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IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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SC Court of Appeals

Consolidated Case No. 2010-CP-10-2271

Appellate Case No.: 2016-000076

Concord and Cumberland Horizontal Property Regime, And Thomas R. Mather, And Betty Y. Segal, And Signature Charleston, LLC and Wade Robinson, And James C. Kirkpatrick, And Paul A. Brim, And Fred Rappaport and Joyce Rappaport, And Thomas R. Debnam, as Trustee of The Trust Agreement of Thomas R. Debnam, And Pamela L. Vaughan, And 304 Concord & Cumberland, LLC, And 402 Concord & Cumberland, LLC, And Avant & Associates, LLC and Oakland Holding, LLC, And Mattison J. MacGillivray and Teresa E. MacGillivray And Pamela Queen, And Stuart Reeves, Plaintiffs,

v.

Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, Estates, Inc., Estates Management Company, Superior Construction Corporation, Weather Shield Mfg., Inc., The Muhler Company, Inc., In The Wind, Inc., J. Davis Architects, PLLC, Wall Craft Construction, Inc., Weatherholtz Masonry, LLC, Philip Gasque d/b/a Philip Gasque Construction, Architectural Stone Company, Southern Mechanical, Inc., Greg Gasque Metal Works, Keating Roofing and Sheet Metal, Inc., Lowcountry Tile Contractors, Inc., Safeco Insurance Company of America, Companion Property and Casualty of America, Companion Property and Casualty Group, Watts Builders, LLC, Elias Duffy d/b/a Masonry Pros, Renaissance Steel, LLC, American Drywall Construction, Inc., Turner Electrical of SC, Inc., and Metro Waterproofing, Inc., Defendants

Of whom Superior Construction Corporation APPELLANT,

And

The Muhler Company, Inc.....RESPONDENT.

RECORD ON APPEAL

Christopher A. Majure, Esquire
Timothy J. Newton, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
Attorneys for Appellant

Peter Gunner Nistad
Gallivan, White & Boyd, P.A.
Post Office Box 22768
Charleston, SC 29143
843-735-7600

Curtis L. Ott
Janice Holmes
Gallivan, White & Boyd, P.A.
Post Office Box 7368
Charleston, SC 29143
Attorneys for Respondent

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

Concord and Cumberland Horizontal Property
Regime,

And

Thomas R. Mather,

And

Betty Y. Segal

And

Signature Charleston, LLC and Wade
Robinson,

And

James C. Kirkpatrick,

And

Paul A. Brim,

And

Fred Rappaport and Joyce Rappaport,

And

Thomas R. Debnam, as Trustee of the Trust
Agreement of Thomas R. Debnam,

And

Pamela L. Vaughn,

And

Stuart Recyes,

And

Mattison J. MacGillivray and

Teresa E. MacGillivray,

And

Avant & Associates, LLC and Oakland
Holding, LLC,

And

304 Concord & Cumberland, LLC

And

402 Concord & Cumberland, LLC

And

Pamela R. Queen,

Plaintiffs,

v.

Concord & Cumberland, LLC; et. al.

Defendants.

CIVIL ACTION NO: 2010-CP-10-2271

CIVIL ACTION NO: 2010-CP-10-2919

CIVIL ACTION NO: 2010-CP-10-3206

CIVIL ACTION NO: 2010-CP-10-3207

CIVIL ACTION NO: 2010-CP-10-3208

CIVIL ACTION NO: 2010-CP-10-3209

CIVIL ACTION NO: 2010-CP-10-3210

CIVIL ACTION NO: 2010-CP-10-9580

CIVIL ACTION NO: 2010-CP-10-9767

CIVIL ACTION NO: 2011-CP-10-4603

CIVIL ACTION NO: 2011-CP-10-4663

CIVIL ACTION NO: 2011-CP-10-8549

CIVIL ACTION NO: 2011-CP-10-8550

CIVIL ACTION NO: 2011-CP-10-8551

CIVIL ACTION NO: 2011-CP-10-9585

CONSENT ORDER

JULIE J. ARMSTRONG
CLERK OF COURT

2012 APR 26 AM 9:41

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OFF

Consent Order

All of the undersigned parties to all of the above-captioned cases consent to refer all claims relating to all parties of the cases to a bench trial before Judge Clifton Newman. In so doing, the undersigned parties agree to waive any and all rights to the arbitration of the claims asserted or which may be asserted in the above-captioned cases by and against any signatory party under any now-existing agreement or contract. Such waiver does not extend to any person or entity who is not a signatory party to this Consent Order nor does it extend to any claim or cause of action not asserted in the above-captioned cases as they currently stand or as may be amended.

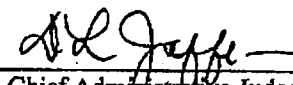
The consent of each party below is predicated upon unanimous consent of all parties, as to each respective case.

The Parties further consent to permit all of the above-referenced Plaintiffs to amend their pleadings to add or remove certain causes of action as to any present party of the case, or to add new causes of action against new defendants by or before May 31, 2012. All Defendants shall be entitled to amend their respective answers thereto, as well as any cross claims, or third and/or fourth party claims in response to the above-referenced Plaintiffs' amended pleadings.

The above-captioned cases will be and will remain consolidated for discovery, but at the present time will remain separate for purposes of bench trial. The parties may elect to petition Judge Newman for consolidation of trials at a later date.

The Parties shall assemble for a status conference before Judge Newman during the week of October 22, 2012, to set a trial date to commence after November 1, 2012, but before November 30, 2012. If the above-captioned cases are tried separately, civil action number 2010-CP-10-2271 shall be tried first.

AND IT IS ORDERED.



Chief Administrative Judge for the Ninth Circuit

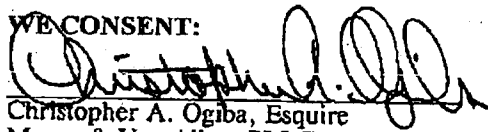
Charleston, South Carolina

April 25 2012

Concord & Cumberland Horizontal Property Regime vs. Concord & Cumberland, LLC, et al
Civil Action No. 2010-CP-10-2271 (Consolidated)

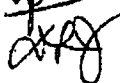
Consent Order

WE CONSENT:



Christopher A. Ogiba, Esquire
Moore & Van Allen, PLLC
40 Calhoun Street, Suite 300
Post Office Box 22828
Charleston, South Carolina 29413-2828
Email: chrisogiba@mvalaw.com

Attorney for Plaintiff Concord & Cumberland
Horizontal Property Regime

3 of 23
3 

Consent Order

WE CONSENT:



Jesse Kirchner, Esquire
Thurmond, Kirchner, Timbes & Yelverton
15 Mid Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Email: jkirchner@tktylawfirm.com

Attorney for Thomas R. Mather, Betty Y. Segal, Signature Charleston, LLC and Wade Robinson, James C. Kirkpatrick, Paul A. Brim, Fred Rappaport and Joyce Rappaport, Thomas R. Debnam, as Trustee of the Trust Agreement Thomas R. Debnam, Stuart Reeves, Mattison J. MacGillivray and Teresa E. MacGillivray, Avant & Associates, LLC and Oakland Holding, LLC, 304 Concord & Cumberland, LLC, 402 Concord & Cumberland, LLC, and Pamela R. Queen

WE CONSENT:

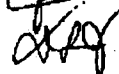
 signed with consent.

I. Keith McCarty, Esquire
McCarty Law Firm, LLC
1212 Wappoo Road
Post Office Box 30055
Charleston, South Carolina 29417
Email: ikeithmccarty@gmail.com

OR

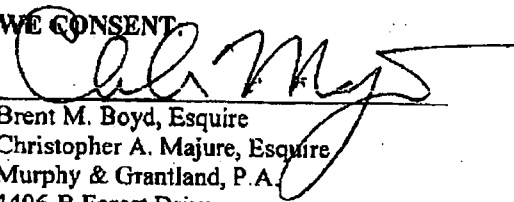
John C. Hayes, IV, Esquire
Mary-Margaret Fitzhenry, Esquire
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, South Carolina 29401
Email: jhayes@hayeslaw.org
mfitzhenry@hayeslaw.org

Attorneys for Pamela L. Vaughn

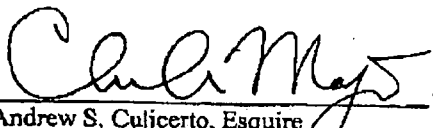
4 of 23
4


Consent Order

WE CONSENT:


Brent M. Boyd, Esquire
Christopher A. Majure, Esquire
Murphy & Grantland, P.A.
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
Email: bboyd@murphygrantland.com
cmajure@murphygrantland.com

Counsel for Defendant, Superior Construction Corporation

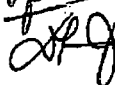
 signed with consent
Andrew S. Culicerto, Esquire
Shumaker, Loop & Kendrick, LLP
128 S. Tryon Street, Suite 1800
Charlotte, North Carolina 28292
Email: aculicerto@slk-law.com

Co-Counsel for Defendant, Superior Construction Corporation

WE CONSENT:

Alan R. Belcher, Jr., Esquire
Allen, Kopet & Associates, PLLC
Post Office Box 61299
Charleston, South Carolina 29419
Email: abelcher@allen-kopet.com

Attorney for Safeco and Superior Construction Corporation

5/4/23
5 

Consent Order

WE CONSENT:

Brent M. Boyd, Esquire
Christopher A. Majure, Esquire
Murphy & Grantland, P.A.
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
Email: bboyd@murphygrantland.com
cmajure@murphygrantland.com

Counsel for Defendant, Superior Construction Corporation

Andrew S. Culicerto, Esquire
Shumaker, Loop & Kendrick, LLP
128 S. Tryon Street, Suite 1800
Charlotte, North Carolina 28292
Email: aculicerto@slk-law.com

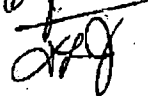
Co-Counsel for Defendant, Superior Construction Corporation

WE CONSENT:



Alan R. Belcher, Jr., Esquire
Allen, Kopet & Associates, PLLC
Post Office Box 61299
Charleston, South Carolina 29419
Email: abelcher@allen-kopet.com

Attorney for Safeco and Superior Construction Corporation

6 of 23
5. 

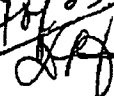
Consent Order

WE CONSENT:

 , signed with consent

Wm. Mark Koontz, Esquire
Koontz Law, L.L.C.
1012 East Montague Avenue, Suite 101
North Charleston, South Carolina 29405
Email: mark@koontzlaw.com

Attorney Keating Roofing and Sheet Metal Company

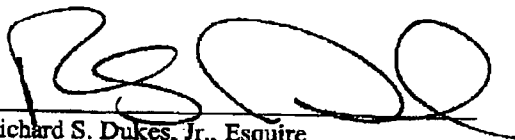
7/12/23
6 

Consent Order

WE CONSENT:

Henry W. Brown, Esquire
John W. Davidson, Esquire
Nexsen Pruet
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, South Carolina 29202
Email: hbrown@nexsenpruet.com
jdavidson@nexsenpruet.com

*Attorneys for Estates, Inc., Estates Management Co. and
Concord & Cumberland Mgr., LLC*



Richard S. Dukes, Jr., Esquire
Turner Padgett Graham & Laney, PA
P.O. Box 22129
Charleston, SC 29413
Email: rdukes@turnerpadgett.com

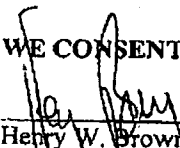
Attorneys for Estates, Inc. and Estates Management Co.

8/23
7/23

Concord & Cumberland Horizontal Property Regime vs Concord & Cumberland, LLC, et al
Civil Action No. 2019-CP-10-2271 (Consolidated)

Consent Order

WE CONSENT:



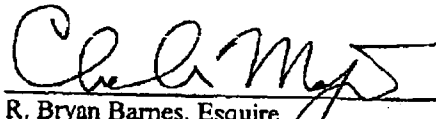
Henry W. Brown, Esquire
John W. Davidson, Esquire
Nexsen Pruet
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, South Carolina 29202
Email: hbrown@nexsenpruet.com
j davidson@nexsenpruet.com

Attorney for Estates, Inc., Concord & Cumberland, LLC
and Concord & Cumberland Property Mgr, LLC

9/23/23
LSA
7

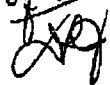
Consent Order

WE CONSENT:

 signed with consent

R. Bryan Barnes, Esquire
T. McRoy Shelley, III, Esquire
Rogers Townsend & Thomas, PC
220 Executive Center Drive, Suite 100
Post Office Box 100200
Columbia, South Carolina 29202-3200
Email: BARNES@rtt-law.com
SHELLEY@rtt-law.com

Attorneys for Concord & Cumberland, LLC

10/12/23
8 

Consent Order

WE CONSENT:

J. David Banner, signed with consent
J. David Banner, Esquire
Aiken Bridges
181 East Evans Street, Suite 409
Florence, South Carolina 29506
Email: jdb@aikenbridges.com
by Chris Majure, Esq.

Attorney for Weatherholtz Masonry, LLC

10/23
JDB

Consent Order

WE CONSENT:



P. Gunnar Nistad, Esquire
McAngus, Goudelock & Courie, LLC
Post Office Box 877
Charleston, South Carolina 29402
Email: gunnar.nistad@mgclaw.com

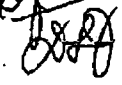
Attorney for The Muhler Company, Inc.

WE CONSENT:

 signed with consent

Paul Robert Rahn, Esquire
Robertson & Hollingsworth
Wachovia Center
177 Meeting Street, Suite 300
Charleston, South Carolina 29401
Email: prh@roblaw.net

*Attorneys for The Muhler Company, Inc. and
Attorneys for Companion Property and Casualty Group*

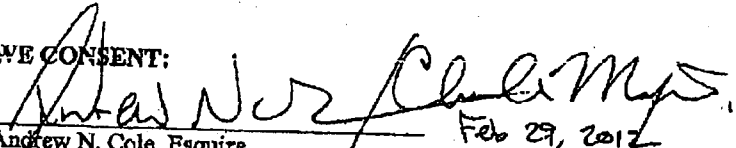
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Concord & Cumberland Horizontal Property Regime vs. Concord & Cumberland, LLC, et al.
Civil Action No.: 2010-CP-10-2271 (Consolidated)

Consent Order

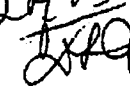
WE CONSENT:


Andrew N. Cole, Esquire
Claude T. Prevost, III, Esquire
Collins & Lacy, P.C.
Post Office Box 12487
Columbia, South Carolina 29211-2487
Email: acole@collinsandlacy.com
cprevost@collinsandlacy.com

Feb 29, 2012

signed with
consent 4/3/12

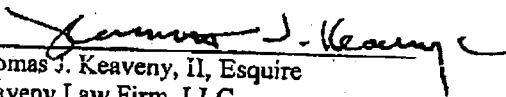
Attorneys for In the Wind, LLC

130223


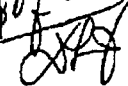
Concord & Cumberland Horizontal Property Regime vs Concord & Cumberland, LLC, et al
Civil Action No 2010-CP-10-2271(Consolidated)

Consent Order

WE CONSENT:

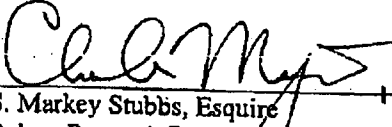

Thomas J. Keaveny, II, Esquire
Keaveny Law Firm, LLC
~~445 Polly Road~~ 1634 Ashley River Road
Charleston, South Carolina 29412 29407
Email: tkeaveny@keavenylawfirm.com

Attorney for Architectural Stone Company

1/30/23


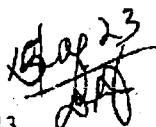
Consent Order

WE CONSENT:

 signed with consent

S. Markey Stubbs, Esquire
Baker, Ravenel, Bender, LLP
3710 Landmark Drive, Suite 440
Post Office Box 8057
Columbia, South Carolina 29202
Email: mstubbs@brblegal.com

Attorneys for Lowcountry Tile Contractors, LLC


13

Consent Order

WE CONSENT:

for P. B. Morgan, Jr.
William W. "Trey" Watkins, Jr., Esquire
Morgan Templeton, Esquire
Wall Templeton & Haldrup, P.A.
145 King Street, Suite 300 (29401)
Post Office Box 1200
Charleston, South Carolina 29402
Email: trey.watkins@elmorewall.com
Morgan.Templeton@elmorewall.com

Attorney for Southern Mechanical, Inc.

Charleston, South Carolina
December 15, 2011

10/9/23
16 *[Signature]*

Consent Order

WE CONSENT:

Sonaly K. Hendricks
Sonaly K. Hendricks, Esquire
Pierce, Hems, Sloan and McLeod, LLC
321 East Bay Street
Post Office Box 22437
Charleston, South Carolina 29413
Email: sonalyhendricks@phsm.net

Attorney for Wallcraft Construction, Inc.

Charleston, South Carolina
January 19th 2012

17-0123
2012
17/16

Consent Order

WE CONSENT:

 signed with consent

Edward D. Buckley, Jr., Esquire

M. Brittain Travis, Esquire

Young Clement Rivers, LLP

Post Office Box 993

Charleston, South Carolina 29402

Email: ebuckley@ycrlaw.com

btravis@ycrlaw.com

Attorney for Watts Builders, LLC

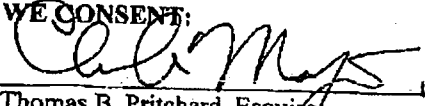
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Concord & Cumberland Horizontal Property Regime vs Concord & Cumberland, LLC, et al
Civil Action No. 2010-CP-10-2271 (Consolidated)

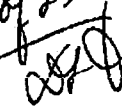
Consent Order

WE CONSENT:

 signed with consent

Thomas B. Pritchard, Esquire
Pritchard & Elliott, LLC
Post Office Box 630
Charleston, South Carolina 29402
Email: tpritchard@pritchard-elliott.com

* Attorney for Greg Gasque Metal Works

18 0723
17 

Consent Order

WE CONSENT:

Christine Varnado

Christine Companion Varnado

Scott Forster, Esquire

Seibels Law Firm, P.A.

127 King Street, Suite 100

Charleston, South Carolina 29401

Email: cvarnado@seibelsfirm.com

sforster@seibelsfirm.com

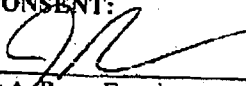
March 1, 2012

Attorney for Weather Shield Mfg., Inc.

200423
AKG

Consent Order

WE CONSENT:



Jeffrey A. Ross, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29429-8144
Email: jross@clawsonandstaubes.com

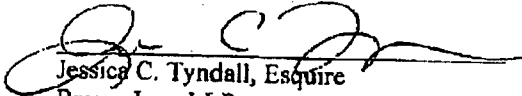
Attorney for American Drywall

Charleston, South Carolina
December 20, 2011

1/
Concord & Cumberland Horizontal Property Regime vs Concord & Cumberland, LLC, et al
Civil Action No. 2010-CP-10-2271 (Consolidated)

Consent Order

WE CONSENT:



Jessica C. Tyndall, Esquire
Brown Law LLP
4130 Parklake Avenue, Suite 130
Raleigh, North Carolina 27612-
Email: jessica@brownlawllp.com

Attorney for Defendant JDavis Architects, PLLC

Raleigh, North Carolina
~~December 2011~~

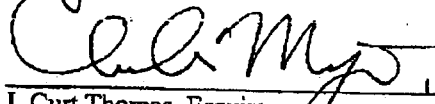
1/9/12

22423
AKG

Concord & Cumberland Horizontal Property Regime vs Concord & Cumberland, LLC, et al
Civil Action No. 2010-CP-10-3271 (Consolidated)

Consent Order

WE CONSENT:

 signed with consent

J. Curt Thomas, Esquire
411 East Liberty Street
Savannah, Georgia 31401

Attorneys for Elias Duffy d/b/a Masonry Pros.

23 of 23
KRG

FILED

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and
WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

And

PAUL A. BRIM,

And

FRED RAPPAPORT and JOYCE
RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF
THE TRUST AGREEMENT OF THOMAS R.
DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC, et al.,

Defendants.

2014 OCT 26 PM 4:56

IN THE COURT OF COMMON PLEAS

JULIE J. ARMSTRONG
CLERK OF COURT

Civil Action No. 2010-CP-10-2271

Civil Action No. 2010-CP-10-2919

Civil Action No. 2010-CP-10-3206

Civil Action No. 2010-CP-10-3207

Civil Action No. 2010-CP-10-3208

Civil Action No. 2010-CP-10-3209

Civil Action No. 2010-CP-10-3210

Civil Action No. 2010-CP-10-9580

Civil Action No. 2010-CP-10-9767

ORDER GRANTING WEATHER
SHIELD'S AND MUHLER'S MOTIONS
FOR PARTIAL SUMMARY JUDGMENT;
DENYING SUPERIOR'S MOTION FOR
PARTIAL SUMMARY JUDGMENT; AND
DENYING JDAVIS'S MOTION FOR
SUMMARY JUDGMENT

Background

This is a construction defect case relating to a condominium project located at the corner of Concord and Cumberland Streets in Charleston, South Carolina ("Subject

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Property"). Concord & Cumberland, LLC ("C&C") was the original owner and the developer of the property. C&C hired J. Davis Architects, PLLC ("JDavis") as the architect for the project, and Superior Construction Corporation ("Superior") as the general contractor for construction of the building shell. Superior was to construct the building shell and then the individual owners of the condominiums would "upfit" their individual units.

Superior entered into a General Contractor Subcontract with The Muhler Company, Inc. ("Muhler") for All Windows, Entry Doors, Patio Doors & Door and Window Trim ("Subcontract") to supply and install windows and exterior doors manufactured by Weather Shield, Inc. ("Weather Shield"). While the Subcontract called for the installation of windows, the scope of that installation was limited to setting windows in rough openings which were prepared by Superior and/or its subcontractors. Although Weather Shield's installation instructions called for its windows to be installed flush with the building's exterior, restrictions imposed by Charleston's Board of Architectural Review required that the windows be recessed. C&C, JDavis and waterproofing experts hired by C&C, Sutton-Kennerly Associates ("SKA"), came up with a joint resolution to this design issue, choosing a method by which the windows were flush mounted to wooden "bucks," that rested in metal sill pans, and fastening that assembly in a recessed configuration to the building's steel frame.

Muhler employed two different subcontractors, In the Wind, Inc. and Watts Builders, Inc., to install the windows. In the Wind also worked as a direct subcontractor for Superior by preparing rough openings that included the installation of sill pans and bucks within the pans.

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In early 2007, the Subject Property began to experience water intrusion issues, including but not limited to leaking at the windows and doors. Weather Shield, Superior and Muhler entered into an agreement, dated June 11, 2007 ("2007 Agreement"), in which C&C is identified as a third party beneficiary, to address the issues of leaking windows. The 2007 Agreement required, among other things, that Superior satisfy any outstanding balances due to Muhler related to the subcontract. Superior acknowledged that it has never paid Muhler the outstanding balances referenced in the 2007 Agreement.

Construction of the building shell was substantially complete in October 2007, at which point all of the condominium units had been sold. Both during and after construction, the windows and doors were tested and various water intrusion issues were noted at the Subject Property.

Subsequently, nearly identical cases were filed by and on behalf of fourteen separately named plaintiffs and the Concord & Cumberland Horizontal Property Regime ("Plaintiffs"). In their complaints, the Plaintiffs alleged water intrusion through the window units themselves and around the windows and doors. The Plaintiffs alleged other water intrusion problems, as well as a number of other construction/design defects or deficiencies. Several of the Defendants filed cross-claims against each other alleging, among other things, claims for contractual indemnification, equitable indemnification, contribution, breach of contract, negligence, and negligent misrepresentation.

After years of litigation, including extensive discovery, the Plaintiffs settled their claims with each of the Defendants. Subsequently, various other subcontractors settled cross-claims with the remaining Defendants, which include C&C, Superior, JDavis, Muhler and Weather Shield. Counsel for Safeco Insurance Company of America,

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Superior's, which provided a surety bond to Superior for its work at the Subject Property, has remained active in this case on the basis that they are representing Superior's interests in some of the remaining claims.

Motions

Superior filed a Motion for Partial Summary Judgment against Muhler seeking indemnification for amounts paid to the Plaintiffs to settle its liability with regard to the window and door issues. Superior's claim against Muhler is based on two contracts between the parties: 1) the Subcontract with Muhler, and 2) the 2007 Agreement. Superior filed a similar Motion for Partial Summary Judgment against Weather Shield based solely on the 2007 Agreement. Muhler also moved for summary judgment against Weather Shield based solely on the 2007 Agreement. Superior alleges that, under both the Subcontract and the 2007 Agreement, it is entitled to recover all amounts it paid to Plaintiffs to settle their window and door claims, even amounts attributable to Superior's own purported negligence.

Muhler and Weather Shield each opposed Superior's motions for partial summary judgment. Muhler argued that neither the Subcontract nor the 2007 Agreement indemnifies Superior for its own negligence. Weather Shield also argued that the 2007 Agreement does not indemnify Superior for its own liability. In addition, both Muhler and Weather Shield argued that the 2007 Agreement is not enforceable because Superior breached certain provisions of that Agreement, and because of impossibility, in that they were prevented from attempting to repair window and door problems as was called for in that Agreement.

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Muhler moved for partial summary judgment on the cross-claims alleged by Superior and by C&C. Muhler argued that: 1) neither the Subcontract nor the 2007 Agreement entitle Superior and C&C for their own wrong doing and, in addition, that the 2007 Agreement is not enforceable due to both breach and impossibility; 2) neither Superior nor C&C is entitled to equitable indemnity because neither can prove it has "clean hands"; and 3) C&C is not entitled to contribution because it failed to extinguish Muhler's exposure to Plaintiffs' claims.

Weather Shield moved for summary judgment against Superior and C&C on all of their claims for equitable indemnity and contractual indemnity, and against C&C for its cause of action for contribution. Weather Shield argued that the 2007 Agreement is unenforceable due to Superior's breach of that agreement, and that Superior's and C&C's indemnity claims are foreclosed due to a lack of special relationship, lack of adjudication as to fault, and by Superior's and C&C's "unclean hands." Weather Shield argued that C&C's contribution claim is barred because C&C has not settled any claims against Weather Shield nor has it obtained a release of any claims against Weather Shield. In the alternative, Weather Shield argued that, if the 2007 Agreement is enforceable, any indemnity owed by Weather Shield would be limited only to claims by subsequent Plaintiff owners regarding the windows and doors themselves and related attorneys' fees.

JDavis filed a motion for summary judgment seeking dismissal of the cross-claims brought against it by C&C for contractual indemnity, equitable indemnity, contribution, breach of contract, negligence, and negligent misrepresentation. JDavis also moved for summary judgment against Superior's cross-claim pursuant to the *Spearin* doctrine, which provides that, "when a party supplies plans and specifications for use by

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a contractor to follow in constructing a project, said party impliedly warrants the sufficiency of the plans and specifications to construct the project." *United States v. Spearin*, 248 U.S. 132 (1918).

C&C opposed Muhler's, Weather Shield's, and J. Davis's motions for summary judgment, arguing that it was entitled to both contractual and equitable indemnification. Superior did not file a formal response to Muhler, Weather Shield's or JDavis's motions for summary judgment but addressed their motions in argument before this court.

This Court heard argument on the various motions on July 28 & 29, 2014. All parties were provided an opportunity to make and respond to the arguments and positions of the other parties.

Standard for Summary Judgment

Under Rule 56, SCRPC, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct. App. 2008). "All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant." *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." *Keith v. River Consult., Inc.*, 365 S.C. 500, 505, 618 S.E.2d 302, 304 (Ct. App. 2005).

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Discussion

Under South Carolina law, parties can agree to indemnify each other for various types of damages or losses; however, neither of the agreements at issue here specifically provides indemnification for an indemnitee's own negligence. Indemnity agreements are strictly construed against the party seeking to be indemnified. *See Fed. Pac. Elec. v. Carolina Prod. Enter.*, 298 S.C. 23, 28-29, 378 S.E.2d 56, 58-59 (Ct. App. 1989); *see also East-Harding, East-Harding, Inc. v. Horace A. Piazza & Assoc.*, 91 S.W.3d 547, 551 (Ark. Ct. App. 2002) (same).

In addition, "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in **clear and unequivocal terms.**" *Laurens Emerg. Med. Spec. v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (emphasis added); *see also Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E. 231, 234 (1934) (finding "broad and comprehensive" language was insufficient to prove the contract relieved a party from its own negligence). In order for Superior and C&C to defeat Muhler's and Weather Shield's motions for summary judgment on the contractual indemnity issue, they have to meet the very high standard of eliminating any possibility that the contract language on which they rely can be read to limit indemnification to the indemnitor's own negligence. In other words, in order to prevail on their contract claims, Superior and C&C must demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contract claims as a matter of law.

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A. The Subcontract does not obligate Muhler to indemnify Superior for Superior's own wrong-doing.

The indemnity clause in the initial Subcontract between Muhler and Superior does not indemnify Superior for its own negligence. The Subcontract's indemnity provision is the form clause for AGC Document No. 600, Subcontract for Building Construction, August 1984 by the Associated General Contractors of America. Courts uniformly interpret this language as not providing indemnification for the indemnitee's own negligence. See, e.g., *Braegelmann v. Horizon Dev. Co.*, 371 N.W.2d 644, 646-47 (Minn. Ct. App. 1985) (interpreting the same operative language as not providing indemnification to the general contractor for its own negligence); *Mautz v. J.P. Patti Co.*, 688 A.2d 1088, 1092-1093 (N.J. Super. Ct. App. Div. 1997) (finding virtually identical language did not indemnify indemnitee for its own negligence but instead provided indemnification "only to the extent the [indemnitor's] negligence contributed to the loss"); *Cabo Constr., Inc. v. R.S. Clark Const., Inc.*, 227 S.W.3d 314, 317-18 (Tex. App. 2007) (finding same language did not expressly state that the subcontractor would indemnify the contractor for the contractor's own negligence); *Brown v. Boyer-Washington Blvd. Assoc.*, 856 P.2d 352, 355 (Utah 1993) (limiting similar indemnification language to damages caused in whole or in part by acts of the subcontractor); *MT Builders, LLC v. Fisher Roofing Inc.*, 197 P.3d 758, 765 (Ariz. Ct. App. 2008) (characterizing this form indemnity clause as "a 'narrow form' of indemnification" that "only covers the indemnitee's losses to the extent caused by the indemnitor or a person the indemnitor supervises or is responsible for," and explaining that this language creates "a comparative fault or negligence arrangement whereby the indemnitor's liability is limited 'to the extent' it and its supervisees were at fault");

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Frank, 527 N.W.2d at 81 (construing practically identical language to mean the subcontractor is liable to the general contractor only "to the extent of its own negligence but is not required to indemnify" the general contractor for the general contractor's own negligence); *Glendale Constr. Servs., Inc. v. Accurate Air Syst., Inc.*, 902 S.W.2d 536, 539 (Tex. Ct. App. 1995) (holding that nearly identical language does not indemnify the indemnitee for its own negligence); *Hagerman*, 741 N.E.2d at 393-394 (similar language in AIA standard construction form contract does not "clearly and unequivocally" provide coverage for indemnitee's own negligence).

Courts have held that the language "to the extent" in this indemnification clause means that the indemnifying party is liable to the indemnitee "to the extent of its own negligence but is not required to indemnify [the indemnitee] for [the indemnitee's] negligence." *Frank v. MSI Constr. Mgrs., Inc.*, 527 N.W.2d 79, 81 (Mich. Ct. App. 1995).

At the hearing, Superior presented a number of cases that it alleged supports its argument that the Subcontract indemnifies it for its own negligence. However, those cases contain language substantially dissimilar to Article 12.1 of the Subcontract which makes them of little use to Superior. In fact, the indemnification clause in the Florida case most heavily relied on by Superior, *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 S.2d 1072 (Fla. Dist. Ct. App. 2003), broadly provided indemnification "from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the **performance of the work**," 853 S.2d at 1076 (emphasis added), whereas the Subcontract only promised to indemnify Superior "from and against all claims, damages, loss and expenses, including but not limited to

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attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work." (Subcontract, ¶ 12.1) (emphasis added).

Unlike the provision at issue in *Camp, Dresser*, here indemnity is limited to the performance of Muhler's work, whether directly or through its own subcontractors.

As a result, I find that this provision does not clearly indicate intent by the parties to indemnify Superior for its own wrongdoing.

B. The 2007 Agreement does not obligate either Muhler or Weather Shield to indemnify Superior or C&C for their own wrong-doing.

Even though the 2007 Agreement contains arguably broader indemnification language than the Subcontract, it does not state clearly and unequivocally that either Muhler or Weather Shield agreed to indemnify Superior and C&C for their own negligence and/or wrong-doing.

To the extent that the provisions in the 2007 Agreement purport to indemnify Superior and C&C "unconditionally," they are unconscionably broad. See *Fisher v. Stevens*, 355 S.C. 290, 296, 584 S.E.2d 149, 152 (Ct. App. 2003) (holding that an overly broad indemnification provision would "offend notions of public policy"). Although *Fisher* involved a so-called exculpatory contract, or waiver, the reasoning applies equally here, where the phrase "unconditionally indemnify" is as objectionably broad, if not broader, as the phrase at issue in *Fisher*, which released "any person in any restricted area" from liability." *Id.*

Sections 11 and 12 of the 2007 Agreement simply do not clearly and unequivocally state that either Muhler or Weather Shield is agreeing to indemnify Superior and C&C for their own negligence. Although "formulaic language expressly stating that 'X indemnifies Y for Y's own negligence' is not mandatory," the agreement,

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however, is required to contain language "unquestionably showing the parties' intent to indemnify in the event of losses resulting from the indemnitee's negligence," *Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 271 P.3d 850, 854 (Wash. 2012) (emphasis added).

Here, as was the case in *Snohomish County*, the indemnity provision "does not tell a court 'clearly and unequivocally' that the parties considered the effect of the negligence of the indemnitee and intended to indemnify for the indemnitee's own negligence." 271 P.3d at 862. Indemnity provisions promising to indemnify "from and against any and all claims," or where the indemnitor assumed "all responsibility for claims asserted by any person whatever," are "general terms" that are "insufficiently clear and unequivocal," to provide indemnification for the indemnitee's own negligence. *Cox Cable Corp. v. Gulf Power Co.*, 591 So.2d 627, 629 (Fla. 1992).

The use of the term "unconditionally" does not, on its face, indicate that either Muhler or Weather Shield intended to indemnify Superior and C&C for their own negligence. At best, the inclusion of the term "unconditionally" in an indemnification provision that also contains restrictions renders that provision ambiguous, which is in direct contrast of clear and unequivocal. Strictly construing the 2007 Agreement, I find that neither Section 11 nor Section 12 covers Superior and C&C for their own negligence.

The Court therefore grants Muhler's and Weather Shield's motions to the extent that they assert that neither the Subcontract nor the 2007 Agreement indemnifies Superior and C&C for their own negligence.

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C. C&C is not entitled to equitable indemnity from Muhler or Weather Shield and JDavis not entitled to summary judgment against C&C or Superior.

Superior has withdrawn its cross-claim for equitable indemnity against both Muhler and Weather Shield. However, C&C maintains that it is entitled to equitable indemnity from both Muhler and Weather Shield. Regardless of whether C&C can establish a special relationship with Weather Shield, C&C is not entitled to equitable indemnity from either Muhler or Weather Shield because there is an abundance of evidence that actions by C&C and/or its direct agents actively contributed to the problems with the windows and doors that the Plaintiffs alleged.

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. [citation omitted] If the second party is also at fault, he comes to court without equity and has no right to indemnity. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999) (emphasis added).

Despite its protestations otherwise, C&C's fault goes beyond passive fault or a failure to discover latent defects. As noted above and explained in more detail below, C&C hired the architect, JDavis, the general contractor, Superior, and waterproofing experts, SKA and Metro Waterproofing. There is substantial evidence that actions by Superior, JDavis, SKA and Metro Waterproofing contributed to the water intrusion issues, and are responsible for damage caused to the windows and doors themselves.

C&C engaged Richard Andrews of Estates Management to serve as its "owner's representative." Mr. Andrews described his role as "working with the contractors,

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helping them to understand the project, working with architects to ... get projects on the plans and specs and get the products spaced The owner's rep has to make sure that the contractor has the information they need to build the job with ..." In other words, as Mr. Andrews described it, he was a conduit for information from the architect to the contractor. He and Theresa Hodges, another Estates Management employee, worked directly with JDavis and Superior to make sure they had what they "needed to build the job." Mr. Andrews testified that JDavis, SKA and Estates Management were involved in coming up with the design for the installation of the Weather Shield windows on the project. Additionally, Mr. Andrews confirmed that he performed "fairly thorough" walk-throughs of the building prior to processing pay applications.

Mr. Glick reviewed the allegations contained in the Plaintiffs' Amended Complaint and opined that each alleged defect was the result of design deficiencies, contract administration and/or construction. Mr. Glick opined that the architect and general contractor missed numerous opportunities to see and correct obvious issues with the Subject Property, including the windows. "Those are contractual obligations and the contractor didn't do things right and that's well documented and the architect didn't catch things that were wrong and that's documented because we wouldn't be here today. If no one violated the standard of care, we wouldn't be here today." Mr. Glick testified that installation of the Weather Shield windows into a barrier system, as opposed to a drainable system, was not only a violation of the Weather Shield installation instructions, but also a violation of code.

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In defense of his own company, Superior, Mr. Clardy testified that the problems lay not so much with Superior's failure to coordinate the work properly but, instead, pointed the finger at the architect and developer:

Majority I think on this project was in a failure of the project to be designed correctly and the contract documents to be complete and clearly show how the project was to be properly constructed That's the design issue I think that performance wound up being significantly integrated to the design problem to the point that it did have a significant ripple-down effect I pretty much agree that it is a step-down process. If the owner and architect don't provide adequate documentation to the contractor, the contractor doesn't provide adequate documentation to the subcontractor, then it's going to be exactly what we got here.

Mr. Lies testified that, during the testing process, they observed water penetration between the window and the buck, "[q]uite often," and attributed that "[p]ossibly due to the waterproofing." JDavis, SKA, and Metro Waterproofing, all hired directly by C&C, were responsible for waterproofing.

Given the substantial evidence by witness testimony, C&C is partially at fault for the conditions the Plaintiffs alleged regarding the windows and doors. C&C therefore comes to the court with unclean hands and is not entitled to equitable relief. Therefore, I find as a matter of law that C&C is not entitled to equitable indemnification.

As to the motion for summary judgment filed by JDavis, I find that the deposition testimony of Mr. Glick alone shows that there exist genuine issues of material facts that would make the granting of summary judgment improper.

Conclusion

Muhler's and Weather Shield's motions for partial summary judgment are GRANTED to the extent that they seek to have the Court find as a matter of law that neither the Subcontract nor the 2007 Agreement clearly and unequivocally provides

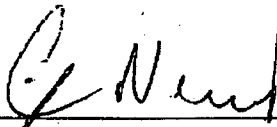
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indemnification for Superior's and/or C&C's own negligence. Muhler's and Weather Shield's motions for summary judgment are GRANTED to the extent that they seek to have the Court find that C&C is not entitled to equitable indemnity. Except to the extent specifically granted herein, all other motions for summary judgment filed by Muhler and Weather Shield are hereby DENIED.

The motions for summary judgment filed by Superior against Muhler and Weather Shield are hereby DENIED.

The motions for summary judgment filed by JDavis against C&C and Superior are hereby DENIED.

AND IT IS SO ORDERED.



Clifton Newman
Presiding Judge

Columbia, South Carolina

September 25, 2014



State of South Carolina
The Circuit Court of the Third Judicial Circuit

Clifton Newman
Judge

Post Office Box 516
Kingstree, SC 29556-0516
Phone: (843) 355-8321 Ext. 7302
Fax: (843) 355-8301
cnewmanj@eccourts.org

September 26, 2014

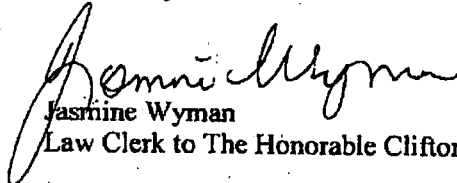
The Honorable Julie Armstrong
Charleston County Clerk of Court
100 Broad Street Ste. 106
Charleston, SC 29401-2210

RE: Concord and Cumberland v. Concord & Cumberland, LLC, et al.

Dear Ms. Julie,

Enclosed is an Order for filing.

Yours truly,


Jasmine Wyman
Law Clerk to The Honorable Clifton Newman

Enclosures

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,

) CONSOLIDATED CASE NO.: 2010-CP-10-2271
)

and

THOMAS R. MATHER,

) ORDER GRANTING PARTIES'
) CONSENT MOTION TO SEAL
)

and

BETTY Y. SEGAL,

and

SIGNATURE CHARLESTON, LLC and
WADE ROBINSON,

and

JAMES C. KIRKPATRICK,

and

PAUL A. BRIM,

and

FRED RAPPAPORT and JOYCE
RAPPAPORT,

and

THOMAS R. DEBNAM, AS TRUSTEE OF
THE TRUST AGREEMENT OF THOMAS
R. DEBNAM,

and

PAMELA L. VAUGHN,

and

STUART REEVES,

and

MATTISON J. MACGILLIVRAY AND
TERESA E. MACGILLIVRAY,

and

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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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AVANT & ASSOCIATES, LLC AND	)
OAKLAND HOLDING, LLC,	)
and	)
304 CONCORD & CUMBERLAND, LLC,	)
and	)
402 CONCORD & CUMBERLAND, LLC,	)
	)
and	)
PAMELA R. QUEEN,	)
Plaintiffs,	)
	)
vs.	)
CONCORD & CUMBERLAND, LLC, ET	)
AL.,	)
Defendants	)

This matter came before the Court on July 28, 2014, whereby the parties filed a Consent Motion to Seal pursuant to Rule 41.1 of the South Carolina Rules of Civil Procedure; and respectfully requested an Order permitting the filing of certain documents under seal.

I. BACKGROUND

This action involves alleged construction defects at a condominium building known as Concord & Cumberland in Charleston, South Carolina. Previously, the Court issued a Consent Confidentiality Order to protect the disclosure of sensitive and proprietary information during discovery. Now, numerous parties to the litigation have settled their claims and the remaining parties seek to file certain documents under seal. Specifically, the parties request that they be authorized by this Court to file under seal the settlement agreements and related documents that have been executed in this matter, including releases, settlement amount payments, as well as other documents that have been produced in discovery pursuant to the Consent Confidentiality Agreement. Prior to the entry of this Order, Defendant The Muhler Co., Inc. ("Muhler")

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inadvertently filed one of the settlement agreements that was intended to be submitted under seal as Ex. K to its memoranda filed in support of its partial summary judgment motions against Superior Construction Corp. ("Superior") and Concord and Cumberland, LLC ("C&C") and in opposition to the partial summary judgment motion filed against it by Superior. The parties wish to include this document as one of those to be filed under seal and request that Muhler's Ex. K be removed from the public record and re-filed under seal.

II. ANALYSIS

Rule 41.1 of the South Carolina Rules of Civil Procedure requires that a Motion to Seal: (1) identify, with specificity, the documents or portions of documents for which sealing is considered necessary; (2) contain a non-confidential description of the documents; and (3) be accompanied by a separately sealed attachment labeled "Confidential Information to be submitted to Court in Connection with the Motion to Seal." The Rule also provides that this Motion address certain listed factors. The requirements of Rule 41.1 are addressed below under corresponding headings.

A. The Documents or Portions for which Sealing is Considered Necessary

This Motion to Seal addresses the settlement agreements and related documents that have been executed in this matter, including releases, settlement amount payments, as well as other documents that have been produced in discovery pursuant to the Consent Confidentiality Agreement. Collectively, these documents are referred to herein as the "Confidential Documents."

B. A Non-Confidential Description of the Documents

The Confidential Documents for which sealing is considered necessary by the parties are comprised of settlement documents that have been executed by the parties in this case, including releases, payment amounts, and related documents, as well as other documents that have been

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produced in discovery pursuant to the Consent Confidentiality Agreement, all of which contain sensitive information to the parties.

C. The Reasons Why Sealing is Necessary

All parties believe that sealing is necessary under these circumstances because the Confidential Documents all contain highly confidential and sensitive information, including settlement payment amounts and other such information. The documents also contain affirmations by these parties that they will keep the documents and settlement amounts confidential.

D. Less Drastic Alternatives to Sealing Will Not Afford Adequate Protection

Given the confidential nature of settlement documents and proprietary information, sealing these Confidential Documents is the only way to adequately protect the parties. Under these circumstances, there is no practical method by which to seal only portions of the Confidential Documents, since the entire documents contain sensitive information.

E. The Factors Listed in Rule 41.1(b):

- (1) the need for a fair trial – This factor is not implicated by this Motion to Seal.
- (2) the need for witness cooperation – This factor is not implicated by this Motion.
- (3) the reliance of the parties upon expectations of confidentiality – All of the parties consent to this Motion to Seal, and have expectations of confidentiality in the settlement documents executed, including settlement payment amounts. Likewise, persons and entities who are no longer parties to this action also have relied on an expectation of confidentiality when entering into the settlement agreements.
- (4) the public or professional significance of the lawsuit – There is little public or professional significance of this lawsuit, as it relates merely to alleged construction defects in a residential multi-family building.

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(5) the perceived harm to the parties from disclosure – All of the parties seek to avoid any potential competitive and/or reputational harm that could result from settlement details and proprietary information being made publically available.

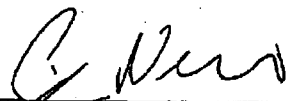
(6) why alternatives other than sealing the documents are not available to protect the legitimate private interests as identified by this Rule – Sealing the Confidential Documents appears to be the only logical way to adequately protect the parties since these documents as a whole contain sensitive information.

(7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents – There is little public interest in this lawsuit, so sealing the Confidential Documents should not impact the public.

Accordingly, having found that the requirements of Rule 41.1(b) have been met, the Consent Motion of the parties is granted and it is hereby ordered that (1) the parties to this litigation are authorized to file the Confidential Documents under seal, which shall include the releases, settlement amount payments, as well as other documents that have been produced in discovery pursuant to the Consent Confidentiality Agreement and (2) the settlement agreement that was intended to be submitted under seal and designated as Ex. K to Muhler's memoranda filed in support of its partial summary judgment motions against Superior Construction Corp. ("Superior") and Concord and Cumberland, LLC ("C&C") and in opposition to the partial summary judgment motion filed against it by Superior shall be removed from the public record and re-filed under seal.

AND IT IS SO ORDERED.

Charleston, South Carolina
October 4, 2014



The Honorable Clifton Newman
Circuit Court Judge

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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JULIE J. ARMSTRONG
CLERK OF COURT

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Concord and Cumberland Horizontal Property
Regime, et. al.,

Civil Action No. 2010-CP-10-2271

Plaintiffs,

vs.

Concord & Cumberland, LLC, et. al.,

Defendants.

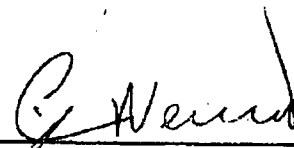
**ORDER DENYING SUPERIOR
CONSTRUCTION CORPORATION'S
MOTION FOR RECONSIDERATION**

THIS MATTER comes before the Court on a Motion for Reconsideration filed by Superior Construction Corporation. The original Order of this Court granted Partial Summary Judgment to The Muhler Company, Inc. on the claim by Superior Construction Company for indemnity.

Having fully considered the submissions and arguments of counsel, this Court finds no error of law or facts in its original Order. The motion should therefore be denied.

IT IS THEREFORE ORDERED that the Motion for Reconsideration is hereby DENIED.

AND IT IS SO ORDERED.



Clifton Newman
Presiding Judge

Columbia, South Carolina
January 12, 2016



State of South Carolina
The Circuit Court of the Third Judicial Circuit

Clifton Newman
Judge

Post Office Box 516
Kingstree, SC 29556-0516
Phone: (843) 355-8321
Ext: 7302
Fax: (843) 355-1576
cnewmanj@sccourts.org

January 13, 2016

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

RE: Concord and Cumberland Horizontal Property Regime, et. al., v. Concord
 and Cumberland, LLC, et. al., Civil Action No. 2010-CP-10-2271

Dear Ms. Armstrong:

Enclosed for filing please find an Order Denying Motion for Reconsideration in the above-referenced case. Please file the enclosed original and mail a clocked copy to the parties.

Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Elizabeth G. Gunby".

Elizabeth G. Gunby, Esq.
Law Clerk to the Honorable Clifton Newman
CNewmanLC@sccourts.org

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

FILED
2016 JAN 21 PM 2:41
JULIE J. ARMSTRONG
CLERK OF COURT

Concord and Cumberland Horizontal Property Regime, *And* Thomas R. Mather, Betty Y. Segal, Signature Charleston, LLC and Wade Robinson, James C. Kirkpatrick, Paul A. Brim, Fred Rappaport and Joyce Rappaport, Thomas R. Debnam, as Trustee of the Trust Agreement of Thomas R. Debnam, Pamela L. Vaughn, 304 Concord & Cumberland, LLC, 402 Concord & Cumberland, LLC, Avant & Associates, LLC and Oakland Holding, LLC, Mattison J. MacGillivray and Teresa E. MacGillivray, Pamela Queen, Stuart Reeves, Plaintiffs,

Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, Estates, Inc., Estates Management Company, Superior Construction Corporation, Weather Shield Mfg., Inc., The Muhler Company, Inc., In The Wind, Inc., J. Davis Architects, PLLC, Wall Craft Construction, Inc., Weatherholtz Masonry, LLC, Philip Gasque d/b/a Philip Gasque Construction, Architectural Stone Company, Southern Mechanical, Inc., Greg Gasque Metal Works, Keating Roofing and Sheet Metal, Inc., Lowcountry Tile Contractors, Inc., Safeco Insurance Company of America, Companion Property and Casualty of America, Companion Property and Casualty Group, Watts Builders, LLC, Elias Duffy d/b/a Masonry Pros, Renaissance Steel, LLC, American Drywall Construction, Inc., Turner Electrical of SC, Inc., and Metro Waterproofing, Inc., Defendants

Of whom

Superior Construction Corporation APPELLANT,

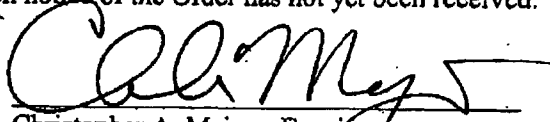
v.

The Muhler Company, Inc. RESPONDENT.

NOTICE OF APPEAL

Superior Construction Corporation appeals the Order of the Honorable Clifton Newman filed October 6, 2014 and the Order dated January 12, 2016. Superior timely filed a Motion to Reconsider the Order filed October 6, 2014, which was heard for oral argument on December 4, 2015. The Order dated January 12, 2016 denying Superior's Motion to Reconsider was received electronically on the same date, and a written notice of the Order has not yet been received.

January 14, 2016



Christopher A. Majure, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
cmajure@murphygrantland.com
Attorneys for Appellant

Other Counsel of Record:
Gunnar Nistad, Esquire
McAngus, Goudelock & Courie, LLC
P.O. Box 650007
Mt. Pleasant, SC 29465
Tel: 843-534-0101

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME

2014 OCT 26 PM 4:56

IN THE COURT OF COMMON PLEAS

JULIE J. ARMSTRONG
CLERK OF COURT

Civil Action No. 2010-CP-10-2271

And

THOMAS R. MATHER,

Civil Action No. 2010-CP-10-2919

And

BETTY Y. SEGAL,

Civil Action No. 2010-CP-10-3206

And

SIGNATURE CHARLESTON, LLC and
WADE ROBINSON,

Civil Action No. 2010-CP-10-3207

And

JAMES C. KIRKPATRICK,

Civil Action No. 2010-CP-10-3208

And

PAUL A. BRIM,

Civil Action No. 2010-CP-10-3209

And

FRED RAPPAPORT and JOYCE
RAPPAPORT,

Civil Action No. 2010-CP-10-3210

And

THOMAS R. DEBNAM, as TRUSTEE OF
THE TRUST AGREEMENT OF THOMAS R.
DEBNAM,

Civil Action No. 2010-CP-10-9580

And

PAMELA L. VAUGHAN,

Civil Action No. 2010-CP-10-9767

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC, et al.,

Defendants.

ORDER GRANTING WEATHER
SHIELD'S AND MUHLER'S MOTIONS
FOR PARTIAL SUMMARY JUDGMENT;
DENYING SUPERIOR'S MOTION FOR
PARTIAL SUMMARY JUDGMENT; AND
DENYING JDAVIS'S MOTION FOR
SUMMARY JUDGMENT

Background

This is a construction defect case relating to a condominium project located at the corner of Concord and Cumberland Streets in Charleston, South Carolina ("Subject

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Property"). Concord & Cumberland, LLC ("C&C") was the original owner and the developer of the property. C&C hired J. Davis Architects, PLLC ("JDavis") as the architect for the project, and Superior Construction Corporation ("Superior") as the general contractor for construction of the building shell. Superior was to construct the building shell and then the individual owners of the condominiums would "upfit" their individual units.

Superior entered into a General Contractor Subcontract with The Muhler Company, Inc. ("Muhler") for All Windows, Entry Doors, Patio Doors & Door and Window Trim ("Subcontract") to supply and install windows and exterior doors manufactured by Weather Shield, Inc. ("Weather Shield"). While the Subcontract called for the installation of windows, the scope of that installation was limited to setting windows in rough openings which were prepared by Superior and/or its subcontractors. Although Weather Shield's installation instructions called for its windows to be installed flush with the building's exterior, restrictions imposed by Charleston's Board of Architectural Review required that the windows be recessed. C&C, JDavis and waterproofing experts hired by C&C, Sutton-Kennerly Associates ("SKA"), came up with a joint resolution to this design issue, choosing a method by which the windows were flush mounted to wooden "bucks," that rested in metal sill pans, and fastening that assembly in a recessed configuration to the building's steel frame.

Muhler employed two different subcontractors, In the Wind, Inc. and Watts Builders, Inc., to install the windows. In the Wind also worked as a direct subcontractor for Superior by preparing rough openings that included the installation of sill pans and bucks within the pans.

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In early 2007, the Subject Property began to experience water intrusion issues, including but not limited to leaking at the windows and doors. Weather Shield, Superior and Muhler entered into an agreement, dated June 11, 2007 ("2007 Agreement"), in which C&C is identified as a third party beneficiary, to address the issues of leaking windows. The 2007 Agreement required, among other things, that Superior satisfy any outstanding balances due to Muhler related to the subcontract. Superior acknowledged that it has never paid Muhler the outstanding balances referenced in the 2007 Agreement.

Construction of the building shell was substantially complete in October 2007, at which point all of the condominium units had been sold. Both during and after construction, the windows and doors were tested and various water intrusion issues were noted at the Subject Property.

Subsequently, nearly identical cases were filed by and on behalf of fourteen separately named plaintiffs and the Concord & Cumberland Horizontal Property Regime ("Plaintiffs"). In their complaints, the Plaintiffs alleged water intrusion through the window units themselves and around the windows and doors. The Plaintiffs alleged other water intrusion problems, as well as a number of other construction/design defects or deficiencies. Several of the Defendants filed cross-claims against each other alleging, among other things, claims for contractual indemnification, equitable indemnification, contribution, breach of contract, negligence, and negligent misrepresentation.

After years of litigation, including extensive discovery, the Plaintiffs settled their claims with each of the Defendants. Subsequently, various other subcontractors settled cross-claims with the remaining Defendants, which include C&C, Superior, JDavis, Muhler and Weather Shield. Counsel for Safeco Insurance Company of America,

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Superior's, which provided a surety bond to Superior for its work at the Subject Property, has remained active in this case on the basis that they are representing Superior's interests in some of the remaining claims.

Motions

Superior filed a Motion for Partial Summary Judgment against Muhler seeking indemnification for amounts paid to the Plaintiffs to settle its liability with regard to the window and door issues. Superior's claim against Muhler is based on two contracts between the parties: 1) the Subcontract with Muhler, and 2) the 2007 Agreement. Superior filed a similar Motion for Partial Summary Judgment against Weather Shield based solely on the 2007 Agreement. Muhler also moved for summary judgment against Weather Shield based solely on the 2007 Agreement. Superior alleges that, under both the Subcontract and the 2007 Agreement, it is entitled to recover all amounts it paid to Plaintiffs to settle their window and door claims, even amounts attributable to Superior's own purported negligence.

Muhler and Weather Shield each opposed Superior's motions for partial summary judgment. Muhler argued that neither the Subcontract nor the 2007 Agreement indemnifies Superior for its own negligence. Weather Shield also argued that the 2007 Agreement does not indemnify Superior for its own liability. In addition, both Muhler and Weather Shield argued that the 2007 Agreement is not enforceable because Superior breached certain provisions of that Agreement, and because of impossibility, in that they were prevented from attempting to repair window and door problems as was called for in that Agreement.

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Muhler moved for partial summary judgment on the cross-claims alleged by Superior and by C&C. Muhler argued that: 1) neither the Subcontract nor the 2007 Agreement entitle Superior and C&C for their own wrong doing and, in addition, that the 2007 Agreement is not enforceable due to both breach and impossibility; 2) neither Superior nor C&C is entitled to equitable indemnity because neither can prove it has "clean hands"; and 3) C&C is not entitled to contribution because it failed to extinguish Muhler's exposure to Plaintiffs' claims.

Weather Shield moved for summary judgment against Superior and C&C on all of their claims for equitable indemnity and contractual indemnity, and against C&C for its cause of action for contribution. Weather Shield argued that the 2007 Agreement is unenforceable due to Superior's breach of that agreement, and that Superior's and C&C's indemnity claims are foreclosed due to a lack of special relationship, lack of adjudication as to fault, and by Superior's and C&C's "unclean hands." Weather Shield argued that C&C's contribution claim is barred because C&C has not settled any claims against Weather Shield nor has it obtained a release of any claims against Weather Shield. In the alternative, Weather Shield argued that, if the 2007 Agreement is enforceable, any indemnity owed by Weather Shield would be limited only to claims by subsequent Plaintiff owners regarding the windows and doors themselves and related attorneys' fees.

JDavis filed a motion for summary judgment seeking dismissal of the cross-claims brought against it by C&C for contractual indemnity, equitable indemnity, contribution, breach of contract, negligence, and negligent misrepresentation. JDavis also moved for summary judgment against Superior's cross-claim pursuant to the *Spearin* doctrine, which provides that, "when a party supplies plans and specifications for use by

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a contractor to follow in constructing a project, said party impliedly warrants the sufficiency of the plans and specifications to construct the project." *United States v. Spearin*, 248 U.S. 132 (1918).

C&C opposed Muhler's, Weather Shield's, and J. Davis's motions for summary judgment, arguing that it was entitled to both contractual and equitable indemnification. Superior did not file a formal response to Muhler, Weather Shield's or JDavis's motions for summary judgment but addressed their motions in argument before this court.

This Court heard argument on the various motions on July 28 & 29, 2014. All parties were provided an opportunity to make and respond to the arguments and positions of the other parties.

Standard for Summary Judgment

Under Rule 56, SCRPC, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct. App. 2008). "All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant." *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." *Keith v. River Consult., Inc.*, 365 S.C. 500, 505, 618 S.E.2d 302, 304 (Ct. App. 2005).

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Discussion

Under South Carolina law, parties can agree to indemnify each other for various types of damages or losses; however, neither of the agreements at issue here specifically provides indemnification for an indemnitee's own negligence. Indemnity agreements are strictly construed against the party seeking to be indemnified. *See Fed. Pac. Elec. v. Carolina Prod. Enter.*, 298 S.C. 23, 28-29, 378 S.E.2d 56, 58-59 (Ct. App. 1989); *see also East-Harding, East-Harding, Inc. v. Horace A. Piazza & Assoc.*, 91 S.W.3d 547, 551 (Ark. Ct. App. 2002) (same).

In addition, "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Laurens Emerg. Med. Spec. v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (emphasis added); *see also Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E. 231, 234 (1934) (finding "broad and comprehensive" language was insufficient to prove the contract relieved a party from its own negligence). In order for Superior and C&C to defeat Muhler's and Weather Shield's motions for summary judgment on the contractual indemnity issue, they have to meet the very high standard of eliminating any possibility that the contract language on which they rely can be read to limit indemnification to the indemnitor's own negligence. In other words, in order to prevail on their contract claims, Superior and C&C must demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contract claims as a matter of law.

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A. The Subcontract does not obligate Muhler to indemnify Superior for Superior's own wrong-doing.

The indemnity clause in the initial Subcontract between Muhler and Superior does not indemnify Superior for its own negligence. The Subcontract's indemnity provision is the form clause for AGC Document No. 600, Subcontract for Building Construction, August 1984 by the Associated General Contractors of America. Courts uniformly interpret this language as not providing indemnification for the indemnitee's own negligence. See, e.g., *Braegelmann v. Horizon Dev. Co.*, 371 N.W.2d 644, 646-47 (Minn. Ct. App. 1985) (interpreting the same operative language as not providing indemnification to the general contractor for its own negligence); *Mautz v. J.P. Patti Co.*, 688 A.2d 1088, 1092-1093 (N.J. Super. Ct. App. Div. 1997) (finding virtually identical language did not indemnify indemnitee for its own negligence but instead provided indemnification "only to the extent the [indemnitor's] negligence contributed to the loss"); *Cabo Constr., Inc. v. R.S. Clark Const., Inc.*, 227 S.W.3d 314, 317-18 (Tex. App. 2007) (finding same language did not expressly state that the subcontractor would indemnify the contractor for the contractor's own negligence); *Brown v. Boyer-Washington Blvd. Assoc.*, 856 P.2d 352, 355 (Utah 1993) (limiting similar indemnification language to damages caused in whole or in part by acts of the subcontractor); *MT Builders, LLC v. Fisher Roofing Inc.*, 197 P.3d 758, 765 (Ariz. Ct. App. 2008) (characterizing this form indemnity clause as "a 'narrow form' of indemnification" that "only covers the indemnitee's losses to the extent caused by the indemnitor or a person the indemnitor supervises or is responsible for," and explaining that this language creates "a comparative fault or negligence arrangement whereby the indemnitor's liability is limited 'to the extent' it and its supervisees were at fault");

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Frank, 527 N.W.2d at 81 (construing practically identical language to mean the subcontractor is liable to the general contractor only "to the extent of its own negligence but is not required to indemnify" the general contractor for the general contractor's own negligence); *Glendale Constr. Servs., Inc. v. Accurate Air Syst., Inc.*, 902 S.W.2d 536, 539 (Tex. Ct. App. 1995) (holding that nearly identical language does not indemnify the indemnitee for its own negligence); *Hagerman*, 741 N.E.2d at 393-394 (similar language in AIA standard construction form contract does not "clearly and unequivocally" provide coverage for indemnitee's own negligence).

Courts have held that the language "to the extent" in this indemnification clause means that the indemnifying party is liable to the indemnitee "to the extent of its own negligence but is not required to indemnify [the indemnitee] for [the indemnitee's] negligence." *Frank v. MSI Constr. Mgrs., Inc.*, 527 N.W.2d 79, 81 (Mich. Ct. App. 1995).

At the hearing, Superior presented a number of cases that it alleged supports its argument that the Subcontract indemnifies it for its own negligence. However, those cases contain language substantially dissimilar to Article 12.1 of the Subcontract which makes them of little use to Superior. In fact, the indemnification clause in the Florida case most heavily relied on by Superior, *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 S.2d 1072 (Fla. Dist. Ct. App. 2003), broadly provided indemnification "from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the work," 853 S.2d at 1076 (emphasis added), whereas the Subcontract only promised to indemnify Superior "from and against all claims, damages, loss and expenses, including but not limited to

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attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work." (Subcontract, ¶ 12.1) (emphasis added).

Unlike the provision at issue in *Camp, Dresser*, here indemnity is limited to the performance of Muhler's work, whether directly or through its own subcontractors.

As a result, I find that this provision does not clearly indicate intent by the parties to indemnify Superior for its own wrongdoing.

B. The 2007 Agreement does not obligate either Muhler or Weather Shield to indemnify Superior or C&C for their own wrong-doing.

Even though the 2007 Agreement contains arguably broader indemnification language than the Subcontract, it does not state clearly and unequivocally that either Muhler or Weather Shield agreed to indemnify Superior and C&C for their own negligence and/or wrong-doing.

To the extent that the provisions in the 2007 Agreement purport to indemnify Superior and C&C "unconditionally," they are unconscionably broad. See *Fisher v. Stevens*, 355 S.C. 290, 296, 584 S.E.2d 149, 152 (Cl. App. 2003) (holding that an overly broad indemnification provision would "offend notions of public policy"). Although *Fisher* involved a so-called exculpatory contract, or waiver, the reasoning applies equally here, where the phrase "unconditionally indemnify" is as objectionably broad, if not broader, as the phrase at issue in *Fisher*, which released "any person in any restricted area" from liability." *Id.*

Sections 11 and 12 of the 2007 Agreement simply do not clearly and unequivocally state that either Muhler or Weather Shield is agreeing to indemnify Superior and C&C for their own negligence. Although "formulaic language expressly stating that 'X indemnifies Y for Y's own negligence' is not mandatory," the agreement,

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however, is required to contain language "unquestionably showing the parties' intent to indemnify in the event of losses resulting from the indemnitee's negligence." *Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 271 P.3d 850, 854 (Wash. 2012) (emphasis added).

Here, as was the case in *Snohomish County*, the indemnity provision "does not tell a court 'clearly and unequivocally' that the parties considered the effect of the negligence of the indemnitee and intended to indemnify for the indemnitee's own negligence." 271 P.3d at 862. Indemnity provisions promising to indemnify "from and against any and all claims," or where the indemnitor assumed "all responsibility for claims asserted by any person whatever," are "general terms" that are "insufficiently clear and unequivocal," to provide indemnification for the indemnitee's own negligence. *Cox Cable Corp. v. Gulf Power Co.*, 591 So.2d 627, 629 (Fla. 1992).

The use of the term "unconditionally" does not, on its face, indicate that either Muhler or Weather Shield intended to indemnify Superior and C&C for their own negligence. At best, the inclusion of the term "unconditionally" in an indemnification provision that also contains restrictions renders that provision ambiguous, which is in direct contrast of clear and equivocal. Strictly construing the 2007 Agreement, I find that neither Section 11 nor Section 12 covers Superior and C&C for their own negligence.

The Court therefore grants Muhler's and Weather Shield's motions to the extent that they assert that neither the Subcontract nor the 2007 Agreement indemnifies Superior and C&C for their own negligence.

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C. C&C is not entitled to equitable indemnity from Muhler or Weather Shield and JDavis not entitled to summary judgment against C&C or Superior.

Superior has withdrawn its cross-claim for equitable indemnity against both Muhler and Weather Shield. However, C&C maintains that it is entitled to equitable indemnity from both Muhler and Weather Shield. Regardless of whether C&C can establish a special relationship with Weather Shield, C&C is not entitled to equitable indemnity from either Muhler or Weather Shield because there is an abundance of evidence that actions by C&C and/or its direct agents actively contributed to the problems with the windows and doors that the Plaintiffs alleged.

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. [citation omitted] If the second party is also at fault, he comes to court without equity and has no right to indemnity. The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999) (emphasis added).

Despite its protestations otherwise, C&C's fault goes beyond passive fault or a failure to discover latent defects. As noted above and explained in more detail below, C&C hired the architect, JDavis, the general contractor, Superior, and waterproofing experts, SKA and Metro Waterproofing. There is substantial evidence that actions by Superior, JDavis, SKA and Metro Waterproofing contributed to the water intrusion issues, and are responsible for damage caused to the windows and doors themselves.

C&C engaged Richard Andrews of Estates Management to serve as its "owner's representative." Mr. Andrews described his role as "working with the contractors,

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helping them to understand the project, working with architects to ... get projects on the plans and specs and get the products spaced The owner's rep has to make sure that the contractor has the information they need to build the job with ..." In other words, as Mr. Andrews described it, he was a conduit for information from the architect to the contractor. He and Theresa Hodges, another Estates Management employee, worked directly with JDavis and Superior to make sure they had what they "needed to build the job." Mr. Andrews testified that JDavis, SKA and Estates Management were involved in coming up with the design for the installation of the Weather Shield windows on the project. Additionally, Mr. Andrews confirmed that he performed "fairly thorough" walk-throughs of the building prior to processing pay applications.

Mr. Glick reviewed the allegations contained in the Plaintiffs' Amended Complaint and opined that each alleged defect was the result of design deficiencies, contract administration and/or construction. Mr. Glick opined that the architect and general contractor missed numerous opportunities to see and correct obvious issues with the Subject Property, including the windows. "Those are contractual obligations and the contractor didn't do things right and that's well documented and the architect didn't catch things that were wrong and that's documented because we wouldn't be here today. If no one violated the standard of care, we wouldn't be here today." Mr. Glick testified that installation of the Weather Shield windows into a barrier system, as opposed to a drainable system, was not only a violation of the Weather Shield installation instructions, but also a violation of code.

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In defense of his own company, Superior, Mr. Clardy testified that the problems lay not so much with Superior's failure to coordinate the work properly but, instead, pointed the finger at the architect and developer:

Majority I think on this project was in a failure of the project to be designed correctly and the contract documents to be complete and clearly show how the project was to be properly constructed That's the design issue I think that performance wound up being significantly integrated to the design problem to the point that it did have a significant ripple-down effect I pretty much agree that it is a step-down process. If the owner and architect don't provide adequate documentation to the contractor, the contractor doesn't provide adequate documentation to the subcontractor, then it's going to be exactly what we got here.

Mr. Lies testified that, during the testing process, they observed water penetration between the window and the buck, "[q]uite often," and attributed that "[p]ossibly due to the waterproofing." JDavis, SKA, and Metro Waterproofing, all hired directly by C&C, were responsible for waterproofing.

Given the substantial evidence by witness testimony, C&C is partially at fault for the conditions the Plaintiffs alleged regarding the windows and doors. C&C therefore comes to the court with unclean hands and is not entitled to equitable relief. Therefore, I find as a matter of law that C&C is not entitled to equitable indemnification.

As to the motion for summary judgment filed by JDavis, I find that the deposition testimony of Mr. Glick alone shows that there exist genuine issues of material facts that would make the granting of summary judgment improper.

Conclusion

Muhler's and Weather Shield's motions for partial summary judgment are GRANTED to the extent that they seek to have the Court find as a matter of law that neither the Subcontract nor the 2007 Agreement clearly and unequivocally provides

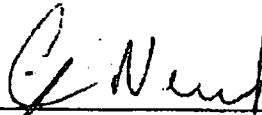
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indemnification for Superior's and/or C&C's own negligence. Muhler's and Weather Shield's motions for summary judgment are GRANTED to the extent that they seek to have the Court find that C&C is not entitled to equitable indemnity. Except to the extent specifically granted herein, all other motions for summary judgment filed by Muhler and Weather Shield are hereby DENIED.

The motions for summary judgment filed by Superior against Muhler and Weather Shield are hereby DENIED.

The motions for summary judgment filed by JDavis against C&C and Superior are hereby DENIED.

AND IT IS SO ORDERED.



Clifton Newman
Presiding Judge

Columbia, South Carolina

September 25, 2014

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Concord and Cumberland Horizontal Property
Regime, et. al.,

Civil Action No. 2010-CP-10-2271

Plaintiffs,
vs.

**ORDER DENYING SUPERIOR
CONSTRUCTION CORPORATION'S
MOTION FOR RECONSIDERATION**

Concord & Cumberland, LLC, et. al.,

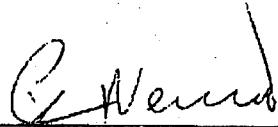
Defendants.

THIS MATTER comes before the Court on a Motion for Reconsideration filed by Superior Construction Corporation. The original Order of this Court granted Partial Summary Judgment to The Muhler Company, Inc. on the claim by Superior Construction Company for indemnity.

Having fully considered the submissions and arguments of counsel, this Court finds no error of law or facts in its original Order. The motion should therefore be denied.

IT IS THEREFORE ORDERED that the Motion for Reconsideration is hereby DENIED.

AND IT IS SO ORDERED.


Clifton Newman
Presiding Judge

Columbia, South Carolina
January 12, 2016

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

FILED
2016 JAN 21 PM 2:47
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Concord and Cumberland Horizontal Property Regime, *And* Thomas R. Mather, Betty Y. Segal, Signature Charleston, LLC and Wade Robinson, James C. Kirkpatrick, Paul A. Brim, Fred Rappaport and Joyce Rappaport, Thomas R. Debnam, as Trustee of the Trust Agreement of Thomas R. Debnam, Pamela L. Vaughn, 304 Concord & Cumberland, LLC, 402 Concord & Cumberland, LLC, Avant & Associates, LLC and Oakland Holding, LLC, Mattison J. MacGillivray and Teresa E. MacGillivray, Pamela Queen, Stuart Reeves, Plaintiffs,

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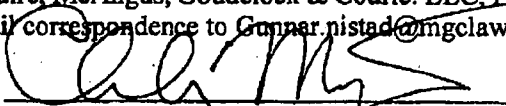
Superior Construction Corporation.....APPELLANT,

v.

The Muhler Company, Inc.....RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on The Muhler Company, Inc. by depositing a copy of it in the United States mail, postage prepaid, on January 13, 2016, addressed to its attorney of record, Gunnar Nistad, Esquire, McAngus, Goudelock & Courie, LLC, P.O. Box 650007, Mt. Pleasant, SC 29465 and by email correspondence to Gunnar.nistad@mgclaw.com



Christopher A. Majure, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
cmajure@murphygrantland.com
Attorneys for Appellant

Columbia, South Carolina
January 14, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

Concord and Cumberland Horizontal Property
Regime,

And

Thomas R. Mather,

And

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And

Signature Charleston, LLC and Wade
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And

Paul A. Brim,

And

Fred Rappaport and Joyce Rappaport,

And

Thomas R. Debnam, as Trustee of the Trust
Agreement of Thomas R. Debnam,

And

Pamela L. Vaughn,

And

304 Concord & Cumberland, LLC,

And

402 Concord & Cumberland, LLC,

And

Avant & Associates, LLC and Oakland
Holding, LLC,

And

Mattison J. MacGillivray and

Teresa E. MacGillivray,

And

Pamela Queen,

And

Stuart Reeves,

Plaintiffs,

v.

Concord & Cumberland, LLC, Concord &

CIVIL ACTION NO: 2010-CP-10-2071

FILED
2016 JAN 25 PM 12:08
CLIE J. ARMSTRONG
CLERK OF COURT

CONSENT ORDER TO STAY TRIAL
PENDING APPEAL

W 187

Cumberland Manager, LLC, Estates, Inc.,
Estates Management Company,
Superior Construction Corporation, Weather
Shield Mfg., Inc., The Muhler Company, Inc.,
In The Wind, Inc., J. Davis Architects, PLLC,
Wall Craft Construction, Inc., Weatherholtz
Masonry, LLC, Philip Gasque d/b/a Philip
Gasque Construction, Architectural Stone
Company, Southern Mechanical, Inc., Greg
Gasque Metal Works, Keating Roofing and
Sheet Metal, Inc., Lowcountry Tile
Contractors, Inc., Safeco Insurance Company
of America, Companion Property and Casualty
of America, Companion Property and Casualty
Group, Watts Builders, LLC, Elias Duffy d/b/a
Masonry Pros, Renaissance Steel, LLC,
American Drywall Construction, Inc., Turner
Electrical of SC, Inc., and Metro
Waterproofing, Inc.,

Defendants.

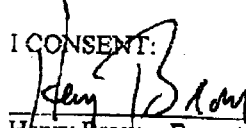
This matter comes before me upon Consent Motion of all the remaining parties of the case, namely Weather Shield MFG, Inc., The Muhler Company Inc., Superior Construction Corporation, and Safeco Insurance Company of America ("the Remaining Parties") to stay the trial of the case scheduled for January 25, 2016. It has reported to this Court that Weather Shield and the Developer, Concord & Cumberland, LLC ("C&C, LLC") have settled all remaining claims between them, and accordingly C&C, LLC is now entirely out of the case, pending filing of the required Stipulation of Dismissal. It is also noted that on January 14, 2016 Superior served a Notice of Appeal pertaining to this Court's Order of October 6, 2014 granting, *enter alia*, partial summary judgment to Muhler Company. Therefore the case is automatically stayed as to the claims by and between Superior and Muhler Company, and it remains to the discretion of this Court as to whether the remaining claims of the case should proceed to trial.

currently scheduled for January 25, 2016. The Remaining Parties have moved for a stay or continuance of the trial pending the outcome of the appeal.

The Remaining Parties represent to the Court that all of the remaining claims among them not subject to the appeal will entail substantially, if not precisely, all of the exact same witnesses and exhibits as the claims subject to the appeal. It is also noted that the Remaining Parties have identified in their various pre-trial trial briefs at least 42 witnesses to be called to testify and at least 775 trial exhibits to be presented in the trial of this case. At least nine of these witnesses are identified as experts subject to compensation for their appearance. There are also cross claims between Muhler and Weather Shield whose disposition is predicated in whole or part upon a possible finding of liability towards Superior. Half of that inquiry is subject to the stay of the appeal, while the whole is required for adjudication. Under the present circumstances, the Court finds it in the compelling interest of judicial economy and the avoidance of duplicative expense of the Remaining Parties to avoid the possible duplication of a long and costly trial, and therefore IT IS ORDERED that the trial of this case is stayed pending the resolution Superior's appeal.

The Honorable Judge Clifton Newman

I CONSENT:



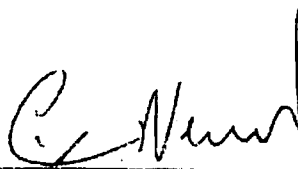
Henry Brown, Esq., Attorney for Concord & Cumberland, LLC

Settlement with Weather Shield is preserved

I CONSENT:

currently scheduled for January 25, 2016. The Remaining Parties have moved for a stay or continuance of the trial pending the outcome of the appeal.

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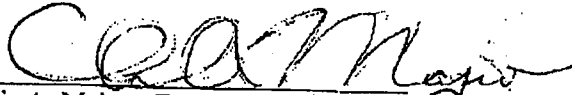


The Honorable Judge Clifton Newman

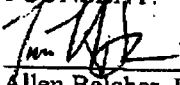
I CONSENT:

Henry Brown, Esq., Attorney for Concord & Cumberland, LLC

I CONSENT:


Chris A. Majure, Esq., Attorney for Superior Construction Corp.

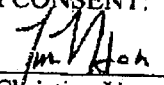
I CONSENT:

 for Chris Majure (with consent)
Allen Belcher, Esq., Attorney for Safeco Ins. Co. of America and Superior Construction Corp.

I CONSENT:

 for Chris Majure (with consent)
Gunnar Nistad, Esq., Attorney for The Muhler Company, Inc.

I CONSENT:

 for Chris Majure (with consent)
Christine Varnado, Esq., Attorney for Weathershield MFG, Inc.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,

Plaintiff,

v.

CONCORD & CUMBERLAND, LLC;
CONCORD & CUMBERLAND
MANAGER, LLC; ESTATES, INC.;
SUPERIOR CONSTRUCTION
CORPORATION; WEATHER SHIELD
MFG., INC.; and J. DAVIS
ARCHITECTS, PLLC,

Defendants.

IN COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-10-2271

SUMMONS

(Construction Defect Claims)

(Declaratory Judgment)

(Negligence)

(Breach of Express and Implied Warranties)

(Negligent Misrepresentation)

(Breach of Fiduciary Duties)

(Accounting)

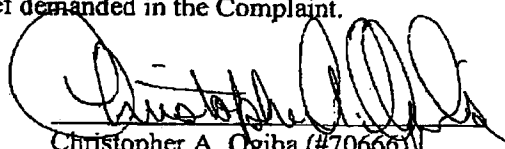
(Unfair Trade Practices)

(Alter-Ego/Piercing the Corporate Veil)

Jury Trial Demanded

TO THE DEFENDANTS ABOVE NAMED:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers, Moore & Van Allen, PLLC, at their offices at 40 Calhoun Street, Suite 300, Charleston, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.


Christopher A. Ogiba (#70666)
Moore & Van Allen, PLLC
40 Calhoun Street, Suite 300
Charleston, SC 29401
PH. (843) 579-7066
FAX (843) 579-8749

ATTORNEYS FOR PLAINTIFF

CHARLESTON, SC

March 19, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-10- 2271

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,)

Plaintiff,)

v.)

CONCORD & CUMBERLAND, LLC;)
CONCORD & CUMBERLAND)
MANAGER, LLC; ESTATES, INC.;)
SUPERIOR CONSTRUCTION)
CORPORATION; WEATHER SHIELD,)
MFG., INC.; and J. DAVIS)
ARCHITECTS, PLLC,)

Defendants.)

COMPLAINT

(Jury Trial Demanded)

FILED
2010 MAR 19 AM 9:51
JULIE J. ALBERTSON
CLERK OF COURT
BY

Concord and Cumberland Horizontal Property Regime ("Plaintiff"), by and through its undersigned attorneys, complaining of the Defendants states and alleges as follows:

1. Plaintiff is a non-profit corporation and horizontal property regime organized and existing under the laws of South Carolina, including the South Carolina Nonprofit Corporation Act (S.C. Code §§ 33-31-101 *et seq.*) and the South Carolina Horizontal Property Act (S.C. Code §§ 27-31-10 *et seq.*).
2. Plaintiff is comprised of the owners of all of the condominium units located at 175 Concord Street, Charleston, Charleston County, South Carolina, known as the Concord & Cumberland Condominiums ("Concord & Cumberland"), and is governed by a Board of Directors (the "Board").
3. Concord & Cumberland is a four story building containing twenty-seven condominium units.
4. The Board is composed of five duly elected members of Plaintiff.

5. At a duly held special meeting of Plaintiff held on January 16, 2010, the Concord & Cumberland unit owners voted, by over 84% percent of Plaintiff's ownership interest, to authorize the Board to pursue claims relative to water intrusion and other construction defects within Concord & Cumberland, including, but not limited to, the building's common elements and limited common elements (hereinafter, the "Vote").

6. The Board is bringing this lawsuit on behalf of Plaintiff, pursuant to the Vote and its legal authority.

7. In addition to its legally defined obligations, the duties and responsibilities of the Plaintiff and the Board are set forth in the Master Deed of the Concord & Cumberland Horizontal Property Regime dated October 18, 2007 and filed in Book U641, Page 739 of the office of the Register Mesne Conveyance ("RMC") for Charleston County, South Carolina (the "Master Deed"). The Master Deed is incorporated herein by reference.

8. Plaintiff is charged with maintaining the common elements and limited common elements and with enforcing all warranties relating to each.

9. Defendant Concord & Cumberland, LLC is a limited liability company organized and existing under the laws of South Carolina with its principal place of business in Charleston County. Upon information and belief, Concord & Cumberland, LLC was organized and incorporated by Estates, Inc. and its agents, directors, and shareholders for the sole purpose of developing Concord & Cumberland.

10. Defendant Concord & Cumberland Manager, LLC, is a limited liability company organized and existing under South Carolina law and does business in Charleston County. Upon information and belief, Concord & Cumberland Manager, LLC is a member and the manager of Concord & Cumberland, LLC.

11. Defendant Estates, Inc. ("Estates") is a corporation organized and existing under South Carolina law and does business in Charleston County. Upon information and belief, Concord & Cumberland, LLC functioned as Estates' alter ego in the development of Concord & Cumberland, and Estates and its officers, directors and shareholders exerted complete control over Concord & Cumberland, LLC in the development of Concord & Cumberland.

12. Upon information and belief, Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, and Estates (hereinafter collectively referred to as "Developers") collectively developed Concord & Cumberland and sold the individual condominium units contained in Concord & Cumberland.

13. Prior to, during, and after construction, the Developers marketed Concord & Cumberland as a luxury condominium development of the highest quality and sold the individual condominium units to members of Plaintiff and others.

14. The Developers' representatives drafted and filed the Master Deed dated October 18, 2007 with the RMC Office, and all amendments and exhibits thereto.

15. From the time Plaintiff was formed and up until the late fall of 2008, the Developers controlled the Board.

16. Defendant Superior Construction Corporation ("Superior") is a corporation organized and existing under the laws of North Carolina and is registered to do business in South Carolina and does business in Charleston County. Upon information and belief, Superior served as the general contractor for the construction of Concord & Cumberland pursuant to the terms of its contract with the Developers and agreed to construct the project in accordance with the applicable contract documents, including, but not limited to, the plans and

specifications prepared by Defendant J. Davis Architects, PLLC ("J. Davis").

17. Defendant J. Davis is a professional limited liability company organized under North Carolina law and is registered to do business in South Carolina and does business in Charleston County. Upon information and belief, J. Davis, through its contract with the Developers, served as the architect for the design of Concord & Cumberland and agreed to provide professional architectural services for the design of Concord & Cumberland, specifically including, but not limited to, the issuance of the plans and specifications for the construction of Concord & Cumberland. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, J. Davis agreed to make periodic visits to the project during construction to observe whether the construction was being completed in accordance with the plans and specifications and all applicable building codes.

18. Weather Shield, Mfg., Inc. ("Weather Shield") is a corporation organized and existing under the laws of Wisconsin and is authorized to do, and in fact does, business in South Carolina and Charleston County. At all times pertinent to this lawsuit, Weather Shield was engaged in the business of manufacturing and selling windows, window systems, and exterior doors for use in construction projects, including in South Carolina. Weather Shield manufactured and sold the windows, window systems, and exterior doors that were installed at Concord & Cumberland (the "products").

19. Beginning in late 2008 and continuing to the present time, Plaintiff and its members experienced numerous instances of water intrusion into several of the condominium units, the common elements, and the limited common elements at Concord & Cumberland.

20. Immediately upon receiving notice of the water intrusion, the Board tendered demands upon the Developers and, through them, upon the remaining Defendants, to investigate and cure the defects that caused the water intrusion at Concord & Cumberland.

21. In the seventeen months since Plaintiff first tendered these demands, Defendants have failed to remedy the defects. As a result, the water intrusion through and into the common elements, limited common elements, and individual condominium units has continued unabated.

22. Despite the fact that the construction of Concord & Cumberland was not complete and in light of the fact that the defects had not been remedied, pursuant to its obligations under the Master Deed, Plaintiff retained the services of several qualified experts to investigate the causes of the water intrusion and to identify any and all defects in the building at Concord & Cumberland.

23. These experts' findings concluded that the water damage to common elements, limited common elements, and individual condominium units is a result of defects and deficiencies in the design and construction of Concord & Cumberland, specifically including, but not limited to, the following:

(a) Stucco System

- (i) lack of weep holes at window heads;
- (ii) lack of through-wall flashing at window heads;
- (iii) lack of a functional water management system;
- (iv) lack of proper slope at the synthetic stucco horizontal trim;
- (v) inconsistent and improper variance of system thickness;
- (vi) lack of proper sealant joints at stucco and window intersections; and

- (vii) failure of installation methods to comply with building code and industry standards.

(b) Windows

- (i) various failures to meet industry standards and field water tests showing water intrusion through the window units themselves;
- (ii) lack of proper spacing for effective sealant joints with adjacent dissimilar materials;
- (iii) negative slope of pan flashing;
- (iv) negative slope of exterior sills;
- (v) improper flashing detail, including at nailing fins;
- (vi) lack of window mullions caps;
- (vii) lack of nailing fins at various locations; and
- (viii) lack of required fasteners.

(c) Wall Sheathing

- (i) improper installation of sheathing around window openings;
- (ii) lack of proper sheathing fasteners; and
- (iii) improper installation of sheathing fasteners.

(d) Brick

- (i) lack of functioning weep holes;
- (ii) lack of through-wall flashing;
- (iii) improper gap for sealant joints;
- (iv) improper slope at brick sills;
- (v) lack of brick ties;
- (vi) lack of end dams in through-wall flashing at brick sill flashing; and
- (vii) lack of proper weep holes at brick sills.

- (e) Balcony Soffits
 - (i) handrail posts penetrating the waterproof membrane without proper detailing; and
 - (ii) lack of vertical flashing leg tying balcony brick walls and its weep holes to the drainage mat under the tile.
- (f) Roof
 - (i) ripped or torn bituminous base flashings;
 - (ii) rusting fasteners;
 - (iii) bituminous base flashing failure at roof mounted equipment curbs;
 - (iv) holes in top of prefinished metal coping;
 - (v) improper fasteners in copper metal coping;
 - (vi) sealant failures at various locations;
 - (vii) improper installation of prefinished metal coping;
 - (viii) scratches in prefinished metal coping;
 - (ix) masonry joint failure at stone coping;
 - (x) excessive granule loss in the modified bitumen membrane surface ply;
 - (xi) improper bituminous membrane stripping of sheet metal edge metal;
 - (xii) improper mounting of HVAC lines and conduit supports;
 - (xiii) fasteners improperly penetrating roof membrane;
 - (xiv) opening in lead soil stack flashing;
 - (xv) improper anchoring of HVAC equipment; and
 - (xvi) improper waterproofing at HVAC duct locations.
- (g) Miscellaneous
 - (i) lack of a drop detail allowing water to roll under the balconies into the soffits;
 - (ii) lack of proper sealant at rail post penetrations into the tile balconies;

- (iii) lack of weeps at brick and stucco walls at the first floor cornice/stone intersection;
- (iv) lack of proper flashing at floor/wall intersections and lack of drip lip at all balconies;

24. Plaintiff is informed and believes that various components of the building, including those detailed above, are not in compliance with the building codes and standards which were applicable to this project at the time of design and construction and must be replaced or remedied to comply with current building codes and standards applicable to this project.

25. The Plaintiff has been and will continue to be proximately damaged by the design and construction defects existing at Concord & Cumberland.

26. The defects detailed above have caused substantial consequential and resulting damage to various non-defective components of Concord & Cumberland's common elements, limited common elements, and individual condominium owners' units, in the form of, *inter alia*, water damage, sheathing rot and failure, rusted/failing fasteners and framing members, and damage to insulation, wood components, drywall, and non-defective elements of the stucco, brick, window, roof, soffit, and water management systems.

27. Due to the design and construction defects and resulting property damage, Plaintiff has, and in the future, will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies, and to implement the remediation plan to the units, the limited common elements, and to the common elements of the building.

28. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the

interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

29. This Court has jurisdiction over the parties and subject matter of this action and venue is proper before this Court.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

30. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 29.

31. Plaintiff brings this cause of action against Defendants pursuant to section 15-53-10, et seq., of the South Carolina Code seeking a declaration that certain provisions of the Master Deed are void and unenforceable against Plaintiff.

32. The Master Deed is dated October 18, 2007, and is signed by Janet K. Safran, authorized agent of Concord & Cumberland Manager, LLC, serving as the manager of Concord and Cumberland, LLC.

33. Exhibit E to the Master Deed is the Bylaws of the Concord & Cumberland Horizontal Property Regime ("Bylaws").

34. No provision of the Master Deed, its exhibits, or its amendments were subject to any arms-length negotiations between the Developers and Plaintiff or the owners, nor was any such provision inserted at the request or insistence of Plaintiff or the owners.

35. The Master Deed, the exhibits to the Master Deed, and the amendments to the Master Deed collectively contain various clauses, provisions, and terms which are oppressive, one-sided, unconscionable, overreaching, and contrary to the law and public policy of South Carolina. Plaintiff seeks a declaratory judgment from this Court that the terms of certain

provisions of these documents are void, invalid, and unenforceable, including, but not limited to, those provisions concerning the purported disclaimer of warranty of habitability, mandatory alternative dispute resolution provisions, and the required vote threshold and approval to initiate litigation.

Warranty of Habitability

36. Section 3.6 of the Master Deed states:

FOR A PERIOD OF ONE (1) YEAR FROM THE DATE OF COMPLETION OF CONSTRUCTION (BEING THE LATER OF SUBSTANTIAL COMPLETION UNDER THE CONSTRUCTION CONTRACT, OR THE DATE A CERTIFICATE OF OCCUPANCY IS ISSUED THEREFOR), THE DEVELOPER SHALL AT NO COST TO THE ASSOCIATION REPAIR OR REPLACE (IN THE DEVELOPER'S DISCRETION) ANY PORTIONS OF THE COMMON ELEMENTS (EXCEPT FIXTURES, ACCESSORIES AND APPLIANCES COVERED BY SEPARATE WARRANTIES OF THEIR RESPECTIVE MANUFACTURERS) WHICH ARE DEFECTIVE AS TO MATERIALS OR WORKMANSHIP. THIS LIMITED WARRANTY IS IN PLACE OF ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AND THE DEVELOPER DISCLAIMS ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. TO THE FULLEST EXTENT PERMITTED BY LAW, THE LIABILITY OF THE DEVELOPER SHALL BE LIMITED TO SUCH REPAIR OR REPLACEMENT AND THE DEVELOPER SHALL NOT BE LIABLE FOR DAMAGES OF ANY NATURE, WHETHER DIRECT, INDIRECT, SPECIAL OR CONSEQUENTIAL, REGARDLESS OF WHETHER SUCH DAMAGES ARE CLAIMED TO ARISE OUT OF THE LAW OF CONTRACT, TORT OR OTHERWISE, OR PURSUANT TO STATUTE OR ADMINISTRATIVE REGULATION. Each Owner in accepting a deed from the Developer or any other party to a Unit, expressly acknowledges and agrees that this Section establishes the sole liability of the Developer to the Association and the Owners related to defects in the Common Elements and the remedies available with regard thereto. At the end of the one (1) year warranty period referred to hereinabove in this Section 3.6, the Developer will assign to the Association in writing all of its rights, claims, causes of action and demands which it has or which may thereafter accrue against all other people who may be responsible for the design and/or construction of the Common Elements.

37. Section 3.6 was inserted in the Master Deed by the Developers for the sole benefit of the Developers.

38. The Defendants did not specifically bargain for Section 3.6 of the Master Deed with Plaintiff or with any of the condominium unit owners or any of the purchasers of the condominium units.

39. Section 3.6 of the Master Deed was not conspicuous to Plaintiff or to prospective purchasers of the condominiums at the time they negotiated their contracts to purchase condominium units from the Developers.

40. Neither Plaintiff nor the owners of the condominium units were aware of the disclaimer of the warranty of habitability language contained in Section 3.6 of the Master Deed.

41. By inserting Section 3.6 into the Master Deed, the Developers sought to insulate themselves from liability for design and construction defects for which the Developers and other Defendants are liable under the laws of South Carolina.

42. The only parties to benefit from the insertion of Section 3.6 into the Master Deed are the Developers of Concord & Cumberland and the other Defendants.

43. Section 3.6 of the Master Deed is oppressive, one-sided, unconscionable, overreaching, and contrary to the law and public policy of South Carolina.

Mandatory Alternative Dispute Resolution Procedures

44. Article XIV of the Master Deed is entitled "Alternative Dispute Resolution."

45. Section 14.1 of Article XIV states:

The Developer, Association, and Owners (collectively, the "Parties" and singularly, a "Party"), agree that any dispute, controversy or claim among them, including counterclaims and crossclaims, whether based upon contract, tort, statute, common law or otherwise (collectively, a "Dispute"), arising from or relating directly or indirectly to the Regime Documents or the Project (but not

matters applicable solely to the Master Association or the Master Covenants), including, without limitation, Disputes relating to the design and construction of the Project, or any portion thereof, or interpretation, application or enforcement of the Regime Documents, except for "Exempt Claims" under Section 14.2, are subject to arbitration, as defined by the South Carolina Arbitration Act and the Federal Arbitration Act, in lieu of civil proceedings and governed by the procedures set forth in Section 14.3.

46. Section 14.2 of the Master Deed purports to identify categories of claims that are exempt from the alternative dispute resolution requirements dictated by Article XIV as a whole.

47. Section 14.3 of the Master Deed purports to prescribe the manner in which non-exempt claims against "Parties" can be made.

48. The Defendants did not specifically bargain for Article XIV of the Master Deed with Plaintiff or with any of the condominium unit owners or any of the purchasers of the condominium units.

49. Neither Plaintiff nor the condominium unit owners expressly or impliedly assented (by vote or otherwise) to the inclusion of Article XIV into the Master Deed.

50. The Master Deed does not constitute a contract or agreement by or between Plaintiff or the condominium unit owners and any of the Defendants.

51. By inserting Article XIV into the Master Deed without Plaintiff's or the owners' express or implied assent, the Developers sought to unilaterally restrict the mode and method by which Plaintiff could pursue claims against the Developers and other parties.

52. While the Master Deed specifically alleges the applicability of the South Carolina Uniform Arbitration Act, because no written agreement or written contract existed by or between Plaintiff or the condominium unit owners and any of the Defendants to refer claims to arbitration, the South Carolina Uniform Arbitration Act does not compel arbitration

of any claims contemplated in Article XIV of the Master Deed, including, but not limited to, those claims asserted herein.

53. Because Plaintiff did not consent to Article XIV of the Master Deed and because the South Carolina Uniform Arbitration Act does not render Article XIV of the Master Deed valid and enforceable, the mandatory alternative dispute resolution provisions of Article XIV should be stricken from the Master Deed.

Required Vote for Litigation

54. Section 14.6 of the Master Deed states, *inter alia*:

Litigation. No judicial or administrative proceeding with an amount in controversy exceeding \$25,000.00 will be commenced or prosecuted by the Association unless approved by seventy-five percent 75% [sic] or more of the votes of the entire Association, by Referendum or at a duly held meeting of the Members called for the purpose of approving the proceeding, which percentage will also constitute the quorum required for any such meeting....This Section will not be amended unless the amendment is approved by both the Developer and the requisite percentage of votes of Members of the Association, and pursuant to the same procedures, necessary to institute proceedings as provided above....

55. Section 14.6 of the Master Deed places oppressive and unfair restrictions on Plaintiff's ability to initiate and pursue litigation against any entity, including against the Developers and the other Defendants.

56. The requirement contained in Section 14.6 of the Master Deed that the "Developer" must approve any amendment to the provision is similarly oppressive and unfair and evinces the intent of the Developers to improperly restrict and forestall any litigation against the Developers.

57. The Developers should not retain control over the adoption of amendments to the Master Deed. Amendments to the Master Deed should be wholly within the control of Plaintiff, the Board, and the condominium unit owners.

58. While Plaintiff secured a vote for the present litigation that surpassed the requirements contained in Section 14.6, the authorization of future necessary litigation is in jeopardy and is likely to require Plaintiff to seek judicial relief under Section 33-31-160 of the South Carolina Nonprofit Corporation Act.

59. Section 14.6 of the Master Deed is oppressive, one sided, unconscionable, overreaching, and contrary to the law and public policy of South Carolina.

REQUESTED DECLARATIONS

60. The Plaintiff requests that the Court declare Article XIV and Sections 3.6 and 14.6 of the Master Deed to be invalid and unenforceable under the laws of South Carolina and should be struck, *in toto*, from the Master Deed.

61. Alternatively, as to Sections 3.6 and 14.6 of the Master Deed, Plaintiff requests the Court to declare that:

- (a) the portions of Section 3.6 of the Master Deed purporting to disclaim the implied warranty of habitability and the portion purporting to limit the liability of the developer to the cost to repair and replace defective work are invalid for such purposes and unenforceable under the laws of South Carolina; and
- (b) Section 14.6 of Master Deed should be amended to require a two-thirds ownership vote of the Association to authorize litigation and the provision requiring the Developers' consent to any amendment to Section 14.6 of the Master Deed be stricken from the provision.

62. The Plaintiff requests that Article XIV of the Master Deed be declared inapplicable to the claims of Plaintiff and/or unenforceable and invalid under the laws of South Carolina.

63. The Plaintiff requests that Section 14.3 of the Master Deed be declared inapplicable to the claims of Plaintiff and/or invalid and unenforceable under the laws of South Carolina.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty of Habitability as to the Developers)

64. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 63.

65. The Developers provided an implied warranty of habitability under South Carolina law to Plaintiff and to the purchasers and owners of the Concord & Cumberland condominium units by controlling the design and ultimate cost of construction, by hiring Superior as the general contractor to control the means and methods of construction, offering the units for sale to the public, and entering into contracts of sale.

66. The attempts by the Developers to disclaim the warranty of habitability are void and unenforceable under the law of South Carolina as interpreted by the South Carolina Supreme Court in that the purported disclaimer was not conspicuous and was not specifically bargained for with Plaintiff or with the individual condominium unit owners or purchasers.

67. The numerous design and construction defects and resulting property damage to the individual condominium units, the common elements, and the limited common elements of Concord & Cumberland constitute a breach of the warranty of habitability under the laws of South Carolina.

68. Due to the design and construction defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common areas, and the common areas of the building.

69. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

70. Plaintiff is entitled to a judgment against the Developers in an amount to be proven at trial for all damages proximately caused by the Developers' breach of the warranty of habitability.

FOR A THIRD CAUSE OF ACTION
(Breach of Fiduciary Duty as to the Developers)

71. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 70.

72. During the time that the Developers controlled the actions of the Board for the Plaintiff, the Developers owed the Plaintiff a fiduciary duty to place the interests of the Plaintiff above the interests of the Developers. This fiduciary duty included a duty to conduct a good faith investigation of all possible design and construction deficiencies at Concord & Cumberland without regard to whether the Developers were ultimately liable for all damages arising from the deficiencies in design and construction.

73. The Developers also owed a non-delegable duty to the Plaintiff to ensure that all of the common elements and limited common elements of Concord & Cumberland were either in good repair and in compliance with all applicable building codes or that sufficient funds had been provided to Plaintiff by the Developers to make any necessary repairs at the time of transition of control from the Board by the Developers to the owners of the Concord & Cumberland condominium units.

74. As of the date of transition of control of the Board from the Developers to the owners of the Concord & Cumberland condominium units, the Developers knew that the construction and design defects and deficiencies in the common elements, limited common elements, and other components of Concord & Cumberland had caused and would in the future cause property damage to the common elements, the limited common elements, and the units and personal property of the condominium unit owners.

75. The Developers failed to make the needed repairs to the common elements, limited common elements, and other building components before transition of control of the Board from the Developers to the owners of the Concord & Cumberland condominium units and failed to mitigate continuing damage to Concord & Cumberland and the Plaintiff.

76. The Developers failed to adequately fund Plaintiff so that it could make the necessary repairs.

77. By failing to repair the common elements, limited common elements, and other building components and by failing to properly fund Plaintiff for the purpose of making such repairs, the Developers breached their fiduciary duties and other non-delegable duties owed to Plaintiff.

78. As a proximate and direct result of the Developers' breach of their fiduciary duties, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and the common elements of the building.

79. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

80. The Plaintiff is entitled to a judgment against the Developers for the breach of their fiduciary and other non-delegable duties in an amount to be proven at trial.

FOR A FOURTH CAUSE OF ACTION
(Negligence as to the Developers)

81. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 80.

82. As the developers of Concord & Cumberland, the Developers owed a duty of due care in overseeing the construction, management, and operation of Concord & Cumberland to Plaintiff and to individual condominium unit owners and purchasers.

83. The Developers breached the duty of due care they owed to Plaintiff through one or more of the following particulars:

- (a) by failing to properly select the architect, general contractor, and materials used in the construction of Concord & Cumberland;
- (b) by failing to properly oversee the design and construction, including the selection of subcontractors, of Concord & Cumberland when they planned to sell the condominium units to members of the public for profit;
- (c) by failing to properly and prudently fund and effect repairs to the common elements, limited common elements, and individual units of Concord & Cumberland while they were in control of Plaintiff;
- (d) by failing to properly and prudently fund Plaintiff before transition of control of the Board to the individual condominium unit owners; and
- (e) by engaging in self-dealing and self-interested transactions while allowing the defects and resulting damage at Concord & Cumberland to continue unabated.

84. The negligent acts and omissions of the Developers were the proximate causes of construction and design deficiencies which have resulted in property damage and financial damages to Plaintiff.

85. Due to the design and construction defects and resulting property damage caused by the Developers' negligence, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and to the common elements of the building.

86. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

87. As a result of the negligence of the Developers, the Plaintiff is entitled to a judgment against said Defendants in an amount to be determined at the trial of this case.

FOR A FIFTH CAUSE OF ACTION
(Accounting as to the Developers)

88. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 87.

89. Management and control of Plaintiff was originally vested in a Board appointed and controlled by the Developers.

90. Before transitioning control of the Board from the Developers to the owners of the Concord & Cumberland condominium units, the Developers controlled the finances of

Plaintiff.

91. Plaintiff is not currently aware of all the money and assets belonging to Plaintiff that were utilized, appropriated, or possibly misappropriated by the Developers.

92. The Developers failed to render a proper accounting as to the funds, operations, assets, and property of Plaintiff upon the transition of the Board.

93. Further, upon information and belief, the Developers realized several million dollars in profit from the development and sale of Concord & Cumberland and the individual units.

94. Upon information and belief, rather than utilize some portion of those profits to remedy the defects and resulting damage at Concord & Cumberland, or to adequately fund Plaintiff as it was obligated to do, Developers improperly utilized and distributed those profits to their respective owners and shareholders.

95. Plaintiff has no adequate remedy at law for this grievance.

96. Plaintiff is entitled to an order requiring a complete accounting as to expenses and receipts of Plaintiff while under the Developers' control and as to the distribution of any and all profits the Developers realized and distributed from the development and sale of Concord & Cumberland.

FOR A SIXTH CAUSE OF ACTION
(Negligent Misrepresentation as to the Developers)

97. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 96.

98. The Developers, through advertisements, sales brochures and other marketing literature, website advertisements and by statements and actions of their agents, made numerous representations to Plaintiff and to the purchasers at Concord & Cumberland,

including, but not limited to, the quality and luxury of the condominium units at Concord & Cumberland.

99. The representations made by the Developers and their agents to Plaintiff and to the purchasers of the condominiums were untrue and were misrepresentations of material facts.

100. The Developers owed a duty to Plaintiff and to potential purchasers of the condominium units to use due care in ensuring that its representations concerning Concord & Cumberland were accurate and fair.

101. The representations were made for the purpose of selling condominium units.

102. Plaintiff and the individual condominium unit owners comprising the Plaintiff, as purchasers of the condominium units, reasonably and justifiably relied upon the representations of the Developers when deciding to purchase the units.

103. In the exercise of reasonable care, the Developers knew or should have known that their representations were false and that Plaintiff and the prospective purchasers would rely on the representations.

104. The Developers failed to exercise reasonable care in making the representations.

105. Upon information and belief, the Developers profited from the sale of the condominium units.

106. Due to the Developers' negligent misrepresentations and the design and construction defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and

specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and to the common elements of the building.

107. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

108. The conduct of the Developers entitles Plaintiff to recover punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices as to the Developers)

109. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 108.

110. The Plaintiff and the Developers are persons within the meaning of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 et seq. (the "Act").

111. By developing, marketing, and selling the condominium units at Concord & Cumberland, the Developers were engaged in commerce.

112. The actions of the Developers in developing, marketing, and selling the condominium units at Concord & Cumberland constitute unfair and deceptive practices.

113. The actions of the Developers affect the public interest of South Carolina.

114. Upon information and belief, the actions of the Developers are capable of repetition and have, in fact, been repeated.

115. Due to the Developers' violation of the Act and the design and construction defects and resulting property damage, Plaintiff has and in the future will be forced to expend

funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and the common elements of the building.

116. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

117. Upon information and belief, the Developers' actions were willful and/or knowing violations of the Act.

118. The Plaintiff is entitled to recover its actual damages, treble damages, interest, and attorneys' fees from the Developers for their willful and/or knowing violations of the Act.

FOR AN EIGHTH CAUSE OF ACTION
(Alter Ego/Piercing the Corporate Veil as to the Developers)

119. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 118.

120. Concord & Cumberland, LLC has been held out as the developer of Concord & Cumberland.

121. Upon information and belief, Estates and Concord & Cumberland Manager, LLC and their officers, directors, and shareholders wholly own and control Concord & Cumberland, LLC.

122. Defendant Concord & Cumberland, LLC, upon information and belief, at all times relevant to this action:

- (a) failed to observe corporate formalities;
- (b) was grossly undercapitalized for the purposes of the corporate undertaking, to wit, the development of Concord & Cumberland and the remediation of any and all defects in the construction of Concord & Cumberland should they arise;
- (c) was controlled by Estates and Concord & Cumberland Manager, LLC to the extent that it was merely a façade for the operations of Estates and Concord & Cumberland Manager, LLC;
- (d) does not have any functioning officers or directors that are independent of Estates and/or Concord & Cumberland Manager, LLC; and
- (e) is functionally insolvent.

123. In addition, upon information and belief, any and all funds that were paid to Concord & Cumberland, LLC, through the sale of the individual units at Concord & Cumberland, were siphoned from the company by Estates, Concord & Cumberland Manager, LLC and their directors, officers, and/or shareholders.

124. Concord & Cumberland, LLC is nothing more than the alter ego of Estates and Concord & Cumberland Manager, LLC and their officers, directors, and shareholders.

125. It would be inequitable to allow Defendants to hide behind a corporate shield that has no basis in fact, for the express purpose of avoiding their obligations and responsibilities to the Plaintiff.

126. Plaintiff is entitled to pierce the corporate veil of Concord & Cumberland, LLC and thereby obtain a judgment against Estates and Concord & Cumberland Manager, LLC for the liability of Concord & Cumberland, LLC in an amount to be determined by the trier of fact.

FOR A NINTH CAUSE OF ACTION
(Negligence as to Superior)

127. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 126.

128. By undertaking construction work on Concord & Cumberland, Superior owed a duty to Plaintiff to use reasonable care during the performance of its work on the building and to perform their scope of work in accordance with all applicable building codes and applicable industry standards, and to ensure that construction conformed to the design documents where such documents reflected good design practice, the applicable standard of care, and industry standards.

129. Superior breached the duty of care it owed to Plaintiff by failing to complete the building pursuant to its duties identified above, by allowing the building to be constructed with the defects identified hereinabove, and by failing to remedy the same.

130. Superior was negligent, grossly negligent, willful, and reckless in numerous aspects of the construction of the buildings, including, but not limited to, the following:

- (a) Failing to properly supervise subcontractors and laborers during the construction of Concord & Cumberland;
- (b) Failing to follow plans and specifications of the architect and design professionals;
- (c) Failing to follow manufacturers' installation instructions and recommendations;
- (d) Failing to perform construction work in accordance with applicable building codes and proper workmanlike practices; and
- (e) Failing to select proper materials and capable subcontractors.

131. As a direct and proximate result of the negligence and recklessness of Superior as hereinabove set forth, the condominium units, the common elements, and the limited common elements of the Plaintiff have been damaged by the intrusion of water.

132. Plaintiff has been proximately damaged by Superior's negligence in that it has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design

remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and the common elements of the building.

133. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

134. As a result of the negligence of Superior, the Plaintiff is entitled to a judgment against Superior in an amount to be determined at the trial of this case.

FOR A TENTH CAUSE OF ACTION
(Negligence Per Se as to Superior)

135. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 134.

136. By undertaking construction work on Concord & Cumberland, Superior owed a duty to Plaintiff to use reasonable care during the performance of its work on the building and to perform their scope of work in accordance with all applicable building codes and applicable industry standards, and to ensure that construction conformed to the design documents where such documents reflected good design practice, conformed to the applicable standard of care, and conformed to industry standards.

137. Superior breached the duty of care it owed to Plaintiff.

138. Superior's work violated the applicable building codes in effect at the time of construction, specifically including, but not limited to, those deficiencies identified hereinabove.

139. The violations of the building codes by Superior amount to negligence per se.

140. Plaintiff has been proximately damaged by Superior's negligence per se in that it has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and the common elements of the building.

141. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

142. As a result of the negligence per se of Superior, the Plaintiff is entitled to a judgment against Superior in an amount to be determined at trial.

FOR AN ELEVENTH CAUSE OF ACTION

(Breach of Implied Warranty of Workmanlike Service as to Superior)

143. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 142.

144. By performing construction work on Concord & Cumberland, Superior impliedly warranted that its work product would be of quality workmanship equal to or greater than industry standards.

145. The above referenced construction defects and deficiencies show that Superior breached its implied warranties by failing to provide such quality workmanship.

146. Plaintiff has been proximately damaged by Superior's breach of its implied

warranty of workmanlike service in that it has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and the common elements of the building.

147. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

148. As a result of the Superior's breach of its implied warranties, Plaintiff is entitled to a judgment against Superior in an amount to be determined at trial.

FOR A TWELFTH CAUSE OF ACTION
(Breach of Express Warranty as to Superior and J. Davis)

149. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 148.

150. Superior, pursuant to the terms of its contract with Concord & Cumberland, LLC to serve as the general contractor for the construction of Concord & Cumberland, expressly warranted that its work would be of good quality, free from defects, and would conform to the contract documents.

151. J. Davis, pursuant to its contract with Concord & Cumberland, LLC, expressly warranted that its plans, specifications, and other instruments of service would be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards.

152. Plaintiff is a beneficiary of the express warranties provided by these

Defendants.

153. These Defendants have breached their express warranties by failing to design and construct Concord & Cumberland such that it would be free from defects and in compliance with the applicable building codes and industry standards.

154. Plaintiff has been proximately damaged by Defendants' breaches of their express warranties in that it has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and the common elements of the building.

155. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

156. The Plaintiff is entitled to a judgment against these Defendants for the breach of their express warranties for an amount to be proven at trial.

FOR A THIRTEENTH CAUSE OF ACTION
(Breach of Express Warranties as to Weather Shield)

157. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 156.

158. Weather Shield warranted that the products they manufactured and sold for use in Concord & Cumberland would be of good quality, free from defects, suitable for use, and in compliance with applicable building codes of the City of Charleston as it relates to a luxury

four-story waterfront condominium project.

159. The products manufactured and marketed by Weather Shield and incorporated into Concord & Cumberland have failed and are allowing water to intrude into the building. Further, upon information and belief, these products are not in compliance with the applicable building codes and industry standards as it relates to the Concord & Cumberland project.

160. The failures of the products manufactured, marketed, and sold by Weather Shield have resulted in damage to various components of the building and will require extensive repair and restoration by the Plaintiff. Additionally, the products themselves must be replaced with products which will be in compliance with the current building codes applicable to Concord & Cumberland.

161. The failures of these products constitute a breach of the express warranties made by Weather Shield.

162. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

163. Plaintiff is entitled to a judgment against Weather Shield in an amount to be determined at trial, as a result of the breach of its express warranties.

FOR A FOURTEENTH CAUSE OF ACTION
(Breach of Implied Warranty of Merchantability as to Weather Shield)

164. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 163.

165. By selling its products for use in Concord & Cumberland, Weather Shield

impliedly warranted that the products would be merchantable.

166. The products sold by Weather Shield and incorporated into Concord & Cumberland have failed and are allowing water to intrude into the building.

167. The failures of these products constitute a breach of Weather Shield's implied warranty of merchantability.

168. The failures of the products marketed and sold by Weather Shield and Weather Shield's breach of its implied warranty of merchantability have resulted in damage to various components of the building and will require extensive repair and restoration by Plaintiff including, but not limited to, removal of the defective products and replacement with products which comply with the building codes currently applicable to the Concord & Cumberland project.

169. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

170. As a result of its breach of the implied warranty of merchantability, Plaintiff is entitled to a judgment against Weather Shield in an amount to be determined at trial.

FOR A FIFTEENTH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for a Particular Purpose as to Weather Shield)

171. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 170.

172. Weather Shield was aware that its products were being considered for use as building components for Concord & Cumberland and knew that Concord & Cumberland was

to be a luxury four-story waterfront building located in the City of Charleston.

173. Upon information and belief, Weather Shield recommended its products for the particular purposes stated by the Developers, Superior, and J. Davis.

174. Weather Shield knew or reasonably should have known that the purchasers were relying on their skill or judgment to select suitable goods which were in compliance with applicable building codes.

175. By selling the products for a particular use in Concord & Cumberland, Weather Shield impliedly warranted that its products would be fit for their intended purpose.

176. The products sold by Weather Shield and incorporated into the Concord & Cumberland have failed and are allowing water to intrude into the building.

177. The failure of these products amounts to a breach of the implied warranty of fitness for a particular purpose.

178. The failure of the products has resulted in damage to the various components of the building and will require extensive repair and restoration by the Plaintiff including removal and replacement of all of Weather Shield's products which are not in compliance with applicable building codes.

179. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

180. As a result of its breach of Weather Shield's implied warranty of fitness for a particular purpose, Plaintiff is entitled to a judgment against Weather Shield in an amount to

be determined at trial.

FOR A SIXTEENTH CAUSE OF ACTION
(Strict Liability in Tort against Weather Shield)

181. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 180.

182. Weather Shield is in the business of selling building products for use in construction projects in South Carolina, specifically windows, window systems, and doors.

183. Weather Shield sold products that were incorporated into Concord & Cumberland during construction.

184. Upon information and belief, the products were expected to and were in fact incorporated into Concord & Cumberland without substantial change from the condition in which they were originally manufactured and sold.

185. Weather Shield's products have failed and are allowing water to intrude into the condominium units and other portions of the common elements and limited common elements from the exterior during rain events.

186. The failure of Weather Shield's products has and continues to cause damage to Plaintiff's property.

187. If these products are unable to withstand the design wind loads required by the applicable building codes, such failure will result in danger to the Plaintiff and their guests and invitees.

188. The products that Weather Shield sold for use in the Concord & Cumberland are defective and unreasonably dangerous to Plaintiff and to the condominium owners and their guests and invitees.

189. As a proximate result of the defective Weather Shield products, Plaintiff has

and will continue to suffer damages, including, but not limited to, removal of all Weather Shield products and replacement with products that comply with the local applicable building codes.

190. Plaintiff has and will suffer loss of use of the common elements and limited common elements, the interference with the use and enjoyment of the common elements and limited common elements during the time in which construction repairs are undertaken to the individual units and to the common elements and limited common elements of Concord & Cumberland.

191. Due to the damages caused by the defective products, Plaintiff is entitled to a judgment against Weather Shield for an amount to be determined at the trial of this case.

FOR A SEVENTEENTH CAUSE OF ACTION
(Negligence as to J. Davis)

192. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 191.

193. J. Davis agreed to provide professional architectural services for the design of Concord & Cumberland, specifically including, but not limited to, the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, J. Davis agreed to make periodic visits to the project during construction to observe whether the construction was being completed in accordance with the plans and specifications and all applicable building codes.

194. It was foreseeable that Plaintiff, as the owner of the Concord & Cumberland common elements and limited common elements would be damaged if the J. Davis breached the above duties.

195. J. Davis breached its duty of care as follows:

- (a) By failing to properly design and prepare specifications for the Concord & Cumberland which were compliant with all applicable building codes and professional standards;
- (b) Failing to specify products that were in compliance with applicable building codes;
- (c) Failing to design and specify an exterior cladding system for Concord & Cumberland with an adequate water management system to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
- (d) Failing to design and specify an adequate water management system in and around building openings, including, but not limited to, the exterior windows at Concord & Cumberland;
- (e) Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- (f) Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at Concord & Cumberland.

196. Due to the design defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and the common elements of the building.

197. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

198. Plaintiff is entitled to a judgment against J. Davis in an amount to be determined at the trial of the case for J. Davis's negligence.

FOR AN EIGHTEENTH CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service as to J. Davis)

199. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 198.

200. By performing design services for the construction of Concord & Cumberland, J. Davis impliedly warranted that its work product would be of good quality, equal to or greater than industry standards.

201. J. Davis breached its duty to provide workmanlike service as follows:

- (a) By failing to properly design and prepare specifications for the Concord & Cumberland that were compliant with all applicable building codes and professional standards;
- (b) Failing to specify products that were in compliance with applicable building codes;
- (c) Failing to design and specify an exterior cladding system for Concord & Cumberland with an adequate water management system to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
- (d) Failing to design and specify an adequate water management system in and around building openings, including, but not limited to, the exterior windows at Concord & Cumberland;
- (e) Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- (f) Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at Concord & Cumberland.

202. Due to the design defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation

plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and the common elements of the building.

203. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

204. Plaintiff is entitled to a judgment against J. Davis in an amount to be determined at trial as a result of the breach of its implied warranty.

FOR A NINETEENTH CAUSE OF ACTION
(Breach of Warranty of Plans and Specifications as to J. Davis)

205. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1 through 204.

206. J. Davis warranted the sufficiency of the design, plans, and specifications for Concord & Cumberland. Plaintiff was the foreseeable beneficiary of this implied warranty.

207. By failing to properly design the building and prepare appropriate plans and specifications, J. Davis breached its warranty as follows:

- (a) By failing to properly design and prepare specifications for Concord & Cumberland that were compliant with all applicable building codes and professional standards;
- (b) Failing to specify products that were in compliance with applicable building codes;
- (c) Failing to design and specify an exterior cladding system for Concord & Cumberland with an adequate water management system to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;

- (d) Failing to design and specify an adequate water management system in and around building openings, including, but not limited to, the exterior windows at Concord & Cumberland;
- (e) Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- (f) Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at Concord & Cumberland.

208. Due to the design defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to repair the units, the limited common elements, and the common elements of the building.

209. Additionally, Plaintiff has, and will continue to, suffer loss of use of the common areas and the limited common areas, and such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements and limited common elements of Concord & Cumberland.

210. Plaintiff is entitled to a judgment against J. Davis in an amount to be determined at trial, as a result of the breach of its warranty.

WHEREFORE, the Plaintiff prays as follows:

a. That the Court issue a Declaratory Judgment with respect to the first cause of action against the Defendants in the following respects:

- (i) that Article XIV and Sections 3.6 and 14.6 of the Master Deed to be invalid and unenforceable under the laws of South Carolina and

should be struck, *in toto*, from the Master Deed;

(ii) Alternatively, as to Sections 3.6 and 14.6 of the Master Deed, that:

(a) the portions of Section 3.6 of the Master Deed purporting to disclaim the implied warranty of habitability and the portion purporting to limit the liability of the developer to the cost to repair and replace defective work be declared invalid for such purpose and unenforceable under the laws of South Carolina; and

(b) Section 14.6 of Master Deed should be amended to require a two-thirds ownership vote of the Association to authorize litigation and that the provision requiring the Developers' consent to any amendment to Section 14.6 of the Master Deed be stricken from the provision.

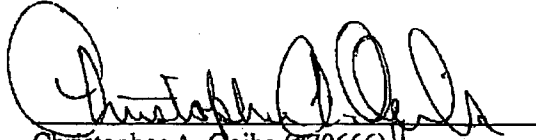
(iii) that Article XIV of the Master Deed be declared inapplicable to the claims of Plaintiff and/or unenforceable and invalid under the laws of South Carolina; and

(iv) that Section 14.3 of the Master Deed be declared inapplicable to the claims of Plaintiff and/or invalid and unenforceable under the laws of South Carolina.

- b. Judgment for actual damages against the Defendants jointly and severally;
- c. Punitive damages against the Developers under the sixth and seventh causes of action detailed herein;
- d. Treble damages against the Developers under the seventh cause of action detailed herein;
- e. An Order requiring a complete accounting as to receipts and expenses of Plaintiff while under the Developers' control and as to the receipt and distribution of any and all profits the Developers realized from the development

and sale of Concord & Cumberland;

- f. Costs and attorneys' fees against the Defendants; and
- g. Such further relief as the Court deems appropriate.



Christopher A. Ogiba (#70666)
Moore & Van Allen, PLLC
40 Calhoun Street, Suite 300
Charleston, SC 29401
PH. (843) 579-7066
FAX (843) 579-8749

ATTORNEYS FOR PLAINTIFF

CHARLESTON, SC

March 19, 2010

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Concord & Cumberland
Horizontal Property Regime,

Plaintiff,

Vs.

Concord & Cumberland, LLC;
Concord & Cumberland Manager, LLC;
Estates, Inc.; Superior Construction
Corporation; Weather Shield Mfg., Inc.; and
J. Davis, Architects, PLLC,

Defendants,

And

Superior Construction Corporation,

Third Party Plaintiff,

Vs.

The Muhler Company, Inc.; Companion
Property and Casualty Insurance Company;
Craiu "Chris" Tocitu d/b/a Wallcraft
Construction; Wallcraft Construction, Inc.;
Weatherholtz Masonry, LLC; In The Wind,
Inc.; Philip Gasque d/b/a Philip Gasque
Construction, Architectural Stone Company,
and Southern Mechanical Inc.

Third Party Defendants

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2010-C P-10-2271

**SUPERIOR CONSTRUCTION
CORPORATION'S ANSWER,
CROSS CLAIMS,
AND
THIRD PARTY COMPLAINT**

(Jury Trial Demanded)

2018 MAY 27 AM 10:58
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

**TO: CHRISTOPHER A. OGIBA, ATTORNEY FOR PLAINTIFF, GUNNAR NISTAD,
ATTORNEY FOR WEATHER SHIELD MFG. INC., AND TO THE THIRD
PARTY DEFENDANTS ABOVE-NAMED:**

The Defendant, Superior Construction Corporation, (herein, "Superior") answering
Plaintiff's Complaint herein would respectfully show unto the Court the following:

FOR A FIRST DEFENSE

1. This Defendant admits upon information and belief the allegations contained in

paragraphs One (1) and Two (2) and Three (3) of the Plaintiff's Complaint.

2. This Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in Paragraphs Four (4), Five (5), Six (6), Seven (7) and Eight (8) of the Plaintiff's Complaint.

3. This Defendant admits upon information and belief the allegations contained in Paragraphs Nine (9) and Ten (10) of the Plaintiff's Complaint.

4. Paragraph Eleven (11) of the Plaintiff's Complaint states legal conclusions to which no response is required. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

5. This Defendant admits upon information and belief the allegations contained in Paragraph Twelve (12) of the Plaintiff's Complaint.

6. This Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in Paragraphs Thirteen (13), Fourteen (14), and Fifteen (15) of the Plaintiff's Complaint.

7. This Defendant admits that it is a North Carolina Corporation registered to do business in South Carolina and that it has in the past done business in Charleston County.

8. This Defendant further admits that it served as the General Contractor for the construction of the Concord in Cumberland pursuant to the terms of its contract with the developers.

9. With respect to the remaining allegations in Paragraph Sixteen (16) of the Plaintiff's Complaint, this Defendant makes reference to the terms of its contract.

10. This Defendant admits upon information and belief the allegations of Paragraph Seventeen (17) of the Plaintiff's Complaint.



11. This Defendant admits upon information and belief the allegations contained in Paragraph Eighteen (18) of the Plaintiff's Complaint.

12. This Defendant denies the allegations contains in Paragraph Nineteen (19) as stated. This Defendant would show that some of the unit owners experienced instances of water intrusion. However, this Defendant denies that the instances of water intrusion have occurred to all of the unit owners.

13. In responding to the allegations contained Paragraph Twenty (20) of the Plaintiff's Complaint, this Defendant admits that at some point following instances of water intrusion, the Board of the Homeowners Association requested that the Developers and the remaining Defendants to investigate and cure the moisture intrusion issues. Except as stated herein, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of any remaining allegations of the Plaintiff in Paragraph 20..

14. This Defendant denies the allegations contained in Paragraph Twenty-One (21) of the Plaintiff's Complaint as stated. In responding, this Defendant, with the assistance and participation of the Developers, Co-Defendant Weather Shield MFG, Inc. and other subcontractors, formulated a repair protocol to address instances of moisture intrusion, and that said protocol was found by professional registered engineers in South Carolina to remedy and address the alleged moisture intrusion issues. This protocol has been advanced to the Plaintiff for performance, but Plaintiff has refused thus far to accept this protocol.

15. In responding to the allegations in Paragraph Twenty-Two (22) of the Plaintiff's Complaint, this Defendant admits that Plaintiff retained the services of forensic professionals to investigate causes of water intrusion in the subject building. Except as expressly admitted herein, the allegations contained in Paragraph Twenty-Two (22) of the Plaintiff's Complaint are denied.



16. In responding to the allegations contained in Paragraph Twenty-Three (23) of the Plaintiff's Complaint including subparagraphs, this Defendant admits that Plaintiff's forensic professionals have reached certain conclusions, but such conclusions are denied.

17. This Defendant denies the allegations contained in Paragraphs Twenty-Four (24), Twenty-Five (25) and Twenty-Six (26) of the Plaintiff's Complaint.

18. To the extent the allegations contained in Paragraph Twenty-Seven (27) of the Plaintiff's Complaint are addressed to construction defects, such allegations are denied. To the extent the allegations are directed to design defects, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

19. This Defendant denies the allegations contained in Paragraph Twenty-Eight (28) of the Plaintiff's Complaint.

20. Paragraph Twenty-Nine (29) of the Plaintiff's Complaint states legal conclusions to which no response is required.

RESPONDING TO FIRST CAUSE OF ACTION

21. In responding to the allegations contained in Paragraph Thirty (30) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

22. Paragraph Thirty-One (31) of the Plaintiff's Complaint states legal conclusions to which no response is required. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

23. This Defendant is without knowledge or information sufficient at this time to form a



belief as to the truth of the allegations contained in Paragraphs Thirty-Two (32) through Fifty-Nine (59) of the Plaintiff's Complaint and furthermore that such allegations are not directed to this Defendant and, therefore, require no response.

24. In responding to the allegations contained in Paragraph Sixty (60) through Sixty Three (63), this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations and further that such allegations state legal conclusions to which no response is required.

RESPONDING TO SECOND CAUSE OF ACTION

25. In responding to the allegations contained in Paragraph Sixty-Four (64) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

26. By their terms, Paragraph Sixty-Five (65) through Seventy (70) are not directed to this Defendant and, therefore, require no response. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO THIRD CAUSE OF ACTION

27. In responding to the allegations contained in Paragraph Seventy-One (71) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

28. By the terms, the allegations contained in Paragraphs Seventy-Two (72) through Eight (80) are not directed to this Defendant and, therefore, require no response. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO FOURTH CAUSE OF ACTION



29. In responding to the allegations contained in Paragraph Eight-One (81) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

30. By their terms, the allegations contained in Paragraphs Eight-Two (82) through Eighty-Seven (87), including all subparagraphs are not directed to this Defendant and, therefore, require no response. Due to the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONSE TO FIFTH CAUSE OF ACTION

31. In responding to the allegations contained in Paragraph Eighty-eight (88) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

32. By the their terms, the allegations contained in Paragraphs Eight-Nine (89) through Ninety-Six (96) are not directed to this Defendant and, therefore, require no response from this Defendant. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO SIXTH CAUSE OF ACTION

33. In responding to the allegations contained in Paragraph Ninety-Seven (97) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

34. By their terms, the allegations contained in Paragraph Ninety-Eight (98) through One Hundred Eight (108) of the Plaintiff's Complaint are not directed to this Defendant and, therefore, require no response from this Defendant. To the extent a response is required, this



Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO SEVENTH CAUSE OF ACTION

35. In responding to the allegations contained in Paragraph One Hundred Nine (109) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

36. By their terms, the allegations contained in Paragraphs One Hundred Ten (110) through One Hundred Eighteen (108) of the Plaintiff's Complaint are not directed to this Defendant and, therefore, require no response from this Defendant. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO EIGHTH CAUSE OF ACTION

37. In responding to the allegations contained in Paragraph One Hundred Nineteen (119), this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

38. By their terms, the allegations contained in Paragraphs One Hundred Twenty (120) through One Hundred Twenty-Six (126), including all subparagraphs, are not directed to this Defendant and, therefore, require no response from this Defendant. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO NINTH CAUSE OF ACTION

39. In responding to the allegations contained in Paragraph One Hundred Twenty-Seven (127) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.



40. In responding to the allegations contained in Paragraph One Hundred Twenty-Eight (128) of the Plaintiff's Complaint, this Defendant admits that it complied with all applicable duties pursuant to the law and pursuant to its scope of work under its contractual agreement with the Developer. Except as expressly admitted herein, the allegations contained in Paragraph One Hundred Twenty-Eight (128) state legal conclusions and further are denied.

41. This Defendant denies the allegations contained in Paragraphs One Hundred Twenty-Nine (129) and One Hundred Thirty (130), including subparagraphs "a" through "e" in Paragraphs One Hundred Thirty-One (131), One Hundred Thirty-Two (132), One Hundred Thirty-Three (133) and One Hundred Thirty-Four (134).

RESPONDING TO TENTH CAUSE OF ACTION

42. In responding to the allegations contained in Paragraph One Hundred Thirty-Five (135) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

43. In responding to the allegations contained in Paragraph One Hundred Thirty-Six (136) of the Plaintiff, this Defendant admits that it complied with all applicable duties under the law and pursuant to its scope of work and its contract with the Developer. Except as expressly admitted herein, the allegations in Paragraph One Hundred Thirty-Six (136) state legal conclusions and furthermore are denied.

44. This Defendant denies the allegations contained in Paragraphs One Hundred Thirty-Seven (137), One Hundred Thirty-Eight (138), One Hundred Thirty-Nine (139), One Hundred Forty (140), One Hundred Forty-One (141) and One Hundred Forty-Two (142) of the Plaintiff's Complaint.

RESPONDING TO ELEVEN CAUSE OF ACTION



45. In responding to the allegations contained in Paragraph One Hundred Forty-Three (143), of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

46. Paragraph One Hundred Forty-Four (144) of the Plaintiff's Complaint states legal conclusions to which no response is required. To the extent a response is required, this Defendant admits that it complied with all applicable duties and warranties. Except as is expressly admitted herein, the allegations are denied.

47. This Defendant denies the allegations contained in Paragraphs One Hundred Forty-Five (145), One Hundred Forty-Six (146), One Hundred Forty-Seven (147) and One Hundred Forty-Eight (148) of the Plaintiff's Complaint.

RESPONDING TO TWELFTH CAUSE OF ACTION

48. In responding to the allegations contained in Paragraph One Hundred Forty-Nine (149) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

49. In responding to the allegations contained in Paragraph One Hundred Fifty (150) of the Plaintiff's Complaint, this Defendant makes reference to the terms of its applicable contract. Except as is expressly admitted herein, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

50. By its terms, Paragraph One Hundred Fifty-One (151) of the Plaintiff's Complaint is not directed to this Defendant and, therefore, requires no response from this Defendant. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.



51. Paragraph One Hundred Fifty-Two (152) of the Plaintiff's Complaint states legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

52. To the extent the allegations contained in Paragraphs One Hundred Fifty-Three (153), One Hundred Fifty-Four (154), One Hundred Fifty-Five (155) and One Hundred Fifty-Six (156) are directed to this Defendant, such allegations are denied. To the extent the allegations are directed to other Defendants, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO THIRTEENTH CAUSE OF ACTION

53. In responding to the allegations contained in Paragraph One Hundred Fifty-Seven (157) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

54. By their terms, the allegations contained in Paragraph One Hundred Fifty-Eight (158) through One Hundred Sixty-Three (163) are not directed to this Defendant and, therefore, require no response from this Defendant. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO FOURTEENTH CAUSE OF ACTION

55. In responding to the allegations contained in Paragraph One Hundred Sixty-Four (164) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

56. By their terms, the allegations contained in Paragraphs One Hundred Sixty-Five (165) through One Hundred Seventy (170) are not directed to this Defendant and, therefore, require no response from this Defendant. To the extent a response is required, this Defendant is

without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO FIFTEENTH CAUSE OF ACTION

57. In responding to the allegations contained in Paragraph One Hundred Seventy-One (171) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein reference.

58. By their terms, the allegations contained in Paragraphs One Hundred Seventy-Two (172) through One Hundred Eighty (180) are not directed to this Defendant and, therefore, require no response from this Defendant.

59. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO SIXTEENTH CAUSE OF ACTION

60. In responding to the allegations contained in Paragraph One Hundred Eighty-One (181) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

61. By their terms, the allegations contained in Paragraphs One Hundred Eight-Two (182) through One Hundred Ninety-One (191) are not directed to this Defendant and, therefore, do not require a response. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO SEVENTEENTH CAUSE OF ACTION

62. In responding to the allegations contained in Paragraph One Hundred Ninety-Two (192) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

63. By their terms, the allegations contained in Paragraph One Hundred Ninety-Three (193) through One Hundred Ninety-Eight (198), including all subparagraphs, are not directed to this Defendant and, therefore, require no response from this Defendant. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.

RESPONDING TO EIGHTEENTH CAUSE OF ACTION

64. In responding to the allegations contained in Paragraph One Hundred Ninety-Nine (199) of Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

65. By the terms of allegations contained in Paragraphs Two Hundred (200) through Two Hundred Four (204) of the Plaintiff's Complaint, including all subparagraphs, are not directed to this Defendant and, therefore, require no response from this Defendant. To the extent a response is required, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

RESPONDING TO NINETEENTH CAUSE OF ACTION

66. In responding to the allegations contained in Paragraph Two Hundred Five (205) of the Plaintiff's Complaint, this Defendant realleges all prior paragraphs of this Answer and incorporates them herein by reference.

67. By the terms, the allegations contained in Paragraphs Two Hundred Six (206) through Two Hundred Ten (210) of the Plaintiff's Complaint are not directed to this Defendant and, therefore, require no response from this Defendant. To the extent a response is required, this Defendant is without knowledge or information sufficient at this time to form a belief as to the truth of such allegations.



68. To the extent the prayer of relief is directed to this Defendant, such allegations are denied.

FOR A SECOND DEFENSE

69. This Defendant asserts that whatever damages, if any, that were sustained by the Plaintiff was due to, caused solely or partly by, and were the direct and proximate result of the negligence of the Plaintiff, including, but not limited to its acts or omissions in properly carrying out its contract, in improperly selecting materials, in improperly supervising the project, in failing to act as a reasonably prudent company would have acted under the same or similar circumstances, and in any other particulars that may come to light through investigation and discovery, and therefore the recovery, if any, should be barred, or reduced, in proportion to its own negligence.

FOR A THIRD DEFENSE

70. This Defendant would show, upon information and belief, that any injuries or damages sustained by the Plaintiff was due to its own negligent, careless, reckless and grossly negligent acts or omissions which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. This Defendant pleads such negligence, carelessness, recklessness and gross negligence on the part of the Plaintiff and would ask that this court compare the negligence of the Plaintiff and this Defendant and if it is determined that the Plaintiff's negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of this Defendant, which is specifically denied, then the Plaintiff should be totally barred from recovery and if it is determined that the Plaintiff's negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of this Defendant, then the amount of recovery available to

the Plaintiff should be reduced by the percentage of the Plaintiff's own negligence, carelessness, recklessness and gross negligence.

FOR A FOURTH DEFENSE

71. This Defendant asserts that it constructed the building in conformance with all plans and specifications and, therefore, is entitled to complete defense under the Spearin doctrine.

FOR A FIFTH DEFENSE

72. The Complaint fails to state a claim upon which relief can be based and accordingly, this Defendant is entitled to judgment as a matter of law pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SIXTH DEFENSE

73. This Defendant asserts the doctrine of Laches as complete or partial bar to the Complaint.

FOR A SEVENTH DEFENSE

74. This Defendant asserts that any alleged remedies and/or warranties have been properly and effectively excluded, modified and are limited either by applicable contracts or by applicable law.

FOR AN EIGHTH DEFENSE

75. This Defendant asserts Plaintiff's failure to mitigate damages and/or the doctrine of avoidable consequences as a complete or partial bar to the Third-Party Complaint.

FOR A NINTH DEFENSE

76. This Defendant asserts the negligence of others not in the employ or control of this Defendant as a complete or partial bar to the Complaint.

FOR A TENTH DEFENSE

77. To the extent this Defendant may be liable to the Plaintiff, which liability is denied, this Defendant would show upon information and belief that the subject property has either been destroyed or modified and as such this Defendant pleads the doctrine of spoliation of evidence as a complete bar to the Third-Party Complaint.

FOR AN ELEVENTH DEFENSE

78. To the extent this Defendant is liable to the Plaintiff, which liability is denied, this Defendant would show upon information and belief that Plaintiff failed to give this Defendant timely and reasonable notice of any alleged defects and/or timely and reasonable opportunity to cure or correct any alleged defects as required in the applicable contracts. This Defendant asserts as a complete bar to the Complaint.

FOR A TWELFTH DEFENSE

79. This Defendant substantially performed the requirements of the applicable contract and all work in question was done in a good and workmanlike manner, within the limitations of materials and design provided.

FOR A THIRTEENTH DEFENSE

80. This Defendant provided work or services which met all construction industry customs, practices, and standards applicable to the claims in this lawsuit.

FOR A FOURTEENTH DEFENSE

81. This Defendant asserts the defenses of waiver and estoppel as a complete or partial bar to the Complaint.

FOR A FIFTEENTH DEFENSE

82. This Defendant asserts the doctrine of unclean hands as a complete or partial bar to the Complaint.

FOR A SIXTEENTH DEFENSE

83. This Defendant is informed and believes that the claims of Complaint against this Defendant, in whole or in part, are barred as a result of the Plaintiff's failure to make a claim within the applicable warranty period.

FOR A SEVENTEENTH DEFENSE

84. This Defendant asserts the doctrine of payment and release as a complete and partial bar to the Complaint.

FOR AN EIGHTEENTH DEFENSE

85. To the extent punitive damages are claimed, this Defendant would show, upon information and belief, that the claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that this Defendant could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because this Defendant can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates this Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills this Defendant's exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

FOR A NINETEENTH DEFENSE

86. This Defendant asserts the Economic Loss Doctrine as complete or partial bar to the Complaint.

FOR A TWENTIETH DEFENSE

87. This Defendant asserts the statute of frauds as a complete or partial bar to the Complaint.

FOR A TWENTY-FIRST DEFENSE

88. This Defendant preserves and reserves the right to rely on and assert any and all other applicable defenses either in contract or under the law as may be asserted by any other Defendant in this action or that may become evident through its investigation and discovery.

FOR A TWENTY-SECOND DEFENSE

89. The damages awarded to Plaintiff, if any, must be reduced by the proportional value of the beneficial use which the Plaintiff has received from the project.

FOR A TWENTY-THIRD DEFENSE

90. Plaintiff's claims are barred against this Defendant on the grounds that this Defendant was provided with deficient plans and specifications.

FOR A TWENTY-FOURTH DEFENSE

91. Plaintiff's claims should be barred or in the alternative stayed pending a resolution of this dispute by arbitration to the extent such arbitration is required by the contract documents.

FOR A TWENTY-FIFTH DEFENSE

92. This Defendant asserts the applicable Statute of Limitations and/or Statute of Repose as a complete or partial bar to the Complaint.

CROSS CLAIMS AND THIRD PARTY CLAIMS
OF
SUPERIOR CONSTRUCTION CORPORATION

Facts Common to All Cross Claims and Third Party Claims

93. Defendant Weather Shield Mfg., Inc., (Weather Shield) is a corporation organized and existing under the laws of Wisconsin and conducts business in the State of South Carolina and Charleston County. Weather Shield manufactured and sold and/or supplied the windows, exterior doors, and related accessories ("the products") that were installed at Concord and Cumberland (the Subject Property). The Causes of Action enumerated below are asserted by Superior as Cross Claims against Weather Shield Mfg. Inc.

94. The Muhler Company, Inc. (Muhler) is a corporation organized and existing under the laws of South Carolina and conducts business in the State of South Carolina and Charleston County. Muhler performed the installation of all windows, entry doors, patio doors, door and window trim, and all related work thereto in the construction of the Subject Property, as a subcontractor to Superior. Companion Property and Casualty Insurance Company is a South Carolina corporation and the Surety of Muhler on its subcontract performance bond for the entire scope of work at the Subject Property.

95. Craiu "Chris" Tocitu d/b/a Wallcraft Construction, upon information and belief, has its principle place of business located in Myrtle Beach, South Carolina, and conducts business in the State of South Carolina and Charleston County. This person and entity, along with Wall Craft Construction, Inc., performed the stucco and related work on the original construction of the Subject Property, as a subcontractor to Superior.

96. Wall Craft Construction, Inc. is a corporation organized under the laws of the State of Georgia, and conducts business in the State of South Carolina and Charleston County. Wall Craft Construction, Inc., along with Chris Tocito d/b/a WallCraft Construction, performed

and provided the stucco cladding and related work on the original construction of the Subject Property, as a subcontractor to Superior.

97. Weatherholtz Masonry, LLC (Weatherholtz) is a Limited Liability Company organized under the laws of South Carolina and Charleston County, and doing business in the same. Weatherholtz performed the complete masonry work on the Subject Property.

98. In the Wind, LLC is a Limited Liability Company organized under the law of South Carolina and doing business in the same. In the Wind, as a second tier subcontractor, performed part or all of the window installation for the original construction of the Subject Property.

99. Philip Gasque d/b/a Philip Gasque Construction, ("Philip Gasque Construction") upon information and belief, is a sole proprietorship with its principle place of business located in Conway, South Carolina. Philip Gasque Construction provided and installed the exterior sheathing work at the Subject Property as a subcontractor to Superior.

100. Architectural Stone Company, (herein "ASC") upon information and Belief, is a sole proprietorship with its principle place of business in Plano, Texas. ASC supplied and installed certain exterior stone façade and cladding elements at the Subject Property as a subcontractor to Superior.

101. Defendant Southern Mechanical Inc. is a corporation organized under the laws of the State of Tennessee, and conducting business in the State of South Carolina. Southern Mechanical Inc. performed the mechanical/ HVAC installation work at the Subject Property as a subcontractor to Superior.

102. Defendants Weather Shield, Mfg., Inc, The Muhler Company, Inc., Chris Tocito d/b/a WallCraft Construction, Wall Craft Construction, Inc., Weatherholtz Masonry, LLC, Philip

Gasque Construction, ASC, and Southern Mechanical Inc. are collectively referred to herein as "the Subcontractors and Suppliers."

103. The Plaintiff has alleged in its Complaint a number of allegedly improper and/or defective items of workmanship and materials, and various resulting damages regarding the Subject Property that directly arises out, or, relates to the respective scope of work of, or materials supplied by, the Subcontractors. While Superior has denied these allegations, the claims and allegations by the Plaintiff, if proven substantiated, entitle Superior to full recovery pursuant to the various claims in law and equity enumerated below.

FOR A FIRST CAUSE OF ACTION
(Contractual Indemnity)

104. Superior is entitled by contractual provisions, to the fullest extent permitted by law, full indemnity from the Subcontractors and Suppliers, to include the assumption of Superior's defense, as a result of the allegations and claims made by the Plaintiff, if substantiated.

FOR A SECOND CAUSE OF ACTION
(Equitable Indemnity)

105. By virtue of the special relationship between Superior and the Subcontractors and Suppliers, and the claims asserted by the Plaintiff against Superior as a result of the subcontractors and suppliers' work, Superior is entitled to equitable indemnity for losses, damages, and other harm that it incurs as a result of the claims and allegations of the Plaintiff, if substantiated, that relate to the Subcontractors and Supplier's respective scope of work and provision of materials.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract- to include Performance Bond Claims)



106. The Suppliers and Subcontractors are in breach of their contractual obligations towards Superior in regards to the construction of the Subject Property, due to the above-referenced claims and allegations of the Plaintiff, if substantiated, and due to project delays caused by the Subcontractors and Suppliers that resulted in Superior being assessed various delay penalties and withheld retainage by the Owner, and for corrective work that Superior had to undertake in the course of construction to cure non-compliant work by the Suppliers and Subcontractors. Furthermore, to cure said breach to the extent that the action of any performance bond is required, Superior asserts a demand of performance against Companion Property and Casualty Insurance Company, and petitions for declaratory judgment against the same on the obligation of the bond.

FOR A FOURTH CAUSE OF ACTION
(Breach of Express and Implied Warranties)

107. If the claims and allegations of the Plaintiff's Complaint regarding alleged defective workmanship and materials are substantiated, then the Subcontractors and Suppliers, and In The Wind, LLC, have breached their respective express warranties, as well as the implied warranty of workmanlike performance, the implied warranty of merchantability, and the implied warranty of use of particular purpose. Furthermore, apart from the claims and allegations of the Plaintiff, the Subcontractors and Suppliers have breached their express warranty obligations in failing to perform on proper demands for warranty work at the Subject Property that were made by Superior.

FOR A FIFTH CAUSE OF ACTION
(Negligence as to In the Wind, LLC)

108. While not in direct privity with Superior, In the Wind, LLC nonetheless was entrusted with, and knowingly undertook a duty of care that extended to Superior, the Owner, and the Plaintiff to install the windows at the subject property in conformance with the



requirements of the controlling building code, manufacture's instructions, industry standards, and proper workmanship. If the claims and allegations of the Plaintiff's Complaint regarding alleged defective workmanship and materials pertaining to the window installation are substantiated, which is denied, then In The Wind, LLC, has breached this duty of care, thereby subjecting Superior to damages for which it was not directly responsible. Such damages include, but are not limited to direct repair costs, investigation costs and testing undertaken by Superior, and claims of resulting damages asserted against Superior by the Plaintiff, the Owner, and individual unit owners in the Subject Property.

This Defendant preserves the right to assert any and all other applicable legal, contractual, or equitable defenses that may be asserted by any other defendant in this action, or which may become evident during its investigation and through discovery. This Defendant also reserves the right to name additional Third Party Defendants in the event that the Plaintiff's claims and allegations implicate the work of any of Superior's other subcontractors or suppliers who were involved with the Subject Property.

WHEREFORE, having answered the Complaint, the Defendant prays that this Court award it the following relief:

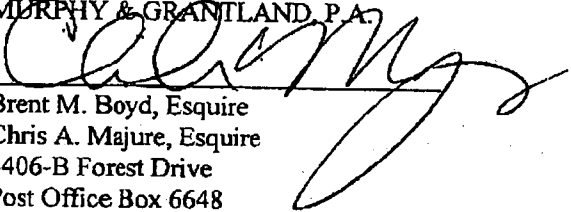
1. Dismiss the Complaint with prejudice to the Defendant Superior;
2. Declare that the Plaintiff is entitled to no recovery from this Defendant;
3. Tax the costs of this action against the Plaintiff;
4. Award the Defendant Superior its attorneys' fees;
5. Award this Defendant a trial by jury on all issues so triable, and;



6. Declare that Superior is entitled to full recovery of its damages, costs, and attorney's fees against the Third Party Defendant and Co-Defendant Subcontractors and Suppliers identified above,
7. Grant such other relief in favor of the Defendant, as the Court may deem just and appropriate.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



Brent M. Boyd, Esquire
Chris A. Majure, Esquire
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Superior Construction, Inc.

Columbia, South Carolina
May 25, 2010

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Concord and Cumberland Horizontal Property
Regime,

Plaintiff,

v.

Concord & Cumberland, LLC; Concord &
Cumberland Manager, LLC; Estates, Inc.;
Superior Construction Corporation; Weather
Shield Mfg., Inc.; and J. Davis Architects,
PLLC,

Defendants.

Concord & Cumberland, LLC,

Third-Party Plaintiff,

v.

The Muhler Company, Inc., Chris Tocito d/b/a
Wallcraft Construction; Wall Craft Construction,
Inc.; Weatherholtz Masonry, LLC; Safeco
Insurance Company of America; and Companion
Property and Casualty Group,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-10-2271

ANSWER OF CONCORD
CUMBERLAND, LLC

and

CROSSCLAIMS

against

Superior Construction Corporation;
Weather Shield Mfg., Inc., and J. Davis
Architects, PLLC

and

THIRD-PARTY COMPLAINT

against

The Muhler Company, Inc., Chris Tocito
d/b/a Wallcraft Construction; Wall Craft
Construction, Inc.; Weatherholtz Masonry,
LLC; Safeco Insurance Company of
America; and Companion Property and
Casualty Group

FILED

2010 JUN 11 PM 4:07
JULIE J. ARMSTRONG
CLERK OF COURT

The Defendant, Concord & Cumberland, LLC ("C&C LLC") answering the Plaintiff's
Complaint, respectfully responds as follows and asserts Cross-Claims and a Third-Party
complaint as set out herein.

In addition, C&C LLC hereby asserts and specifically reserves its right to have all claims
related to this suit resolved by binding arbitration and does not waive such rights by this
responsive pleading or affirmative assertions herein.

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation of the Complaint not specifically admitted herein is denied. To the extent any allegation or part thereof may not be expressly referred to and specifically answered, it is hereby denied and legal proof thereof is requested.

FOR AN ADDITIONAL DEFENSE
(Specific Responses)

2. The allegations contained in Paragraph 1 through 4 are admitted with the exception that, upon information and belief, Plaintiff does not qualify as a "horizontal property regime" under S.C. Code § 27-31-10 et seq..

3. C&C LLC lacks sufficient information and knowledge to form a belief as to the allegations contained in Paragraphs 5 and 6 and therefore can neither admit nor deny same and demands legal proof thereof.

4. The allegations contained in Paragraph 7 are admitted

5. The allegations contained in Paragraphs 8 are admitted only to the extent that they are proper interpretations of the Master Deed and the legal obligations and rights of Plaintiff.

6. As to the allegations contained in Paragraph 9, it is admitted that Concord & Cumberland, LLC is limited liability company organized and existing under the laws of South Carolina and has conducted business in Charleston County. All remaining allegations are denied and legal proof thereof is demanded.

7. As to the allegations contained in Paragraph 10, it is admitted that Concord & Cumberland Manager, LLC is limited liability company organized and existing under the laws of South Carolina and has conducted business in Charleston County. All remaining allegations are denied and legal proof thereof is demanded.

8. As to the allegations contained in Paragraph 11, it is admitted that Estates, Inc. is a South Carolina corporation. All remaining allegations are denied and legal proof thereof is demanded.

9. As to the allegation contained in Paragraph 12, it is admitted that C&C LLC developed and sold some condominium units. All remaining allegations are denied and legal proof thereof is demanded. To the extent that Plaintiff's claims rely upon acts or omissions of others to assert claims against C&C LLC, this Defendant specifically denies any liability for any acts or omissions of others acting without this Defendant's express or other legal authority. This Defendant objects to the Plaintiff's use of the word "Defendants" (or similar language or use of conjunctives) to allege that it acted in concert with, by, and/or through any other party or entity, or is liable for the acts of others, without sufficient legal proof of such authority or liability.

10. As to the allegations contained in Paragraph 13 it is admitted that C&C LLC developed and sold some condominium units. All remaining allegations are denied and legal proof thereof is demanded.

11. As to the allegations contained in Paragraphs 14, it is admitted that a Master Deed dated October 18, 2007, including amendments and attachments thereto, was filed with the RMC Office.

12. The allegations contained in Paragraph 15 are denied and legal proof thereof is demanded.

13. The allegations contained in Paragraphs 16 through 18 are admitted, upon information and belief.

14. As to the allegations contained in Paragraphs 19 and 20, it is admitted that Plaintiff reported some instances of moisture intrusion to C&C LLC, which, upon information and belief,

were properly addressed at that time. All remaining allegations are denied and legal proof thereof is demanded.

15. The allegations contained in Paragraph 21 are denied as they relate to C&C LLC and legal proof thereof is demanded.

16. As to the allegations contained in Paragraphs 22-28, it is admitted that Plaintiff retained someone to inspect the property, and that, upon information and belief, one or more inspection reports were prepared, and that Plaintiff bases its allegation upon such report(s); however, C&C LLC denies the accuracy of such reports unless legal proof thereof is provided, and further denies that Plaintiff's actions in retaining such inspections was necessary. All remaining allegations are denied and legal proof thereof is demanded.

17. As to the allegations in Paragraph 29, C&C LLC does not oppose venue of this matter in this Court at this time.

18. Paragraph 30 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

19. Paragraph 31 states pleading information that requires no response. To the extent that a response is required, C&C LLC denies that any provisions of the Master Deed are unenforceable.

20. The allegations contained in Paragraphs 32 & 33 are admitted.

21. The allegations contained in Paragraph 34 are denied as alleged and legal proof thereof is demanded.

22. The allegations contained in Paragraph 35 are denied and legal proof thereof is demanded.

23. As to the allegations contained in Paragraph 36, C&C LLC craves reference to the

Master Deed itself.

24. The allegations contained in Paragraphs 37 through 43 are denied as alleged and legal proof thereof is demanded.

25. As to the allegations contained in Paragraphs 44 through 47, C&C LLC craves reference to the Master Deed itself.

26. The allegations contained in Paragraphs 48 through 53 are denied as alleged and legal proof thereof is demanded.

27. As to the allegations contained in Paragraph 54, C&C LLC craves reference to the Master Deed itself.

28. The allegations contained in Paragraphs 55 through 59 are denied and legal proof thereof is demanded.

29. Paragraphs 60 through 63 state pleading information that requires no response. To the extent that a response is required, the same is denied. Further, C&C LLC asserts that Plaintiff does not raise a justiciable controversy sufficient to invoke a declaratory judgment.

30. Paragraph 64 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

31. The allegations contained in Paragraphs 65 through 70 are denied and legal proof thereof is demanded.

32. Paragraph 71 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

33. The allegations contained in Paragraph 72 are denied as alleged and legal proof thereof is demanded.

34. The allegations contained in Paragraphs 73 through 80 are denied and legal proof

thereof is demanded.

35. Paragraph 81 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

36. The allegations contained in Paragraph 82 are denied as alleged and legal proof thereof is demanded.

37. The allegations contained in Paragraphs 83 through 87 are denied and legal proof thereof is demanded.

38. Paragraph 88 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

39. The allegations contained in Paragraphs 89 through 96 are denied as alleged and legal proof thereof is demanded.

40. Paragraph 97 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

41. As to the allegations contained in Paragraph 98 through 108, it is admitted that C&C LLC sold some condominium units. All remaining allegations are denied as alleged and legal proof thereof is demanded.

42. Paragraph 109 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

43. Paragraphs 110 and 111 state legal conclusions to which no response is required.

44. The allegations contained in Paragraphs 112 through 118 are denied as alleged and legal proof thereof is demanded.

45. Paragraph 119 is an incorporation paragraph and C&C LLC reiterates its prior responses thereto.

46. The allegations contained in Paragraphs 120 and 121 are denied as alleged and legal proof thereof is demanded.

47. The allegations contained in Paragraphs 122 through 126 are denied and legal proof thereof is demanded.

48. Paragraphs 127 through 210 are not directed towards C&C LLC; thus no response is required. However, to the extent that any allegation of liability is made therein against C&C LLC, the same is hereby denied.

49. C&C LLC denies the allegations contained in the concluding "WHEREFORE" paragraphs and demands legal proof thereof.

FOR AN ADDITIONAL DEFENSE
(Binding Arbitration)

50. The claims in this matter are subject to binding arbitration and C&C LLC hereby moves the Court for an order compelling such as to all parties and all claims.

FOR AN ADDITIONAL DEFENSE
(Failure to State Claim)

51. Plaintiff fails to state a claim against C&C LLC for which relief may be granted.

FOR AN ADDITIONAL DEFENSE
(Privity)

52. Plaintiff lacks sufficient privity or other relationship with C&C LLC to maintain a claim against it.

FOR AN ADDITIONAL DEFENSE
(Statute of Limitations/Repose)

53. The claims set forth in the Complaint are barred, in whole or in part, by the applicable statutes of limitation and/or statutes of repose.

FOR AN ADDITIONAL DEFENSE
(Waiver/Estoppel/Laches)

54. The claims set forth in the Complaint are barred by the doctrines of waiver, estoppel or laches.

FOR AN ADDITIONAL DEFENSE
(Liability/Remedy Limitations)

55. Plaintiff's claims and remedies are limited, restricted, or excluded by the substance of any communication between the parties, including documents and/or oral conversations. Further, C&C LLC's liability, if any, may be limited, restricted, or excluded by the rights, responsibilities, and liability of Plaintiff and/or third parties, either by contract, statute, or equity.

FOR AN ADDITIONAL DEFENSE
(Agency/Authority)

56. To the extent that Plaintiff's claims rely upon acts or omissions of others to assert claims against this Defendant, this Defendant specifically denies any liability for any acts or omissions of others acting without this Defendant's express or other legal authority. This Defendant objects to the Plaintiff's use of the word "Defendants" (or similar language or use of conjunctives) to allege that it acted in concert with, by, and/or through any other party or entity, or is liable for the acts of others, without sufficient legal proof of such authority or liability.

FOR AN ADDITIONAL DEFENSE
(Failure to Mitigate)

57. Plaintiff has failed to act reasonably to prevent, mitigate, or otherwise lessen the alleged damages.

FOR AN ADDITIONAL DEFENSE
(Contract/Warranty Defenses)

58. C&C LLC pleads the following affirmative defenses to any breach of contract or breach of warranty claim: Plaintiff's own breach, Plaintiff's acceptance of modification, waiver,

estoppel, and all equitable defenses applicable to such claim, including without limitation the doctrine of unclean hands.

FOR AN ADDITIONAL DEFENSE

(Notice)

59. Plaintiff's claims are barred or limited by the failure to give timely and reasonable notice to C&C LLC as required by law.

FOR AN ADDITIONAL DEFENSE

(Conditions Precedent)

60. C&C LLC pleads that, to the extent that Plaintiff claims liability against it in any manner, conditions precedent to such liability have not been met.

FOR AN ADDITIONAL DEFENSE

(Reliance)

61. C&C LLC pleads that, to the extent that Plaintiff claims reliance on any action or omission under which it seeks to impose liability on C&C LLC, such reliance did not induce a change in Plaintiff's position, such reliance was unreasonable and unjustified under the circumstances, Plaintiff has not been prejudiced by such asserted reliance, and/or such asserted reliance was not the proximate cause of any damages sustained by Plaintiff.

FOR AN ADDITIONAL DEFENSE

(Economic Loss Rule)

62. Plaintiff seeks damages for purely economic losses and therefore Plaintiff's remedies are limited by the Economic Loss Rule, to include the prohibition against tort-based causes of action.

FOR AN ADDITIONAL DEFENSE

(Warranty-Defenses)

63. To the extent that Plaintiff claims a breach of warranty, C&C LLC specifically pleads

the following defenses: non-existence of warranty, non-applicability of warranty to Plaintiff's claim(s), disclaimer of warranty, modification of warranty, acceptance by Plaintiff, compliance with warranty, and/or waiver by Plaintiff.

FOR AN ADDITIONAL DEFENSE
(Third Party Fault)

64. C&C LLC asserts that the claims against it are barred or limited by the contributing, concurring, intervening, or superseding fault, negligence, or breach by persons or entities other than C&C LLC, including Plaintiff, and that any fault or negligence by C&C LLC, the existence of which is denied, was passive and secondary in light of the primary and active fault, negligence, or breach by others, including Plaintiff. C&C LLC asserts such fault, negligence, or breach as a basis for the elimination or reduction of any liability by C&C LLC, the existence of which is denied.

FOR AN ADDITIONAL DEFENSE
(Contributing/Comparative Fault)

65. C&C LLC alleges that any damages sustained by the Plaintiff were caused and occasioned by the Plaintiff's own negligence, recklessness, willfulness and wantonness or other fault, and

- A. That the fault attributable to Plaintiff is a complete bar to the Plaintiff's claim;
- B. That the fault attributable to Plaintiff was greater than any alleged fault of C&C LLC or others and is a complete bar to the Plaintiff's claim;
- C. That the fault attributable to Plaintiff combined with, contributed to, or concurred in any alleged fault of C&C LLC or others and acted as a proximate cause of the damages allegedly sustained and is therefore a complete bar to Plaintiff's claim;
- D. Should the Plaintiff be entitled to a recovery, such recovery should be reduced in proportion to the fault attributable to Plaintiff; and
- E. Should Plaintiff be entitled to a recovery, C&C LLC specifically requests and moves that such liability should be assessed in accordance with S.C. Code § 15-38-15, if

applicable. In addition and in the alternative, C&C LLC asserts its right under due process of law to have liability, if any, assessed in proportion to the responsibility of each party for such liability and that the amount of recoverable damages, if any, be assessed in accordance with such apportionment.

FOR AN ADDITIONAL DEFENSE

(Assumption of the Risk)

66. C&C LLC alleges that any damages sustained by the Plaintiff were the result of a dangerous condition or the risk thereof, known to Plaintiff, the nature and extent of which Plaintiff fully appreciated, and the Plaintiff voluntarily and knowingly exposed itself to such condition and risk.

FOR AN ADDITIONAL DEFENSE

(Set-off/Credit)

67. C&C LLC asserts entitlement to a set-off and/or credit for all proceeds received by or on behalf of Plaintiff as a result of Plaintiffs' claims in this matter, regardless of the source or basis of such proceeds, to include any contractual or gratuitous reduction in charges or provision of services or materials.

FOR AN ADDITIONAL DEFENSE

(Non-Waiver)

68. C&C LLC reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

FOR AN ADDITIONAL DEFENSE

(Incorporation)

69. C&C LLC hereby incorporates and asserts all defenses, counterclaims, set-offs, and credits pled by other parties in this action, to include any pleadings filed after this Answer, and specifically, without limitation, all defenses, counterclaims, set-offs, and credits pled to Plaintiffs' claims, to the extent not inconsistent with its Answer herein and its denial of liability of any kind.

FOR AN ADDITIONAL DEFENSE
(Punitive Damages-Procedural)

70. C&C LLC alleges upon information and belief that punitive damages as currently awarded in the State of South Carolina violate the Constitutions of the United States and of South Carolina.

FOR AN ADDITIONAL DEFENSE
(Punitive Damages-Substantive)

71. C&C LLC alleges that a verdict for the Plaintiff for punitive damages would deprive C&C LLC of property without due process of law and without equal protection of the laws:

- (a) If the award is based upon conduct that is not intentional or malicious, or conduct that was lawful at the time and place where the conduct occurred or had no impact upon the State of South Carolina or its residents;
- (b) If the amount awarded bears no reasonable relationship to the proven harm claimed by Plaintiff;
- (c) If the award is based upon other, dissimilar acts or omissions;
- (d) If the award is based upon other parties' hypothetical claims;
- (e) If the award is based upon economic rather than physical harm;
- (f) If the award is excessive in comparison to penalties imposed or authorized in comparable cases.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
SUPERIOR CONSTRUCTION CORPORATION, WEATHER SHIELD MFG., INC., and
J. DAVIS ARCHITECTS**
(Contractual Indemnity)

72. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

73. To the extent that Plaintiff's allegations are true, which is specifically denied, C&C LLC is entitled by contractual provisions to be fully indemnified by Superior, Weather Shield, and J. Davis for any and all amounts awarded as a result of settlement or judgment, along with costs and attorney's fees associated with the defense of this action.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
SUPERIOR CONSTRUCTION CORPORATION, WEATHER SHIELD MFG., INC., and
J. DAVIS ARCHITECTS**
(Equitable Indemnity)

74. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

75. By virtue of the special relationship between C&C LLC and Superior, Weather Shield, and J. Davis, and the claims asserted by the Plaintiff against C&C LLC as a result of the contractor's and subcontractors' work, C&C LLC is entitled to equitable indemnity for losses, damages, and other harm that it incurs as a result of the claims and allegations of the Plaintiff, if substantiated, that relate to the Subcontractors and Supplier's respective scope of work and provision of materials.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
SUPERIOR CONSTRUCTION CORPORATION, WEATHER SHIELD MFG., INC., and
J. DAVIS ARCHITECTS**
(Contribution)

76. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

77. To the extent that Plaintiff prevails on any of his claims against C&C LLC, C&C LLC is entitled to contribution from Superior, Weather Shield and J. Davis.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF CROSS CLAIM AGAINST
SUPERIOR CONSTRUCTION CORPORATION and J. DAVIS ARCHITECTS**
(Breach of Contract)

78. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

79. C&C LLC entered into contractual agreements with Superior and J. Davis. Each contract stated the scope and specifications of the individual subcontractor's responsibilities, which is the subject of this action.

80. Superior and J. Davis agreed to perform their work in a workmanlike manner in accordance with the plans and specifications.

81. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

82. C&C LLC denies the allegations of the Amended Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then Superior and J. Davis have breached their contracts with C&C LLC and, therefore, are liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

**FOR AN ADDITIONAL DEFENSE AND BY WAY OF THIRD-PARTY COMPLAINT
AGAINST THE MUHLER COMPANY, INC., COMPANION PROPERTY AND
CASUALTY GROUP, IN THE WIND, INC., CHRIS TOCITO d/b/a WALLCRAFT
CONSTRUCTION, WALL CRAFT CONSTRUCTION, INC., WEATHERHOLTZ
MASONRY, LLC and SAFECO INSURANCE COMPANY OF AMERICA.**

Defendant/Third-Party Plaintiff, Concord & Cumberland, LLC ("C&C LLC"), by and through its undersigned attorneys, and by way of a Third-Party Complaint alleges:

83. C&C LLC is a corporation organized and existing under the laws of the State of South Carolina and is registered to conduct business in the State of South Carolina.

84. Third-Party Defendant The Muhler Company, Inc., is a company doing business in Charleston County, South Carolina.

85. Third-Party Defendant Companion Property and Casualty Group ("Companion") is a foreign corporation doing business in Charleston County, South Carolina.

86. Third-Party Defendant In the Wind, Inc., is a company doing business in Charleston County, South Carolina.

87. Third-Party Defendant Chris Tocito d/b/a Wallcraft Construction ("Tocito"), upon information and belief, has its principle place of business located in Myrtle Beach, South

Carolina, and conducts business in the State of South Carolina and Charleston County.

88. Third-Party Defendant Wall Craft Construction, Inc. ("Wall Craft") is a corporation organized under the laws of the State of Georgia, and conducts business in the State of South Carolina and Charleston County.

89. Third-Party Defendant Weatherholtz Masonry, LLC ("Weatherholtz") is a Limited Liability Company organized under the laws of South Carolina and Charleston County, and doing business in the same.

90. Third-Party Defendant Safeco Insurance Company of America ("Safeco") is a foreign corporation doing business in Charleston County, South Carolina.

91. Third-Party Defendant Companion Property and Casualty Group ("Companion") is a foreign corporation doing business in Charleston County, South Carolina.

92. The four story condominium complex known as Concord & Cumberland ("Subject Property") located in Charleston County, South Carolina is the subject of this action.

93. Subject to the assertion of the right to binding arbitration, this Honorable Court has jurisdiction of the parties and claims, which are hereinafter set forth in this Third-Party Complaint as the contracts being sued upon and the actions complained of occurred or were performed in the County of Charleston, State of South Carolina.

94. Tocito along with Wall Craft Construction, Inc. performed the stucco cladding and related work on the original construction of the subject property.

95. Weatherholtz performed the masonry work on the subject property.

96. Safeco provided a surety bond to Superior Construction for its work on the subject property.

97. Companion provided a surety bond to The Muhler Company for its work on the

subject property.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity as to all Third-Party Defendants)

98. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

99. To the extent, if any, that C&C LLC is held liable to Plaintiff for the alleged damages in this action, such liability would be the direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of Third-Party Defendants, which have damaged C&C LLC as C&C LLC has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

100. C&C LLC is entitled to full common law indemnification from Third-Party Defendants for any liability, which is denied, C&C LLC is found to have to the Plaintiff in this action, including all settlements, judgments, costs, attorney's fees or other monies expended in connection with this action, as the same relate to the work, wrongful acts, omissions, negligence, and/or representations of Third-Party Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Express and Implied Warranties as to Muhler, In the Wind Companion,
Tocito, Wall Craft and Weatherholtz)

101. Third-Party Defendants Muhler, In the Wind, Tocito, Wall Craft and Weatherholtz made express and implied warranties that their labor and materials would be merchantable, fit for their particular purpose, of workmanlike quality, and that their work constituted good and workmanlike service.

102. If the Plaintiff proves that material selection, installation, application, design, and/or workmanship were not in accordance with contract requirements, industry standards, and/or building code requirements, then Third-Party Defendants, Muhler, In the Wind, Tocito, Wall Craft and Weatherholtz have materially breached their express and implied warranties of

workmanlike service, merchantability, and fitness for a particular purpose by failing to provide proper materials, properly install said materials and provide acceptable workmanship at or for the subject property.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract as to Safeco)

103. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

104. C&C LLC entered into contractual agreements with Superior. This contract stated the scope and specifications of the individual subcontractor's responsibilities, which is the subject of this action.

105. Superior agreed to perform its work in a workmanlike manner in accordance with the plans and specifications.

106. The Plaintiff herein has alleged that the subject property was defectively designed and constructed, which C&C LLC denies, resulting in damages the Plaintiff has suffered including costs for repairs, as a result of negligence on the part of Defendants, including C&C LLC.

107. C&C LLC denies the allegations of the Amended Complaint; however, in the event that the facts as alleged by the Plaintiff are substantiated, then Superior has breached its contract with C&C LLC and, therefore, is liable to C&C LLC for the actual, consequential and/or punitive damages proximately resulting there from, said damages to include the costs and attorney's fees associated with the defense of this action.

FOR A FOURTH CAUSE OF ACTION
(Contractual Indemnity as to Safeco, Muhler and Companion)

108. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

109. To the extent that Plaintiff's allegations are true, which is specifically denied, C&C LLC is entitled by contractual provisions to be fully indemnified by Safeco, Muhler and

Companion for any and all amounts awarded as a result of settlement or judgment, along with costs and attorney's fees associated with the defense of this action.

FOR A FIFTH CAUSE OF ACTION

(Negligence as to Muhler, In the Wind, Tocito, Wall Craft and Weatherholtz)

110. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

111. Third-Party Defendants Muhler, In the Wind, Tocito, Wall Craft and Weatherholtz owed a duty to exercise reasonable care in the performance of their work, including their selection of materials, the installation of such materials, the manufacture of such materials, and in ensuring that proper levels of workmanship were achieved.

112. Plaintiff has alleged that the subject property was defectively constructed and designed in various particulars, that the property has been severely damaged, including damage resulting from moisture intrusion that Plaintiff will have to spend substantial amounts of money for repairs and reconstruction as a result of the negligent construction and/or design of the subject property.

113. C&C LLC has denied all substantive allegations of the Amended Complaint; however, if Plaintiff proves the facts as alleged in the Amended Complaint, then Third-Party Defendants Muhler, In the Wind, Tocito, Wall Craft and Weatherholtz breached their duty of reasonable care by selecting improper materials, allowing the improper installation of said materials, improperly manufacturing said materials, improperly providing for quality control, and in failing to ensure that proper levels of workmanship were achieved at the subject property.

114. If the Plaintiff obtains judgment against C&C LLC as a direct and foreseeable and proximate result of the negligence of Third-Party Defendants Muhler, In the Wind, Tocito, Wall Craft and Weatherholtz, then C&C LLC is entitled to judgment against these Third-Party for the amount of any judgment for which C&C LLC may be liable plus attorney's fees and costs and for

punitive damages to be determined by a jury.

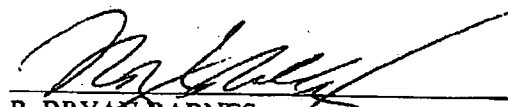
FOR A SIXTH CAUSE OF ACTION
(Contribution as to all Third Party Defendants)

115. C&C LLC incorporates its previous paragraphs as if repeated herein verbatim.

116. To the extent that Plaintiff prevails on any of his claims against C&C LLC, C&C LLC is entitled to contribution from all Third-Party Defendants.

WHEREFORE, Concord & Cumberland, LLC, having responded to the Complaint and asserting its Cross Claims and Third-Party Complaint, prays that the Court:

1. Dismiss all claims against C&C LLC and tax the costs thereof to the Plaintiff;
2. Award C&C LLC the relief sought in its Cross Claims and Third-Party Complaint, including, but not limited to, judgment against the Cross-Claimants and Third-Party Defendants in the amount of any liability C&C LLC may be found to have to Plaintiff in this action, including attorneys' fee and costs;
3. Award C&C LLC judgment requiring the Cross-Claimants and Third-Party Defendants to defend and indemnify C&C LLC against any liability that C&C LLC may have to the Plaintiff;
4. For such other and further relief as this Court may deem just and proper.



R. BRYAN BARNES
T. MCROY SHELLEY, III
ROGERS, TOWNSEND & THOMAS, P.C.
220 Executive Center Drive (29210)
Post Office Box 100200
Columbia, South Carolina 29202-3200
Phone: (803) 771-7900; Fax: (803) 343-7017
barnes@rtt-law.com; Direct: 803-744-1273
shelley@rtt-law.com; Direct: 803-744-1818

ATTORNEYS FOR DEFENDANT
CONCORD & CUMBERLAND, LLC

Columbia, South Carolina

6/10, 2010

3821548-1

I certify that on this date, a copy of the foregoing was served on each party or counsel of record by ☐ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 10 day of June, 2010.

Christie Wagner

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,

Plaintiff,

vs.

CONCORD & CUMBERLAND, LLC;
CONCORD & CUMBERLAND
MANAGER, LLC; ESTATES, INC.;
SUPERIOR CONSTRUCTION
CORPORATION; WEATHER SHIELD
MFG., INC., and J. DAVIS ARCHITECTS,
PLLC,

Defendants.

WEATHER SHIELD MFG., INC.,

Third-Party Plaintiff,

vs.

THE MUHLER COMPANY, INC. AND
IN THE WIND, INC.,

Third-Party Defendants.

CONCORD & CUMBERLAND, LLC

Third-Party Plaintiff,

vs.

THE MUHLER COMPANY, INC., CHRIS
TOCITO d/b/a WALLCRAFT
CONSTRUCTION, WALL CRAFT
CONSTRUCTION, INC.,
WEATHERHOLTZ MASONRY, LLC,
SAFECO INSURANCE COMPANY OF
AMERICA, AND COMPANION
PROPERTY AND CASUALTY GROUP,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-10-2271

THE MUHLER COMPANY, INC.'S
ANSWER TO THE THIRD-PARTY
COMPLAINT OF CONCORD &
CUMBERLAND, LLC, CROSS-
CLAIMS AGAINST WEATHER
SHIELD MFG., INC. AND IN THE
WIND, AND
THIRD-PARTY COMPLAINT
AGAINST WATTS BUILDERS, LLC

FILED
AUG 11 PM 12:55
JULIE J. ARMSTRONG
CLERK OF COURT

SUPERIOR CONSTRUCTION
CORPORATION,

Third-Party Plaintiff,

vs.

THE MUHLER COMPANY, INC.,
COMPANION PROPERTY AND
CASUALTY INSURANCE COMPANY,
CRAIU "CHRIS" TOCITU d/b/a
WALLCRAFT CONSTRUCTION, INC.,
WEATHERHOLTZ MASONRY, LLC, IN
THE WIND, INC., PHILIP GASQUE d/b/a
PHILIP GASQUE CONSTRUCTION,
ARCHITECTURAL STONE COMPANY,
AND SOUTHERN MECHANICAL, INC.

Third-Party Defendants.

THE MUHLER COMPANY, INC.,

Third-Party Plaintiff,

vs.

WATTS BUILDERS, LLC

Third-Party Defendant.

Third-Party Defendant, The Muhler Company, Inc ("Muhler"), answering the Third-Party Complaint of Concord & Cumberland, LLC ("C&C") alleges as follows:

FOR A FIRST DEFENSE

1. This Third-Party Defendant denies each and every allegation of the Third-Party Complaint that is not specifically and unconditionally admitted hereinafter.

FOR A SECOND DEFENSE

2. The allegations of Paragraphs 1 through 71 of the Answer and Cross-Claim relate to Concord & Cumberland LLC's Answer and no response is required.

3. Paragraphs 72 through 82 relate to Cross-Claims by Concord & Cumberland, LLC against Superior Construction Corporation, Weather Shield Mfg., Inc. and J. Davis Architects, PLLC and no response is required from Muhler.

**ANSWERING THE THIRD-PARTY COMPLAINT
AGAINST THE MUHLER COMPANY, INC.**

4. This Third-Party Defendant admits, upon information and belief, the allegations of Paragraph 83.

5. This Third-Party Defendant admits the allegations of Paragraph 84 of the Third-Party Complaint.

6. Paragraphs 85, 86 87, 88, 89, 90 and 91 do not concern this Third-Party Defendant and no response is required.

7. This Defendant admits the allegations of Paragraph 92 of the Third-Party Complaint.

8. The allegations of Paragraph 93 state conclusions of law to which no response is required. Paragraphs 94, 95 and 96 do not concern this Third-Party Defendant and no response is required.

9. In response to Paragraph 97, Muhler admits the existence of a surety bond from Companion but craves references to the contractual documents related to that bond for a complete and accurate interpretation of the obligations therein.

ANSWERING THE FIRST CAUSE OF ACTION

10. In response to Paragraph 98, this Third-Party Defendant incorporates all the previous paragraphs as if repeated herein verbatim.

11. This Third-Party Defendant denies the allegations of Paragraphs 99 and 100 of the Third-Party Complaint.

ANSWERING THE SECOND CAUSE OF ACTION

12. The allegations of Paragraphs 101 state conclusions of law to which no response is required.

13. This Third-Party Defendant denies Paragraph 102 of the Third-Party Complaint.

ANSWERING THE THIRD CAUSE OF ACTION

14. In response to Paragraph 103, this Third-Party Defendant incorporates its previous paragraphs as if repeated herein verbatim.

15. The allegations of Paragraphs 104, 105, 106 and 107 do not concern this Third-Party Defendant and no response is required.

ANSWERING THE FOURTH CAUSE OF ACTION

16. In response to Paragraph 108, this Third-Party Defendant incorporates its previous paragraphs as if repeated herein verbatim.

17. The allegations of Paragraph 109 state conclusions of law to which no response is required. To the extent a response is required, the allegations of Paragraph 109 are denied.

ANSWERING THE FIFTH CAUSE OF ACTION

18. In response to Paragraph 110, this Third-Party Defendant incorporates its previous paragraphs as if repeated herein verbatim.

19. The allegations of Paragraph 111 state conclusions of law to which no response is required.

20. In response to Paragraph 112, this Third-Party Defendant craves reference to the Plaintiff's Complaint for a complete and accurate record of the allegations contained therein.

21. This Third-Party Defendant denies the allegations of Paragraph 113 of the Third-Party Complaint.

22. This Third-Party Defendant denies the allegations of Paragraph 114 of the Third-Party Complaint.

ANSWERING THE SIXTH CAUSE OF ACTION

23. In response to Paragraph 115, this Third-Party Defendant incorporate its previous paragraphs as if repeated herein verbatim.

24. This Third-Party Defendant denies the allegations of Paragraph 116, being all the remaining allegations of the Third-Party Complaint.

FOR A THIRD DEFENSE

25. C&C's claims against Muhler are barred by the doctrine of waiver and estoppel.

FOR A FOURTH DEFENSE

26. If Muhler acted or failed to act as alleged in the Cross Claims of C&C, which is specifically denied, there were separate and intervening acts or failure to act on the part of persons or entities other than Muhler which are the sole and proximate cause of C&C's damages and serve as a complete bar to any recovery against Muhler.

FOR A FIFTH DEFENSE

27. C&C's claims against Muhler are barred or must be reduced because even if Muhler were negligent, grossly negligent, reckless and willful as alleged, which is specifically denied, any negligence, gross negligence, recklessness and willfulness by Muhler must be measured against the negligence, gross negligence, recklessness, wantonness, willfulness of one or more of the entities other than Muhler to include C&C, over whom Muhler had no control, in failing or refusing to exercise reasonable care in the design, development and construction of the project.

FOR A SIXTH DEFENSE

28. Muhler reserves all rights it may have to demand binding arbitration.

FOR A SEVENTH DEFENSE

29. Muhler would allege that C&C has failed to state a claim sufficient to constitute a cause of action against Muhler upon which relief can be granted, and therefore, C&C's Third-Party Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR AN EIGHTH DEFENSE

30. Muhler would allege that C&C's Third-Party Complaint are barred by the doctrine of waiver and/or laches.

FOR A NINTH DEFENSE

31. C&C's claims are barred by applicable statute of limitations or statute of repose.

FOR A TENTH DEFENSE

32. C&C has failed to mitigate its damages; therefore, its claims are barred in whole or in part.

FOR AN ELEVENTH DEFENSE

33. These claims are barred in whole or in part by the doctrine of unclean hands.

FOR A TWELFTH DEFENSE

34. Muhler would allege that any injury and damage sustained by C&C was due to and caused by the sole and negligent acts or omissions of some person or persons other than Muhler, and over whom Muhler exercised no authority or control and for that reason, Muhler is not liable to C&C in any sum whatsoever.

FOR A THIRTEENTH DEFENSE

35. Muhler would show that C&C and/or its agents inspected, approved and ratified all work performed by Muhler. Furthermore, C&C knew or should have known if any of Muhler's work was not in accordance with the plans and specifications and in a workmanlike

manner. Accordingly, Muhler pleads the applicable statute of limitations or statutes of repose as a complete bar to all of C&C's claims.

FOR A FOURTEENTH DEFENSE

36. Muhler would show the materials and workmanship of Muhler at all times and in all manners met applicable plans, specifications, building code requirements, and industry standards and that Muhler are, therefore, not liable to C&C in any sum whatsoever.

FOR A FIFTEENTH DEFENSE

37. Muhler would show that any warranties provided by Muhler have expired.

FOR A SIXTEENTH DEFENSE

38. C&C's damages, if any, are the direct and proximate result of intervening and superseding acts of third parties not affiliated with Muhler and not under Muhler's domain or control.

FOR A SEVENTEENTH DEFENSE

39. C&C may have failed to join a party necessary to this litigation as required by Rule 19, SCRCP, and C&C's Third-Party Complaint should be dismissed pursuant to Rule 12(b)(7), SCRCP.

FOR AN EIGHTEENTH DEFENSE

40. C&C's claims are barred to the extent that C&C and/or C&C's members and agents discovered, or should have discovered, or were aware of any defects and nevertheless unreasonably proceeded to pay for Muhler's services.

FOR A NINETEENTH DEFENSE

41. Any damages suffered by C&C are the direct and proximate result of its comparative and contributory negligence and C&C's recovery should be barred or, alternatively, reduced proportionately to C&C's comparative negligence or others unrelated and not under the

control of Muhler.

FOR A TWENTIETH DEFENSE

42. That even if C&C was damaged as alleged, which is denied, the claims are barred pursuant to the doctrine of spoliation.

FOR A TWENTY-FIRST DEFENSE

43. Muhler alleges C&C failed and refused to comply with the contractual conditions precedent to this action, including but not limited to, timely written notice and detailed statements of the amounts claimed, thereby extinguishing the right to maintain the action herein.

FOR A TWENTY-SECOND DEFENSE

44. C&C's claims are barred and Muhler's obligation to C&C is void as a result of C&C's breach of warranty to provide plans and specifications to Muhler that were sufficient for Muhler to properly perform its work.

FOR A TWENTY-THIRD DEFENSE

45. C&C's claims are barred to the extent that C&C or C&C's members and agents discovered, or should have discovered, or were aware of any defects and failed to allow Muhler an opportunity to investigate and cure any alleged defect.

FOR A TWENTY-FOURTH DEFENSE

46. C&C's claims against Muhler are barred to the extent they seek to recover a tort for purely economic loss.

FOR A TWENTY-FIFTH DEFENSE

47. C&C cannot recover under the theory of an implied warranty because all implied warranties have been explicitly disclaimed by Muhler.

FOR A TWENTY-SIXTH DEFENSE

48. If this Court finds that an express warranty was given by Muhler, which it denies,

C&C's remedy must be limited to the remedies available under the warranty as its sole and exclusive remedy.

FOR A TWENTY-SEVENTH DEFENSE

49. Muhler would allege and show that it has substantially performed all requirements, contractual or otherwise, in a reasonable manner.

FOR A TWENTY-EIGHTH DEFENSE

50. Any injuries and damages sustained by C&C may have been the result of the misuse and/or abuse of the product in question. Additionally, C&C and/or other parties may have failed to use the product properly and may have abused the product and subjected it to abnormal use at the time or times and places alleged in the Cross Claims. Further, the product may have been used and handled contrary to the normal method of using the same, which was well known or ought to have been well known to C&C and/or other parties.

FOR A TWENTY-NINTH DEFENSE

51. Assuming that Muhler manufactured the product in question, which is denied at this time, if, after the product left the possession of Muhler, and without Muhler's knowledge or approval, the product was modified or altered or subjected to treatment that substantially changed its character and condition, then the alleged defect, as set forth in the Cross Claims, resulted from the modification, alteration, or treatment or other change of the product after Muhler relinquished possession and control over it and not from any act or omission of Muhler.

FOR A THIRTIETH DEFENSE

52. C&C's claims are barred, in whole or in part, by the doctrine(s) contained in Restatement (Fourth) of Torts §402(a), Comment k.

FOR A THIRTY-FIRST DEFENSE

53. Muhler would allege and show that the Cross Claims are barred pursuant to S.C.

Code Ann. §15-73-20.

FOR A THIRTY-SECOND DEFENSE

54. If Muhler made any warranties to C&C, which is denied, C&C's claims for breach of warranties are barred because C&C did not rely on any warranties allegedly made by Muhler.

FOR A THIRTY-THIRD DEFENSE

55. Muhler pleads the state-of-the-art doctrine as a complete defense to C&C's Third-Party Complaint.

FOR A THIRTY-FOURTH DEFENSE

56. Muhler hereby gives notice that they intend to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserve the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered, Muhler prays that the Cross Claims of C&C Construction Corporation be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

**FOR A THIRTY-FIFTH DEFENSE AND BY WAY OF
CROSS-CLAIM AGAINST DEFENDANT WEATHER SHIELD MFG., INC.**

57. The Defendant/Cross-Claimant Muhler expressly incorporates all responses to the allegations of the Amended Complaint, including all other defenses and motions related to the Answer, Cross-Claims and Third-Party Complaint, as if set forth herein verbatim, by reference, where relevant.

58. Muhler is a corporation organized and existing under the laws of the State of South Carolina.

59. Defendant Weather Shield Mfg., Inc. ("Weather Shield") is a foreign corporation doing business in the State of South Carolina.

60. Subject matter jurisdiction and personal jurisdiction as well as venue, are proper in this Court.

61. Muhler and Weather Shield entered into an agreement whereby Weather Shield agreed to supply windows of a certain kind and quality for use at Plaintiff's residence in connection with the replacement of portions of all or some of the windows.

62. Plaintiff alleges that the windows supplied by Weather Shield were not of the kind and quality that Weather Shield represented to Defendant Muhler.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

63. Muhler expressly incorporates all responses to the allegations of the Amended Complaint and any and all Cross Claims, including all other defenses and motions related to any and all responsive pleadings of Muhler, as if set forth herein verbatim, by reference, where relevant.

64. The agreement between Muhler and Weather Shield is supported by valuable consideration and contains binding contractual obligations.

65. If and to the extent Plaintiff's allegations as set forth are true, which Defendant Muhler expressly denies, Defendant Weather Shield's failure to supply the windows of a certain kind and quality constitutes a breach of contract.

66. If and to the extent Plaintiff's allegations as set forth are true, the damages claimed by Plaintiff resulted directly from Weather Shield's breach of its agreement with Muhler, and Weather Shield is liable to Muhler for breach of contract.

FOR A SECOND CAUSE OF ACTION
(Negligence)

67. Muhler expressly incorporates all responses to the allegations of the Amended Complaint and any and all Cross Claims, including all other defenses and motions related to any

and all responsive pleadings of Muhler, as if set forth herein verbatim, by reference, where relevant.

68. Weather Shield owed a duty Muhler and breached the same because it was negligent, careless, or reckless in failing to manufacture and supply the windows of a certain kind and quality ordered and required by Muhler for use at the Plaintiff's residence.

69. If and to the extent Plaintiff's allegations as set forth are true, which Defendant Muhler expressly denies, then the negligent acts and omissions of Weather Shield are the sole cause of Plaintiff's damages, and led to the Plaintiff's claims of damages being asserted against Muhler without any fault or wrongdoing by Muhler.

FOR A THIRD CAUSE OF ACTION
(Indemnity)

70. Muhler expressly incorporates all responses to the allegations of the Amended Complaint and any and all Cross Claims, including all other defenses and motions related to any and all responsive pleadings of Muhler, as if set forth herein verbatim, by reference, where relevant.

71. If and to the extent Plaintiff's allegations as set forth are true, which Defendant Muhler expressly denies, then the acts and omissions of Weather Shield are the sole cause of Plaintiff's damages, and led to the Plaintiff's claims of damages being asserted against Defendant Muhler without any fault or wrongdoing by Muhler.

72. Muhler is entitled to equitable indemnification or contractual indemnification, or both, from Weather Shield for any amounts they may be required to pay Plaintiff, plus attorney's fees and costs.

FOR A THIRTY-SIXTH DEFENSE AND BY WAY OF
CROSS-CLAIM AGAINST DEFENDANT IN THE WIND

73. Muhler expressly incorporates all responses to the allegations of the Amended

Complaint and any and all Cross Claims, including all other defenses and motions related to any and all responsive pleadings of Muhler, as if set forth herein verbatim, by reference, where relevant.

74. Muhler is a corporation organized and existing under the laws of the State of South Carolina.

75. Defendant In the Wind ("ITW") is a corporation organized and existing under the laws of the State of South Carolina.

76. Subject matter jurisdiction and personal jurisdiction as well as venue, are proper in this Court.

77. Muhler and ITW entered into an agreement whereby ITW agreed to install windows at Plaintiff's residence.

78. Plaintiff alleges that the installation of the windows was not performed in a workmanlike manner.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

79. Muhler expressly incorporates all responses to the allegations of the Amended Complaint and any and all Cross Claims, including all other defenses and motions related to any and all responsive pleadings of Muhler, as if set forth herein verbatim, by reference, where relevant.

80. The agreement between Muhler and ITW is supported by valuable consideration and contains binding contractual obligations.

81. If and to the extent Plaintiff's allegations as set forth are true, which Defendant Muhler expressly denies, ITW's failure to properly install the windows constitutes a breach of contract.

82. If and to the extent Plaintiff's allegations as set forth are true, the damages

claimed by Plaintiff resulted directly from ITW's breach of its agreement with Muhler, and ITW is liable to Muhler for breach of contract.

FOR A SECOND CAUSE OF ACTION
(Negligence)

83. Muhler expressly incorporates all responses to the allegations of the Amended Complaint and any and all Cross Claims, including all other defenses and motions related to any and all responsive pleadings of Muhler, as if set forth herein verbatim, by reference, where relevant.

84. ITW owed a duty to Muhler and breached the same because it was negligent, careless, or reckless in failing properly install the windows at the Plaintiff's residence.

85. If and to the extent Plaintiff's allegations as set forth are true, which Muhler expressly denies, then the negligent acts and omissions of ITW are the sole cause of Plaintiff's damages, and led to the Plaintiff's claims of damages being asserted against Muhler without any fault or wrongdoing by Muhler.

FOR A THIRD CAUSE OF ACTION
(Indemnity)

86. Muhler expressly incorporates all responses to the allegations of the Amended Complaint and any and all Cross Claims, including all other defenses and motions related to any and all responsive pleadings of Muhler, as if set forth herein verbatim, by reference, where relevant.

87. If and to the extent Plaintiff's allegations as set forth are true, which Muhler expressly denies, then the acts and omissions of ITW are the sole cause of Plaintiff's damages, and led to the Plaintiff's claims of damages being asserted against Muhler without any fault or wrongdoing by Muhler.

88. Muhler is entitled to equitable indemnification or contractual indemnification, or

both, from ITW for any amounts it may be required to pay Plaintiff, plus attorney's fees and costs.

WHEREFORE, Defendant/Cross-Claimant/Third-Party Plaintiff requests that this Court issue an Order granting the relief set forth above; that this Court awards costs to Defendant/Cross-Claimant/Third-Party Plaintiff and for such other relief as the Court and jury deem just and proper.

**FOR A THIRTY-SEVENTH DEFENSE AND BY WAY OF
A THIRD-PARTY COMPLAINT AGAINST
THIRD-PARTY DEFENDANT WATTS BUILDERS, LLC**

89. Muhler is a corporation organized under the laws of the state of South Carolina and resides and does business in the county of Charleston.

90. Watts Builders, LLC ("Watts") is, upon information and belief, a corporation organized under the laws of the state of South Carolina and resides and does business in Charleston County.

91. This Court has jurisdiction over the subject matter and the parties.

92. Muhler was a subcontractor for the supply and installation of windows at the Concord & Cumberland project.

93. Muhler subcontracted installation work of the windows at Concord & Cumberland in part with Watts Builders.

**FOR A FIRST CAUSE OF ACTION AS TO WATTS BUILDERS
(Negligence)**

94. Each and every allegation contained in Paragraphs 1 through 88 above is hereby realleged and reasserted as fully as if set forth verbatim herein.

95. Watts assumed the duties outlined above.

96. Watts failed to perform its respective duties with due care.

97. Watts was negligent, careless, reckless, willful, wanton and grossly negligent in

breaching these duties.

98. As a result of these breaches of duties, Muhler has suffered the damages outlined above and that shall be proven at trial.

99. Watts' breach of duty has proximately caused these damages.

100. As a result of Watts' negligent, careless, reckless, willful, wanton and grossly negligent conduct, Muhler is entitled to recover from Watts all direct and actual damages plus punitive damages to be determined by the trier of fact.

FOR A SECOND CAUSE OF ACTION TO WATTS
(Contractual Indemnification)

101. Each and every allegation contained in Paragraphs 1 through 95 above is hereby realleged and reasserted as fully as if set forth verbatim herein.

102. Upon information and belief, the respective contract between Muhler and Watts, indemnifies Muhler from and against all claims, damages, losses, expenses including, but not limited to, attorney's fees, arising out of or resulting from Muhler's performance or failure in performance.

103. Plaintiff has made claims and filed suit against Muhler seeking damages resulting from the performance or failure to perform portions of the work of Watts. As a result of the Watts' performance or failure to perform the installation of windows at Concord & Cumberland, Muhler has been forced to appear, defend and pay great sums to defend this action, through no fault of its own.

104. Muhler is informed and believes that it is entitled to full and complete contractual indemnity from Watts for any and all damages, including attorney's fees and litigation expenses, in any way related to either the scope of work provided by Watts.

FOR A THIRD CAUSE OF ACTION AS TO WATTS
(Equitable Indemnification)

105. Each and every allegation contained in Paragraphs 1 through 99 above is hereby realleged and reasserted as fully as if set forth verbatim herein.

106. Upon information and belief, the relationship between Muhler and Watts, gives rise to equitable indemnification. As a result of this relationship, Watts is required to indemnify Muhler from and against all claims, damages, losses, expenses including but not limited to attorney's fees arising out of and resulting from Watts' performance or failure in performance.

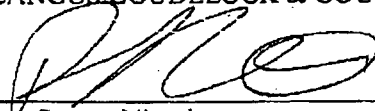
107. Plaintiff has made claims and filed suit against Muhler seeking damages resulting from the performance or failure to perform portions of the work of Watts. As a result of the Watts performance or failure to perform the installation of windows at Concord & Cumberland, Muhler has been forced to appear, defend and pay great sums to defend this action, through no fault of its own.

108. Muhler is informed and believes that it is entitled to full and complete equitable indemnity from Watts for any and all damages, including attorney's fees and litigation expenses, in any way related to either the scope of work and maintenance provided by Watts.

WHEREFORE, the Defendant/Cross-Claimant and Third-Party Plaintiff, The Muhler Company, Inc., prays for the Court to hold Watts liable for the conduct complained of herein and to enter judgment against Watts in favor of Muhler and to award the following relief:

- a) As to the third-party claim for negligence, for actual and punitive damages;
- b) As to the third-party claim for contractual indemnification and equitable indemnification and all damages of any type, including direct, actual, consequential, and punitive damages, and for all attorney's fees and costs incurred by Muhler; and,
- c) For such other and further relief as this Court may deem just and proper.

McANGUS GOUDELOCK & COURIE, LLC



Peter Gunnar Nistad
Post Office Box 877
78 Wentworth Street, Suite 200 (29401)
Charleston, South Carolina 29402
(843) 576-2900

ATTORNEYS FOR DEFENDANT, THE
MUHLER COMPANY, INC.

August 9, 2010

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2010-CP-10-2271

CONCORD AND CUMBERLAND
HORITZONTAL PROPERTY REGIME,

Plaintiff,

vs.

CONCORD & CUMBERLAND, LLC,
CONCORD & CUMBERLAND
MANAGER, LLC, ESTATES, INC.,
ESTATES MANAGEMENT COMPANY,
SUPERIOR CONSTRUCTION
CORPORATION, WEATHER SHIELD
MFG, INC., THE MUHLER COMPANY,
INC., IN THE WIND, INC., J. DAVIS
ARCHITECTS, PLLC, WALL CRAFT
CONSTRUCTION, INC.,
WEATHERHOLTZ MASONRY, LLC,
PHILIP GASQUE d/b/a PHILIP
GASQUE CONSTRUCTION,
ARCHITECTURAL STONE COMPANY,
SOUTHERN MECHANICAL, INC.,
GREG GASQUE METAL WORKS,
KEATING ROOFING AND SHEET
METAL, INC., LOWCOUNTRY TILE
CONTRACTORS, INC., SAFECO
INSURANCE COMPANY OF AMERICA,
COMPANION PROPERTY AND
CASUALTY OF AMERICA,
COMPANION PROPERTY AND
CASUALTY GROUP, WATTS
BUILDERS, LLC, ELIAS DUFFY d/b/a
MASONRY PROS, RENAISSANCE
STEEL, LLC, AMERICAN DRYWALL
CONSTRUCTION, INC., TURNER
ELECTRICAL OF SC, INC., AND
METRO WATERPROOFING, INC.,

Defendants.

AMENDED COMPLAINT
(Amendments in Bold)

(Jury Trial Demanded)

COMES NOW THE PLAINTIFF, Concord and Cumberland Horizontal Property
Regime, by and through its undersigned counsel, pursuant to Rule 15, SCRCP and the

Consent Order signed by the Honorable Deadra L. Jefferson on April 25, 2012, complaining of the Defendants herein by way of a Third Amended Complaint, and alleges unto this Honorable Court as follows:

PARTIES, JURISDICTION AND FACTUAL ALLEGATIONS

1. Plaintiff is a non-profit corporation and horizontal property regime organized and existing under the laws of South Carolina, including the South Carolina Nonprofit Corporation Act (S.C. Code §§ 33-31-101 et seq.) and the South Carolina Horizontal Property Act (S.C. Code §§ 27-31-10 et seq.).

2. Plaintiff is comprised of the owners of all of the condominium units located at 175 Concord Street, Charleston, Charleston County, South Carolina, known as the Concord & Cumberland Condominiums ("Concord & Cumberland"), and is governed by a Board of Directors (the "Board").

3. Concord & Cumberland is a four story building containing twenty-seven condominium units.

4. The Board is composed of five duly elected members of Plaintiff.

5. At a duly held special meeting of Plaintiff held on January 16, 2010, the Concord & Cumberland unit owners voted, by over 84% percent of Plaintiff's ownership interest, to authorize the Board to pursue claims relative to water intrusion and other construction defects within Concord & Cumberland, including, but not limited to, the building's common elements and limited common elements (hereinafter, the "Vote").

6. The Board is bringing this lawsuit on behalf of Plaintiff, pursuant to the Vote and its legal authority.

7. In addition to its legally defined obligations, the duties and responsibilities of the Plaintiff and the Board are set forth in the Master Deed of the Concord & Cumberland Horizontal Property Regime dated October 18, 2007 and filed in Book U641, Page 739 of

the office of the Register Mesne Conveyance ("RMC") for Charleston County, South Carolina (the "Master Deed"). The Master Deed is incorporated herein by reference.

8. Plaintiff is charged with maintaining the common elements and limited common elements and with enforcing all warranties relating to each.

9. **The Concord & Cumberland building is located in Charleston County and is the subject of this action.**

10. Defendant Concord & Cumberland, LLC is a limited liability company organized and existing under the laws of South Carolina with its principal place of business in Charleston County. Upon information and belief, Concord & Cumberland, LLC is a single-purpose limited liability company and was organized and incorporated by Estates, Inc. and its agents, directors, and shareholders for the sole purpose of developing Concord & Cumberland.

11. Defendant Concord & Cumberland Manager, LLC, is a limited liability company organized and existing under the laws of South Carolina and does business in Charleston County. Upon information and belief, Concord & Cumberland Manager, LLC is a member and the manager of Concord & Cumberland, LLC.

12. Defendant Estates, Inc. ("Estates") is a corporation organized and existing under the laws of South Carolina and does business in Charleston County. Upon information and belief, Concord & Cumberland, LLC functioned as Estates' alter ego in the development of Concord & Cumberland, and Estates and its officers, directors and shareholders exerted complete control over Concord & Cumberland, LLC in the development of Concord & Cumberland.

13. **Defendant Estates Management Company (hereinafter "Estates Management") is a corporation organized and existing under the laws of South Carolina with its principal place of business in Columbia, South Carolina. Upon**

information and belief, during the period of developer control, Estates Management operated as the management company for the Regime.

14. Upon information and belief, Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, Estates and Estates Management (hereinafter collectively referred to as "Developers") collectively developed Concord & Cumberland and sold the individual condominium units contained in Concord & Cumberland.

15. Upon information and belief, Estates Management is an entity related to the Developers and was dominated and controlled by the Developers and put the Developers' interests above the interests of the Regime and the property owners.

16. Upon information and belief, the legal distinction between Estates, Estates Management, Concord & Cumberland Manager, LLC and Concord & Cumberland, LLC are blurred and they are, in effect, one and the same and their interests are so amalgamated such that the actions of one should apply to the others.

17. Prior to, during, and after construction, the Developers marketed Concord & Cumberland to the public as a luxury condominium development of the highest quality.

18. The Developers marketed and sold the condominiums to the members of the Plaintiff.

19. The Developers drafted and filed, or caused to be drafted and filed, the Master Deed dated October 18, 2007 and all amendments and exhibits thereto and filed in Book U641, Page 739 in the office of the Register Mesne Conveyance ("RMC") for Charleston County, South Carolina (the "Master Deed"). The Master Deed is incorporated herein by reference.

20. The Developers incorporated, or caused to be incorporated, Concord and Cumberland Horizontal Property Regime (the "Regime"). From the time Regime

was formed and up until approximately March of 2008, the Developers controlled the Board of Directors for the Regime.

21. Pursuant to discovery responses from the Developers, despite having incorporated the Regime, the Developers did not appoint or elect any persons to serve as the Regime's Board of Directors. Prior to March 2008, the Developers were in control of the common elements and served as the de facto Board of Directors for the Incorporated Regime.

22. Defendant Superior Construction Corporation ("Superior") is a corporation organized and existing under the laws of North Carolina and is registered to do business in South Carolina and does business in Charleston County. Upon information and belief, Superior served as the general contractor for the construction of Concord & Cumberland pursuant to the terms of its contract with the Developers and agreed to construct the project in accordance with the applicable contract documents, including, but not limited to, the plans and specifications prepared by Defendant J. Davis Architects, PLLC ("J. Davis").

23. Defendant Weather Shield, Mfg., Inc. ("Weather Shield") is a corporation organized and existing under the laws of Wisconsin and is authorized to do business in South Carolina and does business in Charleston County. At all times relevant hereto, Weather Shield was engaged in the business of designing, manufacturing, marketing, selling and distributing windows, window systems, and exterior doors for use in construction projects, including in South Carolina. Weather Shield designed, manufactured, marketed, sold and distributed the windows, window systems, and exterior doors that were installed at Concord & Cumberland (the "Windows & Doors").

24. Defendant The Muhler Company, Inc. ("Muhler") is a corporation organized and existing under the laws of South Carolina with its principal place of business in Charleston County. At all times relevant hereto, Muhler, as a

subcontractor to Superior, installed the Windows & Doors and related flashings at Concord & Cumberland.

25. Defendant In the Wind, Inc. ("ITW") is a corporation organized and existing under the laws of South Carolina with its principal place of business in Charleston County. At all times relevant hereto, ITW, as a subcontractor to Superior and/or Muhler, installed the Windows & Doors and related flashings at Concord & Cumberland.

26. Defendant J. Davis Architects, PLLC ("J. Davis") is a professional limited liability company organized under the laws of North Carolina and is registered to do business in South Carolina and does business in Charleston County. Upon information and belief, J. Davis, through its contract with the Developers, served as the architect for the design of Concord & Cumberland and agreed to provide professional architectural services for the design of Concord & Cumberland, specifically including, but not limited to, the issuance of the plans and specifications for the construction of Concord & Cumberland. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, J. Davis agreed to make periodic visits to the project during construction to observe whether the construction was being completed in accordance with the plans and specifications and all applicable building codes.

27. Upon information and belief, Defendant Wall Craft Construction, Inc. ("Wall Craft") is a corporation organized under the laws of Georgia and conducts business in Charleston County in South Carolina. At all times relevant hereto Wall Craft Construction, Inc., was engaged as a subcontractor to Superior Construction Company and is responsible for providing and installing the stucco cladding and related flashings at Concord & Cumberland.

28. Upon information and belief, Defendant Weatherholtz Masonry, LLC ("Weatherholtz") is a limited liability company organized under the laws of South Carolina and conducts business in Charleston County. At all times relevant hereto, Weatherholtz was engaged as a subcontractor to Superior Construction Company and is responsible for installing the masonry and related flashings at Concord & Cumberland.

29. Upon information and belief, Defendant Phillip Gasque ("Gasque") is a citizen and resident of Horry County, South Carolina and, at all times relevant hereto was doing business as Phillip Gasque Construction in Charleston County. Upon information and belief, Gasque was engaged as a subcontractor to Superior Construction Company and is responsible for providing and installing the exterior sheathing and certain light gauge metal framing at Concord & Cumberland.

30. Upon information and belief, Defendant Architectural Stone Company ("ASC") is a sole proprietorship with its principle place of business in Plano, Texas and conducts business in Charleston County in South Carolina. Upon information and belief, ASC was engaged as a subcontractor and/or material provider to Superior Construction Company and is responsible for supplying and installing certain exterior stone façade and cladding elements and sealants at Concord & Cumberland.

31. Upon information and belief, Defendant Southern Mechanical, Inc. ("Southern Mechanical") is a corporation organized under the laws of Tennessee and conducts business in Charleston County in South Carolina. Upon information and belief, Southern Mechanical was engaged as a subcontractor to Superior Construction Company and is responsible for designing and installing the mechanical/HVAC systems at Concord & Cumberland.

32. Upon information and belief, Defendant Greg Gasque Metal Works ("Gasque Metal") is a sole proprietorship with its principle place of business in Aynor, South Carolina and conducts business in Charleston County. Upon information and belief, Gasque Metal was engaged as a subcontractor and/or material provider to Superior Construction Company and is responsible for providing and installing certain metal handrails, louvers, and custom metalwork at Concord & Cumberland.

33. Upon information and belief, Defendant Keating Roofing and Sheet Metal Company, Inc. ("Keating") is a corporation organized under the laws of South Carolina and conducts business in Charleston County. Upon information and belief, Keating was engaged as a subcontractor to Superior Construction Company and is responsible for performing the "complete roofing" work at Concord & Cumberland.

34. Upon information and belief, Defendant Lowcountry Tile Contractors, Inc. ("Lowcountry Tile") is a corporation organized under the laws of South Carolina and conducts business in Charleston County. Upon information and belief, Lowcountry Tile was engaged as a subcontractor to Superior Construction Company and is responsible for performing certain exterior patio decking waterproofing and/or sealing applications at Concord & Cumberland.

35. Upon information and belief, Defendant Safeco Insurance Company of America ("Safeco") is a foreign corporation and conducts business in Charleston County. At all times relevant hereto Safeco provided a surety bond to Superior Construction for its work at Concord & Cumberland.

36. Upon information and belief, Defendant Companion Property and Casualty Group ("Companion Group") and Defendant Companion Property and

Casualty of America ("Companion America") are foreign corporations and conducts business in Charleston County. At all times relevant hereto Companion Group and/or Companion America provided a surety bond to The Muhler Company for its work on the subject property.

37. Upon information and belief, Defendant Watts Builders, LLC ("Watts") is a limited liability company organized under the laws of South Carolina and conducts business in Charleston County. At all times relevant hereto Watts, was engaged as a subcontractor to The Muhler Company, Inc. and is responsible for installing the windows and related flashings at Concord & Cumberland.

38. Upon information and belief, Defendant Elias Duffy ("Masonry Pros") is a citizen and resident of Georgia and, at all times relevant hereto was doing business as Masonry Pros in Charleston County in South Carolina. Specifically, Masonry Pros was engaged as a sub-subcontractor to Wall Craft Construction, Inc. and is responsible for installing all or a portion of the stucco and related flashings at Concord & Cumberland.

39. Upon information and belief, Defendant Renaissance Steel, LLC ("Renaissance") is a limited liability corporation organized under the laws of the State of Florida, with its principle place of business therein, and conducts business in Charleston County in South Carolina. Upon information and belief, Renaissance was engaged as a subcontractor to Superior Construction Company and is responsible for providing and performing certain light gauge metal stud framing and related work at Concord & Cumberland.

40. Upon information and belief, Defendant American Drywall Construction, Inc. ("ADC") is a corporation organized under the laws of the State of North Carolina, with its principle place of business therein, and conducts business in

Charleston County in South Carolina. Upon information and belief, ADC was engaged as a subcontractor to Superior Construction Company and is responsible for performing certain drywall, insulation, firestopping, and related work at Concord & Cumberland.

41. Upon information and belief, Defendant Turner Electrical of SC, Inc. ("Turner Electrical") is a corporation organized under the laws of the State of South Carolina, with its principal office located in Bluffton, SC, and conducts business in Charleston County in South Carolina. Upon information and belief, Turner Electrical was engaged as a subcontractor to Superior Construction Company and is responsible for performing the turn-key package installation of the main electrical system and all common element subcomponents of the electrical system at Concord & Cumberland.

42. Upon information and belief, Defendants Muhler, ITW, Wall Craft, Weatherholtz, Gasque, ASC, Southern Mechanical, Gasque Metal, Keating, Lowcountry Tile, Watts, Masonry Pros, Renaissance, ADC and Turner Electrical provided services, labor and material to Concord & Cumberland as set forth above as subcontractors to Superior Construction and may hereinafter be referred to collectively as "Subcontractors."

43. Defendant Subcontractors, by undertaking the work and actually performing work on Concord & Cumberland, owed a duty to the Plaintiff to construct the building free from defects, in a good and workmanlike manner and in accordance with applicable building codes, industry standards and approved plans and specifications.

44. Upon information and belief, Metro Waterproofing, Inc. (hereinafter "Metro") is a corporation organized under the laws of the State of Georgia and has

registered to do business in South Carolina and has appointed an agent for service of process in South Carolina. Upon information and belief, Metro, pursuant to its contract with the Developers, performed certain repair work at the Project, including but not limited to, balcony, brick and through-wall flashing repairs.

45. Upon information and belief, Weather Shield and Muhler designed, manufactured, marketed, distributed and sold the Windows and Doors which were installed at Concord & Cumberland.

46. Plaintiff has experienced numerous instances of water intrusion into several of the condominium units, the common elements, and the limited common elements at Concord & Cumberland.

47. Plaintiff has made repeated demands upon the Developers and, through them, upon the other Defendants, to investigate and cure the defects that caused the water intrusion and damage to its Building.

48. The Defendants have failed to remedy the defects. As a result, the water intrusion through the building envelope and resulting damage to the Plaintiff's building has continued unabated.

49. Plaintiff is informed and believes that the water damage to common elements, limited common elements, and the condominiums is a result of defects and deficiencies in the design and construction of Concord & Cumberland, specifically including, but not limited to, the following:

(a) Stucco System

- i. lack of weep holes at window heads;
- ii. lack of through-wall flashing at window heads;
- iii. lack of a functional water management system;
- iv. lack of proper slope at the synthetic stucco horizontal trim;
- v. inconsistent and improper variance of system thickness;
- vi. lack of proper sealant joints at stucco and window intersections; and

- vii. failure of installation methods to comply with building code and industry standards.

(b) Windows

- i. various failures to meet industry standards and field water tests showing water intrusion through the window units themselves;
- ii. lack of proper spacing for effective sealant joints with adjacent dissimilar materials;
- iii. negative slope of pan flashing;
- iv. negative slope of exterior sills;
- v. improper flashing detail, including at nailing fins;
- vi. lack of window mullions caps;
- vii. lack of nailing fins at various locations;
- viii. lack of required fasteners;
- ix. **Installation of windows in violation of the applicable building code, industry standards and manufacturer's installation instructions; and**
- x. **Improper installation methods which cause the windows, as installed, to not meet the design pressure ratings required by the building code.**

(c) Wall Sheathing

- i. improper installation of sheathing around window openings;
- ii. lack of proper sheathing fasteners; and
- iii. improper installation of sheathing fasteners.

(d) Brick

- i. lack of functioning weep holes;
- ii. **Improper installation of weep accessories in violation of the applicable building code, industry standards and manufacturer's installation instructions;**
- iii. lack of through-wall flashing;
- iv. improper gap for sealant joints;
- v. improper slope at brick sills;
- vi. lack of brick ties and/or inappropriate spacing of brick ties;
- vii. **lack of end dams in through-wall flashing at brick sill flashing; and**
- viii. **lack of proper weep holes at brick sills.**

(e) Balconies

- i. handrail posts penetrating the waterproof membrane without proper detailing; and
- ii. lack of vertical flashing leg tying balcony brick walls and its weep holes to the drainage mat under the tile;
- iii. **improper slope of balconies resulting in a negative slope allowing water intrusion into the wall cavity and interior living space of**

- certain units;
- iv. improper balcony waterproofing systems installed in violation of the applicable building code, industry standards and manufacturer's installation instructions;
 - v. lack of curbs where balconies intersect with exterior walls resulting in water intrusion into the wall cavity and interior living space of certain units.

(f) Roof

- i. ripped or torn bituminous base flashings;
- ii. rusting fasteners;
- iii. bituminous base flashing failure at roof mounted equipment curbs;
- iv. holes in top of prefinished metal coping;
- v. improper fasteners in copper metal coping;
- vi. sealant failures at various locations;
- vii. improper installation of prefinished metal coping;
- viii. scratches in prefinished metal coping;
- ix. masonry joint failure at stone coping;
- x. excessive granule loss in the modified bitumen membrane surface ply;
- xi. improper bituminous membrane stripping of sheet metal edge metal;
- xii. improper mounting of HVAC lines and conduit supports;
- xiii. fasteners improperly penetrating roof membrane;
- xiv. opening in lead soil stack flashing;
- xv. improper anchoring of HVAC equipment; and
- xvi. improper waterproofing at HVAC duct locations.

(g) Miscellaneous

- i. lack of a drop detail allowing water to roll under the balconies into the soffits;
- ii. lack of proper sealant at rail post penetrations into the tile balconies;
- iii. lack of weeps at brick and stucco walls at the first floor cornice/stone intersection;
- iv. lack of proper flashing at floor/wall intersections and lack of drip lip at all balconies; and
- v. **any and all other deficiencies identified by any of the Plaintiff's experts.**

50. Plaintiff is informed and believes that various components of the building, including those detailed above, are not in compliance with the building codes and standards which were applicable to this project at the time of design and construction and must be replaced or remedied to comply with current building codes and standards applicable to this project.

51. Plaintiff is informed and believes that the exposed sprinkler piping in the parking area at Concord & Cumberland was installed with defective materials and/or workmanship and is not in compliance with the building codes and standards which were applicable to this project at the time of the design and construction and must be replaced or remedied to comply with current building code and standards applicable to this project.

52. The Plaintiff and its building have been and will continue to be proximately damaged by the design and construction defects existing at Concord & Cumberland.

53. The defects detailed above have caused substantial consequential and resulting damage to various non-defective components of Concord & Cumberland's common elements, limited common elements, and the Plaintiff's building, in the form of, *inter alia*, water damage, sheathing rot and failure, rusted/failing fasteners and framing members, and damage to insulation, wood components, interior trim, interior flooring, drywall, and non-defective elements of the stucco, brick, windows, doors, roof, soffit, and water management systems. Notwithstanding that Plaintiff has properly maintained its Building, the construction defects set forth herein have caused occurrences in the form of leaks, defects, and failures within the wall which are not readily apparent to one examining the exterior surface thereof.

54. The latent construction defects have resulted in continual exposure to the same generally harmful conditions over time in the form of repeated injurious events that have occurred each and every year since construction, and constitute "occurrences" and compensable damage. The latent construction defects have resulted in repeated water intrusion into the Building, failure of the components of the exterior envelope, failure of the structural system(s), and other consequential

damages. Further, the negligence of each Defendant herein has resulted in damage to the work of the other subcontractors and trades and in damage to the Building, the Plaintiff's property, and the Plaintiff's use and enjoyment of the Building.

55. Upon information and belief, the Developers knew of serious and significant construction deficiencies and code violations at Concord & Cumberland at the time they turned over control of the HPR to the Plaintiff.

56. In violation of South Carolina law, the Developers failed to disclose these material facts to the Plaintiff as a part of the turnover.

57. Due to the design and construction defects and resulting property damage, Plaintiff has, and in the future, will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies, and to implement the remediation plan to the building.

58. As a direct and proximate result of the Defendants' actions, Plaintiff has spent and will continue to expend substantial sums of money in order to renovate and restore the Building to make it safe and habitable, and in addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiff will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

59. As a result of the conduct referenced herein, Plaintiff is entitled to punitive damages in an amount to be determined.

60. Tits matter arises out of the design, development, and construction of the building and the common elements of Concord & Cumberland, located in Charleston County.

61. Tits Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in tits forum.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

62. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

63. Plaintiff brings tits cause of action against Defendants pursuant to section 15-53-10, et seq., of the South Carolina Code seeking a declaration that certain provisions of the Master Deed are void and unenforceable against Plaintiff.

64. The Master Deed is dated October 18, 2007, and is signed by Janet K. Safran, authorized agent of Concord & Cumberland Manager, LLC, serving as the manager of Concord and Cumberland, LLC.

65. Exhibit "E" to the Master Deed is the Bylaws of the Concord & Cumberland Horizontal Property Regime ("Bylaws").

66. No provision of the Master Deed, its exhibits, or its amendments were subject to any arms-length negotiations between the Developers and Plaintiff, nor was any such provision inserted at the request or insistence of Plaintiff.

67. The Master Deed, the exhibits to the Master Deed, and the amendments to the Master Deed collectively contain various clauses, provisions, and terms which are oppressive, one-sided, unconscionable, overreaching, and contrary to the law and public policy of South Carolina. Plaintiff seeks a declaratory judgment from tits Court that the terms of certain provisions of these documents are void, invalid,

and unenforceable, including, but not limited to, those provisions concerning the purported disclaimer of warranty of habitability.

Warranty of Habitability

68. Section 3.6 of the Master Deed states:

FOR A PERIOD OF ONE (1) YEAR FROM THE DATE OF COMPLETION OF CONSTRUCTION (BEING THE LATER OF SUBSTANTIAL COMPLETION UNDER THE CONSTRUCTION CONTRACT, OR THE DATE A CERTIFICATE OF OCCUPANCY IS ISSUED THEREFOR), THE DEVELOPER SHALL AT NO COST TO THE ASSOCIATION REPAIR OR REPLACE (IN THE DEVELOPER'S DISCRETION) ANY PORTIONS OF THE COMMON ELEMENTS (EXCEPT FIXTURES, ACCESSORIES AND APPLIANCES COVERED BY SEPARATE WARRANTIES OF THEIR RESPECTIVE MANUFACTURERS) WHICH ARE DEFECTIVE AS TO MATERIALS OR WORKMANSHIP. THIS LIMITED WARRANTY IS IN PLACE OF ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AND THE DEVELOPER DISCLAIMS ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. TO THE FULLEST EXTENT PERMITTED BY LAW, THE LIABILITY OF THE DEVELOPER SHALL BE LIMITED TO SUCH REPAIR OR REPLACEMENT AND THE DEVELOPER SHALL NOT BE LIABLE FOR DAMAGES OF ANY NATURE, WHETHER DIRECT, INDIRECT, SPECIAL OR CONSEQUENTIAL, REGARDLESS OF WHETHER SUCH DAMAGES ARE CLAIMED TO ARISE OUT OF THE LAW OF CONTRACT, TORT OR OTHERWISE, OR PURSUANT TO STATUTE OR ADMINISTRATIVE REGULATION. Each Owner in accepting a deed from the Developer or any other party to a Unit, expressly acknowledges and agrees that this Section establishes the sole liability of the Developer to the Association and the Owners related to defects in the Common Elements and the remedies available with regard thereto. At the end of the one (1) year warranty period referred to hereinabove in this Section 3.6, the Developer will assign to the Association in writing all of its rights, claims, causes of action and demands which it has or which may thereafter accrue against all other people who may be responsible for the design and/or construction of the Common Elements.

69. Section 3.6 was inserted in the Master Deed by the Developers for the sole and exclusive benefit of the Developers.

70. The Defendants did not specifically bargain for Section 3.6 of the Master Deed with Plaintiff.

71. Section 3.6 of the Master Deed was not conspicuous to Plaintiff or to other prospective purchasers of the condominiums at the time they negotiated their contracts to purchase condominium units from the Developers.

72. Plaintiff was not aware of the disclaimer of the warranty of habitability language contained in Section 3.6 of the Master Deed and the Defendants did not specifically negotiate its inclusion in the Master Deed with the Plaintiff.

73. By inserting Section 3.6 into the Master Deed, the Developers sought to insulate themselves from liability for design and construction defects for which the Developers and other Defendants are liable under the laws of South Carolina.

74. The only parties to benefit from the insertion of Section 3.6 into the Master Deed are the Developers of Concord & Cumberland and the other Defendants.

75. Section 3.6 of the Master Deed is oppressive, one-sided, unconscionable, overreaching, and contrary to the law and public policy of South Carolina.

REQUESTED DECLARATIONS

76. The Plaintiff requests that the Court declare Section 3.6 of the Master Deed to be invalid and unenforceable under the laws of South Carolina and should be struck, *in toto*, from the Master Deed.

77. Alternatively, as to Section 3.6 of the Master Deed, Plaintiff requests the Court to declare that the portions of Section 3.6 of the Master Deed purporting to disclaim the implied warranty of habitability and the portion purporting to limit the liability of the developer to the cost to repair and replace defective work are invalid for such purposes and unenforceable under South Carolina law.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty of Habitability as to the Developers)

78. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

79. In marketing and selling the condominiums or otherwise placing the condominiums into the stream of commerce, Developers, by operation of law, impliedly warranted that the building would be habitable and free from all defects.

80. Developers have breached the implied warranty of habitability by constructing and selling a defective building as set forth above.

81. As a direct, foreseeable and proximate result of Developers' breach of the implied warranty of habitability, the Plaintiff has suffered significant physical damage to the building, including water intrusion, loss of use, as well as diminution in its value. The Plaintiff has further been damaged in that he has spent, and will continue to expend, large sums of money in order to determine the extent of the damage to the building and to repair it.

82. The attempts by the Developers to disclaim the warranty of habitability are void and unenforceable under the law of South Carolina as interpreted by the South Carolina Supreme Court in that the purported disclaimer was not conspicuous and was not specifically bargained for with Plaintiff or with the other individual condominium unit owners or purchasers.

83. Plaintiff is entitled to a judgment against the Developers in an amount to be proven at trial for all damages proximately caused by the Developers' breach of the warranty of habitability.

FOR A THIRD CAUSE OF ACTION
(Negligent Misrepresentation as to the Developers)

84. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

85. The Developers, through advertisements, sales brochures and other marketing literature, website advertisements and by statements and actions of their agents, made numerous representations to Plaintiff and its members, including, but not limited to, the quality and luxury of the condominium units at Concord & Cumberland.

86. The representations made by the Developers and their agents to Plaintiff and to the other purchasers of the condominiums were untrue and were misrepresentations of material facts.

87. These untrue misrepresentations were also made to members of the Board of Directors at the time of turnover to homeowner control.

88. The Developers had a pecuniary interest in making such false representations to the Plaintiff in that the representations were made for the purpose of selling the condominium units and making a profit.

89. The Developers owed a duty to Plaintiff and to the other potential purchasers of the condominium units to use due care in ensuring that its representations concerning Concord & Cumberland were accurate and truthful.

90. Plaintiff reasonably and justifiably relied upon the representations of the Developers when deciding to purchase its Building.

91. In the exercise of reasonable care, the Developers knew or should have known that their representations were false and that the Plaintiff, as a prospective purchaser, would rely on the representations.

92. The Developers failed to exercise reasonable care in making the representations.

93. Upon information and belief, the Developers profited from the sale of the condominium units and, therefore, had a pecuniary interest in the representations made to the Plaintiff.

94. Due to the Developers' negligent misrepresentations and the design and construction defects and resulting property damage, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the building to make it safe and habitable. In addition thereto, the building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

95. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

96. The Plaintiff is entitled to a judgment against the Developers for the damages resulting from the Developers' misrepresentations in an amount to be proven at trial. The conduct of the Developers referenced herein entitles Plaintiff to recover punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to the Developers)

97. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

98. During the time that the Developers controlled the actions of the Board of Directors, the Developers and the Developer-controlled Board of Directors owed the Plaintiff, and its members, a fiduciary duty to place the interests of the Regime above the interests of the Developers. Its fiduciary duty included a duty to conduct a good faith investigation of all possible design and construction

deficiencies at Concord & Cumberland without regard to whether the Developers were ultimately liable for all damages arising from the deficiencies in design and construction.

99. The Developers also owed a non-delegable duty to the Plaintiff to ensure that all of the common elements and limited common elements of Concord & Cumberland were either in good repair and in compliance with all applicable building codes or that sufficient funds had been provided to the Regime by the Developers to make any necessary repairs at the time of transition of control from the Board by the Developers to the owners of the Concord & Cumberland condominium units.

100. As of the date of transition of control of the Board from the Developers to the owners of the Concord & Cumberland condominium units, the Developers and Estates Management knew that the construction and design defects and deficiencies in the common elements, limited common elements, and other components of Concord & Cumberland had caused and would in the future cause property damage to the common elements, the limited common elements, and the units and personal property of the condominium unit owners, including the Plaintiff.

101. The Developers, the Developer-controlled Board of Directors, and Estates Management failed to make the needed repairs to the common elements, limited common elements, and other building components before transition of control of the Board from the Developers to the owners of the Concord & Cumberland condominium units and failed to mitigate continuing damage to Concord & Cumberland and the Plaintiff's Building.

102. Further, the Developers failed to adequately fund the Regime so that it could make the necessary repairs.

103. By failing to repair the common elements, limited common elements, and other building components and by failing to properly fund the Regime for the purpose of making such repairs, the Developers, the Developer-controlled Board, and Estates Management breached their fiduciary duties and other non-delegable duties owed to the Plaintiff.

104. As a proximate and direct result of the breach of fiduciary duties on the part of the Developer, the Developer-controlled Board of Directors and Estates Management, Plaintiff has spent and will continue to expend substantial sums of money in order to renovate and restore the Building to make it safe and habitable, and in addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiff will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

105. Additionally, Plaintiff has suffered, and will continue to suffer, loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

106. The Plaintiff is entitled to a judgment against the Developers, the Developer-controlled Board of Directors, and Estates Management for the breach of their fiduciary and other non-delegable duties in an amount to be proven at trial.

FOR A FIFTH CAUSE OF ACTION
(Accounting as to the Developers)

107. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully rested herein.

108. Management and control of Plaintiff was originally vested in a Board appointed and controlled by the Developers.

109. Before transitioning control of the Board from the Developers to the owners of the Concord & Cumberland condominium units, the Developers controlled the finances of Plaintiff.

110. Plaintiff is not currently aware of all the money and assets belonging to Plaintiff that were utilized, appropriated, or possibly misappropriated by the Developers.

111. The Developers failed to render a proper accounting as to the funds, operations, assets, and property of Plaintiff upon the transition of the Board.

112. Further, upon information and belief, the Developers realized several million dollars in profit from the development and sale of Concord & Cumberland and the individual units.

113. Upon information and belief, rather than utilize some portion of those profits to remedy the defects and resulting damage at Concord & Cumberland, or to adequately fund Plaintiff as it was obligated to do, Developers improperly utilized and distributed those profits to their respective owners and shareholders.

114. Plaintiff has no adequate remedy at law for its grievance.

115. Plaintiff is entitled to an order requiring a complete accounting as to expenses and receipts of Plaintiff while under the Developers' control and as to the distribution of any and all profits the Developers realized and distributed from the development and sale of Concord & Cumberland.

FOR A SIXTH CAUSE OF ACTION
(Negligence as to the Developers)

116. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

117. As the developers of Concord & Cumberland, the Developers owed a duty of due care in overseeing the construction, management, and operation of Concord & Cumberland to Plaintiff.

118. The Developers breached the duty of due care they owed to Plaintiff through one or more of the following particulars:

- a) By failing to properly select the architect, general contractor, and materials used in the construction of Concord & Cumberland;
- b) By failing to properly oversee the design and construction, including the selection of subcontractors, of Concord & Cumberland when they planned to sell the condominium units to members of the public for profit;
- c) By failing to properly and prudently fund and effect repairs to the common elements, limited common elements, and individual units of Concord & Cumberland while they were in control of the HPR;
- d) By failing to properly and prudently fund the HPR before transition of control of the Board to the individual condominium unit owners;
- e) By engaging in self-dealing and self-interested transactions while allowing the defects and resulting damage at Concord & Cumberland to continue unabated; and
- f) In such other failures that will be shown during the discovery of this case and at trial.

119. The negligent acts and omissions of the Developers were the proximate causes of construction and design deficiencies set forth above which have resulted in property damage and financial damages to Plaintiff.

120. Due to the design and construction defects and resulting property damage caused by the Developers' negligence, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and

habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

121. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

122. As a result of the negligence of the Developers, the Plaintiff is entitled to a judgment against said Defendants in an amount to be determined at the trial of its case.

FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices as to the Developers)

123. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

124. The Plaintiff and the Developers are persons within the meaning of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 et seq. (the "Act").

125. By developing, marketing, and selling the condominium units at Concord & Cumberland, the Developers engaged in commerce.

126. The actions of the Developers in developing, marketing, and selling the condominium units at Concord & Cumberland constitute unfair and deceptive trade practices as defined by the Act.

127. The actions of the Developers affect the public interest of South Carolina. Furthermore, the Developers' conduct was willful.

128. Upon information and belief, the actions of the Developers are capable of repetition and have, in fact, been repeated.

129. As a direct, foreseeable, and proximate result of the Defendants' unfair and deceptive trade practices, the Plaintiff has suffered an ascertainable loss of money and property.

130. The Plaintiff is entitled to recover its actual damages, which amount should be trebled, together with interest and attorney's fees.

FOR AN EIGHTH CAUSE OF ACTION
(Alter Ego/Piercing the Corporate Veil/Amalgamation as to the Developers)

131. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

132. Concord & Cumberland, LLC has been held out to the Plaintiff and the public as the developer of Concord & Cumberland.

133. Upon information and belief, Estates and Concord & Cumberland Manager, LLC and their officers, directors, and shareholders wholly own and control Concord & Cumberland, LLC.

134. Defendant Concord & Cumberland, LLC, upon information and belief, at all times relevant to this action:

- a) Failed to observe corporate formalities;
- b) Was grossly undercapitalized for the purposes of the corporate undertaking, to wit, the development of Concord & Cumberland and the remediation of any and all defects in the construction of Concord & Cumberland should they arise;
- c) Was controlled by Estates and Concord & Cumberland Manager, LLC to the extent that it was merely a façade for the operations of Estates and Concord & Cumberland Manager, LLC;
- d) Does not have any functioning officers or directors that are independent of Estates and/or Concord & Cumberland Manager, LLC; and
- e) Is functionally insolvent.

135. In addition, upon information and belief, any and all funds that were paid to Concord & Cumberland, LLC, through the sale of the individual units, including the Plaintiff's Building, at Concord & Cumberland, were siphoned from the company by Estates, Concord & Cumberland Manager, LLC and their directors, officers, and/or shareholders.

136. Estates, Inc. and its directors, officers, and/or shareholders, dominated and controlled Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC and Estates Management Company such that they were merely alter egos of Estates set up to shield Estates and its directors, officers and/or shareholders from personal liability resulting from their construction and sale of residential structures in South Carolina.

137. Upon information and belief, Estates has failed to follow the necessary corporate formalities, as required by law, and has undercapitalized Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC and Estates Management Company and siphoned corporate funds for personal use of its shareholders, used corporate facilities and employees for personal ends, and has otherwise so intermingled the personal and financial affairs with the corporations' that they have become the alter ego of Estates, its directors, officers and/or shareholders.

138. Further, upon information and belief the interests of Estates, Inc. and its shareholders, Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC and Estates Management Company are so amalgamated that the Plaintiff is entitled to disregard the corporate forms and recover against Estates and its shareholders.

139. Upon information and belief, Concord & Cumberland, LLC is a shell and/or sham company dominated and controlled by Estates and Concord & Cumberland Manager such that they are not legally distinct. Concord & Cumberland, LLC is nothing

more than the alter ego of Estates and Concord & Cumberland Manager, LLC and their officers, directors, and shareholders.

140. It would be inequitable to allow Defendants to hide behind a corporate shield that has no basis in fact for the express purpose of avoiding their obligations and responsibilities and liabilities to the Plaintiff.

141. Plaintiff is entitled to pierce the corporate veil of Concord & Cumberland, LLC and thereby obtain a judgment against Estates and Concord & Cumberland Manager, LLC for the liability of Concord & Cumberland, LLC in an amount to be determined by the trier of fact.

142. Further, because the Interests of Estates, Inc. and its shareholders, Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC and Estates Management Company are so amalgamated, Plaintiff is entitled to disregard the corporate forms and recover against Estates and its shareholders in an amount to be determined by the trier of fact.

FOR A NINTH CAUSE OF ACTION
(Negligence as to Superior, Subcontractors and Metro)

143. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

144. Superior and Subcontractors, either by their own employees or through the use of subcontractors, constructed the Building and the common elements and limited common elements of Concord & Cumberland.

145. Superior and Subcontractors owed a duty to the Plaintiff to exercise due care in the construction of the Building, as well as the common elements and limited common elements, and to build the Building, common elements and limited common elements, free from defects and in conformity with all applicable building codes, design documents, plans &

specifications, using good construction practices.

146. At all times relevant hereto, Superior and Subcontractors, their agents, servants, employees, and/or subcontractors undertook and were under a duty to construct the Building, common elements and limited common elements in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects.

147. Metro, either by its own employees or through the use of subcontractors, performed certain repairs at the Project to the common elements and limited common elements of Concord & Cumberland.

148. Metro owed a duty to the Plaintiff to exercise due care in performing its repair work, and to perform the work free from defects and in conformity with all applicable building codes, using good construction practices.

149. At all times relevant hereto, Metro, its agents, servants, employees, and/or subcontractors undertook and were under a duty to perform its work in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects.

150. Superior, Subcontractors and Metro, their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to construct and/or repair the Building, common elements and limited common elements in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, free from latent defects, thereby breaching the above-referenced duty by, but not limited to, the particulars set forth above.

151. As a direct, foreseeable and proximate result of the negligence and gross negligence of Superior, **Subcontractors and Metro**, Plaintiff has spent and will continue to expend substantial sums of money in order to renovate and restore the Building to make it safe and habitable, and in addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiff will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

152. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

153. The violation of applicable building codes constitutes negligence *per se*.

154. The breach of duty, code violations, and deviations from industry standards on the part of the Superior, **Subcontractors and Metro** constitute gross negligence, entitling Plaintiff to an award of all actual, consequential, and punitive damages.

155. As a result of the negligence of Superior, **Subcontractors and Metro**, the Plaintiff is entitled to a judgment against Superior, **Subcontractors and Metro** in an amount to be determined at the trial of this case.

FOR A TENTH CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service
as to Superior, Subcontractors and Metro)

156. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

157. By performing construction work on Concord & Cumberland, Superior, Subcontractors and Metro impliedly warranted that their work would be performed in a careful, diligent, and workmanlike manner and would be free from all defects.

158. Superior, Subcontractors and Metro have breached these implied warranties by the construction defects and deficiencies set forth above.

159. Plaintiff has been proximately damaged by Superior, Subcontractors, and Metro's breach of their implied warranty of workmanlike service in that Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

160. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

161. As a result of the Superior, Subcontractors and Metro's breach of their implied warranties, Plaintiff is entitled to a judgment against Superior and Subcontractors in an amount to be determined at trial.

FOR AN ELEVENTH CAUSE OF ACTION
(Breach of Express Warranty as to Superior and J. Davis)

162. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

163. Superior, pursuant to the terms of its contract with Concord & Cumberland, LLC to serve as the general contractor for the construction of Concord & Cumberland, expressly warranted that its work would be of good quality, free from defects, and would conform to the contract documents.

164. J. Davis, pursuant to its contract with Concord & Cumberland, LLC, expressly warranted that its plans, specifications, and other instruments of service would be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards.

165. Plaintiff is a beneficiary of the express warranties provided by these Defendants.

166. These Defendants have breached their express warranties by failing to design and construct Concord & Cumberland and the Plaintiff's Building such that it would be free from defects and in compliance with the applicable building codes and industry standards.

167. Plaintiff has been proximately damaged by Defendants' breaches of their express warranties in that Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

168. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building

and to the common elements and limited common elements of Concord & Cumberland.

169. The Plaintiff is entitled to a judgment against these Defendants for the breach of their express warranties for an amount to be proven at trial.

FOR A TWELFTH CAUSE OF ACTION
(Breach of Express Warranties as to Weather Shield and Muhler)

170. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

171. Weather Shield and Muhler expressly warranted that the products they manufactured and sold for use in Concord & Cumberland would be of good quality, free from defects, suitable for use, and in compliance with applicable building codes of the City of Charleston as it relates to a luxury four-story waterfront condominium project.

172. The products designed, marketed, manufactured, sold and distributed by Weather Shield and Muhler and incorporated into Concord & Cumberland have failed and are allowing water to intrude into the building and into the Plaintiff's Building. Further, upon information and belief, these products are not in compliance with the applicable building codes and industry standards as it relates to the Concord & Cumberland project.

173. The failures of the products designed, marketed, manufactured, sold and distributed by Weather Shield and Muhler have resulted in damage to various components of the Plaintiff's Building and will require extensive repair and restoration by the Plaintiff. Additionally, the products themselves must be replaced with products which will be in compliance with the current building codes applicable to Concord & Cumberland.

174. The failures of these products constitute a breach of the express warranties made by Weather Shield and Muhler.

175. As a direct and proximate result of these breaches of warranties, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and

restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

176. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

177. Plaintiff is entitled to a judgment against Weather Shield and Muhler in an amount to be determined at trial, as a result of the breach of its express warranties.

FOR A THIRTEENTH CAUSE OF ACTION
(Breach of Implied Warranty of Merchantability as to Weather Shield and Muhler)

178. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

179. By selling its products for use in Concord & Cumberland, Weather Shield and Muhler impliedly warranted that the products would be merchantable.

180. The products sold by Weather Shield and Muhler and incorporated into Concord & Cumberland have failed and are allowing water to intrude into the Building. Weather Shield and Muhler's products were not merchantable and could not pass without objection in the trade at the time of sale.

181. The failures of these products constitute a breach of Weather Shield and Muhler's implied warranty of merchantability.

182. The failures of the products marketed and sold by Weather Shield and Muhler and Weather Shield and Muhler's breach of their implied warranties of merchantability have resulted in damage to various components of the Plaintiff's Building and will require extensive repair and restoration by Plaintiff including, but not limited to, removal of the defective products and replacement with products which comply with the building codes currently applicable to the Concord & Cumberland project.

183. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

184. As a result of their breaches of the implied warranties of merchantability, Plaintiff is entitled to a judgment against Weather Shield and Muhler in an amount to be determined at trial.

FOR A FOURTEENTH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for a Particular Purpose as to
Weather Shield and Muhler)

185. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

186. Weather Shield and Muhler were aware that its products were being used as building components in the exterior building envelope for Concord & Cumberland and knew that Concord & Cumberland was to be a luxury four-story waterfront building located in the City of Charleston.

187. Weather Shield and Muhler, at the time of the sale of its products, had reason to know that the Plaintiff and the Regime, or those authorized to act on their behalf, were relying on the skill or judgment of Weather Shield and Muhler to furnish a product which was

appropriate for use as a component of the structure's exterior envelope and which was in compliance with all applicable building codes.

188. Upon information and belief, Weather Shield and Muhler recommended its products for the particular purposes stated by the Developers, Superior, and J. Davis.

189. By selling the products for a particular use in Concord & Cumberland, Weather Shield and Muhler impliedly warranted that its products would be fit for their intended purpose.

190. The products sold by Weather Shield and Muhler and incorporated into the Concord & Cumberland have failed and are allowing water to intrude into the Building.

191. The failure of these products amounts to a breach of the implied warranty of fitness for a particular purpose.

192. The failure of the products has resulted in damage to the various components of the Building and will require extensive repair and restoration by the Plaintiff including removal and replacement of all of Weather Shield and Muhler's products which are not in compliance with applicable building codes.

193. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

194. As a result of their breaches of implied warranties of fitness for a particular purpose, Plaintiff is entitled to a judgment against Weather Shield and Muhler in an amount to be determined at trial.

FOR A FIFTEENTH CAUSE OF ACTION
(Negligence against Weather Shield and Muhler)

195. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

196. Weather Shield and Muhler designed, manufactured, marketed, distributed, sold and/or otherwise placed into the stream of commerce, the windows and doors which were installed in the Building.

197. Weather Shield and Muhler owed the Plaintiff a duty to design the windows and doors to be free of any and all defects that prevent the windows and doors from properly performing and satisfying their ordinary, intended and foreseeable uses. Weather Shield and Muhler owed the Plaintiff a duty of due care and Weather Shield and Muhler knew or should have known that the Plaintiff and its property would be damaged if Weather Shield and Muhler acted negligently.

198. Weather Shield and Muhler breached its duty of due care and was negligent, careless, willful, wanton, and reckless in the following particulars:

- a) In designing, manufacturing, marketing, distributing, and selling a product that is defective in that it has allowed water and moisture to continuously intrude into the wall system, thereby significantly damaging component parts of the Building;
- b) In developing the windows and doors in a defective manner;
- c) In failing to reasonably test the windows and doors to determine if they would perform in accordance with applicable building codes and industry standards;
- d) In failing to promulgate appropriate installation instructions in compliance with applicable building codes and industry standards;
- e) In failing to appropriately train, instruct and educate the installers of its product;
- f) In failing to use the requisite degree of care and caution that a reasonably prudent manufacturer would have used in manufacturing the windows and doors; and

g) In such other failures that will be shown during the discovery of this case and at trial.

199. As a direct, foreseeable and proximate result of Weather Shield and Muhler's negligence and gross negligence, the Plaintiff has been damaged in that the Plaintiff has suffered significant physical damage to the Building, including water intrusion as well as diminution in its value. The Plaintiff has further been damaged in that he has spent and will continue to expend large sums of money in order to determine the extent of the damage to the structure and to repair it.

200. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

201. Weather Shield and Muhler's breach of duty in designing, manufacturing, marketing, distributing and selling the defective windows, constitutes gross negligence, entitling the Plaintiff to a recovery of actual, consequential, and punitive damages.

FOR A SIXTEENTH CAUSE OF ACTION
(Strict Liability/Products Liability against Weather Shield and Muhler)

202. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

203. Weather Shield and Muhler are in the business of designing, manufacturing, marketing, distributing, selling, and/or installing windows. Weather Shield and Muhler marketed the windows and doors as ones that would provide a safe and durable barrier from the elements. Weather Shield and Muhler further marketed its windows and doors as ones requiring little or no maintenance.

204. The windows and doors installed in the Building were defectively designed and manufactured in that they allow water to intrude into the wall system, resulting in significant damage in the form of rot and mold contamination to the structure into which the windows and doors were installed.

205. Weather Shield and Muhler, in violation of South Carolina Code §15-73-10, designed, manufactured, marketed, distributed and sold a product that was defective and was in a condition unreasonably dangerous to the Plaintiff and its property. Upon information and belief, the windows and doors reached the Plaintiff, and were intended to reach the Plaintiff, without substantial change in the condition in which they were sold.

206. Weather Shield and Muhler's products have failed and are allowing water to intrude into the Plaintiff's Building and portions of the common elements and limited common elements from the exterior during rain events.

207. The failure of Weather Shield and Muhler's products has and continues to cause damage to Plaintiff's property.

208. As a direct, foreseeable and proximate result of the defective Weather Shield and Muhler products, Plaintiff has and will continue to suffer damages, including, but not limited to, removal of all Weather Shield and Muhler products and replacement with products that comply with the local applicable building codes.

209. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

210. Due to the damages caused by the defective products, Plaintiff is entitled to a judgment against Weather Shield and Muhler for an amount to be determined at the trial of this case.

FOR A SEVENTEENTH CAUSE OF ACTION
(Negligence as to Muhler and ITW)

211. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

212. Upon information and belief, Muhler and ITW installed the Windows & Doors in the Concord & Cumberland building.

213. In undertaking and performing the installation of the Windows & Doors, Muhler and ITW owed a duty to the Plaintiff to perform the installation in accordance with all applicable building codes, manufacturer's printed installation instructions, industry standards, and in a good workmanlike manner.

214. Muhler and ITW have breached their duties to the Plaintiff by, *inter alia*, the particulars set forth above.

215. As a direct, foreseeable and proximate result of the negligence and gross negligence of Muhler and ITW, Plaintiff has spent and will continue to expend substantial sums of money in order to renovate and restore the Building to make it safe and habitable, and in addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiff will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

216. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue

through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

217. The violation of applicable building codes constitutes negligence *per se*.

218. The breach of duty, code violations, and deviations from industry standards on the part of the Muhler and ITW constitute gross negligence, entitling Plaintiff to an award of all actual, consequential, and punitive damages.

219. As a result of the negligence of Muhler and ITW, the Plaintiff is entitled to a judgment against Muhler and ITW in an amount to be determined at the trial of this case.

FOR AN EIGHTEENTH CAUSE OF ACTION

(Breach of Implied Warranty of Workmanlike Service as to Muhler and ITW)

220. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

221. By performing construction work on Concord & Cumberland, Muhler and ITW impliedly warranted that their work would be performed in a careful, diligent, and workmanlike manner and would be free from all defects.

222. Muhler and ITW have breached their implied warranties by the construction defects and deficiencies set forth above.

223. Plaintiff has been proximately damaged by Muhler and ITW's breach of their implied warranty of workmanlike service in that Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to

be determined.

224. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

225. As a result of Muhler's and ITW's breach of their implied warranties, Plaintiff is entitled to a judgment against Muhler and ITW in an amount to be determined at trial.

FOR A NINETEENTH CAUSE OF ACTION
(Negligence as to J. Davis)

226. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

227. J. Davis agreed to provide professional architectural services for the design of Concord & Cumberland, specifically including, but not limited to, the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, J. Davis agreed to make periodic visits to the project during construction to observe whether the construction was being completed in accordance with the plans and specifications and all applicable building codes.

228. It was foreseeable that Plaintiff, as the owner of a condominium unit as well as an undivided interest in the Concord & Cumberland common elements and limited common elements would be damaged if J. Davis breached the above-referenced duties.

229. J. Davis breached its duty of care as follows:

- a) By failing to properly design and prepare specifications for the Concord & Cumberland which were compliant with all applicable building codes and

professional standards;

- b) Failing to specify products that were in compliance with applicable building codes;
- c) Failing to design and specify an exterior cladding system for Concord & Cumberland with an adequate water management system to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
- d) Failing to design and specify an adequate water management system in and around building openings, including, but not limited to, the exterior windows at Concord & Cumberland;
- e) Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- f) Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at Concord & Cumberland.

230. As a direct, foreseeable and proximate result of the design defects and resulting property damage, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

231. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

232. Plaintiff is entitled to a judgment against J. Davis in an amount to be determined at the trial of the case for J. Davis's negligence.

FOR A TWENTIETH CAUSE OF ACTION
(Breach of Warranty of Plans and Specifications as to J. Davis)

233. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

234. J. Davis warranted the sufficiency of the design, plans, and specifications for Concord & Cumberland. Plaintiff is a foreseeable beneficiary of its implied warranty.

235. By failing to properly design the building and prepare appropriate plans and specifications, J. Davis breached its warranty as follows:

- a) By failing to properly design and prepare specifications for Concord & Cumberland that were compliant with all applicable building codes and professional standards;
- b) Failing to specify products that were in compliance with applicable building codes;
- c) Failing to design and specify an exterior cladding system for Concord & Cumberland with an adequate water management system to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
- d) Failing to design and specify an adequate water management system in and around building openings, including, but not limited to, the exterior windows at Concord & Cumberland;
- e) Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- f) Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at Concord & Cumberland.

236. As a direct, foreseeable and proximate result of the design defects and resulting property damage, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special,

direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

237. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

238. Plaintiff is entitled to a judgment against J. Davis in an amount to be determined at trial, as a result of the breach of its warranty.

FOR A TWENTY-FIRST CAUSE OF ACTION
(Breach of a Performance Bond as to Safeco)

239. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

240. Upon information and belief, Safeco provided a surety bond to guarantee the obligations of Superior and others supplying labor and material to the Concord & Cumberland project.

241. Upon information and belief, Safeco has actual notice of Superior's breach of its obligations. Nevertheless, Safeco has failed to guarantee such obligations, thereby breaching the terms of its bond.

242. Plaintiff has been damaged by Safeco's breach of its bond and Plaintiff is entitled to recover from Safeco all damages that Plaintiff may suffer as a result of Superior's breach of its obligations and duties.

FOR A TWENTY-SECOND CAUSE OF ACTION
(Breach of a Performance Bond as to Companion)

243. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

244. Upon information and belief, Companion provided a surety bond to guarantee the obligations of Muhler and others supplying labor and material to the Concord & Cumberland project.

245. Upon information and belief, Companion has actual notice of Muhler's breach of its obligations. Nevertheless, Companion has failed to guarantee such obligations, thereby breaching the terms of its bond.

246. Plaintiff has been damaged by Companion's breach of its bond and Plaintiff is entitled to recover from Companion all damages that Plaintiff may suffer as a result of Muhler's breach of its obligations and duties.

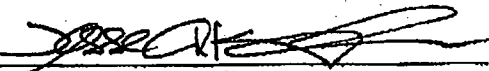
WHEREFORE, the Plaintiff prays the Honorable Court inquire into the matters set forth herein and award judgment in favor of the Plaintiffs against the Defendants, jointly and severally, as follows:

- a) That the Court issue a Declaratory Judgment with respect to the first cause of action against the Defendants in the following respects:
 - i. That Section 3.6 of the Master Deed is invalid and unenforceable under the laws of South Carolina and should be struck, *in toto*, from the Master Deed;
 - ii. Alternatively, as to Section 3.6 of the Master Deed, that the portions of Section 3.6 purporting to disclaim the Implied warranty of habitability and the portion purporting to limit the liability of the developers to the cost to repair and replace defective work, be declared invalid for such purpose and unenforceable under the laws of South Carolina.
- b) For all actual and consequential damages against the Defendants, jointly and severally, in an amount to be shown at trial;
- c) An Order requiring a complete accounting as to receipts and expenses of Plaintiff while under the Developers' control and as to the receipt and distribution of any and all profits the Developers realized from the development and sale of Concord & Cumberland;
- d) For treble actual damages against the Developer Defendants pursuant to applicable law;
- e) For punitive damages in an amount to be determined by the trier of fact;

- f) For prejudgment interest;
- g) For all attorneys fees and costs associated with investigating and prosecuting this action; and
- h) For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

By: 

JESSE A. KIRCHNER
SC BAR NO.: 70479
15 Middle Atlantic Wharf, Suite 101
Charleston, SC 29401
T: 843-937-8000
F: 843-937-4200
jkirchner@tktylawfirm.com

Attorney for Plaintiff

May 31, 2012

Charleston, South Carolina.

2010-CF-10- 3260

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

AFFIDAVIT OF MYLES GLICK ALLEGEDLY
LEED AP

BY JULIE HARMSTRONG
CLERK OF COURT

FILED
Checked in Date Canceled

I, Myles Glick, being first duly sworn, depose and say:

1. I am over the age of eighteen years and understand the meaning of an oath. The following statements are based on my personal knowledge. I have read the following statements and they are true and accurate.

2. This affidavit is given in order to satisfy the requirements of South Carolina Code Annotated Section 15-36-100.

3. My current curriculum vitae reflecting my experience, education, and qualifications is attached hereto as Exhibit A.

4. It is my professional opinion that JDavis Architects, PLLC (the "Architect") has violated the standard of care relative to its role on the Concord & Cumberland condominium project (the "Project"), in failing to perform construction administration responsibilities on the Project as provided in the architect licensing laws of South Carolina.

5. This violation of the standard of care is evidenced by the Architect submitting field reports notifying the general contractor of construction deficiencies but failing to provide follow-up methodology to review the general contractor's correction of such deficiencies on the Project.

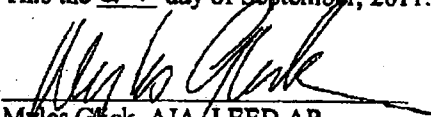
6. As further evidence of this violation of the standard of care, the Architect approved applications for periodic payment and issued the Substantial Completion Certificate for the Project despite the general contractor's failure to correct the construction deficiencies that the Architect, itself, identified.

7. Additionally, the Architect has violated the standard of care by failing to properly detail critical intersections of the tile balconies and the interior/enclosed space. The lack of a curb between the tile balconies and the thresholds of the door/window systems in these locations does not allow a reasonable barrier against wind driven rain and does not allow for that rain and other moisture to be diverted from the interior of the units of the Project.

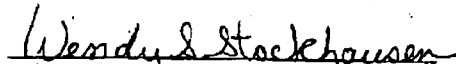
8. As a basis for my opinions contained in this affidavit, I reviewed the entire Architect's file, all plans and specifications, and other documents related to the Project. Further, I have investigated several defective construction and design conditions on the Project and have issued a separate report detailing the nature and extent of those defective conditions. In addition, I have reviewed and considered all applicable codes, laws, and standards governing the architect's standard of care on the Project.

FURTHER AFFIANT SAYETH NAUGHT.

This the 27 day of September, 2011.


Myles Glick, AIA, LEED AP

Sworn to and subscribed before me
this 27 day of September, 2011.


Wendy S. Stockhausen
Notary Public for South Carolina
My Commission Expires: 04-29-2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,

Plaintiff,

vs.

CONCORD & CUMBERLAND, LLC,
CONCORD & CUMBERLAND
MANAGER, LLC, ESTATES, INC.,
ESTATES MANAGEMENT COMPANY,
SUPERIOR CONSTRUCTION
CORPORATION, WEATHER SHIELD
MFG, INC., THE MUHLER COMPANY,
INC., IN THE WIND, INC., J. DAVIS
ARCHITECTS, PLLC, WALL CRAFT
CONSTRUCTION, INC.,
WEATHERHOLTZ MASONRY, LLC,
PHILIP GASQUE d/b/a PHILIP
GASQUE CONSTRUCTION,
ARCHITECTURAL STONE COMPANY,
SOUTHERN MECHANICAL, INC.,
GREG GASQUE METAL WORKS,
KEATING ROOFING AND SHEET
METAL, INC., LOWCOUNTRY TILE
CONTRACTORS, INC., SAFECO
INSURANCE COMPANY OF AMERICA,
COMPANION PROPERTY AND
CASUALTY OF AMERICA,
COMPANION PROPERTY AND
CASUALTY GROUP, WATTS
BUILDERS, LLC, ELIAS DUFFY d/b/a
MASONRY PROS, RENAISSANCE
STEEL, LLC, AMERICAN DRYWALL
CONSTRUCTION, INC., TURNER
ELECTRICAL OF SC, INC., AND
METRO WATERPROOFING, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2010-CP-10-2271

SECOND AMENDED SUMMONS

FILED
2012 JUN -1 PM 2:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO: THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Plaintiff's Second Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Amended Complaint upon the subscriber, Jesse A. Kirchner, at his office located at 15 Middle Atlantic Wharf, Suite 101, Charleston, South Carolina, 29401, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Second Amended Complaint within the time aforesaid, or otherwise appear and defend, the Plaintiff will apply to the Court for the relief demanded in the Second Amended Complaint and judgment by default will be rendered against you.

Respectfully submitted,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

By: 

JESSE A. KIRCHNER
SC Bar No.: 70479
15 Middle Atlantic Wharf, Suite 101
Charleston, SC 29401
T: 843-937-8000
F: 843-937-4200
Email: jkirchner@tktylawfirm.com

Attorneys for the Plaintiff

May 31, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2010-CP-10-2271

CONCORD AND CUMBERLAND
HORIZTONTAL PROPERTY REGIME,

Plaintiff,

vs.

CONCORD & CUMBERLAND, LLC,
CONCORD & CUMBERLAND
MANAGER, LLC, ESTATES, INC.,
ESTATES MANAGEMENT COMPANY,
SUPERIOR CONSTRUCTION
CORPORATION, WEATHER SHIELD
MFG, INC., THE MUHLER COMPANY,
INC., IN THE WIND, INC., J. DAVIS
ARCHITECTS, PLLC, WALL CRAFT
CONSTRUCTION, INC.,
WEATHERHOLTZ MASONRY, LLC,
PHILIP GASQUE d/b/a PHILIP
GASQUE CONSTRUCTION,
ARCHITECTURAL STONE COMPANY,
SOUTHERN MECHANICAL, INC.,
GREG GASQUE METAL WORKS,
KEATING ROOFING AND SHEET
METAL, INC., LOWCOUNTRY TILE
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INSURANCE COMPANY OF AMERICA,
COMPANION PROPERTY AND
CASUALTY OF AMERICA,
COMPANION PROPERTY AND
CASUALTY GROUP, WATTS
BUILDERS, LLC, ELIAS DUFFY d/b/a
MASONRY PROS, RENAISSANCE
STEEL, LLC, AMERICAN DRYWALL
CONSTRUCTION, INC., TURNER
ELECTRICAL OF SC, INC., AND
METRO WATERPROOFING, INC.,

Defendants.

SECOND AMENDED COMPLAINT
(Amendments in Bold)

(Jury Trial Demanded)

2012 JUN -1 PM 2:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

COMES NOW THE PLAINTIFF, Concord and Cumberland Horizontal Property
Regime, by and through its undersigned counsel, pursuant to Rule 15, SCRCP and the

Consent Order signed by the Honorable Deadra L. Jefferson on April 25, 2012, complaining of the Defendants herein by way of a Second Amended Complaint, and alleges unto this Honorable Court as follows:

PARTIES, JURISDICTION AND FACTUAL ALLEGATIONS

1. Plaintiff is a non-profit corporation and horizontal property regime organized and existing under the laws of South Carolina, including the South Carolina Nonprofit Corporation Act (S.C. Code §§ 33-31-101 et seq.) and the South Carolina Horizontal Property Act (S.C. Code §§ 27-31-10 et seq.).
2. Plaintiff is comprised of the owners of all of the condominium units located at 175 Concord Street, Charleston, Charleston County, South Carolina, known as the Concord & Cumberland Condominiums ("Concord & Cumberland"), and is governed by a Board of Directors (the "Board").
3. Concord & Cumberland is a four story building containing twenty-seven condominium units.
4. The Board is composed of five duly elected members of Plaintiff.
5. At a duly held special meeting of Plaintiff held on January 16, 2010, the Concord & Cumberland unit owners voted, by over 84% percent of Plaintiff's ownership interest, to authorize the Board to pursue claims relative to water intrusion and other construction defects within Concord & Cumberland, including, but not limited to, the building's common elements and limited common elements (hereinafter, the "Vote").
6. The Board is bringing this lawsuit on behalf of Plaintiff, pursuant to the Vote and its legal authority.
7. In addition to its legally defined obligations, the duties and responsibilities of the Plaintiff and the Board are set forth in the Master Deed of the Concord & Cumberland Horizontal Property Regime dated October 18, 2007 and filed in Book U641, Page 739 of

the office of the Register, Mesne Conveyance ("RMC") for Charleston County, South Carolina (the "Master Deed"). The Master Deed is incorporated herein by reference.

8. Plaintiff is charged with maintaining the common elements and limited common elements and with enforcing all warranties relating to each.

9. The Concord & Cumberland building is located in Charleston County and is the subject of this action.

10. Defendant Concord & Cumberland, LLC is a limited liability company organized and existing under the laws of South Carolina with its principal place of business in Charleston County. Upon information and belief, Concord & Cumberland, LLC is a single-purpose limited liability company and was organized and incorporated by Estates, Inc. and its agents, directors, and shareholders for the sole purpose of developing Concord & Cumberland.

11. Defendant Concord & Cumberland Manager, LLC, is a limited liability company organized and existing under the laws of South Carolina and does business in Charleston County. Upon information and belief, Concord & Cumberland Manager, LLC is a member and the manager of Concord & Cumberland, LLC.

12. Defendant Estates, Inc. ("Estates") is a corporation organized and existing under the laws of South Carolina and does business in Charleston County. Upon information and belief, Concord & Cumberland, LLC functioned as Estates' alter ego in the development of Concord & Cumberland, and Estates and its officers, directors and shareholders exerted complete control over Concord & Cumberland, LLC in the development of Concord & Cumberland.

13. Defendant Estates Management Company (hereinafter "Estates Management") is a corporation organized and existing under the laws of South Carolina with its principal place of business in Columbia, South Carolina. Upon

information and belief, during the period of developer control, Estates Management operated as the management company for the Regime.

14. Upon information and belief, Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, Estates and Estates Management (hereinafter collectively referred to as "Developers") collectively developed Concord & Cumberland and sold the individual condominium units contained in Concord & Cumberland.

15. Upon information and belief, Estates Management is an entity related to the Developers and was dominated and controlled by the Developers and put the Developers' interests above the interests of the Regime and the property owners.

16. Upon information and belief, the legal distinction between Estates, Estates Management, Concord & Cumberland Manager, LLC and Concord & Cumberland, LLC are blurred and they are, in effect, one and the same and their interests are so amalgamated such that the actions of one should apply to the others.

17. Prior to, during, and after construction, the Developers marketed Concord & Cumberland to the public as a luxury condominium development of the highest quality.

18. The Developers marketed and sold the condominiums to the members of the Plaintiff.

19. The Developers drafted and filed, or caused to be drafted and filed, the Master Deed dated October 18, 2007 and all amendments and exhibits thereto and filed in Book U641, Page 739 in the office of the Register Mesne Conveyance ("RMC") for Charleston County, South Carolina (the "Master Deed"). The Master Deed is incorporated herein by reference.

20. The Developers incorporated, or caused to be incorporated, Concord and Cumberland Horizontal Property Regime (the "Regime"). From the time Regime

was formed and up until approximately March of 2008, the Developers controlled the Board of Directors for the Regime.

21. Pursuant to discovery responses from the Developers, despite having incorporated the Regime, the Developers did not appoint or elect any persons to serve as the Regime's Board of Directors. Prior to March 2008, the Developers were in control of the common elements and served as the de facto Board of Directors for the Incorporated Regime.

22. Defendant Superior Construction Corporation ("Superior") is a corporation organized and existing under the laws of North Carolina and is registered to do business in South Carolina and does business in Charleston County. Upon information and belief, Superior served as the general contractor for the construction of Concord & Cumberland pursuant to the terms of its contract with the Developers and agreed to construct the project in accordance with the applicable contract documents, including, but not limited to, the plans and specifications prepared by Defendant J. Davis Architects, PLLC ("J. Davis").

23. Defendant Weather Shield, Mfg., Inc. ("Weather Shield") is a corporation organized and existing under the laws of Wisconsin and is authorized to do business in South Carolina and does business in Charleston County. At all times relevant hereto, Weather Shield was engaged in the business of designing, manufacturing, marketing, selling and distributing windows, window systems, and exterior doors for use in construction projects, including in South Carolina. Weather Shield designed, manufactured, marketed, sold and distributed the windows, window systems, and exterior doors that were installed at Concord & Cumberland (the "Windows & Doors").

24. Defendant The Muhler Company, Inc. ("Muhler") is a corporation organized and existing under the laws of South Carolina with its principal place of business in Charleston County. At all times relevant hereto, Muhler, as a

subcontractor to Superior, installed the Windows & Doors and related flashings at Concord & Cumberland.

25. Defendant In the Wind, Inc. ("ITW") is a corporation organized and existing under the laws of South Carolina with its principal place of business in Charleston County. At all times relevant hereto, ITW, as a subcontractor to Superior and/or Muhler, installed the Windows & Doors and related flashings at Concord & Cumberland.

26. Defendant J. Davis Architects, PLLC ("J. Davis") is a professional limited liability company organized under the laws of North Carolina and is registered to do business in South Carolina and does business in Charleston County. Upon information and belief, J. Davis, through its contract with the Developers, served as the architect for the design of Concord & Cumberland and agreed to provide professional architectural services for the design of Concord & Cumberland, specifically including, but not limited to, the issuance of the plans and specifications for the construction of Concord & Cumberland. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, J. Davis agreed to make periodic visits to the project during construction to observe whether the construction was being completed in accordance with the plans and specifications and all applicable building codes.

27. Upon information and belief, Defendant Wall Craft Construction, Inc. ("Wall Craft") is a corporation organized under the laws of Georgia and conducts business in Charleston County in South Carolina. At all times relevant hereto Wall Craft Construction, Inc., was engaged as a subcontractor to Superior Construction Company and is responsible for providing and installing the stucco cladding and related flashings at Concord & Cumberland.

28. Upon information and belief, Defendant Weatherholtz Masonry, LLC ("Weatherholtz") is a limited liability company organized under the laws of South Carolina and conducts business in Charleston County. At all times relevant hereto, Weatherholtz was engaged as a subcontractor to Superior Construction Company and is responsible for installing the masonry and related flashings at Concord & Cumberland.

29. Upon information and belief, Defendant Philip Gasque ("Gasque") is a citizen and resident of Horry County, South Carolina and, at all times relevant hereto was doing business as Philip Gasque Construction in Charleston County. Upon information and belief, Gasque was engaged as a subcontractor to Superior Construction Company and is responsible for providing and installing the exterior sheathing and certain light gauge metal framing at Concord & Cumberland.

30. Upon information and belief, Defendant Architectural Stone Company ("ASC") is a sole proprietorship with its principle place of business in Plano, Texas and conducts business in Charleston County in South Carolina. Upon information and belief, ASC was engaged as a subcontractor and/or material provider to Superior Construction Company and is responsible for supplying and installing certain exterior stone façade and cladding elements and sealants at Concord & Cumberland.

31. Upon information and belief, Defendant Southern Mechanical, Inc. ("Southern Mechanical") is a corporation organized under the laws of Tennessee and conducts business in Charleston County in South Carolina. Upon information and belief, Southern Mechanical was engaged as a subcontractor to Superior Construction Company and is responsible for designing and installing the mechanical/HVAC systems at Concord & Cumberland.

32. Upon information and belief, Defendant Greg Gasque Metal Works ("Gasque Metal") is a sole proprietorship with its principle place of business in Aynor, South Carolina and conducts business in Charleston County. Upon information and belief, Gasque Metal was engaged as a subcontractor and/or material provider to Superior Construction Company and is responsible for providing and installing certain metal handrails, louvers, and custom metalwork at Concord & Cumberland.

33. Upon information and belief, Defendant Keating Roofing and Sheet Metal Company, Inc. ("Keating") is a corporation organized under the laws of South Carolina and conducts business in Charleston County. Upon information and belief, Keating was engaged as a subcontractor to Superior Construction Company and is responsible for performing the "complete roofing" work at Concord & Cumberland.

34. Upon information and belief, Defendant Lowcountry Tile Contractors, Inc. ("Lowcountry Tile") is a corporation organized under the laws of South Carolina and conducts business in Charleston County. Upon information and belief, Lowcountry Tile was engaged as a subcontractor to Superior Construction Company and is responsible for performing certain exterior patio decking waterproofing and/or sealing applications at Concord & Cumberland.

35. Upon information and belief, Defendant Safeco Insurance Company of America ("Safeco") is a foreign corporation and conducts business in Charleston County. At all times relevant hereto Safeco provided a surety bond to Superior Construction for its work at Concord & Cumberland.

36. Upon information and belief, Defendant Companion Property and Casualty Group ("Companion Group") and Defendant Companion Property and

Casualty of America ("Companion America") are foreign corporations and conducts business in Charleston County. At all times relevant hereto Companion Group and/or Companion America provided a surety bond to The Muhler Company for its work on the subject property.

37. Upon information and belief, Defendant Watts Builders, LLC ("Watts") is a limited liability company organized under the laws of South Carolina and conducts business in Charleston County. At all times relevant hereto Watts, was engaged as a subcontractor to The Muhler Company, Inc. and is responsible for installing the windows and related flashings at Concord & Cumberland.

38. Upon information and belief, Defendant Elias Duffy ("Masonry Pros") is a citizen and resident of Georgia and, at all times relevant hereto was doing business as Masonry Pros in Charleston County in South Carolina. Specifically, Masonry Pros was engaged as a sub-subcontractor to Wall Craft Construction, Inc. and is responsible for installing all or a portion of the stucco and related flashings at Concord & Cumberland.

39. Upon information and belief, Defendant Renaissance Steel, LLC ("Renaissance") is a limited liability corporation organized under the laws of the State of Florida, with its principle place of business therein, and conducts business in Charleston County in South Carolina. Upon information and belief, Renaissance was engaged as a subcontractor to Superior Construction Company and is responsible for providing and performing certain light gauge metal stud framing and related work at Concord & Cumberland.

40. Upon information and belief, Defendant American Drywall Construction, Inc. ("ADC") is a corporation organized under the laws of the State of North Carolina, with its principle place of business therein, and conducts business in

Charleston County in South Carolina. Upon information and belief, ADC was engaged as a subcontractor to Superior Construction Company and is responsible for performing certain drywall, insulation, firestopping, and related work at Concord & Cumberland.

41. Upon information and belief, Defendant Turner Electrical of SC, Inc. ("Turner Electrical") is a corporation organized under the laws of the State of South Carolina, with its principle office located in Bluffton, SC, and conducts business in Charleston County in South Carolina. Upon information and belief, Turner Electrical was engaged as a subcontractor to Superior Construction Company and is responsible for performing the turn-key package installation of the main electrical system and all common element subcomponents of the electrical system at Concord & Cumberland.

42. Upon information and belief, Defendants Muhler, ITW, Wall Craft, Weatherholtz, Gasque, ASC, Southern Mechanical, Gasque Metal, Keating, Lowcountry Tile, Watts, Masonry Pros, Renaissance, ADC and Turner Electrical provided services, labor and material to Concord & Cumberland as set forth above as subcontractors to Superior Construction and may hereinafter be referred to collectively as "Subcontractors."

43. Defendant Subcontractors, by undertaking the work and actually performing work on Concord & Cumberland, owed a duty to the Plaintiff to construction the building free from defects, in a good and workmanlike manner and in accordance with applicable building codes, industry standards and approved plans and specifications.

44. Upon information and belief, Metro Waterproofing, Inc. (hereinafter "Metro") is a corporation organized under the laws of the State of Georgia and has

registered to do business in South Carolina and has appointed an agent for service of process in South Carolina. Upon information and belief, Metro, pursuant to its contract with the Developers, performed certain repair work at the Project, including but not limited to, balcony, brick and through-wall flashing repairs.

45. Upon information and belief, Weather Shield and Muhler designed, manufactured, marketed, distributed and sold the Windows and Doors which were installed at Concord & Cumberland.

46. Plaintiff has experienced numerous instances of water intrusion into several of the condominium units, the common elements, and the limited common elements at Concord & Cumberland.

47. Plaintiff has made repeated demands upon the Developers and, through them, upon the other Defendants, to investigate and cure the defects that caused the water intrusion and damage to its Building.

48. The Defendants have failed to remedy the defects. As a result, the water intrusion through the building envelope and resulting damage to the Plaintiff's building has continued unabated.

49. Plaintiff is informed and believes that the water damage to common elements, limited common elements, and the condominiums is a result of defects and deficiencies in the design and construction of Concord & Cumberland, specifically including, but not limited to, the following:

(a) Stucco System

- i. lack of weep holes at window heads;
- ii. lack of through-wall flashing at window heads;
- iii. lack of a functional water management system;
- iv. lack of proper slope at the synthetic stucco horizontal trim;
- v. inconsistent and improper variance of system thickness;
- vi. lack of proper sealant joints at stucco and window intersections; and

- vii. failure of installation methods to comply with building code and industry standards.

(b) Windows

- i. various failures to meet industry standards and field water tests showing water intrusion through the window units themselves;
- ii. lack of proper spacing for effective sealant joints with adjacent dissimilar materials;
- iii. negative slope of pan flashing;
- iv. negative slope of exterior sills;
- v. improper flashing detail, including at nailing fins;
- vi. lack of window mullions caps;
- vii. lack of nailing fins at various locations;
- viii. lack of required fasteners;
- ix. **installation of windows in violation of the applicable building code, industry standards and manufacturer's installation instructions; and**
- x. **improper installation methods which cause the windows, as installed, to not meet the design pressure ratings required by the building code.**

(c) Wall Sheathing

- i. improper installation of sheathing around window openings,
- ii. lack of proper sheathing fasteners; and
- iii. improper installation of sheathing fasteners.

(d) Brick

- i. lack of functioning weep holes;
- ii. **improper installation of weep accessories in violation of the applicable building code, industry standards and manufacturer's installation instructions;**
- iii. lack of through-wall flashing;
- iv. improper gap for sealant joints;
- v. improper slope at brick sills;
- vi. lack of brick ties and/or inappropriate spacing of brick ties;
- vii. **lack of end dams in through-wall flashing at brick sill flashing; and**
- viii. **lack of proper weep holes at brick sills.**

(e) Balconies

- i. handrail posts penetrating the waterproof membrane without proper detailing; and
- ii. lack of vertical flashing leg tying balcony brick walls and its weep holes to the drainage mat under the tile;
- iii. **Improper slope of balconies resulting in a negative slope allowing water intrusion into the wall cavity and interior living space of**

- certain units;
- iv. improper balcony waterproofing systems installed in violation of the applicable building code, industry standards and manufacturer's installation instructions;
- v. lack of curbs where balconies intersect with exterior walls resulting in water intrusion into the wall cavity and interior living space of certain units.

(f) Roof

- i. ripped or torn bituminous base flashings;
- ii. rusting fasteners;
- iii. bituminous base flashing failure at roof mounted equipment curbs;
- iv. holes in top of prefinished metal coping;
- v. improper fasteners in copper metal coping;
- vi. sealant failures at various locations;
- vii. improper installation of prefinished metal coping;
- viii. scratches in prefinished metal coping;
- ix. masonry joint failure at stone coping;
- x. excessive granule loss in the modified bitumen membrane surface ply;
- xi. improper bituminous membrane stripping of sheet metal edge metal;
- xii. improper mounting of HVAC lines and conduit supports;
- xiii. fasteners improperly penetrating roof membrane;
- xiv. opening in lead soil stack flashing;
- xv. improper anchoring of HVAC equipment; and
- xvi. improper waterproofing at HVAC duct locations.

(g) Miscellaneous

- i. lack of a drop detail allowing water to roll under the balconies into the soffits;
- ii. lack of proper sealant at rail post penetrations into the tile balconies;
- iii. lack of weeps at brick and stucco walls at the first floor cornice/stone intersection;
- iv. lack of proper flashing at floor/wall intersections and lack of drip lip at all balconies; and
- v. **any and all other deficiencies identified by any of the Plaintiff's experts.**

50. Plaintiff is informed and believes that various components of the building, including those detailed above, are not in compliance with the building codes and standards which were applicable to this project at the time of design and construction and must be replaced or remedied to comply with current building codes and standards applicable to this project.

51. Plaintiff is informed and believes that the exposed sprinkler piping in the parking area at Concord & Cumberland was installed with defective materials and/or workmanship and is not in compliance with the building codes and standards which were applicable to this project at the time of the design and construction and must be replaced or remedied to comply with current building code and standards applicable to this project.

52. The Plaintiff and its building have been and will continue to be proximately damaged by the design and construction defects existing at Concord & Cumberland.

53. The defects detailed above have caused substantial consequential and resulting damage to various non-defective components of Concord & Cumberland's common elements, limited common elements, and the Plaintiff's building, in the form of, *inter alia*, water damage, sheathing rot and failure, rusted/failing fasteners and framing members, and damage to insulation, wood components, interior trim, interior flooring, drywall, and non-defective elements of the stucco, brick, windows, doors, roof, soffit, and water management systems. Notwithstanding that Plaintiff has properly maintained its Building, the construction defects set forth herein have caused occurrences in the form of leaks, defects, and failures within the wall which are not readily apparent to one examining the exterior surface thereof.

54. The latent construction defects have resulted in continual exposure to the same generally harmful conditions over time in the form of repeated injurious events that have occurred each and every year since construction, and constitute "occurrences" and compensable damage. The latent construction defects have resulted in repeated water intrusion into the Building, failure of the components of the exterior envelope, failure of the structural system(s), and other consequential

damages. Further, the negligence of each Defendant herein has resulted in damage to the work of the other subcontractors and trades and in damage to the Building, the Plaintiff's property, and the Plaintiff's use and enjoyment of the Building.

55. Upon information and belief, the Developers knew of serious and significant construction deficiencies and code violations at Concord & Cumberland at the time they turned over control of the HPR to the Plaintiff.

56. In violation of South Carolina law, the Developers failed to disclose these material facts to the Plaintiff as a part of the turnover.

57. Due to the design and construction defects and resulting property damage, Plaintiff has, and in the future, will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies, and to implement the remediation plan to the building.

58. As a direct and proximate result of the Defendants' actions, Plaintiff has spent and will continue to expend substantial sums of money in order to renovate and restore the Building to make it safe and habitable, and in addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiff will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

59. As a result of the conduct referenced herein, Plaintiff is entitled to punitive damages in an amount to be determined.

60. This matter arises out of the design, development, and construction of the building and the common elements of Concord & Cumberland, located in Charleston County.

61. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

62. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

63. Plaintiff brings this cause of action against Defendants pursuant to section 15-53-10, et seq., of the South Carolina Code seeking a declaration that certain provisions of the Master Deed are void and unenforceable against Plaintiff.

64. The Master Deed is dated October 18, 2007, and is signed by Janet K. Safran, authorized agent of Concord & Cumberland Manager, LLC, serving as the manager of Concord and Cumberland, LLC.

65. Exhibit "E" to the Master Deed is the Bylaws of the Concord & Cumberland Horizontal Property Regime ("Bylaws").

66. No provision of the Master Deed, its exhibits, or its amendments were subject to any arms-length negotiations between the Developers and Plaintiff, nor was any such provision inserted at the request or insistence of Plaintiff.

67. The Master Deed, the exhibits to the Master Deed, and the amendments to the Master Deed collectively contain various clauses, provisions, and terms which are oppressive, one-sided, unconscionable, overreaching, and contrary to the law and public policy of South Carolina. Plaintiff seeks a declaratory judgment from this Court that the terms of certain provisions of these documents are void, invalid,

and unenforceable, including, but not limited to, those provisions concerning the purported disclaimer of warranty of habitability.

Warranty of Habitability

68. Section 3.6 of the Master Deed states:

FOR A PERIOD OF ONE (1) YEAR FROM THE DATE OF COMPLETION OF CONSTRUCTION (BEING THE LATER OF SUBSTANTIAL COMPLETION UNDER THE CONSTRUCTION CONTRACT, OR THE DATE A CERTIFICATE OF OCCUPANCY IS ISSUED THEREFOR), THE DEVELOPER SHALL AT NO COST TO THE ASSOCIATION REPAIR OR REPLACE (IN THE DEVELOPER'S DISCRETION) ANY PORTIONS OF THE COMMON ELEMENTS (EXCEPT FIXTURES, ACCESSORIES AND APPLIANCES COVERED BY SEPARATE WARRANTIES OF THEIR RESPECTIVE MANUFACTURERS) WHICH ARE DEFECTIVE AS TO MATERIALS OR WORKMANSHIP. THIS LIMITED WARRANTY IS IN PLACE OF ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AND THE DEVELOPER DISCLAIMS ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. TO THE FULLEST EXTENT PERMITTED BY LAW, THE LIABILITY OF THE DEVELOPER SHALL BE LIMITED TO SUCH REPAIR OR REPLACEMENT AND THE DEVELOPER SHALL NOT BE LIABLE FOR DAMAGES OF ANY NATURE, WHETHER DIRECT, INDIRECT, SPECIAL OR CONSEQUENTIAL, REGARDLESS OF WHETHER SUCH DAMAGES ARE CLAIMED TO ARISE OUT OF THE LAW OF CONTRACT, TORT OR OTHERWISE, OR PURSUANT TO STATUTE OR ADMINISTRATIVE REGULATION. Each Owner in accepting a deed from the Developer or any other party to a Unit, expressly acknowledges and agrees that this Section establishes the sole liability of the Developer to the Association and the Owners related to defects in the Common Elements and the remedies available with regard thereto. At the end of the one (1) year warranty period referred to hereinabove in this Section 3.6, the Developer will assign to the Association in writing all of its rights, claims, causes of action and demands which it has or which may thereafter accrue against all other people who may be responsible for the design and/or construction of the Common Elements.

69. Section 3.6 was inserted in the Master Deed by the Developers for the sole and exclusive benefit of the Developers.

70. The Defendants did not specifically bargain for Section 3.6 of the Master Deed with Plaintiff.

71. Section 3.6 of the Master Deed was not conspicuous to Plaintiff or to other prospective purchasers of the condominiums at the time they negotiated their contracts to purchase condominium units from the Developers.

72. Plaintiff was not aware of the disclaimer of the warranty of habitability language contained in Section 3.6 of the Master Deed and the Defendants did not specifically negotiate its inclusion in the Master Deed with the Plaintiff.

73. By inserting Section 3.6 into the Master Deed, the Developers sought to insulate themselves from liability for design and construction defects for which the Developers and other Defendants are liable under the laws of South Carolina.

74. The only parties to benefit from the insertion of Section 3.6 into the Master Deed are the Developers of Concord & Cumberland and the other Defendants.

75. Section 3.6 of the Master Deed is oppressive, one-sided, unconscionable, overreaching, and contrary to the law and public policy of South Carolina.

REQUESTED DECLARATIONS

76. The Plaintiff requests that the Court declare Section 3.6 of the Master Deed to be invalid and unenforceable under the laws of South Carolina and should be struck, *in toto*, from the Master Deed.

77. Alternatively, as to Section 3.6 of the Master Deed, Plaintiff requests the Court to declare that the portions of Section 3.6 of the Master Deed purporting to disclaim the implied warranty of habitability and the portion purporting to limit the liability of the developer to the cost to repair and replace defective work are invalid for such purposes and unenforceable under South Carolina law.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty of Habitability as to the Developers)

78. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

79. In marketing and selling the condominiums or otherwise placing the condominiums into the stream of commerce, Developers, by operation of law, impliedly warranted that the building would be habitable and free from all defects.

80. Developers have breached the implied warranty of habitability by constructing and selling a defective building as set forth above.

81. As a direct, foreseeable and proximate result of Developers' breach of the implied warranty of habitability, the Plaintiff has suffered significant physical damage to the building, including water intrusion, loss of use, as well as diminution in its value. The Plaintiff has further been damaged in that he has spent, and will continue to expend, large sums of money in order to determine the extent of the damage to the building and to repair it.

82. The attempts by the Developers to disclaim the warranty of habitability are void and unenforceable under the law of South Carolina as interpreted by the South Carolina Supreme Court in that the purported disclaimer was not conspicuous and was not specifically bargained for with Plaintiff or with the other individual condominium unit owners or purchasers.

83. Plaintiff is entitled to a judgment against the Developers in an amount to be proven at trial for all damages proximately caused by the Developers' breach of the warranty of habitability.

FOR A THIRD CAUSE OF ACTION
(Negligent Misrepresentation as to the Developers)

84. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

85. The Developers, through advertisements, sales brochures and other marketing literature, website advertisements and by statements and actions of their agents, made numerous representations to Plaintiff and its members, including, but not limited to, the quality and luxury of the condominium units at Concord & Cumberland.

86. The representations made by the Developers and their agents to Plaintiff and to the other purchasers of the condominiums were untrue and were misrepresentations of material facts.

87. These untrue misrepresentations were also made to members of the Board of Directors at the time of turnover to homeowner control.

88. The Developers had a pecuniary interest in making such false representations to the Plaintiff in that the representations were made for the purpose of selling the condominium units and making a profit.

89. The Developers owed a duty to Plaintiff and to the other potential purchasers of the condominium units to use due care in ensuring that its representations concerning Concord & Cumberland were accurate and truthful.

90. Plaintiff reasonably and justifiably relied upon the representations of the Developers when deciding to purchase its Building.

91. In the exercise of reasonable care, the Developers knew or should have known that their representations were false and that the Plaintiff, as a prospective purchaser, would rely on the representations.

92. The Developers failed to exercise reasonable care in making the representations.

93. Upon information and belief, the Developers profited from the sale of the condominium units and, therefore, had a pecuniary interest in the representations made to the Plaintiff.

94. Due to the Developers' negligent misrepresentations and the design and construction defects and resulting property damage, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the building to make it safe and habitable. In addition thereto, the building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

95. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

96. The Plaintiff is entitled to a judgment against the Developers for the damages resulting from the Developers' misrepresentations in an amount to be proven at trial. The conduct of the Developers referenced herein entitles Plaintiff to recover punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to the Developers)

97. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

98. During the time that the Developers controlled the actions of the Board of Directors, the Developers and the Developer-controlled Board of Directors owed the Plaintiff, and its members, a fiduciary duty to place the interests of the Regime above the interests of the Developers. This fiduciary duty included a duty to conduct a good faith investigation of all possible design and construction

deficiencies at Concord & Cumberland without regard to whether the Developers were ultimately liable for all damages arising from the deficiencies in design and construction.

99. The Developers also owed a non-delegable duty to the Plaintiff to ensure that all of the common elements and limited common elements of Concord & Cumberland were either in good repair and in compliance with all applicable building codes or that sufficient funds had been provided to the Regime by the Developers to make any necessary repairs at the time of transition of control from the Board by the Developers to the owners of the Concord & Cumberland condominium units.

100. As of the date of transition of control of the Board from the Developers to the owners of the Concord & Cumberland condominium units, the Developers and Estates Management knew that the construction and design defects and deficiencies in the common elements, limited common elements, and other components of Concord & Cumberland had caused and would in the future cause property damage to the common elements, the limited common elements, and the units and personal property of the condominium unit owners, including the Plaintiff.

101. The Developers, the Developer-controlled Board of Directors, and Estates Management failed to make the needed repairs to the common elements, limited common elements, and other building components before transition of control of the Board from the Developers to the owners of the Concord & Cumberland condominium units and failed to mitigate continuing damage to Concord & Cumberland and the Plaintiff's Building.

102. Further, the Developers failed to adequately fund the Regime so that it could make the necessary repairs.

103. By failing to repair the common elements, limited common elements, and other building components and by failing to properly fund the Regime for the purpose of making such repairs, the Developers, the Developer-controlled Board, and Estates Management breached their fiduciary duties and other non-delegable duties owed to the Plaintiff.

104. As a proximate and direct result of the breach of fiduciary duties on the part of the Developer, the Developer-controlled Board of Directors and Estates Management, Plaintiff has spent and will continue to expend substantial sums of money in order to renovate and restore the Building to make it safe and habitable, and in addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiff will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

105. Additionally, Plaintiff has suffered, and will continue to suffer, loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

106. The Plaintiff is entitled to a judgment against the Developers, the Developer-controlled Board of Directors, and Estates Management for the breach of their fiduciary and other non-delegable duties in an amount to be proven at trial.

FOR A FIFTH CAUSE OF ACTION
(Accounting as to the Developers)

107. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully rested herein.

108. Management and control of Plaintiff was originally vested in a Board appointed and controlled by the Developers.

109. Before transitioning control of the Board from the Developers to the owners of the Concord & Cumberland condominium units, the Developers controlled the finances of Plaintiff.

110. Plaintiff is not currently aware of all the money and assets belonging to Plaintiff that were utilized, appropriated, or possibly misappropriated by the Developers.

111. The Developers failed to render a proper accounting as to the funds, operations, assets, and property of Plaintiff upon the transition of the Board.

112. Further, upon information and belief, the Developers realized several million dollars in profit from the development and sale of Concord & Cumberland and the individual units.

113. Upon information and belief, rather than utilize some portion of those profits to remedy the defects and resulting damage at Concord & Cumberland, or to adequately fund Plaintiff as it was obligated to do, Developers improperly utilized and distributed those profits to their respective owners and shareholders.

114. Plaintiff has no adequate remedy at law for this grievance.

115. Plaintiff is entitled to an order requiring a complete accounting as to expenses and receipts of Plaintiff while under the Developers' control and as to the distribution of any and all profits the Developers realized and distributed from the development and sale of Concord & Cumberland.

FOR A SIXTH CAUSE OF ACTION
(Negligence as to the Developers)

116. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

117. As the developers of Concord & Cumberland, the Developers owed a duty of due care in overseeing the construction, management, and operation of Concord & Cumberland to Plaintiff.

118. The Developers breached the duty of due care they owed to Plaintiff through one or more of the following particulars:

- a) By failing to properly select the architect, general contractor, and materials used in the construction of Concord & Cumberland;
- b) By failing to properly oversee the design and construction, including the selection of subcontractors, of Concord & Cumberland when they planned to sell the condominium units to members of the public for profit;
- c) By failing to properly and prudently fund and effect repairs to the common elements, limited common elements, and individual units of Concord & Cumberland while they were in control of the HPR;
- d) By failing to properly and prudently fund the HPR before transition of control of the Board to the individual condominium unit owners;
- e) By engaging in self-dealing and self-interested transactions while allowing the defects and resulting damage at Concord & Cumberland to continue unabated; and
- f) In such other failures that will be shown during the discovery of this case and at trial.

119. The negligent acts and omissions of the Developers were the proximate causes of construction and design deficiencies set forth above which have resulted in property damage and financial damages to Plaintiff.

120. Due to the design and construction defects and resulting property damage caused by the Developers' negligence, Plaintiff has spent, and will continue to expend, substantial sums of money in order to renovate and restore the Building to make it safe and

habitable. In addition thereto, the Building has suffered a loss in value and depreciation by virtue of the defects and damages which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined.

121. Additionally, Plaintiff has, and will continue to, suffer loss of use of its Building as well as the common areas and the limited common areas. Such loss will continue through the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to its Building and to the common elements and limited common elements of Concord & Cumberland.

122. As a result of the negligence of the Developers, the Plaintiff is entitled to a judgment against said Defendants in an amount to be determined at the trial of this case.

FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices as to the Developers)

123. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

124. The Plaintiff and the Developers are persons within the meaning of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 et seq. (the "Act").

125. By developing, marketing, and selling the condominium units at Concord & Cumberland, the Developers engaged in commerce.

126. The actions of the Developers in developing, marketing, and selling the condominium units at Concord & Cumberland constitute unfair and deceptive trade practices as defined by the Act.

127. The actions of the Developers affect the public interest of South Carolina. Furthermore, the Developers' conduct was willful.