by the parties. The parties agree to (a) allow to join into the arbitration proceeding hereunder or (b) join any other arbitration proceeding being conducted by, persons or entities related to the dispute whose involvement may be necessary to completely resolve the dispute, such as (1) a homeowner, (2) Ryland's home warranty corporation, (3) Ryland's or Subcontractor's insurers, and (4) Subcontractor's materialmen or subcontractors. The arbitration shall determine all rights and obligations under this Agreement and the award of the arbitrator shall be final, binding and enforceable. Subcontractor shall include a comparable arbitration provision in all of its subcontracts related to the Work.

17. (a) This Agreement (including all Documents incorporated herein) constitutes the entire Agreement between the parties, superseding any prior negotiations, agreements or contracts, written or oral, between the parties and may not be amended without the written agreement of both parties.

(b) Subcontractor shall have no right to assign this Agreement or its right to payments hereunder.

(c) All plans, drawings, specifications and the subject matter contained therein and all other information given to Subcontractor in connection with the Work ("Proprietary Materials") shall remain the property of Ryland and shall not be used by or disclosed to anyone by Subcontractor for any purpose other than performance of the Work. Upon completion of the Work, Subcontractor shall return all Proprietary Materials to Ryland.

(d) If any one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall be construed as if the invalid, illegal or unenforceable portion of the provision had never been contained herein.

(e) This Agreement shall be governed by the laws of the state in which the Work is performed.

IN WITNESS WHEREOF, the parties have executed and entered this Agreement as of the date set forth above.

THE RYLAND GROUP, INC.

(SUBCONTRACTOR)

License # _____

Expiration Date _____

By: [Signature] (SEAL)

By: [Signature] (SEAL)

Name: GARYN GARCIA

Name: Michael Rishman

Title: PURCHASING MANAGER

Title: GM

Ryland shall retain 0% retention until _____

SUBCONTRACTOR AGREEMENT

THE RYLAND GROUP, INC.

ADDENDUM 1

RELEASE OF LIENS

OWNER: _____
SUBCONTRACTOR: _____
PROPERTY: _____
CONTRACT DATE: _____
FOR WORK AND MATERIALS FURNISHED THROUGH _____, 200__.

The undersigned, which provided services, materials or equipment for the above Property in accordance with a contract with the Subcontractor identified above, for good and valuable consideration received by it, hereby waives and releases all claims for, liens and rights of lien now existing to the extent of \$_____, which represents full payment received by the undersigned (exclusive of contractual retainage) for work, services, materials and/or equipment furnished in connection with the above Property to the date of this release.

This Release of Liens is executed and delivered simultaneously with or after payment has been received for the work, services, materials and/or equipment performed or provided to the date referenced above.

This Release of Liens may be relied upon by purchasers procuring improvements from Owner, by mortgagees making mortgage loans to said purchasers, and title insurance companies insuring titles for said purchasers and shall run to the benefit of any such persons/entities and their successors and assigns.

IN WITNESS WHEREOF, the undersigned has hereunto set his hand and seal for the duly authorized officer/s of the undersigned this _____ day of _____, 200__.

_____, (Corporate or Partnership Name of Subcontractor/supplier)

By: _____
Name: _____
Title: _____

[Individual Subcontractor/supplier]

Corporate/Partnership Acknowledgment

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 200__, before me, personally appeared _____, the _____ of _____ who I am satisfied is the person who signed the within instrument and he/she did acknowledge that he/she signed and delivered this instrument as the [officer] [partner] above stated, and that the foregoing instrument is the act and deed of said [Corporation] [Partnership].

Notary Public

My commission expires: _____

Individual Acknowledgment

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 200__, before me personally appeared _____ who I am satisfied is the person who signed the within instrument and he/she did acknowledge that he/she signed and delivered this instrument on his/her behalf and that the foregoing instrument is his/her voluntary act and deed.

Notary Public

My commission expires: _____

SUBCONTRACTOR AGREEMENT

THE RYLAND GROUP, INC.

ADDENDUM 2

FINAL WAIVER AND RELEASE OF LIENS

OWNER: _____
SUBCONTRACTOR: _____
PROPERTY: _____
CONTRACT DATED: _____
FOR WORK AND MATERIALS FURNISHED THROUGH _____, 200__

The undersigned for itself, its successors and assigns and its subcontractors and suppliers, which/who has provided materials, work, services and/or equipment in connection with the Project on the Property for the Owner in consideration of the sum of \$_____ paid [by Owner] which sum represents the final payment due pursuant to the Contract, together with any amendments or change orders related thereto (all of the foregoing being collectively referred to as the "Contract");

1. Acknowledges that it has been paid in full for all materials, work, services and/or equipment furnished in connection with the performance of the Contract or otherwise in connection with the construction on the Property.

2. Waives and releases any and all construction lien claim(s) and/or Notice(s) of Unpaid Balance and Right to File Lien and the like ("Lien") which Subcontractor has had or currently has, against or upon any portion of the Project or Property for materials, work, services and/or equipment provided.

3. Agrees that if, after the date hereof, there shall be evidence of any Lien filed (i) by the undersigned or (ii) any subcontractor or supplier of the undersigned for which, if established, Owner might become liable or which might encumber title to the Property or Project, the undersigned shall promptly discharge same and indemnify, hold harmless and defend Owner against any loss, damages or costs or expenses, including attorneys' fees, associated therewith.

4. The undersigned for itself, its successors and assigns, releases and forever discharges Owner (and its shareholders, directors, officers, employees, and agents) and their successors and assigns, from all claims, demands or causes of action which it has had, currently has, or may in the future have, arising from or in any way relating to the Contract or the Property.

5. Agrees that this Release may be rolled upon by purchasers procuring improvements from Owner, by mortgagees making mortgage loans to said purchasers, and title insurance companies insuring titles for said purchasers and shall run to the benefit of any such persons/entities and their successors and assigns.

IN WITNESS WHEREOF, the undersigned has set his hand and seal [as the duly authorized officer/partner of the undersigned] on this _____ day of _____, 200__.

[Corporate or Partnership Name of Subcontractor]

By: _____
Name: _____
Title: _____

[Individual Subcontractor]

Corporate/Partnership Acknowledgment

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 200__, before me, personally appeared _____, the _____ of _____, who I am satisfied is the person who signed the within instrument and he/she did acknowledge that he/she signed and delivered this instrument as the [officer] [partner] above stated, and that the foregoing instrument is the act and deed of said [Corporation] [Partnership].

Notary Public

My commission expires: _____

Individual Acknowledgment

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 200__, before me personally appeared _____, who I am satisfied is the person who signed the within instrument and he/she did acknowledge that he/she signed and delivered this instrument on his/her behalf and that the foregoing instrument is his/her voluntary act and deed.

Notary Public

My commission expires: _____

SUBCONTRACTOR AGREEMENT

THE RYLAND GROUP, INC.

ADDENDUM 3

SUBCONTRACTOR INSURANCE REQUIREMENTS

CERTIFICATES OF INSURANCE, INCLUDING COPIES OF POLICY ENDORSEMENTS LISTED BELOW, EVIDENCING REQUIRED COVERAGE SHALL BE DELIVERED TO RYLAND PRIOR TO THE COMMENCEMENT OF ANY WORK (SAMPLE CERTIFICATES ATTACHED).

PLEASE DIRECT INSURANCE INQUIRIES TO _____ AT _____

TYPE OF COVERAGE	AMOUNT OF COVERAGE
A. WORKER'S COMPENSATION -- and Occupational Disease Coverage in accordance with the laws of the State within whose jurisdiction the work is performed. - Coverage to include all employees, agents, officers, partners, and proprietors/owners of Subcontractor. - The certificate should specify that the insurance company's A.M. Best Rating is at least A-/VIII. - If the services of a leasing company are used to insure its workers' compensation exposure, the following documents must be delivered to Ryland before any work can be performed on a Ryland job site: A. One certificate documenting workers' compensation insurance for Subcontractor's employees on Ryland's job sites covered through the leasing company. B. A second certificate of insurance evidencing that the Subcontractor has purchased its own separate workers' compensation insurance policy for any employees not covered by the leasing company's insurance. It is imperative that this second policy be insured through the same insurance company as the leasing company and that the second policy has a different policy number from that of the leasing company. C. A declaration sheet (the cover page of the insurance policy) from the Subcontractor's own policy. - The workers' compensation policy should be amended to include a 30-day cancellation notice provision in lieu of the standard 10-day cancellation notice provision. - Workers' compensation carrier shall waive subrogation against The Ryland Group, Inc. and its subsidiaries, affiliated and successor companies, officers, directors, agents, servants, employees, divisions, partners and shareholders.	Workers Compensation -- Statutory
EMPLOYER'S LIABILITY	<u>Employers Liability:</u> \$500,000. Ea. Bodily Injury by Accident \$500,000. Bodily Injury by Disease, Ea. Employee
B. COMMERCIAL GENERAL LIABILITY -- with the following minimum coverage: - Coverage for all residential building including both attached and unattached projects - Occurrence form not modified - Subsidence, no endorsements limiting coverage - Contractual liability coverage included - The Certificates of Insurance must state that "The Ryland Group, Inc. and its subsidiaries, affiliated and successor companies, officers, directors, agents, servants, employees, divisions, partners and shareholders" are named as Additional Insureds on the	\$1,000,000. General Aggregate Limit (other than Products/Completed Operations) \$1,000,000. Products/Completed Operations Aggregate Limit \$1,000,000. Bodily Injury (Ea. Occurrence) \$1,000,000. Property Damage (Ea. Occurrence) \$1,000,000. Personal Injury & Advertising Injury Limit \$ 50,000. Fire Damage Limit (any one fire)

CTB/MD
Subcontractor's Initials

Subcontractors' general liability insurance policy. - The additional insured status must be provided only on a CG 2010 (11/85) Additional Insured Endorsement or on a CG 2026 (11/85) Additional Insured Endorsement, or their equivalent. - A copy of the correct Additional Insured Endorsement, as described above, must be attached to the certificate of insurance. - The Additional Insured status will be provided to Ryland on a blanket basis for all jobs performed for Ryland (not project specific). - The general liability insurance provided must be primary over Ryland's insurance and Ryland's insurance should not be called upon to contribute toward the payment of any claim arising out of the Subcontractor's work. The Certificate of Insurance must clearly state that the Subcontractor's insurance is "primary and non-contributory" over Ryland's insurance. - The Certificate of Insurance should specifically state that the Subcontractor's insurance company's A.M. Best Rating is at least A-/VIII. - The general liability policy should be amended to include a 30-day cancellation notice provision in lieu of the standard 10-day cancellation notice provision. The certificate of insurance should so state. There shall be no endorsements limiting coverage for explosion, collapse, or underground damage, blanket contractual liability, or Broad Form property damage coverage. There shall be no limitation on the limits available to the additional insureds. Nor shall there be any limitation or exclusions as respects the additional insured coverage for claims involving Bodily Injury of a Subcontractor's employees or of any other third party.	
<u>C.</u> <u>BUSINESS AUTO LIABILITY</u> — covering any automobile, including hired and non-owned autos - The certificate of insurance must evidence that "The Ryland Group, Inc. and its subsidiaries, affiliated and successor companies and their officers, directors, agents, servants, employees, divisions, partners and shareholders" are named as Additional Insureds on the auto liability insurance policy. - The certificate of insurance must reflect that the auto liability insurance insures any vehicle driven by the Subcontractor and its employees. - The certificate of insurance must specify that the Subcontractor's insurance company's A.M. Best rating is at least A-/VIII. - The Subcontractor's auto liability policy should be amended to include a 30-day cancellation notice provision in lieu of the standard 10-day cancellation notice provision.	\$500,000, Combined Single Limit

ELB/mre
Subcontractor's Initials

SUBCONTRACTOR AGREEMENT

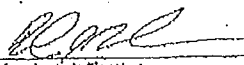
THE RYLAND GROUP, INC.

ADDENDUM 4

DRUG AND ALCOHOL ADDENDUM

FOR THE SAFETY AND WELL BEING OF ALL EMPLOYEES ON RYLAND CONSTRUCTION SITES, RYLAND HAS A POLICY THAT NEITHER CONTROLLED SUBSTANCES NOR ALCOHOL SHALL BE DISTRIBUTED, POSSESSED OR USED ON RYLAND CONSTRUCTION SITES. ANYONE FOUND TO BE IMPAIRED BY OR IN POSSESSION OF CONTROLLED SUBSTANCES OR ALCOHOL MUST IMMEDIATELY LEAVE THE RYLAND CONSTRUCTION SITE OR PROPERTY. To help ensure the safety of all workers, including a worker that may be impaired, Subcontractor agrees to adhere to the following procedures:

- (1) If a Subcontractor suspects that one of Subcontractor's Agents is impaired by controlled substances or alcohol, Subcontractor is required to investigate and make inquiries of co-workers on the job site to confirm the suspected impairment. If Ryland becomes aware that one of Subcontractor's Agents has been impaired on the job, Ryland shall have the right, but not the duty, to request that Subcontractor's foreperson investigate. When such a request is given, orally or in writing, Subcontractor's foreperson shall immediately proceed with such investigation and shall thereafter promptly report the results to the Ryland Supervisor. Ryland may send formal written notification to the Subcontractor regarding any such situation, a copy of which will be placed in the Subcontractor's file.
- (2) Any worker who is impaired or reasonably believed to be impaired must be immediately removed from the job site. The Subcontractor must provide transportation for the impaired worker and not allow the impaired worker to drive him/herself from the job and endanger the public.
- (3) A repeated violation by Subcontractor or any of Subcontractor's Agents of this policy will be cause for immediate termination of this Agreement by Ryland, in Ryland's sole discretion.


Subcontractor's Signature

3/12/93
Date

SUBCONTRACTOR AGREEMENT

THE RYLAND GROUP, INC.

ADDENDUM 5

FOR ALL FHFA APPROVED PROJECTS

During the performance of this Agreement, the Subcontractor agrees as follows:

- (1) The Subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Subcontractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin, such action shall include, but not be limited to, the following: Recruitment, upgrading, promotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.
- (2) The Subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of the Subcontractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.
- (3) The Subcontractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the Subcontractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (4) The Subcontractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- (5) The Subcontractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (6) In the event of the Subcontractor's noncompliance with the nondiscrimination clauses of this Agreement or with any of the said rules, regulations, or orders, this Agreement may be canceled, terminated, or suspended, in whole or in part, and the Subcontractor may be declared ineligible for further Government contracts or federally-assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- (7) The Subcontractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor of Subcontractor. The Subcontractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance. *Provided, however*, that in the event a Subcontractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor of Subcontractor as a result of such direction by the administering agency, the Subcontractor may request the United States to enter into such litigation to protect the interests of the United States.

Supply Agreement

Buyer: Ryland Homes, _____ Division
Address: _____

Seller: C.T.S.
Address: _____

Period: From 7/1, 2002 to 10/31, 2002

Product(s), Quantities: Buyer's requirements for NA, which are estimated to total NA (quantify)
NA (units) at its Division operations or other locations specified by Buyer.

Specifications: Product shall meet or exceed the specifications in Exhibit A. NA

Price: \$ NA / NA or as detailed in Exhibit B, F.O.B. delivered to Buyer's construction sites in the
Divisions listed above or to other delivery points designated by Buyer.

Payment Terms: Net 30 F.O.B. jobsite

Accepted and Agreed:

By Seller: [Signature]
Signature: _____
Name: Mark S. Eiden
Title: General Manager
Date: 7/5/02

By Buyer: [Signature]
Signature: _____
Name: DAVID GREEN
Title: PURCHASING MANAGER
Date: 7/5/02

Special Terms and Conditions: The Special Terms and Conditions on the reverse side of this form are
incorporated in and a part of this Agreement.

TERMS AND CONDITIONS

1. **PRODUCT CHANGES** - Seller shall provide notice of any change in Product (1). Any changes must be approved by Buyer. Buyer may terminate this Agreement without liability if Seller fails to obtain prior approval of Buyer to changes in the Product.

2. **PAYMENTS** - Seller shall bill invoices to the appropriate Division office unless Seller has entered into the appropriate Division office. Payment is due within 10 days of invoice date. Payment is due within 10 days of invoice date. Payment is due within 10 days of invoice date.

3. **ORDERS, DELIVERIES** - Buyer shall order Product for delivery as required from time to time during the term of this Agreement. Seller shall deliver to the destination sites or other destinations specified by Buyer in an invoice form to be attached to the order. Delivery shall be made on the date specified on each order provided that Buyer places orders by phone or other means not later than seven (7) days in advance of the specified delivery date. Time is of the essence. Seller understands that Buyer's maintenance of its construction schedules depends upon timely receipt of the Product. Seller must notify Buyer in writing immediately of any delay or shortages in delivery of the Product. Seller agrees to reimburse and indemnify Buyer from any loss, damage, cost or other result caused by any delay or shortage in receipt of the Product.

4. **INSPECTION & REJECTION** - Buyer may inspect, reject and test all Products under this Agreement up to arrival at the final destination. To the extent Buyer rejects Product(s) as nonconforming, the quantity under this Agreement will automatically be reduced unless Buyer otherwise notifies Seller. Rejected shipments or overages may be returned to Seller freight collected with no prior notice. Buyer may replace at Seller's cost any shortages in delivery.

5. **PACKING & CANTON** - No charge shall be allowed for packing, boxing, or crating. Packages and invoices must show Buyer's purchase order number, date, time and net weight under quantity, and (where applicable) lot number and package number, and must be accompanied by packing list or weight sheet.

6. **PLANS AND DRAWINGS, ETC.** - All drawings, logs, tools, etc. and related material or equipment furnished to Seller by Buyer or specifically paid for by Buyer shall remain the property of Buyer, and Seller shall have no right, legal or equitable, in such property. Seller shall return same to Buyer in the same condition as originally received by Seller, reasonable wear and tear excepted, upon Buyer's written request, without penalty to Buyer.

7. **COMPLIANCE WITH LAWS** - Seller will comply with all foreign, federal, state and local laws, orders, rules and regulations which may affect or be applicable to this Agreement, the Product(s), or the Seller, including, without limitation, (a) those applying to the prices charged by Seller, (b) those applying to the payments to be made by Buyer, (c) those applying to labor, including, without limitation, the Fair Labor Standards Act and federal, state and local laws and orders regarding equal opportunity, handicapped workers, affirmative action, disabled veterans and small and disadvantaged businesses.

8. **TITLE** - Title, risk of loss of and liability for goods shall pass to Buyer only upon delivery of the goods to Buyer's construction site or to other locations as designated by Buyer.

9. **SHIPMENT OF HAZARDOUS MATERIALS** - All hazardous materials must be clearly marked by Seller and Seller shall comply with federal, state and local laws and regulations applicable to shipment of hazardous materials or substances.

10. **INSURANCE** - Seller shall maintain adequate and commercially reasonable insurance coverage for all Products purchased hereunder. Seller shall maintain in force insurance described on Exhibit C attached. Seller shall furnish a Certificate of Insurance satisfactory to Buyer, showing all required insurance to be in force and showing that the insurance will not be canceled or changed except upon at least thirty (30) days written notice to Buyer.

11. **INFORMATION DISCLOSED TO BUYER** - Any knowledge or information which Seller shall disclose to Buyer in connection with the purchase of the goods or services covered by this Agreement shall not, unless otherwise specifically agreed upon in writing by Buyer, be deemed to be confidential or proprietary information and shall be required from any restrictions as part of the consideration for this Agreement.

12. **INFORMATION DISCLOSED TO SELLER** - All forecasts, estimates, specifications, drawings, technical information and data (collectively, the "Information") furnished by Buyer to Seller in connection with the purchase of the goods or services covered by this Agreement shall remain the property of Buyer. Seller shall not use the Information in any manner, nor shall extract or take therefrom, for a purpose or use unrelated to work performed by Seller for Buyer without Buyer's prior written consent. The Information shall be used only in the manufacture, production, or supply of goods, equipment, or services for Buyer and shall be returned to Buyer whenever requested and, in any event, at the conclusion of this Agreement.

No information relating to this Agreement, including specifically this pricing and other terms of this Agreement, shall be released or disclosed, other than to Seller's employees immediately concerned with the work hereunder, who shall be instructed to comply with this Paragraph 12, without the advance written approval of Buyer.

13. **LOWER COMPETITIVE PRICE** - If Buyer is offered goods of equal or better quality, as reasonably determined by Buyer, than those sold hereunder at a lower price (after all allowances and discounts) or upon better terms and conditions than those in effect under this Agreement, as reasonably determined by Buyer, then within ten (10) days of Buyer notifying Seller, Seller shall either (a) the price or terms and conditions, as the case may be, under this Agreement with respect to all goods shipped by Seller to Buyer, after receiving the notice, shall be changed to those of such offer or (b) Buyer shall be released from its purchase obligation under this Agreement to the extent Buyer so elects. Seller's failure to notify Buyer in writing within such ten (10) day period shall be deemed an election of choice (b).

14. **MOST FAVORED NATION** - If, at any time during the period of this Agreement, Seller or any of its affiliates shall sell goods of equal or better quality than the goods covered hereunder, or any substantially similar goods, at a lower price (after all allowances and discounts) or upon better terms and conditions (collectively the "Price") than the price or terms and conditions hereunder (collectively "Buyer's Price"), Seller, with respect to all goods shipped to Buyer after any such sale, shall change Buyer's Price to the Price. Buyer shall have the right, from time to time, to take such action as required in Buyer's reasonable judgment to verify Seller's compliance with this Section 14.

15. **RIGHTS** - Seller will be P.O.B. Buyer's Facilities or such other location designated by Buyer. Seller will pay all shipping costs.

16. **WARRANTY** - Seller warrants that it has good and marketable title to all goods delivered to Buyer hereunder, free and clear of all liens and encumbrances. Seller warrants that the goods, equipment and/or services furnished hereunder conform substantially to the Buyer's specifications, the terms of this Agreement, and all applicable codes and standards and are of good and merchantable quality, free of all faults and defects and fit for the particular purpose intended and shall be properly packaged, packaged and labeled. Seller warrants that the use or sale of the goods delivered hereunder will not infringe any patent. Seller shall indemnify and defend Buyer against any claim or liability for infringement of any patent relating to the use or use of the goods furnished hereunder or the intended use thereof and shall defend any suit for such infringement.

17. **REMEDIES** - In the event Seller breaches any of its obligations to Buyer, in addition to any rights, remedies or privileges contained herein or otherwise, Buyer shall be entitled to whatever rights, remedies or privileges that may be available to it at law or in equity, including all remedies provided under the Uniform Commercial Code, notwithstanding any provision in Seller's invoices or other documents relating to this transaction which purport to limit Seller's liability. Buyer shall be entitled to recover any expenses (including reasonable attorney's fees) incurred by it in enforcing its rights hereunder. In addition to any other remedies available to Buyer, Seller agrees, at Seller's expense and at the convenience of and the direction of the Buyer, to repair, replace, or promptly otherwise correct any defective or nonconforming Product(s) discovered within the maximum time permitted by law. Any claim made by Buyer under this Agreement for indemnification or warranties as provided in this Agreement shall survive termination of this Agreement.

18. **INDEMNITY** - Seller agrees to defend, indemnify and hold Buyer harmless from any loss, cost, damage, expense, or liability, including attorney's fees, caused by, resulting from, or connected with the Product or Seller's negligent failure to perform pursuant to this Agreement.

19. **CONTINGENCIES** - The parties specifically agree that an increase in price of raw materials, or the unavailability of raw materials, shall not constitute either a cash increase or an event of commercial impracticability.

20. **DELAYS** - a. When Seller can not perform in accordance with Section 3 of this Agreement, Seller will provide upgraded Product acceptable to Buyer without delay at the prices specified in this Agreement for the ordered Product.

b. Seller shall be liable for any and all damages incurred by Buyer by reason of delay in Seller's performance, unless such delay results from an act of God or the active interference of Buyer. If Seller for any reason, other than the fault or neglect of Buyer, fails to perform or it becomes apparent that Seller will fail or be unable to perform as required hereunder, Buyer, without limiting its other remedies, may upon 24 hours notice to Seller, obtain substituted Product or performance and effect or recover against Seller its cost thereof.

c. If Seller is unable to supply goods the same as or similar to the ones covered herein in the quantities contracted for, Seller shall allocate its total production in such a manner as is fair and reasonable within the meaning of Section 2-615 of the Uniform Commercial Code then in effect. Deliveries omitted due to any excused contingency shall, without liability, reduce by an equivalent quantity the quantity of the goods to be sold, delivered and purchased during the term of this Agreement.

TERMS AND CONDITIONS

- 514207600150753242400

7/25/01

MR

EXHIBIT A
TO SUPPLY AGREEMENT
PRODUCT SPECIFICATIONS

EXHIBIT B
TO SUPPLY AGREEMENT
PRICING

EXHIBIT C
TO SUPPLY AGREEMENT

The following insurance is required:

Workers' Compensation
Statutory Limits

Employers' Liability

\$500,000 Each Bodily Injury by Accident
\$500,000 Each Bodily Injury by Disease, Each Employee

Commercial Liability

General Aggregate Limit per Location (other than Products/Completed Operations)	\$1,000,000
Personal Injury & Advertising	\$1,000,000
Injury Limit	\$1,000,000
Bodily Injury	\$1,000,000 (Each Occurrence)
Property Damage	\$1,000,000 (Each Occurrence)
Fire Damage Limit (any one fire)	\$50,000

Auto Liability

Bodily Injury Each Person	\$500,000
Bodily Injury Each Accident	Combined Single Limit
Property Damage Each Accident	

ALL CERTIFICATES OF INSURANCE MUST SPECIFY THAT THE INSURANCE
COMPANY'S A.M. BEST RATING IS AT LEAST A-/VIII.

EXHIBIT 2

THE RYLAND GROUP, INC.
SUBCONTRACTOR AGREEMENT
GENERAL TERMS

SUBCONTRACTOR: LOWE'S SEWERS RYLAND DIVISIONS: 443
 Address: 1800 FORTCHES BLVD. RD. (Insert all divisions for which work
 Phone No.: 513-34-8910 is performed under this contract)
 Effective Date: 1/10/02

This Subcontractor Agreement ("Agreement") shall govern the relationship between Subcontractor and THE RYLAND GROUP, INC. ("RYLAND") for any project ("Project") on which Subcontractor provides services to Ryland. The description of any work ("Work") to be performed on any Project, any specifics regarding the Work, rules and regulations regarding the Work and the price ("Price") shall be contained on bid sheets, proposals, drawings, specifications, scopes of work, site plans and other documentation governing the Work (collectively, the "Documents"). All Documents are incorporated herein by reference and made a part hereof. The Documents shall be identified as being subject to this Agreement.

Subcontractor and Ryland agree as follows:

1. (a) Subcontractor shall complete the Work in strict conformity with generally accepted building practices and the Documents. All materials incorporated into the Work shall be new, and the Work shall be completed in a good and workmanlike manner free from defects.
 (b) Subcontractor has examined the Documents and is fully aware of their provisions.
 (c) Subcontractor represents, warrants and covenants that the Documents are complete and sufficient to enable Subcontractor to determine the Price, to construct the Work and otherwise to fulfill its obligations hereunder. Subcontractor has visited the site and examined the conditions affecting the Work.
 (d) Subcontractor has satisfied itself as to the location of all utilities that may affect or interfere with the Work and agrees to protect all utilities and keep them operational at all times.

2. Time is of the essence. Subcontractor shall begin the Work on the date designated by Ryland and shall proceed diligently to complete the Work in accordance with the schedule set by Ryland without delays to Ryland or to other subcontractors.

3. (a) Subcontractor is an independent contractor. Subcontractor is not an employee of Ryland for any purpose.
 (b) Subcontractor is responsible for the manner, method and means of accomplishing the Work; hiring, training, disciplining, firing and scheduling its own employees; withholding appropriate amounts for federal, state and local taxes; and providing fringe benefits to employees, including but not limited to, workers' compensation benefits. Ryland shall not be liable for any such items. Ryland does not have the right to cause Subcontractor to take any disciplinary action against its employees except as specifically provided in this Agreement or to assign work to any of Subcontractor's employees.
 (c) Ryland reserves the right to (1) inspect all Work to determine, in good faith, whether the Work has been satisfactorily completed, (2) control access to each Ryland work site, (3) schedule Work in a logical sequence or to avoid disturbances, and (4) stop Work for safety reasons or to insure conformity of end product with contracted for results.

4. (a) Ryland shall pay Subcontractor [weekly] [biweekly] [monthly] [by autopay] so long as Subcontractor is not in default upon written certification by Ryland's Housebuilding Supervisor that the portion of the Work for which payment has been requested has been completed satisfactorily. Payment shall be in accordance with the Price set forth in the Documents. Subcontractor agrees to provide notice of price increases to Ryland for the longer of completion of current backlog or 120 days. Payment for additions or extra work will be made only pursuant to advance written change orders, which may include purchase orders, signed by the purchasing manager of Ryland.

(b) Ryland, in its sole discretion, may retain any payment or portion thereof and/or offset such amounts against future payments due to Subcontractor to assure satisfactory completion of the Work and all service work arising therefrom or to compensate Ryland for any damages Ryland suffers as a result of Subcontractor's default of this Agreement. Any retainage shall be paid to the Subcontractor upon satisfactory final completion of any Work and/or service work applicable for the warranty period.

(c) Subcontractor shall submit to Ryland with Subcontractor's request for payment, executed lien waivers in the form attached as Addendum 1 from Subcontractor and all persons and entities furnishing any labor, equipment, materials or services on the Project in any way concerning or relating to Subcontractor's Work, including, without limitation Subcontractor's employees, suppliers, subcontractors, agents and officers ("Subcontractor's Agents"). Upon completion of the Work on any Project Subcontractor shall deliver to Ryland a Final Waiver and Release of Liens in form attached as Addendum 2 executed by Subcontractor and each of Subcontractor's Agents. If any of Subcontractor's Agents files or maintains any such lien or claim after payment by Ryland to Subcontractor, Subcontractor agrees to cause such lien and claim to be satisfied, removed or discharged at its own expense by bond, payment or otherwise within ten (10) days from the day of filing thereof. Upon Subcontractor's failure to satisfy, remove or discharge the lien or claim, Ryland shall have the right, in addition to all other rights and remedies provided under the Agreement or by law, to cause such lien or claim to be satisfied, removed or discharged by whatever means Ryland chooses, at the entire cost and expense of the Subcontractor, including without limitation, legal fees. To the maximum extent permitted by law, Subcontractor agrees to indemnify, protect and save harmless Ryland from and against any and all such liens and claims and actions brought or judgments rendered thereon, and from and against any and all loss, damages, liability, costs and expenses, including legal fees, which Ryland may sustain or incur in connection therewith.

(d) Subcontractor shall be in default if any demand is made on Ryland for amounts due to Subcontractor's Agents, and Ryland shall have the right to withhold such amounts claimed out of any payments due to the Subcontractor.

5. INSURANCE.

(a) Ryland requires that Subcontractor maintain minimum insurance coverages as detailed on Addendum 3. All insurance policies required shall (i) not contain endorsements that restrict limits of liability to additional insureds; and (ii) have coverage forms acceptable to Ryland. If requested, Subcontractor shall provide certified copies of all such policies to Ryland within 30 days of such request.

(b) Subcontractor shall maintain all required insurance coverage in force until completion of Work. Subcontractor shall maintain Products and Completed Operations Insurance coverage, including required endorsements, in force until expiration of the applicable statute of limitations relating to latent defects in construction or improvements to real property.

(c) The use of self-insured retentions or deductibles in excess of \$5,000 is not allowed. Subcontractor is fully responsible for payment of any self-insured retentions or deductibles.

 Subcontractor's Initials

(d) The insurance requirements shall not limit Subcontractor's obligations under this Agreement or Subcontractor's indemnification, warranty obligations or other liability in any manner. The requirements merely represent the minimum amounts of insurance coverage required to be maintained by Subcontractor.

(e) Subcontractor shall provide evidence of the renewal of policies required 30 days in advance of the expiration of any such policy.

(f) If Subcontractor fails to secure and maintain the required insurance, Ryland shall have the right (without any obligation to do so, however) to secure same in the name and for the account of the Subcontractor, in which event the Subcontractor shall pay the costs thereof and furnish upon demand all information that may be required in connection therewith.

6. TO THE MAXIMUM EXTENT PERMITTED BY LAW, SUBCONTRACTOR SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND RYLAND, ITS OFFICERS, DIRECTORS, EMPLOYEES, SUPPLIERS AND AGENTS ("RYLAND'S AGENTS") AND THE PROPERTY OF RYLAND, INCLUDING ANY PROJECT COVERED BY THIS AGREEMENT, FROM ANY AND ALL CLAIMS, COSTS, LOSSES, DAMAGES, FINES, PENALTIES, FEES AND OTHER COSTS, INCLUDING, BUT NOT LIMITED TO, ATTORNEYS' FEES AND DISPUTE RELATED COSTS (COLLECTIVELY, "SUCH COSTS"), TO THE EXTENT THAT SUCH COSTS ARISE OUT OF, ARE INCIDENTAL TO OR RESULT FROM (A) THE PERFORMANCE OF THE WORK OR SUBCONTRACTOR'S FAILURE TO ENFORCE THE DRUG AND ALCOHOL ADDENDUM AND ARE ATTRIBUTABLE TO BODILY INJURY, PERSONAL INJURY, SICKNESS, DISEASE OR DEATH OF ANY PERSON, INCLUDING ANY INJURY OR DEATH OF AN EMPLOYEE OR OWNER OF SUBCONTRACTOR, OR INJURY TO, DEFECT IN, DAMAGE TO OR DESTRUCTION OF THE WORK OR OF ANY PROPERTY; OR (B) SUBCONTRACTOR'S OR SUBCONTRACTOR'S AGENTS FAILURE TO COMPLY WITH THE LEGAL REQUIREMENTS AND (A) OR (B) IS CAUSED BY ANY ACT OR OMISSION OF SUBCONTRACTOR OR ANYONE ACTING FOR, ON BEHALF OF OR THROUGH OR REPRESENTING SUBCONTRACTOR OR SUBCONTRACTOR'S AGENT. SUBCONTRACTOR SHALL SO INDEMNIFY, HOLD HARMLESS AND DEFEND RYLAND AND RYLAND'S AGENTS FROM SUCH COSTS AND EVEN THOUGH IT IS ALLEGED OR FOUND THAT ANY NEGLIGENCE ACT OR OMISSION, OR WRONGFUL ACT OF RYLAND OR RYLAND'S AGENTS ALSO CAUSED OR CONTRIBUTED TO SUCH COSTS WITHOUT REGARD TO WHETHER THE EXTENT OF ANY SUCH ALLEGED NEGLIGENCE ACT OR OMISSION, OR WRONGFUL ACT OF RYLAND OR RYLAND'S AGENTS IS GREATER OR LESSER THAN ANY ALLEGED NEGLIGENCE ACT OR OMISSION, OR WRONGFUL ACT OF SUBCONTRACTOR OR SUBCONTRACTOR'S AGENTS. THIS INDEMNIFICATION IS NOT INTENDED TO COVER THE NEGLIGENCE OR WILLFUL MISCONDUCT OF RYLAND OR RYLAND'S AGENTS. SUBCONTRACTOR AGREES THAT A PORTION OF THE PRICE HAS BEEN PAID TO THE SUBCONTRACTOR AS SPECIFIC CONSIDERATION FOR THE INDEMNIFICATIONS REQUIRED OR GIVEN IN ACCORDANCE WITH THIS AGREEMENT AND THAT ALL INDEMNIFICATIONS, WARRANTIES, GUARANTEES AND OBLIGATIONS GIVEN IN ACCORDANCE WITH THIS AGREEMENT OR THE DOCUMENTS SHALL SURVIVE FINAL PAYMENT, COMPLETION AND ACCEPTANCE OF THE WORK AND TERMINATION OR COMPLETION OF THIS AGREEMENT. UNDER NO CIRCUMSTANCES SHALL THE INSURANCE REQUIREMENTS, AND LIMITS SET FORTH IN THIS AGREEMENT BE CONSTRUED TO LIMIT SUBCONTRACTOR'S INDEMNIFICATION OBLIGATIONS OR OTHER LIABILITY HEREUNDER. SUBCONTRACTOR WAIVES ANY RIGHTS OF SUBROGATION AGAINST RYLAND AND SHALL REQUIRE SUBCONTRACTOR'S AGENTS TO WAIVE SUBROGATION RIGHTS AGAINST RYLAND.

7. Subcontractor warrants and represents that it is familiar with and covenants to comply with all laws, regulations and rulings of all federal, state, county and municipal jurisdictions and agencies applicable to this Agreement and to the Work, including, without limitation, OSHA, state occupational safety and health laws, workers' compensation laws, minimum wage and overtime laws, employment discrimination laws, building codes and all regulations and rules promulgated thereunder (collectively, the "Legal Requirements"). Subcontractor shall maintain all records required for compliance with the Legal Requirements and will indemnify and save Ryland harmless from any damage, fine or penalty which may be assessed against Ryland and any attorneys' fees and other costs incurred by Ryland by reason of the breach or alleged breach of this section by Subcontractor or Subcontractor's Agents.

(a) At all times, Subcontractor shall:

- (1) conduct, operate and maintain a safe, clean and healthful workplace;
- (2) provide to its employees the protective clothing, equipment, training and safety devices necessary to ensure compliance with relevant Legal Requirements; and
- (3) abide by the Drug and Alcohol Addendum 4.

(b) To the maximum extent permitted by law, Ryland may withhold from payment to Subcontractor the full amount of any fine, damages or penalty assessed or proposed to be assessed against Ryland by local, state or federal authorities as well as a sum sufficient to cover any attorneys' fees and costs that are incurred by Ryland as a result of Subcontractor's or Subcontractor's Agents failure to comply with applicable Legal Requirements. When any such amounts are actually assessed and paid by Ryland, Ryland will release to Subcontractor any excess withheld.

(c) Either Subcontractor or Ryland may contest responsibility for Subcontractor's or Subcontractor's Agents failure to comply with applicable Legal Requirements. Subcontractor shall reimburse Ryland up to the full amount of any legal costs and expenses that Ryland may incur to contest responsibility which relates to Subcontractor's or Subcontractor's Agents failure or alleged failure to comply with applicable Legal Requirements.

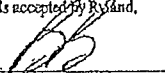
(d) COMPLIANCE WITH APPLICABLE OCCUPATIONAL SAFETY AND HEALTH STANDARDS IS AN EXPRESS CONDITION OF WORK UNDER THIS AGREEMENT.

(e) Addendum 5 applies to all FHA approved Projects.

8. All Work shall be performed by qualified tradespersons. Ryland reserves the right to reject any materials or Work which do not, in Ryland's opinion, comply with the terms of this Agreement. All materials shall be installed in accordance with applicable Legal Requirements and manufacturer's specifications or recommendations.

9. Subcontractor agrees, at its expense, (a) to remedy any defect in the Work due to faulty or unacceptable material or workmanship, (b) to repair or replace any Work not in compliance with the Documents, and (c) to pay any expenses and costs, including legal fees and dispute resolution costs, incurred by Ryland as a result of (i) such defect or (ii) any personal injury or damage to other property caused by Subcontractor or Subcontractor's Agents. Subcontractor shall fully cooperate with Ryland in responding to any warranty claims. All warranties made by Ryland to its homebuyer, whether under the Ryland warranty or applicable law, are, to the extent applicable, deemed made by Subcontractor to Ryland.

10. Subcontractor agrees, at the request of Ryland, to take delivery or assume custody of materials purchased by Ryland from manufacturers. Risk of loss of all material and equipment supplied by, delivered to or under the custody of the Subcontractor shall be upon the Subcontractor until the Work reaches final completion and is accepted by Ryland.


Subcontractor's Initials

11. Subcontractor shall keep the jobsite free of accumulations of trash and debris. At the conclusion of daily work on any housing unit, Subcontractor shall remove all trash and debris caused by its operations and leave the site broom clean.

12. Subcontractor shall abide by all directives which Ryland may publish from time to time.

13. If Subcontractor fails to perform any of its obligations hereunder, Subcontractor shall be in default. If such default is not cured within two (2) days after oral or written notice, then Ryland may pursue any remedy or combination of remedies available at law or equity, including, without limitation: (a) terminating this Agreement; (b) applying any retainage or other amounts due to Subcontractor to cure Subcontractor's defaults or compensate Ryland for damages suffered; (c) taking any action necessary to perform the Work by other means, in which case Subcontractor shall upon demand reimburse Ryland for any amounts expended by Ryland to complete the Work in excess of the Price together with interest from the date paid by Ryland to the date reimbursed by Subcontractor at the rate of eighteen percent (18%) per annum or the maximum amount permitted under applicable law; and (d) pursuing an action for damages and recovery of all costs and expenses, including legal fees, incurred by Ryland in enforcing this Agreement. All remedies shall be cumulative and not exclusive.

14. Ryland may terminate Subcontractor's performance under this Agreement at any time, at the sole option of Ryland and for Ryland's own convenience. In such event, Subcontractor will turn over all equipment and materials ordered, purchased for, or delivered to the Project, and Ryland will pay the Subcontractor any amounts due based on the percentage of completion of the Subcontractor's Work that is in compliance with this Agreement and the Price for Work actually accomplished and equipment and materials supplied to the Project, excluding any payment for unearned profit and overhead. The payments for percentage completion shall be Subcontractor's sole remedy under this Agreement at law or in equity. Subcontractor will facilitate transfer of the Work to Ryland by assigning its rights under subcontracts and purchase orders.

15. Subcontractor shall fully cooperate and coordinate performance of the Work with the work of Ryland and other subcontractors of Ryland. Ryland may suspend or reschedule the Work in its discretion. Subcontractor shall not be entitled to any damages or additional compensation for any delay caused by rescheduling or suspension of the Work other than an equivalent extension of time to perform.

16. Except in the event that either party is sued by someone other than a party hereto or it would be appropriate for complete resolution of the issues for either party to cross-claim against the other party in a legal action not initiated by either of the parties hereto, any dispute arising out of or relating to this Agreement or the breach, tampering or validity thereof shall be settled by binding arbitration conducted by a neutral arbitrator. If the parties do not mutually agree on an arbitrator, the arbitrator shall be selected by the American Arbitration Association at its offices closest to the construction site where the dispute arose. The arbitration shall be conducted according to the American Arbitration Association Construction Arbitration Rules unless other procedures are agreed upon by the parties. The parties agree to (a) allow to join into the arbitration proceeding hereunder or (b) join any other arbitration proceeding being conducted by, persons or entities related to the dispute whose involvement may be necessary to completely resolve the dispute, such as (1) a homeowner, (2) Ryland's home warranty corporation, (3) Ryland's or Subcontractor's insurers, and (4) Subcontractor's materialmen or subcontractors. The arbitration shall determine all rights and obligations under this Agreement and the award of the arbitrator shall be final, binding and enforceable. Subcontractor shall include a comparable arbitration provision in all of its subcontracts related to the Work.

17. (a) This Agreement (including all Documents incorporated herein) constitutes the entire Agreement between the parties, supersedes any prior negotiations, agreements or contracts, written or oral, between the parties and may not be amended without the written agreement of both parties.

(b) Subcontractor shall have no right to assign this Agreement or its right to payments hereunder.

(c) All plans, drawings, specifications and the subject matter contained therein and all other information given to Subcontractor in connection with the Work ("Proprietary Materials") shall remain the property of Ryland and shall not be used by or disclosed to anyone by Subcontractor for any purpose other than performance of the Work. Upon completion of the Work, Subcontractor shall return all Proprietary Materials to Ryland.

(d) If any one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall be construed as if the invalid, illegal or unenforceable portion of the provision had never been contained herein.

(e) This Agreement shall be governed by the laws of the state in which the Work is performed.

IN WITNESS WHEREOF, the parties have executed and sealed this Agreement as of the date set forth above.

THE RYLAND GROUP, INC.

_____(SUBCONTRACTOR)

License # _____

Expiration Date _____

By: _____ (SEAL)

By: _____ (SEAL)

Name: GAVIN GREEN

Name: LAND SITE SERVICES

Title: DEPUTY MGR.

Title: OWNER

Ryland shall retain _____ % retention until _____.

SUBCONTRACTOR AGREEMENT

THE RYLAND GROUP, INC.

ADDENDUM 1

~~RELEASE OF LIENS~~

OWNER: _____
SUBCONTRACTOR: _____
PROPERTY: _____
CONTRACT DATE: _____
FOR WORK AND MATERIALS FURNISHED THROUGH _____, 200__

The undersigned, which provided services, materials or equipment for the above Property in accordance with a contract with the Subcontractor identified above, for good and valuable consideration received by it, hereby waives and releases all claims for, liens and rights of lien now existing to the extent of \$ _____, which represents full payment received by the undersigned (exclusive of contractual retainage) for work, services, materials and/or equipment furnished in connection with the above Property to the date of this release.

This Release of Liens is executed and delivered simultaneously with or after payment has been received for the work, services, materials and/or equipment performed or provided to the date referenced above.

This Release of Liens may be relied upon by purchasers procuring improvements from Owner, by mortgagees making mortgage loans to said purchasers, and title insurance companies insuring titles for said purchasers and shall run to the benefit of any such persons/entities and their successors and assigns.

IN WITNESS WHEREOF, the undersigned has hereunto set his hand and seal [as the duly authorized officer/partner of the undersigned] this _____ day of _____, 200__.

[Corporate or Partnership Name of Subcontractor/supplier]

By: _____
Name: _____
Title: _____

[Individual Subcontractor/supplier]

Corporate/Partnership Acknowledgment

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 200__, before me, personally appeared _____, the _____ of _____, who I am satisfied is the person who signed the within instrument and he/she did acknowledge that he/she signed and delivered this instrument as the [officer] [partner] above stated, and that the foregoing instrument is the act and deed of said [Corporation] [Partnership].

Notary Public

My commission expires: _____

Individual Acknowledgment

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 200__, before me personally appeared _____, who I am satisfied is the person who signed the within instrument and he/she did acknowledge that he/she signed and delivered this instrument on his/her behalf and that the foregoing instrument is his/her voluntary act and deed.

Notary Public

My commission expires: _____

SUBCONTRACTOR AGREEMENT

THE RYLAND GROUP, INC.

ADDENDUM 2

~~FINAL WAIVER AND RELEASE OF LIENS~~

OWNER: _____
SUBCONTRACTOR: _____
PROPERTY: _____
CONTRACT DATED: _____
FOR WORK AND MATERIALS FURNISHED THROUGH _____, 200__

The undersigned for itself, its successors and assigns and its subcontractors and suppliers, which/who has provided materials, work, services and/or equipment in connection with the Project on the Property for the Owner in consideration of the sum of \$ _____ paid [by Owner] which sum represents the final payment due pursuant to the Contract, together with any amendments or change orders related thereto (all of the foregoing being collectively referred to as the "Contract"):

1. Acknowledges that it has been paid in full for all materials, work, services and/or equipment furnished in connection with the performance of the Contract or otherwise in connection with the construction on the Property.
2. Waives and releases any and all construction lien claim(s) and/or Notices(s) of Unpaid Balance and Right to File Lien and the like ("Lien") which Subcontractor has had or currently has, against or upon any portion of the Project or Property for materials, work, services and/or equipment provided.
3. Agrees that if, after the date hereof, there shall be evidence of any lien filed (i) by the undersigned or (ii) any subcontractor or supplier of the undersigned for which, if established, Owner might become liable or which might encumber title to the Property or Project, the undersigned shall promptly discharge same and indemnify, hold harmless and defend Owner against any loss, damages or costs or expenses, including attorneys' fees, associated therewith.
4. The undersigned for itself, its successors and assigns, releases and forever discharges Owner (and its shareholders, directors, officers, employees, and agents) and their successors and assigns, from all claims, demands or causes of action which it has had, currently has, or may in the future have, arising from or in any way relating to the Contract or the Property.
5. Agrees that this Release may be relied upon by purchasers procuring improvements from Owner, by mortgages making mortgage loans to said purchasers, and title insurance companies insuring titles for said purchasers and shall run to the benefit of any such persons/entities and their successors and assigns.

IN WITNESS WHEREOF, the undersigned has set his hand and seal [as the duly authorized officer/partner of the undersigned] on this _____ day of _____, 200__.

[Corporate or Partnership Name of Subcontractor]

By: _____

Name: _____

Title: _____

[Individual Subcontractor]

Corporate/Partnership Acknowledgment

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 200__, before me, personally appeared _____, the _____ of _____, who I am satisfied is the person who signed the within Instrument and he/she did acknowledge that he/she signed and delivered this Instrument as the [officer] [partner] above stated, and that the foregoing Instrument is the act and deed of said [Corporation] [Partnership].

Notary Public

My commission expires: _____

Individual Acknowledgment

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 200__, before me personally appeared _____, who I am satisfied is the person who signed the within instrument and he/she did acknowledge that he/she signed and delivered this Instrument on his/her behalf and that the foregoing Instrument is his/her voluntary act and deed.

Notary Public

My commission expires: _____

SUBCONTRACTOR AGREEMENT

THE RYLAND GROUP, INC.

ADDENDUM 3

SUBCONTRACTOR INSURANCE REQUIREMENTS

CERTIFICATES OF INSURANCE, INCLUDING COPIES OF POLICY ENDORSEMENTS LISTED BELOW, EVIDENCING REQUIRED COVERAGE SHALL BE DELIVERED TO RYLAND PRIOR TO THE COMMENCEMENT OF ANY WORK (SAMPLE CERTIFICATES ATTACHED).

PLEASE DIRECT INSURANCE INQUIRIES TO ____ AT ____.

TYPE OF COVERAGE	AMOUNT OF COVERAGE
A. WORKER'S COMPENSATION - and Occupational Disease <u>Coverage in accordance with the laws of the State within whose jurisdiction the work is performed.</u> - Coverage to include all employees, agents, officers, partners, and proprietors/owners of Subcontractor. - The certificate should specify that the insurance company's A.M. Best Rating is at least A-/VIII. - If the services of a leasing company are used to insure its workers' compensation exposure, the following documents must be delivered to Ryland before any work can be performed on a Ryland job site: A. One certificate documenting workers' compensation insurance for Subcontractor's employees on Ryland's job sites covered through the leasing company. B. A second certificate of insurance evidencing that the Subcontractor has purchased its own separate workers' compensation insurance policy for any employees not covered by the leasing company's insurance. <u>It is imperative that this second policy be insured through the same insurance company as the leasing company and that the second policy has a different policy number from that of the leasing company.</u> C. A declaration sheet (the cover page of the insurance policy) from the Subcontractor's own policy. - The workers' compensation policy should be amended to include a 30-day cancellation notice provision in lieu of the standard 90-day cancellation notice provision. - Workers' compensation carrier shall waive subrogation against The Ryland Group, Inc. and its subsidiaries, affiliated and successor companies, officers, directors, agents, servants, employees, divisions, partners and shareholders.	Workers Compensation - Statutory
EMPLOYER'S LIABILITY	Employers Liability: \$500,000. Ea. Bodily Injury by Accident \$500,000. Bodily Injury by Disease, Ea. Employee
B. COMMERCIAL GENERAL LIABILITY - with the following minimum coverage: - Coverage for all residential building including both attached and unattached projects - Occurrence form not modified - Subsidence/no endorsements limiting coverage - Contractual liability coverage included - The Certificates of Insurance must state that "The Ryland Group, Inc. and its subsidiaries, affiliated and successor companies, officers, directors, agents, servants, employees, divisions, partners and shareholders" are named as Additional Insureds on the	\$1,000,000. General Aggregate Limit (other than Products/Completed Operations) \$1,000,000. Products/Completed Operations Aggregate Limit \$1,000,000. Bodily Injury (Ea. Occurrence) \$1,000,000. Property Damage (Ea. Occurrence) \$1,000,000. Personal Injury & Advertising Injury Limit \$ 50,000. Fire Damage Limit (any one fire)

Subcontractor's Initials

Subcontractors' general liability insurance policy. • The additional insured status must be provided only on a CG 2010 (11/85) Additional Insured Endorsement or on a CG 2026 (11/85) Additional Insured Endorsement, or their equivalent. • A copy of the correct Additional Insured Endorsement, as described above, must be attached to the certificate of insurance. • The Additional Insured status will be provided to Ryland on a blanket basis for all jobs performed for Ryland (not project specific). • The general liability insurance provided must be primary over Ryland's insurance and Ryland's insurance should not be called upon to contribute toward the payment of any claim arising out of the Subcontractor's work. The Certificate of Insurance must clearly state that the Subcontractor's insurance is "primary and non-contributory" over Ryland's insurance. • The Certificate of Insurance should specifically state that the Subcontractor's insurance company's A.M. Best Rating is at least A-/VIII. • The general liability policy should be amended to include a 30-day cancellation notice provision in lieu of the standard 10-day cancellation notice provision. The certificate of insurance should so state. There shall be no endorsements limiting coverage for explosion, collapse, or underground damage, Blanket contractual liability, or Broad Form property damage coverage. There shall be no limitation on the limits available to the additional insureds. Nor shall there be any limitation or exclusions as respects the additional insured coverage for claims involving Bodily Injury of a Subcontractor's employees or of any other third party.	
C. <u>BUSINESS AUTO LIABILITY</u> -- covering any automobile, including hired and non-owned autos • The certificates of insurance must evidence that "The Ryland Group, Inc. and its subsidiaries, affiliated and successor companies and their officers, directors, agents, servants, employees, divisions, partners and shareholders" are named as Additional Insureds on the auto liability insurance policy. • The certificate of insurance must reflect that the auto liability insurance insures any vehicle driven by the Subcontractor and its employees. • The certificate of insurance must specify that the Subcontractor's insurance company's A.M. Best rating is at least A-/VIII. • The Subcontractor's auto liability policy should be amended to include a 30-day cancellation notice provision in lieu of the standard 10-day cancellation notice provision.	\$500,000, Combined Single Limit


Subcontractor's Initials

SUBCONTRACTOR AGREEMENT

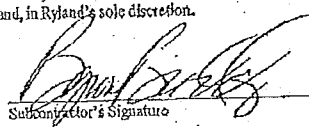
THE RYLAND GROUP, INC.

ADDENDUM 4

DRUG AND ALCOHOL ADDENDUM

FOR THE SAFETY AND WELL BEING OF ALL EMPLOYEES ON RYLAND CONSTRUCTION SITES, RYLAND HAS A POLICY THAT NEITHER CONTROLLED SUBSTANCES NOR ALCOHOL SHALL BE DISTRIBUTED, POSSESSED OR USED ON RYLAND CONSTRUCTION SITES. ANYONE FOUND TO BE IMPAIRED BY OR IN POSSESSION OF CONTROLLED SUBSTANCES OR ALCOHOL MUST IMMEDIATELY LEAVE THE RYLAND CONSTRUCTION SITE OR PROPERTY. To help ensure the safety of all workers, including a worker that may be impaired, Subcontractor agrees to adhere to the following procedures:

- (1) If a Subcontractor suspects that one of Subcontractor's Agents is impaired by controlled substances or alcohol, Subcontractor is required to investigate and make inquiries of co-workers on the job site to confirm the suspected impairment. If Ryland becomes aware that one of Subcontractor's Agents has been impaired on the job, Ryland shall have the right, but not the duty, to request that Subcontractor's foreperson investigate. When such a request is given, orally or in writing, Subcontractor's foreperson shall immediately proceed with such investigation and shall thereafter promptly report the results to the Ryland Supervisor. Ryland may send formal written notification to the Subcontractor regarding any such situation, a copy of which will be placed in the Subcontractor's file.
- (2) Any worker who is impaired or reasonably believed to be impaired must be immediately removed from the job site. The Subcontractor must provide transportation for the impaired worker and not allow the impaired worker to drive him/herself from the job and endanger the public.
- (3) A repeated violation by Subcontractor or any of Subcontractor's Agents of this policy will be cause for immediate termination of this Agreement by Ryland, in Ryland's sole discretion.


Subcontractor's Signature


Date

SUBCONTRACTOR AGREEMENT

THE RYLAND GROUP, INC.

ADDENDUM 5

FOR ALL FHA APPROVED PROJECTS

During the performance of this Agreement, the Subcontractor agrees as follows:

- (1) The Subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Subcontractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin, such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.
- (2) The Subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of the Subcontractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.
- (3) The Subcontractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the Subcontractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (4) The Subcontractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- (5) The Subcontractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor, for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (6) In the event of the Subcontractor's noncompliance with the nondiscrimination clauses of this Agreement or with any of the said rules, regulations, or orders, this Agreement may be canceled, terminated, or suspended, in whole or in part, and the Subcontractor may be declared ineligible for further Government contracts or federally-assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- (7) The Subcontractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor of Subcontractor. The Subcontractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance; *Provided, however*, that in the event a Subcontractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor of Subcontractor as a result of such direction by the administering agency, the Subcontractor may request the United States to enter into such litigation to protect the interests of the United States.

THE RYLAND GROUP, INC.

RULES AND REGULATIONS FOR SUBCONTRACTORS

THIS DOCUMENT IS A PART OF AND INCORPORATED INTO THE SUBCONTRACTOR AGREEMENT
DATED 6/19/00 BY AND BETWEEN THE RYLAND GROUP, INC. AND

LAND SITE SERVICES

The following rules and regulations apply to Subcontractors working on Ryland Homes Projects. The term "SUBCONTRACTOR" includes all of Subcontractor's Agents.

I. General:

- A. Licenses. At the request of Ryland, SUBCONTRACTOR shall submit evidence of city or county business licenses.
- B. No Substitutions. There shall be no substitutions of materials or equipment specifications without written approval of Ryland's purchasing department. This policy shall include "or equal" determination.
- C. Operation of Vehicles. The operation of vehicles in or about the Project Site by SUBCONTRACTOR (including material delivery vehicles operated by material suppliers of SUBCONTRACTOR) shall be as follows: (1) Use only the designated entries to enter the Project Site; (2) Use only established roadways and temporary roadways as authorized by RYLAND; (3) No crossing of curbs or sidewalks without prior approval by RYLAND; and (4) Observe speed limit of 15 miles per hour within the entire Project Site. SUBCONTRACTORS shall immediately reimburse RYLAND for any damage to curbs, sidewalks, landscaping, or concrete surfaces or any other damage to the Project Site caused by SUBCONTRACTOR.
- D. Parking. SUBCONTRACTOR shall provide necessary parking areas for all workers in suitable locations as approved by RYLAND. In the event RYLAND has to tow vehicles owned by SUBCONTRACTOR, or SUBCONTRACTOR'S Agents, to maintain ingress and egress to the Project Site, all such towing charges will be backcharged to SUBCONTRACTOR. There shall be no parking in driveways, garages or carports of the housing units (whether completed or being constructed) or on sidewalks within the Project Site. RYLAND shall have the right to fine or backcharge SUBCONTRACTOR \$100.00 per vehicle per day for violation of parking restrictions.
- E. NO UNAUTHORIZED PERSONS. THE JOB SITE IS AN EXTREMELY DANGEROUS AREA, AND NO CHILDREN OR OTHER UNAUTHORIZED PERSONS ARE ALLOWED ON THE JOB SITE AT ANY TIME.
- F. Toilet Facilities. RYLAND will provide portable toilet facilities within the Project for the use of SUBCONTRACTOR. SUBCONTRACTOR is not permitted to use the toilet facilities or bathrooms of any housing unit (completed or being constructed) within in the Project Site. RYLAND shall have the right to fine or backcharge SUBCONTRACTOR \$100.00 per occurrence for any violation of these restrictions.
- G. Food and Beverages. No food or drink shall be allowed within a completed housing unit. SUBCONTRACTOR shall be responsible for the cleanup of trash generated by any eating and drinking within the Project Site.
- H. Counter-Tops. None of the finished counter-tops to be delivered with each housing unit in the Project Site shall be used for the placement of tools or for use as a work surface. The placing of tools or using of such counter-tops as a work surface by SUBCONTRACTOR shall give RYLAND the right to fine or backcharge SUBCONTRACTOR \$100.00 per occurrence in addition to any costs incurred to repair or replace any damaged counter-top.
- I. Pets. No pets (other than seeing-eye dogs) shall be brought to the Project Site by SUBCONTRACTOR. RYLAND shall have the right to fine or backcharge SUBCONTRACTOR \$100.00 per occurrence for violations of the Pet policy.
- J. Prior Work. SUBCONTRACTORS should inspect all previous Subcontractors' work and report any discrepancies that they notice to RYLAND'S Project Superintendent. DO NOT KNOWINGLY CONSTRUCT OVER FAULTY WORK.
- K. Storage. If SUBCONTRACTORS require storage for material on the job site or an area for prefabrication, SUBCONTRACTOR and RYLAND'S Project Superintendent shall agree to a location for a storage area. SUBCONTRACTORS are solely responsible to provide their own controlled storage, i.e., bins, chain link fence, lighting, etc. SUBCONTRACTORS are responsible for cleaning the area on a regular basis. After the job is complete, SUBCONTRACTORS must clean the storage area and remove all containers and debris from the job site.

B/B
Subcontractor's Initials

RECEIVED

FEB 07 2017

SC Court of Appeals

THE RYLAND GROUP, INC.

RULES AND REGULATIONS FOR SUBCONTRACTORS

THIS DOCUMENT IS A PART OF AND INCORPORATED INTO THE SUBCONTRACTOR AGREEMENT
DATED 6/19/02 BY AND BETWEEN THE RYLAND GROUP, INC. AND
RYLAND SERVICE

II. Scheduling:

- A. SUBCONTRACTORS must maintain a minimum schedule of one (1) unit per day or production rate as agreed upon by SUBCONTRACTOR and RYLAND'S Project Superintendent.
- B. RYLAND'S Project Superintendent will give SUBCONTRACTOR a production schedule. SUBCONTRACTOR will be required to meet the production schedule even if it requires working six (6) days per week.
- C. Commencement of work by SUBCONTRACTOR on any house or garage unit is indicative of SUBCONTRACTOR'S agreement to complete such building or unit of work in its entirety.

III. Warranty:

- A. During the one-year warranty, SUBCONTRACTORS must respond to all customer service requests within 24 hours of receipt of request and must complete service within seven (7) calendar days of receipt of request.
- B. Emergencies shall be corrected immediately. The following conditions are considered as customer service emergencies requiring immediate action and service may be requested during non-working hours:
 1. Total stoppage of the complete plumbing system within a unit.
 2. A water leak which requires the main water service to be shut off to avoid serious damage to the building and/or furnishings.
 3. Complete loss of heat (when evening temperatures fall below 60 degrees). Complete loss of air conditioning in climate zones with temperatures greater than 90 degrees.
 4. Total loss of electrical service.
 5. Water penetration into the unit, threatening severe interior damage.
- C. SUBCONTRACTORS must utilize adequate precautionary measures to protect both the work of other subcontractors, as well as the homeowners' personal belongings. In the event that the SUBCONTRACTOR causes damage to other work in the home or the personal belongings of that homeowner, RYLAND will repair or provide monetary compensation for damaged item(s) to the homeowner at the expense of the SUBCONTRACTOR.
- D. SUBCONTRACTOR will provide neat, clean warranty service personnel for work appointments who will act professionally by appearing at the time of the scheduled appointment with the homeowner, and will treat both the homeowner and the home with respect.
- E. After one (1) attempt to correct a warranty service issue, if the SUBCONTRACTOR fails to perform work satisfactorily, RYLAND has the right to take necessary steps to ensure the quality of warranty work at the expense of the SUBCONTRACTOR.
- F. All areas in which warranty service work is performed shall be free from debris, dirt, stains, drips, droppings, and any other spills which may result from warranty service work. RYLAND will backcharge without notice if RYLAND must clean a residence because of SUBCONTRACTOR'S failure to leave the work area clean.


Subcontractor's Initials

THE RYLAND GROUP, INC.

RULES AND REGULATIONS FOR SUBCONTRACTORS

THIS DOCUMENT IS A PART OF AND INCORPORATED INTO THE SUBCONTRACTOR AGREEMENT
DATED 01/11/02 BY AND BETWEEN THE RYLAND GROUP, INC. AND
LAND SITE SERVICES

IV. *Models only:*

- A. Models will be constructed on an accelerated schedule. Failure of SUBCONTRACTORS to meet this schedule will be grounds for termination of contract of production work. Due to uncertain economic conditions, Phases may be delayed. SUBCONTRACTORS will not hold RYLAND responsible for extra costs which may be incurred as a result of Phases being delayed. Additional work may be required due to model changes or out-of-sequence installations to expedite construction of models.

THE REMAINDER OF THIS PAGE IS BLANK

BB

Subcontractor's Initials

EXHIBIT 3

RYLAND HOMES

SCOPE OF WORK RYLAND HOMES - CAROLINAS DIVISION General Conditions To Job Specification

I. SPECIFIC REQUIREMENTS

A. OVERVIEW

Ryland's Responsibilities

1. To provide regular supervision and directions from the Ryland Home-Building Supervisor.
2. To supply the most timely and accurate scheduling information.
3. To provide all Pertinent Documents/Plans/Drawings/Details/Selection Sheets/Change Orders/Community Specifications/Site Plans/As-Builts/etc. as required by each subcontractor to perform and complete his/her job duties.

Subcontractor's Responsibilities

1. It is the responsibility of the Subcontractor to maintain current copies of all licenses and certificates of competency. If necessary copies of these documents are to be provided to Ryland Homes before commencement of the work.
2. It is the responsibility of the Subcontractor to have all required insurances and to provide certificates of insurance to Ryland Homes before commencement of the work. Ryland Homes shall be named as Additional Insured. Minimum notice of cancellation to be thirty (30) days.
3. To conform completely to all labor and material specifications per the plans, Ryland Homes specifications, PMA and VA Minimum Property Standards, and all laws and rules of the Federal, State, County, and City authorities having jurisdiction over all projects. In the event of any discrepancy between the laws, rules and codes governing this section and the specifications of this section, the Subcontractor shall use the greater of the requirements.
4. It is the responsibility of the Subcontractor to verify that the correct material, color, options, elevations and garage brands are being used.
5. Each Subcontractor and Supplier should be aware that the schedule is part of his/her contract. Time is of the essence. Subcontractors are to coordinate scheduling of all County or Municipality inspections relative to their own work with Ryland Homes or Municipality. Where applicable, all re-inspection fees or fees incurred due to inadequate pass/fail ratios will be paid by the Subcontractor. Inspections must be called in within 24 hrs of scheduled completion of contracted work. Each Subcontractor is expected to have the necessary personnel available to meet the schedule and to make up weather delay(s).

bb

6. The Subcontractor must be prepared to provide the Supervisor with a timeline for job completion.
7. The Subcontractor and Supplier are to perform or deliver per Ryland Homes' schedule at minimum five (5) days per week. Without prior approval, no work should be performed in the community after 6:00 p.m.
8. The Subcontractor is to coordinate his/her work with all other Subcontractors to allow the completion of all work. If this coordination hinders both parties from meeting the schedule, then a Ryland Supervisor must be notified as soon as possible.
9. Each Subcontractor shall have a qualified job supervisor on the job with responsibility toward his/her trade. Each Subcontractor is to furnish a representative for Subcontractor Meetings as scheduled by Ryland Homes.
10. It is the responsibility of the Subcontractor to inspect the project prior to beginning his/her work. If any problems or differences from the plans exist he/she should notify Ryland Homes so that these items are corrected. Subcontractor will be responsible for any known deficiencies, which are covered over.
11. The Subcontractor must notify the Ryland Supervisor of any missing material. Notification must be made as soon as possible so that materials may be ordered expeditiously.
12. It is each Subcontractor's obligation to check each job to see that the necessary materials to perform his/her work are on the job site. Subcontractor is responsible to carry an adequate supply of material to eliminate any delay in completion and scheduling. The subcontractor is required to immediately inform the Supervisor, prior to commencement of his/her work, of any delay that may result from lack of material, manpower, etc.
13. It is the responsibility of each Subcontractor to properly inspect their own work for quality and completion. All construction punch list items shall be completed within 48 hours of receiving notification.
14. The Subcontractor must notify the Ryland Supervisor of any defects or other conditions that would obstruct him/her from completing his/her work.
15. The Subcontractor must notify the Ryland Supervisor of any material substitutions and approval may be granted only if the quality is of equal or greater in grade level.
16. The Subcontractor must receive written approval from a Ryland Supervisor in the form of a purchase order before beginning any extra work.
17. The Subcontractor must be equipped, during normal business hours, to answer and respond to all phone calls within a two (2) hour period. This can be done through office personnel or by radio or mobile telephone.
18. Once the doors or windows have been installed, it is the responsibility of each Subcontractor to close them during inclement weather in an effort to minimize damage to the home.
19. It is the obligation of each Subcontractor to lock the home after 5:00 p.m. each day. This will include all exterior doors, garage doors, patio doors and windows.
20. Subcontractors must clean up all Subcontractor related debris prior to leaving the home each day. Each Subcontractor is to broom sweep his or her work area upon completion of their individual job. All debris must be placed in the nearest trash bin or designated area, NOT in the garage. Daily cleaning includes:
 - a. Removing any incidental trash resulting from his/her work on-site and placing in a designated area.

- D. Removing and cleaning any excess dirt or mud left on streets adjacent to the site as a result of his/her work. The Subcontractor will be liable to any future charges incurred to complete this work.
21. The Subcontractor shall take every precaution and provide suitable means to protect finished work from damage. Protection of countertops, bathtubs, sinks, toilets, floors, walls, etc. is the responsibility of all Subcontractors.
 22. Subcontractor/Supplier must furnish appropriate manuals, written warranties and manufacturer supplied tools for all equipment.
 23. Supplier is to furnish samples to sales offices, as required.
 24. It is the responsibility of the owner or representative of all Subcontractors and Suppliers to make sure that anyone working on a Ryland Homes job site is aware of these specifications and quality requirements. Copies of these specifications and quality requirements should be distributed to and reviewed with all job supervisors. It is the responsibility of the Subcontractor to train their personnel on these job specifications.
 25. Any violation or non-conformance to the above regulations may result in additional cost and/or termination of Subcontractor or Supplier.
 26. First violation by any Subcontractors employee may result in a written or verbal warning, second violation can result in a minimum \$50 fine, third violation can result in a minimum \$100 fine and fourth violation can result in termination from the project.
 27. Any Subcontractor of a Subcontractor must adhere to all guidelines referred to within this scope.
 28. It is the responsibility of the Subcontractor to own a computer with access to email and the Internet. The subcontractor is also responsible for registering for and applying the Ryland Build Pro online system within its day-to-day operations. Any and all Build Pro questions should be directed to the Purchasing Manager.

B. JOB SITE CONDITIONS

No Drinking/Use of Drugs/Eating/Gambling/Pets

1. Ryland Homes' policy of no drinking of alcoholic beverages will be strictly enforced. Drinking on the job and/or the disposal of alcoholic beverage containers will not be tolerated and are subject to termination.
2. Ryland Homes' policy of no taking or possession of drugs will be strictly enforced. Taking or possessing drugs on the job will not be tolerated and is subject to termination.
3. Under no circumstances shall food be eaten or smoking be permitted in any home after drywall.
4. Gambling on the jobsite will not be tolerated and any offender is subject to termination.
5. No pets (other than seeing-eye dogs) will be allowed on the project site.

No Parking

1. There is no parking on finish grade lots, wet rough graded lots, driveways or sidewalks. Access to homes will be designated by a Ryland Homes representative. Violators can be subject to a fine. Vehicles are to be parked on one side of the street, leaving access to each construction site for deliveries. Whenever possible, do not park in front of occupied units or mailboxes.

BB

2. Parking on driveways is subject to a minimum \$200 fine. If approved by the supervisor, vehicles may be allowed on driveways for a short period of time for the sole purpose of loading and unloading tools, equipment, etc. Vehicles that leak fluids are never allowed on concrete and are responsible for major damages caused to the street.

Utilities/Storage

1. No one shall use any utilities except ones specifically provided or specified to them by Ryland Homes. Current homeowners' utilities should never be used without prior approval.
2. If properly informed by the Supervisor, the Subcontractor will be required to supply their own power/electricity when certain job conditions demand.
3. No main water supply is to be turned on by any unauthorized Subcontractor. If authorization to turn on the main water supply is granted by a Ryland Homes representative, the main water supply must be turned off prior to leaving the job site. Failure to do so will make the Subcontractor liable for any subsequent water damage.
4. No main panel box or temporary pole service cover is to be removed or tampered with by an unauthorized Subcontractor under any circumstances. The main power breaker can only be turned on by the electrical Subcontractor or a Ryland Homes representative. All work is to be done on a circuit protected by a ground fault circuit interrupter.
5. Prior to excavation or digging, the Subcontractor is to verify that there is no conflict with location of underground utilities, telephone, cable, electric, sewer, water, gas, landscape, etc. Subcontractor is responsible for having all existing underground utilities located prior to excavation or digging. Subcontractor is responsible for any damages and repairs incurred while digging or excavating.
6. All Subcontractors and Suppliers shall use the site portable toilets exclusively.
7. If Subcontractors require storage for material on the job site or an area for prefabrication, the Subcontractor and the Supervisor shall agree to a location for a temporary storage area. Subcontractors are solely responsible to provide their own controlled storage, i.e., bins, chain link fence, lighting, etc. with approval from the Supervisor. The Subcontractors will be responsible for cleaning the area on a regular basis. When informed by the Supervisor to vacate, the Subcontractors must clean the storage area and remove all containers and debris from the job site.

General

1. No one shall use abusive or foul language, play loud music, or bring children or pets on any job site. Courtesy should be shown to all customers and potential customers.
2. Under no circumstances shall a Subcontractor take direction or make any changes on behalf of a Homebuyer or Salesperson. Only those documents issued by Ryland Homes, Plans, Selection or Change Orders shall be followed. Any communication with a customer is discouraged and all communication should flow through the Supervisor.
3. All deliveries will be placed in a designated area and checked in by a Ryland Homes representative. Suppliers are responsible to unload their own materials. Shipments are to be checked in and signed for by a Ryland Homes representative. If the Supervisor is out of the subdivision at the time of delivery, the ticket should be left in the construction office mailbox and the shipment should be checked within 24 hours.
4. Curb, walks, drives and streets must be inspected prior to work. Any damage must be reported to Ryland Homes. Damage found later will be charged to the Subcontractor responsible for the damage.
5. Anyone found placing tools or materials on counter tops, vanity tops or finished floors, or removing protective floor or bathtub coverings at any time during construction can be subject to a fine and will be responsible for all damages.

6. The job site must be kept neat and clean at all times. Any scraps, paper, etc., must be picked up daily. Trash from lunch is not to be left on the job site.
7. The interior and exterior of all homes are to be broom clean at all times to allow each trade to do his work efficiently and safely and to make the job site appear more professional to our customers. All Subcontractors are required to leave proper access to the lot and not to leave any open holes, dirt piles, material piles or any other type of condition preventing safe accessibility. Crawl spaces must be free of all loose debris and trash upon completion of your work.
8. Trash dumpsters or designated areas will be provided and all trash or debris must be placed in these dumpsters or areas. All debris must be compacted and boxes broken down before disposal. All Subcontractors and suppliers must adhere to all environmental regulations regarding hazardous waste. The Subcontractor shall be responsible to properly store and dispose of all hazardous wastes and all spills resulting from his/her work immediately.
9. After carpet is laid in a home, all shoes must be removed at the door before entering. If the removal of protective footwear is a conflict with safety standards, Subcontractor will need to wear "shoe booties". Shoes may not be required on vinyl, tile and hardwoods that are covered with protective paper or cardboard unless designated by the Supervisor.

C. QUALITY OF WORK

1. All materials delivered to the job shall be new and in original condition and shall bear the name of the manufacturer and any required grade stamps.
2. It is the obligation of each Subcontractor to protect and respect the material or work of all other Subcontractors preceding him/her.
3. Subcontractor is responsible for the finished quality of his work. If Subcontractor proceeds to install his work over substandard work by others, it then becomes the responsibility of the Subcontractor to correct the substandard work, as well as his/her own, upon Ryland Homes' request.
4. Subcontractor will assume full responsibility for all materials, if applicable, until they are installed and accepted. If a scheduling error has occurred on the part of the Supervisor which delays timely installation, Ryland Homes will not hold the Subcontractor fully responsible for stolen or damaged material. Do not install damaged materials.

D. SAFETY

1. Hard hats must be worn at all times, off the curb, by all workers, managers and delivery personnel. Subcontractor is to provide his/her workers with all OSHA rules and regulations and is responsible for enforcement. Obey Ryland Safety Rules, regardless of lesser rules by OSHA.
2. No children under the age of 18 years old or other unauthorized persons are allowed on the job site at any time.
3. The Subcontractor is responsible for the assurance that their employees are fully trained in safety practices and have a full understanding of hazards involved in their job and surroundings. There should be procedures in place to control or eliminate these hazards.
4. All Subcontractors and their employees should understand the following:
 - (a) Unsafe conditions, accidents, injuries and illness, no matter how minor, must be reported to a Ryland Homes Supervisor at once and an accident report filled out.

- (b) Subcontractor and each employee shall provide for frequent and regular inspections of the job site, their materials and equipment. A Safety Manager will be designated by Ryland Homes for inspecting and assuring safe work sites for Subcontractors and Suppliers.
 - (c) No person is expected to undertake a job until they have received instructions on how to properly do it.
 - (d) No person should undertake a job that appears to be unsafe.
 - (e) Mechanical safeguards are to be in place and must be kept in place.
5. Subcontractor shall be responsible for maintaining and supervising all safety precautions and programs in connection with their work. Subcontractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, loss or injury to:
- (a) All employees on the job site and all other persons who may be affected thereby.
 - (b) All the work, materials, and equipment to be incorporated therein, whether in storage on or off the site, under the care, custody or control of the Subcontractors.
6. The Subcontractor is required to operate all electrical equipment on a ground fault interrupted circuit (GFI).
7. Electric Heaters are NOT ALLOWED. (Propane Heaters may be supplied by the job site Supervisor.) Propane Tanks are NOT ALLOWED inside the home. The heaters are not allowed to sit on top of a wood deck floor unless 2 layers of drywall (approximately 2'x2' larger in width than the heater itself) separate the heater and the sub-floor.
8. The speed limit in all construction areas is 15 miles per hour or as posted, whichever is lower. Driving on non-established roadways or non-established temporary roadways is prohibited.
9. The Subcontractor is to insure that back up alarms are installed and functioning on all cranes, forklifts, back hoes, bulldozers, rollers and other heavy equipment used on the job site. No equipment with tracks is allowed on streets or curbs, they must be off-loaded directly onto the site.
10. Subcontractor is to comply with all Hazardous Communication Material requirements as set forth by OSHA.
11. Subcontractor will provide Ryland Homes and their own work crews with all necessary Material Safety Data Sheets prior to any hazardous material arriving on the job site.
12. Subcontractor will insure that all containers of hazardous materials are labeled with the appropriate hazard and warning precautions. The Manufacturer's label can be used as the main source of hazard information. If the primary label is removed, becomes illegible or if hazardous material is transferred from a labeled container to an unlabeled container for storage (not immediate use), the container must then be labeled with a copy of the chemical MSDS or NFPA generic label. Subcontractors must inform Ryland Homes in writing of the type of alternative labeling they are using.
13. No flammable materials are to be stored on any job site.
14. No alcohol or non-prescription drugs are allowed on any Ryland Homes job site. Anyone found in violation of this is subject to immediate termination.

E. STANDARDS/WARRANTY

1. The Subcontractor shall guarantee all workmanship free of any defects for 13 months commencing with the Buyer Settlement date. Additional or longer warranty periods will apply if detailed by scope of specific trade of which the Subcontractor is working. Should field inspection warrant the acceptance of inferior workmanship, the subcontractor shall assume liability for any future charges incurred in the correction of this work.
2. Per law, "Latent Defects" have a seven (7) and thirteen (13) year statute of limitations, in the states of North Carolina and South Carolina respectively, and will be warranted for that time frame. Latent Defect is defined as "A construction flaw, related to either a product or workmanship, that can not be seen or is not evident until some manifestation brings notice to the flaw".
3. Each Subcontractor is to supply a professional representative who is a qualified knowledgeable tradesman and professionally dressed, for all contacts with Ryland Homes' customers. This person must be instructed not to discuss other Subcontractors workmanship, or the materials and products chosen by Ryland Homes.
4. All pre-settlement and buyer orientation repairs shall be completed within two (2) working days of receiving notification of the repairs. Time is of the essence. Subcontractor will be financially responsible for any costs incurred due to the delay.
5. All non-emergency customer service work is to be completed within 5 working days after notification from the Ryland Homes Warranty Department or the homeowner. Phone calls must be returned, with appointments scheduled, within 48 hours of a request. Subcontractor will be financially responsible for any costs incurred, such as loss of wages to the homeowner, due to the delay.
6. All service work completed must have two signatures that the work was completed, the person who did the work and the customer, and must be returned to the Warranty Department or Construction Office.
7. Subcontractor's failure to complete warranty work and Ryland Homes' prior notification of non-compliance will result in the selection of others to complete the Subcontractor's work. Should Ryland Homes thereby incur any additional costs, such costs will be passed on to the Subcontractor.
8. All Subcontractors must respond within three (3) hours and complete all Emergency warranty work within twenty-four (24) hours of notification.
9. Suppliers are responsible to furnish material for touch-up work on all materials furnished to Ryland Homes. Replacement parts must be kept in stock for delivery within two (2) days of placing the order.

F. PAYMENT

1. Because Ryland Homes wishes to pay in a timely fashion, all invoices must be submitted within ninety (90) days of the completion of the work or delivery of materials, otherwise payments are forfeited. Rejected invoices due to Subcontractor errors must be resolved within 90 days from the date that the Subcontractor was notified of the error.
2. Ryland Homes reserves the right to hold payment until 100% work completion and applicable county or city inspections are passed.
3. Payment shall be based upon the contract price at the time the home is sold. Upon notification of a price change by the Subcontractor, Ryland Homes may furnish in writing a list of units to be completed at the original contract price. Price changes require at least a 120 day written notification to the Purchasing Manager.
4. Ryland Homes reserves the right to issue joint checks to a subcontractor and his supplier.

BB

Sep. 20. 06 05:18p
Sep. 18. 2006

JOHN (1K)

110.9850 P. 112
P. 12

5. Subcontractor is responsible to follow all invoicing, verification, and payment procedures.
6. Ryland Homes reserves the right to hold appropriate monies from a subcontractor's payment based on untimely response(s) to warranty work by the Subcontractor. Related monies may be held until such outstanding or overdue Warranty requests have been honored and satisfied.
7. For any work to be performed, or materials supplied beyond the scope of the contract, there must be a purchase order signed with a fixed dollar amount by a Ryland Homes representative.
8. Ryland Homes reserves the right to debit (back charge) a subcontractor for untimely, incomplete or inferior work. No debits will be issued without prior notification to the Subcontractor. Subcontractors will given proper time to correct &/or respond prior to a back charge. Time is of the essence with regards to response time. Back charges are not encouraged and if necessary are to be for costs only.
9. Subcontractors are expected to coordinate and respect all other Subcontractors' work and work together to eliminate any costs due to deficiencies.
10. All items of deficiency or improperly installed items noted on any superintendent or manager punch list, items appearing on any quality assurance or buyer walk-through list, will be the responsibility of each Subcontractor or Supplier to repair or replace at no cost to Ryland Homes.
11. Subcontractors' bids are to include transportation and trip charges.
12. Fines can be incurred for not adhering to any rules and regulations stated within this general scope or detailed by scope, of specific trade of which the Subcontractor is working at the discretion of a Ryland Homes Representative.

G. INSURANCE REQUIREMENTS - SEE ATTACHED ADDENDUM

Subcontractor

Date

9/20/06

Ryland Homesbuilding/Purchasing Manager

Date

10/23/06

BB

RYLAND HOMES

SCOPE OF WORK RYLAND HOMES - CAROLINAS DIVISION CLEARING, GRADING, BACKFILL & EXCAVATION COST CODES: 4304, 4319, 4322, 4340 & 4547

The Subcontractor or Supplier, (hereinafter referred to as the Subcontractor), will adhere to all City, County, State and Federal building regulations, codes and licensing in all areas where work is to be performed.

This document defines both Ryland Homes' and the Subcontractors' responsibilities in this phase of construction. It is intended as a checklist that will define the work to be done, the level of quality and any timing that is required when performing said work. The Excavation, Backfill and Grading Subcontractor's work will not be considered complete until all specifications are fully met.

I. Specific Requirements

A. Overview

The Excavation, Backfill and Grading Subcontractor must supply all labor, materials, supervision, tools and equipment to excavate, backfill and grade lots as required by plans and the Customer Selection Sheet. This construction must be done in conformance with all specifications.

B. Excavation

1. The Subcontractor must excavate each lot per architectural drawing, site plan and lot, block and grading plan or per Supervisor's direction.
2. Trees to be saved will be flagged by the Ryland Supervisor prior to clearing. The Subcontractor is responsible for reviewing tree save areas with the Ryland Supervisor prior to commencement of work. Subcontractor is to clear and grub all areas as identified by the Ryland Supervisor including but not limited to the house pad, side yard and 20 feet behind the house pad.
3. In the event that any trees are damaged it is the Subcontractor's responsibility to notify the Supervisor and to patch and/or paint all scarred areas on the trees or remove if necessary.
4. Remaining trees to be trimmed and cleaned as directed by Supervisor.
5. The Subcontractor must not place dirt within the drip line of trees to be saved. (Prior approval must be obtained from the Superintendent)
6. The Subcontractor must clear the "right of way" for flag lots.

AB

Sep 20 06 05:18p
Sep 18, 2006

2:02PM (R)

No. 8838 P. 10

P. 10

7. All clearing and grubbing debris, including all stumps, shall be removed from the site by Subcontractor and disposed of in a government-approved landfill.
8. On fill lots, fill locations will be marked prior to excavation. Fill lots will be coordinated with an engineer for proper "lifts" and compaction.
9. Excavation around each house must be between 30" and 36", with 36" being the maximum, must be to allow for foundation wall placement. Any loose dirt must be cut back to prevent any hazard to the foundation.
10. Excavated area must be within 2" of level or proposed grade.
11. Lots where a crawl space foundation is to be built are required to be benched to drain to allow water to properly flow under the house and exit through the crawl drain location.
12. The Subcontractor is responsible for the diversion of water away from the excavated area until the house is complete, when permissible by lot conditions.
13. The Subcontractor will haul all debris away from excavation site the same day.
14. For dirt removal or purchase, Subcontractor must furnish time tickets signed by the Supervisor with all invoices, except when a bid job.
15. The Subcontractor will provide a clear, level area (10' x 60'), near the house site, for rough lumber delivery.
16. The Subcontractor will provide access for concrete trucks.
17. The Subcontractor will provide dirt for backfill of slab when necessary.
18. Temporary drives are to be cut out approximately 8" below the curb. One load of 57 or ABC stone is to be spread consistently from the curb to the garage, approximately 8' in width. (Cut 8", fill with 4" of stone and pour drive on top of stone.)

C. Backfill

1. The Subcontractor will properly backfill each lot, with consideration given to the type and condition of the material to be used in the backfill. The Subcontractor is responsible to ensure that no damage to the foundation occurs.
2. The Subcontractor will backfill all garages and establish grade along all walls.
3. No fill may be placed against trees that are flagged to be saved.
(Prior approval must be obtained from the Superintendent)
4. Subcontractor will notify Ryland Supervisor of any damage to the foundation prior to backfill.
5. When placing controlled fill, compacted fill material must be well-graded soil (or other suitable material) that has been tested and accepted by soil engineers.
6. All fill material is to be properly compacted in lifts not to exceed 12".
7. The Subcontractor will grade the entire area within the lot in accordance to the site plan.

Revised: 9/13/2006

Is Purchasing Department Scopes - Revised '06 GRADING '06.DOC

Page 2 of 3

BB

Sep 20 06 05:18p
Sep. 18. 2006 2:02PM (IR

No. 8838 P. 11 P. 11

8. The swales and berms will be established at time of backfill.
9. The grade must conform to the approved site plan, provide drainage away from the house, and leave no standing water on property.
10. The Subcontractor must conform with the Ryland Homebuilding Supervisor that all excavations, backfill and grading conforms to the site plan.
11. The Subcontractor will stay out of undisturbed areas unless given permission by the Supervisor.

D. Rough Grading

1. Subcontractor will establish swales and grades for finish grade.
2. Subcontractor will cut drive, patio, deck and porch.
3. Subcontractor will establish the grade a minimum of 6" below the siding.
4. Subcontractor is responsible for not piling dirt around trees.

E. Finish Grade

1. Swales should conform to Ryland standards.
2. Subcontractor will establish proper grades and swales within +/- 2" so landscaper can complete his/her job. Final grades must ensure proper drainage.
3. Subcontractor shall ensure that the lot is graded so that water is first directed away from the house with a 10% grade (6" in 10') and then directed off of the lot with a minimum grade of 2% unless directed otherwise by a Ryland Supervisor.

As a representative of

Land Site Services, Inc.
(Contractor Name)

I have read and fully understand the content of the job scopes and I agree to comply with all of the aforementioned terms. Furthermore, I understand that all of my personnel performing work on Ryland job sites will be given a copy of this job scope and are expected to read, understand and comply with the written responsibilities. Also, they are expected to have the job scope in their possession when on a Ryland job site.

Subcontractor

9/20/06
Date

Ryland Homebuilding/Purchasing Manager

10/23/06
Date

EXHIBIT 4

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

) IN THE COURT OF COMMON PLEAS

) THE NINTH JUDICIAL CIRCUIT

Christopher Duvall and Natalie
Duvall,

Plaintiffs,

v.

The Ryland Group, Inc.,

Defendant.

Civil Action No.: 2015-CP-08-01213

AFFIDAVIT OF MIKE DYER

The Ryland Group, Inc.,

Third Party Plaintiff,

v.

Land Site Services, Inc., Carolina
Consulting Engineers, Inc., Higdon
Concrete, LLC, A.C. Construction,
Inc., and Stark Truss Company, Inc.
a/k/a Stark Truss Company of
Summerville, Ltd., a/k/a Stark Truss,
Inc. d/b/a Carolina Truss Systems,
Inc.,

Third Party Defendants.

PERSONALLY APPEARED BEFORE ME, the undersigned, Mike Dyer, who after being duly sworn, deposes and says:

1. I am Mike Dyer, Risk Manager for Stark Truss Co., Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, incorrectly referred to as Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc.
2. Upon information and belief, Stark Truss Company, Inc. purchased the assets only of Carolina Truss Systems, Inc. effective July 31, 2002. The business and plant was located in Summerville, South Carolina. Stark initially operated the business under the name of Stark Truss Company of Summerville, LTD dba Carolina Truss Systems.

Upon information and belief, Stark changed the name to Carolina Total Supply around perhaps 2006 and it operated under that name for approximately one (1) year. Then the name was changed to Stark Truss Company, Inc. permanently. Regardless of the name, the business and plant were located in Summerville, South Carolina.

3. Throughout this affidavit for ease of reference all of the Stark entities that it has ever owned or names it has worked under are referred to as Carolina Truss Systems or as "we." The use of the name Carolina Truss and "we" throughout specifically encompasses all of the entities connected to Stark Truss Company, Inc. as named in the lawsuit for ease of reference only and shall not be construed to mean that the Defendant is properly named in the lawsuit.
4. We have searched the records for Carolina Truss Systems which includes all of Stark's records.
5. We located an electronic record for Order # 0602179-T.
6. The "T" stands for Truss.
7. The Job name was Lot 74 The Reserve with a delivery address of 1502 Marsh Reed Court, Goose Creek, SC in Berkeley County.
8. The order was for roof trusses only.
9. The roof trusses would have been built in the Summerville, South Carolina Plant.
10. The roof trusses at issue would have been manufactured within the State of South Carolina.
11. The alleged contract attached as Exhibit G to Ryland's Memorandum is with Carolina Truss with an address of PO Box 1049, Summerville, SC with a phone number of 843-875-0550.
12. The alleged contract is signed by Michael Redman, a then employee of Carolina Truss, who was located within South Carolina and never worked at any other location and had no responsibilities at any other location other than in the State of South Carolina.
13. The trusses were quoted, ordered, sold, designed, manufactured, and delivered in the State of South Carolina.
14. The only involvement of the company outside the State of South Carolina was the accounting performed by the corporate headquarters in Ohio. This accounting process in no way had any involvement in the transaction which included the customer relations, communication, fulfillment and manufacturing related to the job which all occurred in the State of South Carolina.
15. All of Ryland's communications with the sales, design and manufacturing for the products in question would have been conducted entirely within the State of South Carolina.
16. Although Ryland may have sent a check to Canton, Ohio, all of the manufacturing, delivery, and supply of any materials were solely within the State of South Carolina.
17. Exhibit H to Ryland's Memorandum clearly lists the address for Carolina Truss Systems in Summerville, South Carolina with delivery in South Carolina from South Carolina with a sold to as Ryland Homes in South Carolina.

18. In summary, this order was made in South Carolina and fulfilled in South Carolina.

FURTHER AFFIANT SAYETH NOT.

Mike Dyer - Risk Mgr.
Mike Dyer

SWORN TO and subscribed before me
this 20th day of June, 2016

Steph Benson
Notary Public for Ohio
My Commission Expires: 09-16-2018



Stephanie Benson
Notary Public, State of Ohio
My Commission Expires 09-16-2018

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
THE NINTH JUDICIAL CIRCUIT

Christopher Duvall and Natalie Duvall

Civil Action No.: 2015-CP-08-01213

Plaintiff,

v.

The Ryland Group, Inc.

Defendant.

The Ryland Group, Inc.

STARK TRUSS COMPANY, INC. A/K/A
STARK TRUSS COMPANY OF
SUMMERVILLE, LTD., A/K/A STARK
TRUSS, INC. D/B/A CAROLINA TRUSS
SYSTEMS, INC. AND LAND SITE
SERVICES' RESPONSE TO THE RYLAND
GROUP'S MOTION TO ALTER OR
AMEND THE COURT'S ORDER DENYING
RYLAND'S MOTION TO COMPEL
ARBITRATION

Third Party Plaintiff,

v.

Land Site Services, Inc., Carolina
Consulting Engineers, Inc., Higdon
Concrete, LLC, A.C. Construction,
Inc., and Stark Truss Company, Inc.
a/k/a Stark Truss Company of
Summerville, Ltd., a/k/a Stark Truss,
Inc. d/b/a Carolina Truss Systems, Inc.

Third Party Defendants.

Following a hearing, the Court denied Ryland's Motion to Compel Arbitration. Ryland Group, Inc. ("Ryland") filed a Motion to Reconsider, Amend and/or Alter Order Denying its

REM

2016 JUL 13 AM 11:22
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.
ROC

Motion to Compel Arbitration dated July 8, 2016. Third Party Defendants Land Site Services, Inc. ("Land Site") and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd., a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. ("Stark") are hereby responding to Ryland's Motion to Alter or Amend the Court's denial of Ryland's Motion to Compel Arbitration.

Ryland argues that the Court failed to properly apply the Federal Arbitration Act and erred in failing to compel arbitration. Land Site and Stark respectfully disagree with Ryland and believe the Court's ruling denying Ryland's Motion to Compel Arbitration was proper.

I. THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO RYLAND'S ALLEGED SUBCONTRACTOR AGREEMENTS WITH LAND SITE AND STARK.

As discussed below, the alleged agreements with Land Site and Stark clearly do not meet the requirements of the South Carolina Uniform Arbitration Act (the "UAA"), and therefore the only way Ryland can compel arbitration is if the matter is subject to the FAA. First, Ryland failed to prove any applicable contracts with Land Site and Stark which contained an arbitration provision. Land Site and Stark incorporate the arguments they made in their Memorandum of Law in Opposition to Ryland's Motion to Compel Arbitration. Second, the plain and unambiguous language of the arbitration clauses in the alleged Subcontractor Agreements explicitly excludes Ryland's claims against Land Site and Stark from arbitration under the facts of this case. The alleged arbitration clause contains an exclusion from arbitration, if either party has been sued by someone other than a party to the Subcontract Agreement. That exclusion precludes arbitration in this case. The homeowners filed this suit against Ryland. They did not sue Land Site or Stark. The homeowners are not parties to Ryland's alleged Subcontractor Agreements with Land Site and Stark. Because Ryland has been sued by someone other than a

party to the alleged Subcontractor Agreements, the arbitration clause does not apply. Therefore, the arbitration clause in the alleged Subcontractor Agreements plainly, clearly, and unambiguously excludes Ryland's claims from arbitration against Land Site and Stark. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (General contract principles apply in evaluating the enforceability of an arbitration clause); *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App.2004)) (If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect).

Even if the alleged Subcontractor Agreements did not preclude arbitration based on their own unambiguous language, the FAA does not apply.

In order for the FAA to apply and govern, the alleged Subcontractor Agreement must evidence foreign or interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 454, 730 S.E.2d 312, 315-16 (2012).

This case involves the clearing and preparation of land and the supplying of roof trusses for a single-family home in 2006, all of which occurred in South Carolina. The alleged agreements did not state that the arbitration was to be pursuant to the FAA and did not even mention the FAA at all.

As discussed in Land Site and Stark's Memorandum of Law in Opposition to Ryland's Motion to Compel Arbitration none of the alleged "facts" are sufficient to implicate interstate

commerce in the construction of this single family residence, and are therefore insufficient to establish that the FAA would apply. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 456, 730 S.E.2d at 317 (“adher[ing] to the view that the development of real estate is an inherently intrastate transaction”); *id.* at 458, 730 S.E.2d at 317–18 (noting the FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce).

The alleged Subcontractor Agreements at issue in this case do not evidence interstate commerce. The alleged contracts contain no mention of any out-of-state equipment, materials, manufacturers, or products. Therefore, the FAA does not apply.

Land Site and Stark hereby incorporate their arguments made in their Memorandum of Law in Opposition to Ryland’s Motion to Compel Arbitration.

In addition, for the contract at issue between Ryland and the Plaintiffs, the FAA still would not apply because that suit centers on the purchase of the house which is exactly analogous to *Bradley v. Brentwood Homes, Inc.*, *supra*. The Plaintiff’s claims against Ryland are exactly on point with *Bradley*. The Plaintiffs have sued Ryland in regard to claims arising from the warranty that springs from the sale of the residence and therefore the FAA would not apply to those claims or any alleged subcontractor agreements. *Bradley v. Brentwood Homes, Inc.*, *supra* (a builder-vendor’s contract solely for the sale of a single-family house does not involve interstate commerce even if out-of-state materials, subcontractors and financing was used; hence, the FAA does not apply).

Accordingly, the FAA does not apply, and the Court should deny Ryland’s Motion to Alter or Amend.

II. THE ARBITRATION CLAUSE FROM THE ALLEGED SUBCONTRACTOR AGREEMENTS IS UNENFORCEABLE BECAUSE IT IS NOT IN COMPLIANCE WITH THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

South Carolina's Uniform Arbitration Act (UAA) requires:

(a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter *shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.*

S.C. Code Ann. § 15-48-10 (emphasis added).

These elements are to be strictly adhered to in order to satisfy the notice requirements.

Zabinski v. Bright Acres Assocs., 346 S.C. at 589, 553 S.E.2d at 114. No other variation is acceptable. *See Zabinski v. Bright Acres Assocs.*, *supra*.

Ryland's alleged Subcontractor Agreements with Land Site and Stark do not meet the requirements of the UAA. The arbitration clauses in the respective alleged Subcontractor Agreements are not capitalized, bolded, underlined, or rubber stamped. Moreover, the arbitration clauses are buried on the third page of the alleged agreement. These arbitration clauses do not comply with the explicit requirements of the UAA. Accordingly, the alleged Subcontractor Agreements identified by Ryland are not subject to arbitration.

III. RYLAND HAS WAIVED ANY ALLEGED RIGHT TO COMPEL ARBITRATION.

Land Site and Stark incorporate the arguments made by Plaintiffs in their submission and at the hearing that Ryland has waived any alleged right to arbitration.

IV. RYLAND'S DISPUTE RESOLUTION PROCEDURE ALLEGEDLY WITH THE HOMEOWNER IS UNCONSCIONABLE.

Land Site and Stark join in the arguments by Plaintiffs that the dispute resolution procedure in Ryland's Home Warranty Program Insured Limited Warranty is unconscionable. *See also Smith v. D.R. Horton*, Opinion No. 27645 (S.C. Sup. Ct. filed July 6, 2016).

CONCLUSION

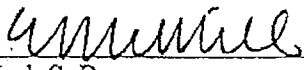
The Court properly denied Ryland's Motion to Compel Arbitration and also properly found that Ryland had waived arbitration. In addition, the arbitration clauses in Ryland's alleged Subcontractor Agreements with Land Site and Stark are not applicable or enforceable against Land Site or Stark based upon their plain language. The provision in the alleged contracts simply does not provide for arbitration in this matter. The FAA is not applicable because the alleged agreements did not involve interstate commerce. Finally, the arbitration provision in the alleged agreements is not in compliance with the South Carolina Uniform Arbitration Act, and therefore is not enforceable under the Act.

Land Site and Stark incorporate all of their arguments made in their Memorandum of Law in Opposition to Ryland's Motion to Compel Arbitration.

-signature to follow-

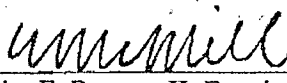
Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.


for Mark S. Barrow
Christy E. Mahon
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211

**ATTORNEYS FOR THIRD-PARTY
DEFENDANTS STARK TRUSS COMPANY,
INC. A/K/A STARK TRUSS COMPANY OF
SUMMERVILLE, LTD., A/K/A STARK
TRUSS, INC. D/B/A CAROLINA TRUSS
SYSTEMS, INC.**

THE WARD LAW FIRM, PA

 w/expressed
permission
John E. Rogers, II, Esquire
C. Reed Teague, Esquire
The Ward Law Firm, PA
P.O. Box 5663
Spartanburg, SC 29304

**ATTORNEYS FOR THIRD-PARTY
DEFENDANT LAND SITE SERVICES, INC.**

Columbia, South Carolina

July 11, 2016

CERTIFICATE OF SERVICE

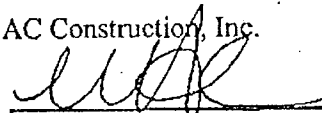
I, the undersigned secretary of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Third-Party Defendant, do hereby certify that I have served a copy of the foregoing Response to Ryland's Motion to Alter or Amend the Court's denial of Ryland's Motion to Compel Arbitration in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein L.L.P.
200 Meeting Street, Suite 301
Charleston, SC 29401
Attorney for Defendant/Third Party Plaintiff The Ryland Group, Inc.

James Taylor Anderson, III, Esquire
Kernodle, Taylor & Root Law Firm
914 Folly Road, Suite 2
Post Office Box 13897
Charleston, SC 29402
Attorney for Plaintiff

James E. Scott, IV, Esquire
Perry Buckner, Esquire
Camden Hodge, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
Attorneys for Third-Party Defendant Carolina Consulting Engineers, Inc.

Kevin W. Mims, Esquire
Caroline C. McIntosh, Esquire
Luzuriaga Mims, LLP
50 Immigration St., Suite 200
Charleston, SC 29403
Attorneys for Third-Party Defendant AC Construction, Inc.



Melissa H. Abbott

FILED
2016 JUL 13 AM 11:22
MARY P. BROWN
CLERK OF COURT
JESSELY COUNTY, S.C.

Columbia, South Carolina
July 11, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
Christopher Duvall and Natalie Duvall,)
Plaintiffs,)
vs.)
The Ryland Group, Inc.)
Defendant.)
The Ryland Group, Inc.,)
Third-Party Plaintiff,)
vs.)
Land Site Services, Inc., Carolina)
Consulting Engineers, Inc., Higdon)
Concrete, LLC, A.C. Construction, Inc.,)
and Stark Truss Company, Inc. a/k/a)
Stark Truss Company of Summerville,)
Ltd. a/k/a Stark Truss, Inc. d/b/a)
Carolina Truss Systems, Inc.,)
Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2015-CP-08-01213

FILED
2016 AUG -3 AM 9:05
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC
KDC

CHRISTOPHER AND NATALIE DUVALL'S
MEMORANDUM IN OPPOSITION TO
THE RYLAND GROUP, INC.'S MOTION TO
RECONSIDER, AMEND AND/OR ALTER
ORDER DENYING ITS MOTION TO
COMPEL ARBITRATION

Plaintiffs Christopher and Natalie Duvall (the "Duvalls") respectfully submit by their undersigned attorneys, the following Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Reconsider, Amend and/or Alter Order Denying its Motion to Compel Arbitration, (filed July 8, 2016) and show this Court that Defendant The Ryland Group, Inc., has waived any right it may have had to have this case referred to binding arbitration by conducting extensive discovery, including Court Ordered discovery. Further, even absent waiver, the at-issue arbitration provision is unenforceable.

KDC

In support of this Memorandum, Plaintiffs incorporate by reference their Memorandum in Opposition to the Ryland Group, Inc.'s Motion to Compel Arbitration, filed April 29, 2016.

By way of further response:

1. WAIVER:

At the hearing of June 27, 2016, the Court properly found that Ryland's conduct of extensive discovery, including Court Ordered discovery, waived arbitration.¹ Despite Ryland's apparent disagreement with the Court's ruling that its conduct of discovery waived arbitration, Ryland continues to conduct discovery pursuant to Judge Nicholson's Order of January 11, 2016. Judge Nicholson's Order Granting [Ryland's] Motion to Compel allows Ryland to attach "crack monitors" to Plaintiffs' home, to access those crack monitors, and to leave the crack monitors in place at Plaintiffs' home through "trial."

Even after filing its Motion to Reconsider, Ryland continues to maintain its crack monitors at Plaintiffs' home. Ryland's continued conduct of Court Ordered discovery shows that it is not serious about its Motion to Reconsider and that its Motion to Reconsider is filed for purposes of delay.

The Court was correct in finding Ryland waived arbitration. See *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 127 (Ct. App. 2007); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551 (Ct. App. 2003).

2. UNENFORCEABLE ARBITRATION PROVISION:

¹ Since Plaintiffs filed suit Ryland has requested expert reports from Plaintiffs, conducted site visits (2 pursuant to Court Order, one pursuant to request of counsel), performed soils samples, filed a Motion to Amend, filed a Motion to Compel, and received an Order compelling Plaintiffs' to place crack monitors on their home. Further, Ryland has served third-party complaints on its subcontractors and those subcontractors have served extensive discovery on Plaintiffs. Ryland has received 108 pages of documents from Plaintiffs and has received documents from multiple non-parties produced via subpoenas issued by the third-party defendants.

This case involves a warranty issued in connection with the purchase of a single family home located in South Carolina. Ryland's arbitration provision is not governed by the Federal Arbitration Act. See *Bradley v. Brentwood Homes, Inc.* 398 S.C. 447 (2012)(recognizing "intrastate nature of the sale and purchase of residential real estate" and "well-established real estate exception to the FAA"). The arbitration provisions at issue in this case are not mentioned on the first page of the Warranty and are therefore invalid under South Carolina law. See S.C. Code Ann. § 15-48-10(a).

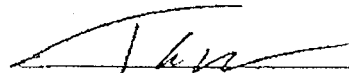
At any rate, the dispute resolution procedure in the Ryland Home Warranty Program Insured Limited Warranty is Unconscionable. In an analogous case the South Carolina Supreme Court has recently reaffirmed that South Carolina will not enforce unconscionable arbitration provisions in residential home warranties. See *Smith v. D.R. Horton*, Opinion No. 27645 (S.C. Sup. Ct., July 6, 2016). The arbitration provision in this case – which purports to require homeowners whose warranty claims ultimately fail to pay Ryland's attorney's fees – is far worse than that involved in *Smith v. D.R. Horton*, Opinion No. 27645 (S.C. Sup. Ct., July 6, 2016).²

For all of the foregoing reasons, Plaintiffs respectfully request that this Court DENY The Ryland Group, Inc.'s Motion to Reconsider, Amend and/or Alter Order Denying its Motion to Compel Arbitration, (filed July 8, 2016).

[SIGNATURE PAGE TO FOLLOW]

² The unconscionable provisions are extensively discussed in Plaintiffs' Memorandum in Opposition to the Ryland Group, Inc.'s Motion to Compel Arbitration, filed April 29, 2016, and are incorporated herein by reference.

KERNODLE COLEMAN

By: 

James Taylor Anderson, III
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422-3897
(843) 795-7800
(843) 795-3032 Fax
tanderson@kernodlelaw.com

ATTORNEYS FOR PLAINTIFFS

July 27, 2016

Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, *Plaintiffs' Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Reconsider, Amend and/or Alter Order Denying its Motion to Compel Arbitration* was sent via facsimile, hand-delivery, e-mail and/or by depositing a copy in the United States Mail, First Class to:

Thomas C. Hildebrand, Jr., Esquire
Olesya V. Vaskevich, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
**ATTORNEY FOR DEFENDANT/3rd
PARTY PLAINTIFF THE RYLAND GROUP**

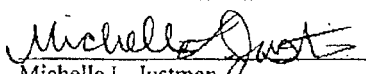
John E. Rogers, II, Esquire
C. Reed Teague, Esquire
The Ward Law Firm, PA
P.O. Box 5663
Spartanburg, SC 29304
**ATTORNEYS FOR 3rd-PARTY DEFENDANT
LAND SITE SERVICES, INC.**

James E. Scott, IV, Esquire
Perry Buckner, Esquire
Camden Hodge, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
**ATTORNEYS FOR 3rd PARTY DEFENDANT
CAROLINA CONSULTING ENGINEERS, INC.**

Mark S. Barrow, Esquire
Christy E. Mahon, Esquire
Sweeny, Wingate & Barrow, PA
1515 Lady Street
P.O. Box 12129
Columbia, SC 29211
**ATTORNEYS FOR 3RD PARTY DEFENDANT
STARK TRUSS COMPANY, INC. a/k/a STARK
TRUSS COMPANY OF SUMMERVILLE,
LTD. a/l/a STARK TRUSS, INC. d/b/a CAROLINA
TRUSS SYSTEMS, INC.**

Kevin W. Mims, Esquire
Caroline C. McIntosh, Esquire
Luzuriaga Mims, LLP
50 Immigration St., Suite 200
Charleston, SC 29403
**ATTORNEYS FOR 3RD PARTY DEFENDANT AC
CONSTRUCTION, INC.**

KERNODLE COLEMAN


Michelle L. Justman

July 27, 2016
Charleston, South Carolina

2016 AUG -3 AM 9:05
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

