

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-10-3326
Case No. 2014-CP-10-4335
Appellate Case No. 2017-000542

RECEIVED
MAY 11 2018
SC Court of Appeals

Waverly at Hamlin Plantation Townhome Association, Inc., **Respondent**,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., **Defendants**,

And

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes Inc., Builders Support Services of the Carolinas, Inc., **Third-Party Plaintiffs**,

v.

Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanches Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC, **Third-Party Defendants**,

Of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the **Appellant**,

And George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., **Defendants**,

And

Jeffery Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sunders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Giles pie, Jared D. Overcash, **Plaintiffs**,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a Jon Wieland Homes and Neighborhoods, Inc., Bar Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's FirstSource, Inc. a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, George Medine a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasque, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC, **Defendants**,

Of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the **Appellant**,

And Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David

McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sunders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gilespeie, Jared D. Overcash, are the ***Respondents***,

And Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., ***Defendants***.

RECORD ON APPEAL / VOLUME 1 OF 3

Andrew Elliott Haselden, Esquire
HOWSER NEWMAN & BESLEY, LLC
215 East Bay Street, Suite 303
Charleston, SC 29401
(843) 216-6940

Theodore Luke Manos, Esquire
ROBERTSON HOLLINGSWORTH & FLYNN
177 Meeting Street, Suite 300
Charleston, SC 29401
(843) 723-6470

Attorneys for Appellant

John Calvin Hayes IV, Esquire
HAYES LAW FIRM LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
(843) 805-7003

Ivon Keith McCarty, Esquire
MCCARTY LAW FIRM, PC
1212 Wappoo Road
Post Office Box 30055
Charleston, SC 29417
(843) 793-1272

Jesse Sanchez, Esquire
THE LAW OFFICE OF JESSE SANCHEZ
98½ Broad Street, Suite B
Charleston, SC 29401
(843) 814-8181

Attorneys for Respondents

Peter G. Nistad, Esquire
3614 Ashley Phosphate Rd.
North Charleston, SC 29418
(843)297-8485
gunnar@leekalaw.com

Attorney for Respondent

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffery Sills as Class Representative, et al.,

☒ Plaintiff

v.

John Wieland Homes And Neighborhoods, Inc., Et

Al.,

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2014-CP-10-4335

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: John C. Hayes, IV, Esquire, Bar No. 69740 Address: 180 Meeting Street, Suite 300 Charleston, SC 29401 phone: 843-805-7003 fax: 843-573-7388 e-mail: jhayes@hayeslaw.org other:		Defendant's Attorney: Andrew E. Haselden, Esquire, Bar No. Address: 215 East Bay Street, Suite 303 Charleston, SC 29401 phone: 843-216-6940 fax: e-mail: ahaselden@hnblaw.com other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Order Granting Class Certification Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO <i>20 mins</i>			
SECTION II: Motion/Order Type ☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. May 2, 2016 Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: _____ Date: _____	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____			

SCCA/233 (11-03)

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2014-CP-10-4335

Jeffrey Sills as Class Representative,
Marie Labarowski, Edward and Nancy
Peyser, Francis Sills, Daniel and Suzanne
Ruth, Stephani Adili, Marc and Brandy
Lynn, Russell Robinson, George Busnach,
Helen Furtado, Jessica Baucom, Nancy S.
Coleman, Linda Glitz, Peggy Gerou,
Shannon Bebout, Maryann Walsh, Patty
Whitmire, Donald L. Tomasello and
Patricia Kelly, Chris Leigh-Jones, Edward
Ray and Kathy Jo Feagins, Cindy Hunt for
Bentgrass Limited, LLC, Adam A. and
Susan A. Sokoloski, William and Carolyn
Barone, Michelle Ray, Eugene and
Cynthia Ray, William Abel, Dean and
Conny Mason, David McCartney, Paul and
Patricia Watters, James and Andrea
Lowry, R. Robinson, Jr., Thaddeus R. &
Barbara A. Kuczynski, Beverly Sanders
Carlson, Lisa Roeck, Elizabeth Jackson,
Charles and Mary Kathleen Jenkins, Linda
M. and Earl K. Rigler, Jr., John Twomey,
Joe and Anita Brittain, Gilbert J. Hager &
Kelly Hager Holmes, Carol & Chris
Gillespie, Jarred D. Overcash,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc. as successor by
statutory merger to John Wieland Homes
and Neighborhoods of South Carolina,
Inc., John Wieland Homes of Charleston,
Inc., John Wieland Homes, Inc., Builders
Support Services of the Carolinas, Inc. and
Wheelock Street Capital, LLC d/b/a John
Wieland Homes and Neighborhoods, Inc.,
Barr Construction, Inc., Benjamin Mora
d/b/a Mora Construction, a/k/a Benjamin

FILED
2016 MAY -3 PM 12:06
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

CONSENT ORDER
OF BIFURCATION

Mora Construction, LLC, Builder's Firstsource, Inc., a/k/a Builders Firstsource-Atlantic Group, LLC DBC Construction Services, LLC, Gerado Rosette Sanchez, a/ka/ GR Painting, George Medina a/k/a JMC Construction, LLC a/k/a/ JMC Construction, Inc.; Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC; Juan Luisa Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC,

Defendants.

The Defendant Wheelock Street Capital, LLC (Defendant Wheelock) earlier moved this Court for an Order bifurcating the claims against Wheelock Street Capital, LLC asserted by the Plaintiffs. Defendant Wheelock and the Plaintiffs have consented to bifurcation of the claims asserted against Defendant Wheelock.

The motion to bifurcate is consented to by Plaintiffs contingent upon the following terms, therefore, this Court orders the following order of bifurcation and sequencing:

- (1) FIRST PHASE. In the first phase, the fact finder will consider the issues arising as alleged against the Non-Wheelock Defendants.
- (2) SECOND PHASE. The second phase would come into play only if a verdict is obtained by Plaintiffs on the underlying claims, or if the case is resolved in a way leaving potential claims to be asserted against others, including but not limited to Wheelock, affiliated with the Wieland Defendants as owners, successors or the like. In the second phase, the fact finder would consider

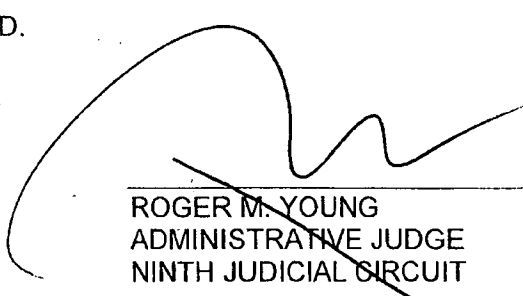
Plaintiffs' ability to hold others, including Defendant Wheelock, liable for damages caused by the Wieland Defendants under such theories as may be available, including, but not limited to piercing the corporate veil, alter ego, instrumentality, amalgamation, fraudulent conveyance, successor liability, de facto merger, or aiding and abetting breaches of duty.

(3) In Defendant Wheelock's Motion to Bifurcate, it asserted that Plaintiffs' claims against Wheelock are equitable and require a bench trial by the Court sitting in equity. Plaintiffs do not agree, and this consent order leaves open the question for later determination.

(4) The parties will engage in discovery on the second phase to determine among other things, whether other parties are essential, or desirable to be added to the second-phase proceeding. The parties estimate, at this time, that the discovery and motion practice shall require about six months to complete, followed by a trial as promptly thereafter as the Court may schedule.

Based on the above, the claims asserted against Defendant Wheelock are hereby ordered bifurcated in accordance with the terms set forth above.

AND IT IS SO ORDERED.

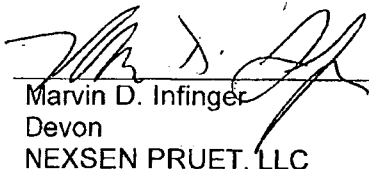


ROGER M. YOUNG
ADMINISTRATIVE JUDGE
NINTH JUDICIAL CIRCUIT

May 3, 2016

Charleston, South Carolina

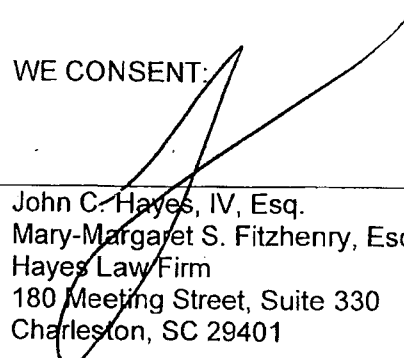
WE SO MOVE:



Marvin D. Infinger
Devon
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Phone: 843.577.9440
Facsimile: 843.414.8209
E-mail: minfinger@nexsenpruet.com

Attorneys for
Wheelock Street Capital, LLC

WE CONSENT:



John C. Hayes, IV, Esq.
Mary-Margaret S. Fitzhenry, Esq.
Hayes Law Firm
180 Meeting Street, Suite 330
Charleston, SC 29401

and

I. Keith McCarty, Esq.
McCarty Law Firm, PC
1212 Wappoo Road
Charleston, SC 29407

Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc. as successor by
statutory merger to John Wieland Homes
and Neighborhoods of South Carolina,
Inc., John Wieland Homes of Charleston,
Inc., John Wieland Homes, Inc., Builders
Support Services of the Carolinas, Inc. and
Wheelock Street Capital, LLC d/b/a John
Wieland Homes and Neighborhoods, Inc.,

Defendants,

John Wieland Homes and Neighborhoods
of the Carolinas, Inc. as successor by
statutory merger to John Wieland Homes
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Inc., John Wieland Homes, Inc., Builders
Support Services of the Carolinas, Inc.

Third-Party Plaintiffs,

Barr Construction, Inc.; Benjamin Mora
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Firstsource, Inc. a/k/a Builders Firstsource-
Southeast Group, LLC, a/k/a Builders
Firstsource -Atlantic Group, LLC; DBC
Construction Services, LLC; Eli, Inc.;
Gerardo Rosette Sanchez a/k/a GR
Painting; George Medina, George Medina
a/k/a JMC Construction, LLC a/k/a JMC
Construction, Inc.; Jesus Mora a/k/a J.
Mora Brick & Block Mason, LLC; Juan Luis

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2013-CP-10-3326

FILED
2016 MAY -3 PM 12:06
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

**CONSENT ORDER
OF BIFURCATION**

Sanchez; Juan Luis Sanchez a/k/a Sanchez Brothers Paintin ; Latitude Construction Services, LLC; The Muhler Company, Inc.; Paul M. Vasquez; Richard Ditullio; Richard Ditullio a/k/a ROT Contracting, LLC,

Third-Party Defendants.

The Defendant Wheelock Street Capital, LLC (Defendant Wheelock) earlier moved this Court for an Order bifurcating the claims against Wheelock Street Capital, LLC asserted by the Plaintiff. Defendant Wheelock and the Plaintiff have consented to bifurcation of the claims asserted against Defendant Wheelock.

The motion to bifurcate is consented to by Plaintiff, therefore, this Court orders the following order of bifurcation and sequencing:

(1) FIRST PHASE. In the first phase, the fact finder will consider the issues arising ~~in tort and breach of contract~~ as alleged against the Non-Wheelock Defendants.

(2) SECOND PHASE. The second phase would come into play only if a verdict is obtained by Plaintiff on the underlying claims, or if the case is resolved in a way leaving potential claims to be asserted against others, including but not limited to Wheelock, affiliated with the Wieland Defendants as owners, successors or the like. In the second phase, the fact finder would consider Plaintiff's ability to hold others, including Defendant Wheelock, liable for damages caused by the Wieland Defendants under such theories as may be available, including, but not limited to piercing the corporate veil, alter ego, instrumentality, amalgamation, fraudulent conveyance, successor liability, de

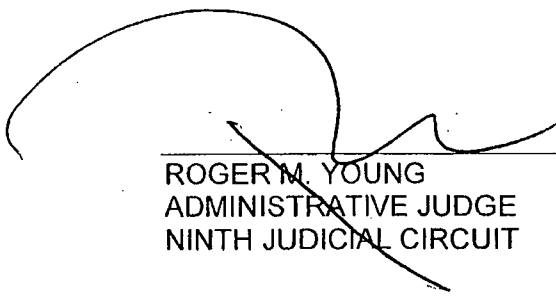
facto merger, or aiding and abetting breaches of duty.

(3) In Defendant Wheelock's Motion to Bifurcate, it asserted that the Plaintiff's claims against Wheelock are equitable and require a bench trial by the Court sitting in equity. Plaintiff does not agree, and this consent order leaves open the question for later determination.

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Based on the above, the claims asserted against Defendant Wheelock are hereby ordered bifurcated in accordance with the terms set forth above.

AND IT IS SO ORDERED.

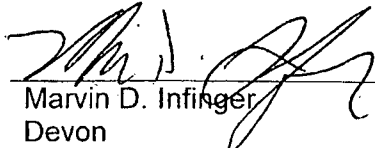


ROGER M. YOUNG
ADMINISTRATIVE JUDGE
NINTH JUDICIAL CIRCUIT

May 3, 2016

Charleston, South Carolina

WE SO MOVE:



Marvin D. Infinger
Devon
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Phone: 843.577.9440
Facsimile: 843.414.8209
E-mail: minfinger@nexsenpruet.com

Attorneys for
Wheelock Street Capital, LLC

WE CONSENT:



John C. Hayes, IV, Esq.
Mary-Margaret S. Fitzhenry, Esq.
Hayes Law Firm
180 Meeting Street, Suite 330
Charleston, SC 29401

and

I. Keith McCarty, Esq.
McCarty Law Firm, PC
1212 Wappoo Road
Charleston, SC 29407

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-10-4335

Jeffrey Sills as Class Representative,)
Marie Labarowski, Edward and Nancy)
Peyser, Francis Sills, Daniel and Suzanne)
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Peggy Gerou, Shannon Bebout,)
Maryann Walsh, Patty Whitmire,)
Donald L. Tomasello and Patricia Kelly,)
Chris Leigh-Jones, Edward Ray and)
Kathy Jo Feagins, Cindy Hunt for)
Bentgrass Limited, LLC, Adam A. and)
Susan A. Sokoloski, William and Carolyn)
Barone, Michelle Ray, Eugene and)
Cynthia Ray, William Abel, Dean and)
Conny Mason, David McCartney, Paul)
and Patricia Watters, James and Andrea)
Lowry, R. Robinson, Jr., Thaddeus R. &)
Barbara A. Kuczynski, Beverly Sanders)
Carlson, Lisa Roeck, Elizabeth Jackson,)
Charles and Mary Kathleen Jenkins,)
Linda M. and Earl K. Rigler, Jr., John)
Twomey, Joe and Anita Brittain, Gilbert)
J. Hager & Kelly Hager Holmes, Carol &)
Chris Gillespie, Jarred D. Overcash,)

Plaintiffs,)

vs.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builder Support)
Services of the Carolinas, Inc.,)
Wheelock Street Capital, LLC d/b/a John)

**ORDER GRANTING PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION**

FILED
2016 MAY -4 AM 11:22
JULIE J. ARMSTRONG
CLERK OF COURT

Wieland Homes and Neighborhoods,)
 Inc., Barr Construction, Inc., Benjamin)
 Mora d/b/a Mora Construction, a/k/a)
 Benjamin Mora Construction, LLC,)
 Builder's Firstsource, Inc. a/k/a Builders)
 Firstsource-Southeast Group, LLC, a/k/a)
 Builders Firstsource—Atlantic Group,)
 LLC, DBC Construction Services, LLC,)
 Gerardo Rosette Sanchez a/k/a GR)
 Painting, Jeorge Medina a/k/a JMC)
 Construction, LLC a/k/a JMC)
 Construction, Inc.; Jesus Mora a/k/a J.)
 Mora Brick & Block Mason, LLC; Juan)
 Luis Sanchez, Juan Luis Sanchez a/k/a)
 Sanchez Brothers Painting; Latitude)
 Construction Services, LLC, The Muhler)
 Company, Inc., Paul M. Vasquez,)
 Richard Ditullio, Richard Ditullio a/k/a)
 ROT Contracting, LLC,)
)
 Defendants.)

ORDER

This matter came before the Court on May 3, 2016, upon motion by the Plaintiffs to certify a class of homeowners in this matter. Plaintiffs, Waverly at Hamlin Plantation Townhome Association, Inc., Edward Peyser, and on behalf of all others similarly situated (hereinafter collectively referred to as "Plaintiffs"), were represented by attorneys, John Hayes, IV and I. Keith McCarty; Defendants, John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the Carolinas, Inc. (hereinafter "Wieland Defendants"), were represented by Andrew Haselden. Various subcontractor/supplier Defendants were also in attendance through counsel.



Having reviewed the submissions of the parties and having heard the oral arguments presented by counsel, Plaintiffs' Motion for Class Certification is GRANTED.

INTRODUCTION

Plaintiffs' Motion for Class Certification seeks to certify, as a class, all persons and entities that are members of The Waverly at Hamlin Plantation Townhome Association, Inc. (the "Association"). The members of the Association consist of the owners of the townhomes located within the Waverly at Hamlin Plantation development ("Waverly townhomes"), all of which were designed and constructed by the Weiland Defendants during 2005 through 2010.

Plaintiff, Edward Peyser, is an owner of a Waverly townhome which is suffering from construction defects. Specifically, the Waverly townhomes are alleged to suffer latent defects including, but not limited to, roof leaks, inadequate waterproofing, improper flashing installation, and improper installation of building material all of which allow for water intrusion or otherwise compromise the homes' integrity, resulting in damage to the homes as well as to other property. Based on architectural and engineering investigations of Waverly, Plaintiffs' experts opine these defects are common to all of the buildings and have caused similar damage to the residences.

SUMMARY OF PERTINENT FACTS

A.) Overview of Waverly

Completed by Defendants between 2005 and 2010, Waverly consists of one hundred and five (105) townhomes situated in twenty-two (22) buildings within Hamlin Plantation, a neighborhood located in Mt. Pleasant. According to Plaintiffs, Waverly's construction issues first came to light when extreme damage to the homes was discovered by homeowners. Waverly consulted with construction professionals and counsel. According to his expert report and

Affidavit, Waverly's architect, Myles Glick, has determined and documented that common, neighborhoodwide construction defects exist¹ and that these defects have resulted in water intrusion, and building component rot that are systemic throughout the complex (See Glick Report²).

1.) Waverly - Commonly Constructed with Shared Components

Not only does the Glick Report evidence that the townhomes suffer common defects and common damages, the Report, along with the homeowners' purchase contracts and governing regime documents, evidence that the townhomes were commonly constructed and share common components. Specifically, all of the townhomes were constructed by the Wieland Defendants over the course of a five-year period. Moreover, the Glick Report and governing regime documents indicate that the townhomes share roofs, exterior walls, foundations, and common walls. Additionally, the Report and photographs of the Waverly buildings show that the buildings' major, exterior components are all identical: asphalt shingle covered main roofs; and cementitious siding on main walls over building wrap. (See Reports and Waverly Photographs). Thus, while there are some standard variations in certain building components such as garages, dormers, front entry ways, and rear porches, the Report, purchase contracts, regime documents and Waverly photographs evidence that all buildings' major, exterior components consist of the same materials and all buildings share other common components.

¹ Specifically, Mr. Glick opines that "The damages caused by the deficiencies are typical and consistent amongst all structures inspected and require significant repairs ..." (See Glick Affidavit).

² Mr. Glick's expert report and Affidavit are hereinafter collectively referred to as "the Glick Report" or "the Report".



2.) Waverly - Common Governance and Common Management

Also, the Waverly townhomes are commonly governed by a set of regime documents, and its "common" elements are managed by the Association. (See Waverly Declaration). Specifically, the "Declaration of Protective Covenants for Waverly at Hamlin Plantation Townhomes" executed on December 7, 2005 and recorded at Book E 566, Page 543 provide for the Association to maintain and repair the Areas of Common Responsibility. (See Waverly Declaration, Art. V, Sec. 1). This includes "all roofs, downspouts and gutters. . . all exterior building surfaces with the exception of hardware and glass ... " The Covenants further provide (1) "the Association shall have the right, but not the obligation, to maintain property not owned by the Association where the Board has determined that such maintenance would benefit all the owners;" and (2) "The Association shall repair incidental damage to any Unit resulting from performance of work which is the responsibility of the Association." *Id.*

3.) Waverly-Common Defects and Common Damages

The Glick Report evidences that the Waverly townhomes contain common, latent defects including, but not limited to, improperly installed siding facades, roofing, flashing, and weather barrier, all of which result in repeated water intrusion and other similar, consequential damages.

As evidenced by the Glick Report, the principal, common defect is the improper integration of exterior envelope components, a condition which permits water intrusion that consistently damages the exterior sheathing and building components. The report reflects that the major exterior envelope components (shingles, siding, building wrap, and flashing) are improperly installed, sealed, or lapped, allowing regular, common points of water entry behind the weather barriers at typical locations on all buildings.

The Glick Report also notes that both the siding and the roofing are improperly fastened to the buildings, and thus, neither are properly installed to withstand a design weather event (e.g., hurricane) as required by the building code. Other common deficiencies documented by Mr. Glick include the use of improper fasteners for deck and porch rails, which have prematurely failed. Numerous other common deficiencies, and their common, resulting damages, are documented in the Glick Report.

B.) Procedural Background and Proposed Class

Plaintiffs commenced this suit by filing a Class Action Complaint which, as amended, asserts a number of claims including negligence/gross negligence, breach of warranty, breach of fiduciary duty, strict liability and unfair trade practices against Wieland Defendants. Plaintiffs filed a Motion for Class Certification, along with supporting Affidavits, requesting the certification of the following Proposed Class:

PROPOSED CLASS

The class Plaintiffs requests this Court to certify is defined as follows:

All persons and entities that are members of The Waverly at Hamlin Plantation Townhome Association.

Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and their legal representatives, assigns and successors of Defendants and Defendants' current or former employees, investors, members, or officers; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

Plaintiffs propose that an opt-out class be certified. *See Salmonsens v. CGD, Inc.*, 377 S.C.

A handwritten signature, possibly reading 'Re', is written in black ink.

442, 459-60, 661 S.E. 2d 81, 91 (2008) (concluding the adoption of opt-out class action and notification is the exclusive method of class action litigation in this state), and that sub-classes be used as necessary to further align class interests.

CLASS ACTION PRINCIPLES

South Carolina courts give Rule 23 an expansive, rather than a restrictive construction, adopting a standard of flexibility in application which best serves the affected parties and promotes efficiency in a particular case. *Littlefield v. S. C. Forestry Comm'n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) (recognizing Rule 23, SCRC, "endorses a more expansive view of class action availability"). In fact, the South Carolina Supreme Court recently touted Rule 23's expansive nature and the benefits in liberally applying Rule 23 in favor of class certification, notably in the construction-defect context, where a court finds all Rule 23(a)'s prerequisites are satisfied. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) ("this Court has expressed the viewpoint that class actions are favored in this state ...").

South Carolina courts enjoy significant discretion in reviewing a motion for class certification, and a court may certify a class if, following a "rigorous analysis," the court finds the Rule 23(a) requirements have been met. *Waller v. Seabrook Island Prop. Owners Assoc.*, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990) ("[A] trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion...It is imperative the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied ..."); see also *Dukes*, ___ U.S. ___, 131 S. Ct. at 2551 (noting the plaintiff must "affirmatively demonstrate his compliance with the Rule - that is, he must be prepared to prove [that], in fact, [the requirements of Rule 23 are satisfied.]")



Specifically, under South Carolina's Rule 23(a), the Plaintiffs must demonstrate:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class;
- (4) the class representatives will fairly and adequately protect the interests of the class; and
- (5) the amount in controversy exceeds one hundred dollars per class member.

South Carolina's Rule 23(a) is nearly identical to its federal counterpart, and accordingly, South Carolina looks favorably on federal precedent interpreting this language. *Waller*, 300 S.C. at 467, 388 S.E.2d at 801 (noting Rule 23(a), SCRPC, is principally drawn from Rule 23(a), FRCP).³ South Carolina's Rule 23 is materially different from the Federal Rule, however, in that it does not require Plaintiffs satisfy any predominance, superiority or ascertainability requirement in order to achieve class certification - class certification, under South Carolina law, only requires Plaintiffs satisfy the five, above-listed prerequisites. *Littlefield*, 337 S.C. at 355, 523 S.E.2d at 784 ("Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, [SCRPC] intentionally omitted from our state rule the additional requirements found in [Rule 23(b), FRCP].");

³ In fact, the first four class action prerequisites listed under Rule 23(a), SCRPC - numerosity, commonality, typicality, and adequacy - are the same prerequisites listed under Rule 23(a), FRCP, with South Carolina adding a fifth prerequisite, amount in controversy, not contained in the Federal Rule.

DISCUSSION

Plaintiffs satisfy each of the five prerequisites necessary to maintain this class action, even under a rigorous analysis of the same, and therefore, this Court finds class certification is appropriate under Rule 23(a), SCRCP.

1.) Numerosity

First, Plaintiffs satisfied Rule 23(a)'s numerosity requirement by demonstrating "the class is so numerous that joinder of all members is impracticable." Rule 23(a)(1), SCRCP. Numerosity is "not dependent on a specific number of class members," and "[t]here is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied." *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) quoting *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967); *Kelley v. Norfolk & W Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978) ("The issue [of numerosity] is one primarily for the [c]ourt, to be resolved in light of the facts and circumstances of the particular case."). Indeed, "numerosity" is really a question of "impracticable joinder" which "depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *George v. Duke Energy Ret. Cash Balance Plan*, 259 F.R.D. 225, 231 (D.S.C. 2009) (citations omitted).

Here, the record contains sufficient documentation evidencing the size of the Proposed Class is potentially so numerous that joinder is impractical. Simply stated, there are at least one hundred and five owners of Waverly townhomes, all of whom qualify as potential class members because all own homes commonly designed, commonly constructed, and commonly suffering from similar defective conditions and resulting damage. See, e.g., *Cypress*, 375 F.2d at 652-54



(Fourth Circuit approving certification of class containing 18 potential members); *see also Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968) ("While 25 members is a small number compared to the size of the other classes being considered, it is a large number when compared to a single unit. *I see no necessity for encumbering the judicial process with 25 lawsuits if one will do.*") (emphasis added). Given there are in excess of one hundred and five (likely more considering spouses and co-owners) Waverly homeowners whose residences contain latent defects, Plaintiffs satisfy the "numerosity" requirement for class certification.

By this same token, Plaintiffs satisfy the impractical joinder analysis given that the joinder of one hundred and fourteen or more homeowners, some dispersed throughout a sizable geographic area, is difficult and impractical to achieve, and difficult to manage if achieved. *See, e.g., City of Ann Arbor Employees' Retirement Sys. v. Sonoco Prods. Co.*, 270 F.R.D. 247, 251 (D.S.C. 2010) (granting plaintiff's class certification motion, in part, on the basis that "[g]iven the number and likely geographical dispersion of potential class members, joinder would be impracticable). Moreover, many of the Waverly homeowners do not have the ability to bring their own claims because of the efforts and financial resources required to pursue construction defect-related litigation on the few exterior components for which the homeowners are responsible. In other words, judicial economies of time, effort and expense support certifying a class of Waverly homeowners to promote uniformity of decision among these similarly situated persons as



opposed to trying a hundred plus individual suits involving the same defendants, the same defects, the same claims, and the same or similar damage.⁴

2.) Commonality

Second, Plaintiffs' satisfy Rule 23's commonality requirement because several common legal and factual questions exist among Class members. *McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 154, 157 (Ct. App. 1986) (noting "a single, common question" can fulfill the Rule 23(a)(2), SCRPC, commonality requirement) (citations omitted); see also *Dukes*, U.S., 131 S. Ct. at 2556 (noting Rule 23(a) does not require that all questions of law or fact raised in the litigation be common; indeed, even a single question of law or fact common to the members of the class will satisfy the commonality requirement.); Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176, n. 110 (2003) (For purposes of Rule 23(a)(2), "even a single common question will do.").⁵ "A question is ordinarily understood to be a subject 'or point open to controversy ... [t]hus, a question common to the class must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims." *Dukes*, U.S., 131 S. Ct. at 2562. (dissent). Similarly stated, what is necessary for certification are common issues, the resolution of which will advance the litigation. *McGarin*, 287 S.C. at 568, 340 S.E.2d at 157 ("Ultimately, commonality is a judgment that the

⁴ Further, an alleged class that has a fluid, changing membership can be accommodated by the class action device. This is especially true where the alleged class has constant defining characteristics. James F. Flannagan, *South Carolina Civil Procedure*, 184 (3rd ed. 2010). Here, the proposed class consisting of Waverly homeowners may have changing membership based on the sale and purchase of the townhomes; however, the construction defects allegedly existing within the townhomes, defects allegedly caused by the Defendants, are the constant defining characteristic of the class.

Consequently, the requirement of Rule 23(a) in this case is not only satisfied by the number of putative class members, but also by additional factors such as potential change in ownership and the otherwise inability of owners to properly pursue their own claim because of lack of time or resources, or the individual investment necessary.

⁵ Thus, the threshold of "commonality" is not high under South Carolina's Rule 23, and contrasts with the "more demanding" predominance showing required by Federal Rule 23. *Amchem Products v. Windsor*, 521 U.S. 591, 623-24 (1997); I Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3:10 n.9 (41 h ed. 2002) (noting commonality "is easily met in most cases").

issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem ... ") (citations omitted); *Dukes*, U.S., 131 S. Ct. at 2551 (noting commonality requires "a common contention of such a nature that it is capable of class-wide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."); Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009) ("What matters to class certification ... is not the raising of common questions ... but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.")

Here, Plaintiffs demonstrate at least four primary questions, all of which will produce answers central to the validity of Plaintiffs' claims:

- (1) Whether Waverly contains latent defects;
- (2) Whether Defendants contributed to Waverly's defective condition;
- (3) Whether Waverly's defective condition proximately caused resulting damage; and
- (4) How much will the repair of Waverly's defective condition and resulting damage cost?

In addition to raising common questions, Plaintiffs' claims also arise from a common nucleus of facts given their homes, all of which allegedly contain similar latent defects and resulting damage, were commonly developed and commonly constructed, using purportedly the same construction plans, the same materials, the same developer, and nearly the same building code (while Charleston moved from IRC 2003 to IRC 2006 during the construction of Waverly, the relevant building code provisions remain essentially unchanged). (See Glick Report; Homeowner Purchase Contracts; Waverly Photographs).



Notably, the Glick Report provides that the relevant portion of each building, the exterior envelope, is nearly identical to the other buildings' exterior envelope. (See Glick Report). The Glick Report further provides that all main roofs, on each of the twenty-two buildings, are comprised of asphalt shingles suffering from the same installation deficiencies; all main walls, on each of the twenty-two buildings, are clad with cementitious siding over a weather barrier with both evidencing the same deficiencies. While there may be some variation in the extent of the damage, this variation ultimately becomes academic as all units and buildings are defective to the extent that a complete recladding of the exterior has been specified by Mr. Glick. *Id.*

Because Plaintiffs' claims are essentially based upon the same contentions (i.e., defective construction), and the Glick Report evidences these contentions are common among the Association members (owners of Waverly townhomes), it follows said contentions are "of such nature that [they] are capable of class-wide resolution." *Dukes*, __ U.S. __, 131 S. Ct. at 2551. In other words, proof of common defects, common failures and common damage exist as to the Waverly townhomes, and therefore, class certification is appropriate because the class action vehicle best serves to resolve such "common" issues "in one stroke" for all members of the class.

*Id.*⁶

⁶ See also *Butler v. Sears, Roebuck and Co.* ("Butler I"), 727 F.3d 796, 798 (7th Cir. 2013) *cert denied*, *Sears, Roebuck and Co. v. Butler*, __ S. Ct. __, 2014 WL 684064, at *1 (Feb. 24, 2014) ("[t]he basic question presented ... are [washing] machines defective in permitting mold to accumulate and generate noxious odors? - is common to the entire [class], although damages are likely to vary across class members ..."); *In re Whirlpool Corp. Front-Loading Washer Products liability litigation* ("Whirlpool II"), 722 F.3d 838, 853 (6th Cir. 2013), *cert denied*, *Whirlpool Corp. v. Glazer*, __ S. Ct. __, 2014 WL 684065, at *1 (Feb. 24, 2014) (noting class certification requires only a single common question of law or fact, the answer to which would drive the resolution of the claims of the class); *Cobb v. ESH Home Appliances* ("ESH"), 2013 WL 1395690, at *1 (9th Cir. 2013), *cert denied*, *ESH Home Appliances v. Cobb*, __ S.Ct. __, 2014 WL 684056, at *1 (Feb. 24, 2014) (denying appeal of district court order granting class certification; *Donovan v. Philip Morris USA, Inc. (Donovan II)*, 2012 WL 957663, at *2 (D. Mass. Mar. 21, 2012) (noting class certification should only be denied on commonality grounds where "there is no common question that could generate a common answer to resolve an issue central to the litigation.")).

3.) Typicality

Third, Plaintiffs satisfy Rule 23(a)'s typicality requirement.⁷ Typicality is satisfied if "the claims or defenses of the [class representative] are typical of the claims or defenses of the class." Rule 23(a)(3), SCRCP. Typical does not mean identical, and Rule 23(a)'s typicality requirement is satisfied if the class members' claims are "fairly encompassed by the named plaintiffs' claims." *Whirlpool II*, 722 F.3d at 852. In other words, the principal "typicality" inquiry is whether the class representative's claims have the same essential characteristics as the claims of the other members of the Class. As the Supreme Court observed in *Dukes*, the typicality analysis aids courts in "determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiffs claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, ___ U.S. ___, 131 S. Ct. at 2551, n.5 quoting *Gen. Tel. Co. of Southwest v Falcon*, 457 U.S. 147, 157-58, n. 13 (1982).

Generally, the typicality requirement is satisfied in instances where plaintiffs' claims arise out of a defendant's common course of conduct. *Bates v. Tenco Services, Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990) ("The question of typicality focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs. The plaintiffs' claims for damages stem from effects of the defendants' activities on the plaintiffs' property.... Whether each potential member of the class has suffered the same degree of harm, or each and every type of harm, does

⁷ Generally, the commonality and typicality requirements "tend to merge" because both "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiffs claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, ___ U.S. at ___, 131 S. Ct. 2551-52.

not preclude a finding of typicality.") Thus, in a class action involving several homeowners pursuing construction defect-related claims, the class representative need only allege injury stemming from "defective conditions caused by defendants" to satisfy Rule 23's typicality requirement. *Id.*; see also *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 422, 717 S.E.2d 765, 775 (Ct. App. 2011), cert. granted June 26, 2014 ("In this case, we find the representatives claimed damages arising from construction defects and loss of use ... We find the representatives' claims were typical of the claims of the other class members."). Simply stated, the same defective conditions, allegedly caused by the same developer, giving rise to homeowner claims in the first place, establish the "typicality" of same.

In light of the foregoing, Plaintiffs satisfy Rule 23(a)'s typicality requirement because the claims asserted by Plaintiffs are typical of the claims of the Class. Specifically, Waverly's class representatives share attributes typical of each proposed Class member. Indeed, the class representatives' claims are based upon a common nucleus of operative facts arising out of Defendants' common course of conduct, conduct which directly involved the construction of Waverly. Accordingly, the class representatives' claims each arise from the same practice giving rise to the claims of the Class - Defendants' allegedly flawed construction of Waverly. Accordingly, Waverly's class representatives and the proposed Class necessarily pursue the same legal theories: the class representatives own townhomes located within Waverly, and their homes contain latent defects allegedly caused by the Defendants. Exactly like the class representatives, the proposed Class *also* own townhomes within Waverly, and their townhomes *also* contain latent defects allegedly caused by the Defendants. Where, as here, the class representatives and all class members own substantially similar residences, and they advance the same legal theories

regarding those residences, the typicality requirement is satisfied. *See Pope, supra*; *see also Saltzman v. Pella Corp.*, 257 F.R.D. 471, 479 (N.D. Ill. 2009) (finding typicality where class members and class representatives advanced consistent legal theories arising out of defective Windows), *aff'd*, 606 F.3d 391 (7th Cir. 2010) (per curiam); *Brooks v. GAF*, 2013 WL 461468, at *3 (D.S.C. 2013) (finding Plaintiffs met Rule 23's typicality requirement for class certification in an action concerning defective shingles).

In sum, Plaintiffs' claims are legally and factually consistent with those sought on behalf of the proposed Class, and thus, Plaintiffs' claims are typical of the Class members' claims under Rule 23(a). *Id.*; *see also In Re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation*, 2014 WL 104964 at *4 (W.D. Ok. 2014) ("Differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory.") (citations omitted).

4.) Adequacy

Fourth, Plaintiffs satisfy Rule 23(a)'s adequacy requirement. The principal factor in determining the adequacy of a class representative is whether the Plaintiff has the ability and commitment to prosecute the action vigorously. *South Carolina Natl. Bank v. Stone*, 139 F.R.D. 325, 329-30 (D.S.C. 1991). There are two criteria to which courts look in determining whether the class representative adequately protects the interests of the class: (1) The class representatives should not have any significant antagonistic or conflicting interests to the unnamed Class members; and (2) it must appear the class representatives will vigorously prosecute the interests of the class through qualified counsel. *Runion v. US. Shelter*, 98 F.R.D. 313, 316 (D.S.C. 1983); *Natl. Ass'n of Regional Med. Programs, Inc. v. Matthews*, 551 F.2d 340, 345 (D.C. Cir. 1976), *cert.*

denied, 431 U.S. 954 (1977). In addition, it must appear the class representatives voluntarily accept the fiduciary relationship towards all the members of the putative Class. *Id.*

As owners of a Waverly townhome, these class representatives "possess the same interest and suffer the same injury as the class members." *Gunnells v. Healthcare Services, Inc.*, 348 F.3d 417, 425 (4th Cir. 2003). Indeed, no material conflict exists between the class representatives (owners of a Waverly townhome, and thus, Association members) and the class members they seek to represent (also owners of Waverly townhomes, and thus, Association members). Moreover, the class representatives and their counsel are committed to aggressively pursuing this litigation on behalf of the other Waverly homeowners whose homes contain latent defects. (See Peyser Affidavit; Hayes Affidavit; McCarty Affidavit).

Notably, Plaintiffs' counsel has practiced before this Court, in a number of complex construction defect actions, and thus, this Court is aware of counsel's competency in litigating complex actions as further described in Counsel's Affidavit. (See Hayes and McCarty Affidavit). Accordingly, this Court is satisfied the class representatives and their counsel will fairly and adequately protect the interests of the class.

5.) Amount in Controversy

Fifth, and finally, Plaintiffs satisfy Rule 23(a)'s amount in controversy requirement. Rule 23(a)'s prerequisite requires the "amount in controversy" to exceed one hundred dollars for each member of the proposed class. This amount is based on the amount claimed by the plaintiffs, and where plaintiffs' claim damages greater than one hundred dollars per class member, the "amount in controversy" requirement is satisfied. *Gardner v. Newsome Chevrolet-Buick*, 404

S.E.2d 200, 201 (S.C. 1991). Here, the amount in controversy exceeds one hundred dollars per class member, and this is verified by the Glick Affidavit.

DEFENDANTS' OPPOSITION IS LEGALLY INSUFFICIENT

Given Plaintiffs' satisfaction of all Rule 23(a) requirements necessary for class certification, coupled with the benefits class certification serves in promoting the efficient handling of this case, any challenge proffered by Defendants as to this Court's grant of class certification is presently insufficient to defeat class certification. The Waverly townhomes share their roofs, exterior walls, and cladding, share common construction details, and all are alleged to suffer common defects and common resulting damages which are addressed in a single repair scope and a single repair estimate. Thus, any purported individualized differences in subcontractors or floor plans, does not likely change the common facts and common questions which exist among the class. Additionally, Defendants failed to introduce any evidence substantiating any material differences in the two, governing building codes or other material differences opposing class certification during the May 3, 2016 motion hearing.

Moreover, the subcontractors' objections to a class being certified because of the complexity of the case or because they only worked on some residences misses an important point: all are already part of the Association's suit, irrespective of the class certification. All the class certification does is ensure that 100% of this dispute is resolved, rather than piece-mealing it, by consolidating the regime's claims (based upon its repair obligation) and the owners' claims (based upon ownership rights).

CONCLUSION

Following a rigorous analysis of the Rule 23(a), SCRCP, prerequisites, this Court finds Plaintiffs satisfy the Rule's numerosity, commonality, typicality, adequacy and amount in controversy requirements, and thus, class certification is warranted.

Accordingly, it is hereby:

ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Class Certification is GRANTED;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the following Class is CERTIFIED:

All persons and entities that are members of The Waverly at Hamlin Plantation Townhome Association.

Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and their legal representatives, assigns and successors of Defendants and Defendants' current or former employees, investors, members, or officers; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

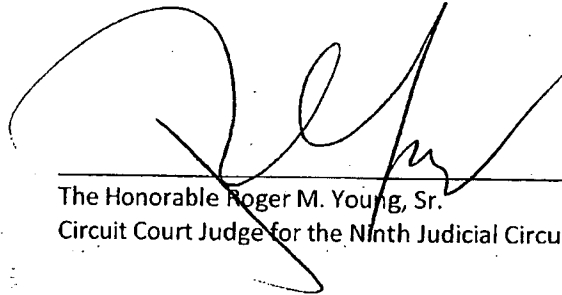
IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Edward Peyser is appointed as class representative.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that John C. Hayes, IV and I. Keith McCarty are appointed as class counsel; and

A handwritten signature, likely of a judge or court official, is written in black ink. It consists of a large, stylized capital letter 'P' followed by a cursive 'r' and a small mark.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the attached notice plan, notice form, and opt-out form are approved for implementation by class counsel as detailed in the attached documents.

AND IT IS SO ORDERED!



The Honorable Roger M. Young, Sr.
Circuit Court Judge for the Ninth Judicial Circuit

Charleston, South Carolina

Date: 5/3 2016

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-10-04335

Jeffrey Sills as Class Representative,
Marie Labarowski, Edward and Nancy
Peyser, Francis Sills, Daniel and
Suzanne Ruth, Stephani Adili, Marc and
Brandy Lynn, Russell Robinson, George
Busnach, Helen Furtado, Jessica
Baucom, Nancy S. Coleman, Linda
Glitz, Peggy Gerou, Shannon Bebout,
Maryann Walsh, Patty Whitmire,
Donald L. Tomasello and Patricia Kelly,
Chris Leigh-Jones, Edward Ray and
Kathy Jo Feagins, Cindy Hunt for
Bentgrass Limited, LLC, Adam A. and
Susan A. Sokoloski, William and
Carolyn Barone, Michelle Ray, Eugene
and Cynthia Ray, William Abel, Dean
and Conny Mason, David McCartney,
Paul and Patricia Watters, James and
Andrea Lowry, R. Robinson, Jr.,
Thaddeus R. & Barbara A. Kuczynski,
Beverly Sanders Carlson, Lisa Roeck,
Elizabeth Jackson, Charles and Mary
Kathleen Jenkins, Linda M. and Earl K.
Rigler, Jr., John Twomey, Joe and Anita
Brittain, Gilbert J. Hager & Kelly Hager
Holmes, Carol & Chris Gillespie, Jarred
D. Overcash,

Plaintiffs,

vs.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc. as
successor by statutory merger to John
Wieland Homes and Neighborhoods of
South Carolina, Inc., John Wieland
Homes of Charleston, Inc., John
Wieland Homes, Inc., Builder Support
Services of the Carolinas, Inc.,
Wheelock Street Capital, LLC d/b/a
John Wieland Homes and

**ORDER GRANTING PLAINTIFFS'
MOTION TO ADD AN ADDITIONAL
CLASS REPRESENTATIVE**

FILED
2016 NOV 28 PM 1:41
JULIE J. ARMSTRONG
CLERK OF COURT

Neighborhoods, Inc., Barr Construction,)
 Inc., Benjamin Mora d/b/a Mora)
 Construction, a/k/a Benjamin Mora)
 Construction, LLC, Builder's)
 Firstsource, Inc. a/k/a Builders)
 Firstsource-Southeast Group, LLC, a/k/a)
 Builders Firstsource -Atlantic Group,)
 LLC, DBC Construction Services, LLC,)
 Gerardo Rosette Sanchez a/k/a GR)
 Painting, George Medina a/k/a JMC)
 Construction, LLC a/k/a JMC)
 Construction, Inc.; Jesus Mora a/k/a J.)
 Mora Brick & Block Mason, LLC; Juan)
 Luis Sanchez, Juan Luis Sanchez a/k/a)
 Sanchez Brothers Painting; Latitude)
 Construction Services, LLC, The)
 Muhler Company, Inc., Paul M.)
 Vasquez, Richard Ditullio, Richard)
 Ditullio a/k/a ROT Contracting, LLC,)

Defendants.

Presiding Judge:
 Plaintiff's Attorney:
 Defendant's Attorney:

Hon. Deadra L. Jefferson
 John Hayes, IV, Esq.
 Theodore Manos, Esq.
 Andrew Cole, Esq.
 Pete Gunnar Nistad, Esq.
 October 31, 2016
 Denise Lauder

Date of Trial:
 Court Reporter:

This matter came before the Court on October 31, 2016, upon motion by the Plaintiffs to Add an Additional Class Representative, filed August 22, 2016. Present at the hearing were John Hayes, IV, attorney for Plaintiff Jeffrey Sills, as Class Representative, and all others similarly situated (hereinafter collectively referred to as "Plaintiffs"), Theodore Manos, attorney for Defendants, John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the

2016
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Carolinas, Inc. (hereinafter "Wieland Defendants"), Andrew Cole, attorney for Defendant JMC Construction, Inc., and Peter Gunnar Nistad, attorney for Defendant The Muhler Company, Inc.

The motion arises from the named Class Representative Edward Peyser's inability to solely perform all the responsibilities of a class representative in this class action lawsuit. Edward Peyser is named as Class Representative, however, subsequent to the filing of the Complaint, Edward Peyser has independently had developments in his personal life that may make it difficult for him to solely perform his responsibilities in this class action lawsuit. Specifically, Edward Peyser sold his home that is the subject of this litigation and as such, wishes to have another class member added as class representative in this action. Because of this, Plaintiffs filed a motion, respectfully requesting that the Court add Steve Denby as additional Class Representative in this matter. Mr. Denby is already a Plaintiff in this matter by virtue of being a member of the class.

I. ADDITION OF THE CLASS REPRESENTATIVE IS APPROPRIATE

SCRCP Rule 23 outlines class actions. More specifically, SCRCP Rule 23(a) outlines the prerequisites to being certified as a class action and states that:

[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Plaintiff's Motion for Class Certification, filed February 24, 2016, was granted in an Order by Judge R. Markley Dennis Jr., filed May 4, 2016. Judge Dennis's Order stated that "this Court finds Plaintiffs satisfy the Rule's numerosity, commonality, typicality, adequacy, and amount in

30 Feb
[Signature]

controversy requirements, and thus, class certification is awarded." Judge Dennis's Order also appointed Edward Peyser as class representative.

Under SCRCP Rule 23, the Court's class certification order may be amended at any time prior to a decision on the merits. "Once a class complaint is filed, but certainly following certification, Rule 23 is designed to assure that the rights of absent class members are not prejudiced by the voluntary actions of the representative plaintiff." *Newberg on Class Actions* §2:17 (5th ed. 2014). "Where the named plaintiffs' claims become moot after class certification by death or other means, the class claims become moot unless intervenors can be substituted as named plaintiffs." *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 566, 564 S.E.2d 94, 98 (2002). Here, the Class Representative wishes to add an additional class representative for personal reasons, which affect only him, rather than anything that affects the class as a whole. Further, the movant still maintains his allegations of damages even though he has sold the subject property. Therefore, addition is appropriate.

II. STEVE DENBY IS QUALIFIED TO BE APPOINTED AS CLASS REPRESENTATIVE

Steve Denby owns property at Waverly and is familiar with the claims on behalf of himself and others similarly situated. Like the other members in the class, he claims damages as a result of defective construction at Waverly. Moreover, Steve Denby meets the requirement of a class representative.

1. Typicality is Satisfied

SCRCP Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Here, Plaintiff Steve Denby asserts claims that are typical of those of the class. All of the class members, including Denby, assert the identical claim: that they are entitled to damages as a result of defective construction at Waverly.

2. Adequacy of Representation is Satisfied

The proposed Class Representative and Class Counsel must "fairly and adequately protect the interests of the class." SCRCF Rule 23(a)(4). As indicated above, Denby has already been involved in this case and is familiar with the lawsuit and the issues giving rise to the claims. Since he was contacted to be substituted as class representative, he has conveyed a willingness and ability to protect the interests of the class.

3. No Antagonistic or Adverse Interest to Those of the Rest of the Class

"In determining whether a particular named plaintiff will adequately represent a proposed class pursuant to Rule 23(a)(4) one factor we must consider is whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class." *Waller v. Seabrook Island Prop. Owners Ass'n.*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). "If so, that plaintiff will not be considered an adequate representative of the class. The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class." *Id.* Denby both owns property at Waverly and has been involved in this case previously. There is no antagonistic interest that can be discerned such that Denby would not be an appropriate class representative.

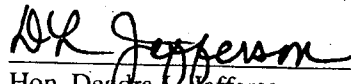
III. CONCLUSION

Each of the factors required for class certification remain unchanged. For these reasons, and those discussed above, Plaintiffs respectfully request that Steve Denby be added as an additional Class Representative.

Having reviewed the submissions of the parties and having heard the oral arguments presented by counsel, Plaintiffs' Motion to Add an Additional Class Representative is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Steve Denby is appointed as a class representative.

AND IT IS SO ORDERED.



Hon. Debra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

November 22, 2016
Charleston, South Carolina



FORM 4

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Waverly at Hamlin Plantation Townhome
Association, Inc.

v.

JUDGMENT IN A CIVIL
CASE

CASE NO. 2013-CP-10-03326

John Wieland Homes and
Neighborhoods of the Carolinas, Inc.,
et al,

PLAINTIFF

DEFENDANT

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE**

BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

This case was called before the Court for a jury trial on January 23-30, 2017. On January 30, 2017, a judgment was rendered by the jury. The jury reached a verdict in favor of Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc. in the amount of \$ 7,000,000.00 dollars actual damages.

At the end of the trial, post-trial motions were required and heard. The Defendant filed its Post-Trial Motions numbered 1-15. The Defendant's concede that numbers 3, 4, and 6 are moot. Defendants also withdraw number 13. Defendant John Wieland Homes made a Motion for Judgment Notwithstanding the Verdict pursuant to SCRPC, Rule 50. SCRPC Rule 50 states that "[w]henver a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to

have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict." "Motions for directed verdict or JNOV should be denied if the evidence yields more than one reasonable inference or its inference is in doubt." *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). Further, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

The Defendant additionally made a Motion for both a New Trial and a Remittitur of the Award. "A motion for a new trial nisi remittitur asks the trial court in its discretion to reduce the verdict because it is 'merely excessive,' although not motivated by considerations such as passion, caprice, or prejudice. If the amount of the verdict is grossly excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute, not a new trials nisi remittitur." *Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261, 268 (Ct. App. 1999). A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. "The jury's determination of damages, however, is entitled to substantial deference." *RRR, Inc. v. Toggas*, 378 S.C. 174, 662 S.E.2d 438, 442-43 (Ct. App. 2008). The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. . . . Similarly, the circuit court alone has the power to grant a new trial nisi when it finds the amount of the verdict to be merely inadequate or excessive. "Compelling reasons, however, must be given to justify invading the jury's province in this manner." *Id.*

Accordingly, JNOV, a new trial, or a remittitur of the damages award would be improper as a reasonable jury could have reached the challenged verdict. Further, the jury's verdict must be upheld if there is any evidence to sustain the factual findings implicit in the verdict. *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819, 823 (Ct. App. 1996). The Court further finds that the verdict is not shockingly disproportionate to the injuries sustained by the Plaintiff as to indicate passion, caprice, prejudice, or some other influence outside the evidence. *Kalchthaler v. Workman*, 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994). Pursuant to SCRPC Rule 59, "the motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." The Court required motions to be made promptly after the jury was discharged. The Court heard argument on motions numbered 1-2, 5, 7-12, and 14-15. At that time the Court made contemporaneous findings of fact and conclusions of law for the record which are incorporated herein. No other motions were made and are therefore waived. Accordingly, the Defendant's Motions were heard and respectfully denied.

Subsequent to trial, on February 3, 2017 the Defendants filed a motion for set-off. Accordingly, a hearing was held on February 9, 2017 on Defendant's Motion to Enforce Set-Off and Reduce Judgment. Present at the hearing were John Hayes, Esquire and I. Keith McCarty, Esquire, representing the Plaintiff, and Theodore Manos, Esquire and Andrew Haselden, Esquire, representing Defendant John Wieland Homes. "Before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury; when the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). After hearing from all parties present, the parties stipulate, without objection, that the Defendants are entitled to a set-off in the amount of \$1,919,000.00. Therefore, Judgment is entered

against the Defendants in the amount of \$5,081,000.00. Further, the gravamen of Defendant John Wieland Homes' Motion is their contention that they are entitled to an enhanced set-off in the amount of \$434,000.00. They maintain this is the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC. The Court heard argument on the matter and has taken this matter under advisement. The Court will issue a Supplemental Order concerning this matter.

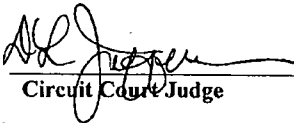
ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Waverly at Hamlin Plantation Townhome Association, Inc.	John Wieland Homes and Neighborhoods of the Carolinas, Inc. As successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc.	\$ 5,081,000.00
If applicable, describe the property, including tax map information and address		

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


Circuit Court Judge

2128
Judge Code

2/9/17
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or

to parties (when appearing pro se) as follows:

John C. Hayes, Esq., I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.

PLAINTIFF

Theodore Manos, Esq., Andrew Haselden Esq.,
Justin Novak, Esq.

ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter: Ruth Weese

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

CASE NO.: 2013-CP-10-03326

Waverly at Hamlin Plantation
Townhome Association, Inc.)

Plaintiff,)

v.)

VERDICT FORM

John Wieland Homes and
Neighborhoods of the Carolinas, Inc.)
As successor by statutory merger to
John Wieland Homes and
Neighborhoods of South Carolina,)
Inc., John Wieland Homes of)
Charleston, Inc., John Wieland)
Homes, Inc.,)

Defendants,)

AS TO THE NEGLIGENCE CAUSE OF ACTION:

1. We, the jury, unanimously find for the Plaintiff in the amount

\$ 7,000,000 (dollars) actual damages.

OR

2. We, the jury, unanimously find for the Plaintiff in the amount of

\$ _____ (dollars) actual damages.

\$ _____ (dollars) punitive damages.

OR

3. _____ We, the jury, unanimously find for the Defendants.

Please sign and date.

Chris Donnan

Foreperson

Date

1/30/17

Please notify the Bailiff when you have completed your deliberations.

FORM 4

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Stephen Denby, Individually and as Class Representative, et al, v.

PLAINTIFF

JUDGMENT IN A CIVIL
CASE

CASE NO. 2014-CP-10-04335

John Wieland Homes and
Neighborhoods of the Carolinas, Inc.,
et al,

DEFENDANT

FILED
2017 FEB -9 PM 4:13
JULIE ARMSTRONG
CLERK OF COURT

CHECK ONE:

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

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

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☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE**

BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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IT IS ORDERED AND ADJUDGED:

☐ See attached order. (Formal order to follow)
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This case was called before the Court for a jury trial on January 23-30, 2017. On January 30, 2017, a judgment was rendered by the jury. The jury reached a verdict in favor of Plaintiff Stephen Denby, Individually and as Class Representative, in the amount of \$ 200,000.00 dollars actual damages.

At the end of the trial, post-trial motions were required and heard. The Defendant filed its Post-Trial Motions numbered 1-15. The Defendant's concede that numbers 3, 4, and 6 are moot. Defendants also withdraw number 13. Defendant John Wieland Homes made a Motion for Judgment Notwithstanding the Verdict pursuant to SCRPC, Rule 50. SCRPC Rule 50 states that "[w]henever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to

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no Judgment is entered against the Defendants. Further, the gravamen of Defendant John Wieland Homes' Motion is their contention that they are entitled to an enhanced set-off in the amount of \$434,000.00. They maintain this is the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC. The Court heard argument on the matter and has taken this matter under advisement. The Court will issue a Supplemental Order concerning this matter.

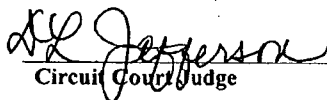
ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address		

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


Circuit Court Judge

2128
Judge Code

2/9/17
Date

For Clerk of Court Office Use Only

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

John C. Hayes, Esq., I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.

PLAINTIFF

Theodore Manos, Esq., Andrew Haselden Esq.,
Justin Novak, Esq.

ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter: Ruth Weese

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Stephen Denby, Individually and as Class)
Representative, Marie Labarowski,)
Stephanie Adili, Marc and Brandy)
Lynn Russell Robinson, Jessica,)
Baucorn, Nancy S. Coleman, Linda)
Glitz, Maryann Walsh, Patty Whitmire,)
Donald L. Tomasella and Patricia)
Kelly, Chris Leigh-Jones, Edward)
Ray and Kathy Jo Feagins,)
William and Carolyn Barone,)
William Abel, Dean and Conny)
Mason, Paul and Patricia Waters,)
R. Robinson, Jr., Lisa Roeck,)
Elizabeth Jackson, Joe and)
Anita Brittain, Gilbert J. Hager and)
Kelly Hager Holmes,)
Jessica Shipman, Arlene Conte, Carol Ann)
Dumond, Lawrence Murray, Yvonne)
Walker, Darlene and Richard)
Gleeson, Robert and Michell Bagrie,)
Russell Johnston, Kathryn Howle,)
Dorothy Newman, Nicholas and)
Debora Yost, Helen and Bob Harmon)
Estate of Rose Minton,)
Stephen and Merifaith Perdue.)

Plaintiffs,)

v.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc.)
As successor by statutory merger to)
John Wieland Homes and)
Neighborhoods of South Carolina,)
Inc., John Wieland Homes of)
Charleston, Inc., John Wieland)
Homes, Inc.,)

Defendants,)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-10-04335

VERDICT FORM

AS TO THE NEGLIGENCE CAUSE OF ACTION:

1. We, the jury, unanimously find for the Plaintiffs in the amount

\$ 200,000 (dollars) actual damages.

OR

2. We, the jury, unanimously find for the Plaintiffs in the amount of

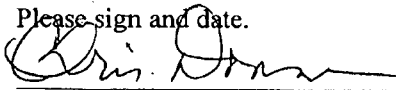
\$ _____ (dollars) actual damages.

\$ _____ (dollars) punitive damages.

OR

3. _____ We, the jury, unanimously find for the Defendants.

Please sign and date.



Foreperson

1/30/17

Date

Please notify the Bailiff when you have completed your deliberations.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation)
Townhome Association, Inc.)

Plaintiff,)

v.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc.)
As successor by statutory merger to)
John Wieland Homes and)
Neighborhoods of South Carolina,)
Inc., John Wieland Homes of)
Charleston, Inc., John Wieland)
Homes, Inc.,)

Defendants,)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-03326

**SUPPLEMENTAL ORDER DENYING
DEFENDANT JOHN WIELAND
HOMES' MOTION TO ENFORCE
ENHANCED SET-OFF**

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Stephen Denby, Individually and as Class)
Representative, Marie Labarowski,)
Stephanie Adili, Marc and Brandy)
Lynn Russell Robinson, Jessica,)
Baucom, Nancy S. Coleman, Linda)
Glitz, Maryann Walsh, Patty Whitmire,)
Donald L. Tomasella and Patricia)
Kelly, Chris Leigh-Jones, Edward)
Ray and Kathy Jo Feagins,)
William and Carolyn Barone,)
William Abel, Dean and Conny)
Mason, Paul and Patricia Waters,)
R. Robinson, Jr., Lisa Roeck,)
Elizabeth Jackson, Joe and)
Anita Brittain, Gilbert J. Hager and)
Kelly Hager Holmes,)
Jessica Shipman, Arlene Conte, Carol Ann)
Dumond, Lawrence Murray, Yvonne)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-10-04335

FILED
2017 MAR -3 AM 9:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

10/7
[Signature]

Walker, Darlene and Richard)
Gleeson, Robert and Michell Bagrie,)
Russell Johnston, Kathryn Howle,)
Dorothy Newman, Nicholas and)
Debora Yost, Helen and Bob Harmon)
Estate of Rose Minton,)
Stephen and Merifaith Perdue)

Plaintiffs,)

v.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc.)
As successor by statutory merger to)
John Wieland Homes and)
Neighborhoods of South Carolina,)
Inc., John Wieland Homes of)
Charleston, Inc., John Wieland)
Homes, Inc.,)

Defendants,)

Presiding Judge:
Counsel for Plaintiff:

Counsel for John Wieland Homes:

Counsel for JMC Construction:
Counsel for Sanchez Brothers Painting:
Counsel for The Muhler Company:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
John Hayes, IV, Esq.
I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.
Theodore Manos, Esq.
Andrew Haselden, Esq.
Andrew Cole, Esq.
Sarah Fragale, Esq.
Peter Gunnar Nistad, Esq.
January 17, 2016
Phyllis Norton

THIS MATTER came before the Court on Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment, filed February 3, 2017. A hearing was held on February 9, 2017. Present at the hearing were John Hayes, Esquire and I. Keith McCarty, Esquire, representing the Plaintiff, and Theodore Manos, Esquire and Andrew Haselden, Esquire, representing Defendant John Wieland Homes. Curtis Martin, Esquire representing Defendant Benjamin Mora was not present at the hearing.

2017
JH

"Before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury; when the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012).

After hearing from all parties present, the parties stipulated, without objection, that the Defendants were entitled to a set-off in the amount of \$2,119,000.00¹ to the combined jury verdict of \$7,200,000.00². Therefore, Judgment was entered against the Defendants in the amount of \$5,081,000.00 for the Plaintiffs Waverly at Hamlin Plantation Townhome Association and no judgment for the Plaintiffs in the class action companion suit. Accordingly, a Form 4 was signed and entered for both cases on February 9, 2017 issuing the judgment with the agreed upon set-off. This Supplemental Order addresses the gravamen of Defendant John Wieland Homes' Motion. Defendant John Wieland Homes' contends that they are entitled to an enhanced set-off in the amount of \$434,000.00.³ They maintain this is the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC (hereinafter referred to as "Benjamin Mora").

A trial court has inherent jurisdiction to enforce settlement agreements entered before it, and the inherent power to refuse to enforce settlements. Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 419 S.E.2d 841 (Ct. App. 1992). With regards to agreements between parties, SCRPC Rule 43(k) states that:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed

¹ The settlement funds totaling \$2,119,000.00 are as follows: Jesus Mora; \$100,000.00; Benjamin Mora Construction; \$70,000.00; Barr Construction; \$15,000.00; Latitude Construction; \$50,000.00; AC Construction; \$67,500.00; and Builders First Source; \$7,500.00. Additionally, the set-off encompasses the outstanding settlements pending class action approval. These additional settlements are as follows: JMC Construction; \$1,250,000.00; The Muhler Company; \$250,000.00; RDT; \$125,000.00; and Sanchez Brothers Painting; \$184,000.00. The combined settlements from the various Defendants totals to the applied set-off of \$2,119,000.00. Cross-claims by Defendant John Wieland Homes are still pending for the following parties: JMC Construction, The Muhler Company, and Sanchez Brothers Painting. These claims were bifurcated and will be tried separately.

² This judgment reflects the total verdict from the combined cases. In the class action suit, the jury returned a verdict in favor of the Plaintiffs in the amount of \$200,000 actual damages. The jury reached a verdict of \$7,000,000.00 actual damages for Plaintiff Waverly at Hamlin Plantation Townhome Association. By consent of counsel, the set-off was applied as follows: \$200,000.00 towards the class action suit resulting in no judgment and \$1,919,000.00 applied towards the judgment for Plaintiff Waverly at Hamlin Plantation Townhome Association resulting in a judgment of \$5,081,000.00.

³ The alleged enhanced set-off of \$434,000.00 does not include the already approved settlement of \$70,000.00 between Plaintiffs and Defendant Benjamin Mora.

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[Signature]

by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

SCRCP 43. SCRCP Rule 43(k) allows for agreements between counsel to be binding under four scenarios. However, three of the scenarios require that the agreement be noted and entered on the record. As a fourth option, SCRCP Rule 43(k) allows an agreement to be binding if an agreement is "reduced to writing and signed by the parties and their counsel." The signature of the party to the agreement is a requirement under the plain language of SCRCP Rule 43(k). Further, South Carolina courts have consistently throughout the years ruled that in order for a settlement to be enforced an agreement must strictly adhere to SCRCP Rule 43(k).

Defendant John Wieland Homes' Motion for an Enhanced Set-Off in the amount of \$434,000.00 fails for several reasons. First, Defendant John Wieland Homes' request must be denied because no documentation of the alleged set-off complies with the requirements of SCRCP Rule 43(k). Defendant John Wieland Homes urges this Court to accept a chain of e-mail correspondence as evidence of the alleged negotiated settlement. However, e-mail correspondence as evidence of a negotiated settlement do not meet any of the four scenarios mandated by SCRCP Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

In the alternative, Defendant John Wieland Homes argues that the alleged Benjamin Mora settlement agreement concerning the enhanced set-off was memorialized, in open court on the record, and thus complies with SCRCP Rule 43(k). In further support of their argument, Defendant John Wieland Homes contends that on Tuesday, January 17, 2017, Plaintiffs' counsel and Defendant John Wieland Homes' counsel notified the Court, on the record, that Plaintiffs and Defendant John Wieland Homes had settled with Defendant Benjamin Mora. However, after reviewing the record from both January 17, 2017 and January 23, 2017, this Court cannot discern

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from the record that a settlement agreement was ever articulated between Plaintiffs, Defendant Benjamin Mora, and Defendant John Wieland Homes.

Further, even if a conversation mentioning the alleged settlement agreement were made on the record, it still would not comply with SCRCP 43(k) because all parties needed for the agreement to be enforceable were not present. In order for the alleged settlement agreement to have been made enforceable on the record, all parties would have had to be present, indicate their intention to enter into the alleged settlement agreement, and meet one of the scenarios contemplated by SCRCP Rule 43(k). This would require Defendant Benjamin Mora and/or its counsel, Curtis B. Martin, Esquire, to be present as it was to be a party to this alleged settlement agreement. Accordingly, on January 17, 2017 and January 23, 2017, neither Defendant Benjamin Mora nor his counsel were present. In fact, Defendant Benjamin Mora did not make an appearance at any time throughout the proceedings even though his counsel received notice of the proceedings. As such, there is no way the alleged settlement agreement could have been binding and enforceable based upon SCRCP Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

Finally, Defendant John Wieland Homes' cites Byrd v. Livingston, as being analogous to the present situation. See Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012). In Byrd, the plaintiff entered into a contract with the defendant to purchase property after winning the bid at a live auction. Id. at 240, 727 S.E.2d at 621. Litigation ensued over the purchase property, and following pretrial discovery, the parties attended a mediation and signed an "Agreement in Principle" which stated that the agreement will be supplemented by a more formal and detailed written agreement. Id. However, the subsequent agreement was never signed. Id. The trial court found the agreement enforceable against the parties and ordered the parties to prepare and execute

a formal settlement document. Id. On appeal, the Court of Appeals affirmed the trial court's decision stating, "[w]e find no error with the court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement." Id. at 243, 727 S.E.2d at 624.

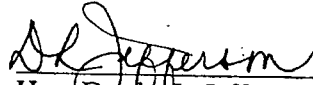
The present case is not analogous to Byrd v. Livingston, as Defendant John Wieland Homes suggests. In Byrd, there was a clear meeting of the minds that was formalized in a writing. In the present case, there is no written agreement in the record that complies with SCRCP Rule 43(k). The alleged written agreement at issue is a proposed settlement agreement releasing the claims against Defendant Benjamin Mora. Defendant John Wieland Homes' Attorney Theodore Manos presented this release for Plaintiff's Attorney I. Keith McCarty's review and signature. Even after Attorney McCarty received the proposed written settlement agreement, he refused to sign it because he did not believe it was meant for his client. At the hearing, Attorney McCarty indicated to the Court that although he had received the release, he thought the release concerned only Defendant John Wieland Homes and Defendant Benjamin Mora. This is made evident by Attorney McCarty's refusal to sign the release. As such, because there is no written agreement by counsel, there is no evidence in the record to indicate that there was a meeting of the minds between the parties. If anything, Attorney McCarty's confusion surrounding the proposed release agreement as well as his refusal to sign the release evidences a lack of a meeting of the minds and distinguishes the present case from that of Byrd v. Livingston. Accordingly, Defendant John Wieland Homes' motion fails on this ground.

Finally, it is of importance to note that on January 23, 2017, counsel for JMC Construction, Andrew Cole, Esq., indicated to the Court that his client, JMC Construction, had settled with the Plaintiffs. He indicated to the Court that this settlement agreement was memorialized in writing

and noted on the record, thus complying with SCRCP Rule 43(k). At that time, this Court stressed to all parties the importance of SCRCP Rule 43(k) and made clear that unless there was strict compliance, agreements would not be binding. This Court read the rule verbatim into the record to assure that the parties had fully complied with the requirements of SCRCP Rule 43(k) concerning the settlement.

Accordingly, it is hereby ordered, adjudged, and decreed, that Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment is denied as to the enhanced setoff of \$434,000.00.

IT IS SO ORDERED.


Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 1, 2017
Charleston, South Carolina
At Chambers

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation)
Townhome Association, Inc.)

Plaintiff,)

v.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc.)
As successor by statutory merger to)
John Wieland Homes and)
Neighborhoods of South Carolina,)
Inc., John Wieland Homes of)
Charleston, Inc., John Wieland)
Homes, Inc.,)

Defendants,)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-03326

**SUPPLEMENTAL ORDER DENYING
DEFENDANT JOHN WIELAND
HOMES' MOTION TO ENFORCE
ENHANCED SET-OFF**

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Stephen Denby, Individually and as Class)
Representative, Marie Labarowski,)
Stephanie Adili, Marc and Brandy)
Lynn Russell Robinson, Jessica,)
Baucom, Nancy S. Coleman, Linda)
Glitz, Maryann Walsh, Patty Whitmire,)
Donald L. Tomasella and Patricia)
Kelly, Chris Leigh-Jones, Edward)
Ray and Kathy Jo Feagins,)
William and Carolyn Barone,)
William Abel, Dean and Conny)
Mason, Paul and Patricia Waters,)
R. Robinson, Jr., Lisa Roeck,)
Elizabeth Jackson, Joe and)
Anita Brittain, Gilbert J. Hager and)
Kelly Hager Holmes,)
Jessica Shipman, Arlene Conte, Carol Ann)
Dumond, Lawrence Murray, Yvonne)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-10-04335

FILED
2017 MAR -3 AM 9:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

10/7
[Signature]

Walker, Darlene and Richard
Gleeson, Robert and Michell Bagrie,
Russell Johnston, Kathryn Howle,
Dorothy Newman, Nicholas and
Debora Yost, Helen and Bob Harmon
Estate of Rose Minton,
Stephen and Merifaith Perdue

Plaintiffs,

v.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc.
As successor by statutory merger to
John Wieland Homes and
Neighborhoods of South Carolina,
Inc., John Wieland Homes of
Charleston, Inc., John Wieland
Homes, Inc.,

Defendants,

Presiding Judge:
Counsel for Plaintiff:

Counsel for John Wieland Homes:

Counsel for JMC Construction:
Counsel for Sanchez Brothers Painting:
Counsel for The Muhler Company:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
John Hayes, IV, Esq.
I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.
Theodore Manos, Esq.
Andrew Haselden, Esq.
Andrew Cole, Esq.
Sarah Fragale, Esq.
Peter Gunnar Nistad, Esq.
January 17, 2016
Phyllis Norton

THIS MATTER came before the Court on Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment, filed February 3, 2017. A hearing was held on February 9, 2017. Present at the hearing were John Hayes, Esquire and I. Keith McCarty, Esquire, representing the Plaintiff, and Theodore Manos, Esquire and Andrew Haselden, Esquire, representing Defendant John Wieland Homes. Curtis Martin, Esquire representing Defendant Benjamin Mora was not present at the hearing.

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"Before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury; when the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012).

After hearing from all parties present, the parties stipulated, without objection, that the Defendants were entitled to a set-off in the amount of \$2,119,000.00¹ to the combined jury verdict of \$7,200,000.00². Therefore, Judgment was entered against the Defendants in the amount of \$5,081,000.00 for the Plaintiffs Waverly at Hamlin Plantation Townhome Association and no judgment for the Plaintiffs in the class action companion suit. Accordingly, a Form 4 was signed and entered for both cases on February 9, 2017 issuing the judgment with the agreed upon set-off. This Supplemental Order addresses the gravamen of Defendant John Wieland Homes' Motion. Defendant John Wieland Homes' contends that they are entitled to an enhanced set-off in the amount of \$434,000.00.³ They maintain this is the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC (hereinafter referred to as "Benjamin Mora").

A trial court has inherent jurisdiction to enforce settlement agreements entered before it, and the inherent power to refuse to enforce settlements. Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 419 S.E.2d 841 (Ct. App. 1992). With regards to agreements between parties, SCRPC Rule 43(k) states that:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed

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² This judgment reflects the total verdict from the combined cases. In the class action suit, the jury returned a verdict in favor of the Plaintiffs in the amount of \$200,000 actual damages. The jury reached a verdict of \$7,000,000.00 actual damages for Plaintiff Waverly at Hamlin Plantation Townhome Association. By consent of counsel, the set-off was applied as follows: \$200,000.00 towards the class action suit resulting in no judgment and \$1,919,000.00 applied towards the judgment for Plaintiff Waverly at Hamlin Plantation Townhome Association resulting in a judgment of \$5,081,000.00.

³ The alleged enhanced set-off of \$434,000.00 does not include the already approved settlement of \$70,000.00 between Plaintiffs and Defendant Benjamin Mora.

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[Signature]

by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

SCRCP 43. SCRCP Rule 43(k) allows for agreements between counsel to be binding under four scenarios. However, three of the scenarios require that the agreement be noted and entered on the record. As a fourth option, SCRCP Rule 43(k) allows an agreement to be binding if an agreement is "reduced to writing and signed by the parties and their counsel." The signature of the party to the agreement is a requirement under the plain language of SCRCP Rule 43(k). Further, South Carolina courts have consistently throughout the years ruled that in order for a settlement to be enforced an agreement must strictly adhere to SCRCP Rule 43(k).

Defendant John Wieland Homes' Motion for an Enhanced Set-Off in the amount of \$434,000.00 fails for several reasons. First, Defendant John Wieland Homes' request must be denied because no documentation of the alleged set-off complies with the requirements of SCRCP Rule 43(k). Defendant John Wieland Homes urges this Court to accept a chain of e-mail correspondence as evidence of the alleged negotiated settlement. However, e-mail correspondence as evidence of a negotiated settlement do not meet any of the four scenarios mandated by SCRCP Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

In the alternative, Defendant John Wieland Homes argues that the alleged Benjamin Mora settlement agreement concerning the enhanced set-off was memorialized, in open court on the record, and thus complies with SCRCP Rule 43(k). In further support of their argument, Defendant John Wieland Homes contends that on Tuesday, January 17, 2017, Plaintiffs' counsel and Defendant John Wieland Homes' counsel notified the Court, on the record, that Plaintiffs and Defendant John Wieland Homes had settled with Defendant Benjamin Mora. However, after reviewing the record from both January 17, 2017 and January 23, 2017, this Court cannot discern

Page 7
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from the record that a settlement agreement was ever articulated between Plaintiffs, Defendant Benjamin Mora, and Defendant John Wieland Homes.

Further, even if a conversation mentioning the alleged settlement agreement were made on the record, it still would not comply with SCRCP 43(k) because all parties needed for the agreement to be enforceable were not present. In order for the alleged settlement agreement to have been made enforceable on the record, all parties would have had to be present, indicate their intention to enter into the alleged settlement agreement, and meet one of the scenarios contemplated by SCRCP Rule 43(k). This would require Defendant Benjamin Mora and/or its counsel, Curtis B. Martin, Esquire, to be present as it was to be a party to this alleged settlement agreement. Accordingly, on January 17, 2017 and January 23, 2017, neither Defendant Benjamin Mora nor his counsel were present. In fact, Defendant Benjamin Mora did not make an appearance at any time throughout the proceedings even though his counsel received notice of the proceedings. As such, there is no way the alleged settlement agreement could have been binding and enforceable based upon SCRCP Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

Finally, Defendant John Wieland Homes' cites Byrd v. Livingston, as being analogous to the present situation. See Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012). In Byrd, the plaintiff entered into a contract with the defendant to purchase property after winning the bid at a live auction. Id. at 240, 727 S.E.2d at 621. Litigation ensued over the purchase property, and following pretrial discovery, the parties attended a mediation and signed an "Agreement in Principle" which stated that the agreement will be supplemented by a more formal and detailed written agreement. Id. However, the subsequent agreement was never signed. Id. The trial court found the agreement enforceable against the parties and ordered the parties to prepare and execute

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a formal settlement document. Id. On appeal, the Court of Appeals affirmed the trial court's decision stating, "[w]e find no error with the court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement." Id. at 243, 727 S.E.2d at 624.

The present case is not analogous to Byrd v. Livingston, as Defendant John Wieland Homes suggests. In Byrd, there was a clear meeting of the minds that was formalized in a writing. In the present case, there is no written agreement in the record that complies with SCRCP Rule 43(k). The alleged written agreement at issue is a proposed settlement agreement releasing the claims against Defendant Benjamin Mora. Defendant John Wieland Homes' Attorney Theodore Manos presented this release for Plaintiff's Attorney I. Keith McCarty's review and signature. Even after Attorney McCarty received the proposed written settlement agreement, he refused to sign it because he did not believe it was meant for his client. At the hearing, Attorney McCarty indicated to the Court that although he had received the release, he thought the release concerned only Defendant John Wieland Homes and Defendant Benjamin Mora. This is made evident by Attorney McCarty's refusal to sign the release. As such, because there is no written agreement by counsel, there is no evidence in the record to indicate that there was a meeting of the minds between the parties. If anything, Attorney McCarty's confusion surrounding the proposed release agreement as well as his refusal to sign the release evidences a lack of a meeting of the minds and distinguishes the present case from that of Byrd v. Livingston. Accordingly, Defendant John Wieland Homes' motion fails on this ground.

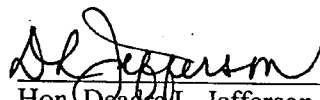
Finally, it is of importance to note that on January 23, 2017, counsel for JMC Construction, Andrew Cole, Esq., indicated to the Court that his client, JMC Construction, had settled with the Plaintiffs. He indicated to the Court that this settlement agreement was memorialized in writing

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and noted on the record, thus complying with SCRCP Rule 43(k). At that time, this Court stressed to all parties the importance of SCRCP Rule 43(k) and made clear that unless there was strict compliance, agreements would not be binding. This Court read the rule verbatim into the record to assure that the parties had fully complied with the requirements of SCRCP Rule 43(k) concerning the settlement.

Accordingly, it is hereby ordered, adjudged, and decreed, that Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment is denied as to the enhanced setoff of \$434,000.00.

IT IS SO ORDERED.


Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 1, 2017
Charleston, South Carolina
At Chambers

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Stephen Denby, et al.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

**ORDER DENYING DEFENDANT JOHN
WIELAND HOMES' MOTION FOR
RECONSIDERATION**

IN THE COURT OF COMMON PLEAS

C/A No.: 2014-CP-10-4335

JULIE J. ARMSTRONG
CLERK OF COURT

2017 MAR 17 AM 10:10

FILED

Presiding Judge:
Counsel for Plaintiff:

Counsel for John Wieland Homes:

Counsel for JMC Construction:
Counsel for Sanchez Brothers Painting:
Counsel for The Muhler Company:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
John Hayes, IV, Esq.
I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.
Theodore Manos, Esq.
Andrew Haselden, Esq.
Andrew Cole, Esq.
Sarah Fragale, Esq.
Peter Gunnar Nistad, Esq.
February 9, 2016
Phyllis Norton

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SPX

THIS MATTER came before the Court on Defendant John Wieland Homes' Motion for Reconsideration, filed March 10, 2017, and received by this Court on the same date. Defendant moves for this Court to reconsider an Order Denying Defendant John Wieland Homes' Motion for Enhanced Set-Off signed March 1, 2017 and subsequently filed March 3, 2017. Counsel for Plaintiff Waverly at Hamlin Plantation was given the opportunity to respond and instead relied on their previous written submissions and oral arguments from the hearing in opposing the motion. Having considered Defendant's Motion, as well as the various interests balanced by the Court at the time of the ruling, Defendant's Motion for Reconsideration is hereby denied.

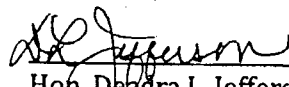
Rule 59(e) of the South Carolina Rules of Civil Procedure states that "(a) motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of entry of the order." Rule 59(e), SCRPC. The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to allow the parties liberal opportunity to move for the trial judge to reconsider matters properly encompassed in a decision on the merits, regardless of whether the issues and arguments have been previously presented. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400

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[Signature]

(Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)). See Arnold v. State, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992).

Defendant presented no novel facts, arguments, or theories in support of their Motion for Reconsideration. Moreover, Defendant has not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, Defendant's Motion to Reconsider is hereby DENIED.¹

IT IS SO ORDERED.


Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 5, 2017
Charleston, South Carolina
At Chambers

¹ This Motion is disposed of without the necessity of a hearing and decided on the record, written motion, and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Stephen Denby, et al.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

**ORDER DENYING DEFENDANT JOHN
WIELAND HOMES' MOTION FOR
RECONSIDERATION**

IN THE COURT OF COMMON PLEAS

C/A No.: 2014-CP-10-4335

FILED
2017 MAR 17 AM 10:10
JULIE J. ARMSTRONG
CLERK OF COURT

Presiding Judge:
Counsel for Plaintiff:

Counsel for John Wieland Homes:

Counsel for JMC Construction:
Counsel for Sanchez Brothers Painting:
Counsel for The Muhler Company:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
John Hayes, IV, Esq.
I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.
Theodore Manos, Esq.
Andrew Haselden, Esq.
Andrew Cole, Esq.
Sarah Fragale, Esq.
Peter Gunnar Nistad, Esq.
February 9, 2016
Phyllis Norton

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[Signature]

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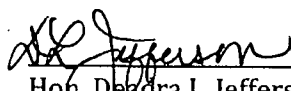
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[Signature]

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Defendant presented no novel facts, arguments, or theories in support of their Motion for Reconsideration. Moreover, Defendant has not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, Defendant's Motion to Reconsider is hereby DENIED.¹

IT IS SO ORDERED.


Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 5, 2017
Charleston, South Carolina
At Chambers

¹ This Motion is disposed of without the necessity of a hearing and decided on the record, written motion, and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).



FORM 4**STATE OF SOUTH CAROLINA****JUDGMENT IN A CIVIL
CASE**COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

CASE NO. 2013-CP-10-03326

Waverly at Hamlin Plantation Townhome
Association, Inc.,

v.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc., et
al,

PLAINTIFF

DEFENDANT

CHECK ONE:☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues
have been tried and a verdict rendered.☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court.
The issues have been tried or heard and a decision rendered.☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a),
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify
arbitration award; ☐ Other☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE
BOX):**☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ OtherNOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT,
TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING
IN THIS APPEAL.**IT IS ORDERED AND ADJUDGED:**☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

This case was before the Court on January 17, 2017 for a hearing on Defendant Juan Luis Sanchez and Juan Luis Sanchez A/K/A Sanchez Brothers Painting's Notice of Motion and Motion to Bifurcate Wieland's Cross-Claims, filed January 17, 2017. SCRCP Rule 42 governs the consolidation and separation of trials and states;

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

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2017 JAN 26 AM 9:04
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COURT OF COMMON PLEAS

SCRCP 42. Further, "[a] motion seeking bifurcation of the issues of liability and damages . . . is addressed to the sound discretion of the trial court pursuant to Rule 42(b), SCRCP." Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000). "Trial judges have discretion as to whether to bifurcate a trial. . . . A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." Wright v. Hiester Constr. Co., Inc., 389 S.C. 504, 516, 698 S.E.2d 822, 828 (Ct. App. 2010). See also, The Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc., 418 S.C. 142, 153, 791 S.E.2d 152, 158 (Ct. App. 2016), reh'g denied (Oct. 21, 2016). The Court, finding bifurcation will neither prejudice the parties and finding that bifurcation of the John Wieland Cross-Claims will promote convenience and be conducive to expedition and economy grants Defendant's Motion for Bifurcation of the John Wieland Cross-Claims.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

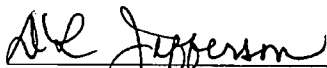
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Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$

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

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Circuit Court Judge

2128
Judge Code

1/24/17
Date

For Clerk of Court Office Use Only

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

John C. Hayes, Esq., I. Keith McCarty, Esq.

Mary Margaret Noland, Esq.

PLAINTIFF

Sarah L. Fragale, Esq.

ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter: Phyllis Norton

FILED
FORM 4

STATE OF SOUTH CAROLINA JAN 26 AM 9:06 JUDGMENT IN A CIVIL
COUNTY OF CHARLESTON JULIE J. ARMSTRONG CLERK OF COURT CASE

IN THE COURT OF COMMON PLEAS CASE NO. 2014-CP-10-04335

Jeffrey Sills, et al,

v.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc., et
al,

PLAINTIFF

DEFENDANT

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

BOX:

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

This case was before the Court on January 17, 2017 for a hearing on Defendant Juan Luis Sanchez and Juan Luis Sanchez A/K/A Sanchez Brothers Painting's Notice of Motion and Motion to Bifurcate Wieland's Cross-Claims, filed January 17, 2017. SCRPC Rule 42 governs the consolidation and separation of trials and states;

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SCRCP 42. Further, "[a] motion seeking bifurcation of the issues of liability and damages . . . is addressed to the sound discretion of the trial court pursuant to Rule 42(b), SCRCP." Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000). "Trial judges have discretion as to whether to bifurcate a trial. . . . A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." Wright v. Hiester Constr. Co., Inc., 389 S.C. 504, 516, 698 S.E.2d 822, 828 (Ct. App. 2010). See also, The Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc., 418 S.C. 142, 153, 791 S.E.2d 152, 158 (Ct. App. 2016), reh'g denied (Oct. 21, 2016). The Court, finding bifurcation will neither prejudice the parties and finding that bifurcation of the John Wieland Cross-Claims will promote convenience and be conducive to expedition and economy grants Defendant's Motion for Bifurcation of the John Wieland Cross-Claims.

ORDER INFORMATION

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Additional Information for the Clerk :

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Alk Jaffer
Circuit Court Judge

2128
Judge Code

1/24/17
Date

For Clerk of Court Office Use Only

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Mary Margaret Noland, Esq.

PLAINTIFF

Sarah L. Fragale, Esq.

ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter: Phyllis Norton

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Waverly at Hamlin Plantation Townhome
Association, Inc.,

v.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc., et
al,

PLAINTIFF

DEFENDANT

FORM 4

FILED
JUL 26 PM 3:06
JUL 26 2017
CLERK OF COURT
BY J. ARMSTRONG

CASE NO. 2013-CP-10-03326

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
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BOX:

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

This case was before the Court on January 17, 2017 for a hearing on Defendant George Medina A/K/A JMC Construction, LLC A/K/A JMC Construction, Inc.'s Supplemental Motion for Summary Judgment as to the Cross-Claims Asserted by the John Wieland Homes Entities or in the Alternative For a Motion to Bifurcate the Equitable Indemnity Cross-Claims Asserted by the John Wieland Homes Entities, filed January 17, 2017. "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law." Evening Post Pub. Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 81, 708 S.E.2d 745, 748 (2011); Rule 56(c), SCRPC. "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986)). In considering a motion for summary judgment, "the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." Id. "Summary judgment is not appropriate where

further inquiry into the facts of the case is desirable to clarify the application of the law. . . . Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." USAA Property & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). Based on arguments of the parties presented at the hearing and the memoranda submitted, this Court finds that a question of fact exists. Therefore, Defendant's Motion for Summary Judgment is heard and respectfully denied.

As to Defendant's alternative request to bifurcate the equitable indemnity Cross-Claim asserted by the John Wieland Home entities, the Motion is heard and granted with further instruction that the John Wieland Cross-Claim is to be bifurcated in its entirety. SCRPC Rule 42 governs the consolidation and separation of trials and states;

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The Court, finding bifurcation will neither prejudice the parties and finding that bifurcation of the John Wieland Cross-Claims will promote convenience and be conducive to expedition and economy grants Defendant's Motion in the Alternative for Bifurcation of the John Wieland Equitable Cross-Claims with further instruction that the entire claim will be bifurcated. In its Motion, Defendant JMC seeks to bifurcate only the equitable indemnity claim. However, "when issues common to both legal and equitable claims are to be tried in a single proceeding, legal issues are to be determined first, and the findings of the jury are binding on the sitting judge, as trier of the equitable claims." Johnson v. S.C. Nat. Bank, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987). The Court having found that the bifurcation of only the equitable claim would be contrary to precedent, orders that the Cross-Claim asserted by John Wieland be bifurcated in its entirety. Accordingly, Defendants Motion as to Bifurcation is granted with further instruction that the John Wieland Cross-Claims are to be bifurcated in its entirety.

ORDER INFORMATION

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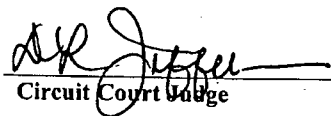
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Circuit Court Judge

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Judge Code

1/25/17
Date

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PLAINTIFF

Andrew N. Cole, Esq.

ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter: Phyllis Norton

FORM 4**STATE OF SOUTH CAROLINA****JUDGMENT IN A CIVIL
CASE**COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

CASE NO. 2014-CP-10-04335

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v.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc., et
al,

PLAINTIFF

DEFENDANT

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PLAINTIFF

Andrew N. Cole, Esq.

ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter: Phyllis Norton

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Stephen Denby, et al.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc., et al.,

Defendants.

Presiding Judge:
Counsel for Plaintiff:

Counsel for John Wieland Homes:

Date of Hearing:
Court Reporter:

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

**ORDER GRANTING DIRECTED
VERDICT AS TO CERTAIN
CAUSES OF ACTION**

IN THE COURT OF COMMON PLEAS

C/A No.: 2014-CP-10-4335

FILED
JULIE J. ARMSTRONG
CLERK OF COURT

2017 MAR 24 PM 1:12

Hon. Deadra L. Jefferson
John Hayes, IV, Esq.
I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.
Theodore Manos, Esq.
Andrew Haselden, Esq.
Justin Novak, Esq.
January 26, 2016
Phyllis Norton

1/2/18
[Signature]

THIS MATTER came before the Court for a consolidated trial by jury on January 23-30, 2017. Present at the trial were John Hayes, Esquire, Mary Margaret Noland, Esquire and I. Keith McCarty, Esquire, representing the Plaintiffs, and Theodore Manos, Esquire, Justin Novak, Esquire and Andrew Haselden, Esquire, representing Defendant John Wieland Homes. At the close of Plaintiffs' case on January 25, 2017, this matter came before the Court, pursuant to Rule 50 of the South Carolina Rules of Civil Procedure, on a Motion for Directed Verdict by the Defendant John Wieland Homes as to various causes of action asserted by Plaintiffs. Viewing the evidence and all reasonable inferences in the light most favorable to the Plaintiffs, the Defendant John Wieland Homes' Motion for Directed Verdict is hereby granted in part and denied in part.¹

INTRODUCTION

In their amended pleadings, Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc. asserted six (6) causes of action against Defendant John Wieland Homes.² The class action suit involving Stephen Denby as class representative asserted fourteen (14) causes of action against Defendant John Wieland Homes.³ However, during the trial and prior to

¹ At the time of the motion the Court ruled contemporaneously indicating that a formal Order would be submitted by the Court.

² Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc. pled the following causes of action against Defendants John Wieland Homes in their Amended Summons and Complaint, filed December 19, 2014: (1) Unfair Trade Practices; (2) Breach of Implied Warranty of Fitness of Habitability; (3) Breach of Implied Warranty of Fitness for Particular Purpose; (4) Negligence; (5) Breach of Contract; and (6) Breach of Fiduciary Duty.

³ The class action suit, involving Stephen Denby as class representative pled the following causes of action against Defendant John Wieland Homes in their Amended Summons and Complaint, filed March 4, 2015: (1) Negligence, Professional Negligence, and Gross Negligence; (2) Negligent Misrepresentation; (3) Breach of Implied Warranty; (4) Breach of Implied Warranty of Fitness of Habitability; (5) Breach of Implied Warranty of Fitness for a Particular Purpose; (6) Breach of Implied Warranties as to the Project's Development and Construction; (7) Individual Liability as to the Developer Defendants; (8) Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.*; (9) Breach of Fiduciary Duty by Initial Board Members of the Waverly at Hamlin Plantation Townhome Association, Inc.; (10) Breach of Fiduciary Duty; (11) Breach of Contract; (12) Violation of the Residential Property Condition Disclosure Act; (13) Strict Liability; and (14) Alter Ego Liability and Piercing the Corporate Veil.

2/2/18
JH

Defendant John Wieland Homes' Motion for Directed Verdicts, Plaintiffs stated, on the record, that they were only proceeding on the following causes of action:

- Denby:
- (1) Negligence;
 - (2) Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing;
 - (3) Breach of Warranty;
 - (4) Violation of the South Carolina Unfair Trade Practices Act;
 - (5) Breach of Fiduciary Duty; and
 - (6) Negligent Misrepresentation.

- Waverly:
- (1) Negligence;
 - (2) Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing;
 - (3) Breach of Warranty;
 - (4) Violation of the South Carolina Unfair Trade Practices Act;
 - (5) Breach of Fiduciary Duty; and
 - (6) Negligent Misrepresentation.

STANDARD OF REVIEW

Pursuant to Rule 50(a) of the South Carolina Rules of Civil Procedure, a trial court may, upon a motion by a party at the close of evidence offered by the party's opponent, direct a verdict if the case presents only questions of law. When considering a party's Rule 50, SCRCP, motion for directed verdict, the trial court must view the evidence and any reasonable inferences therefrom in the light most favorable to the nonmoving party. *Eadie v. Krause*, 381 S.C. 55, 57, 671 S.E.2d 389, 390 (Ct. App. 2010); *Law v. S.C. Dep't of Corrs.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Cutchin v. South Carolina Dept. of Highways & Public Transportation*, 301 S.C. 35, 389 S.E.2d 646 (1990). The court cannot ignore facts unfavorable to the nonmoving party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts. *Hopson v. Clary*, 321 S.C. 312, 468 S.E.3d 305 (Ct. App. 1996); *Haulbrooks v. Overton*, 295 S.C. 380, 368 S.E.2d 676 (Ct. App. 1988). A jury issue is not created where the evidence taken as a whole is susceptible to only one reasonable inference.

Hopson, 321 S.C. at 314, 468 S.E.2d at 307; *Whelan v. Welch*, 304 S.C. 548, 405 S.E.2d 836 (Ct. App. 1991). "It is not the province of the court to weigh the testimony, but simply to determine if there is any relevant, competent testimony reasonably tending to establish the material elements of plaintiff's cause of action." *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). "If more than one reasonable inference can be drawn . . . the case should be submitted to the jury." *Id.*

LEGAL ANALYSIS

I. Defendant John Wieland Homes' Motion for Directed Verdict in the class action suit involving Stephen Denby as class representative is granted in part and denied in part.

After considering the arguments of counsel and the evidence presented, the Court grants Defendant's Motion for Directed Verdict in the class action suit involving Stephen Denby as class representative as to the following causes of action: (1) Breach of Implied Warranties of Habitability, Workmanlike Service, Fitness for a Particular Purpose, and Good Faith and Fair Dealing; (2) Violation of the South Carolina Unfair Trade Practices Act; (3) Breach of Fiduciary Duty; and (4) Negligent Misrepresentation. Further, the Court denies Defendant's Motion for Directed Verdict as to the following causes of action: (1) Negligence; and (2) Breach of Warranty.

A. Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing

Although not originally pled in Plaintiff's Complaint,⁴ Plaintiff's claims against Defendant John Wieland Homes concerning Breach of Implied Warranties were pled during the

⁴ Plaintiff's Amended Summons and Complaint, filed March 4, 2015, raises the following causes of action concerning Implied Warranties: Breach of Implied Warranty; Breach of Implied Warranty of Fitness of Habitability; Breach of Implied Warranty of Fitness for Particular Purpose; and Breach of Implied Warranties as to the Project's Development and Construction. However, during the trial, Counsel stipulated that the underlying causes of action actually pled by the Plaintiffs were better characterized as follows: Breach of

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proceedings as follows: Breach of Implied Warranty of Habitability, Workmanlike Service, Fitness for a Particular Purpose, and Good Faith and Fair Dealing.

The Implied Warranty of Workmanlike Service states that "[a] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008). This warranty is separate and distinct from the warranty of habitability. "In a sale of a new house by a builder who is also the seller, there is both an implied warranty that the house was built in a reasonably workmanlike manner and an implied warranty that the house is reasonably suitable for habitation." 17 S.C. Jur. Construction Law § 54 (citing, *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S. C. 335, 384 S. E. 2d 730 (1989)). "To establish a claim for breach of an implied warranty of workmanlike services, a plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner." *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Cl. App. 2012). "An implied warranty of workmanlike service extends not only to the original purchasers of the home, with whom the builder is in privity, but to subsequent purchasers who may pursue a cause of action in contract or tort against a builder *for a reasonable period after the home's construction.*" *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80 (S.C. 2008)(emphasis added).

In contrast, the Implied Warranty of Habitability is synonymous with the Implied Warranty of Fitness for its Intended Use, and concerns the sale of new homes. A builder/vendor of a new house gives his purchaser an implied warranty that the house is fit for its intended use. *See, Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976). *Kennedy v. Columbia*

Implied Warranty of Habitability, Breach of Implied Warranty of Fitness for Particular Purpose, and Breach of Implied Warranty of Workmanlike Service and Good Faith and Fair Dealing.



Lumber and Manufacturing Company, Inc. makes clear that Implied Warranty of Habitability springs from the sale of a new home. 299 S.C. 335, 384 S.E.2d 730 (1989) ("the warranty of habitability arises or springs from the sale of the home").

The causes of action concerning the Implied Warranties are inapplicable to the class action Plaintiffs. The Implied Warranty of Habitability pled by Plaintiffs concerns the construction of new homes. Additionally, this type of warranty focuses on the transaction of the new homes sold to the homeowners. In the present case, Plaintiffs provided no evidence that the homes were purchased from the builder/vendor nor did Plaintiffs provide evidence that the homes were built recently. In fact, the construction of the homes commenced over ten (10) years ago. As such, Plaintiffs' claim for Breach of Implied Warranty of Habitability fails.

Similarly, Plaintiff's cause of action for Breach of Workmanlike Service also fails. This cause of action allows subsequent purchasers to bring suit against a builder even in the absence of contractual privity. However, this cause of action must be brought within a reasonable period after the construction of the new home. The construction of the class action Plaintiffs' homes occurred over ten (10) years ago. As such, the Implied Warranty of Workmanlike Service is untimely as it was not brought within a reasonable time period. Further the record is void of any testimony regarding any sales transactions of the residences.

Finally, there exists no Implied Warranty of Good Faith and Fair Dealing. In every contract, there exists an implied covenant of good faith and fair dealing. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 672 S.E.2d 816 (Ct. App. 2009). However, this cause of action is not separate and distinct from a claim for breach of contract as it must be treated as merely another term of the contract at issue. *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). Accordingly, as Plaintiffs did not bring a cause of

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action for Breach of Contract, Defendant John Wieland Homes' Motion for Directed Verdict is granted as to the Implied Warranty of Good Faith and Fair Dealing.

Finally, the record is devoid of any evidence supporting the Plaintiffs' claims concerning Breach of Implied Warranties as the Plaintiffs failed to produce any evidence to support this cause of action. The evidence and testimony provided by Plaintiffs in their case in chief is pled as a Negligence cause of action rather than an Implied Warranties cause of action. Accordingly, Defendant John Wieland Homes Motion for Directed Verdict as to the class action Plaintiffs' cause of action for Breach of Implied Warranties is granted while their Motion for Directed Verdict as to the Negligence cause of action is denied.

B. Violation of the South Carolina Unfair Trade Practices Act

The Plaintiffs' cause of action for Violation of the South Carolina Unfair Trade Practices Act also fails. Section 39-5-20 of the South Carolina Code of Laws outlines the South Carolina Unfair Trade Practices Act and states that "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." To prevail in a SCUPTA claim,

[p]laintiffs must allege and prove that the defendant's actions adversely affected the public interest. . . An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 595 S.E.2d 461 (2004). "Plaintiffs . . . generally have shown potential for repetition in two ways: (1) by showing the same kind of actions

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occurred in the past, thus making it likely they will continue to occur absent deterrence . . . or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 43-44, 664 S.E.2d 83, 89 (Ct. App. 2008) (quoting, *Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996)).

In the present case, Plaintiffs provided no testimony or evidence to prove that Defendant John Wieland Homes' actions affected the public interest. There was neither evidence presented showing the same kind of actions occurring in the past nor was there evidence presented that Defendant John Wieland Homes' company procedures created a potential for repetition of the unfair and deceptive acts.

Furthermore, pursuant to the SCUPTA statute, a class may not maintain an action under the statute. *See, Dema v. Tenet Physician Servs-Hilton Head, Inc.*, 383 S.C. 115, 122, 678 S.E.2d 430, 434 (2009) ("SCUPTA claims may not be maintained in a class action law suit"). Accordingly, the class action suit involving Stephen Denby as class representative's cause of action of a Violation of the South Carolina Unfair Trade Practices Act, must be denied on these grounds as well.

For these reasons stated herein, the Court grants Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs cause of action of Violation of the South Carolina Unfair Trade Practices Act.

C. Breach of Fiduciary Duty

Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs' cause of action concerning breach of fiduciary duty is granted. "A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and

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fidelity of another. . . . A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Cl. App. 2004). "Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003). With regards to builders' duties, "[a] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008).

Accordingly, there is evidence in the record to support the finding that Defendant John Wieland Homes owed Plaintiffs a duty to perform the building of the townhomes in a careful, diligent, workmanlike manner. However, there is insufficient evidence to conclude that this duty rose to the level of a fiduciary duty. Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs' cause of action of breach of Fiduciary Duty is granted.

D. Negligent Misrepresentation

Defendant John Wieland Homes' Motion for Directed Verdict as to the class action Plaintiffs' cause of action for Negligent Misrepresentation is granted. "To state a claim for negligent misrepresentation, the plaintiff must allege (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff

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justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation." *Hurst v. Sandy*, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997).

In the present case, the Plaintiffs presented insufficient evidence to support a finding that Defendant John Wieland Homes negligently misrepresented the building of the townhomes. There is no evidence set forth in the record to support a finding that Defendant John Wieland Homes made representations to the class action Plaintiffs. Further, even if there were representations made by Defendant John Wieland Homes, there is no evidence in the record to support a finding that the class action Plaintiffs relied on these representations in purchasing their townhomes. Accordingly, because the class action Plaintiffs failed to provide sufficient evidence to justify a cause of action of negligent representation against Defendant John Wieland Homes, Defendant's Motion for Directed Verdict is granted.

E. Negligence and Breach of Warranty

As to the remaining causes of actions, Negligence and Breach of Warranty, this Court finds that there exists sufficient evidence in the record to deny Defendant John Wieland Homes' Motion for Directed Verdict. Plaintiffs produced evidence sufficient to create a factual question for the jury as to Defendant John Wieland Homes' liability concerning the cause of action of Negligence and Breach of Warranty. As such, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiffs' causes of action of Negligence and Breach of Warranty are denied.

Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to the class action suit brought by Plaintiff Stephen Denby, as class representative, is hereby GRANTED in part and DENIED in part.

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II. Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly Townhome Association, Inc. is granted in part and denied in part.

After considering the arguments of counsel and the evidence presented, the Court grants Defendant's Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc.'s for the following causes of action: 1) Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing; (2) Violation of the South Carolina Unfair Trade Practices Act; (3) Breach of Warranty; and (4) Negligent Misrepresentation. However, the Court finds that directed verdicts would not be appropriate for the remaining causes of action of both Breach of Fiduciary Duty and Negligence.

A. Breach of Implied Warranties of Habitability, Workmanlike Service, and Good Faith and Fair Dealing

Although not originally pled in Plaintiff Waverly at Hamlin Plantation's Complaint,⁵ Plaintiff's claims against Defendant John Wieland Homes' concerning Breach of Implied Warranties were pled during the proceedings as follows: Breach of Implied Warranty of Habitability, Workmanlike Service, Fitness for a Particular Purpose, and Good Faith and Fair Dealing.

The Implied Warranty of Workmanlike Service states that "[a] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner." *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008). This warranty is separate and distinct from the warranty of habitability. "In a sale of a new house by a builder who is also the seller, there is both an implied warranty that the house

⁵ The Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc.'s Amended Summons and Complaint, filed December 19, 2014, raises the following causes of action concerning implied warranties: Breach of Implied Warranty of Fitness of Habitability and Breach of Implied Warranty of Fitness for Particular Purpose. However, during the trial, Counsel stipulated that the underlying causes of action actually pled by the Waverly Plaintiffs were better characterized as follows: Breach of Implied Warranty of Habitability, Breach of Implied Warranty of Fitness for Particular Purpose, and Breach of Implied Warranty of Workmanlike Service and Good Faith and Fair Dealing.

was built in a reasonably workmanlike manner and an implied warranty that the house is reasonably suitable for habitation." 17 S.C. Jur. Construction Law § 54 (citing, *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S. C. 335, 384 S. E. 2d 730 (1989). "To establish a claim for breach of an implied warranty of workmanlike services, a plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner." *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). "An implied warranty of workmanlike service extends not only to the original purchasers of the home, with whom the builder is in privity, but to subsequent purchasers who may pursue a cause of action in contract or tort against a builder *for a reasonable period after the home's construction.*" *Fields v. J. Haynes Waters Builders, Inc.*, 658 S.E.2d 80 (S.C. 2008)(emphasis added).

In contrast, the Implied Warranty of Habitability is synonymous with the Implied Warranty of Fitness for its Intended Use, and concerns the sale of new homes. A builder/vendor of a new house gives his purchaser an implied warranty that the house is fit for its intended use. See, *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976). *Kennedy v. Columbia Lumber and Manufacturing Company, Inc.* makes clear that Implied Warranty of Habitability springs from the sale of a new home. 299 S.C. 335, 384 S.E.2d 730 (1989) ("the warranty of habitability arises or springs from the sale of the home").

The causes of action concerning the Implied Warranties are inapplicable to the class action Plaintiffs. The Implied Warranty of Habitability pled by Plaintiffs concerns the construction of new homes. Additionally, this type of warranty focuses on the transaction of the new homes being sold to the homeowners. In the present case, Plaintiffs provided no evidence that the homes were purchased from the builder/vendor nor did Plaintiffs provide evidence that

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the homes were built recently. In fact, the construction of the homes commenced over ten (10) years ago. As such, Plaintiffs' claim for Breach of Implied Warranty of Habitability fails.

Similarly, Plaintiff's cause of action for Breach of Workmanlike Service also fails. This cause of action allows subsequent purchasers to bring suit against a builder even in the absence of contractual privity. However, this cause of action must be brought within a reasonable period after the construction of the new home. The construction of the class action Plaintiffs' homes occurred over ten (10) years ago. As such, the Implied Warranty of Workmanlike Service is untimely as it was not brought within a reasonable time period.

Finally, there exists no Implied Warranty of Good Faith and Fair Dealing. In every contract, there exists an implied covenant of good faith and fair dealing. *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 672 S.E.2d 816 (Ct. App. 2009). However, this cause of action is not separate and distinct from a claim for breach of contract as it must be treated as merely another term of the contract at issue. *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). Accordingly, as Plaintiffs did not bring a cause of action for Breach of Contract, Defendant John Wieland Homes' Motion for Directed Verdict is granted as to the Implied Warranty of Good Faith and Fair Dealing.

Finally, the record is devoid of any evidence to support the Plaintiff's claims concerning Breach of Implied Warranties as the Plaintiff failed to produce any evidence to support this cause of action. The evidence and testimony provided by Plaintiffs in their case in chief is pled as a Negligence cause of action rather than an Implied Warranties cause of action. Accordingly, Defendant John Wieland Homes Motion for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation's cause of action for Breach of Implied Warranties is granted while their Motion for Directed Verdict as to the Negligence cause of action is denied.

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B. Violation of the South Carolina Unfair Trade Practices Act

Plaintiff Waverly at Hamlin Plantation's cause of action for Violation of the South Carolina Unfair Trade Practices Act also fails. Section 39-5-20 of the South Carolina Code of Laws outlines the South Carolina Unfair Trade Practices Act and states that "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." To prevail in a SCUPTA claim,

[p]laintiffs must allege and prove that the defendant's actions adversely affected the public interest. . . An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 595 S.E.2d 461 (2004). "Plaintiffs . . . generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence . . . or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 43-44, 664 S.E.2d 83, 89 (Ct. App. 2008) (quoting, *Daisy Outdoor Adver. Co., Inc. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996)).

In the present case, Plaintiff provided no testimony or evidence to prove that Defendant John Wieland Homes' actions affected the public interest. There was neither evidence presented showing the same kind of actions occurring in the past nor was there evidence presented that Defendant John Wieland Homes' company procedures created a potential for repetition of the

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unfair and deceptive acts. Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation's cause of action for Violation of the South Carolina Unfair Trade Practices Act is granted.

C. Breach of Warranty

Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation's cause of action for Breach of Warranty is granted. "A warranty is created when the seller makes an affirmation with respect to the thing to be sold with the intention that the buyer shall rely on it in making the purchase." *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 284 (Ct. App. 1993); *See also, Roland v. Heritage Litchfield, Inc.*, 372 S.C. 161, 641 S.E.2d 465 (Ct. App. 2007). "An action for breach of warranty requires the existence of an express or implied warranty as described in sections 36-2-313 and 36-2-314, respectively." *Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002). With regards to an express warranty, S.C. Code § 36-2-313 states;

- (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise, including those on containers or labels, made by the seller to the buyer, whether directly or indirectly, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

S.C. Code § 36-3-213.

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Accordingly, Plaintiff Waverly at Hamlin Plantation produced insufficient evidence to conclude that a warranty was made on behalf of Defendant John Wieland Homes to the Plaintiffs. Unlike the class action suit, the Waverly Townhome Association did not purchase the townhomes at issue in this lawsuit. Further, the Plaintiff Waverly at Hamlin Plantation provided no evidence by way of deed or otherwise that indicated that they held ownership in the common areas. The only evidence indicating a warranty was made by Stephen Denby, as class representative of the class action lawsuit. The Plaintiff Waverly at Hamlin Plantation offered no evidence to prove that an express warranty had been extended to the HOA as well as the individual homeowners. Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation's cause of action of Breach of Warranty is granted.

D. Negligent Misrepresentation

Finally, the Court grants Defendant John Wieland Homes' Motion for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation's cause of action for negligent misrepresentation. "To state a claim for negligent misrepresentation, the plaintiff must allege (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation." *Hurst v. Sandy*, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997).

In the present case, Plaintiff presented insufficient evidence to support a finding that Defendant John Wieland Homes negligently misrepresented the building of the townhomes.

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There is no evidence set forth in the record to support a finding that Defendant John Wieland Homes made false representations to the Plaintiff Waverly at Hamlin Plantation. Further, even if there were representations made by Defendant John Wieland Homes, there is no evidence in the record to support a finding that the Plaintiffs relied on these representations. Accordingly, because the Plaintiff failed to provide sufficient evidence to justify a cause of action of negligent representation against Defendant John Wieland Homes, Defendant's Motion for Directed Verdict is granted.

E. Negligence and Breach of Fiduciary Duty

As to the remaining causes of actions, Negligence and Breach of Fiduciary Duty, this Court finds that there exists sufficient evidence in the record to deny Defendant John Wieland Homes' Motion for Directed Verdict. Plaintiffs produced evidence sufficient to create a factual question for the jury as to Defendant John Wieland Homes' liability concerning the cause of action of Negligence and Breach of Fiduciary Duty. As such, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiffs' causes of action of Negligence and Breach of Fiduciary Duty are denied.

Accordingly, Defendant John Wieland Homes' Motion for Directed Verdict as to Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc., is hereby GRANTED in part and DENIED in part.

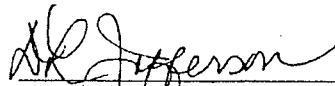
CONCLUSION

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT Defendants' Motions for Direct Verdict as to the class action suit is hereby granted with respect to all causes of action except Negligence and Breach of Warranty; and

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IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendants' Motions for Directed Verdict as to the Plaintiff Waverly at Hamlin Plantation is hereby granted with respect to all causes of action except Negligence and Breach of Fiduciary Duty.

AND IT IS SO ORDERED.



Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 24, 2017
Charleston, SC

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO. 2013-CP-10-03326

Waverly at Hamlin Plantation
Townhome Association, Inc.,

Plaintiff,

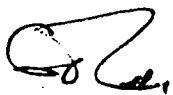
vs.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc.
as successor by statutory merger to
John Wieland Homes and
Neighborhoods of South Carolina,
Inc., John Wieland Homes of
Charleston, Inc., John Wieland
Homes, Inc., Builders Support
Services of the Carolinas, Inc. and
Wheelock Street Capital, LLC d/b/a
John Wieland Homes and
Neighborhoods, Inc., Barr
Construction, Inc.; Benjamin Mora
d/b/a Mora Construction, a/k/a
Benjamin Mora Construction, LLC;
Builders FirstSource, Inc. a/k/a
Builders FirstSource-Southeast Group,
LLC, a/k/a Builders FirstSource-
Atlantic Group, LLC; DBC
Construction Services, LLC; ELI, Inc.;
Gerardo Rosette Sanchez d/b/a GF
Painting; George Medina, George
Medina a/k/a JMC Construction, LLC
a/k/a JMC Construction, Inc.; Jesus
Mora a/k/a J. Mora Brick and Block
Mason, LLC; Juan Luis Sanchez; Juan
Luis Sanchez a/k/a Sanchez Brothers
Painting; Latitude Construction
Services, LLC; The Mulher Company,
Inc., Inc.; Paul M. Vasquez; Richard
Ditullio; Richard Ditullio a/k/a RDT
Contracting, LLC.,

Defendants.

FILED
2016 SEP 26 PM 4:16
JULIE J. ANDERSON
CLERK OF COURT

**BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC
ORDER ENFORCING
SETTLEMENT AGREEMENT**



Builders FirstSource-Southeast Group,
LLC,

Third Party Plaintiff,

vs.

AC Construction, Inc.,

Third Party Defendant.

Jeffrey Sills, Individually and as Class
Representative, Marie Labarowski,
Edward and Nancy Peyser, Francis
Sills, Daniel and Suzanne Ruth,
Stephani Adili, Marc and Brandy Lynn,
Russell Robinson, George Busnach,
Helen Furtado, Jessica Baucom,
Nancy S. Coleman, Linda Glitz, Peggy
Gerou, Shannon Bebout, Maryann
Walsh, Patty Whitmire, Donald L.
Tomasello and Patricia Kelly, Chris
Leigh-Jones, Edward Ray and Kathy
Jo Feagins, Cindy Hunt for Bentgrass
Limited, LLC, Adam A. and Susan S.
Sokoloski, William and Carolyn
Barone, Michelle Ray, Eugene and
Cynthia Ray, William Abel, Dean and
Conny Mason, David McCartney, Paul
and Patricia Waters, James and
Andrea Lowry, R. Robinson, Jr.,
Thaddeus R. and Barbara A.
Kuczynski, Beverly Sanders Carlson,
Lisa Roeck, Elizabeth Jackson,
Charles and Mary Kathleen Jenkins,
Linda M. and Earl K. Rigler, Jr., John
Twomey, Joe and Anita Brittain,
Gilbert J. Hager and Kelly Hager
Holmes, Carol and Chris Gillespie,
Jared D. Overcash, and James and
Susie Lesesne, Jessica Shipman,

CIVIL ACTION NO: 2014-CP-10-
04335

**BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC
ORDER ENFORCING
SETTLEMENT AGREEMENT**

Arlene Conte, Carol Ann Dumond,
Lawrence Murray, Yvonne Walker,
Darlene and Richard Gleeson, Robert
and Michell Bagrie, Russell Johnston,
Kathryn Howle, Dorothy Newman,
Nicholas and Debora Yost, Stephen
Deby, Colin and Phyllis Braybrooks,
Helen and Bob Harman, Rose Minton,
and Stephen and Merifaith Perdue,
and John and Jane Does (1-48),

Plaintiffs,

vs.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc.
as successor by statutory merger to
John Wieland Homes and
Neighborhoods of South Carolina,
Inc., John Wieland Homes of
Charleston, Inc., John Wieland
Homes, Inc., Builder Support Services
of the Carolinas, Inc., Wheelock Street
Capital, LLD d/b/a John Wieland
Homes and Neighborhoods, Inc., Barr
Construction, Inc., Benjamin Mora
d/b/a Mora Construction, a/k/a
Benjamin Mora Construction, LLC,
Builder's FirstSource, Inc. a/k/a
Builders FirstSource-Southeast Group,
LLC, a/k/a Builders FirstSource-
Atlantic Group, LLC, DBC
Construction Services, LLC, Eli, Inc.,
Gerardo Rosette Sanchez a/k/a GR
Painting, Jeorge Medina a/k/a JMC
Construction, LLC a/k/a JMC
Construction, Inc., Jesus Mora a/k/a J.
Mora Brick & Block Mason, LLC, Juan
Luis Sanchez a/k/a Sanchez Brothers
Painting, Latitude Construction
Services, LLC, The Muhler Company,
Inc., Paul M. Vazquez, Richard
Ditullio, Richard Ditullio a/k/a RDT
Contracting, LLC,



Defendants.	)
	)
and	)
	)
Builders FirstSource-Southeast Group,	)
LLC,	)
	)
Third-Party Plaintiff,	)
	)
vs.	)
	)
AC Construction, Inc.,	)
	)
Third-Party Defendant.	)

This matter is before the Court upon Motion of the Defendant, Builders FirstSource-Southeast Group, LLC, seeking an Order enforcing the terms of the Settlement Agreement previously executed between the Movant and the respective Plaintiffs.

A hearing on the matter was conducted before the Court, in Charleston, South Carolina, on Wednesday, September 7, 2016. In attendance at the hearing were: Stephen P. Hughes, Esquire, counsel for Builders FirstSource-Southeast Group, LLC; John C. Hayes, Esquire, and Kieth McCarty, Esquire, counsel for the respective Plaintiffs; and counsel for a majority of the remaining Parties Defendant.

Upon due consideration of the relevant Settlement Agreement, applicable principles of law, and the arguments of respective counsel, the Court issues the within Order, granting the Motion of Builders FirstSource-Southeast Group, LLC to enforce the Settlement Agreement against the respective Plaintiffs.



The captioned actions are those whereby the Plaintiffs, Waverly at Hamlin Plantation Townhome Association, Inc. and Jeffrey Sills, et al, respectively, have sought recovery of damages allegedly occasioned as a consequence of defects in the design, development, construction, and/or component materials of the Waverly Townhomes, in Hamlin Plantation. The Townhomes complex consists of a total of 105 individual residential units, constructed within 22 separate buildings, located in Mount Pleasant, in Charleston County, South Carolina. The Townhomes were originally constructed by John Wieland Homes, as general contractor, utilizing the services of numerous subcontractors, the majority of which have also been designated as Parties Defendant. The Movant supplied materials used in construction of some of the Townhome units, and, through its subcontractor, AC Construction, Inc., also provided framing services in connection with construction of a limited number of residential units.

The respective actions were initially commenced by the Plaintiffs seeking recovery against Defendants, including the general contracting entities, John Wieland Homes et al. By subsequent amendments, the respective complaints also designated, among additional parties Defendant, the Movant herein. By their initial and/or amended responsive pleadings, the Wieland entities asserted cross claims and/or Third Party Claims, including such claims against the Movant, Builders FirstSource-Southeast Group, LLC. The Movant also asserted (within the action commenced by Waverly at Hamlin Plantation Townhome Association, Inc.), Third Party Claims against its subcontractor, AC Construction, Inc.

The claims, as asserted in these actions, were, during the course of fairly comprehensive discovery, subjected to extensive investigations by forensic experts retained on behalf of the Plaintiffs. Following those investigations, and after a total of four days of mediation, conducted, respectively, during the periods of (a) November 19 and 20, 2015, and (b) June 7 and 8, 2016, the Plaintiffs, through their retained counsel, agreed to settlement of their claims against the Movant, and its framing subcontractor, AC Construction, Inc., in consideration of the cumulative payment, by or on behalf of said Defendants, in the amount of \$75,000, to be funded by respective contributions of (a) \$7,500, by or on behalf of Builders FirstSource-Southeast Group, LLC, and (b) \$67,500, by or on behalf of AC Construction, Inc. The aforesaid Settlement Agreement was contingent solely upon the release of any and/or all Cross Claims and/or Third Party Claims, as filed against the Movant, by John Wieland Homes and Neighborhoods of the Carolinas, Inc., or any of its affiliated entities.

The mediated settlement was evidenced by a written Settlement Agreement, executed by the Plaintiffs (the Parties against whom enforcement is sought), and by their retained legal counsel, and on behalf of Builders FirstSource-Southeast Group, LLC. A copy of the referenced executed Settlement Agreement is attached to the within Order, and fully incorporated herein by reference as Exhibit A.

Moreover, during the course of a scheduled status conference, conducted before the Honorable Roger Young, on June 9, 2016, counsel for the respective parties, including counsel for the Plaintiffs, advised the Court of various

settlements achieved during the course of mediation, including the Settlement Agreement at issue here.

The sole contingency, as set forth within the subject Settlement Agreement, was subsequently satisfied when counsel for the Wieland entities agreed to release of the Wieland Cross Claims and/or Third Party Claims asserted against Builders FirstSource-Southeast Group, LLC, and/or against AC Construction. The agreed release was evidenced by email communications to and from Wieland counsel, dated July 20, 2016, copies of which are also attached to the within Order, and fully incorporated herein by reference as Exhibit B.

Notwithstanding (a) the execution of the subject Settlement Agreement, (b) the parties' representation to the Court of the referenced settlement, and (c) satisfaction of the sole contingency as set forth within the Agreement, the Plaintiffs, through their legal counsel, by letter dated August 16, 2016 (and subsequent to satisfaction of the sole contingency), attempted to withdraw from the Agreement, citing additional framing problems purportedly identified subsequent to execution of the Agreement. A copy of the referenced correspondence of August 16, 2016, is attached to the within Order and fully incorporated herein by references as Exhibit C.

The Court notes, initially, that the Settlement Agreement, as executed between the parties, is not only the product of specific court-ordered mediation, but was also undertaken in accordance with longstanding judicial mandate in the Court of Common Pleas for Charleston County. The Agreement was executed



following a total of four days of mediation, and was preceded by extensive forensic investigation, on behalf of the Plaintiffs, of the onsite conditions at the Townhomes at Waverly. Moreover, the Agreement was executed by the Plaintiffs upon the advice and consideration of sophisticated legal counsel with extensive experience in the field of construction litigation.

The Court notes, additionally, that the terms of Settlement, as negotiated by the parties during the course of mediation, are unambiguous, and clearly set forth the obligations of the parties subject only to the occurrence of a contingency which was satisfied prior the Plaintiffs' attempted withdrawal. The instant Motion seeks enforcement of the Agreement against the Plaintiffs, whose execution of the written Agreement is not challenged here.

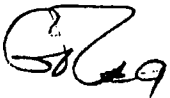
"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Pee Dee Stores, Inc. vs. Doyle*, 381 S. C. 234, 241, 672 S.E. 2nd 799, 802 (Ct. App. 2009). "The Court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis vs. Taylor*, 316 S. C. 245, 248, 449 S.E. 2nd, 487, 488 (1994). Moreover, interpretation of a contract "...is governed by the objective manifestation of the parties' ascent at the time the contract was made", rather than "...the subjective, after the fact meaning one party assigns to it." *Bannon vs. Knauss*, 282 S. C. 589, 593, 32 S.E. 2nd, 470, 472, (Ct. App. 1984). "When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the Court." *Wallace vs. Day*, 390 S. C. 69, 74, 700 S.E. 2nd, 446, 449 (Ct. App.

CL

2010). Whether a contingency is enforceable at the option of a party who enters into a contract "...depends upon the intention of the parties as to the person or persons for whose benefit the contingency was inserted in the contract." Century 21, Horton Real Estate, Inc. vs Sokcevic, 300 S.C. 8, 10-11, 386 S.E. 2nd 270, 272, (Ct. App. 1989), citing Ehlke vs. Nemec Construction Company, 298 S.C. 477, 381 S.E. 2nd 508 (Ct. App. 1989)

The Memorandum of Settlement is a two page document executed by counsel for the respective Plaintiffs, Plaintiffs' representative, counsel for Builders FirstSource-Southeast Group, LLC, and counsel for other Defendants. It bears emphasis that the validity of the settlement agreement as to the other participating Defendants has not been challenged by the Plaintiffs. Moreover, the language of the Memorandum of Settlement is plain and unambiguous. The only contingency, as set forth within the Memorandum of Settlement, was the release of the Wieland Cross Claims and/or Third Party Claims as asserted against the Movant. That sole contingency was clearly for the exclusive benefit of Builders FirstSource-Southeast Group, LLC, and was satisfied not later than July 20, 2016, following communication among counsel, as evidenced by emails of counsel (see Exhibit B). The parties informed the Court of the settlement agreement at the status conference conducted on June 9, 2016.

Finally, Plaintiffs' counsel attempted to withdraw from settlement by letter of August 16, 2016, fully two months following the executed Agreement, nearly a month after satisfaction of the sole contingency, and less than one month prior to trial scheduled for September 12, 2016.



The Court, upon due consideration, has determined that the subject Settlement Agreement constitutes a written contract between the parties, the terms of which are unambiguous, valid, and subject to enforcement by this Court.

Based on those considerations set forth herein, it is Ordered as follows:

- a. That the terms of the subject Settlement Agreement, executed between the respective Plaintiffs, Waverly at Hamlin Plantation Townhome Association, Inc., and Jeffrey Sills, et al, and the Movant, Builders FirstSource (and AC Construction, Inc.), and requiring payment, by or on behalf of Builders FirstSource, in the amount of \$7,500 (and payment by or on behalf of AC Construction, Inc. in the amount of \$67,500), is valid and enforceable against the respective Plaintiffs;
- b. That the respective Plaintiffs, upon payment of the cumulative sum of \$7,500 by or on behalf of the Movant, Builders FirstSource (and the sum of \$67,500, by or on behalf of AC Construction, Inc.), shall execute such full release and/or releases, and such stipulation/stipulations, with prejudice, as may be necessary or appropriate to evidence release of Builders FirstSource-Southeast Group, LLC from the claims of the respective Plaintiffs, and to evidence resolution and dismissal of the respective claims against Builders FirstSource-Southeast Group, LLC;
- c. That the claims of the respective Plaintiffs, Waverly at Hamlin Plantation Townhome Association, Inc. as asserted against Builders



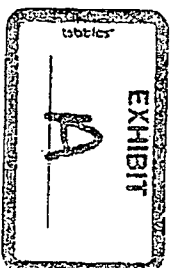
FirstSource-Southeast Group, LLC in the captioned respective actions,
are hereby dismissed, with prejudice, and forever ended.

IT IS SO ORDERED.

By: 
G. Thomas Cooper, Jr.
Presiding Judge
Ninth Judicial Circuit

CAUDEN, South Carolina

September 22, 2016.



Plaintiffs and Defendants Bar Construction,

Jesus Mora + J. Mora Brick + Block, and

Builders First AC Construction, Inc. have reached

a Contingent Resolution ^{of the} for the ^{waverly +} following amounts: ^{5115 miles}

Bar Construction: Fifteen Thousand Dollars (\$15,000)

Jesus Mora + J. Mora Brick + Block: One Hundred Thousand Dollars (\$100,000.00)

Builders First Source
Southwest
Construction, Inc.

AC Construction, Inc.: Seventy Five Thousand Dollars + Builders First Source (\$75,000.00),

Consisting of (BFS: \$17,500.00; AC \$67,500.00)
The Release is Contingent upon the release of
any + all cross claims filed by any of the
Weiland Entities to include any additional Insured
Claims, and between any party to this agreement.
A formal Release + Settlement documents will
further memorialize the terms of
the agreement once the Contingency
has been Satisfied.

* and of
- Each Party to pay own fees + costs. any/all
- Defendants will not pay any Settlement + not Third Party
Defendants are not providing any indemnity claims

Attorneys for Plaintiffs

Attorneys for Defendant Bar
Construction

Attorneys for the Plaintiffs

[Signature] and John Rogers

Attorney for Jovis
Mora + J. Mora
Brick + Blocks

[Signature] R.H. L.

Attorney for Builders
First Source Southeast
Group, LLC

[Signature]

Attorney for
AC Construction

57 *[Signature]*



Kevin Mims

From: Teddy Manos <tlm@roblaw.net>
Sent: Wednesday, July 20, 2016 6:49 PM
To: Kevin Mims
Subject: RE: Waverly v. Muhler, et al, 2013-CP-10-3326 and Sills v. Muhler, et al, 2014-CP-10-4335

Send me a draft release and dismissal

From: Kevin Mims [mailto:KMims@lmlawllp.com]
Sent: Wednesday, July 20, 2016 6:20 PM
To: Teddy Manos <tlm@roblaw.net>
Subject: FW: Waverly v. Muhler, et al, 2013-CP-10-3326 and Sills v. Muhler, et al, 2014-CP-10-4335

Are we good to go on dismissal of cross-claims as to BFS?

Kevin W. Mims
Direct: 843.410.4717
Main: 843.410.4713



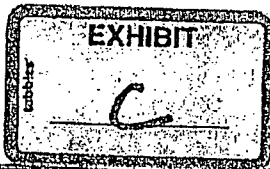
Confidentiality Notice: This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain a copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (843-410-4713) or replying to this e-mail and delete all copies of this message.

From: Terri James
Sent: Wednesday, July 20, 2016 10:12 AM
To: Andrew Cole; 'John Hayes'; Shannon Skelly; Teddy Manos; Jena Lingle; cmartin@arslawsc.com; janderson@arslawsc.com; erindean@tgdpa.com; sphughes@hghpa.com; swetmore@carlockcopeland.com; lpaton@carlockcopeland.com; dashley@watsonlawgroup.com; methridge@carlockcopeland.com; tpritchard@pritchardlawgroup.com; liz@pritchardlawgroup.com; kcarlsten@carlockcopeland.com; sfragale@turnerpadget.com; minfinger@nexsenpruet.com; ahaselden@hnblaw.com; Kevin Mims; jgarraux@richardsonplowden.com; Gunnar Nistad; mccartylea3@aol.com; caboyne@hghpa.com; jdunning@arslawsc.com; Richelle Campbell; CEadie@nexsenpruet.com; XIngram@tgdpa.com; Richard M. Glover; aterrien@carlockcopeland.com; sbethell@turnerpadget.com; tstanley@wardfirm.com; SSantana@wardfirm.com; kkeller@wardfirm.com; Marilyn Trevino; hhagen@turnerpadget.com; Kathryn Mixson; kjandron@richardsonplowden.com; HWhite@hghpa.com; DCox@hnblaw.com; tdavis@carlockcopeland.com; Elissa Jones; ssmith@scnlaw.com; keith mccarty
Subject: RE: Waverly v. Muhler, et al, 2013-CP-10-3326 and Sills v. Muhler, et al, 2014-CP-10-4335

Please remove all folks from Luzuriaga Mims- we have settled. Thank you

From: Andrew Cole [mailto:acole@collinsandlacy.com]
Sent: Wednesday, July 20, 2016 10:08 AM
To: 'John Hayes'; Shannon Skelly; Teddy Manos; Jena Lingle; cmartin@arslawsc.com; janderson@arslawsc.com; erindean@tgdpa.com; sphughes@hghpa.com; swetmore@carlockcopeland.com; lpaton@carlockcopeland.com;

A handwritten signature in black ink, appearing to be "GZ" followed by some less distinct marks.



Kevin Mims

From: keith mccarty <ikeithmccarty@gmail.com>
Sent: Thursday, July 14, 2016 10:35 AM
To: Kevin Mims
Subject: Waverly

Kevin, please make the settlement check in this case to The Hayes Law Firm as Attorney for..... You will be receiving a W-9 shortly.

We will hold the funds in trust until all appropriate releases have been executed.

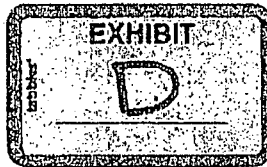
Keith

--

I. Keith McCarty
McCarty Law Firm, PC
1212 Wappoo Road (29407)
P.O. Box 30055
Charleston, South Carolina 29417
Phone: 843-793-1272
Fax : 843-793-1282

This message may be protected by the attorney/client privilege, attorney work product or other privileges. If you received this message in error, please send a reply, delete the message immediately, and do not forward this message to any other person.

A handwritten signature in black ink, appearing to be "I. Keith McCarty".



McCARTY LAW FIRM, PC

1212 WAPPOO ROAD (29407)
POST OFFICE BOX 30055
CHARLESTON, SOUTH CAROLINA 29417

I. KEITH McCARTY
(SC & TN)

Phone: (843) 793-1272
Fax: (843) 793-1282
ikm@mcarty-law.com

August 16, 2016

Kevin W. Mims
Luzuriaga Mims, LLP
50 Immigration Street
Charleston, South Carolina 29403

Stephen P. Hughes
Howell, Gibson & Hughes, PA
Post Office Box 40
Beaufort, South Carolina 29901

Re: Waverly at Hamlin Plantation Townhomes, Inc. v. John Wieland
Homes, et al.
Civil Action No.: 2013-CP-10-3326

Jeffrey Sills as Class Representative, et al. v. John Wieland Homes, et al.
Civil Action No.: 2014-CP-10-4335

Counselors:

Since the mediation in the Waverly case, we have been made aware of significant additional framing problems. The extent of these problems makes it impossible for us to continue with the tentative settlement discussed at the mediation. Accordingly, please allow this letter to formally notify you that the offer to settle at the mediation held on June 10th and 11th, 2016 is hereby withdrawn.

Please feel free to call me if you have questions regarding this letter.

With kindest regards, I am

Sincerely,

A handwritten signature in dark ink, appearing to read "I. Keith McCarty".

I. Keith McCarty

IKM:lam

A handwritten mark or signature in dark ink, possibly initials, located at the bottom left of the page.



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

G. Thomas Cooper, Jr.
Judge

Post Office Box 192
1701 Main Street, Room 320
Columbia, SC 29202-0192
Phone: (803) 576-1783
Fax: (803) 576-1741
gcooperj@sccourts.org

September 22, 2016

The Hon. Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., #106
Charleston, SC 29401

RE: Waverly at Hamlin Plantation Townhome Association, Inc., et al. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al. C/A No.: 2013-CP-10-3326

Dear Ms. Armstrong:

Please find enclosed for filing a signed Order in the above captioned case. I have enclosed a copy, and if possible, please timestamp and return to Judge Cooper's chambers for our records.

Very truly yours,

George James
Law Clerk to the Honorable G. Thomas
Cooper, Jr.

GTCJr.:gcj

Enclosures

2014-CP-10-4335

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO: 2013-CP-10-03326

Waverly at Hamlin Plantation
Townhome Association, Inc.,

Plaintiff,

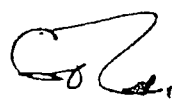
vs.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc.
as successor by statutory merger to
John Wieland Homes and
Neighborhoods of South Carolina,
Inc., John Wieland Homes of
Charleston, Inc., John Wieland
Homes, Inc., Builders Support
Services of the Carolinas, Inc. and
Wheelock Street Capital, LLC d/b/a
John Wieland Homes and
Neighborhoods, Inc., Barr
Construction, Inc.; Benjamin Mora
d/b/a Mora Construction, a/k/a
Benjamin Mora Construction, LLC;
Builders FirstSource, Inc. a/k/a
Builders FirstSource-Southeast Group,
LLC, a/k/a Builders FirstSource-
Atlantic Group, LLC; DBC
Construction Services, LLC; ELI, Inc.;
Gerardo Rosette Sanchez d/b/a GF
Painting; George Medina, George
Medina a/k/a JMC Construction, LLC
a/k/a JMC Construction, Inc.; Jesus
Mora a/k/a J. Mora Brick and Block
Mason, LLC; Juan Luis Sanchez; Juan
Luis Sanchez a/k/a Sanchez Brothers
Painting; Latitude Construction
Services, LLC; The Mulher Company,
Inc., Inc.; Paul M. Vasquez; Richard
Ditullio; Richard Ditullio a/k/a RDT
Contracting, LLC.,

Defendants.

**BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC**
ORDER ENFORCING
SETTLEMENT AGREEMENT

FILED
2014 SEP 26 PM 4:19
CLERK OF COURT



Builders FirstSource-Southeast Group,
LLC,

Third Party Plaintiff,

vs.

AC Construction, Inc.,

Third Party Defendant.

Jeffrey Sills, Individually and as Class
Representative, Marie Labarowski,
Edward and Nancy Peyser, Francis
Sills, Daniel and Suzanne Ruth,
Stephani Adili, Marc and Brandy Lynn,
Russell Robinson, George Busnach,
Helen Furtado, Jessica Baucom,
Nancy S. Coleman, Linda Glitz, Peggy
Gerou, Shannon Bebout, Maryann
Walsh, Patty Whitmire, Donald L.
Tomasello and Patricia Kelly, Chris
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Jo Feagins, Cindy Hunt for Bentgrass
Limited, LLC, Adam A. and Susan S.
Sokoloski, William and Carolyn
Barone, Michelle Ray, Eugene and
Cynthia Ray, William Abel, Dean and
Conny Mason, David McCartney, Paul
and Patricia Waters, James and
Andrea Lowry, R. Robinson, Jr.,
Thaddeus R. and Barbara A.
Kuczynski, Beverly Sanders Carlson,
Lisa Roeck, Elizabeth Jackson,
Charles and Mary Kathleen Jenkins,
Linda M. and Earl K. Rigler, Jr., John
Twomey, Joe and Anita Brittain,
Gilbert J. Hager and Kelly Hager
Holmes, Carol and Chris Gillespie,
Jared D. Overcash, and James and
Susie Lesesne, Jessica Shipman,

CIVIL ACTION NO: 2014-CP-10-
04335

**BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC
ORDER ENFORCING
SETTLEMENT AGREEMENT**

 2

Arlene Conte, Carol Ann Dumond,
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and John and Jane Does (1-48),

Plaintiffs,

vs.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc.
as successor by statutory merger to
John Wieland Homes and
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Inc., John Wieland Homes of
Charleston, Inc., John Wieland
Homes, Inc., Builder Support Services
of the Carolinas, Inc., Wheelock Street
Capital, LLD d/b/a John Wieland
Homes and Neighborhoods, Inc., Barr
Construction, Inc., Benjamin Mora
d/b/a Mora Construction, a/k/a
Benjamin Mora Construction, LLC,
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Builders FirstSource-Southeast Group,
LLC, a/k/a Builders FirstSource-
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Construction, Inc., Jesus Mora a/k/a J.
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Painting, Latitude Construction
Services, LLC, The Muhler Company,
Inc., Paul M. Vazquez, Richard
Ditullio, Richard Ditullio a/k/a RDT
Contracting, LLC,

Defendants.	)
	)
and	)
	)
Builders FirstSource-Southeast Group,	)
LLC,	)
	)
Third-Party Plaintiff,	)
	)
vs.	)
	)
AC Construction, Inc.,	)
	)
Third-Party Defendant.	)

This matter is before the Court upon Motion of the Defendant, Builders FirstSource-Southeast Group, LLC, seeking an Order enforcing the terms of the Settlement Agreement previously executed between the Movant and the respective Plaintiffs.

A hearing on the matter was conducted before the Court, in Charleston, South Carolina, on Wednesday, September 7, 2016. In attendance at the hearing were: Stephen P. Hughes, Esquire, counsel for Builders FirstSource-Southeast Group, LLC; John C. Hayes, Esquire, and Kieth McCarty, Esquire, counsel for the respective Plaintiffs; and counsel for a majority of the remaining Parties Defendant.

Upon due consideration of the relevant Settlement Agreement, applicable principles of law, and the arguments of respective counsel, the Court issues the within Order, granting the Motion of Builders FirstSource-Southeast Group, LLC to enforce the Settlement Agreement against the respective Plaintiffs.



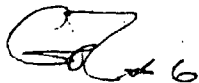
The captioned actions are those whereby the Plaintiffs, Waverly at Hamlin Plantation Townhome Association, Inc. and Jeffrey Sills, et al, respectively, have sought recovery of damages allegedly occasioned as a consequence of defects in the design, development, construction, and/or component materials of the Waverly Townhomes, in Hamlin Plantation. The Townhomes complex consists of a total of 105 individual residential units, constructed within 22 separate buildings, located in Mount Pleasant, in Charleston County, South Carolina. The Townhomes were originally constructed by John Wieland Homes, as general contractor, utilizing the services of numerous subcontractors, the majority of which have also been designated as Parties Defendant. The Movant supplied materials used in construction of some of the Townhome units, and, through its subcontractor, AC Construction, Inc., also provided framing services in connection with construction of a limited number of residential units.

The respective actions were initially commenced by the Plaintiffs seeking recovery against Defendants, including the general contracting entities, John Wieland Homes et al. By subsequent amendments, the respective complaints also designated, among additional parties Defendant, the Movant herein. By their initial and/or amended responsive pleadings, the Wieland entities asserted cross claims and/or Third Party Claims, including such claims against the Movant, Builders FirstSource-Southeast Group, LLC. The Movant also asserted (within the action commenced by Waverly at Hamlin Plantation Townhome Association, Inc.), Third Party Claims against its subcontractor, AC Construction, Inc.

The claims, as asserted in these actions, were, during the course of fairly comprehensive discovery, subjected to extensive investigations by forensic experts retained on behalf of the Plaintiffs. Following those investigations, and after a total of four days of mediation, conducted, respectively, during the periods of (a) November 19 and 20, 2015, and (b) June 7 and 8, 2016, the Plaintiffs, through their retained counsel, agreed to settlement of their claims against the Movant, and its framing subcontractor, AC Construction, Inc., in consideration of the cumulative payment, by or on behalf of said Defendants, in the amount of \$75,000, to be funded by respective contributions of (a) \$7,500, by or on behalf of Builders FirstSource-Southeast Group, LLC, and (b) \$67,500, by or on behalf of AC Construction, Inc. The aforesaid Settlement Agreement was contingent solely upon the release of any and/or all Cross Claims and/or Third Party Claims, as filed against the Movant, by John Wieland Homes and Neighborhoods of the Carolinas, Inc., or any of its affiliated entities.

The mediated settlement was evidenced by a written Settlement Agreement, executed by the Plaintiffs (the Parties against whom enforcement is sought), and by their retained legal counsel, and on behalf of Builders FirstSource-Southeast Group, LLC. A copy of the referenced executed Settlement Agreement is attached to the within Order, and fully incorporated herein by reference as Exhibit A.

Moreover, during the course of a scheduled status conference, conducted before the Honorable Roger Young, on June 9, 2016, counsel for the respective parties, including counsel for the Plaintiffs, advised the Court of various



settlements achieved during the course of mediation, including the Settlement Agreement at issue here.

The sole contingency, as set forth within the subject Settlement Agreement, was subsequently satisfied when counsel for the Wieland entities agreed to release of the Wieland Cross Claims and/or Third Party Claims asserted against Builders FirstSource-Southeast Group, LLC, and/or against AC Construction. The agreed release was evidenced by email communications to and from Wieland counsel, dated July 20, 2016, copies of which are also attached to the within Order, and fully incorporated herein by reference as Exhibit B.

Notwithstanding (a) the execution of the subject Settlement Agreement, (b) the parties' representation to the Court of the referenced settlement, and (c) satisfaction of the sole contingency as set forth within the Agreement, the Plaintiffs, through their legal counsel, by letter dated August 16, 2016 (and subsequent to satisfaction of the sole contingency), attempted to withdraw from the Agreement, citing additional framing problems purportedly identified subsequent to execution of the Agreement. A copy of the referenced correspondence of August 16, 2016, is attached to the within Order and fully incorporated herein by references as Exhibit C.

The Court notes, initially, that the Settlement Agreement, as executed between the parties, is not only the product of specific court-ordered mediation, but was also undertaken in accordance with longstanding judicial mandate in the Court of Common Pleas for Charleston County. The Agreement was executed

 7

following a total of four days of mediation, and was preceded by extensive forensic investigation, on behalf of the Plaintiffs, of the onsite conditions at the Townhomes at Waverly. Moreover, the Agreement was executed by the Plaintiffs upon the advice and consideration of sophisticated legal counsel with extensive experience in the field of construction litigation.

The Court notes, additionally, that the terms of Settlement, as negotiated by the parties during the course of mediation, are unambiguous, and clearly set forth the obligations of the parties subject only to the occurrence of a contingency which was satisfied prior the Plaintiffs' attempted withdrawal. The instant Motion seeks enforcement of the Agreement against the Plaintiffs, whose execution of the written Agreement is not challenged here.

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Pee Dee Stores, Inc. vs. Doyle*, 381 S. C. 234, 241, 672 S.E. 2nd 799, 802 (Ct. App. 2009). "The Court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis vs. Taylor*, 316 S. C. 245, 248, 449 S.E. 2nd, 487, 488 (1994). Moreover, interpretation of a contract "...is governed by the objective manifestation of the parties' ascent at the time the contract was made", rather than "...the subjective, after the fact meaning one party assigns to it." *Bannon vs. Knauss*, 282 S. C. 589, 593, 32 S.E. 2nd, 470, 472, (Ct. App. 1984). "When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the Court." *Wallace vs. Day*, 390 S. C. 69, 74, 700 S.E. 2nd, 446, 449 (Ct. App.

GRUB

2010). Whether a contingency is enforceable at the option of a party who enters into a contract "...depends upon the intention of the parties as to the person or persons for whose benefit the contingency was inserted in the contract." Century 21, Horton Real Estate, Inc. vs Sokcevic, 300 S.C. 8, 10-11, 386 S.E. 2nd 270, 272, (Ct. App. 1989), citing Ehlke vs. Nemec Construction Company, 298 S.C. 477, 381 S.E. 2nd 508 (Ct. App. 1989)

The Memorandum of Settlement is a two page document executed by counsel for the respective Plaintiffs, Plaintiffs' representative, counsel for Builders FirstSource-Southeast Group, LLC, and counsel for other Defendants. It bears emphasis that the validity of the settlement agreement as to the other participating Defendants has not been challenged by the Plaintiffs. Moreover, the language of the Memorandum of Settlement is plain and unambiguous. The only contingency, as set forth within the Memorandum of Settlement, was the release of the Wieland Cross Claims and/or Third Party Claims as asserted against the Movant. That sole contingency was clearly for the exclusive benefit of Builders FirstSource-Southeast Group, LLC, and was satisfied not later than July 20, 2016, following communication among counsel, as evidenced by emails of counsel (see Exhibit B). The parties informed the Court of the settlement agreement at the status conference conducted on June 9, 2016.

Finally, Plaintiffs' counsel attempted to withdraw from settlement by letter of August 16, 2016, fully two months following the executed Agreement, nearly a month after satisfaction of the sole contingency, and less than one month prior to trial scheduled for September 12, 2016.



The Court, upon due consideration, has determined that the subject Settlement Agreement constitutes a written contract between the parties, the terms of which are unambiguous, valid, and subject to enforcement by this Court.

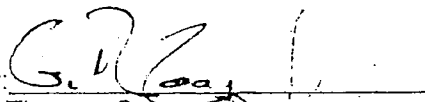
Based on those considerations set forth herein, it is Ordered as follows:

- a. That the terms of the subject Settlement Agreement, executed between the respective Plaintiffs, Waverly at Hamlin Plantation Townhome Association, Inc., and Jeffrey Sills, et al, and the Movant, Builders FirstSource (and AC Construction, Inc.), and requiring payment, by or on behalf of Builders FirstSource, in the amount of \$7,500 (and payment by or on behalf of AC Construction, Inc. in the amount of \$67,500), is valid and enforceable against the respective Plaintiffs;
- b. That the respective Plaintiffs, upon payment of the cumulative sum of \$7,500 by or on behalf of the Movant, Builders FirstSource (and the sum of \$67,500, by or on behalf of AC Construction, Inc.), shall execute such full release and/or releases, and such stipulation/stipulations, with prejudice, as may be necessary or appropriate to evidence release of Builders FirstSource-Southeast Group, LLC from the claims of the respective Plaintiffs, and to evidence resolution and dismissal of the respective claims against Builders FirstSource-Southeast Group, LLC;
- c. That the claims of the respective Plaintiffs, Waverly at Hamlin Plantation Townhome Association, Inc. as asserted against Builders

A handwritten signature, possibly reading "A 10", is located in the bottom left corner of the page.

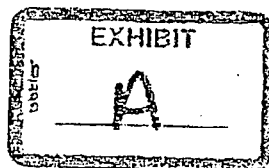
FirstSource-Southeast Group, LLC in the captioned respective actions,
are hereby dismissed, with prejudice, and forever ended.

IT IS SO ORDERED.

By: 
G. Thomas Cooper, Jr.
Presiding Judge
Ninth Judicial Circuit

CAUDEN, South Carolina

September 22, 2016.



Plaintiffs and Defendants Barr Construction,
Jesus Mora + J. Mora Brick + Block, and
Buildes First Source, AC Construction, Inc. have reached
a Contingent resolution for the following amounts:

Barr Construction: Fifteen Thousand Dollars (\$15,000)

Jesus Mora + J. Mora Brick + Block: One Hundred Thousand Dollars
(\$100,000.00)

Buildes First Source
Southwest
Group, LLC

AC Construction, Inc.: Seventy Five Thousand Dollars
+ Buildes First Source (\$75,000.00),
Consisting of (BFS: \$17,500.00; AC \$67,500.00)

The Release is Contingent upon the release of
any + all cross claims filed by any of the
Weiland Entities to include any Additional Insured
claims, and between any party to this agreement.
A formal Release + settlement documents will
further memorialize the terms of
the agreement once the contingency
has been satisfied.

- Each Party to pay own fees + costs
- Defendants will not require Settlement. is not Confidential
- Defendants are not providing any indemnity
- * and of any all Third Party Claims

[Signature]
Plaintiffs

[Signature]
Attorney for Defendant Barr
Construction

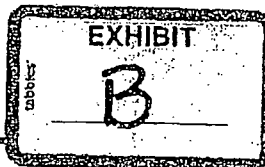
[Signature]
Attorneys for the Plaintiffs

24

Attorney for
RC Construction
Kul/W/ly
Group, LLC
First Source Southeast
Attorney for Builders

Attorney for USGS
Mora + T. Mora
Brick + Blocks

[Signature]
and John Rogers
Attorney for USGS



Kevin Mims

From: Teddy Manos <tlm@roblaw.net>
Sent: Wednesday, July 20, 2016 6:49 PM
To: Kevin Mims
Subject: RE: Waverly v. Muhler, et al, 2013-CP-10-3326 and Sills v. Muhler, et al, 2014-CP-10-4335

Send me a draft release and dismissal

From: Kevin Mims [mailto:KMims@lmlawllp.com]
Sent: Wednesday, July 20, 2016 6:20 PM
To: Teddy Manos <tlm@roblaw.net>
Subject: FW: Waverly v. Muhler, et al, 2013-CP-10-3326 and Sills v. Muhler, et al, 2014-CP-10-4335

Are we good to go on dismissal of cross-claims as to BFS?

Kevin W. Mims
Direct: 843.410.4717
Main: 843.410.4713



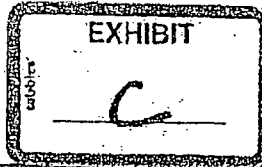
Confidentiality Notice: This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain a copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (843-410-4713) or replying to this e-mail and delete all copies of this message.

From: Terri James
Sent: Wednesday, July 20, 2016 10:12 AM
To: Andrew Cole; 'John Hayes'; Shannon Skelly; Teddy Manos; Jena Lingle; cmartin@arslawsc.com; janderson@arslawsc.com; erindean@todpa.com; sphughes@hqhpa.com; swetmore@carlockcopeland.com; lpaton@carlockcopeland.com; dashley@watsonlawgroup.com; methridge@carlockcopeland.com; tpritchard@pritchardlawgroup.com; liz@pritchardlawgroup.com; kcarlsten@carlockcopeland.com; sfragale@turnerpadget.com; minfinger@nexsenpruet.com; ahaselden@hnblaw.com; Kevin Mims; jgarraux@richardsonplowden.com; Gunnar Nistad; mccartyiea3@aol.com; caboyne@hqhpa.com; jdunning@arslawsc.com; Richelle Campbell; CEadie@nexsenpruet.com; XIngram@todpa.com; Richard M. Glover; aterrien@carlockcopeland.com; sbethell@turnerpadget.com; tstanley@wardfirm.com; SSantana@wardfirm.com; kkeller@wardfirm.com; Marilyn Trevino; hhagen@turnerpadget.com; Kathryn Mixson; kjandron@richardsonplowden.com; HWhite@hqhpa.com; DCox@hnblaw.com; tdavis@carlockcopeland.com; Elissa Jones; ssmith@scnlaw.com; keith mccarty
Subject: RE: Waverly v. Muhler, et al, 2013-CP-10-3326 and Sills v. Muhler, et al, 2014-CP-10-4335

Please remove all folks from Luzuriaga Mims- we have settled. Thank you

From: Andrew Cole [mailto:acole@collinsandlacy.com]
Sent: Wednesday, July 20, 2016 10:08 AM
To: 'John Hayes'; Shannon Skelly; Teddy Manos; Jena Lingle; cmartin@arslawsc.com; janderson@arslawsc.com; erindean@todpa.com; sphughes@hqhpa.com; swetmore@carlockcopeland.com; lpaton@carlockcopeland.com;

A handwritten signature in black ink, appearing to be "GZ" followed by a flourish.



Kevin Mims

From: keith mccarty <ikeithmccarty@gmail.com>
Sent: Thursday, July 14, 2016 10:35 AM
To: Kevin Mims
Subject: Waverly

Kevin, please make the settlement check in this case to The Hayes Law Firm as Attorney for..... You will be receiving a W-9 shortly.

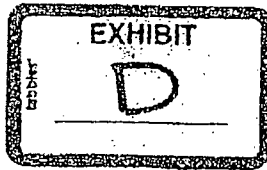
We will hold the funds in trust until all appropriate releases have been executed.

Keith

--
I. Keith McCarty
McCarty Law Firm, PC
1212 Wappoo Road (29407)
P.O. Box 30055
Charleston, South Carolina 29417
Phone: 843-793-1272
Fax : 843-793-1282

This message may be protected by the attorney/client privilege, attorney work product or other privileges. If you received this message in error, please send a reply, delete the message immediately, and do not forward this message to any other person.

A handwritten signature in dark ink, appearing to be "I. Keith McCarty".



McCARTY LAW FIRM, PC

1212 WAPPOO ROAD (29407)
POST OFFICE BOX 30055
CHARLESTON, SOUTH CAROLINA 29417

I. KEITH McCARTY
(SC & TN)

Phone: (843) 793-1272
Fax: (843) 793-1282
keithmccarty@gmail.com

August 16, 2016

Kevin W. Mims
Luzuriaga Mims, LLP
50 Immigration Street
Charleston, South Carolina 29403

Stephen P. Hughes
Howell, Gibson & Hughes, PA
Post Office Box 40
Beaufort, South Carolina 29901

Re: Waverly at Hamlin Plantation Townhomes, Inc. v. John Wieland
Homes, et al.
Civil Action No.: 2013-CP-10-3326

Jeffrey Sills as Class Representative, et al. v. John Wieland Homes, et al.
Civil Action No.: 2014-CP-10-4335

Counselors:

Since the mediation in the Waverly case, we have been made aware of significant additional framing problems. The extent of these problems makes it impossible for us to continue with the tentative settlement discussed at the mediation. Accordingly, please allow this letter to formally notify you that the offer to settle at the mediation held on June 10th and 11th, 2016 is hereby withdrawn.

Please feel free to call me if you have questions regarding this letter.

With kindest regards, I am

Sincerely,

A handwritten signature in dark ink, appearing to read "I. Keith McCarty".

I. Keith McCarty

IKM:lam

A handwritten mark or signature in the bottom left corner, possibly initials "G" followed by "06".



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

G. Thomas Cooper, Jr.
Judge

Post Office Box 192
1701 Main Street, Room 320
Columbia, SC 29202-0192
Phone: (803) 576-1783
Fax: (803) 576-1741
gcooperj@sccourts.org

September 22, 2016

The Hon. Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., #106
Charleston, SC 29401

RE: Waverly at Hamlin Plantation Townhome Association, Inc., et al. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al. C/A No.: 2013-CP-10-3326

Dear Ms. Armstrong:

Please find enclosed for filing a signed Order in the above captioned case. I have enclosed a copy, and if possible, please timestamp and return to Judge Cooper's chambers for our records.

Very truly yours,

A handwritten signature in black ink, appearing to read "George James".

George James
Law Clerk to the Honorable G. Thomas
Cooper, Jr.

GTCJr.:gcj

Enclosures

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiff(s)

vs.

John Wieland Homes and Neighborhoods of the
Carolinas, Inc. as successor by statutory merger to
John Wieland Homes and Neighborhoods of South
Carolina, Inc., et al.,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013-CP - 10- 3326

(Please Print)

Submitted By: John C. Hayes, IV, Esquire

Address: Hayes Law Firm
180 Meeting Street, Suite 330
Charleston, SC 29401

SC Bar #: 69740

Telephone #: 843-805-7003

Fax #: 843-573-7388

Other:

E-mail: jhayes@hayeslaw.org

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☒ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -CP- ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (518)		

Submitting Party Signature:



Date: 06/06/2013

SCCA / 234 (01/2011)

Page 1 of 3

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation
Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and
Neighborhoods of the Carolinas, Inc. as
successor by statutory merger to John
Wieland Homes and Neighborhoods of
South Carolina, Inc., John Wieland
Homes of Charleston, Inc., John
Wieland Homes, Inc., Builder Support
Services of the Carolinas, Inc., and
Wheelock Street Capital, LLC d/b/a John
Wieland Homes and Neighborhoods,
Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO: 2013-CP-10- 3324

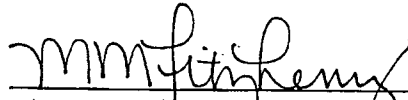
SUMMONS
(Jury Trial Demanded)

FILED
2013 JUN -6 PM 3:45
JULIE J ARMSTRONG
CLERK OF COURT
BY _____

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Summons and Complaint upon the subscribers at their office at 180 Meeting Street, Suite 330, Charleston, South Carolina within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer within the prescribed time, a judgment by default will be rendered against you for the amount or other remedy requested in the attached Complaint, plus interests and costs.

[Signature Page to Follow]

HAYES LAW FIRM, LLC



John C. Hayes, IV, Esquire (SC Bar #: 69740)
Mary-Margaret S. Fitzhenry (SC Bar #: 71713)
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: (843) 805-7003
Fax: (843) 720-5999
jhayes@hayeslaw.org

June 6, 2013
Charleston, South Carolina

ATTORNEY FOR PLAINTIFFS

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10- 3326

Waverly at Hamlin Plantation)
Townhome Association, Inc.,)
)
Plaintiffs,)

vs.)

COMPLAINT
(Jury Trial Demanded)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builder Support)
Services of the Carolinas, Inc., and)
Wheelock Street Capital, LLC d/b/a John)
Wieland Homes and Neighborhoods,)
Inc.,)
)
Defendants.)

FILED
2013 JUN -6 PM 3:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Plaintiff, complaining of the Defendants above named, would allege and show unto this Honorable Court as follows:

1. Waverly at Hamlin Plantation Townhome Association, Inc. (hereinafter "Association" or "Waverly Townhomes") is a duly authorized South Carolina non-profit corporation.

2. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina and are authorized to conduct business in this state, and have a principal place of business in Charleston County.

3. Defendant Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., is a joint venture with the Wieland Defendants formed in November 2012.

4. Waverly Townhomes is a section of the residential community, Hamlin Plantation, located in Mount Pleasant, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.

5. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.

6. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.

7. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.

8. This Court has jurisdiction over the parties and subject matter hereto.

9. The construction of Waverly Townhomes was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and

experienced in performing such construction work as to properly build Waverly Townhomes according to the normal standards of good and workmanlike practice in the construction field.

10. Construction defects in the Waverly Townhomes have recently been discovered. A recent inspection of the subject Townhomes resulted in the discovery of major problems and deficiencies including but not limited to the following:

- (a) Lack of proper flashing;
- (b) Lack of proper roofing installation;
- (c) Moisture damage along porches;
- (d) Water intrusion damage resulting from defects;
- (e) Improper flashing installation; and
- (f) Improper paving and drainage.

11. As a direct and proximate result and consequence of the faulty construction by the Defendants of Plaintiff's homes, causing major problems and defects thereto, the Plaintiff have and will continue to spend substantial sums of money for the repairs and reconstruction of major portions of Waverly Townhomes and will be subject to consequential damages.

FOR A FIRST CAUSE OF ACTION
(Unfair Trade Practices)

12. Plaintiff and the Defendants are "persons" within the meaning of S.C. Code § 39-5-10(a).

13. The Defendants, by developing, marketing and constructing the subject Residences, were engaged in commerce within the meaning of S.C. Code § 39-5-10(b).

14. The Defendants' actions, described hereinabove, constitute unfair and deceptive practices within the meaning of S.C. Code § 39-5-20(a).

15. The Defendants' acts are capable of repetition, and, upon information and belief, have been repeated.

16. The Defendants' conduct affects the public interest of South Carolina.

17. The Defendants knew, or reasonably should have known, that their conduct violated the Unfair Trade Practices Act.

18. As a direct foreseeable and proximate result of the Defendants' unfair and deceptive practices, Plaintiff has suffered an ascertainable loss of money and property.

19. Plaintiff is entitled to recover his actual damages, which amount should be trebled, together with interest and attorney's fees.

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

20. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 19 above, as if fully set forth herein verbatim.

21. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

22. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiff.

FOR A THIRD CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for Particular purpose)

23. The Plaintiff incorporates into this cause of action the allegations in Paragraphs 1 through 22 above, as fully as if repeated verbatim herein.

24. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

25. At the time of the sale of the subject Residences to the Plaintiff, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

26. The Defendants, at the time of the sale of the subject Residences to the Plaintiff, had reason to know that the Plaintiff was relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

27. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

28. As a result of the Defendants' breach of its implied warranties, Plaintiff has suffered physical damages.

FOR A FOURTH CAUSE OF ACTION
(Negligence)

29. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 28 above, as if fully set forth herein verbatim.

30. The construction of the subject Residences by the Defendants deviated from the normal standards of good and workmanlike practice in the construction filed in the following particulars, to-wit:

- (a) In failing and omitting to construct the residences in conformity with the applicable building codes, so as to create statutory violations;
- (b) In failing and omitting to construct the subject Residences pursuant to good and workmanlike construction practices;
- (c) In failing and omitting to install proper flashing throughout the subject Residences;
- (d) In failing and omitting to properly seal the subject Residences' exteriors to prevent water infiltration and intrusion;

31. As a direct, foreseeable and proximate result of the Defendants' negligence, Plaintiff has suffered damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)

32. Plaintiff repeats and realleges their allegations of Paragraphs 1 through 31 above as if set forth herein verbatim.

33. That the Defendants entered into a contract with the homeowners and/or predecessors-in-title, whereby the Defendants were to construct the subject homes and facilities to industry standards and in a good workmanlike proper manner.

34. The Defendants did not honor their obligations under the agreement with the Plaintiff and/or their predecessors-in-title in that they failed to construct subject Residences according to industry standards and in a good, workmanlike proper manner causing major defects to the homes.

35. That the Defendants are in breach of the parties' contracts.

36. That as a result of the Defendants' breach of contract, the Plaintiff has suffered and will continue to suffer and are entitled to recover monetary damages caused by the defective construction by the Defendants and for loss of use and diminution in value of the subject Residences.

FOR A SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

37. Plaintiff repeats and realleges the allegations contained in the above paragraphs as if more fully set forth herein.

38. The Defendants had a fiduciary duty and duty of loyalty and good faith dealing to transfer Waverly Townhomes to the control of the Plaintiff in a state of good repair. Defendants, having transferred elements with the defects and deficiencies set forth above, in the alternative is required to provide the Plaintiff with the funds necessary to bring the elements up to standard of reasonably good repair and condition.

39. Defendants breached their fiduciary duty and duty of loyalty and good faith dealing by transferring the elements in a substandard and deficient condition without the funds necessary to bring them up to standards of good repair and condition.

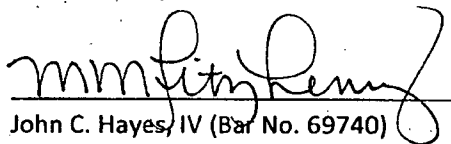
40. As a direct and proximate result and consequence of the Defendants actions, Plaintiff has suffered damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the buildings and other improvements, loss of use and diminution in value.

WHEREFORE, the Plaintiffs pray that this Court issue an Order granting judgment for the Plaintiff against the Defendants, jointly and severally, for the following:

- (a) for actual damages in an amount to be proven at trial;

- (b) for trebled damages under S.C. Code § 39-5-10, et seq.;
- (c) for punitive damages;
- (d) for prejudgment and post judgment interest on Plaintiffs' damages;
- (e) for attorney's fees and costs; and
- (f) for such other and further relief as this Court may deem just and proper.

HAYES LAW FIRM, LLC



John C. Hayes, IV (Bar No. 69740)

Mary-Margaret S. Fitzhenry (Bar No. 71713)

180 Meeting Street, Suite 330

Charleston, SC 29401

Phone: (843) 805-7003

Fax: (843) 720-5999

jhayes@hayeslawfirm.org

mfitzhenry@hayeslawfirm.org

ATTORNEYS FOR PLAINTIFF

June 6, 2013

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc. as successor by
statutory merger to John Wieland Homes
and Neighborhoods of South Carolina,
Inc., John Wieland Homes of Charleston,
Inc., John Wieland Homes, Inc., Builders
Support Services of the Carolinas, Inc. and
Wheelock Street Capital, LLC d/b/a John
Wieland Homes and Neighborhoods, Inc.

Defendants.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc. as successor by
statutory merger to John Wieland Homes
and Neighborhoods of South Carolina,
Inc., John Wieland Homes of Charleston,
Inc., John Wieland Homes, Inc., Builders
Support Services of the Carolinas, Inc.

Third-Party Plaintiffs,

Barr Construction, Inc.; Benjamin Mora
d/b/a Mora Construction, a/k/a Benjamin
Mora Construction, LLC; Builder's
Firstsource, Inc. a/k/a Builders
Firstsource- Southeast Group, LLC, a/k/a
Builders Firstsource – Atlantic Group, LLC;
DBC Construction Services, LLC; Eli, Inc.;
Gerardo Rosette Sanchez a/k/a GR
Painting; George Medina, George Medina
a/k/a JMC Construction, LLC a/k/a JMC
Construction, Inc.; Jesus Mora a/k/a J.
Mora Brick & Block Mason, LLC; Juan Luis
Sanchez; Juan Luis Sanchez a/k/a
Sanchez Brothers Painting; Latitude

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-3326

ANSWER AND THIRD-PARTY
COMPLAINTS

FILED
2014 APR 17 PM 4:54
JULIE J. ARISTORO
CLERK OF COURT
BY _____

Construction Services, LLC; The Muhler Company, Inc.; Paul M. Vasquez; Richard Ditullio; Richard Ditullio a/k/a RDT Contracting, LLC,

Third-Party Defendants.

The Defendants identified in the caption as John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., and Builders Support Services of the Carolinas, Inc. (hereinafter collectively referred to as "Wieland"), through their below-signed attorneys, answering the Complaint of the Plaintiffs above-named, and by way of Third-Party Complaint, allege as follows:

1. They admit, upon information and belief, the allegations of Paragraph 1.
2. Answering the allegations of Paragraphs 2 and 3, they crave reference to the applicable corporate and business filings and documents for their exact terms and contents and deny any allegations inconsistent therewith.
3. They deny the allegations of Paragraph 4 as stated but admit that Wieland was the developer and general contractor for the townhomes; however, actual construction was performed by others.
4. They deny the allegations of Paragraphs 5 through 7.
5. The allegations of Paragraph 8 state legal conclusions which require no responsive pleading from Wieland.
6. They deny the allegations of Paragraphs 9 through 11.

AS TO THE FIRST CAUSE OF ACTION

7. They deny the allegations of Paragraphs 12 through 19.

AS TO THE SECOND CAUSE OF ACTION

8. Answering the allegations of Paragraph 20, they reallege their responses to the above paragraphs as if repeated herein verbatim.

9. They deny the allegations of Paragraphs 21 and 22.

AS TO THE THIRD CAUSE OF ACTION

10. Answering the allegations of Paragraph 23, they reallege their responses to the above paragraphs as if repeated herein verbatim.

11. They deny the allegations of Paragraphs 24 through 28

AS TO THE FOURTH CAUSE OF ACTION

12. Answering the allegations of Paragraph 29, they reallege their responses to the above paragraphs as if repeated herein verbatim.

13. They deny the allegations of Paragraphs 30 and 31.

AS TO THE FIFTH CAUSE OF ACTION

14. Answering the allegations of Paragraph 32, they reallege their responses to the above paragraphs as if repeated herein verbatim.

15. Answering the allegations of Paragraph 33, Wieland craves reference to its contracts and sales documents, as amended, for their exact terms and contents and denies any allegations inconsistent therewith.

16. They deny the allegations of Paragraphs 34 through 36.

AS TO THE SIXTH CAUSE OF ACTION

17. Answering the allegations of Paragraph 37, they reallege their responses to the above paragraphs as if repeated herein verbatim.

18. They deny the allegations of Paragraphs 38 through 40, being all the remaining allegations of the Plaintiff's Complaint.

19. They deny each and every allegation of the Plaintiffs' Complaint not specifically admitted above.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

20. Plaintiffs lack standing and otherwise have improperly attempted to make the claims asserted against Wieland in this action. Plaintiffs lack of standing and improprieties include, but are not limited to, the fact that Plaintiffs have improperly attempted to file a derivative action and Plaintiffs' filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiffs' claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

21. That all claims asserted against Wieland are barred by the applicable statute of limitations and/or the applicable statute of repose.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

22. Plaintiffs' claims, if any, are barred, or should be reduced, by Plaintiffs' own comparative negligence and recklessness by Plaintiffs' failure to properly maintain the property and to mitigate their damages.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

23. Plaintiffs' claims, if any, are the result of acts and omissions of other entities over whom Wieland has no control, barring Plaintiffs' claims against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

24. That all claims are barred by the doctrine of Laches, waiver and estoppel.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

25. That the final completion and acceptance of the work undertaken by Wieland pursuant to the original contract and all modifications thereto constitutes a complete defense to all claims asserted by Plaintiffs.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

26. Plaintiffs' claims are, upon information and belief, barred as it has failed to make a claim against Wieland within any applicable warranty period.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

27. That all claims asserted by Plaintiffs are barred by the doctrine of unclean hands.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

28. That Plaintiffs failed to give Wieland reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide Wieland a reasonable opportunity to correct any such alleged defects.

29. That Plaintiffs' failure to give Wieland notice of and an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims of breach of warranty.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

30. Upon information and belief, any express or implied warranties were limited in duration from the date of completion and acceptance of the project by the Owner.

31. That the failure of Plaintiffs within the warranty period from the date of the completion and acceptance of the project by the Plaintiffs, to give notice of or make any claim for alleged deficiencies in the workmanship and/or materials provided by Wieland constitutes a complete defense to all claims asserted by Plaintiffs.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

32. Plaintiffs' Complaint is barred by payment and/or release.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

33. Plaintiffs have waived and/or are estopped from asserting the claims set forth in their Complaint.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

34. If Plaintiffs sustained injuries and damages in the manner alleged in the Complaint, which injuries and damages are specifically denied by Wieland, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Wieland nor of anyone for whose conduct Wieland are anyway responsible, but solely through the fault, neglect, breach of warranty (express or implied) and want of due care on the part of Plaintiffs, all of which will be shown at the trial of this case, and for which Plaintiffs can have no recovery against Wieland or, in the alternative, for which Plaintiffs' recovery

should be appropriately reduced. Plaintiffs' comparative negligence includes, but is not limited, the following particulars:

- (a) In failing to exercise reasonable care in maintaining the structures;

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

35. Plaintiffs' claims are barred as the court lacks jurisdiction over the subject matter of the case.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

36. Plaintiffs' claims fail to state facts sufficient to constitute causes of action against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

37. Wieland has contractually limited its warranty and non-warranty obligations and exposure to the Plaintiffs, excluding liability for many claims the Plaintiffs are making, barring Plaintiffs' claims and/or Plaintiffs' claimed damages, including Plaintiffs' claim for consequential damages, in whole or in part, against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

38. Plaintiffs' claims are barred, or should be stayed, pending arbitration as there exists a valid arbitration provision in the contract between the Plaintiffs and Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

39. Plaintiffs' claims should be dismissed as the Plaintiffs failed to effect proper service of process on Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

40. Plaintiffs' claims should be dismissed as there is a lack of appropriate personal jurisdiction against one or all of the Wieland Defendants in this action.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

41. Plaintiffs' claim are barred by the doctrine of corporate immunity.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

42. Plaintiffs' claim are barred or would be reduced as Wieland provided a limited warranty to Plaintiffs which was in lieu of all other warranties or obligations, express or implied, including the warranty of habitability, warranty of suitability for residential purposes, any warranties of marketability or fitness for particular purposes. Plaintiffs' claims and remedies are limited to claims and remedies under the limited warranty that was provided, and any other claims are barred.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

43. The Plaintiffs' claims are barred or should be dismissed by virtue of the doctrine of spoliation of evidence, as the Plaintiffs spoiled evidence and repaired alleged deficiencies without notice to Wieland and without giving Wieland opportunity to observe the alleged deficiencies.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

44. Plaintiff's claims are barred and/or should be stayed or dismissed by virtue of Plaintiff's failure to comply with the South Carolina Notice and Opportunity to Cure Non-Residential Construction Defects Act, South Carolina Code §40-11-510, et. seq.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

45. Plaintiffs' claims are barred and/or should be stayed or dismissed by virtue of the Plaintiffs' failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, South Carolina Code §40-59-810-860 (1976 as amended).

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

46. Plaintiff's claims are barred by the economic loss rule.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

47. Plaintiffs' claims should be dismissed or stayed as Plaintiffs have failed, prior to filing suit, to comply with valid, applicable and mutually enforceable conditions precedent contained in the applicable purchase and sales documents and applicable corporate/legal documents (to include, but not limited to, the regime documents, Master Deed and Bylaws, deeds, sales contracts and Townhouse Association documents), including any and all alternative dispute provisions and provisions related to the number of owner/members who must agree to file a claim or suit. Plaintiffs lack of standing and improprieties include, but are not limited to, the fact that Plaintiffs have improperly attempted to file a derivative action and Plaintiffs' filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the

requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiffs' claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

48. Plaintiffs' Complaint should be dismissed for failure to join necessary persons, parties and/or entities pursuant to SCRPC 19.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

49. Plaintiffs' claims for the unfair trade practices act should be dismissed as the alleged actions of Wieland do not have an impact on the public interest.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

50. Plaintiffs' claims for breach of South Carolina's unfair trade practices act are barred pursuant to South Carolina Code §39-5-40.

FURTHER ANSWERING AND BY WAY OF THIRD-PARTY COMPLAINT AGAINST
THE ABOVE-NAMED THIRD-PARTY DEFENDANTS, WIELAND ALLEGES AS
FOLLOWS

51. Wieland realleges the Paragraphs above as if repeated herein verbatim.

52. Plaintiffs have sued Wieland claiming damages caused by alleged deficient materials, design, engineering and/or construction services provided by Third-Party Defendants on the Project. See Complaint attached as Exhibit "A".

53. Wieland contracted with the following persons and entities (herein collectively referred to as "Subcontractor Defendants") to perform work and provide materials as subcontractors and materialmen for the Project. The written contracts, as amended, between Wieland and the Subcontractor Defendants are incorporated herein

by reference, to include any and all arbitration provisions that are applicable and that would apply in this matter. The Subcontractor Defendants are as follows:

- (a) framing, to include but not limited to installation of the water management system and installation of doors and windows, together with all associated waterproofings and flashings
 - Builder's Firstsource, Inc. a/k/a Builders Firstsource- Southeast Group, LLC, a/k/a Builders Firstsource – Atlantic Group, LLC
- (b) roofing, together with all associated and related waterproofings and flashings
 - Richard Ditullio, Richard Ditullio d/b/a RDT Contracting, LLC
 - DBC Construction Services, LLC
 - George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.
- (c) window and door manufacturer, supplier, retailer and installer, together with all associated and related waterproofings and flashings
 - The Muhler Company, Inc.
 - Paul M. Vasquez
- (d) railing suppliers and installers for balconies, porches and stairs, together with all associated and related waterproofings and flashings
 - George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.
- (e) waterproofing supplier and installer for balconies and porches, together with all associated and related waterproofings and flashings
 - Latitude Construction Services, LLC
- (f) hardiplank/cement board siding supplier and installer, together with all associated and related waterproofings and flashings
 - George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.
- (g) hurricane strap installer, together with all associated and related waterproofings and flashings

- Builder's Firstsource, Inc. a/k/a Builders Firstsource- Southeast Group, LLC, a/k/a Builders Firstsource – Atlantic Group, LLC
- i) masonry supplier and installer to include brick entryway steps, together with all associated and related waterproofings and flashings
 - Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC
- j) exterior painter/caulker, together with all associated and related waterproofings and flashings
 - Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting
 - Gerardo Rosette Sanchez a/k/a GR Painting
- k) foundation connections, supplier and installer, together with all associated and related waterproofings and flashings
 - Benjamin Mora a/k/a Mora Construction, a/k/a Benjamin Mora Construction, LLC
 - Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC
- l) sidewalk, walkway and driveway paving
 - Eli, Inc.
- m) sitework/drainage supplier and installer
 - Barr Construction, Inc.

54. Wieland has denied all of the substantive allegations against it that were made by the Plaintiffs.

FOR A FIRST CAUSE OF ACTION
(Indemnity)

55. To the extent, if any, that Wieland is held liable to the Plaintiffs in this action, such liability would be a direct and proximate result of the wrongful acts, errors, omissions, breaches, negligence, gross negligence, recklessness and/or representations of Subcontractor Defendants, which has damaged Wieland as Wieland

has been subjected to liability, and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

56. To the extent, if any, that the construction was defective or deficient in workmanship, installation, materials, and/or were not merchantable or fit for their particular purposes, such defects and deficiencies would be the result of the breach of the express and implied contractual obligations and warranties that Subcontractor Defendants provided, damaging Wieland as Wieland has been subjected to liability, and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

57. Wieland is entitled to full indemnification from Subcontractor Defendants for any liability Wieland is found to have to the Plaintiffs in this action, and Wieland would be entitled to damages for Subcontractor Defendants' negligence, gross negligence and recklessness as aforescribed and for Subcontractor Defendants' breach of its implied and express warranties, entitling Wieland to recover from Subcontractor Defendants its attorney's fees, costs and other expenses incurred in defending this action, and entitling Wieland to recover from Subcontractor Defendants any sums for which it may be held liable to Plaintiffs.

58. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor

Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

FOR A SECOND CAUSE OF ACTION
(Negligence)

59. Wieland realleges the Paragraphs above as if repeated herein verbatim.

60. The Subcontractor Defendants were negligent, grossly negligent, reckless and careless in the construction, supervision, inspection and/or supplying of the work or materials outlined above and incorporated into the project.

61. As a direct and proximate result of such negligence, gross negligence, recklessness and carelessness, Wieland has been damaged in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

62. Upon information and belief, Wieland is entitled to judgment for actual damages collectively or individually against the Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as fees and costs incurred in the investigation, defense and settlement of this claim.

63. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor

Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

64. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' negligence, gross negligence and recklessness and for which the Subcontractor Defendants are also liable to Wieland.

FOR A THIRD CAUSE OF ACTION
(Breach of Warranty)

65. Wieland realleges the Paragraphs above as if repeated herein verbatim.

66. The Subcontractor Defendants expressly or impliedly warranted to Wieland that all work performed by them would be performed in a careful, diligent and workmanlike manner, and that any materials and/or services designed, supplied or sold by them for use on the project would be merchantable and fit for their intended or specific purpose. Subcontractor Defendants breached their implied and/or express warranties of merchantability, workmanlike service, and/or fitness for a particular or intended purpose in the construction of the project.

67. As a result of these breaches of warranties, Wieland has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

68. Upon information and belief, Wieland is entitled to judgment against the Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs,

or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

69. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

70. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' breach of warranty and for which the Subcontractor Defendants are also liable to Wieland.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract)

71. Wieland realleges the Paragraphs above as if repeated herein verbatim.

72. Wieland entered into contracts with the Subcontractor Defendants. Subcontractor Defendants were to provide work and materials to the Project in question as described above.

73. The terms of the contracts required Subcontractor Defendants to provide construction goods and services for the Project that, among other things, would produce

a quality building free from defects and otherwise in conformance of all contract documents, including all building codes and industry standards. The contract further required Subcontractor Defendants to supervise and direct its work, using the best skill and attention.

74. Subcontractor Defendants breached their contract by failing to provide appropriate construction goods and services to the Project, by failing to perform their work in a careful, diligent and workmanlike manner, by failing to provide goods and services that resulted in a quality building free from defects and otherwise in conformance with all contract documents, and failing to provide goods and services that were in conformity with all appropriate building codes and industry standards.

75. As a result of these breaches of contract, Wieland has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it paid Plaintiffs in settlement of Plaintiffs' claims, plus the costs of investigating and defending this claim.

76. Upon information and belief, Wieland is entitled to judgment against Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs, or which it paid Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

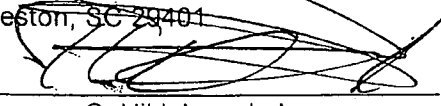
77. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor

Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

78. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' breach of contract and for which the Subcontractor Defendants are also liable to Wieland.

WHEREFORE, Wieland prays that the claims of the Plaintiffs be dismissed, and that Wieland be given judgment against the Subcontractor Defendants in the amount of any liability Wieland is found to have to Plaintiffs in this action, and Wieland demands judgment requiring Subcontractor Defendants to defend and indemnify Wieland against any liability which Wieland may suffer to Plaintiffs in this action, to include Wieland's attorney's fees, costs and other expenses incurred in defending this action. Wieland further demands judgment for actual and punitive damages against the Subcontractor Defendants and to reimburse it fully for all costs, expenses, and attorneys' fees associated with the deficiencies described herein, in an amount to be determined by the trier of fact, and for such other and further relief as this Court may deem just and proper.

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

By: 

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

Kristina Y. Baxley
kristinaybaxley@parkerpoe.com

John Wieland Homes and Neighborhoods
of the Carolinas, Inc. as successor by
statutory merger to John Wieland Homes
and Neighborhoods of South Carolina, Inc.,
John Wieland Homes of Charleston, Inc.,
John Wieland Homes, Inc., Builders
Support Services of the Carolinas, Inc.

April 17, 2014

2013-CP-10-3326

CERTIFICATE OF SERVICE

This is to certify that a copy of the Answer to Plaintiff's Complaint has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 17th day of April, 2014.

John C. Hayes, IV, Esq.
Mary-Margaret S. Fitzhenry, Esq.
Hayes Law Firm
180 Meeting Street, Suite 330
Charleston, SC 29401

Lauren Heuss

Lauren Heuss, Legal Professional Assistant
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401

FILED
2014 APR 17 PM 4:54
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation
Townhome Association, Inc.,)

Plaintiffs,)

vs.)

John Wieland Homes and
Neighborhoods of the Carolinas, Inc. as
successor by statutory merger to John
Wieland Homes and Neighborhoods of
South Carolina, Inc., John Wieland
Homes of Charleston, Inc., John
Wieland Homes, Inc., Builder Support
Services of the Carolinas, Inc., and
Wheelock Street Capital, LLC d/b/a John
Wieland Homes and Neighborhoods,
Inc.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO: 2013-CP-10- 3326

COMPLAINT

(Jury Trial Demanded)

FILED
2013 JUN -6 PM 3:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Plaintiff, complaining of the Defendants above named, would allege and show unto this Honorable Court as follows:

1. Waverly at Hamlin Plantation Townhome Association, Inc. (hereinafter "Association" or "Waverly Townhomes") is a duly authorized South Carolina non-profit corporation.

2. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina and are authorized to conduct business in this state, and have a principal place of business in Charleston County.
3. Defendant Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., is a joint venture with the Wieland Defendants formed in November 2012.
4. Waverly Townhomes is a section of the residential community, Hamlin Plantation, located in Mount Pleasant, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.
5. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.
6. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.
7. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.
8. This Court has jurisdiction over the parties and subject matter hereto.
9. The construction of Waverly Townhomes was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and

experienced in performing such construction work as to properly build Waverly Townhomes according to the normal standards of good and workmanlike practice in the construction field.

10. Construction defects in the Waverly Townhomes have recently been discovered. A recent inspection of the subject Townhomes resulted in the discovery of major problems and deficiencies including but not limited to the following:

- (a) Lack of proper flashing;
- (b) Lack of proper roofing installation;
- (c) Moisture damage along porches;
- (d) Water intrusion damage resulting from defects;
- (e) Improper flashing installation; and
- (f) Improper paving and drainage.

11. As a direct and proximate result and consequence of the faulty construction by the Defendants of Plaintiff's homes, causing major problems and defects thereto, the Plaintiff have and will continue to spend substantial sums of money for the repairs and reconstruction of major portions of Waverly Townhomes and will be subject to consequential damages.

FOR A FIRST CAUSE OF ACTION
(Unfair Trade Practices)

12. Plaintiff and the Defendants are "persons" within the meaning of S.C. Code § 39-5-10(a).

13. The Defendants, by developing, marketing and constructing the subject Residences, were engaged in commerce within the meaning of S.C. Code § 39-5-10(b).

14. The Defendants' actions, described hereinabove, constitute unfair and deceptive practices within the meaning of S.C. Code § 39-5-20(a).

15. The Defendants' acts are capable of repetition, and, upon information and belief, have been repeated.

16. The Defendants' conduct affects the public interest of South Carolina.

17. The Defendants knew, or reasonably should have known, that their conduct violated the Unfair Trade Practices Act.

18. As a direct foreseeable and proximate result of the Defendants' unfair and deceptive practices, Plaintiff has suffered an ascertainable loss of money and property.

19. Plaintiff is entitled to recover his actual damages, which amount should be trebled, together with interest and attorney's fees.

FOR A SECOND CAUSE OF ACTION

(Breach of Implied Warranty of Fitness of Habitability)

20. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 19 above, as if fully set forth herein verbatim.

21. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

22. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiff.

FOR A THIRD CAUSE OF ACTION

(Breach of Implied Warranty of Fitness for Particular purpose)

23. The Plaintiff incorporates into this cause of action the allegations in Paragraphs 1 through 22 above, as fully as if repeated verbatim herein.

24. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

25. At the time of the sale of the subject Residences to the Plaintiff, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

26. The Defendants, at the time of the sale of the subject Residences to the Plaintiff, had reason to know that the Plaintiff was relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

27. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

28. As a result of the Defendants' breach of its implied warranties, Plaintiff has suffered physical damages.

FOR A FOURTH CAUSE OF ACTION
(Negligence)

29. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 28 above, as if fully set forth herein verbatim.

30. The construction of the subject Residences by the Defendants deviated from the normal standards of good and workmanlike practice in the construction filed in the following particulars, to-wit:

- (a) In failing and omitting to construct the residences in conformity with the applicable building codes, so as to create statutory violations;
- (b) In failing and omitting to construct the subject Residences pursuant to good and workmanlike construction practices;
- (c) In failing and omitting to install proper flashing throughout the subject Residences;
- (d) In failing and omitting to properly seal the subject Residences' exteriors to prevent water infiltration and intrusion;

31. As a direct, foreseeable and proximate result of the Defendants' negligence, Plaintiff has suffered damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)

32. Plaintiff repeats and realleges their allegations of Paragraphs 1 through 31 above as if set forth herein verbatim.

33. That the Defendants entered into a contract with the homeowners and/or predecessors-in-title, whereby the Defendants were to construct the subject homes and facilities to industry standards and in a good workmanlike proper manner.

34. The Defendants did not honor their obligations under the agreement with the Plaintiff and/or their predecessors-in-title in that they failed to construct subject Residences according to industry standards and in a good, workmanlike proper manner causing major defects to the homes.

35. That the Defendants are in breach of the parties' contracts.

36. That as a result of the Defendants' breach of contract, the Plaintiff has suffered and will continue to suffer and are entitled to recover monetary damages caused by the defective construction by the Defendants and for loss of use and diminution in value of the subject Residences.

FOR A SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

37. Plaintiff repeats and realleges the allegations contained in the above paragraphs as if more fully set forth herein.

38. The Defendants had a fiduciary duty and duty of loyalty and good faith dealing to transfer Waverly Townhomes to the control of the Plaintiff in a state of good repair. Defendants, having transferred elements with the defects and deficiencies set forth above, in the alternative is required to provide the Plaintiff with the funds necessary to bring the elements up to standard of reasonably good repair and condition.

39. Defendants breached their fiduciary duty and duty of loyalty and good faith dealing by transferring the elements in a substandard and deficient condition without the funds necessary to bring them up to standards of good repair and condition.

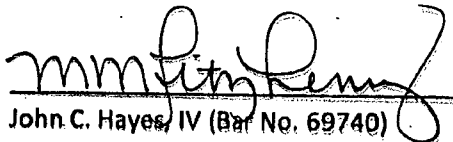
40. As a direct and proximate result and consequence of the Defendants actions, Plaintiff has suffered damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and expended, and to be required and expended, over the expected life of the buildings and other improvements, loss of use and diminution in value.

WHEREFORE, the Plaintiffs pray that this Court issue an Order granting judgment for the Plaintiff against the Defendants, jointly and severally, for the following:

(a) for actual damages in an amount to be proven at trial;

- (b) for trebled damages under S.C. Code § 39-5-10, et seq.;
- (c) for punitive damages;
- (d) for prejudgment and post judgment interest on Plaintiffs' damages;
- (e) for attorney's fees and costs; and
- (f) for such other and further relief as this Court may deem just and proper.

HAYES LAW FIRM, LLC



John C. Hayes, IV (Bar No. 69740)

Mary-Margaret S. Fitzhenry (Bar No. 71713)

180 Meeting Street, Suite 330

Charleston, SC 29401

Phone: (843) 805-7003

Fax: (843) 720-5999

jhayes@hayeslawfirm.org

mfitzhenry@hayeslawfirm.org

ATTORNEYS FOR PLAINTIFF

June 6, 2013

Charleston, South Carolina

HAYES LAW FIRM, LLC

180 Meeting Street – Suite 330
Charleston, South Carolina 29401
Tel: (843) 805-7003
Fax: (843) 573-7388

John C. Hayes, IV
Email: jhayes@hayeslaw.org

Mary-Margaret S. Fitzhenry
Email: mfitzhenry@hayeslaw.org

June 6, 2013

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: *Waverly at Hamlin Plantation Townhome Association, Inc., et al. v. John Wieland
Homes and Neighborhoods of the Carolinas, Inc., et al.*
Case No.: 2013-CP-10-_____
HLF File No.: 82.001

Dear Ms. Armstrong:

Enclosed herewith please find the original and one (1) copy of the *Summons and Complaint* with regard to the above-referenced matter. Please file the original and return the clocked-in copy to us in the stamped, self-addressed envelope enclosed for your convenience.

Also enclosed is our firm's check in the amount of \$150.00 to cover the filing fee.

Thank you for your attention to this matter. Should you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,


Mary-Margaret S. Fitzhenry

JCH/rc
Enclosures

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, Individually and as Class
Representative, Marie Labarowski, Edward and
Nancy Peyser, Francis Sills, Daniel and Suzanne
Ruth, et al.,

Plaintiff(s)

vs.

John Wieland Homes and Neighborhoods of the
Carolinas, Inc. as successor by statutory merger to
John Wieland Homes and Neighborhoods of South
Carolina, Inc., et al.,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 10- 4335

(Please Print)

Submitted By: I. Keith McCarty, Esq.

Address: McCarty Law Firm, PC
1212 Wappoo Road
Charleston, SC 29407

SC Bar #: 66447
Telephone #: 843-793-1272

Fax #:

Other:

E-mail: ikeithmccarty@gmail.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts

- ☒ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP- -
☐ Notice/ File Med Mal (230)
☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions

- ☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured
Settlement Payment Rights
Application (760)
☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission
(990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in
an Out-of-County Action (660)
☐ Sexual Predator (510)

Submitting Party Signature:

J. W. M. J.

Date: 7-11-2014

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO: 2014-CP-10- 41335

Jeffrey Sills as Class Representative,)
Marie Labarowski, Edward and Nancy)
Peyser, Francis Sills, Daniel and Suzanne)
Ruth, Stephani Adili, Marc and Brandy)
Lynn, Russell Robinson, George)
Busnach, Helen Furtado, Jessica)
Baucom, Nancy S. Coleman, Linda Glitz,)
Peggy Gerou, Shannon Bebout,)
Maryann Walsh, Patty Whitmire,)
Donald L. Tomasello and Patricia Kelly,)
Chris Leigh-Jones, Edward Ray and)
Kathy Jo Feagins, Cindy Hunt for)
Bentgrass Limited, LLC, Adam A. and)
Susan A. Sokoloski, William and Carolyn)
Barone, Michelle Ray, Eugene and)
Cynthia Ray, William Abel, Dean and)
Conny Mason, David McCartney, Paul)
and Patricia Watters, James and Andrea)
Lowry, R. Robinson, Jr., Thaddeus R. &)
Barbara A. Kuczynski, Beverly Sanders)
Carlson, Lisa Roeck, Elizabeth Jackson,)
Charles and Mary Kathleen Jenkins,)
Linda M. and Earl K. Rigler, Jr., John)
Twomey, Joe and Anita Brittain, Gilbert)
J. Hager & Kelly Hager Holmes, Carol &)
Chris Gillespie, Jarred D. Overcash,)

Plaintiffs,)

vs.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builder Support)
Services of the Carolinas, Inc.,)
Wheelock Street Capital, LLC d/b/a John)

SUMMONS
(Jury Trial Demanded)

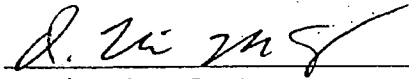
FILED
2014 JUL 11 PM 4:28
JULIE A. ARMSTRONG
CLERK OF COURT
BY _____

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Summons and Verified Complaint upon the subscribers at their office at 180 Meeting Street, Suite 330, Charleston, South Carolina within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer within the prescribed time, a judgment by default will be rendered against you for the amount or other remedy requested in the attached Complaint, plus interests and costs.

2

Respectfully Submitted,

MCCARTY LAW FIRM, PC



J. Keith McCarty, Esquire
McCarty Law Firm, P.C.
1212 Wappoo Road
Charleston, SC 29407
Tel: 843-793-1272
ikeithmccarty@gmail.com

and

John C. Hayes, IV, Esquire
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: 843-805-7003
Fax: 843-573-7388
jhayes@hayeslaw.org

ATTORNEYS FOR PLAINTIFFS

July 11th, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO: 2014-CP-10- 41335

Jeffrey Sills, Individually and as Class)
Representative, Marie Labarowski,)
Edward and Nancy Peyser, Francis Sills,)
Daniel and Suzanne Ruth, Stephani)
Adili, Marc and Brandy Lynn, Russell)
Robinson, George Busnach, Helen)
Furtado, Jessica Baucom, Nancy S.)
Coleman, Linda Glitz, Peggy Gerou,)
Shannon Bebout, Maryann Walsh, Patty)
Whitmire, Donald L. Tomasello and)
Patricia Kelly, Chris Leigh-Jones, Edward)
Ray and Kathy Jo Feagins, Cindy Hunt)
for Bentgrass Limited, LLC, Adam A. and)
Susan A. Sokoloski, William and Carolyn)
Barone, Michelle Ray, Eugene and)
Cynthia Ray, William Abel, Dean and)
Conny Mason, David McCartney, Paul)
and Patricia Watters, James and Andrea)
Lowry, R. Robinson, Jr., Thaddeus R. &)
Barbara A. Kuczynski, Beverly Sanders)
Carlson, Lisa Roeck, Elizabeth Jackson,)
Charles and Mary Kathleen Jenkins,)
Linda M. and Earl K. Rigler, Jr., John)
Twomey, Joe and Anita Brittain, Gilbert)
J. Hager & Kelly Hager Holmes, Carol &)
Chris Gillespie, Jarred D. Overcash, and)
James & Susie Lesesne,)

Plaintiffs,)

vs.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builder Support)
Services of the Carolinas, Inc.,)

VERIFIED COMPLAINT
(Jury Trial Demanded)

FILED
2014 JUL 11 PM 4:28
JULIE Y. ARMSTRONG
CLERK OF COURT
BY _____

Wheelock Street Capital, LLC d/b/a John)
 Wieland Homes and Neighborhoods,)
 Inc., Barr Construction, Inc., Benjamin)
 Mora d/b/a Mora Construction, a/k/a)
 Benjamin Mora Construction, LLC,)
 Builder's Firstsource, Inc. a/k/a Builders)
 Firstsource-Southeast Group, LLC, a/k/a)
 Builders Firstsource -Atlantic Group,)
 LLC, DBC Construction Services, LLC,)
 Gerardo Rosette Sanchez a/k/a GR)
 Painting, George Medina a/k/a JMC)
 Construction, LLC a/k/a JMC)
 Construction, Inc.; Jesus Mora ak/a J.)
 Mora Brick & Block Mason, LLC; Juan)
 Luis Sanchez, Juan Luis Sanchez a/k/a)
 Sanchez Brothers Painting; Latitude)
 Construction Services, LLC, The Muhler)
 Company, Inc., Paul M. Vasquez,)
 Richard Ditullio, Richard Ditullio a/k/a)
 ROT Contracting, LLC,)
)

Defendants.

The Plaintiffs, Jeffrey Sills, as Class Representative and the above-named Plaintiffs (hereinafter collectively referred to as "Plaintiffs"), individually and as a class of similarly situated owners of townhome units in a residential townhome community named Waverly at Hamlin Plantation complaining of the above-mentioned Defendants, allege and state as follows:

1. Plaintiffs, Jeffrey Sills is a citizen and resident of Charleston County, South Carolina, who at all times relevant hereto live in a residential community known as Waverly at Hamlin Plantation Townhomes, located in Mt. Pleasant, South Carolina, Plaintiff Jeffrey Sills further alleges and state that he is bringing this action pursuant to Rule 23, SCRPC, as representing a class composed of each and every unit owner in the Waverly at Hamlin Plantation Townhome Association, Inc., and that:

a) The class is so numerous that joinder of all members is impracticable;

- b) There are questions of law and fact common to the class;
- c) The claims of the Plaintiff, Jeffrey Sills, are typical of the claims of the class;
- d) The Plaintiff Jeffrey Sills will fairly and adequately protect the interest of the class; and
- e) The amount in controversy exceeds One Hundred Dollars (\$100.00) for each member of the class.

2. The individual Plaintiffs are citizens and residents of Charleston County, South Carolina, who at all times relevant hereto live in a residential community known as Waverly at Hamlin Plantation Townhomes, located in Mt. Pleasant, South Carolina.

3. Waverly Townhomes is a section of the residential community, Hamlin Plantation, located in Mount Pleasant, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.

4. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina and are authorized to conduct business in this state, and have a principal place of business in Charleston County.

5. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.

6. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed and constituted in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.

7. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.

8. This Court has jurisdiction over the parties and subject matter hereto.

9. The construction of Waverly Townhomes was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and experienced in performing such construction work as to properly build Waverly Townhomes according to the normal standards of good and workmanlike practice in the construction field.

10. Construction defects in the Waverly Townhomes have recently been discovered. A recent inspection of the subject Townhomes resulted in the discovery of major problems and deficiencies including but not limited to the following:

- (a) Lack of proper flashing;
- (b) Lack of proper roofing installation;
- (c) Water damage along porches;
- (d) Water intrusion, damage resulting from defects;
- (e) Improper flashing installation; and
- (f) Improper paving and drainage

11. Defendant John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc. (hereinafter referred to as "Wieland SC") is a corporation organized and existing under the laws of the State of South Carolina and, at all times relevant hereto, was authorized to and did conduct business in the State of South Carolina, County of Charleston for the purpose of planning,

developing, marketing, owning, maintaining, leasing, selling, and constructing the townhomes in a manner for sale to the public.

12. Defendant John Wieland Homes of Charleston, Inc., upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County Charleston for the purpose of planning, developing, marketing, owning, maintaining, leasing, sale, and constructing the townhomes in a manner for sale to the public.

13. Defendant John Wieland Homes, Inc., upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County Charleston for the purpose of planning, developing, marketing, owning, maintaining, leasing, sale, and constructing the townhomes in a manner for sale to the public.

14. Defendant Builder Support Services of the Carolinas, Inc., upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state.

15. Defendant Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. is a joint venture formed in November 2012 with the Wieland Defendants where John Wieland Homes and Neighborhoods, Inc. sold its assets and intellectual property to Wheelock Street Capital.

16. Defendant Barr Construction (hereinafter referred to as "Barr") upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in

Charleston County. Also, upon information and belief, Barr supplied and installed drainage materials, performed other sitework, and other work at the subject property.

17. Defendant Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC, (hereinafter "Mora Construction") upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Mora Construction supplied and installed foundation connections together with all associated and related waterproofings and flashings, and other work at the subject property.

18. Defendant Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource -Atlantic Group, LLC (hereinafter referred to as "BFS", upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, BFS performed framing, to include but not limited to installation of the water management system and installation of doors and windows, together with all associated waterproofings and flashings, installation of hurricane straps, together with all associated and related waterproofings and flashings, and other work at the subject property.

19. Defendant DBC Construction Services, LLC (hereinafter referred to as "DBC"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, DBC performed roofing

services, together with all associated and related waterproofings and flashings, and other work at the subject property.

20. Defendant Eli, Inc. (hereinafter referred to as "Eli"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Eli performed sidewalk, walkway and driveway paving services, and other work at the subject property.

21. Defendant Gerardo Rosette Sanchez a/k/a GR Painting (hereinafter referred to as "GR"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, GR performed exterior painting and caulking services, together with all related waterproofings and flashings, and other work at the subject property.

22. Defendant George Medina, Individually and d/b/a JMC Construction, LLC a/k/a JMC Construction, Inc. (hereinafter referred to as "JMC"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, JMC performed roofing services, together with all associated and related waterproofings and flashings, supplied and installed railing for balconies, porches and stairs, together with all associated and related waterproofings and flashings, supplied and installed hardiplank/cement board, together with all associated and related waterproofings and flashings, and other work at the subject property.

23. Defendant Jesus Mora a/k/a J. Mora Brick and Block Mason, LLC (hereinafter referred to as "J. Mora", upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, J. Mora supplied and installed masonry to include brick entryway steps, together with all associated and related waterproofings and flashings, supplied and installed foundation connections, together with all associated and related waterproofings and flashings, and other work at the subject property.

24. Defendant Juan Luis Sanchez, Individually and d/b/a Sanchez Brothers Painting (hereinafter referred to as "Sanchez"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Sanchez performed exterior painting and caulking services, together with all associated and related waterproofings and flashings, and other work at the subject property.

25. Defendant Latitude Construction Services, LLC (hereinafter referred to as "Latitude"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Latitude supplied and installed waterproofing for balconies and porches, together with all associated and related waterproofings and flashings, and other work at the subject property, and other work at the subject property.

26. Defendant The Muhler Company, Inc. (hereinafter referred to as "Muhler", upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Muhler manufactured, supplied, retailed, and installed windows and doors, together with all associated and related waterproofings and flashings, and other work at the subject property.

27. Defendant Paul M. Vasquez (hereinafter referred to as "Vasquez"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Vasquez manufactured, supplied, sold, and installed windows and doors, together with all associated and related waterproofings and flashings, and other work at the subject property.

28. Defendant Richard Ditullio, Individually and d/b/a ROT Contracting, LLC. (hereinafter referred to as "ROT"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and has a principal place of business in Charleston County. Also, upon information and belief, ROT performed roofing services, together with all associated and related waterproofings and flashings.

29. Upon information and belief, the above-identified Waverly Defendants were, in various capacities, individually and collectively engaged in the planning and developing of the Project, and contracted with various entities for the design and construction of the Project.

30. Upon information and belief, one or more of the Waverly Defendants were merged into one or more of the John Wieland Homes and Neighborhoods of South Carolina, Inc. and John Wieland Homes and Neighborhoods, Inc. with the intent to carry on the business of the Wieland Defendants in connection with the Project.

31. Wheelock Street Capital, LLC (hereinafter referred to as Wheelock) d/b/a John Wieland Homes and Neighborhoods, Inc., is a joint venture with the Wieland Defendants formed in November 2012.

32. Upon information and belief, the ownership of the Project was maintained uninterrupted by the Wieland Defendants during and following the aforementioned merger activities, resulting in ownership and/or control of the Project by the resulting merged entity (the resulting merged entity, including all of the affiliated, subsidiary, or other merged component entities, shall hereinafter be referred to collectively as the "Developer Defendants" and/or "Wieland").

33. The Developer Defendants are all Variable Interest Entities of (as defined by the Financial Accounting Standards Board, among other institutions and authorities) subsidiaries of, parents of, partners of, associates of, agents of, affiliated with, joint venturers, servants, instrumentalities and/or alter ego entities of each other and are responsible to the Plaintiff herein for the condition of the Project and the damages set forth herein below.

34. The Developer Defendants, along with and through their directors, officers, employees, agents, assignees, and subservient and affiliated entities, during the development of the Project and immediately after sale of the townhomes to members of the public, sought and established a special relationship with the purchasers of the townhomes, and the Developer

Defendants, at various times during and after the construction of the townhomes, breached their fiduciary duties to the purchasers in that the Developer Defendants owed dual and conflicting loyalties to themselves, to the Contractor Defendants as set forth below, to the purchasers of the townhomes, to the Association established in the Master Deed for the construction of the Project, and to the Plaintiff.

35. The Developer Defendants, along with and through their directors, officers, employees, agents, assignees, and subservient and affiliated entities had irreconcilable conflicts of interest by virtue of the dual and conflicting loyalties they owed to themselves and to the purchasers and/or tenants of the Project along with the Association established in the Master Deed for the townhomes and the Plaintiff, all of whose interests were diverse and adverse, one to the other and, as such, the Developer Defendants did not act in good faith or in a manner they could reasonably believe to be in or not opposed to the best interests of the purchasers and/or tenants of the Project along with the Association established in the Master Deed for the townhomes and the Plaintiff.

36. The Developer Defendants, along with and through their directors, officers, employees, agents, assignees, and subservient and affiliated entities, all participated in self-dealing by promoting their own interests through sacrificing the interests of the purchasers of the Project.

37. In connection with the Project, the Developer Defendants all became and/or acted as subsidiaries, parents, partners, associates, agents, affiliate, co-joint venturers, servants, instrumentalities and/or alter ego entities of each other and are responsible to the Plaintiffs herein for the condition of the Project and the damages set forth herein.

38. The Developer Defendants conducted business in connection with the Project by and through the use and control of subservient entities, and all of these entities in fact manifested no separate interest of their own, and demonstrated an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between any members of that group of corporations, shareholders, officers, agents, partners, employees, and assets.

39. The Defendants listed above including Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource -Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC; Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC (hereinafter referred to collectively as the "Contractor Defendants") provided labor, materials, goods, and services in connection with the construction of the Waverly at Hamlin Plantation Townhomes Project as contractors, subcontractors, consultants, or independent contractors, or which manufactured, fabricated, and/or otherwise provided construction and building materials, equipment and goods for use in connection with the construction of the Project; and these entities provided labor, materials, goods, and services associated with the original construction of the Project, and the work of each of these defendants was deficient and defective and resulted in damages to the Plaintiffs as set forth below.

40. All Defendants were instrumental in carrying out duties and actions relating to the construction of the Project, and each of these defendants had independent duties under South

Carolina law to perform their duties in a good and workmanlike manner and in accordance with applicable building codes and accepted building practices.

JURISDICTION

41. Personal jurisdiction is vested and exists in the Court of Common Pleas, County of Charleston, State of South Carolina, and venue is proper in the County of Charleston, State of South Carolina, by virtue of, among other things, the fact that the property which is the subject matter of the Complaint is located in Mt. Pleasant, South Carolina, and the great majority of the activities relating to the Project and the claims herein occurred in this jurisdiction.

BACKGROUND

42. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

43. Plaintiffs are informed and believe that the Developer Defendants engaged contractors to construct the Project including 105 properties, and related facilities and amenities, collectively known as Waverly at Hamlin Plantation, which were thereafter substantially completed, and contained various buildings. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project and/or are liable for the actions of the original Developer of the project.

44. The Developer Defendants created and controlled numerous and various entities including, but not limited to, the John Wieland Homes and Neighborhoods of South Carolina, Inc., Builder Support Services of the Carolinas, and Wieland Defendants set forth hereinabove, for the sole purpose of the construction, development, purchase of property, sale of property, leasing of townhomes, and other activities solely relating to development and leasing of the townhomes

that were known as Waverly at Hamlin Plantation. The Developer Defendants created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of the Developer Defendants to achieve their financial goals and to perpetrate the activities more particularly described herein. The subservient entities in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the Developer Defendants and the sham entities, shareholders, officers, agents, partners, employees, assets, and each of them.

45. By way of example, the Wieland Defendants included entities which were created to perform single purpose functions in order to effectuate the sole will of the Developer Defendants in purchasing, developing, leasing, and/or selling the homes. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, the Developer Defendants and the Individual Developer Defendants actively and directly participated in the development, purchase, sale, management, leasing, and/or operations of the Project, and in fact put the same into the stream of commerce.

46. The sham entities established by the Developer Defendants were and are characterized by one or more of the following: (1) being undercapitalized; (2) failing to observe corporate formalities; (3) failing to pay dividends; (4) insolvency; (5) lack(ed) proper records; (6) siphoning of funds by its members and/or affiliates; and (7) was used as a mere facade for the operation of the dominant shareholders, members, associates, and affiliates. Upon information and belief, each shared the same mailing address, their business was conducted on the letter

head of the Developer Defendants, the Developer Defendants directly received payment and disbursed payment for obligations relating to the sham entities, the sham entities had no shareholders and/or officers of their own, no separation of accounting and bookkeeping functions, and/or the Developer Defendants directly contracted for the sham entities in the name of the Developer Defendants.

47. The Developer Defendants directed and oversaw those listed as Defendants herein and contractors including the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

48. The Developer Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of units, and other activities solely relating to the Project which is the subject of this action.

49. There would exist a broad element of injustice and fundamental unfairness of the acts of the Developer Defendants, and each of them individually, were not regarded as the acts of one another.

50. The Defendants began the process of constructing the townhomes by engaging and directing the actions of the various contractors and/or subcontractors named as Defendants herein, and participated in the negligent, deficient, and shoddy workmanship which ignored and/or covered up design and construction defects then in existence and, thereafter, placed the

units into the stream of commerce for sale, which they did sell to the general public and, in particular, to the current owners who are members of the Association:

51. The Developer Defendants, by and through their instrumentalities and alter-ego entities, controlled and operated the Association and its Board of Directors prior to turning over control of the Waverly Association. During this period, the Developer Defendants attempted to carry out construction prior to, during and after the time they offered and sold said townhome units. This work was attempted to be performed by contractors engaged by the Developer Defendants for the purpose of expediting the sales process and was calculated for the purpose of, or through careless, reckless, negligent and grossly negligent conduct by the Developer Defendants, resulting in the concealing, fabricating, patching, hiding, and/or cloaking of the deficiencies and damage known, both actually and constructively, to the Developer Defendants and/or their affiliates, subservient entities, agents, and assigns.

52. At the time the units were offered for sale and placed into the stream of commerce by the Developer Defendants, the units contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of the Developer Defendants.

53. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

54. These latent building defects have, unbeknownst to Plaintiff, regularly resulted in water intrusion into the buildings and property damage and continue to do so through the date of this filing.

55. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

56. The Plaintiffs suffered damages when the Developer Defendants put these units into the stream of commerce and continue to be damaged through the date of this filing.

57. The Developer Defendants failed to make a sufficient inquiry into the conditions of the Project in order to establish adequate financial reserves for maintenance and repair of the Project, and instead provided inaccurate and misleading information to third-parties in the research and establishment of the reserve figures, and thereby provided inaccurate and misleading reserve requirements and related information to the general public, prospective purchasers, and to the Plaintiffs, both before and after tendering control of the Association and the common elements to the homeowners, all resulting in damages to the Plaintiffs and in violation of South Carolina law, the Master Deed, and the By-laws.

58. The Developer Defendants controlled and managed the Association and its Board of Directors through the use of its subservient entities prior to the tender of the control over the Association to the unit owners; and the Developer Defendants negligently failed to provide sufficient and reasonable information and resources for the proper management and maintenance of the Project; and in fact negligently provided insufficient, inaccurate, and

misleading information and prevented the use of financial and other resources required for the proper management and maintenance of the Project, all of which resulted in continued and exacerbated damages to the Project and suffered by the Plaintiffs.

59. The Developer Defendants were engaged in a joint venture, partnership, or other legal or de facto relationship with each other.

60. The Developer Defendants caused, directed, participated in, or acted in willful, reckless, heedless, negligent and grossly negligent disregard of their collective and respective acts and omissions in the planning, development, design, construction, management and sale of the units in the Project, all as more fully described herein.

61. The Developer Defendants represented to the public over the internet and through various publications and other media that they, by and through their various affiliates, entities, venturers, and agents referenced herein, were qualified, experienced, and would in fact be directing, managing, and otherwise facilitating the construction and selling of the units, and these representations were relied upon by the Plaintiffs.

62. Prior to and until transferring control of the Waverly Association to the unit owners and a newly elected Board of Directors comprised of unit owners, the Developer Defendants, through their subservient and affiliated entities, employees, and agents, had a duty to serve as Board members and to conduct the business of the Waverly Association, had authority and control over, and in fact controlled and directed the Waverly Association Board of Directors and dictated all of the Board's activities.

63. In conjunction therewith, the Developer Defendants in their capacity as Board members and otherwise, in a negligent manner, carelessly, willfully, wantonly, and with reckless

disregard for the rights of the Plaintiffs, participated in, acquiesced in and caused the wrongful acts and omissions described herein.

64. These collective and respective wrongful acts and omissions of the Developer Defendants and such other Defendants as set forth in the causes of action below, represent unfair trade practices and have resulted in substantial deterioration and/or failure of structures and building systems, building deficiencies, actual, incidental, special and consequential damages and loss of use. Remedying the above wrongful acts will result in actual, incidental, consequential, and special damages including loss of use to the Plaintiffs and its members, and entitle Plaintiffs and its members to punitive damages and attorney's fees. Further, these wrongful acts and omissions have directly and proximately caused substantial diminution in value, both pre- and post-repair.

65. The acts and omissions of the Defendants were contrary to the duties they owed, individually and collectively, to the Plaintiffs and actually caused damages to the Plaintiffs including, but not limited to, damages which did not result from the acts and omissions of other defendants and including, but not limited to, damages other than damages which resulted in physical injury or damage to tangible real and personal property in connection with this Project.

AS A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence, Professional Negligence, and Gross Negligence)

66. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

67. Defendants, and each of them, owed a duty to Plaintiffs to act in a manner compliant with the reasonable standard of care, good faith, and fair dealing recognized under South Carolina law, and Defendants violated this duty to the Plaintiff and were negligent,

professionally negligent, grossly negligent, careless, reckless, willful and wanton in one or more of the following particulars:

- a) in failing to properly design, construct, develop and repair the townhomes;
- b) in failing to comply with the applicable Building Codes of the County of Charleston, the City of Mt. Pleasant and the State of South Carolina;
- c) in failing to comply with the applicable Fire and Safety Codes of the County and of Charleston, the City of Mt. Pleasant and the State of South Carolina;
- d) in failing to properly design and construct the structural elements and the foundation and other elements of the Project to permit the existence of an adequate and sufficient program for the treatment, extermination, eradication, colony control, and/or termite control of any kind on the Project in accordance with industry standards, due care, and applicable law prior to the sale of the units;
- e) in failing to establish and maintain a sufficient program for the treatment, extermination, eradication, colony control, and/or termite control of any kind on the Project in accordance with industry standards, due care, and applicable law prior to the sale of the units;
- f) in failing to properly supervise the project developer entities and individuals, project architects and engineers, as well as contractors, subcontractors, suppliers and/or agents or employees of any of them in connection with the planning, development, design and construction of the townhomes offered for sale to the public;
- g) in manufacturing, fabricating, preparing for the incorporation into a residential building, reviewing, approving, procuring, and incorporating into the construction of this project such items which were defective, deficient, inferior, inadequate, unsafe, dangerous, inappropriate for the use intended, noncompliant with approved design or design intent, non-compliant with applicable codes and standards in the industry, and otherwise improper for use in the project including, but not limited to, HVAC systems, mechanical systems, plumbing systems, drainage systems, and sewer line systems without appropriate clean-out piping and/or other issues; electrical systems and equipment, interior and exterior drywall and other substrate and sheathing material, windows, insulation, roofing, waterproofing systems, and other building materials and supplies, finishes, and other items relating to the construction and ultimate use of this residential project;

- h) in designing, constructing, marketing, selling, units and/or property with defective windows;
- i) in designing, constructing, marketing, selling, units and/or property with inadequate flashing;
- j) in designing, constructing, marketing, selling, units and/or property with inadequate roofs;
- k) in designing, constructing, marketing, selling, units and/or property with inadequate water barriers;
- l) in designing, constructing, marketing, selling, units and/or property with without weather proof building envelopes and exteriors;
- m) in designing, constructing, marketing, selling, units and/or property which were defective, deficient, inadequate, unsafe, dangerous, or otherwise non-compliant with codes and standards;
- n) in placing defective and inferior construction into the stream of commerce;
- o) in placing defective and inferior manufactured systems, equipment, building materials and other products into the stream of commerce.
- p) in failing to permit and facilitate a proper evaluation of the condition of the Project prior to and during the process of offering units and other property for the use and sale to the general public and, further, to obstruct and/or hinder efforts to conduct a proper evaluation of the Project by intended purchasers or users;
- q) in misrepresenting the condition of the units, common elements, garages and other property to prospective and actual purchasers and other users, and in making representations in negligent and/or intentional disregard of whether these representations were false or inaccurate;
- r) in failing to undertake sufficient actions to develop a plan for repairs and otherwise failing to make adequate repairs to conditions at the project which were unsafe, dangerous, or otherwise not in compliance with applicable building codes or other authorities or standards of care;
- s) in negligently and/or intentionally covering up deficiencies prior to construction of the units and other property for sale or use by the general public;

- t) in failing to determine accurate information required, failing to disclose the absence of such information, as well as negligently and/or intentionally providing misleading and inaccurate information regarding the proper level of financial capitalization and reserve funding required for the operations, maintenance, and repairs required by the Waverly Association for the Project and individual unit owners;
- u) in tendering common elements and other property to Plaintiffs in a deficient condition;
- v) in failing to act as reasonable persons would in circumstances then and there prevailing and in such other failures as will be shown during discovery and at trial.

68. Said failures above-described, as well as the Defendants' gross negligence, willfulness, and reckless disregard for the rights of Plaintiff and others, have actually and proximately caused damages to Plaintiffs, and the Defendants are liable to the Plaintiffs in an amount of actual, incidental, consequential, special, and punitive damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SECOND CAUSE OF ACTION
(Against the Developer Defendants and Contractor Defendants)
(Negligent Misrepresentation)

69. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

70. These reports and representations were actually published and presented for information to the general public by these Defendants, and these representations were actually

received by, and relied upon by, the prospective and actual purchasers of the townhomes at the Project.

71. At the time of the sale of the homes and the turnover of control of the Waverly Association from the Developer Defendants to the unit owners, Plaintiff was not aware of the falsity of the representations or the lack of investigation and lack of candor by these Defendants in connection with the reports.

72. Plaintiff subsequently determined that the representations made by these Defendants were false and that these Defendants failed to exercise due care, not only in failing to discover defects in the project, but also in failing to communicate information about the true condition of the Project. As a result of its justifiable reliance on the representations, reports, and other documents presented by these Defendants, Plaintiffs and its members have assumed control over the Project and/or purchased units, and have thereby suffered pecuniary losses in an amount to be determined by the trier of fact.

73. As a direct and proximate result of its justifiable reliance on numerous false representations made by these Defendants in connection with the Project, Plaintiffs have suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A THIRD CAUSE OF ACTION
(Against the Contractor Defendants and the Developer Defendants)
(Breach of Implied Warranty)

74. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

75. The design, construction, development and sale of the units by these Defendants contained as a matter of law implied warranties of good faith and fair dealing, fitness for use, merchantability, habitability, and workmanship with respect to construction, which warranties were not effectively disclaimed under South Carolina law.

76. The Developer Defendants, whether named or unnamed on the Deeds of Transfer, through their acts and/or omissions, have breached the aforesaid implied warranties, which directly, actually, and proximately caused and resulted in damage which the Plaintiffs have suffered and continues to suffer in an amount to be determined by the trier of fact.

77. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness of Habitability)

78. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

79. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

80. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiffs.

AS A FIFTH CAUSE OF ACTION

**(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness for Particular Purpose)**

81. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

82. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

83. At the time of the sale of the subject Residences to the Plaintiffs, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

84. The Defendants, at the time of the sale of the subject Residences to the Plaintiffs, had reason to know that the Plaintiffs were relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

85. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

86. As a result of the Defendants' breach of its implied warranties, Plaintiffs have suffered physical damages.

AS A SIXTH CAUSE OF ACTION
(Against the Developer Defendants and Contractor Defendants,)
(Breach of Implied Warranties as to the Project's Development and Construction)

87. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

88. These Defendants engaged in conduct during the period of development and construction of the Project which gave rise to duties and implied warranties to the public including, but not limited to, tenants, purchasers and other users of the Project, in that by their conduct these Defendants placed the Project, which constitutes defective, deleterious, and dangerous property, into the stream of commerce.

89. The placement of the Project into the stream of commerce by these Defendants, contained as a matter of law implied warranties of fitness, merchantability, workmanship and habitability, which warranties were not effectively disclaimed pursuant to South Carolina law.

90. As a direct and proximate result of the breaches of the above-described implied warranties by these Defendants, their affiliates, associates, sham entities, and/or joint venturers, whether named or unnamed on any documents transferring interest in the Project, the Plaintiffs has suffered and will continue to suffer damages, injuries and other losses.

91. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SEVENTH CAUSE OF ACTION
(Individual Liability as to the Developer Defendants)

92. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

93. As a direct and proximate cause and result of the acts and omissions of these Defendants as aforesaid, Plaintiffs have been damaged, and these Defendants are liable to the Plaintiffs for actual, incidental, consequential, and special damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A EIGHTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, et seq.)

94. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

95. These Defendants' construction and the subsequent offering and sale of the units, along with the issuance of the property condition reports and other representations to tenants, purchasers, and the public at large, constituted the conduct of trade and commerce within the meaning of S.C. Code Section 39-5-20(a).

96. The Defendants, and each of them, through their acts and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 39-5-140(a) and 27-31-430, S.C. Code of Laws as amended:

- a) in failing to properly evaluate the plans and specifications for the Project prior to construction;
- b) in failing to conduct a reasonable inquiry into the conditions existing at the Project and marketing the units, common elements, and other property at the Project to the public for sale and use;
- c) in failing to repair the latent defects about which these Defendants were or should have been aware;
- d) in failing to carry out the fiduciary duties owed to prospective and actual purchasers and other members of the public in their special relationships of trust and confidence by virtue of their role in the process of offering these units, common elements, and other property for sale and use by the general public, as design professionals, licensed professionals, and sellers according to South Carolina law, and as Board Members and Directors of the Waverly Association;
- e) in attempting to disclaim implied warranties of merchantability and habitability in documents contrary to South Carolina law;
- f) in failing to provide any additional consideration for these purported efforts to waive implied warranties of merchantability and habitability;
- g) in failing to properly investigate the true conditions of the Project and putting them into the stream of commerce;
- h) in making false representations as to the condition of the Project and/or representations as to the condition of the Project in reckless disregard as to the truth of the representations;
- i) in failing to analyze relevant data and conditions to determine adequate capital reserves for maintenance and operation of the Project by future owners and users;
- j) in failing to provide adequate capital reserves and projections for adequate reserves for maintenance and operation of the Project prior to selling units and other property and prior to turning control of the Waverly Association over to the unit owners;

97. The conduct of the Defendants as described above was knowing and willful, and Defendants knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.

98. Plaintiffs are persons within the meaning of S.C. Code Section 39-5-140(a) and Plaintiffs have suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of these Defendants, in an amount to be determined by the trier of fact.

99. The aforesaid acts of Defendants impact the public interest in that they constituted unfair and deceptive acts and have the potential for repetition and, in fact, occurred at each and every sale of the units of this Project and, as such, are acts which can, have and will affect the public at large by repetition.

100. These unfair and deceptive acts are acts which will affect members of the public, beyond the parties to the above-described transactions, in the form of other consumers who may be injured by purchasing townhomes by the Defendants and/or rely upon the actions and representations of these Defendants thereby placing members of the public in danger of physical and other injuries.

101. Plaintiffs are entitled to be compensated pursuant to S.C. Code Section 39-5-140(a) for the above-described actual, incidental, consequential, and special damages, as well as costs, interest, and attorney's fees, and to recover three (3) times these damages by reason of the knowing and willful nature of the unfair and deceptive acts by Defendants and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A NINTH CAUSE OF ACTION
(As to the Developer Defendants)
(Breach of Fiduciary Duty by Initial Board Members of the Waverly at Hamlin Plantation
Townhome Association, Inc.)

102. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

103. These Defendants, at all times during which they were Directors of the Waverly Association Board and/or the Board of the Waverly Association's predecessor entity, were charged with the duty of administration, care and maintenance of the regime property and its common elements according to the terms of the Master Deed and with safeguarding any interests and rights of the members, both present and future, of the regime as unit owners or they undertook such duties.

104. These Defendants breached these obligations by their acts and omissions such that they have committed breaches of fiduciary duties, negligence, gross negligence, recklessness, willfulness, wantonness, bad faith, mismanagement, self-dealing and waste with respect to their duty of administration, care and maintenance of the regime property and their duty to protect the interests and rights of the individual members of the Waverly Association, along with their duty to protect and preserve the regime property. These wrongful acts and omissions have caused and will cause the Plaintiffs to incur and continue to incur substantial monetary damages.

105. These Defendants owed a duty to Plaintiffs to exercise that degree of skill necessary to insure that the regime property was properly maintained and to keep the owners informed of serious defects found or discovered and to protect the owners' property interest in conformity with customary and ordinary standards.

106. These Defendants held themselves out to the public as qualified and experienced in the administration and management of multifamily residential properties and, in particular, the Developer Defendants held themselves out as qualified and experienced in the building of townhomes, and these representations of experience and qualifications were imputed to the Developer Defendants by virtue of their legal relationship and appearance to the public as an indistinguishable single entity by and through the operation of the various individuals and affiliated entities.

107. These Defendants' negligent, reckless and willful conduct includes, but is not limited to:

- a) failing to properly inform the tenants, prospective purchasers, and unit owners of the conditions known or which should have been known at the time each owner purchased a unit;
- b) failing to properly oversee the regime in order to ensure that all defects discovered by the Defendants or which should have been discovered by the Defendants, were reported so that repairs could proceed in accordance with the customary and ordinary standards of construction at the expense of the Defendants;
- c) failing to report the defective conditions of the Project to any owners or the Plaintiff at the time of the turnover to the Waverly Association;
- d) failing to inform the Board and the individual unit owners of the true nature of the defective conditions of the townhome property at the time of turnover;
- e) placing their loyalties to themselves and/or their affiliated entities above the loyalties they owed to Plaintiffs and unit owners;
- f) failing to raise sufficient capital through assessments or otherwise from the Defendants prior to turnover so that adequate funds would be available to mitigate the substantial damages which were and are resulting from the aforementioned significant design and construction defects and deficiencies; and

14-4335

g) participating in self-dealing, sacrificing the Waverly Association's and the unit owners' interests for their own interests and the interests of themselves and/or their affiliated entities;

h) failing to reasonably plan or anticipate the adequate reserve for insurance premiums required to be paid by the Waverly Association, and resigning from the Board of Directors of the Association and ceding control over the Association to the unit owners.

108. As a direct and proximate result and consequence of the aforementioned negligent, grossly negligent and reckless acts or omissions of these Defendants, Plaintiffs have and will continue to be required to spend substantial sums of money in connection with the extraordinary repairs and reconstruction of the Project and the associated loss of use and other damages.

109. The Defendants' breaches of duty, acts, errors, and omissions as set forth above caused, among other damages: physical injury to tangible property; a resulting loss of use of that property; and Plaintiffs resulting money damages due to budget deficits and special assessments; all of which were directly and proximately caused by and resulting from the Defendants' negligence, willfulness, wantonness, and recklessness directly related to the mismanagement of the Project by the Defendants prior to turning over control of the Project to the Waverly Association Board.

110. Each of the wrongful acts of the Defendants as described above that occurred in connection with the mismanagement of the Project constituted gross negligence and were more than momentary thoughtlessness, inadvertence or error in judgment on the part of the Defendants with regard to representations consisting of either affirmative statements or silence when there was a duty to speak; instead, these wrongful acts or omissions constitute a complete lack of care and conscious indifference to the rights, welfare or property of the Plaintiff, tenants,

prospective purchasers, and unit owners, and were intended to cause financial harm to the Plaintiff and its members.

111. The Defendants as described above had a fiduciary relationship and owed fiduciary obligations and duties to Plaintiffs.

112. The Defendants as described above at all relevant times were or should have been aware of, among other things, the extensive and severe construction defects and deficient conditions at the Project. The Defendants' failure to properly investigate the extent of the defects and problems; their failure to properly investigate the extent of these defects and problems; their failure to properly mitigate the damaging effects of these problems and defects; and their failure to properly safeguard the rights and interests of Plaintiffs, all constitute breaches of their fiduciary obligations to Plaintiffs.

113. Upon information and belief, Defendants purposely withheld their knowledge of the above-described defects, despite receiving notification thereof, and problems from Plaintiffs or consciously failed to investigate the defects knowing that the Defendants would find defects to the extreme detriment of Plaintiffs and against the Plaintiffs' pecuniary interest. In failing to notify Plaintiffs, these Defendants knowingly caused Plaintiffs to become responsible for and liable for the above-described needed extraordinary repairs and reconstruction expenses such that these Defendants breached their fiduciary duties owed to Plaintiffs including, but not limited to, the duty to perform, the duty of care and skill, the duty of good conduct, the duty to give information, the duty to keep and render accounts, and the duty to act only as authorized.

114. As a direct and proximate result of their breaches of their fiduciary duties to the Plaintiffs, these Defendants are liable to the Plaintiffs for the actual, direct, consequential,

incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS AN TENTH CAUSE OF ACTION
(As to the Developer Defendants)
(Breach of Fiduciary Duty)

115. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

116. These were required to use good judgment and act in the utmost good faith to complete the formation of and operate the Waverly Association until it was turned over to the unit owners' control.

117. Prior to ceding control over the Waverly Association to the unit owners, these Defendants had the unilateral ability to determine the assessments against individual owners and were required to fund shortfalls between the assessments necessary to perform the duties and obligations of the Master Deed and By-laws and the assessments actually collected from individual unit owners.

118. These Defendants failed to establish and provide adequate capital reserves and projections for the sufficient maintenance and repair of the Project prior to turning the Waverly Association over to the unit owners, in that the limited repairs and maintenance done were substandard and inadequate and were intended to and, in fact did, conceal instead of correct the latent defects that existed in the Project and of which these Defendants were or should have been aware.

119. These Defendants sought and obtained a special relationship of trust and confidence with the Plaintiffs and, as such, these Defendants owed a fiduciary duty to the Plaintiffs to ensure that the Project was safe, habitable, and in good repair at the time the Project was turned over to the Waverly Association, and/or these Defendants were required to provide funds sufficient to bring the Project to a safe, habitable and code-compliant condition and in good repair as required by South Carolina law.

120. These Defendants owed a duty to the Plaintiffs to turn over the Project including, but not limited to, its common areas in a safe, habitable, code-compliant condition and in good repair.

121. These Defendants negligently, carelessly, recklessly, willfully and wantonly failed to turn over common areas, units, and other property that was safe, habitable, in code-compliant condition and in good repair, and failed to establish guidelines and plans to ensure that the property interests of the Plaintiffs would be preserved and protected in conformity with the customary and normal standards in the townhome management industry.

122. These Defendants further failed to establish and provide sufficient capital replacement reserves at the time of the turn over to effectuate the necessary repairs and to bring the substandard conditions up to a state of code compliance and good repair.

123. As a direct and proximate result of the negligent, reckless, willful, wanton and grossly negligent conduct of these Defendants, Plaintiffs have and will continue to be required to expend substantial sums of money in order to investigate, design, repair and implement the necessary repairs and alterations to bring the Project to a condition which is consistent with the representations made by the Developer Defendants in property condition disclosures made

during the construction and sale process for units at the Project, and Plaintiffs will suffer other and further injuries, damages, and losses as a direct and proximate result of the acts and omissions of these Defendants.

124. As a direct and proximate result of their breaches of their fiduciary duties to the Plaintiffs, these Defendants are liable to the Plaintiffs for the actual, direct, consequential, incidental, special, and punitive damages to the Plaintiffs as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A ELEVENTH CAUSE OF ACTION
(Against the Developer Defendants)
(Breach of Contract)

125. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

126. These Defendants entered into oral and/or written contractual arrangements with Plaintiffs relating to the representation in a purchase and sale transaction, as well as the purchase of units and other property within the Project, and the right to beneficial use of common elements and amenities to be established, coordinated, and managed by these Defendants, and these Defendants received consideration which was adequate and accepted pursuant to the terms of the Defendants' offer of ownership, goods, and/or services which were accepted by the Plaintiff.

127. Based upon the terms of their contractual agreements, along with the duties which flowed from these Defendants by virtue of the Master Deed and By-laws, real estate

agency or other agreements for representation by these Defendants, and the purchase agreements for individual townhome units and other property interests at the Project, these Defendants owed a contractual obligation to Plaintiffs which required that these Defendants ensure that the Project was safe, habitable, code-compliant, and in a condition consistent with these Defendants' representations prior to turning over control of the Project to the unit owners or, in the alternative, these Defendants had a duty to establish and fund sufficient capital reserves which could be used by the Plaintiffs to repair any of these deficient and defective conditions at the Project.

128. In breach of these contractual obligations and in breach of the Master Deed, By-laws, and real estate agency and other agreements, these Defendants failed to make a full investigation of conditions at the Project, and failed to disclose the existence of the known defects at the Project, which constitutes a breach of contract and violation of the terms of the Master Deed and By-laws by these Defendants as described above.

129. In addition to and accompanying this breach of these contractual and other obligations, these Defendants made material representations which were false as more fully described in this Complaint which the Plaintiffs relied upon to the Plaintiffs detriment.

130. As a direct and proximate result thereof, Plaintiff have and will continue to suffer, and the actual, incidental, special, and consequential damages and other injuries including, but not limited to, the damages and injuries associated with the acts and omissions which constituted the breach of contract by these Defendants as aforesaid, all in an amount to be determined by the trier of fact.

131. These Defendants are therefore liable to the Plaintiffs for the actual, incidental, special, and consequential damages and other injuries as aforesaid in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A TWELFTH CAUSE OF ACTION
(Against the Developer Defendants)
(Violation of the Residential Property Condition Disclosure Act)

132. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

133. These Defendants were engaged in a joint venture, partnership, or some other form of business venture or association including, but not limited to, the formation of a Limited Liability Company, in connection with the development and construction of the Waverly at Hamlin Plantation Townhomes.

134. The Developer Defendants did so place the townhome units into the stream of commerce for sale to the general public and to the members of the Waverly Association in particular.

135. At all times relevant to this cause of action the Developer Defendants were "owners" as that term is used within S.C. Code Ann. § 27-50-10 *et seq.*, referred to as the "South Carolina Residential Property Condition Disclosure Act" (referred to in the remainder of this cause of action as the "Act").

136. The Developer Defendants failed to furnish to the purchasers of the townhome units a written disclosure statement in conformity and compliance with S.C. Code Ann. § 27-50-40.

137. These Defendants failed to inform the sellers of the units of their obligations under the Act and had reasonable cause to suspect that the information, if any, supplied by the sellers to the individual purchasers was inherently false, incomplete, and misleading.

138. Upon information and belief, notwithstanding the above-described failures of these Defendants, and each of them, knowingly violated and/or failed to perform the duties described in § 27-50-40.

139. The nature of the defects that were undisclosed in violation of § 27-50-40, prevented and/or limited any inspection performed by the Plaintiff to uncover or discover the said defects.

140. As a direct and proximate result of these Defendants' violations of their respective and collective duty to furnish written disclosure to the purchasers as required by § 27-50-10, *et seq.*, the Plaintiff has suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, along with costs, interest, and attorney's fees pursuant to the remedies set forth in the Act, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A THIRTEENTH CAUSE OF ACTION
(Against the Developer Defendants)
(Strict Liability)

141. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

142. Each and every townhome unit sold by these Defendants was a product within the meaning of S.C. Code Section 15-73-10, *et seq.*

143. These Defendants are and were engaged in the business of selling the aforesaid townhome units which are within the meaning of S.C. Code Section 15-73-10, *et seq.*

144. The aforesaid townhome units/products were expected to, and in fact did, reach the Plaintiffs herein as Users or Consumers without substantial change in condition in which it was sold within the meaning of Section B of S.C. Code 15-73-10, *et seq.*

145. The townhome units/products which were sold by these Defendants were at the time of sale in a defective condition, unreasonably dangerous to Plaintiff as a User or Consumer or to the Plaintiffs property and, as such, these Defendants are strictly liable to Plaintiff as Users or Consumers herein for the physical harm and damage proximately caused thereby.

146. As a direct and proximate result thereof, Plaintiffs as Users or Consumers have suffered, and these Defendants are liable to the Plaintiffs for, actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTEENTH CAUSE OF ACTION
(Against Developer Defendants)
(Alter Ego Liability and Piercing the Corporate Veil)

147. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

148. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project, and the Developer Defendants combined and joined together through various instrumentalities and alter egos to facilitate to process of building the townhome units in or about 2006-2007.

149. The Developer Defendants created and controlled numerous and various entities including, but not limited to, the Wieland Defendants, Builder Support Services, Inc. and Wheelock, set forth hereinabove, for the sole purpose of the construction, development, purchase of property, sale of property, leasing of townhomes, and other activities solely relating to development and sale of the townhomes that are known as the Waverly at Hamlin Plantation Townhomes. The Developer Defendants created and controlled numerous and various entities including, but not limited to, Wieland, for the sole purpose of the building and sale of the townhomes at the Project. These Defendants created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of these Defendants to achieve their financial goals and to perpetrate the activities more particularly described herein. The subservient entities in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests,

entities, and activities so as to blur the legal distinction between these Defendants and the sham corporations, shareholders, officers, agents, partners, employees, assets, and each of them.

150. These Defendants created entities which were created to perform single purpose functions in order to effectuate the sole will of these Defendants in purchasing, developing, leasing, and/or selling the units. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, these Defendants actively and directly participated in the development, purchase, sale, management, leasing, and/or operations of the Project, and in fact put the same into the stream of commerce.

151. These Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of units, and other activities solely relating to the Project which is the subject of this action.

152. The sham entities established by these Defendants were and are characterized by one or more of the following: (1) being undercapitalized; (2) failing to observe corporate formalities; (3) failing to pay dividends; (4) Insolvency; (5) lack(ed) proper records; (6) siphoning of funds by its members and/or affiliates; and (7) was used as a mere facade for the operation of the dominant shareholders, members, associates, and affiliates. Upon information and belief, each shared the same mailing address, their business was conducted on the letter head of these Defendants, these Defendants directly received payment and disbursed payment for obligations relating to the sham entities, the sham entities had no shareholders and/or officers of their own,

no separation of accounting and bookkeeping functions, and/or these Defendants directly contracted for the sham entities in the name of these Defendants.

153. These Defendants directed and oversaw the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

154. There would exist a broad element of injustice and fundamental unfairness if the acts of these Defendants, and each of them individually, were not regarded as the acts of one another.

155. At the time the units were offered for sale and placed into the stream of commerce by these Defendants, the units contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of these Defendants.

156. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

157. These latent building defects have, unbeknownst to Plaintiffs, regularly resulted in water intrusion into the buildings and property damage and continue to do so through the date of this filing.

158. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

159. The Plaintiffs suffered damages and injuries when these Defendants put these units into the stream of commerce and continue to be damaged and injured through the date of this filing.

160. As a direct and proximate result thereof, these Defendants are liable to the Plaintiffs for actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

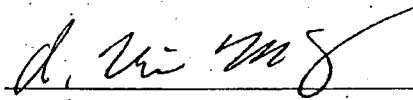
WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- a) Enter judgment in favor of the Plaintiffs and against all Defendants, jointly and severally, in an amount to be determined for actual, incidental, consequential, special, and punitive damages.
- b) Find that the Defendants have engaged in unfair trade practices and knowingly did so thereby entitling Plaintiffs to treble damages.
- c) Award attorneys' fees and costs to the Plaintiffs; and
- d) Award such other and further relief as the Court may deem just and proper.

[Signature Page to Follow]

Respectfully Submitted,

MCCARTY LAW FIRM, PC

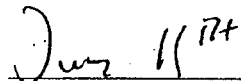


I. Keith McCarty, Esquire
1212 Wappoo Road
Charleston, SC 29407
Tel: 843-793-1272
ikeithmccarty@gmail.com

and

John C. Hayes, IV, Esquire
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: 843-805-7003
Fax: 843-573-7388
jhayes@hayeslaw.org

ATTORNEYS FOR PLAINTIFFS

 2014
Charleston, South Carolina

2014-CP-10-4335⁸²

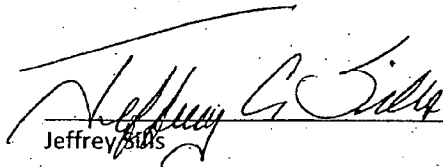
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JULIE ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)

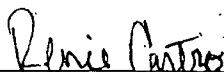
COUNTY OF CHARLESTON)

VERIFICATION

PERSONALLY APPEARED before me Jeffrey Sills, who being duly sworn, says that he is a Plaintiff in the foregoing action and makes this Affidavit based upon his personal knowledge; that he has read the allegations in the foregoing Complaint and that the same are true of his own knowledge, except those matters that state on information and belief, and as to those matters, he believes them to be true.


Jeffrey Sills

SWORN to before me this
11th day of July, 2014


Notary Public for South Carolina

My Commission Expires: 8/13/18

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. and Barbara A. Kuczynski, Beverly Sanders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gillespie, Jared D. Overcash, and James and Susie Lesesne,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-10-4335

DEFENDANTS JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC. AS SUCCESSOR BY STATUTORY MERGER TO JOHN WIELAND HOMES AND NEIGHBORHOODS OF SOUTH CAROLINA, INC., JOHN WIELAND HOMES OF CHARLESTON, INC., JOHN WIELAND HOMES, INC., AND BUILDER SUPPORT SERVICES OF THE CAROLINAS, INC.'S ANSWER TO COMPLAINT, CROSS CLAIMS AND THIRD-PARTY COMPLAINT

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 OCT -6 PM 3:50

FILED

Mora Construction, LLC, Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource-Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; Jesus Mora a/k/a J, Mora Brick & Block Mason, LLC; Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC,

Defendants.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the Carolinas, Inc.,

Third-Party Plaintiffs,

vs.

Eli, Inc.,

Third-Party Defendant.

The Defendants identified as John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., and Builders Support Services of the Carolinas, Inc. (hereinafter collectively referred to as "Wieland"), through their below-signed attorneys, answering the Complaint of the Plaintiffs above-named, and by way of cross claims and third-party

complaint, allege as follows:

1. They are without information sufficient to form a belief as to the allegations of Paragraph 1 and therefore deny the same and demand strict proof thereof.
2. They admit, upon information and belief, the allegations of Paragraph 2.
3. They deny the allegations of Paragraph 3 as stated but admit only that Wieland was the developer and general contractor for the townhomes; however, actual construction was performed by others.
4. Answering the allegations of Paragraph 4, they crave reference to the applicable corporate and business filings and documents for their exact terms and contents and deny any allegations inconsistent therewith.
5. They deny the allegations of Paragraphs 5 through 7.
6. The allegations of Paragraph 8 state legal conclusions which require no responsive pleading from Wieland. To the extent, however, that any of those allegations require a response, they are denied.
7. They deny the allegations of Paragraphs 9 through 10.
8. Answering the allegations of Paragraphs 11 through 14, the Wieland Defendants crave reference to the applicable corporate and business filings and documents for their exact terms and contents and deny any allegations inconsistent therewith. As to these structures, they admit that John Wieland Homes and Neighborhoods of South Carolina, Inc. developed and sold the residences in question.
9. The allegations of Paragraphs 15 through 28 relate to defendants other than the Wieland Defendants and therefore require no responsive pleading from these Defendants. To the extent, however, that any of those allegations require a response,

they are denied.

10. They deny the allegations of Paragraphs 29 through 38. They specifically deny any and all joint venture and amalgamation allegations.

11. Answering the allegations of Paragraph 39, they deny the characterization of the work of the named entities as being "deficient and defective", and they are otherwise without information sufficient to form a belief as to the remaining allegations of that Paragraph.

12. The allegations of Paragraphs 40 and 41 state legal conclusions which require no responsive pleading from Wieland. To the extent, however, that any of those allegations require a response, they are denied.

13. Answering the allegations of Paragraph 42, they reallege the responses to the above paragraphs as if repeated herein verbatim.

14. They deny the allegations of Paragraphs 43 through 65.

AS TO THE FIRST CAUSE OF ACTION

15. Answering the allegations of Paragraph 66, they reallege the responses to the above paragraphs as if repeated herein verbatim.

16. They deny the allegations of Paragraphs 67 through 68, including subparts.

AS TO THE SECOND CAUSE OF ACTION

17. Answering the allegations of Paragraph 69, they reallege the responses to the above paragraphs as if repeated herein verbatim.

18. They deny the allegations of Paragraphs 70 through 73.

AS TO THE THIRD CAUSE OF ACTION

19. Answering the allegations of Paragraph 74, they reallege the responses to the above paragraphs as if repeated herein verbatim.

20. They deny the allegations of Paragraphs 75 through 77.

AS TO THE FOURTH CAUSE OF ACTION

21. Answering the allegations of Paragraph 78, they reallege the responses to the above paragraphs as if repeated herein verbatim.

22. They deny the allegations of Paragraphs 79 through 80.

AS TO THE FIFTH CAUSE OF ACTION

23. Answering the allegations of Paragraph 81, they reallege the responses to the above paragraphs as if repeated herein verbatim.

24. They deny the allegations of Paragraphs 82 through 86.

AS TO THE SIXTH CAUSE OF ACTION

25. Answering the allegations of Paragraph 87, they reallege the responses to the above paragraphs as if repeated herein verbatim.

26. They deny the allegations of Paragraphs 88 through 91.

AS TO THE SEVENTH CAUSE OF ACTION

27. Answering the allegations of Paragraph 92, they reallege the responses to the above paragraphs as if repeated herein verbatim.

28. They deny the allegations of Paragraph 93.

AS TO THE EIGHTH CAUSE OF ACTION

29. Answering the allegations of Paragraph 94, they reallege the responses to the above paragraphs as if repeated herein verbatim.

30. They deny the allegations of Paragraphs 95 through 101, including subparts.

AS TO THE NINTH CAUSE OF ACTION

31. Answering the allegations of Paragraph 102, they reallege the responses to the above paragraphs as if repeated herein verbatim.

32. They deny the allegations of Paragraphs 103 through 114, including subparts.

AS TO THE TENTH CAUSE OF ACTION

33. Answering the allegations of Paragraph 115, they reallege the responses to the above paragraphs as if repeated herein verbatim.

34. They deny the allegations of Paragraphs 116 through 124.

AS TO THE ELEVENTH CAUSE OF ACTION

35. Answering the allegations of Paragraph 125, they reallege the responses to the above paragraphs as if repeated herein verbatim.

36. They deny the allegations of Paragraphs 126 through 131.

AS TO THE TWELFTH CAUSE OF ACTION

37. Answering the allegations of Paragraph 132, they reallege the responses to the above paragraphs as if repeated herein verbatim.

38. They deny the allegations of Paragraphs 133 through 140.

AS TO THE THIRTEENTH CAUSE OF ACTION

39. Answering the allegations of Paragraph 141, they reallege the responses to the above paragraphs as if repeated herein verbatim.

40. They deny the allegations of Paragraphs 142 through 146.

AS TO THE FOURTEENTH CAUSE OF ACTION

41. Answering the allegations of Paragraph 147, they reallege the responses to the above paragraphs as if repeated herein verbatim.

42. They deny the allegations of Paragraphs 148 through 160, being all the remaining allegations of the Plaintiffs' Complaint.

43. They deny each and every allegation of the Plaintiffs' Complaint not specifically admitted above.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

44. Plaintiffs lack standing and otherwise have improperly attempted to make the claims asserted against Wieland in this action. Plaintiffs lack of standing and improprieties include, but are not limited to, the fact that Plaintiffs have improperly attempted to file a derivative action and Plaintiffs' filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiffs' claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

45. That all claims asserted against Wieland are barred by the applicable statute of limitations and/or the applicable statute of repose.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

46. Plaintiffs' claims, if any, are barred, or should be reduced, by Plaintiffs' own comparative negligence and recklessness by Plaintiffs' failure to properly maintain the property and to mitigate their damages.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

47. Plaintiffs' claims, if any, are the result of acts and omissions of other entities over whom Wieland has no control, barring Plaintiffs' claims against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

48. That all claims are barred by the doctrines of laches, waiver and estoppel.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

49. That the final completion and acceptance of the work undertaken by Wieland pursuant to the original contract and all modifications thereto constitutes a complete defense to all claims asserted by Plaintiffs.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

50. That all claims asserted by Plaintiffs are barred by the doctrine of unclean hands.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

51. That Plaintiffs failed to give Wieland reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide Wieland a reasonable opportunity to correct any such alleged defects.

52. That Plaintiffs' failure to give Wieland notice of and an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims of breach of warranty.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

53. Upon information and belief, any express or implied warranties were limited in duration from the date of completion and acceptance of the project by the Owner.

54. That the failure of Plaintiffs within the warranty period from the date of the completion and acceptance of the project by the Plaintiffs, to give notice of or make any claim for alleged deficiencies in the workmanship and/or materials provided by Wieland constitutes a complete defense to all claims asserted by Plaintiffs.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

55. Plaintiffs' Complaint is barred by payment and/or release.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

56. Plaintiffs have waived and/or are estopped from asserting the claims set forth in their Complaint.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

57. If Plaintiffs sustained injuries and damages in the manner alleged in the Complaint, which injuries and damages are specifically denied by Wieland, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Wieland nor of anyone for whose conduct Wieland are anyway responsible, but solely through the fault, neglect, breach of warranty (express or implied) and want of due care on the part of Plaintiffs, all of which will be shown at the trial of this case, and for which Plaintiffs

can have no recovery against Wieland or, in the alternative, for which Plaintiffs' recovery should be appropriately reduced. Plaintiffs' comparative negligence includes, but is not limited, the following particulars:

- a. In failing to exercise reasonable care in maintaining the structures.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

58. Plaintiffs' claims are barred as the court lacks jurisdiction over the subject matter of the case.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

59. Plaintiffs' claims fail to state facts sufficient to constitute causes of action against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

60. Wieland has contractually limited its warranty and non-warranty obligations and exposure to the Plaintiffs, excluding liability for many claims the Plaintiffs are making, barring Plaintiffs' claims and/or Plaintiffs' claimed damages, including Plaintiffs' claim for consequential damages, in whole or in part, against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

61. Plaintiffs' claims are barred, or should be stayed, pending arbitration as there exists a valid arbitration provision in the contract between the Plaintiffs and Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

62. Plaintiffs' claims should be dismissed as the Plaintiffs failed to effect proper service of process on Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

63. Plaintiffs' claims should be dismissed as there is a lack of appropriate personal jurisdiction against one or all of the Wieland Defendants in this action.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

64. Plaintiffs' claims are barred by the doctrine of corporate immunity.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

65. Plaintiffs' claim are barred or would be reduced as Wieland provided a limited warranty to Plaintiffs which was in lieu of all other warranties or obligations, express or implied, including the warranty of habitability, warranty of suitability for residential purposes, any warranties of marketability or fitness for particular purposes. Plaintiffs' claims and remedies are limited to claims and remedies under the limited warranty that was provided, and any other claims are barred.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

66. The Plaintiffs' claims are barred or should be dismissed by virtue of the doctrine of spoliation of evidence, as the Plaintiffs spoiled evidence and repaired alleged deficiencies without notice to Wieland and without giving Wieland opportunity to observe the alleged deficiencies.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

67. Plaintiff's claims are barred and/or should be stayed or dismissed by virtue of Plaintiff's failure to comply with the South Carolina Notice and Opportunity to Cure Non-Residential Construction Defects Act, South Carolina Code §40-11-510, et. seq.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

68. Plaintiffs' claims are barred and/or should be stayed or dismissed by virtue of the Plaintiffs' failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, South Carolina Code §40-59-810-860 (1976 as amended).

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

69. Plaintiff's claims are barred by the economic loss rule.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

70. Plaintiffs' claims should be dismissed or stayed as Plaintiffs have failed, prior to filing suit, to comply with valid, applicable and mutually enforceable conditions precedent contained in the applicable purchase and sales documents and applicable corporate/legal documents (to include, but not limited to, the regime documents, Master Deed and Bylaws, deeds, sales contracts and Townhouse Association documents), including any and all alternative dispute provisions and provisions related to the number of owner/members who must agree to file a claim or suit. Plaintiffs lack of standing and improprieties include, but are not limited to, the fact that Plaintiffs have improperly attempted to file a derivative action and Plaintiffs' filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the

requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiffs' claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

71. Plaintiffs' Complaint should be dismissed for failure to join necessary persons, parties and/or entities pursuant to SCRPC 19.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

72. Plaintiffs' claims for the unfair trade practices act should be dismissed as the alleged actions of Wieland do not have an impact on the public interest.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

73. Plaintiffs' claims for breach of South Carolina's unfair trade practices act are barred pursuant to South Carolina Code §39-5-40.

FURTHER ANSWERING AND BY WAY OF CROSSCLAIMS AND THIRD-PARTY
CLAIMS AGAINST THE SUBCONTRACTOR DEFENDANTS BELOW, WIELAND
ALLEGES AS FOLLOWS

74. Wieland realleges the Paragraphs above as if repeated herein verbatim.

75. Plaintiffs have sued Wieland claiming damages caused by alleged deficient materials, design, engineering and/or construction services provided by Subcontractor Defendants on the Project. See Complaint attached as Exhibit "A".

76. Wieland contracted with the following persons and entities (herein collectively referred to as "Subcontractor Defendants") to perform work and provide materials as subcontractors and materialmen for the Project. The written contracts, as amended, between Wieland and the Subcontractor Defendants are incorporated herein by reference, to include any and all arbitration provisions that are applicable and that

would apply in this matter. The Subcontractor Defendants are as follows:

- a. framing, to include but not limited to installation of the water management system and installation of doors and windows, together with all associated waterproofings and flashings
 - i. Builder's FirstSource, Inc., a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource-Atlantic Group, LLC
- b. roofing, together with all associated and related waterproofings and flashings
 - i. Richard Ditullio, Richard Ditullio d/b/a RDT Contracting, LLC
 - ii. DBC Construction Services, LLC
 - iii. George Medina, George Medina a/k/a JMC Construction, LLC, a/k/a JMC Construction, Inc.
- c. window and door manufacturer, supplier, retailer, and installer, together with all associated and related waterproofings and flashings
 - i. The Muhler Company, Inc.
 - ii. Paul M. Vasquez
- d. railing suppliers and installers for balconies, porches and stairs, together with all associated and related waterproofings and flashings
 - i. George Medina, George Medina a/k/a JMC Construction, LLC, a/k/a JMC Construction, Inc.
- e. waterproofing supplier and installer for balconies and porches, together with all associated and related waterproofings and flashings
 - i. Latitude Construction Services, LLC

- f. hardiplank/cement board siding supplier and installer, together with all associated and related waterproofings and flashings
 - i. George Medina, Jeorge Medina a/k/a JMC Construction, LLC, a/k/a JMC Construction, Inc.
- g. hurricane strap installer, together with all associated and related waterproofings and flashings
 - i. Builders Firstsource, Inc., a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource-Atlantic Group, LLC
- h. masonry supplier and installer to include brick entryway steps, together with all associated and related waterproofings and flashings
 - i. Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC
- i. exterior painter/caulker, together with all associated and related waterproofings and flashings
 - i. Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting
 - ii. Gerardo Rosette Sanchez, a/k/a GR Painting
- j. foundation connections, supplier and installer, together with all associated and related waterproofings and flashings
 - i. Benjamin Mora, a/k/a Mora Construction, a/k/a Benjamin Mora Construction, LLC
 - ii. Jesus Mora, a/k/a J. Mora Brick and Block Mason, LLC
- k. sidewalk, walkway, and driveway paving
 - i. Eli, Inc.

I. sitework/drainage supplier and installer

i. Barr Construction, Inc.

77. Wieland has denied all of the substantive allegations against it that were made by the Plaintiffs.

FURTHER ANSWERING AND AS A FIRST CROSSCLAIM AND/OR THIRD-PARTY
CLAIM, WIELAND ALLEGES AS FOLLOWS:
(Indemnity)

78. To the extent, if any, that Wieland is held liable to the Plaintiffs in this action, such liability would be a direct and proximate result of the wrongful acts, errors, omissions, breaches, negligence, gross negligence, recklessness and/or representations of Subcontractor Defendants, which has damaged Wieland as Wieland has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

79. To the extent, if any, that the construction was defective or deficient in workmanship, installation, materials, and/or were not merchantable or fit for their particular purposes, such defects and deficiencies would be the result of the breach of the express and implied contractual obligations and warranties that Subcontractor Defendants provided, damaging Wieland as Wieland has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

80. Wieland is entitled to full indemnification from Subcontractor Defendants for any liability Wieland is found to have to the Plaintiffs in this action, and Wieland would be entitled to damages for Subcontractor Defendants' negligence, gross negligence, and recklessness as aforescribed and for Subcontractor Defendants' breach of implied and express warranties, entitling Wieland to recover from

Subcontractor Defendants its attorney's fees, costs, and other expenses incurred in defending this action, and entitling Wieland to recover from Subcontractor Defendants any sums for which it may be held liable to Plaintiffs.

81. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged fault construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

FURTHER ANSWERING AND AS A SECOND CROSSCLAIM AND/OR THIRD-PARTY CLAIM, WIELAND ALLEGES AS FOLLOWS:

(Negligence)

82. Wieland realleges the Paragraphs above and as if repeated herein verbatim.

83. The Subcontractor Defendants were negligent, grossly negligent, reckless and careless in the construction, supervision, inspection and/or supplying of the work or materials outlined above and incorporated into the project.

84. As a direct and proximate result of such negligence, gross negligence, recklessness and carelessness, Wieland has been damaged in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

85. Upon information and belief, Wieland is entitled to judgment for actual damages collectively or individually against the Subcontractor Defendants in the amount

of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as fees and costs incurred in the investigation, defense and settlement of this claim.

86. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

87. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' negligence, gross negligence and recklessness and for which the Subcontractor Defendants are also liable to Wieland.

FURTHER ANSWERING AND AS A THIRD CROSSCLAIM AND/OR THIRD-PARTY
CLAIM, WIELAND ALLEGES AS FOLLOWS:
(Breach of Warranty)

88. Wieland realleges the Paragraphs above as if repeated herein verbatim.

89. The Subcontractor Defendants expressly or impliedly warranted to Wieland that all work performed by them would be performed in a careful, diligent and workmanlike manner, and that any materials and/or services designed, supplied or sold by them for use on the project would be merchantable and fit for their intended or

specific purpose. Subcontractor Defendants breached their implied and/or express warranties of merchantability, workmanlike service, and/or fitness for a particular or intended purpose in the construction of the project.

90. As a result of the breaches of warranties, Wieland has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

91. Upon information and belief, Wieland is entitled to judgment against the Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

92. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged fault construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

93. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' breach of warranty and for which the

Subcontractor Defendants are also liable to Wieland.

FURTHER ANSWERING AND AS A THIRD CROSSCLAIM AND/OR THIRD-PARTY
CLAIM, WIELAND ALLEGES AS FOLLOWS:
(Breach of Contract)

94. Wieland realleges the Paragraphs above as if repeated herein verbatim.

95. Wieland entered into contracts with the Subcontractor Defendants who were to provide work and materials to the Project in question as described above.

96. The terms of the contracts required Subcontractor Defendants to provide construction goods and services for the Project that, among other things, would produce a quality building free from defects and otherwise in conformance of all contract documents, including all building codes and industry standards. The contract further required Subcontractor Defendants to supervise and direct its work, using the best skill and attention.

97. Subcontractor Defendants breached their contract by failing to provide appropriate construction goods and services to the Project, by failing to perform their work in a careful, diligent and workmanlike manner, by failing to provide goods and services that resulted in a quality building free from defects and otherwise in conformance with all contract documents, and failing to provide good and services that were in conformity with all appropriate building codes and industry standards.

98. As a result of these breaches of contract, Wieland has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it paid Plaintiffs in settlement of Plaintiffs' claims, plus the costs of investigating and defending this claim.

99. Upon information and belief, Wieland is entitled to judgment against the Subcontractor Defendants in the amount of any monies it is adjudge to owe Plaintiffs, or which it paid Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees

incurred in the investigation, defense and settlement of this claim.

100. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged fault construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

101. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' breach of contract and for which the Subcontractor Defendants are also liable to Wieland.

FURTHER ANSWERING AND AS A FOURTH CROSSCLAIM AND/OR THIRD-PARTY
CLAIM, WIELAND ALLEGES AS FOLLOWS:
(Strict Liability/Products Liability)

102. Wieland realleges the Paragraphs above as if repeated herein verbatim.

103. The products supplied, sold, and/or distributed by the Subcontractor Defendants were defective in the design/and or manufacture, and the Subcontractor Defendants failed to warn Wieland of the dangers and problems inherent with the products.

104. By virtue of the defects in the products and the failure to warn by the Subcontractor Defendants, the products used on the Project are claimed by Plaintiffs to

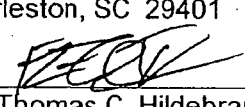
have failed, causing consequential damages to the residences, and causing damage to Wieland in that Wieland has incurred damage in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

105. Plaintiffs' residences have allegedly sustained actual damage by exposure to the defective products manufactured, supplied, and sold by the Subcontractor Defendants. Plaintiffs' residences have sustained property damage caused by continuous exposure to the defective products manufactured, supplied, and sold by the Subcontractor Defendants and not merely negligent construction damaging only the work product of each of the separate Subcontractor Defendants. In addition, the faulty workmanship, breaches, errors, omissions, and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous, and/or injurious events that caused property damage.

WHEREFORE, Wieland prays that the claims of the Plaintiffs be dismissed, and that Wieland be given judgment against the Subcontractor Defendants in the amount of any liability Wieland is found to have to Plaintiffs in this action, and Wieland demands judgment requiring the Subcontractor Defendants to defend and indemnify Wieland against any liability which Wieland may suffer to Plaintiffs in this action, to include Wieland's attorney's fees, costs and other expenses incurred in defending this action. Wieland further demands judgment for actual and punitive damages against the Subcontractor Defendants and to reimburse it fully for all costs, expenses, and attorney's fees associated with the deficiencies described herein, in an amount to be determined by the trier of fact, and for such other and further relief as this Court may

deem just and proper.

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

By:  for Tom Hildebrand

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

Kristina Y. Baxley
kristinabaxley@parkerpoe.com

F. Elliotte Quinn IV
elliottequinn@parkerpoe.com

Attorneys for John Wieland Homes and
Neighborhoods of the Carolinas, Inc. as
successor by statutory merger to John
Wieland Homes and Neighborhoods of South
Carolina, Inc., John Wieland Homes of
Charleston, Inc., John Wieland Homes, Inc.,
Builders Support Services of the Carolinas,
Inc.

October 6, 2014

CERTIFICATE OF SERVICE

This is to certify that a copy of Defendants John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the Carolinas, Inc.'s Answer to Complaint, Cross Claims and Third-Party Complaint has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 6th day of October, 2014.

John C. Hayes, IV, Esq.
Mary-Margaret S. Fitzhenry, Esq.
Hayes Law Firm
180 Meeting Street, Suite 330
Charleston, SC 29401
Email: jhayes@hayeslaw.org

Laura Paton, Esq.
R. Michael Ethridge, Esq.
Carlock, Copeland & Stair, LLP
40 Calhoun St., Suite 400
Charleston, SC 29401
Email: lpatis@carlockcopeland.com

Julian K. Allen, Esq.
Turner Padget Graham & Laney P.A.
40 Calhoun Street, Suite 200
Charleston SC 29401
Email: jallen@turnerpadget.com

Marvin D. Infinger
Nexsen Pruet, LLC
205 King Street, Suite 400 (29401-1)
P.O. Box 486
Charleston, SC 29402
Email: Minfinger@nexsenpruet.com

Stephen P. Hughes, Esq.
Email: shughes@hgghpa.com
Andy Yoho, Esq.
Email: ayoho@hgghpa.com
Howell, Gibson and Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901

Andrew Cole, Esq.
Collins & Lacey
1330 Lady Street, 6th Floor
Columbia, SC 29201
Email: acole@collinsandlacy.com

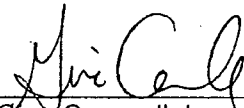
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JULIE A. RONG
CLERK OF COURT

Jonathan J. Anderson, Esq.
Email: janderson@arlawsc.com
Curt Martin, Esq.
Email: cmartin@arlawsc.com
Anderson Reynolds & Stephens, LLC
37 1/2 Broad Street
P.O. Box 87
Charleston, SC 29402

Patrick T. Morrissey, Esq.
Clawson Staubes, LLC
126 Seven Farms Dr., Suite 200
Charleston, SC 29492
Email:
pmorrissey@clawsonandstaubes.com

E. Glenn Elliott, Esq.
Aiken Bridges
181 E. Evans Street, Suite 409
P.O. Drawer 1931
Florence, SC 29503
Phone: 843-669-8787
Email: ege@aikenbridges.com

Erin D. Dean, Esq.
Tupper, Grimsley & Dean, P.A.
Post Office Box 2055
611 Bay Street
Beaufort, SC 29901-2055
Email: erindean@tgdpa.com



Gina Cornwell, Legal Professional Assistant
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, et al.,

Plaintiff(s)

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., et al.,

Defendant(s)

(Please Print)

Submitted By: I. Keith McCarty, Esq.

Address: McCarty Law Firm, PC
1212 Wappoo Road
Charleston, SC 29407

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 10- 4335

SC Bar #: 66447

Telephone #: 843-793-1272

Fax #:

Other:

E-mail: ikeithmccarty@gmail.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☒ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20-CP- ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

SCCA / 234 (01/2011)

Page 1 of 3



Submitting Party Signature:

J. ni M. J.

Date: 7-11-2014

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-10- 41335

Jeffrey Sills as Class Representative,)
Marie Labarowski, Edward and Nancy)
Peyser, Francis Sills, Daniel and Suzanne)
Ruth, Stephani Adili, Marc and Brandy)
Lynn, Russell Robinson, George)
Busnach, Helen Furtado, Jessica)
Baucom, Nancy S. Coleman, Linda Glitz,)
Peggy Gerou, Shannon Bebout,)
Maryann Walsh, Patty Whitmire,)
Donald L. Tomasello and Patricia Kelly,)
Chris Leigh-Jones, Edward Ray and)
Kathy Jo Feagins, Cindy Hunt for)
Bentgrass Limited, LLC, Adam A. and)
Susan A. Sokoloski, William and Carolyn)
Barone, Michelle Ray, Eugene and)
Cynthia Ray, William Abel, Dean and)
Conny Mason, David McCartney, Paul)
and Patricia Watters, James and Andrea)
Lowry, R. Robinson, Jr., Thaddeus R. &)
Barbara A. Kuczynski, Beverly Sanders)
Carlson, Lisa Roeck, Elizabeth Jackson,)
Charles and Mary Kathleen Jenkins,)
Linda M. and Earl K. Rigler, Jr., John)
Twomey, Joe and Anita Brittain, Gilbert)
J. Hager & Kelly Hager Holmes, Carol &)
Chris Gillespie, Jarred D. Overcash,)

Plaintiffs,)

vs.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builder Support)
Services of the Carolinas, Inc.,)
Wheelock Street Capital, LLC d/b/a John)

SUMMONS
(Jury Trial Demanded)

FILED
2014 JUL 11 PM 4:28
JULIE H. HARRIS
CLERK OF COURT
BY _____

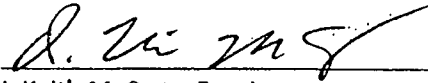
Wieland Homes and Neighborhoods,)
 Inc., Barr Construction, Inc., Benjamin)
 Mora d/b/a Mora Construction, a/k/a)
 Benjamin Mora Construction, LLC,)
 Builder's Firstsource, Inc. a/k/a Builders)
 Firstsource-Southeast Group, LLC, a/k/a)
 Builders Firstsource –Atlantic Group,)
 LLC, DBC Construction Services, LLC,)
 Gerardo Rosette Sanchez a/k/a GR)
 Painting, Jorge Medina a/k/a JMC)
 Construction, LLC a/k/a JMC)
 Construction, Inc.; Jesus Mora a/k/a J.)
 Mora Brick & Block Mason, LLC; Juan)
 Luis Sanchez, Juan Luis Sanchez a/k/a)
 Sanchez Brothers Painting; Latitude)
 Construction Services, LLC, The Muhler)
 Company, Inc., Paul M. Vasquez,)
 Richard Ditullio, Richard Ditullio a/k/a)
 ROT Contracting, LLC,)
)
 Defendants.)

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Summons and Verified Complaint upon the subscribers at their office at 180 Meeting Street, Suite 330, Charleston, South Carolina within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer within the prescribed time, a judgment by default will be rendered against you for the amount or other remedy requested in the attached Complaint, plus interests and costs.

[Signature Page to Follow]

Respectfully Submitted,

MCCARTY LAW FIRM, PC



J. Keith McCarty, Esquire
McCarty Law Firm, P.C.
1212 Wappoo Road
Charleston, SC 29407
Tel: 843-793-1272
ikeithmccarty@gmail.com

and

John C. Hayes, IV, Esquire
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: 843-805-7003
Fax: 843-573-7388
jhayes@hayeslaw.org

ATTORNEYS FOR PLAINTIFFS

July 11th, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-10- 41335

Jeffrey Sills, Individually and as Class)
Representative, Marie Labarowski,)
Edward and Nancy Peyser, Francis Sills,)
Daniel and Suzanne Ruth, Stephani)
Adili, Marc and Brandy Lynn, Russell)
Robinson, George Busnach, Helen)
Furtado, Jessica Baucom, Nancy S.)
Coleman, Linda Glitz, Peggy Gerou,)
Shannon Bebout, Maryann Walsh, Patty)
Whitmire, Donald L. Tomasello and)
Patricia Kelly, Chris Leigh-Jones, Edward)
Ray and Kathy Jo Feagins, Cindy Hunt)
for Bentgrass Limited, LLC, Adam A. and)
Susan A. Sokoloski, William and Carolyn)
Barone, Michelle Ray, Eugene and)
Cynthia Ray, William Abel, Dean and)
Conny Mason, David McCartney, Paul)
and Patricia Watters, James and Andrea)
Lowry, R. Robinson, Jr., Thaddeus R. &)
Barbara A. Kuczynski, Beverly Sanders)
Carlson, Lisa Roeck, Elizabeth Jackson,)
Charles and Mary Kathleen Jenkins,)
Linda M. and Earl K. Rigler, Jr., John)
Twomey, Joe and Anita Brittain, Gilbert)
J. Hager & Kelly Hager Holmes, Carol &)
Chris Gillespie, Jarred D. Overcash, and)
James & Susie Lesesne,)

Plaintiffs,)

vs.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builder Support)
Services of the Carolinas, Inc.,)

VERIFIED COMPLAINT
(Jury Trial Demanded)

FILED
2014 JUL 11 PM 4:28
JULIE ARMSTRONG
CLERK OF COURT
BY _____

Wheelock Street Capital, LLC d/b/a John)
 Wieland Homes and Neighborhoods,)
 Inc., Barr Construction, Inc., Benjamin)
 Mora d/b/a Mora Construction, a/k/a)
 Benjamin Mora Construction, LLC,)
 Builder's Firstsource, Inc. a/k/a Builders)
 Firstsource-Southeast Group, LLC, a/k/a)
 Builders Firstsource -Atlantic Group,)
 LLC, DBC Construction Services, LLC,)
 Gerardo Rosette Sanchez a/k/a GR)
 Painting, George Medina a/k/a JMC)
 Construction, LLC a/k/a JMC)
 Construction, Inc.; Jesus Mora ak/a J.)
 Mora Brick & Block Mason, LLC; Juan)
 Luis Sanchez, Juan Luis Sanchez a/k/a)
 Sanchez Brothers Painting; Latitude)
 Construction Services, LLC, The Muhler)
 Company, Inc., Paul M. Vasquez,)
 Richard Ditullio, Richard Ditullio a/k/a)
 ROT Contracting, LLC,)
)

Defendants.

The Plaintiffs, Jeffrey Sills, as Class Representative and the above-named Plaintiffs (hereinafter collectively referred to as "Plaintiffs"), individually and as a class of similarly situated owners of townhome units in a residential townhome community named Waverly at Hamlin Plantation complaining of the above-mentioned Defendants, allege and state as follows:

1. Plaintiffs, Jeffrey Sills is a citizen and resident of Charleston County, South Carolina, who at all times relevant hereto live in a residential community known as Waverly at Hamlin Plantation Townhomes, located in Mt. Pleasant, South Carolina; Plaintiff Jeffrey Sills further alleges and state that he is bringing this action pursuant to Rule 23, SCRPC, as representing a class composed of each and every unit owner in the Waverly at Hamlin Plantation Townhome Association, Inc., and that:

a) The class is so numerous that joinder of all members is impracticable;

- b) There are questions of law and fact common to the class;
- c) The claims of the Plaintiff, Jeffrey Sills, are typical of the claims of the class;
- d) The Plaintiff Jeffrey Sills will fairly and adequately protect the interest of the class;
and
- e) The amount in controversy exceeds One Hundred Dollars (\$100.00) for each member of the class.

2. The individual Plaintiffs are citizens and residents of Charleston County, South Carolina, who at all times relevant hereto live in a residential community known as Waverly at Hamlin Plantation Townhomes, located in Mt. Pleasant, South Carolina.

3. Waverly Townhomes is a section of the residential community, Hamlin Plantation, located in Mount Pleasant, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.

4. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina and are authorized to conduct business in this state, and have a principal place of business in Charleston County.

5. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.

6. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed and constituted in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.

7. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.

8. This Court has jurisdiction over the parties and subject matter hereto.

9. The construction of Waverly Townhomes was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and experienced in performing such construction work as to properly build Waverly Townhomes according to the normal standards of good and workmanlike practice in the construction field.

10. Construction defects in the Waverly Townhomes have recently been discovered. A recent inspection of the subject Townhomes resulted in the discovery of major problems and deficiencies including but not limited to the following:

- (a) Lack of proper flashing;
- (b) Lack of proper roofing installation;
- (c) Water damage along porches;
- (d) Water intrusion damage resulting from defects;
- (e) Improper flashing installation; and
- (f) Improper paving and drainage

11. Defendant John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc. (hereinafter referred to as "Wieland SC") is a corporation organized and existing under the laws of the State of South Carolina and, at all times relevant hereto, was authorized to and did conduct business in the State of South Carolina, County of Charleston for the purpose of planning,

developing, marketing, owning, maintaining, leasing, selling, and constructing the townhomes in a manner for sale to the public.

12. Defendant John Wieland Homes of Charleston, Inc., upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County Charleston for the purpose of planning, developing, marketing, owning, maintaining, leasing, sale, and constructing the townhomes in a manner for sale to the public.

13. Defendant John Wieland Homes, Inc., upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County Charleston for the purpose of planning, developing, marketing, owning, maintaining, leasing, sale, and constructing the townhomes in a manner for sale to the public.

14. Defendant Builder Support Services of the Carolinas, Inc., upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state.

15. Defendant Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. is a joint venture formed in November 2012 with the Wieland Defendants where John Wieland Homes and Neighborhoods, Inc. sold its assets and intellectual property to Wheelock Street Capital.

16. Defendant Barr Construction (hereinafter referred to as "Barr") upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in

Charleston County. Also, upon information and belief, Barr supplied and installed drainage materials, performed other sitework, and other work at the subject property.

17. Defendant Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC, (hereinafter "Mora Construction") upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Mora Construction supplied and installed foundation connections together with all associated and related waterproofings and flashings, and other work at the subject property.

18. Defendant Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource -Atlantic Group, LLC (hereinafter referred to as "BFS", upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, BFS performed framing, to include but not limited to installation of the water management system and installation of doors and windows, together with all associated waterproofings and flashings, installation of hurricane straps, together with all associated and related waterproofings and flashings, and other work at the subject property.

19. Defendant DBC Construction Services, LLC (hereinafter referred to as "DBC"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, DBC performed roofing

services, together with all associated and related waterproofings and flashings, and other work at the subject property.

20. Defendant Eli, Inc. (hereinafter referred to as "Eli"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Eli performed sidewalk, walkway and driveway paving services, and other work at the subject property.

21. Defendant Gerardo Rosette Sanchez a/k/a GR Painting (hereinafter referred to as "GR"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, GR performed exterior painting and caulking services, together with all related waterproofings and flashings, and other work at the subject property.

22. Defendant Jeorge Medina, Individually and d/b/a JMC Construction, LLC a/k/a JMC Construction, Inc. (hereinafter referred to as "JMC"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, JMC performed roofing services, together with all associated and related waterproofings and flashings, supplied and installed railing for balconies, porches and stairs, together with all associated and related waterproofings and flashings; supplied and installed hardiplank/cement board, together with all associated and related waterproofings and flashings, and other work at the subject property.

23. Defendant Jesus Mora a/k/a J. Mora Brick and Block Mason, LLC (hereinafter referred to as "J. Mora", upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, J. Mora supplied and installed masonry to include brick entryway steps, together with all associated and related waterproofings and flashings, supplied and installed foundation connections, together with all associated and related waterproofings and flashings, and other work at the subject property.

24. Defendant Juan Luis Sanchez, Individually and d/b/a Sanchez Brothers Painting (hereinafter referred to as "Sanchez"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Sanchez performed exterior painting and caulking services, together with all associated and related waterproofings and flashings, and other work at the subject property.

25. Defendant Latitude Construction Services, LLC (hereinafter referred to as "Latitude"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Latitude supplied and installed waterproofing for balconies and porches, together with all associated and related waterproofings and flashings, and other work at the subject property, and other work at the subject property.

26. Defendant The Muhler Company, Inc. (hereinafter referred to as "Muhler", upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Muhler manufactured, supplied, retailed, and installed windows and doors, together with all associated and related waterproofings and flashings, and other work at the subject property.

27. Defendant Paul M. Vasquez (hereinafter referred to as "Vasquez"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Vasquez manufactured, supplied, sold, and installed windows and doors, together with all associated and related waterproofings and flashings, and other work at the subject property.

28. Defendant Richard Ditullio, Individually and d/b/a ROT Contracting, LLC. (hereinafter referred to as "ROT"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and has a principal place of business in Charleston County. Also, upon information and belief, ROT performed roofing services, together with all associated and related waterproofings and flashings.

29. Upon information and belief, the above-identified Waverly Defendants were, in various capacities, individually and collectively engaged in the planning and developing of the Project, and contracted with various entities for the design and construction of the Project.

30. Upon information and belief, one or more of the Waverly Defendants were merged into one or more of the John Wieland Homes and Neighborhoods of South Carolina, Inc. and John Wieland Homes and Neighborhoods, Inc. with the intent to carry on the business of the Wieland Defendants in connection with the Project.

31. Wheelock Street Capital, LLC (hereinafter referred to as Wheelock) d/b/a John Wieland Homes and Neighborhoods, Inc., is a joint venture with the Wieland Defendants formed in November 2012.

32. Upon information and belief, the ownership of the Project was maintained uninterrupted by the Wieland Defendants during and following the aforementioned merger activities, resulting in ownership and/or control of the Project by the resulting merged entity (the resulting merged entity, including all of the affiliated, subsidiary, or other merged component entities, shall hereinafter be referred to collectively as the "Developer Defendants" and/or "Wieland").

33. The Developer Defendants are all Variable Interest Entities of (as defined by the Financial Accounting Standards Board, among other institutions and authorities) subsidiaries of, parents of, partners of, associates of, agents of, affiliated with, joint venturers, servants, instrumentalities and/or alter ego entities of each other and are responsible to the Plaintiff herein for the condition of the Project and the damages set forth herein below.

34. The Developer Defendants, along with and through their directors, officers, employees, agents, assignees, and subservient and affiliated entities, during the development of the Project and immediately after sale of the townhomes to members of the public, sought and established a special relationship with the purchasers of the townhomes, and the Developer

Defendants, at various times during and after the construction of the townhomes, breached their fiduciary duties to the purchasers in that the Developer Defendants owed dual and conflicting loyalties to themselves, to the Contractor Defendants as set forth below, to the purchasers of the townhomes, to the Association established in the Master Deed for the construction of the Project, and to the Plaintiff.

35. The Developer Defendants, along with and through their directors, officers, employees, agents, assignees, and subservient and affiliated entities had irreconcilable conflicts of interest by virtue of the dual and conflicting loyalties they owed to themselves and to the purchasers and/or tenants of the Project along with the Association established in the Master Deed for the townhomes and the Plaintiff, all of whose interests were diverse and adverse, one to the other and, as such, the Developer Defendants did not act in good faith or in a manner they could reasonably believe to be in or not opposed to the best interests of the purchasers and/or tenants of the Project along with the Association established in the Master Deed for the townhomes and the Plaintiff.

36. The Developer Defendants, along with and through their directors, officers, employees, agents, assignees, and subservient and affiliated entities, all participated in self-dealing by promoting their own interests through sacrificing the interests of the purchasers of the Project.

37. In connection with the Project, the Developer Defendants all became and/or acted as subsidiaries, parents, partners, associates, agents, affiliate, co-joint venturers, servants, instrumentalities and/or alter ego entities of each other and are responsible to the Plaintiffs herein for the condition of the Project and the damages set forth herein.

38. The Developer Defendants conducted business in connection with the Project by and through the use and control of subservient entities, and all of these entities in fact manifested no separate interest of their own, and demonstrated an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between any members of that group of corporations, shareholders, officers, agents, partners, employees, and assets.

39. The Defendants listed above including Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource -Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC; Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC (hereinafter referred to collectively as the "Contractor Defendants") provided labor, materials, goods, and services in connection with the construction of the Waverly at Hamlin Plantation Townhomes Project as contractors, subcontractors, consultants, or independent contractors, or which manufactured, fabricated, and/or otherwise provided construction and building materials, equipment and goods for use in connection with the construction of the Project; and these entities provided labor, materials, goods, and services associated with the original construction of the Project, and the work of each of these defendants was deficient and defective and resulted in damages to the Plaintiffs as set forth below.

40. All Defendants were instrumental in carrying out duties and actions relating to the construction of the Project, and each of these defendants had independent duties under South

Carolina law to perform their duties in a good and workmanlike manner and in accordance with applicable building codes and accepted building practices.

JURISDICTION

41. Personal jurisdiction is vested and exists in the Court of Common Pleas, County of Charleston, State of South Carolina, and venue is proper in the County of Charleston, State of South Carolina, by virtue of, among other things, the fact that the property which is the subject matter of the Complaint is located in Mt. Pleasant, South Carolina, and the great majority of the activities relating to the Project and the claims herein occurred in this jurisdiction.

BACKGROUND

42. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

43. Plaintiffs are informed and believe that the Developer Defendants engaged contractors to construct the Project including 105 properties, and related facilities and amenities, collectively known as Waverly at Hamlin Plantation, which were thereafter substantially completed, and contained various buildings. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project and/or are liable for the actions of the original Developer of the project.

44. The Developer Defendants created and controlled numerous and various entities including, but not limited to, the John Wieland Homes and Neighborhoods of South Carolina, Inc., Builder Support Services of the Carolinas, and Wieland Defendants set forth hereinabove, for the sole purpose of the construction, development, purchase of property, sale of property, leasing of townhomes, and other activities solely relating to development and leasing of the townhomes

that were known as Waverly at Hamlin Plantation. The Developer Defendants created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of the Developer Defendants to achieve their financial goals and to perpetrate the activities more particularly described herein. The subservient entities in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the Developer Defendants and the sham entities, shareholders, officers, agents, partners, employees, assets, and each of them.

45. By way of example, the Wieland Defendants included entities which were created to perform single purpose functions in order to effectuate the sole will of the Developer Defendants in purchasing, developing, leasing, and/or selling the homes. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, the Developer Defendants and the Individual Developer Defendants actively and directly participated in the development, purchase, sale, management, leasing, and/or operations of the Project, and in fact put the same into the stream of commerce.

46. The sham entities established by the Developer Defendants were and are characterized by one or more of the following: (1) being undercapitalized; (2) failing to observe corporate formalities; (3) failing to pay dividends; (4) Insolvency; (5) lack(ed) proper records; (6) siphoning of funds by its members and/or affiliates; and (7) was used as a mere facade for the operation of the dominant shareholders, members, associates, and affiliates. Upon information and belief, each shared the same mailing address, their business was conducted on the letter

head of the Developer Defendants, the Developer Defendants directly received payment and disbursed payment for obligations relating to the sham entities, the sham entities had no shareholders and/or officers of their own, no separation of accounting and bookkeeping functions, and/or the Developer Defendants directly contracted for the sham entities in the name of the Developer Defendants.

47. The Developer Defendants directed and oversaw those listed as Defendants herein and contractors including the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

48. The Developer Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of units, and other activities solely relating to the Project which is the subject of this action.

49. There would exist a broad element of injustice and fundamental unfairness of the acts of the Developer Defendants, and each of them individually, were not regarded as the acts of one another.

50. The Defendants began the process of constructing the townhomes by engaging and directing the actions of the various contractors and/or subcontractors named as Defendants herein, and participated in the negligent, deficient, and shoddy workmanship which ignored and/or covered up design and construction defects then in existence and, thereafter, placed the

units into the stream of commerce for sale, which they did sell to the general public and, in particular, to the current owners who are members of the Association.

51. The Developer Defendants, by and through their instrumentalities and alter-ego entities, controlled and operated the Association and its Board of Directors prior to turning over control of the Waverly Association. During this period, the Developer Defendants attempted to carry out construction prior to, during and after the time they offered and sold said townhome units. This work was attempted to be performed by contractors engaged by the Developer Defendants for the purpose of expediting the sales process and was calculated for the purpose of, or through careless, reckless, negligent and grossly negligent conduct by the Developer Defendants, resulting in the concealing, fabricating, patching, hiding, and/or cloaking of the deficiencies and damage known, both actually and constructively, to the Developer Defendants and/or their affiliates, subservient entities, agents, and assigns.

52. At the time the units were offered for sale and placed into the stream of commerce by the Developer Defendants, the units contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of the Developer Defendants.

53. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

54. These latent building defects have, unbeknownst to Plaintiff, regularly resulted in water intrusion into the buildings and property damage and continue to do so through the date of this filing.

55. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

56. The Plaintiffs suffered damages when the Developer Defendants put these units into the stream of commerce and continue to be damaged through the date of this filing.

57. The Developer Defendants failed to make a sufficient inquiry into the conditions of the Project in order to establish adequate financial reserves for maintenance and repair of the Project, and instead provided inaccurate and misleading information to third-parties in the research and establishment of the reserve figures, and thereby provided inaccurate and misleading reserve requirements and related information to the general public, prospective purchasers, and to the Plaintiffs, both before and after tendering control of the Association and the common elements to the homeowners, all resulting in damages to the Plaintiffs and in violation of South Carolina law, the Master Deed, and the By-laws.

58. The Developer Defendants controlled and managed the Association and its Board of Directors through the use of its subservient entities prior to the tender of the control over the Association to the unit owners; and the Developer Defendants negligently failed to provide sufficient and reasonable information and resources for the proper management and maintenance of the Project; and in fact negligently provided insufficient, inaccurate, and

misleading information and prevented the use of financial and other resources required for the proper management and maintenance of the Project, all of which resulted in continued and exacerbated damages to the Project and suffered by the Plaintiffs.

59. The Developer Defendants were engaged in a joint venture, partnership, or other legal or de facto relationship with each other.

60. The Developer Defendants caused, directed, participated in, or acted in willful, reckless, heedless, negligent and grossly negligent disregard of their collective and respective acts and omissions in the planning, development, design, construction, management and sale of the units in the Project, all as more fully described herein.

61. The Developer Defendants represented to the public over the internet and through various publications and other media that they, by and through their various affiliates, entities, venturers, and agents referenced herein, were qualified, experienced, and would in fact be directing, managing, and otherwise facilitating the construction and selling of the units, and these representations were relied upon by the Plaintiffs.

62. Prior to and until transferring control of the Waverly Association to the unit owners and a newly elected Board of Directors comprised of unit owners, the Developer Defendants, through their subservient and affiliated entities, employees, and agents, had a duty to serve as Board members and to conduct the business of the Waverly Association, had authority and control over, and in fact controlled and directed the Waverly Association Board of Directors and dictated all of the Board's activities.

63. In conjunction therewith, the Developer Defendants in their capacity as Board members and otherwise, in a negligent manner, carelessly, willfully, wantonly, and with reckless

disregard for the rights of the Plaintiffs, participated in, acquiesced in and caused the wrongful acts and omissions described herein.

64. These collective and respective wrongful acts and omissions of the Developer Defendants and such other Defendants as set forth in the causes of action below, represent unfair trade practices and have resulted in substantial deterioration and/or failure of structures and building systems, building deficiencies, actual, incidental, special and consequential damages and loss of use. Remedying the above wrongful acts will result in actual, incidental, consequential, and special damages including loss of use to the Plaintiffs and its members, and entitle Plaintiffs and its members to punitive damages and attorney's fees. Further, these wrongful acts and omissions have directly and proximately caused substantial diminution in value, both pre- and post-repair.

65. The acts and omissions of the Defendants were contrary to the duties they owed, individually and collectively, to the Plaintiffs and actually caused damages to the Plaintiffs including, but not limited to, damages which did not result from the acts and omissions of other defendants and including, but not limited to, damages other than damages which resulted in physical injury or damage to tangible real and personal property in connection with this Project.

AS A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence, Professional Negligence, and Gross Negligence)

66. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

67. Defendants, and each of them, owed a duty to Plaintiffs to act in a manner compliant with the reasonable standard of care, good faith, and fair dealing recognized under South Carolina law, and Defendants violated this duty to the Plaintiff and were negligent,

professionally negligent, grossly negligent, careless, reckless, willful and wanton in one or more of the following particulars:

- a) in failing to properly design, construct, develop and repair the townhomes;
- b) in failing to comply with the applicable Building Codes of the County of Charleston, the City of Mt. Pleasant and the State of South Carolina;
- c) in failing to comply with the applicable Fire and Safety Codes of the County and of Charleston, the City of Mt. Pleasant and the State of South Carolina;
- d) in failing to properly design and construct the structural elements and the foundation and other elements of the Project to permit the existence of an adequate and sufficient program for the treatment, extermination, eradication, colony control, and/or termite control of any kind on the Project in accordance with industry standards, due care, and applicable law prior to the sale of the units;
- e) in failing to establish and maintain a sufficient program for the treatment, extermination, eradication, colony control, and/or termite control of any kind on the Project in accordance with industry standards, due care, and applicable law prior to the sale of the units;
- f) in failing to properly supervise the project developer entities and individuals, project architects and engineers, as well as contractors, subcontractors, suppliers and/or agents or employees of any of them in connection with the planning, development, design and construction of the townhomes offered for sale to the public;
- g) in manufacturing, fabricating, preparing for the incorporation into a residential building, reviewing, approving, procuring, and incorporating into the construction of this project such items which were defective, deficient, inferior, inadequate, unsafe, dangerous, inappropriate for the use intended, noncompliant with approved design or design intent, non-compliant with applicable codes and standards in the industry, and otherwise improper for use in the project including, but not limited to, HVAC systems, mechanical systems, plumbing systems, drainage systems, and sewer line systems without appropriate clean-out piping and/or other issues; electrical systems and equipment, interior and exterior drywall and other substrate and sheathing material, windows, insulation, roofing, waterproofing systems, and other building materials and supplies, finishes, and other items relating to the construction and ultimate use of this residential project;

- h) in designing, constructing, marketing, selling, units and/or property with defective windows;
- i) in designing, constructing, marketing, selling, units and/or property with inadequate flashing;
- j) in designing, constructing, marketing, selling, units and/or property with inadequate roofs;
- k) in designing, constructing, marketing, selling, units and/or property with inadequate water barriers;
- l) in designing, constructing, marketing, selling, units and/or property with without weather proof building envelopes and exteriors;
- m) in designing, constructing, marketing, selling, units and/or property which were defective, deficient, inadequate, unsafe, dangerous, or otherwise non-compliant with codes and standards;
- n) in placing defective and inferior construction into the stream of commerce;
- o) in placing defective and inferior manufactured systems, equipment, building materials and other products into the stream of commerce.
- p) in failing to permit and facilitate a proper evaluation of the condition of the Project prior to and during the process of offering units and other property for the use and sale to the general public and, further, to obstruct and/or hinder efforts to conduct a proper evaluation of the Project by intended purchasers or users;
- q) in misrepresenting the condition of the units, common elements, garages and other property to prospective and actual purchasers and other users, and in making representations in negligent and/or intentional disregard of whether these representations were false or inaccurate;
- r) in failing to undertake sufficient actions to develop a plan for repairs and otherwise failing to make adequate repairs to conditions at the project which were unsafe, dangerous, or otherwise not in compliance with applicable building codes or other authorities or standards of care;
- s) in negligently and/or intentionally covering up deficiencies prior to construction of the units and other property for sale or use by the general public;

- t) in failing to determine accurate information required, failing to disclose the absence of such information, as well as negligently and/or intentionally providing misleading and inaccurate information regarding the proper level of financial capitalization and reserve funding required for the operations, maintenance, and repairs required by the Waverly Association for the Project and individual unit owners;
- u) in tendering common elements and other property to Plaintiffs in a deficient condition;
- v) in failing to act as reasonable persons would in circumstances then and there prevailing and in such other failures as will be shown during discovery and at trial.

68. Said failures above-described, as well as the Defendants' gross negligence, willfulness, and reckless disregard for the rights of Plaintiff and others, have actually and proximately caused damages to Plaintiffs, and the Defendants are liable to the Plaintiffs in an amount of actual, incidental, consequential, special, and punitive damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SECOND CAUSE OF ACTION

**(Against the Developer Defendants and Contractor Defendants)
(Negligent Misrepresentation)**

69. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

70. These reports and representations were actually published and presented for information to the general public by these Defendants, and these representations were actually

received by, and relied upon by, the prospective and actual purchasers of the townhomes at the Project.

71. At the time of the sale of the homes and the turnover of control of the Waverly Association from the Developer Defendants to the unit owners, Plaintiff was not aware of the falsity of the representations or the lack of investigation and lack of candor by these Defendants in connection with the reports.

72. Plaintiff subsequently determined that the representations made by these Defendants were false and that these Defendants failed to exercise due care, not only in failing to discover defects in the project, but also in failing to communicate information about the true condition of the Project. As a result of its justifiable reliance on the representations, reports, and other documents presented by these Defendants, Plaintiffs and its members have assumed control over the Project and/or purchased units, and have thereby suffered pecuniary losses in an amount to be determined by the trier of fact.

73. As a direct and proximate result of its justifiable reliance on numerous false representations made by these Defendants in connection with the Project, Plaintiffs have suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A THIRD CAUSE OF ACTION
(Against the Contractor Defendants and the Developer Defendants)
(Breach of Implied Warranty)

74. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

75. The design, construction, development and sale of the units by these Defendants contained as a matter of law implied warranties of good faith and fair dealing, fitness for use, merchantability, habitability, and workmanship with respect to construction, which warranties were not effectively disclaimed under South Carolina law.

76. The Developer Defendants, whether named or unnamed on the Deeds of Transfer, through their acts and/or omissions, have breached the aforesaid implied warranties, which directly, actually, and proximately caused and resulted in damage which the Plaintiffs have suffered and continues to suffer in an amount to be determined by the trier of fact.

77. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness of Habitability)

78. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

79. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

80. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiffs.

AS A FIFTH CAUSE OF ACTION

**(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness for Particular Purpose)**

81. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

82. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

83. At the time of the sale of the subject Residences to the Plaintiffs, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

84. The Defendants, at the time of the sale of the subject Residences to the Plaintiffs, had reason to know that the Plaintiffs were relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

85. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

86. As a result of the Defendants' breach of its implied warranties, Plaintiffs have suffered physical damages.

AS A SIXTH CAUSE OF ACTION

**(Against the Developer Defendants and Contractor Defendants,
(Breach of Implied Warranties as to the Project's Development and Construction)**

87. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

88. These Defendants engaged in conduct during the period of development and construction of the Project which gave rise to duties and implied warranties to the public including, but not limited to, tenants, purchasers and other users of the Project, in that by their conduct these Defendants placed the Project, which constitutes defective, deleterious, and dangerous property, into the stream of commerce.

89. The placement of the Project into the stream of commerce by these Defendants, contained as a matter of law implied warranties of fitness, merchantability, workmanship and habitability, which warranties were not effectively disclaimed pursuant to South Carolina law.

90. As a direct and proximate result of the breaches of the above-described implied warranties by these Defendants, their affiliates, associates, sham entities, and/or joint venturers, whether named or unnamed on any documents transferring interest in the Project, the Plaintiffs has suffered and will continue to suffer damages, injuries and other losses.

91. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SEVENTH CAUSE OF ACTION
(Individual Liability as to the Developer Defendants)

92. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

93. As a direct and proximate cause and result of the acts and omissions of these Defendants as aforesaid, Plaintiffs have been damaged, and these Defendants are liable to the Plaintiffs for actual, incidental, consequential, and special damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A EIGHTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.*)

94. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

95. These Defendants' construction and the subsequent offering and sale of the units, along with the issuance of the property condition reports and other representations to tenants, purchasers, and the public at large, constituted the conduct of trade and commerce within the meaning of S.C. Code Section 39-5-20(a).

96. The Defendants, and each of them, through their acts and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 39-5-140(a) and 27-31-430, S.C. Code of Laws as amended:

- a) in failing to properly evaluate the plans and specifications for the Project prior to construction;
- b) in failing to conduct a reasonable inquiry into the conditions existing at the Project and marketing the units, common elements, and other property at the Project to the public for sale and use;
- c) in failing to repair the latent defects about which these Defendants were or should have been aware;
- d) in failing to carry out the fiduciary duties owed to prospective and actual purchasers and other members of the public in their special relationships of trust and confidence by virtue of their role in the process of offering these units, common elements, and other property for sale and use by the general public, as design professionals, licensed professionals, and sellers according to South Carolina law, and as Board Members and Directors of the Waverly Association;
- e) in attempting to disclaim implied warranties of merchantability and habitability in documents contrary to South Carolina law;
- f) in failing to provide any additional consideration for these purported efforts to waive implied warranties of merchantability and habitability;
- g) in failing to properly investigate the true conditions of the Project and putting them into the stream of commerce;
- h) in making false representations as to the condition of the Project and/or representations as to the condition of the Project in reckless disregard as to the truth of the representations;
- i) in failing to analyze relevant data and conditions to determine adequate capital reserves for maintenance and operation of the Project by future owners and users;
- j) in failing to provide adequate capital reserves and projections for adequate reserves for maintenance and operation of the Project prior to selling units and other property and prior to turning control of the Waverly Association over to the unit owners;

97. The conduct of the Defendants as described above was knowing and willful, and Defendants knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.

98. Plaintiffs are persons within the meaning of S.C. Code Section 39-5-140(a) and Plaintiffs have suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of these Defendants, in an amount to be determined by the trier of fact.

99. The aforesaid acts of Defendants impact the public interest in that they constituted unfair and deceptive acts and have the potential for repetition and, in fact, occurred at each and every sale of the units of this Project and, as such, are acts which can, have and will affect the public at large by repetition.

100. These unfair and deceptive acts are acts which will affect members of the public, beyond the parties to the above-described transactions, in the form of other consumers who may be injured by purchasing townhomes by the Defendants and/or rely upon the actions and representations of these Defendants thereby placing members of the public in danger of physical and other injuries.

101. Plaintiffs are entitled to be compensated pursuant to S.C. Code Section 39-5-140(a) for the above-described actual, incidental, consequential, and special damages, as well as costs, interest, and attorney's fees, and to recover three (3) times these damages by reason of the knowing and willful nature of the unfair and deceptive acts by Defendants and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A NINTH CAUSE OF ACTION
(As to the Developer Defendants)
**(Breach of Fiduciary Duty by Initial Board Members of the Waverly at Hamlin Plantation
Townhome Association, Inc.)**

102. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

103. These Defendants, at all times during which they were Directors of the Waverly Association Board and/or the Board of the Waverly Association's predecessor entity, were charged with the duty of administration, care and maintenance of the regime property and its common elements according to the terms of the Master Deed and with safeguarding any interests and rights of the members, both present and future, of the regime as unit owners or they undertook such duties.

104. These Defendants breached these obligations by their acts and omissions such that they have committed breaches of fiduciary duties, negligence, gross negligence, recklessness, willfulness, wantonness, bad faith, mismanagement, self-dealing and waste with respect to their duty of administration, care and maintenance of the regime property and their duty to protect the interests and rights of the individual members of the Waverly Association, along with their duty to protect and preserve the regime property. These wrongful acts and omissions have caused and will cause the Plaintiffs to incur and continue to incur substantial monetary damages.

105. These Defendants owed a duty to Plaintiffs to exercise that degree of skill necessary to insure that the regime property was properly maintained and to keep the owners informed of serious defects found or discovered and to protect the owners' property interest in conformity with customary and ordinary standards.

106. These Defendants held themselves out to the public as qualified and experienced in the administration and management of multifamily residential properties and, in particular, the Developer Defendants held themselves out as qualified and experienced in the building of townhomes, and these representations of experience and qualifications were imputed to the Developer Defendants by virtue of their legal relationship and appearance to the public as an indistinguishable single entity by and through the operation of the various individuals and affiliated entities.

107. These Defendants' negligent, reckless and willful conduct includes, but is not limited to:

- a) failing to properly inform the tenants, prospective purchasers, and unit owners of the conditions known or which should have been known at the time each owner purchased a unit;
- b) failing to properly oversee the regime in order to ensure that all defects discovered by the Defendants or which should have been discovered by the Defendants, were reported so that repairs could proceed in accordance with the customary and ordinary standards of construction at the expense of the Defendants;
- c) failing to report the defective conditions of the Project to any owners or the Plaintiff at the time of the turnover to the Waverly Association;
- d) failing to inform the Board and the individual unit owners of the true nature of the defective conditions of the townhome property at the time of turnover;
- e) placing their loyalties to themselves and/or their affiliated entities above the loyalties they owed to Plaintiffs and unit owners;
- f) failing to raise sufficient capital through assessments or otherwise from the Defendants prior to turnover so that adequate funds would be available to mitigate the substantial damages which were and are resulting from the aforementioned significant design and construction defects and deficiencies; and

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- g) participating in self-dealing, sacrificing the Waverly Association's and the unit owners' interests for their own interests and the interests of themselves and/or their affiliated entities;
- h) failing to reasonably plan or anticipate the adequate reserve for insurance premiums required to be paid by the Waverly Association, and resigning from the Board of Directors of the Association and ceding control over the Association to the unit owners.

108. As a direct and proximate result and consequence of the aforementioned negligent, grossly negligent and reckless acts or omissions of these Defendants, Plaintiffs have and will continue to be required to spend substantial sums of money in connection with the extraordinary repairs and reconstruction of the Project and the associated loss of use and other damages.

109. The Defendants' breaches of duty, acts, errors, and omissions as set forth above caused, among other damages: physical injury to tangible property; a resulting loss of use of that property; and Plaintiffs resulting money damages due to budget deficits and special assessments; all of which were directly and proximately caused by and resulting from the Defendants' negligence, willfulness, wantonness, and recklessness directly related to the mismanagement of the Project by the Defendants prior to turning over control of the Project to the Waverly Association Board.

110. Each of the wrongful acts of the Defendants as described above that occurred in connection with the mismanagement of the Project constituted gross negligence and were more than momentary thoughtlessness, inadvertence or error in judgment on the part of the Defendants with regard to representations consisting of either affirmative statements or silence when there was a duty to speak; instead, these wrongful acts or omissions constitute a complete lack of care and conscious indifference to the rights, welfare or property of the Plaintiff, tenants,

prospective purchasers, and unit owners, and were intended to cause financial harm to the Plaintiff and its members.

111. The Defendants as described above had a fiduciary relationship and owed fiduciary obligations and duties to Plaintiffs.

112. The Defendants as described above at all relevant times were or should have been aware of, among other things, the extensive and severe construction defects and deficient conditions at the Project. The Defendants' failure to properly investigate the extent of the defects and problems; their failure to properly investigate the extent of these defects and problems; their failure to properly mitigate the damaging effects of these problems and defects; and their failure to properly safeguard the rights and interests of Plaintiffs, all constitute breaches of their fiduciary obligations to Plaintiffs.

113. Upon information and belief, Defendants purposely withheld their knowledge of the above-described defects, despite receiving notification thereof, and problems from Plaintiffs or consciously failed to investigate the defects knowing that the Defendants would find defects to the extreme detriment of Plaintiffs and against the Plaintiffs' pecuniary interest. In failing to notify Plaintiffs, these Defendants knowingly caused Plaintiffs to become responsible for and liable for the above-described needed extraordinary repairs and reconstruction expenses such that these Defendants breached their fiduciary duties owed to Plaintiffs including, but not limited to, the duty to perform, the duty of care and skill, the duty of good conduct, the duty to give information, the duty to keep and render accounts, and the duty to act only as authorized.

114. As a direct and proximate result of their breaches of their fiduciary duties to the Plaintiffs, these Defendants are liable to the Plaintiffs for the actual, direct, consequential,

incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS AN TENTH CAUSE OF ACTION
(As to the Developer Defendants)
(Breach of Fiduciary Duty)

115. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

116. These were required to use good judgment and act in the utmost good faith to complete the formation of and operate the Waverly Association until it was turned over to the unit owners' control.

117. Prior to ceding control over the Waverly Association to the unit owners, these Defendants had the unilateral ability to determine the assessments against individual owners and were required to fund shortfalls between the assessments necessary to perform the duties and obligations of the Master Deed and By-laws and the assessments actually collected from individual unit owners.

118. These Defendants failed to establish and provide adequate capital reserves and projections for the sufficient maintenance and repair of the Project prior to turning the Waverly Association over to the unit owners, in that the limited repairs and maintenance done were substandard and inadequate and were intended to and, in fact did, conceal instead of correct the latent defects that existed in the Project and of which these Defendants were or should have been aware.

119. These Defendants sought and obtained a special relationship of trust and confidence with the Plaintiffs and, as such, these Defendants owed a fiduciary duty to the Plaintiffs to ensure that the Project was safe, habitable, and in good repair at the time the Project was turned over to the Waverly Association, and/or these Defendants were required to provide funds sufficient to bring the Project to a safe, habitable and code-compliant condition and in good repair as required by South Carolina law.

120. These Defendants owed a duty to the Plaintiffs to turn over the Project including, but not limited to, its common areas in a safe, habitable, code-compliant condition and in good repair.

121. These Defendants negligently, carelessly, recklessly, willfully and wantonly failed to turn over common areas, units, and other property that was safe, habitable, in code-compliant condition and in good repair, and failed to establish guidelines and plans to ensure that the property interests of the Plaintiffs would be preserved and protected in conformity with the customary and normal standards in the townhome management industry.

122. These Defendants further failed to establish and provide sufficient capital replacement reserves at the time of the turn over to effectuate the necessary repairs and to bring the substandard conditions up to a state of code compliance and good repair.

123. As a direct and proximate result of the negligent, reckless, willful, wanton and grossly negligent conduct of these Defendants, Plaintiffs have and will continue to be required to expend substantial sums of money in order to investigate, design, repair and implement the necessary repairs and alterations to bring the Project to a condition which is consistent with the representations made by the Developer Defendants in property condition disclosures made

during the construction and sale process for units at the Project, and Plaintiffs will suffer other and further injuries, damages, and losses as a direct and proximate result of the acts and omissions of these Defendants.

124. As a direct and proximate result of their breaches of their fiduciary duties to the Plaintiffs, these Defendants are liable to the Plaintiffs for the actual, direct, consequential, incidental, special, and punitive damages to the Plaintiffs as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A ELEVENTH CAUSE OF ACTION
(Against the Developer Defendants)
(Breach of Contract)

125. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

126. These Defendants entered into oral and/or written contractual arrangements with Plaintiffs relating to the representation in a purchase and sale transaction, as well as the purchase of units and other property within the Project, and the right to beneficial use of common elements and amenities to be established, coordinated, and managed by these Defendants, and these Defendants received consideration which was adequate and accepted pursuant to the terms of the Defendants' offer of ownership, goods, and/or services which were accepted by the Plaintiff.

127. Based upon the terms of their contractual agreements, along with the duties which flowed from these Defendants by virtue of the Master Deed and By-laws, real estate

agency or other agreements for representation by these Defendants, and the purchase agreements for individual townhome units and other property interests at the Project, these Defendants owed a contractual obligation to Plaintiffs which required that these Defendants ensure that the Project was safe, habitable, code-compliant, and in a condition consistent with these Defendants' representations prior to turning over control of the Project to the unit owners or, in the alternative, these Defendants had a duty to establish and fund sufficient capital reserves which could be used by the Plaintiffs to repair any of these deficient and defective conditions at the Project.

128. In breach of these contractual obligations and in breach of the Master Deed, By-laws, and real estate agency and other agreements, these Defendants failed to make a full investigation of conditions at the Project, and failed to disclose the existence of the known defects at the Project, which constitutes a breach of contract and violation of the terms of the Master Deed and By-laws by these Defendants as described above.

129. In addition to and accompanying this breach of these contractual and other obligations, these Defendants made material representations which were false as more fully described in this Complaint which the Plaintiffs relied upon to the Plaintiffs detriment.

130. As a direct and proximate result thereof, Plaintiff have and will continue to suffer, and the actual, incidental, special, and consequential damages and other injuries including, but not limited to, the damages and injuries associated with the acts and omissions which constituted the breach of contract by these Defendants as aforesaid, all in an amount to be determined by the trier of fact.

131. These Defendants are therefore liable to the Plaintiffs for the actual, incidental, special, and consequential damages and other injuries as aforesaid in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A TWELFTH CAUSE OF ACTION
(Against the Developer Defendants)
(Violation of the Residential Property Condition Disclosure Act)

132. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

133. These Defendants were engaged in a joint venture, partnership, or some other form of business venture or association including, but not limited to, the formation of a Limited Liability Company, in connection with the development and construction of the Waverly at Hamlin Plantation Townhomes.

134. The Developer Defendants did so place the townhome units into the stream of commerce for sale to the general public and to the members of the Waverly Association in particular.

135. At all times relevant to this cause of action the Developer Defendants were "owners" as that term is used within S.C. Code Ann. § 27-50-10 *et seq.*, referred to as the "South Carolina Residential Property Condition Disclosure Act" (referred to in the remainder of this cause of action as the "Act").

136. The Developer Defendants failed to furnish to the purchasers of the townhome units a written disclosure statement in conformity and compliance with S.C. Code Ann. § 27-50-40.

137. These Defendants failed to inform the sellers of the units of their obligations under the Act and had reasonable cause to suspect that the information, if any, supplied by the sellers to the individual purchasers was inherently false, incomplete, and misleading.

138. Upon information and belief, notwithstanding the above-described failures of these Defendants, and each of them, knowingly violated and/or failed to perform the duties described in § 27-50-40.

139. The nature of the defects that were undisclosed in violation of § 27-50-40, prevented and/or limited any inspection performed by the Plaintiff to uncover or discover the said defects.

140. As a direct and proximate result of these Defendants' violations of their respective and collective duty to furnish written disclosure to the purchasers as required by § 27-50-10, *et seq.*, the Plaintiff has suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, along with costs, interest, and attorney's fees pursuant to the remedies set forth in the Act, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A THIRTEENTH CAUSE OF ACTION
(Against the Developer Defendants)
(Strict Liability)

141. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

142. Each and every townhome unit sold by these Defendants was a product within the meaning of S.C. Code Section 15-73-10, *et seq.*

143. These Defendants are and were engaged in the business of selling the aforesaid townhome units which are within the meaning of S.C. Code Section 15-73-10, *et seq.*

144. The aforesaid townhome units/products were expected to, and in fact did, reach the Plaintiffs herein as Users or Consumers without substantial change in condition in which it was sold within the meaning of Section B of S.C. Code 15-73-10, *et seq.*

145. The townhome units/products which were sold by these Defendants were at the time of sale in a defective condition, unreasonably dangerous to Plaintiff as a User or Consumer or to the Plaintiffs property and, as such, these Defendants are strictly liable to Plaintiff as Users or Consumers herein for the physical harm and damage proximately caused thereby.

146. As a direct and proximate result thereof, Plaintiffs as Users or Consumers have suffered, and these Defendants are liable to the Plaintiffs for, actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTEENTH CAUSE OF ACTION
(Against Developer Defendants)
(Alter Ego Liability and Piercing the Corporate Veil)

147. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

148. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project, and the Developer Defendants combined and joined together through various instrumentalities and alter egos to facilitate to process of building the townhome units in or about 2006-2007.

149. The Developer Defendants created and controlled numerous and various entities including, but not limited to, the Wieland Defendants, Builder Support Services, Inc. and Wheelock, set forth hereinabove, for the sole purpose of the construction, development, purchase of property, sale of property, leasing of townhomes, and other activities solely relating to development and sale of the townhomes that are known as the Waverly at Hamlin Plantation Townhomes. The Developer Defendants created and controlled numerous and various entities including, but not limited to, Wieland, for the sole purpose of the building and sale of the townhomes at the Project. These Defendants created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of these Defendants to achieve their financial goals and to perpetrate the activities more particularly described herein. The subservient entities in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests,

entities, and activities so as to blur the legal distinction between these Defendants and the sham corporations, shareholders, officers, agents, partners, employees, assets, and each of them.

150. These Defendants created entities which were created to perform single purpose functions in order to effectuate the sole will of these Defendants in purchasing, developing, leasing, and/or selling the units. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, these Defendants actively and directly participated in the development, purchase, sale, management, leasing, and/or operations of the Project, and in fact put the same into the stream of commerce.

151. These Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of units, and other activities solely relating to the Project which is the subject of this action.

152. The sham entities established by these Defendants were and are characterized by one or more of the following: (1) being undercapitalized; (2) failing to observe corporate formalities; (3) failing to pay dividends; (4) Insolvency; (5) lack(ed) proper records; (6) siphoning of funds by its members and/or affiliates; and (7) was used as a mere facade for the operation of the dominant shareholders, members, associates, and affiliates. Upon information and belief, each shared the same mailing address, their business was conducted on the letter head of these Defendants, these Defendants directly received payment and disbursed payment for obligations relating to the sham entities, the sham entities had no shareholders and/or officers of their own,

no separation of accounting and bookkeeping functions, and/or these Defendants directly contracted for the sham entities in the name of these Defendants.

153. These Defendants directed and oversaw the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

154. There would exist a broad element of injustice and fundamental unfairness if the acts of these Defendants, and each of them individually, were not regarded as the acts of one another.

155. At the time the units were offered for sale and placed into the stream of commerce by these Defendants, the units contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of these Defendants.

156. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

157. These latent building defects have, unbeknownst to Plaintiffs, regularly resulted in water intrusion into the buildings and property damage and continue to do so through the date of this filing.

158. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

159. The Plaintiffs suffered damages and injuries when these Defendants put these units into the stream of commerce and continue to be damaged and injured through the date of this filing.

160. As a direct and proximate result thereof, these Defendants are liable to the Plaintiffs for actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

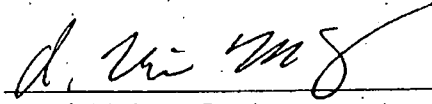
WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- a) Enter judgment in favor of the Plaintiffs and against all Defendants, jointly and severally, in an amount to be determined for actual, incidental, consequential, special, and punitive damages.
- b) Find that the Defendants have engaged in unfair trade practices and knowingly did so thereby entitling Plaintiffs to treble damages.
- c) Award attorneys' fees and costs to the Plaintiffs; and
- d) Award such other and further relief as the Court may deem just and proper.

[Signature Page to Follow]

Respectfully Submitted,

MCCARTY LAW FIRM, PC

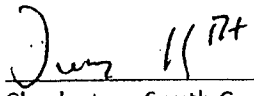


I. Keith McCarty, Esquire
1212 Wappoo Road
Charleston, SC 29407
Tel: 843-793-1272
ikeithmccarty@gmail.com

and

John C. Hayes, IV, Esquire
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: 843-805-7003
Fax: 843-573-7388
jhayes@hayeslaw.org

ATTORNEYS FOR PLAINTIFFS

 2014
Charleston, South Carolina

2014-CP-10-4335^{BZ}

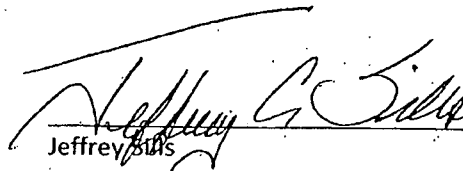
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JULIE A. STRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

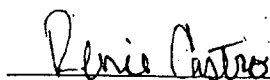
VERIFICATION

PERSONALLY APPEARED before me Jeffrey Sills, who being duly sworn, says that he is a Plaintiff in the foregoing action and makes this Affidavit based upon his personal knowledge; that he has read the allegations in the foregoing Complaint and that the same are true of his own knowledge, except those matters that state on information and belief, and as to those matters, he believes them to be true.


Jeffrey Sills

SWORN to before me this

11th day of July, 2014


Notary Public for South Carolina

My Commission Expires: 8/13/18

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation)
Townhome Association, Inc.,)

Plaintiff,)

vs.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builder Support)
Services of the Carolinas, Inc., and)
Wheelock Street Capital, LLC d/b/a John)
Wieland Homes, Neighborhoods, Inc.,)
Barr Construction, Inc., Benjamin Mora)
d/b/a Mora Construction a/k/a)
Benjamin Mora Construction, LLC,)
Builder's Firstsource, Inc. a/k/a Builders)
Firstsource-Southeast Group, LLC a/k/a)
Builders Firstsource-Atlantic Group, LLC,)
DBC Construction Services, LLC, Eli, Inc.,)
Gerardo Rosette Sanchez a/k/a GR)
Painting, George Medina, George Medina)
a/k/a JMC Construction, Inc., Jesus)
Mora a/k/a J. Mora Brick & Block)
Mason, LLC, Juan Luis Sanchez, Juan)
Luis Sanchez a/k/a Sanchez Brothers)
Painting, Latitude Construction)
Services, LLC, The Muhler Company,)
Inc., Paul M. Vasquez, Richard Ditullio,)
Richard Ditullio a/k/a RDT Contracting,)
LLC,)

Defendants.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10-3326

AMENDED SUMMONS
(Jury Trial Demanded)

FILED
2014 DEC 19 PM 4:04
JULIE J. ARMSTRONG
CLERK OF COURT

successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builders Support)
Services of the Carolinas, Inc.)

Third-Party Plaintiffs,)

Barr Construction, Inc., Benjamin Mora)
d/b/a Mora Construction, a/k/a)
Benjamin Mora Construction, LLC,)
Builder's Firstsource, Inc. a/k/a Builders)
Firstsource-Southeast Group, LLC, a/k/a)
Builders Firstsource –Atlantic Group,)
LLC, DBC Construction Services, LLC, Eli,)
Inc., Gerardo Rosette Sanchez a/k/a GR)
Painting, Jorge Medina a/k/a JMC)
Construction, LLC a/k/a JMC)
Construction, Inc.; Jesus Mora a/k/a J.)
Mora Brick & Block Mason, LLC; Juan)
Luis Sanchez, Juan Luis Sanchez a/k/a)
Sanchez Brothers Painting; Latitude)
Construction Services, LLC, The Muhler)
Company, Inc., Paul M. Vasquez,)
Richard Ditullio, Richard Ditullio a/k/a)
ROT Contracting, LLC,)

Third-Party Defendants.)

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Summons and Complaint upon the subscribers at their office at 180 Meeting Street, Suite 330, Charleston, South Carolina within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer within the prescribed time, a judgment by default will be rendered against you for the amount or other remedy requested in the attached Complaint, plus interests and costs.

[Signature Page to Follow]

HAYES LAW FIRM, LLC

John C. Hayes, IV, Esquire (SC Bar #: 69740)
Mary-Margaret E. Noland (SC Bar #: 71713)
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: (843) 805-7003
Fax: (843) 573-7388
jhayes@hayeslaw.org
mnoland@hayeslaw.org

AND

I. Keith McCarty
McCarty Law Firm, P.C.
1212 Wappoo Road
Charleston, SC 29407
Phone: (843) 793-1272
ikeithmccarty@gmail.com

ATTORNEYS FOR PLAINTIFF

December 19, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10-3326

Waverly at Hamlin Plantation)
Townhome Association, Inc.,)
)
Plaintiff,)

vs.)

AMENDED COMPLAINT
(Jury Trial Demanded)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builder Support)
Services of the Carolinas, Inc., and)
Wheelock Street Capital, LLC d/b/a John)
Wieland Homes and Neighborhoods,)
Inc., Barr Construction, Inc., Benjamin)
Mora d/b/a Mora Construction a/k/a)
Benjamin Mora Construction, LLC,)
Builder's Firstsource, Inc. a/k/a Builders)
Firstsource-Southeast Group, LLC a/k/a)
Builders Firstsource-Atlantic Group, LLC,)
DBC Construction Services, LLC, Eli, Inc.,)
Gerardo Rosette Sanchez a/k/a GR)
Painting, George Medina, George Medina)
a/k/a JMC Construction, Inc., Jesus)
Mora a/k/a J. Mora Brick & Block)
Mason, LLC Juan Luis Sanchez; Juan Luis)
Sanchez a/k/a Sanchez Brothers)
Painting, Latitude Construction)
Services, LLC, The Muhler Company,)
Inc., Paul M. Vasquez, Richard Ditullio,)
Richard Ditullio a/k/a RDT Contracting,)
LLC,)
)
Defendants.)

FILED
2014 DEC 19 PM 4:05
JULIE J. ARMSTRONG
CLERK OF COURT

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc.; Builders Support)
Services of the Carolinas, Inc.)

Third-Party Plaintiffs,)

Barr Construction, Inc., Benjamin Mora)
d/b/a Mora Construction, a/k/a)
Benjamin Mora Construction, LLC,)
Builder's Firstsource, Inc. a/k/a Builders)
Firstsource-Southeast Group, LLC, a/k/a)
Builders Firstsource –Atlantic Group,)
LLC, DBC Construction Services, LLC, Eli,)
Inc., Gerardo Rosette Sanchez a/k/a GR)
Painting, George Medina a/k/a JMC)
Construction, LLC a/k/a JMC)
Construction, Inc.; Jesus Mora a/k/a J.)
Mora Brick & Block Mason, LLC; Juan)
Luis Sanchez, Juan Luis Sanchez a/k/a)
Sanchez Brothers Painting; Latitude)
Construction Services, LLC, The Muhler)
Company, Inc., Paul M. Vasquez,)
Richard Ditullio, Richard Ditullio a/k/a)
ROT Contracting, LLC,)

Third-Party Defendants.)

The Plaintiff, complaining of the Defendants above named, would allege and show unto this Honorable Court as follows:

1. Waverly at Hamlin Plantation Townhome Association, Inc. (hereinafter "Association" or "Waverly Townhomes") is a duly authorized South Carolina non-profit corporation.

2. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina and are authorized to conduct business in this state, and have a principal place of business in Charleston County.

3. Defendant Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., is a joint venture with the Wieland Defendants formed in November 2012.

4. Defendant Barr Construction, Inc., (hereinafter "Barr") is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and supplied and performed site work/drainage items and labor.

5. Defendant Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC, (hereinafter "Mora Construction") is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and supplied and installed foundation connections together with all associated and related waterproofing and flashing.

6. Defendant Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC a/k/a Builder's Firstsource-Atlantic Group, LLC, is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and performed framing work, to include, but not limited to, installation of the water management system and installation of doors and windows, together with all associated waterproofings and flashings.

7. Defendant DBC Construction Services, LLC, is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and performed roofing, together with all associated and related waterproofings and flashings.

8. Defendant Eli, Inc., is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and performed sidewalk, walkway and driveway paving.

9. Defendant Gerardo Rosette Sanchez a/k/a GR Painting, is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and performed exterior painting/caulking, together with all associated and related waterproofing and flashing.

10. Defendant Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and performed hardiplank/cement board siding supplier and installer, together with all associated and related waterproofing and flashing.

11. Defendant Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and was the masonry supplier and installer to include brick entryway steps, together with all associated and related waterproofing and flashing.

12. Defendant Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and performed exterior painting/caulking, together with all associated and related waterproofing and flashing.

13. Defendant Latitude Construction Services, LLC, upon information and belief a corporation organized pursuant to the laws of the State of South Carolina and was the waterproofing supplier and installer for balconies and porches, together with all associated and related waterproofing and flashing.

14. Defendant The Muhler Company, Inc., is upon information and belief a corporation organized pursuant to the laws of the State of South Carolina and was the window and door manufacturer, supplier, retailer and installer, together with all associated and related waterproofing and flashing.

15. Defendant Paul M. Vasquez, is upon information and belief a corporation organized pursuant to laws of the State of South Carolina and was the window and door manufacturer, supplier, retailer and installer, together with all associated and related waterproofing and flashing.

16. Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC, is upon information and belief, a corporation organized pursuant to the laws of the State of South Carolina and performed roofing, together with all associated and related waterproofings and flashings.

17. Waverly Townhomes is a section of the residential community, Hamlin Plantation, located in Mount Pleasant, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.

18. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.

19. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.

20. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.

21. This Court has jurisdiction over the parties and subject matter hereto.

22. The construction of Waverly Townhomes was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and experienced in performing such construction work as to properly build Waverly Townhomes according to the normal standards of good and workmanlike practice in the construction field.

23. Construction defects in the Waverly Townhomes have recently been discovered. A recent inspection of the subject Townhomes resulted in the discovery of major problems and deficiencies including but not limited to the following:

- (a) Lack of proper flashing;
- (b) Lack of proper roofing installation;
- (c) Moisture damage along porches;
- (d) Water intrusion damage resulting from defects;
- (e) Improper flashing installation;
- (f) Improper paving and drainage; and
- (g) Improper window installation.

24. As a direct and proximate result and consequence of the faulty construction by the Defendants of Plaintiff's homes, causing major problems and defects thereto, the Plaintiff have and will continue to spend substantial sums of money for the repairs and reconstruction of major portions of Waverly Townhomes and will be subject to consequential damages.

FOR A FIRST CAUSE OF ACTION
(Unfair Trade Practices)

25. Plaintiff and the Defendants are "persons" within the meaning of S.C. Code § 39-5-10(a).

26. The Defendants, by developing, marketing and constructing the subject Residences, were engaged in commerce within the meaning of S.C. Code § 39-5-10(b).

27. The Defendants' actions, described hereinabove, constitute unfair and deceptive practices within the meaning of S.C. Code § 39-5-20(a).

28. The Defendants' acts are capable of repetition, and, upon information and belief, have been repeated.

29. The Defendants' conduct affects the public interest of South Carolina.

30. The Defendants knew, or reasonably should have known, that their conduct violated the Unfair Trade Practices Act.

31. As a direct foreseeable and proximate result of the Defendants' unfair and deceptive practices, Plaintiff has suffered an ascertainable loss of money and property.

32. Plaintiff is entitled to recover his actual damages, which amount should be trebled, together with interest and attorney's fees.

FOR A SECOND CAUSE OF ACTION
(Breach of implied Warranty of Fitness of Habitability)

33. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 22 above, as if fully set forth herein verbatim.

34. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

35. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiff.

FOR A THIRD CAUSE OF ACTION

(Breach of Implied Warranty of Fitness for Particular purpose)

36. The Plaintiff incorporates into this cause of action the allegations in Paragraphs 1 through 25 above, as fully as if repeated verbatim herein.

37. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

38. At the time of the sale of the subject Residences to the Plaintiff, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

39. The Defendants, at the time of the sale of the subject Residences to the Plaintiff, had reason to know that the Plaintiff was relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

40. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

41. As a result of the Defendants' breach of its implied warranties, Plaintiff has suffered physical damages.

FOR A FOURTH CAUSE OF ACTION

(Negligence)

42. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 31 above, as if fully set forth herein verbatim.

43. The construction of the subject Residences by the Defendants deviated from the normal standards of good and workmanlike practice in the construction filed in the following particulars, to-wit:

- (a) In failing and omitting to construct the residences in conformity with the applicable building codes, so as to create statutory violations;
- (b) In failing and omitting to construct the subject Residences pursuant to good and workmanlike construction practices;
- (c) In failing and omitting to install proper flashing throughout the subject Residences;
- (d) In failing and omitting to properly seal the subject Residences' exteriors to prevent water infiltration and intrusion;

44. As a direct, foreseeable and proximate result of the Defendants' negligence, Plaintiff has suffered damages in the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure.

FOR A FIFTH CAUSE OF ACTION

(Breach of Contract)

45. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 34 above as if set forth herein verbatim.

46. That the Defendants entered into a contract with the homeowners and/or predecessors-in-title, whereby the Defendants were to construct the subject homes and facilities to industry standards and in a good workmanlike proper manner.

47. The Defendants did not honor their obligations under the agreement with the Plaintiff and/or their predecessors-in-title in that they failed to construct subject Residences according to industry standards and in a good, workmanlike proper manner causing major defects to the homes.

48. That the Defendants are in breach of the parties' contracts.

49. That as a result of the Defendants' breach of contract, the Plaintiff has suffered and will continue to suffer and are entitled to recover monetary damages caused by the defective construction by the Defendants and for loss of use and diminution in value of the subject Residences.

FOR A SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

50. Plaintiff repeats and realleges the allegations contained in the above paragraphs as if more fully set forth herein.

51. The Defendants had a fiduciary duty and duty of loyalty and good faith dealing to transfer Waverly Townhomes to the control of the Plaintiff in a state of good repair. Defendants, having transferred elements with the defects and deficiencies set forth above, in the alternative is required to provide the Plaintiff with the funds necessary to bring the elements up to standard of reasonably good repair and condition.

52. Defendants breached their fiduciary duty and duty of loyalty and good faith dealing by transferring the elements in a substandard and deficient condition without the funds necessary to bring them up to standards of good repair and condition.

53. As a direct and proximate result and consequence of the Defendants actions, Plaintiff has suffered damages in the amount equal to the extraordinary repair, maintenance and

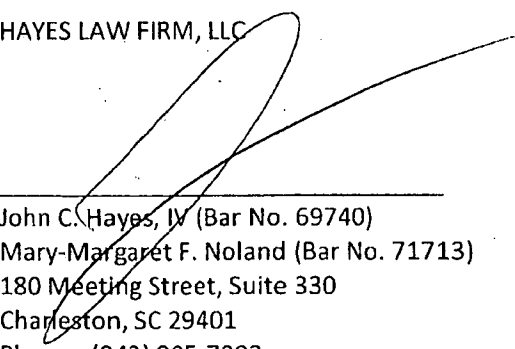
reconstruction costs required and expended, and to be required and expended, over the expected life of the buildings and other improvements, loss of use and diminution in value.

WHEREFORE, the Plaintiff prays that this Court issue an Order granting judgment for the Plaintiff against the Defendants, jointly and severally, for the following:

- (a) for actual damages in an amount to be proven at trial;
- (b) for trebled damages under S.C. Code § 39-5-10, et seq.;
- (c) for punitive damages;
- (d) for prejudgment and post judgment interest on Plaintiff's damages;
- (e) for attorney's fees and costs; and
- (f) for such other and further relief as this Court may deem just and proper.

[Signature Page to Follow]

HAYES LAW FIRM, LLC



John C. Hayes, IV (Bar No. 69740)
Mary-Margaret F. Noland (Bar No. 71713)
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: (843) 805-7003
Fax: (843) 720-5999
jhayes@hayeslawfirm.org
mnoland@hayeslawfirm.org

AND

I. Keith McCarty
McCarty Law Firm, P.C.
1212 Wappoo Road
Charleston, SC 29407
Phone: (843) 793-1272
ikeithmccarty@gmail.com

ATTORNEYS FOR PLAINTIFF

December 19, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2013-CP-10-3326

Waverly at Hamlin Plantation)
Townhome Association, Inc.,)
)
Plaintiffs,)

vs.)

CERTIFICATE OF SERVICE

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builder Support)
Services of the Carolinas, Inc., and)
Wheelock Street Capital, LLC d/b/a John)
Wieland Homes and Neighborhoods,)
Inc.,)
)
Defendants.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc. as)
successor by statutory merger to John)
Wieland Homes and Neighborhoods of)
South Carolina, Inc., John Wieland)
Homes of Charleston, Inc., John)
Wieland Homes, Inc., Builders Support)
Services of the Carolinas, Inc.)

Third-Party Plaintiffs,)

Barr Construction, Inc., Benjamin Mora)
d/b/a Mora Construction, a/k/a)
Benjamin Mora Construction, LLC,)
Builder's Firstsource, Inc. a/k/a Builders)
Firstsource-Southeast Group, LLC, a/k/a)
Builders Firstsource -Atlantic Group,)
LLC, DBC Construction Services, LLC,)

2014 DEC 19 PM 4:05
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Gerardo Rosette Sanchez a/k/a GR)
 Painting, Jeorge Medina a/k/a JMC)
 Construction, LLC a/k/a JMC)
 Construction, Inc.; Jesus Mora ak/a J.)
 Mora Brick & Block Mason, LLC; Juan)
 Luis Sanchez, Juan Luis Sanchez a/k/a)
 Sanchez Brothers Painting; Latitude)
 Construction Services, LLC, The Muhler)
 Company, Inc., Paul M. Vasquez,)
 Richard Ditullio, Richard Ditullio a/k/a)
 ROT Contracting, LLC,)
)
 Third-Party Defendants.)
)

The undersigned hereby certifies that on the 19 day of December 2014, a true and correct copy of the attached Amended Summons and Amended Complaint was served upon all parties and/or their respective counsel of record by placing the same in the U.S. Mail and/or email with sufficient postage affixed and addressed as follows:

Thomas C. Hildebrand, Jr., Esquire Kristina Y. Baxley, Esquire Elliott E. Quinn, Esquire Parker Poe Adams & Bernstein, LLP 200 Meeting Street, Suite 301 Charleston, SC 29401 tomhildebrand@parkerpoe.com kristinabaxley@parkerpoe.com elliottquinn@parkerpoe.com Attorneys for Third-Party Defendants John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., and Builder Support Services of the Carolinas, Inc.	Jonathan J. Anderson, Esquire Curt Martin, Esquire Anderson Reynolds & Stephens, LLC 37 ½ Broad Street Charleston, SC 29401 cmartin@arslawsc.com janderson@arslawsc.com and E. Glenn Elliott Aiken, Bridges, Elliott, Tyler & Saleeby, P.A. 181 East Evans St., Suite 409 Florence, SC 29506 ege@aikenbridges.com Attorneys for Benjamin Mora d/b/a Mora Construction and Benjamin Mora Construction, LLC
Erin D. Dean, Esquire Tupper, Grimsley & Dean, P.A. PO Box 2055 Beaufort, SC 29901-2055 erindean@tgdpa.com	Marvin D. Infinger, Esquire Nexsen Pruet, LLC 205 King Street, Suite 400 Charleston, SC 29401 minfinger@nexsenpruet.com

Attorney for Barr Construction, Inc.	Attorney for Wheelock Street Capital, LLC
Patrick T. Morrissey Clawson & Staubes, LLC 126 Seven Farms Drive, Suite 200 Charleston, SC 29492 pmorrissey@clawsonandstaubes.com Attorneys for ELI, Inc.	<u>Laura E. Paton, Esquire</u> <u>R. Michael Ethridge, Esquire</u> <u>Carlock Copeland & Stair, LLP</u> 40 Calhoun St., Suite 400 Charleston, SC 29401 lpaton@carlockcopeland.com Attorney for Latitude Construction Services, LLC
Julian K. Allen, Esquire Turner, Padgett, Graham & Laney, P.A. 40 Calhoun Street Charleston, SC 29401 jallen@turnerpadgett.com Attorney for Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting	Andrew N. Cole Collins & Lacy, P.C. 1330 Lady St., 6 th Floor (29201) Post Office Box 12487 Columbia, SC 29211 acole@collinsandlacy.com Attorney for JMC Construction and George Medina
Stephen P. Hughes, Esquire Kimberly Hopkinson, Esquire Andrew Yoho, Esquire Howell Gibson & Hughes, P.A. 25 Rue Du Bois Beaufort, SC 29907 sphughes@hgghpa.com khopkinson@hgghpa.com ayoho@hgghpa.com Attorney for Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource -Atlantic Group, LLC	

HAYES LAW FIRM



Jefa M. Lingle
Paralegal to John C. Hayes, IV and
Mary-Margaret F. Noland

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome
Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc. as successor by
statutory merger to John Wieland Homes
and Neighborhoods of South Carolina,
Inc., John Wieland Homes of Charleston,
Inc., John Wieland Homes, Inc., Builders
Support Services of the Carolinas, Inc. and
Wheelock Street Capital, LLC d/b/a John
Wieland Homes and Neighborhoods, Inc.;
Barr Construction, Inc.; Benjamin Mora
d/b/a Mora Construction, a/k/a Benjamin
Mora Construction, LLC; Builder's
Firstsource, Inc. a/k/a Builders
Firstsource- Southeast Group, LLC, a/k/a
Builders Firstsource – Atlantic Group, LLC;
DBC Construction Services, LLC; Eli, Inc.;
Gerardo Rosette Sanchez a/k/a GR
Painting; George Medina, George Medina
a/k/a JMC Construction, LLC a/k/a JMC
Construction, Inc.; Jesus Mora a/k/a J.
Mora Brick & Block Mason, LLC; Juan Luis
Sanchez; Juan Luis Sanchez a/k/a
Sanchez Brothers Painting; Latitude
Construction Services, LLC; The Muhler
Company, Inc.; Paul M. Vasquez; Richard
Ditullio; Richard Ditullio a/k/a RDT
Contracting, LLC

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-3326

DEFENDANTS JOHN WIELAND HOMES
AND NEIGHBORHOODS OF THE
CAROLINAS, INC. AS SUCCESSOR BY
STATUTORY MERGER TO JOHN
WIELAND HOMES AND
NEIGHBORHOODS OF SOUTH
CAROLINA, INC., JOHN WIELAND
HOMES OF CHARLESTON, INC., JOHN
WIELAND HOMES, INC., BUILDERS
SUPPORT SERVICES OF THE
CAROLINAS, INC.'S ANSWER TO
AMENDED COMPLAINT AND
CROSS CLAIMS

FILED
2015 JAN 26 PM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT

The Defendants identified in the caption as John Wieland Homes and
Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland

Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., and Builders Support Services of the Carolinas, Inc. (hereinafter collectively referred to as "Wieland"), through their below-signed attorneys, answering the Amended Complaint of the Plaintiffs above-named and by way of Crossclaims, allege as follows.:

1. They admit, upon information and belief, the allegations of Paragraph 1.
2. Answering the allegations of Paragraphs 2 and 3, they crave reference to the applicable corporate and business filings and documents for their exact terms and contents and deny any allegations inconsistent therewith.
3. They are without information sufficient to form a belief as to the allegations of Paragraphs 4 through 16 and therefore deny the same and demand strict proof thereof.
4. They deny the allegations of Paragraph 17 as stated but admit that Wieland was the developer and general contractor for the townhomes; however, actual construction was performed by others.
5. They deny the allegations of Paragraphs 18 through 20.
6. The allegations of Paragraph 21 state legal conclusions which require no responsive pleading from Wieland.
7. They deny the allegations of Paragraphs 22 through 24, including subparts.

AS TO THE FIRST CAUSE OF ACTION

8. They deny the allegations of Paragraphs 25 through 32.

AS TO THE SECOND CAUSE OF ACTION

9. Answering the allegations of Paragraph 33, they reallege their responses to the above paragraphs as if repeated herein verbatim.

10. They deny the allegations of Paragraphs 34 and 35.

AS TO THE THIRD CAUSE OF ACTION

11. Answering the allegations of Paragraph 36, they reallege their responses to the above paragraphs as if repeated herein verbatim.

12. They deny the allegations of Paragraphs 37 through 41.

AS TO THE FOURTH CAUSE OF ACTION

13. Answering the allegations of Paragraph 42, they reallege their responses to the above paragraphs as if repeated herein verbatim.

14. They deny the allegations of Paragraphs 43 and 44, including subparts.

AS TO THE FIFTH CAUSE OF ACTION

15. Answering the allegations of Paragraph 45, they reallege their responses to the above paragraphs as if repeated herein verbatim.

16. Answering the allegations of Paragraph 46, Wieland craves reference to its contracts and sales documents, as amended, for their exact terms and contents and denies any allegations inconsistent therewith.

17. They deny the allegations of Paragraphs 47 through 49.

AS TO THE SIXTH CAUSE OF ACTION

18. Answering the allegations of Paragraph 50, they reallege their responses to the above paragraphs as if repeated herein verbatim.

19. They deny the allegations of Paragraphs 51 through 53, being all the remaining allegations of the Plaintiff's Amended Complaint.

20. They deny each and every allegation of the Plaintiffs' Amended Complaint not specifically admitted above.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

21. Plaintiffs lack standing and otherwise have improperly attempted to make the claims asserted against Wieland in this action. Plaintiffs lack of standing and improprieties include, but are not limited to, the fact that Plaintiffs have improperly attempted to file a derivative action and Plaintiffs' filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiffs' claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

22. That all claims asserted against Wieland are barred by the applicable statute of limitations and/or the applicable statute of repose.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

23. Plaintiffs' claims, if any, are barred, or should be reduced, by Plaintiffs' own comparative negligence and recklessness by Plaintiffs' failure to properly maintain the property and to mitigate their damages.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

24. Plaintiffs' claims, if any, are the result of acts and omissions of other entities over whom Wieland has no control, barring Plaintiffs' claims against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

25. That all claims are barred by the doctrine of laches, waiver and estoppel.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

26. That the final completion and acceptance of the work undertaken by Wieland pursuant to the original contract and all modifications thereto constitutes a complete defense to all claims asserted by Plaintiffs.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

27. Plaintiffs' claims are, upon information and belief, barred as it has failed to make a claim against Wieland within any applicable warranty period.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

28. That all claims asserted by Plaintiffs are barred by the doctrine of unclean hands.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

29. That Plaintiffs failed to give Wieland reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide Wieland a reasonable opportunity to correct any such alleged defects.

30. That Plaintiffs' failure to give Wieland notice of and an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims of breach of warranty.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

31. Upon information and belief, any express or implied warranties were limited in duration from the date of completion and acceptance of the project by the Owner.

32. That the failure of Plaintiffs within the warranty period from the date of the completion and acceptance of the project by the Plaintiffs, to give notice of or make any claim for alleged deficiencies in the workmanship and/or materials provided by Wieland constitutes a complete defense to all claims asserted by Plaintiffs.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

33. Plaintiffs' Amended Complaint is barred by payment and/or release.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

34. Plaintiffs have waived and/or are estopped from asserting the claims set forth in their Amended Complaint.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

35. If Plaintiffs sustained injuries and damages in the manner alleged in the Amended Complaint, which injuries and damages are specifically denied by Wieland, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Wieland nor of anyone for whose conduct Wieland are anyway responsible, but solely through the fault, neglect, breach of warranty (express or implied) and want of due care on the part of Plaintiffs, all of which will be shown at the trial of this case, and for which Plaintiffs can have no recovery against Wieland or, in the alternative, for which Plaintiffs'

recovery should be appropriately reduced. Plaintiffs' comparative negligence includes, but is not limited, the following particulars:

- (a) In failing to exercise reasonable care in maintaining the structures;

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

36. Plaintiffs' claims are barred as the court lacks jurisdiction over the subject matter of the case.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

37. Plaintiffs' claims fail to state facts sufficient to constitute causes of action against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

38. Wieland has contractually limited its warranty and non-warranty obligations and exposure to the Plaintiffs, excluding liability for many claims the Plaintiffs are making, barring Plaintiffs' claims and/or Plaintiffs' claimed damages, including Plaintiffs' claim for consequential damages, in whole or in part, against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

39. Plaintiffs' claims are barred, or should be stayed, pending arbitration as there exists a valid arbitration provision in the contract between the Plaintiffs and Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

40. Plaintiffs' claims should be dismissed as the Plaintiffs failed to effect proper service of process on Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

41. Plaintiffs' claims should be dismissed as there is a lack of appropriate personal jurisdiction against one or all of the Wieland Defendants in this action.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

42. Plaintiffs' claim are barred by the doctrine of corporate immunity.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

43. Plaintiffs' claim are barred or would be reduced as Wieland provided a limited warranty to Plaintiffs which was in lieu of all other warranties or obligations, express or implied, including the warranty of habitability, warranty of suitability for residential purposes, any warranties of marketability or fitness for particular purposes. Plaintiffs' claims and remedies are limited to claims and remedies under the limited warranty that was provided, and any other claims are barred.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

44. The Plaintiffs' claims are barred or should be dismissed by virtue of the doctrine of spoliation of evidence, as the Plaintiffs spoiled evidence and repaired alleged deficiencies without notice to Wieland and without giving Wieland opportunity to observe the alleged deficiencies.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

45. Plaintiff's claims are barred and/or should be stayed or dismissed by virtue of Plaintiff's failure to comply with the South Carolina Notice and Opportunity to Cure Non-Residential Construction Defects Act, South Carolina Code §40-11-510, et. seq.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

46. Plaintiffs' claims are barred and/or should be stayed or dismissed by virtue of the Plaintiffs' failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, South Carolina Code §40-59-810-860 (1976 as amended).

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

47. Plaintiff's claims are barred by the economic loss rule.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

48. Plaintiffs' claims should be dismissed or stayed as Plaintiffs have failed, prior to filing suit, to comply with valid, applicable and mutually enforceable conditions precedent contained in the applicable purchase and sales documents and applicable corporate/legal documents (to include, but not limited to, the regime documents, Master Deed and Bylaws, deeds, sales contracts and Townhouse Association documents), including any and all alternative dispute provisions and provisions related to the number of owner/members who must agree to file a claim or suit. Plaintiffs lack of standing and improprieties include, but are not limited to, the fact that Plaintiffs have improperly attempted to file a derivative action and Plaintiffs' filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the

requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiffs' claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

49. Plaintiffs' Amended Complaint should be dismissed for failure to join necessary persons, parties and/or entities pursuant to SCRCP 19.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

50. Plaintiffs' claims for the unfair trade practices act should be dismissed as the alleged actions of Wieland do not have an impact on the public interest.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

51. Plaintiffs' claims for breach of South Carolina's unfair trade practices act are barred pursuant to South Carolina Code §39-5-40.

FURTHER ANSWERING AND BY WAY OF CROSSCLAIMS AGAINST THE ABOVE-
NAMED CO-DEFENDANTS, WIELAND ALLEGES AS FOLLOWS:

52. Wieland realleges the Paragraphs above as if repeated herein verbatim.

53. Plaintiffs have sued Wieland claiming damages caused by alleged deficient materials, design, engineering and/or construction services provided by Subcontractor Defendants on the Project. See Amended Complaint attached as Exhibit "A".

54. Wieland contracted with the following persons and entities (herein collectively referred to as "Subcontractor Defendants") to perform work and provide materials as subcontractors and materialmen for the Project. The written contracts, as amended, between Wieland and the Subcontractor Defendants are incorporated herein

by reference, to include any and all arbitration provisions that are applicable and that would apply in this matter. The Subcontractor Defendants are as follows:

- (a) framing, to include but not limited to installation of the water management system and installation of doors and windows, together with all associated waterproofings and flashings
 - Builder's Firstsource, Inc. a/k/a Builders Firstsource- Southeast Group, LLC, a/k/a Builders Firstsource – Atlantic Group, LLC
- (b) roofing, together with all associated and related waterproofings and flashings
 - Richard Ditullio, Richard Ditullio d/b/a RDT Contracting, LLC
 - DBC Construction Services, LLC
 - George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.
- (c) window and door manufacturer, supplier, retailer and installer, together with all associated and related waterproofings and flashings
 - The Muhler Company, Inc.
 - Paul M. Vasquez
- (d) railing suppliers and installers for balconies, porches and stairs, together with all associated and related waterproofings and flashings
 - George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.
- (e) waterproofing supplier and installer for balconies and porches, together with all associated and related waterproofings and flashings
 - Latitude Construction Services, LLC
- (f) hardiplank/cement board siding supplier and installer, together with all associated and related waterproofings and flashings
 - George Medina, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.
- (g) hurricane strap installer, together with all associated and related waterproofings and flashings

- Builder's Firstsource, Inc. a/k/a Builders Firstsource- Southeast Group, LLC, a/k/a Builders Firstsource – Atlantic Group, LLC
- i) masonry supplier and installer to include brick entryway steps, together with all associated and related waterproofings and flashings
 - Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC
- (j) exterior painter/caulker, together with all associated and related waterproofings and flashings
 - Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting
 - Gerardo Rosette Sanchez a/k/a GR Painting
- (k) foundation connections, supplier and installer, together with all associated and related waterproofings and flashings
 - Benjamin Mora a/k/a Mora Construction, a/k/a Benjamin Mora Construction, LLC
 - Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC
- (l) sidewalk, walkway and driveway paving
 - Eli, Inc.
- (m) sitework/drainage supplier and installer
 - Barr Construction, Inc.

55. Wieland has denied all of the substantive allegations against it that were made by the Plaintiffs.

FOR A FIRST CAUSE OF ACTION
(Indemnity)

56. To the extent, if any, that Wieland is held liable to the Plaintiffs in this action, such liability would be a direct and proximate result of the wrongful acts, errors, omissions, breaches, negligence, gross negligence, recklessness and/or representations of Subcontractor Defendants, which has damaged Wieland as Wieland

has been subjected to liability, and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

57. To the extent, if any, that the construction was defective or deficient in workmanship, installation, materials, and/or were not merchantable or fit for their particular purposes, such defects and deficiencies would be the result of the breach of the express and implied contractual obligations and warranties that Subcontractor Defendants provided, damaging Wieland as Wieland has been subjected to liability, and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

58. Wieland is entitled to full indemnification from Subcontractor Defendants for any liability Wieland is found to have to the Plaintiffs in this action, and Wieland would be entitled to damages for Subcontractor Defendants' negligence, gross negligence and recklessness as aforescribed and for Subcontractor Defendants' breach of its implied and express warranties, entitling Wieland to recover from Subcontractor Defendants its attorney's fees, costs and other expenses incurred in defending this action, and entitling Wieland to recover from Subcontractor Defendants any sums for which it may be held liable to Plaintiffs.

59. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor

Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

FOR A SECOND CAUSE OF ACTION
(Negligence)

60. Wieland realleges the Paragraphs above as if repeated herein verbatim.

61. The Subcontractor Defendants were negligent, grossly negligent, reckless and careless in the construction, supervision, inspection and/or supplying of the work or materials outlined above and incorporated into the project.

62. As a direct and proximate result of such negligence, gross negligence, recklessness and carelessness, Wieland has been damaged in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

63. Upon information and belief, Wieland is entitled to judgment for actual damages collectively or individually against the Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as fees and costs incurred in the investigation, defense and settlement of this claim.

64. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor

Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

65. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' negligence, gross negligence and recklessness and for which the Subcontractor Defendants are also liable to Wieland.

FOR A THIRD CAUSE OF ACTION
(Breach of Warranty)

66. Wieland realleges the Paragraphs above as if repeated herein verbatim.

67. The Subcontractor Defendants expressly or impliedly warranted to Wieland that all work performed by them would be performed in a careful, diligent and workmanlike manner, and that any materials and/or services designed, supplied or sold by them for use on the project would be merchantable and fit for their intended or specific purpose. Subcontractor Defendants breached their implied and/or express warranties of merchantability, workmanlike service, and/or fitness for a particular or intended purpose in the construction of the project.

68. As a result of these breaches of warranties, Wieland has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

69. Upon information and belief, Wieland is entitled to judgment against the Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs,

or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

70. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

71. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' breach of warranty and for which the Subcontractor Defendants are also liable to Wieland.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract)

72. Wieland realleges the Paragraphs above as if repeated herein verbatim.

73. Wieland entered into contracts with the Subcontractor Defendants. Subcontractor Defendants were to provide work and materials to the Project in question as described above.

74. The terms of the contracts required Subcontractor Defendants to provide construction goods and services for the Project that, among other things, would produce

a quality building free from defects and otherwise in conformance of all contract documents, including all building codes and industry standards. The contract further required Subcontractor Defendants to supervise and direct its work, using the best skill and attention.

75. Subcontractor Defendants breached their contract by failing to provide appropriate construction goods and services to the Project, by failing to perform their work in a careful, diligent and workmanlike manner, by failing to provide goods and services that resulted in a quality building free from defects and otherwise in conformance with all contract documents, and failing to provide goods and services that were in conformity with all appropriate building codes and industry standards.

76. As a result of these breaches of contract, Wieland has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it paid Plaintiffs in settlement of Plaintiffs' claims, plus the costs of investigating and defending this claim.

77. Upon information and belief, Wieland is entitled to judgment against Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs, or which it paid Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

78. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor

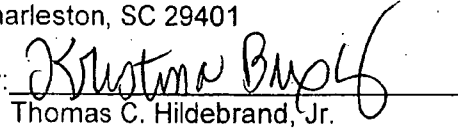
Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

79. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' breach of contract and for which the Subcontractor Defendants are also liable to Wieland.

WHEREFORE, Wieland prays that the claims of the Plaintiffs be dismissed, and that Wieland be given judgment against the Subcontractor Defendants in the amount of any liability Wieland is found to have to Plaintiffs in this action, and Wieland demands judgment requiring Subcontractor Defendants to defend and indemnify Wieland against any liability which Wieland may suffer to Plaintiffs in this action, to include Wieland's attorney's fees, costs and other expenses incurred in defending this action. Wieland further demands judgment for actual and punitive damages against the Subcontractor Defendants and to reimburse it fully for all costs, expenses, and attorneys' fees associated with the deficiencies described herein, in an amount to be determined by the trier of fact, and for such other and further relief as this Court may deem just and proper.

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

By:



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

Kristina Y. Baxley
kristinaybaxley@parkerpoe.com

John Wieland Homes and Neighborhoods
of the Carolinas, Inc. as successor by
statutory merger to John Wieland Homes
and Neighborhoods of South Carolina, Inc.,
John Wieland Homes of Charleston, Inc.,
John Wieland Homes, Inc., Builders
Support Services of the Carolinas, Inc.

January 26, 2015

CERTIFICATE OF SERVICE

13 CP-10-3326

This is to certify that a copy of the DEFENDANTS JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC. AS SUCCESSOR BY STATUTORY MERGER TO JOHN WIELAND HOMES AND NEIGHBORHOODS OF SOUTH CAROLINA, INC., JOHN WIELAND HOMES OF CHARLESTON, INC., JOHN WIELAND HOMES, INC., BUILDERS SUPPORT SERVICES OF THE CAROLINAS, INC.'S ANSWER TO AMENDED COMPLAINT AND CROSS CLAIMS has been served upon the following counsel of record by electronic, and US Mail addressed to the following as shown below this 26 day of January, 2015.

John C. Hayes, IV, Esq.
Mary-Margaret S. Fitzhenry, Esq.
Hayes Law Firm
180 Meeting Street, Suite 330
Charleston, SC 29401
Email: jhayes@hayeslaw.org

Stephen P. Hughes, Esq.
Andy Yoho, Esq.
Howell, Gibson and Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901
Phone: 843-522-2400
Email: shughes@hgpha.com
ayoho@hgpha.com

Marvin D. Infinger, Esq.
Nexsen Pruet, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Email: Minfinger@nexsenpruet.com

I. Keith McCarty, Esq.
1212 Wappoo Road
Charleston, SC 29407
Email: ikeithmccarty@gmail.com

Laura Paton, Esq.
R. Michael Ethridge, Esq.
Carlock, Copeland & Stair, LLP
40 Calhoun St., Suite 400
Charleston, SC 29401
Email: lpatis@carlockcopeland.com

Andrew Cole, Esq.
Collins & Lacey
1330 Lady Street, 6th Floor
Columbia, SC 29201
Email: acole@collinsandlacy.com

Erin D. Dean, Esq.
Tupper, Grimsley & Dean, P.A.
Post Office Box 2055
611 Bay Street
Beaufort, SC 29901-2055

Julian K. Allen, Esq.
Turner Padgett Graham & Laney P.A.
40 Calhoun Street, Suite 200
Charleston SC 29401
Email: jallen@turnerpadgett.com

BY

JULIE J. ARMSTRONG
CLERK OF COURT

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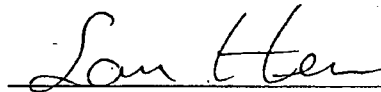
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Email: erindean@tgdpa.com

Jonathan J. Anderson, Esq.
Curt Martin, Esq.
Anderson Reynolds & Stephens, LLC
37 ½ Broad Street
P.O. Box 87
Charleston, SC 29402
Email: janderson@arslawsc.com
Email: cmartin@arslawsc.com

Patrick T. Morrissey, Esq.
Clawson Staubes, LLC
126 Seven Farms Dr., Suite 200
Charleston, SC 29492
Email:
pmorrissey@clawsonandstaubes.com

E. Glenn Elliott, Esq.
Aiken Bridges
181 E. Evans Street, Suite 409
P.O. Drawer 1931
Florence, SC 29503
Email: ege@aikenbridges.com



Lauren Heuss, Legal Professional Assistant
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, Individually and as Class
Representative, Marie Labarowski, Edward and
Nancy Peyser, Francis Sills, Daniel and Suzanne
Ruth, et al.,

Plaintiff(s)

vs.

John Wieland Homes and Neighborhoods of the
Carolinas, Inc. as successor by statutory merger to
John Wieland Homes and Neighborhoods of South
Carolina, Inc., et al.,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 10- 4335

(Please Print)

Submitted By: John C. Hayes, IV

Address: Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401

SC Bar #: 69740

Telephone #: 843-805-7003

Fax #: 843-573-7388

Other:

E-mail: jhayes@hayeslaw.org

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☒ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20__-CP-_____	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Other (899)	☐ Worker's Comp (960)
	☐ Other (799)		☐ Zoning Board (970)
Special/Complex /Other			☐ Public Service Commission (990)
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Employment Security Comm (991)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		
☐ Medical (620)	☐ Out-of State Depositions (650)		☐ Other (999)
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)		
	☐ Sexual Predator (510)		

Submitting Party Signature: _____

Date: 03/04/2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-10-4335

Jeffrey Sills as Class Representative,)
Marie Labarowski, Edward and Nancy)
Peyser, Francis Sills, Daniel and Suzanne)
Ruth, Stephani Adili, Marc and Brandy)
Lynn, Russell Robinson, George)
Busnach, Helen Furtado, Jessica)
Baucom, Nancy S. Coleman, Linda Glitz,)
Peggy Gerou, Shannon Bebout,)
Maryann Walsh, Patty Whitmire,)
Donald L. Tomasello and Patricia Kelly,)
Chris Leigh-Jones, Edward Ray and)
Kathy Jo Feagins, Cindy Hunt for)
Bentgrass Limited, LLC, Adam A. and)
Susan A. Sokoloski, William and Carolyn)
Barone, Michelle Ray, Eugene and)
Cynthia Ray, William Abel, Dean and)
Conny Mason, David McCartney, Paul)
and Patricia Watters, James and Andrea)
Lowry, R. Robinson, Jr., Thaddeus R. &)
Barbara A. Kuczynski, Beverly Sanders)
Carlson, Lisa Roeck, Elizabeth Jackson,)
Charles and Mary Kathleen Jenkins,)
Linda M. and Earl K. Rigler, Jr., John)
Twomey, Joe and Anita Brittain, Gilbert)
J. Hager & Kelly Hager Holmes, Carol &)
Chris Gillespie, Jarred D. Overcash,)
James & Susie Lesesne, Jessica)
Shipman, Arlene Conte, Carol Ann)
Dumond, Lawrence Murray, Yvonne)
Walker, Darlene and Richard Gleeson,)
Robert and Michelle Bagrie, Russell)
Johnston, Kathryn Howle, Dorthy)
Newman, Nicholas and Debora Yost,)
Stephen Denby, Colin and Phyllis)
Braybrooks, Helen and Bob Harman,)
Rose Minton, Stephen and Merifaith)
Perdue, and John and Jane Does (1-48))
)
Plaintiffs,)

AMENDED SUMMONS
(Jury Trial Demanded)

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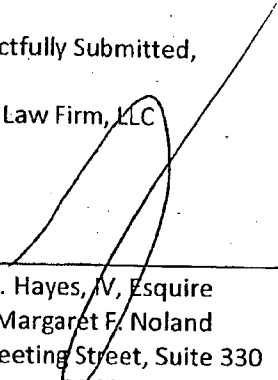
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be rendered against you for the amount or other remedy requested in the attached Amended Complaint, plus interests and costs.

Respectfully Submitted,

Hayes Law Firm, LLC



John C. Hayes, IV, Esquire
Mary-Margaret F. Noland
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: 843-805-7003
Fax: 843-573-7388
jhayes@hayeslaw.org
mnoland@hayeslaw.org

and

I. Keith McCarty, Esquire
McCarty Law Firm, P.C.
1212 Wappoo Road
Charleston, SC 29407
Phone: 843-793-1272
ikeithmccarty@gmail.com

ATTORNEYS FOR PLAINTIFFS

March 4, 2015
Charleston, South Carolina

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-10-4335

**AMENDED COMPLAINT
(Jury Trial Demanded)**

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JULIE J. ALLEN, CLERK OF COURT
BY _____

	)
vs.	)
	)
John Wieland Homes and	)
Neighborhoods of the Carolinas, Inc. as	)
successor by statutory merger to John	)
Wieland Homes and Neighborhoods of	)
South Carolina, Inc., John Wieland	)
Homes of Charleston, Inc., John	)
Wieland Homes, Inc., Builder Support	)
Services of the Carolinas, Inc.,	)
Wheelock Street Capital, LLC d/b/a John	)
Wieland Homes and Neighborhoods,	)
Inc., Barr Construction, Inc., Benjamin	)
Mora d/b/a Mora Construction, a/k/a	)
Benjamin Mora Construction, LLC,	)
Builder's Firstsource, Inc. a/k/a Builders	)
Firstsource-Southeast Group, LLC, a/k/a	)
Builders Firstsource –Atlantic Group,	)
LLC, DBC Construction Services, LLC, Eli,	)
Inc., Gerardo Rosette Sanchez a/k/a GR	)
Painting, Jeorge Medina a/k/a JMC	)
Construction, LLC a/k/a JMC	)
Construction, Inc.; Jesus Mora a/k/a J.	)
Mora Brick & Block Mason, LLC; Juan	)
Luis Sanchez, Juan Luis Sanchez a/k/a	)
Sanchez Brothers Painting; Latitude	)
Construction Services, LLC, The Muhler	)
Company, Inc., Paul M. Vasquez,	)
Richard Ditullio, Richard Ditullio a/k/a	)
RDT Contracting, LLC,	)
	)
Defendants.	

The Plaintiffs, Jeffrey Sills, as Class Representative and the above-named Plaintiffs (hereinafter collectively referred to as "Plaintiffs"), individually and as a class of similarly situated owners of townhome units in a residential townhome community named Waverly at Hamlin Plantation complaining of the above-mentioned Defendants, allege and state as follows:

1. Plaintiffs, Jeffrey Sills is a citizen and resident of Charleston County, South Carolina, who at all times relevant hereto live in a residential community known as Waverly at Hamlin Plantation Townhomes, located in Mt. Pleasant, South Carolina, Plaintiff Jeffrey Sills further alleges and state that he is bringing this action pursuant to Rule 23, SCRPC, as representing a class composed of each and every unit owner in the Waverly at Hamlin Plantation Townhome Association, Inc., and that:

- a) The class is so numerous that joinder of all members is impracticable;
- b) There are questions of law and fact common to the class;
- c) The claims of the Plaintiff, Jeffrey Sills, are typical of the claims of the class;
- d) The Plaintiff Jeffrey Sills will fairly and adequately protect the interest of the class; and
- e) The amount in controversy exceeds One Hundred Dollars (\$100.00) for each member of the class.

2. The individual Plaintiffs are citizens and residents of Charleston County, South Carolina, who at all times relevant hereto live in a residential community known as Waverly at Hamlin Plantation Townhomes, located in Mt. Pleasant, South Carolina.

3. Waverly Townhomes is a section of the residential community, Hamlin Plantation, located in Mount Pleasant, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.

4. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina and are authorized to conduct business in this state, and have a principal place of business in Charleston County.

5. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.

6. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed and constituted in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.

7. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.

8. This Court has jurisdiction over the parties and subject matter hereto.

9. The construction of Waverly Townhomes was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and experienced in performing such construction work as to properly build Waverly Townhomes according to the normal standards of good and workmanlike practice in the construction field.

10. Construction defects in the Waverly Townhomes have recently been discovered. A recent inspection of the subject Townhomes resulted in the discovery of major problems and deficiencies including but not limited to the following:

- (a) Lack of proper flashing;
- (b) Lack of proper roofing installation;
- (c) Water damage along porches;
- (d) Water intrusion damage resulting from defects;

- (e) Improper flashing installation; and
- (f) Improper paving and drainage

11. Defendant John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc. (hereinafter referred to as "Wieland SC") is a corporation organized and existing under the laws of the State of South Carolina and, at all times relevant hereto, was authorized to and did conduct business in the State of South Carolina, County of Charleston for the purpose of planning, developing, marketing, owning, maintaining, leasing, selling, and constructing the townhomes in a manner for sale to the public.

12. Defendant John Wieland Homes of Charleston, Inc., upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County Charleston for the purpose of planning, developing, marketing, owning, maintaining, leasing, sale, and constructing the townhomes in a manner for sale to the public.

13. Defendant John Wieland Homes, Inc., upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County Charleston for the purpose of planning, developing, marketing, owning, maintaining, leasing, sale, and constructing the townhomes in a manner for sale to the public.

14. Defendant Builder Support Services of the Carolinas, Inc., upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state.

15. Defendant Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. is a joint venture formed in November 2012 with the Wieland Defendants where John Wieland Homes and Neighborhoods, Inc. sold its assets and intellectual property to Wheelock Street Capital.

16. Defendant Barr Construction (hereinafter referred to as "Barr") upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Barr supplied and installed drainage materials, performed other sitework, and other work at the subject property.

17. Defendant Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC, (hereinafter "Mora Construction") upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Mora Construction supplied and installed foundation connections together with all associated and related waterproofings and flashings, and other work at the subject property.

18. Defendant Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource -Atlantic Group, LLC (hereinafter referred to as "BFS", upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, BFS performed framing, to include but not limited to installation of the water management system and installation of doors

and windows, together with all associated waterproofings and flashings, installation of hurricane straps, together with all associated and related waterproofings and flashings, and other work at the subject property.

19. Defendant DBC Construction Services, LLC (hereinafter referred to as "DBC"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, DBC performed roofing services, together with all associated and related waterproofings and flashings, and other work at the subject property.

20. Defendant Eli, Inc. (hereinafter referred to as "Eli"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Eli performed sidewalk, walkway and driveway paving services, and other work at the subject property.

21. Defendant Gerardo Rosette Sanchez a/k/a GR Painting (hereinafter referred to as "GR"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, GR performed exterior painting and caulking services, together with all related waterproofings and flashings, and other work at the subject property.

22. Defendant George Medina, Individually and d/b/a JMC Construction, LLC a/k/a JMC Construction, Inc. (hereinafter referred to as "JMC"), upon information and belief, is a

corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, JMC performed roofing services, together with all associated and related waterproofings and flashings, supplied and installed railing for balconies, porches and stairs, together with all associated and related waterproofings and flashings, supplied and installed hardiplank/cement board, together with all associated and related waterproofings and flashings, and other work at the subject property.

23. Defendant Jesus Mora a/k/a J. Mora Brick and Block Mason, LLC (hereinafter referred to as "J. Mora", upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, J. Mora supplied and installed masonry to include brick entryway steps, together with all associated and related waterproofings and flashings, supplied and installed foundation connections, together with all associated and related waterproofings and flashings, and other work at the subject property.

24. Defendant Juan Luis Sanchez, Individually and d/b/a Sanchez Brothers Painting (hereinafter referred to as "Sanchez"); upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Sanchez performed exterior painting and caulking services, together with all associated and related waterproofings and flashings, and other work at the subject property.

25. Defendant Latitude Construction Services, LLC (hereinafter referred to as "Latitude"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Latitude supplied and installed waterproofing for balconies and porches, together with all associated and related waterproofings and flashings, and other work at the subject property, and other work at the subject property.

26. Defendant The Muhler Company, Inc. (hereinafter referred to as "Muhler", upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Muhler manufactured, supplied, retailed, and installed windows and doors, together with all associated and related waterproofings and flashings, and other work at the subject property.

27. Defendant Paul M. Vasquez (hereinafter referred to as "Vasquez"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state, and have a principal place of business in Charleston County. Also, upon information and belief, Vasquez manufactured, supplied, sold, and installed windows and doors, together with all associated and related waterproofings and flashings, and other work at the subject property.

28. Defendant Richard Ditullio, Individually and d/b/a RDT Contracting, LLC. (hereinafter referred to as "RDT"), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in

this state, and has a principal place of business in Charleston County. Also, upon information and belief, RDT performed roofing services, together with all associated and related waterproofings and flashings.

29. Upon information and belief, the above-identified Waverly Defendants were, in various capacities, individually and collectively engaged in the planning and developing of the Project, and contracted with various entities for the design and construction of the Project.

30. Upon information and belief, one or more of the Waverly Defendants were merged into one or more of the John Wieland Homes and Neighborhoods of South Carolina, Inc. and John Wieland Homes and Neighborhoods, Inc. with the intent to carry on the business of the Wieland Defendants in connection with the Project.

31. Wheelock Street Capital, LLC (hereinafter referred to as Wheelock) d/b/a John Wieland Homes and Neighborhoods, Inc., is a joint venture with the Wieland Defendants formed in November 2012.

32. Upon information and belief, the ownership of the Project was maintained uninterrupted by the Wieland Defendants during and following the aforementioned merger activities, resulting in ownership and/or control of the Project by the resulting merged entity (the resulting merged entity, including all of the affiliated, subsidiary, or other merged component entities, shall hereinafter be referred to collectively as the "Developer Defendants" and/or "Wieland").

33. The Developer Defendants are all Variable Interest Entities of (as defined by the Financial Accounting Standards Board, among other institutions and authorities) subsidiaries of, parents of, partners of, associates of, agents of, affiliated with, joint venturers, servants,

instrumentalities and/or alter ego entities of each other and are responsible to the Plaintiff herein for the condition of the Project and the damages set forth herein below.

34. The Developer Defendants, along with and through their directors, officers, employees, agents, assignees, and subservient and affiliated entities, during the development of the Project and immediately after sale of the townhomes to members of the public, sought and established a special relationship with the purchasers of the townhomes, and the Developer Defendants, at various times during and after the construction of the townhomes, breached their fiduciary duties to the purchasers in that the Developer Defendants owed dual and conflicting loyalties to themselves, to the Contractor Defendants as set forth below, to the purchasers of the townhomes, to the Association established in the Master Deed for the construction of the Project, and to the Plaintiff.

35. The Developer Defendants, along with and through their directors, officers, employees, agents, assignees, and subservient and affiliated entities had irreconcilable conflicts of interest by virtue of the dual and conflicting loyalties they owed to themselves and to the purchasers and/or tenants of the Project along with the Association established in the Master Deed for the townhomes and the Plaintiff, all of whose interests were diverse and adverse, one to the other and, as such, the Developer Defendants did not act in good faith or in a manner they could reasonably believe to be in or not opposed to the best interests of the purchasers and/or tenants of the Project along with the Association established in the Master Deed for the townhomes and the Plaintiff.

36. The Developer Defendants, along with and through their directors, officers, employees, agents, assignees, and subservient and affiliated entities, all participated in self-

dealing by promoting their own interests through sacrificing the interests of the purchasers of the Project.

37. In connection with the Project, the Developer Defendants all became and/or acted as subsidiaries, parents, partners, associates, agents, affiliate, co-joint venturers, servants, instrumentalities and/or alter ego entities of each other and are responsible to the Plaintiffs herein for the condition of the Project and the damages set forth herein.

38. The Developer Defendants conducted business in connection with the Project by and through the use and control of subservient entities, and all of these entities in fact manifested no separate interest of their own, and demonstrated an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between any members of that group of corporations, shareholders, officers, agents, partners, employees, and assets.

39. The Defendants listed above including Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource -Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC; Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC (hereinafter referred to collectively as the "Contractor Defendants") provided labor, materials, goods, and services in connection with the construction of the Waverly at Hamlin Plantation Townhomes Project as contractors, subcontractors, consultants, or independent contractors, or which manufactured, fabricated, and/or otherwise

provided construction and building materials, equipment and goods for use in connection with the construction of the Project; and these entities provided labor, materials, goods, and services associated with the original construction of the Project, and the work of each of these defendants was deficient and defective and resulted in damages to the Plaintiffs as set forth below.

40. All Defendants were instrumental in carrying out duties and actions relating to the construction of the Project, and each of these defendants had independent duties under South Carolina law to perform their duties in a good and workmanlike manner and in accordance with applicable building codes and accepted building practices.

JURISDICTION

41. Personal jurisdiction is vested and exists in the Court of Common Pleas, County of Charleston, State of South Carolina, and venue is proper in the County of Charleston, State of South Carolina, by virtue of, among other things, the fact that the property which is the subject matter of the Complaint is located in Mt. Pleasant, South Carolina, and the great majority of the activities relating to the Project and the claims herein occurred in this jurisdiction.

BACKGROUND

42. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

43. Plaintiffs are informed and believe that the Developer Defendants engaged contractors to construct the Project including 105 properties, and related facilities and amenities, collectively known as Waverly at Hamlin Plantation, which were thereafter substantially completed, and contained various buildings. The Developer Defendants, by and through various

instrumentalities and alter-egos and other Defendants were the original developers of the Project and/or are liable for the actions of the original Developer of the project.

44. The Developer Defendants created and controlled numerous and various entities including, but not limited to, the John Wieland Homes and Neighborhoods of South Carolina, Inc., Builder Support Services of the Carolinas, and Wieland Defendants set forth hereinabove, for the sole purpose of the construction, development, purchase of property, sale of property, leasing of townhomes, and other activities solely relating to development and leasing of the townhomes that were known as Waverly at Hamlin Plantation. The Developer Defendants created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of the Developer Defendants to achieve their financial goals and to perpetrate the activities more particularly described herein. The subservient entities in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the Developer Defendants and the sham entities, shareholders, officers, agents, partners, employees, assets, and each of them.

45. By way of example, the Wieland Defendants included entities which were created to perform single purpose functions in order to effectuate the sole will of the Developer Defendants in purchasing, developing, leasing, and/or selling the homes. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, the Developer Defendants and the Individual Developer

Defendants actively and directly participated in the development, purchase, sale, management, leasing, and/or operations of the Project, and in fact put the same into the stream of commerce.

46. The sham entities established by the Developer Defendants were and are characterized by one or more of the following: (1) being undercapitalized; (2) failing to observe corporate formalities; (3) failing to pay dividends; (4) Insolvency; (5) lack(ed) proper records; (6) siphoning of funds by its members and/or affiliates; and (7) was used as a mere facade for the operation of the dominant shareholders, members, associates, and affiliates. Upon information and belief, each shared the same mailing address, their business was conducted on the letter head of the Developer Defendants, the Developer Defendants directly received payment and disbursed payment for obligations relating to the sham entities, the sham entities had no shareholders and/or officers of their own, no separation of accounting and bookkeeping functions, and/or the Developer Defendants directly contracted for the sham entities in the name of the Developer Defendants.

47. The Developer Defendants directed and oversaw those listed as Defendants herein and contractors including the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

48. The Developer Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of units, and other activities solely relating to the Project which is the subject of this action.

49. There would exist a broad element of injustice and fundamental unfairness of the acts of the Developer Defendants, and each of them individually, were not regarded as the acts of one another.

50. The Defendants began the process of constructing the townhomes by engaging and directing the actions of the various contractors and/or subcontractors named as Defendants herein, and participated in the negligent, deficient, and shoddy workmanship which ignored and/or covered up design and construction defects then in existence and, thereafter, placed the units into the stream of commerce for sale, which they did sell to the general public and, in particular, to the current owners who are members of the Association.

51. The Developer Defendants, by and through their instrumentalities and alter-ego entities, controlled and operated the Association and its Board of Directors prior to turning over control of the Waverly Association. During this period, the Developer Defendants attempted to carry out construction prior to, during and after the time they offered and sold said townhome units. This work was attempted to be performed by contractors engaged by the Developer Defendants for the purpose of expediting the sales process and was calculated for the purpose of, or through careless, reckless, negligent and grossly negligent conduct by the Developer Defendants, resulting in the concealing, fabricating, patching, hiding, and/or cloaking of the deficiencies and damage known, both actually and constructively, to the Developer Defendants and/or their affiliates, subservient entities, agents, and assigns.

52. At the time the units were offered for sale and placed into the stream of commerce by the Developer Defendants, the units contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and

proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of the Developer Defendants.

53. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

54. These latent building defects have, unbeknownst to Plaintiff, regularly resulted in water intrusion into the buildings and property damage and continue to do so through the date of this filing.

55. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

56. The Plaintiffs suffered damages when the Developer Defendants put these units into the stream of commerce and continue to be damaged through the date of this filing.

57. The Developer Defendants failed to make a sufficient inquiry into the conditions of the Project in order to establish adequate financial reserves for maintenance and repair of the Project, and instead provided inaccurate and misleading information to third-parties in the research and establishment of the reserve figures, and thereby provided inaccurate and misleading reserve requirements and related information to the general public, prospective purchasers, and to the Plaintiffs, both before and after tendering control of the Association and

the common elements to the homeowners, all resulting in damages to the Plaintiffs and in violation of South Carolina law, the Master Deed, and the By-laws.

58. The Developer Defendants controlled and managed the Association and its Board of Directors through the use of its subservient entities prior to the tender of the control over the Association to the unit owners; and the Developer Defendants negligently failed to provide sufficient and reasonable information and resources for the proper management and maintenance of the Project; and in fact negligently provided insufficient, inaccurate, and misleading information and prevented the use of financial and other resources required for the proper management and maintenance of the Project, all of which resulted in continued and exacerbated damages to the Project and suffered by the Plaintiffs.

59. The Developer Defendants were engaged in a joint venture, partnership, or other legal or de facto relationship with each other.

60. The Developer Defendants caused, directed, participated in, or acted in willful, reckless, heedless, negligent and grossly negligent disregard of their collective and respective acts and omissions in the planning, development, design, construction, management and sale of the units in the Project, all as more fully described herein.

61. The Developer Defendants represented to the public over the internet and through various publications and other media that they, by and through their various affiliates, entities, venturers, and agents referenced herein, were qualified, experienced, and would in fact be directing, managing, and otherwise facilitating the construction and selling of the units, and these representations were relied upon by the Plaintiffs.

62. Prior to and until transferring control of the Waverly Association to the unit owners and a newly elected Board of Directors comprised of unit owners, the Developer Defendants, through their subservient and affiliated entities, employees, and agents, had a duty to serve as Board members and to conduct the business of the Waverly Association, had authority and control over, and in fact controlled and directed the Waverly Association Board of Directors and dictated all of the Board's activities.

63. In conjunction therewith, the Developer Defendants in their capacity as Board members and otherwise, in a negligent manner, carelessly, willfully, wantonly, and with reckless disregard for the rights of the Plaintiffs, participated in, acquiesced in and caused the wrongful acts and omissions described herein.

64. These collective and respective wrongful acts and omissions of the Developer Defendants and such other Defendants as set forth in the causes of action below, represent unfair trade practices and have resulted in substantial deterioration and/or failure of structures and building systems, building deficiencies, actual, incidental, special and consequential damages and loss of use. Remedying the above wrongful acts will result in actual, incidental, consequential, and special damages including loss of use to the Plaintiffs and its members, and entitle Plaintiffs and its members to punitive damages and attorney's fees. Further, these wrongful acts and omissions have directly and proximately caused substantial diminution in value, both pre- and post-repair.

65. The acts and omissions of the Defendants were contrary to the duties they owed, individually and collectively, to the Plaintiffs and actually caused damages to the Plaintiffs including, but not limited to, damages which did not result from the acts and omissions of other

defendants and including, but not limited to, damages other than damages which resulted in physical injury or damage to tangible real and personal property in connection with this Project.

AS A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence, Professional Negligence, and Gross Negligence)

66. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

67. Defendants, and each of them, owed a duty to Plaintiffs to act in a manner compliant with the reasonable standard of care, good faith, and fair dealing recognized under South Carolina law, and Defendants violated this duty to the Plaintiff and were negligent, professionally negligent, grossly negligent, careless, reckless, willful and wanton in one or more of the following particulars:

- a) in failing to properly design, construct, develop and repair the townhomes;
- b) in failing to comply with the applicable Building Codes of the County of Charleston, the City of Mt. Pleasant and the State of South Carolina;
- c) in failing to comply with the applicable Fire and Safety Codes of the County and of Charleston, the City of Mt. Pleasant and the State of South Carolina;
- d) in failing to properly design and construct the structural elements and the foundation and other elements of the Project to permit the existence of an adequate and sufficient program for the treatment, extermination, eradication, colony control, and/or termite control of any kind on the Project in accordance with industry standards, due care, and applicable law prior to the sale of the units;
- e) e) in failing to establish and maintain a sufficient program for the treatment, extermination, eradication, colony control, and/or termite control of any kind on the Project in accordance with industry standards, due care, and applicable law prior to the sale of the units;
- f) in failing to properly supervise the project developer entities and individuals, project architects and engineers, as well as contractors, subcontractors, suppliers and/or agents or employees of any of them in connection with the

planning, development, design and construction of the townhomes offered for sale to the public;

- g) in manufacturing, fabricating, preparing for the incorporation into a residential building, reviewing, approving, procuring, and incorporating into the construction of this project such items which were defective, deficient, inferior, inadequate, unsafe, dangerous, inappropriate for the use intended, noncompliant with approved design or design intent, non-compliant with applicable codes and standards in the industry, and otherwise improper for use in the project including, but not limited to, HVAC systems, mechanical systems, plumbing systems, drainage systems, and sewer line systems without appropriate clean-out piping and/or other issues; electrical systems and equipment, interior and exterior drywall and other substrate and sheathing material, windows, insulation, roofing, waterproofing systems, and other building materials and supplies, finishes, and other items relating to the construction and ultimate use of this residential project;
- h) in designing, constructing, marketing, selling, units and/or property with defective windows;
- i) in designing, constructing, marketing, selling, units and/or property with inadequate flashing;
- j) in designing, constructing, marketing, selling, units and/or property with inadequate roofs;
- k) in designing, constructing, marketing, selling, units and/or property with inadequate water barriers;
- l) in designing, constructing, marketing, selling, units and/or property with without weather proof building envelopes and exteriors;
- m) in designing, constructing, marketing, selling, units and/or property which were defective, deficient, inadequate, unsafe, dangerous, or otherwise non-compliant with codes and standards;
- n) in placing defective and inferior construction into the stream of commerce;
- o) in placing defective and inferior manufactured systems, equipment, building materials and other products into the stream of commerce.
- p) in failing to permit and facilitate a proper evaluation of the condition of the Project prior to and during the process of offering units and other property for the use and sale to the general public and, further, to obstruct and/or hinder

efforts to conduct a proper evaluation of the Project by intended purchasers or users;

- q) in misrepresenting the condition of the units, common elements, garages and other property to prospective and actual purchasers and other users, and in making representations in negligent and/or intentional disregard of whether these representations were false or inaccurate;
- r) in failing to undertake sufficient actions to develop a plan for repairs and otherwise failing to make adequate repairs to conditions at the project which were unsafe, dangerous, or otherwise not in compliance with applicable building codes or other authorities or standards of care;
- s) in negligently and/or intentionally covering up deficiencies prior to construction of the units and other property for sale or use by the general public;
- t) in failing to determine accurate information required, failing to disclose the absence of such information, as well as negligently and/or intentionally providing misleading and inaccurate information regarding the proper level of financial capitalization and reserve funding required for the operations, maintenance, and repairs required by the Waverly Association for the Project and individual unit owners;
- u) in tendering common elements and other property to Plaintiffs in a deficient condition;
- v) in failing to act as reasonable persons would in circumstances then and there prevailing and in such other failures as will be shown during discovery and at trial.

68. Said failures above-described, as well as the Defendants' gross negligence, willfulness, and reckless disregard for the rights of Plaintiff and others, have actually and proximately caused damages to Plaintiffs, and the Defendants are liable to the Plaintiffs in an amount of actual, incidental, consequential, special, and punitive damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SECOND CAUSE OF ACTION
(Against the Developer Defendants and Contractor Defendants)
(Negligent Misrepresentation)

69. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

70. These reports and representations were actually published and presented for information to the general public by these Defendants, and these representations were actually received by, and relied upon by, the prospective and actual purchasers of the townhomes at the Project.

71. At the time of the sale of the homes and the turnover of control of the Waverly Association from the Developer Defendants to the unit owners, Plaintiff was not aware of the falsity of the representations or the lack of investigation and lack of candor by these Defendants in connection with the reports.

72. Plaintiff subsequently determined that the representations made by these Defendants were false and that these Defendants failed to exercise due care, not only in failing to discover defects in the project, but also in failing to communicate information about the true condition of the Project. As a result of its justifiable reliance on the representations, reports, and other documents presented by these Defendants, Plaintiffs and its members have assumed control over the Project and/or purchased units, and have thereby suffered pecuniary losses in an amount to be determined by the trier of fact.

73. As a direct and proximate result of its justifiable reliance on numerous false representations made by these Defendants in connection with the Project, Plaintiffs have suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential,

and special damages, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A THIRD CAUSE OF ACTION
(Against the Contractor Defendants and the Developer Defendants)
(Breach of Implied Warranty)

74. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

75. The design, construction, development and sale of the units by these Defendants contained as a matter of law implied warranties of good faith and fair dealing, fitness for use merchantability, habitability, and workmanship with respect to construction, which warranties were not effectively disclaimed under South Carolina law.

76. The Developer Defendants, whether named or unnamed on the Deeds of Transfer, through their acts and/or omissions, have breached the aforesaid implied warranties, which directly, actually, and proximately caused and resulted in damage which the Plaintiffs have suffered and continues to suffer in an amount to be determined by the trier of fact.

77. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness of Habitability)

78. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

79. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

80. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiffs.

AS A FIFTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness for Particular Purpose)

81. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

82. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

83. At the time of the sale of the subject Residences to the Plaintiffs, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

84. The Defendants, at the time of the sale of the subject Residences to the Plaintiffs, had reason to know that the Plaintiffs were relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry

standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

85. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

86. As a result of the Defendants' breach of its implied warranties, Plaintiffs have suffered physical damages.

AS A SIXTH CAUSE OF ACTION

(Against the Developer Defendants and Contractor Defendants,)

(Breach of Implied Warranties as to the Project's Development and Construction)

87. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

88. These Defendants engaged in conduct during the period of development and construction of the Project which gave rise to duties and implied warranties to the public including, but not limited to, tenants, purchasers and other users of the Project, in that by their conduct these Defendants placed the Project, which constitutes defective, deleterious, and dangerous property, into the stream of commerce.

89. The placement of the Project into the stream of commerce by these Defendants, contained as a matter of law implied warranties of fitness, merchantability, workmanship and habitability, which warranties were not effectively disclaimed pursuant to South Carolina law.

90. As a direct and proximate result of the breaches of the above-described implied warranties by these Defendants; their affiliates, associates, sham entities, and/or joint venturers,

whether named or unnamed on any documents transferring interest in the Project, the Plaintiffs has suffered and will continue to suffer damages, injuries and other losses.

91. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SEVENTH CAUSE OF ACTION
(Individual Liability as to the Developer Defendants)

92. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

93. As a direct and proximate cause and result of the acts and omissions of these Defendants as aforesaid, Plaintiffs have been damaged, and these Defendants are liable to the Plaintiffs for actual, incidental, consequential, and special damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A EIGHTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, et seq.)

94. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

95. These Defendants' construction and the subsequent offering and sale of the units, along with the issuance of the property condition reports and other representations to tenants,

purchasers, and the public at large, constituted the conduct of trade and commerce within the meaning of S.C. Code Section 39-5-20(a).

96. The Defendants, and each of them, through their acts and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 39-5-140(a) and 27-31-430, S.C. Code of Laws as amended:

- a) in failing to properly evaluate the plans and specifications for the Project prior to construction;
- b) in failing to conduct a reasonable inquiry into the conditions existing at the Project and marketing the units, common elements, and other property at the Project to the public for sale and use;
- c) in failing to repair the latent defects about which these Defendants were or should have been aware;
- d) in failing to carry out the fiduciary duties owed to prospective and actual purchasers and other members of the public in their special relationships of trust and confidence by virtue of their role in the process of offering these units, common elements, and other property for sale and use by the general public, as design professionals, licensed professionals, and sellers according to South Carolina law, and as Board Members and Directors of the Waverly Association;
- e) in attempting to disclaim implied warranties of merchantability and habitability in documents contrary to South Carolina law;
- f) in failing to provide any additional consideration for these purported efforts to waive implied warranties of merchantability and habitability;
- g) in failing to properly investigate the true conditions of the Project and putting them into the stream of commerce;
- h) in making false representations as to the condition of the Project and/or representations as to the condition of the Project in reckless disregard as to the truth of the representations;
- i) in failing to analyze relevant data and conditions to determine adequate capital reserves for maintenance and operation of the Project by future owners and users;

- j) in failing to provide adequate capital reserves and projections for adequate reserves for maintenance and operation of the Project prior to selling units and other property and prior to turning control of the Waverly Association over to the unit owners;

97. The conduct of the Defendants as described above was knowing and willful, and Defendants knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.

98. Plaintiffs are persons within the meaning of S.C. Code Section 39-5-140(a) and Plaintiffs have suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of these Defendants, in an amount to be determined by the trier of fact.

99. The aforesaid acts of Defendants impact the public interest in that they constituted unfair and deceptive acts and have the potential for repetition and, in fact, occurred at each and every sale of the units of this Project and, as such, are acts which can, have and will affect the public at large by repetition.

100. These unfair and deceptive acts are acts which will affect members of the public, beyond the parties to the above-described transactions, in the form of other consumers who may be injured by purchasing townhomes by the Defendants and/or rely upon the actions and representations of these Defendants thereby placing members of the public in danger of physical and other injuries.

101. Plaintiffs are entitled to be compensated pursuant to S.C. Code Section 39-5-140(a) for the above-described actual, incidental, consequential, and special damages, as well as costs, interest, and attorney's fees, and to recover three (3) times these damages by reason of the knowing and willful nature of the unfair and deceptive acts by Defendants and any attempts

in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A NINTH CAUSE OF ACTION
(As to the Developer Defendants)
**(Breach of Fiduciary Duty by Initial Board Members of the Waverly at Hamlin Plantation
Townhome Association, Inc.)**

102. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

103. These Defendants, at all times during which they were Directors of the Waverly Association Board and/or the Board of the Waverly Association's predecessor entity, were charged with the duty of administration, care and maintenance of the regime property and its common elements according to the terms of the Master Deed and with safeguarding any interests and rights of the members, both present and future, of the regime as unit owners or they undertook such duties.

104. These Defendants breached these obligations by their acts and omissions such that they have committed breaches of fiduciary duties, negligence, gross negligence, recklessness, willfulness, wantonness, bad faith, mismanagement, self-dealing and waste with respect to their duty of administration, care and maintenance of the regime property and their duty to protect the interests and rights of the individual members of the Waverly Association, along with their duty to protect and preserve the regime property. These wrongful acts and omissions have caused and will cause the Plaintiffs to incur and continue to incur substantial monetary damages.

105. These Defendants owed a duty to Plaintiffs to exercise that degree of skill necessary to insure that the regime property was properly maintained and to keep the owners informed of serious defects found or discovered and to protect the owners' property interest in conformity with customary and ordinary standards.

106. These Defendants held themselves out to the public as qualified and experienced in the administration and management of multifamily residential properties and, in particular, the Developer Defendants held themselves out as qualified and experienced in the building of townhomes, and these representations of experience and qualifications were imputed to the Developer Defendants by virtue of their legal relationship and appearance to the public as an indistinguishable single entity by and through the operation of the various individuals and affiliated entities.

107. These Defendants' negligent, reckless and willful conduct includes, but is not limited to:

- a) failing to properly inform the tenants, prospective purchasers, and unit owners of the conditions known or which should have been known at the time each owner purchased a unit;
- b) failing to properly oversee the regime in order to ensure that all defects discovered by the Defendants or which should have been discovered by the Defendants, were reported so that repairs could proceed in accordance with the customary and ordinary standards of construction at the expense of the Defendants;
- c) failing to report the defective conditions of the Project to any owners or the Plaintiff at the time of the turnover to the Waverly Association;
- d) failing to inform the Board and the individual unit owners of the true nature of the defective conditions of the townhome property at the time of turnover;
- e) placing their loyalties to themselves and/or their affiliated entities above the loyalties they owed to Plaintiffs and unit owners;

- f) failing to raise sufficient capital through assessments or otherwise from the Defendants prior to turnover so that adequate funds would be available to mitigate the substantial damages which were and are resulting from the aforementioned significant design and construction defects and deficiencies; and
- g) participating in self-dealing, sacrificing the Waverly Association's and the unit owners' interests for their own interests and the interests of themselves and/or their affiliated entities;
- h) failing to reasonably plan or anticipate the adequate reserve for insurance premiums required to be paid by the Waverly Association, and resigning from the Board of Directors of the Association and ceding control over the Association to the unit owners.

108. As a direct and proximate result and consequence of the aforementioned negligent, grossly negligent and reckless acts or omissions of these Defendants, Plaintiffs have and will continue to be required to spend substantial sums of money in connection with the extraordinary repairs and reconstruction of the Project and the associated loss of use and other damages.

109. The Defendants' breaches of duty, acts, errors, and omissions as set forth above caused, among other damages: physical injury to tangible property; a resulting loss of use of that property; and Plaintiffs resulting money damages due to budget deficits and special assessments; all of which were directly and proximately caused by and resulting from the Defendants' negligence, willfulness, wantonness, and recklessness directly related to the mismanagement of the Project by the Defendants prior to turning over control of the Project to the Waverly Association Board.

110. Each of the wrongful acts of the Defendants as described above that occurred in connection with the mismanagement of the Project constituted gross negligence and were more

than momentary thoughtlessness, inadvertence or error in judgment on the part of the Defendants with regard to representations consisting of either affirmative statements or silence when there was a duty to speak; instead, these wrongful acts or omissions constitute a complete lack of care and conscious indifference to the rights, welfare or property of the Plaintiff, tenants, prospective purchasers, and unit owners, and were intended to cause financial harm to the Plaintiff and its members.

111. The Defendants as described above had a fiduciary relationship and owed fiduciary obligations and duties to Plaintiffs.

112. The Defendants as described above at all relevant times were or should have been aware of, among other things, the extensive and severe construction defects and deficient conditions at the Project. The Defendants' failure to properly investigate the extent of the defects and problems; their failure to properly investigate the extent of these defects and problems; their failure to properly mitigate the damaging effects of these problems and defects; and their failure to properly safeguard the rights and interests of Plaintiffs, all constitute breaches of their fiduciary obligations to Plaintiffs.

113. Upon information and belief, Defendants purposely withheld their knowledge of the above-described defects, despite receiving notification thereof, and problems from Plaintiffs or consciously failed to investigate the defects knowing that the Defendants would find defects to the extreme detriment of Plaintiffs and against the Plaintiffs' pecuniary interest. In failing to notify Plaintiffs, these Defendants knowingly caused Plaintiffs to become responsible for and liable for the above-described needed extraordinary repairs and reconstruction expenses such that these Defendants breached their fiduciary duties owed to Plaintiffs including, but not limited

to, the duty to perform, the duty of care and skill, the duty of good conduct, the duty to give information, the duty to keep and render accounts, and the duty to act only as authorized.

114. As a direct and proximate result of their breaches of their fiduciary duties to the Plaintiffs, these Defendants are liable to the Plaintiffs for the actual, direct, consequential, incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS AN TENTH CAUSE OF ACTION
(As to the Developer Defendants)
(Breach of Fiduciary Duty)

115. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

116. These were required to use good judgment and act in the utmost good faith to complete the formation of and operate the Waverly Association until it was turned over to the unit owners' control.

117. Prior to ceding control over the Waverly Association to the unit owners, these Defendants had the unilateral ability to determine the assessments against individual owners and were required to fund shortfalls between the assessments necessary to perform the duties and obligations of the Master Deed and By-laws and the assessments actually collected from individual unit owners.

118. These Defendants failed to establish and provide adequate capital reserves and projections for the sufficient maintenance and repair of the Project prior to turning the Waverly

Association over to the unit owners, in that the limited repairs and maintenance done were substandard and inadequate and were intended to and, in fact did, conceal instead of correct the latent defects that existed in the Project and of which these Defendants were or should have been aware.

119. These Defendants sought and obtained a special relationship of trust and confidence with the Plaintiffs and, as such, these Defendants owed a fiduciary duty to the Plaintiffs to ensure that the Project was safe, habitable, and in good repair at the time the Project was turned over to the Waverly Association, and/or these Defendants were required to provide funds sufficient to bring the Project to a safe, habitable and code-compliant condition and in good repair as required by South Carolina law.

120. These Defendants owed a duty to the Plaintiffs to turn over the Project including, but not limited to, its common areas in a safe, habitable, code-compliant condition and in good repair.

121. These Defendants negligently, carelessly, recklessly, willfully and wantonly failed to turn over common areas, units, and other property that was safe, habitable, in code-compliant condition and in good repair, and failed to establish guidelines and plans to ensure that the property interests of the Plaintiffs would be preserved and protected in conformity with the customary and normal standards in the townhome management industry.

122. These Defendants further failed to establish and provide sufficient capital replacement reserves at the time of the turn over to effectuate the necessary repairs and to bring the substandard conditions up to a state of code compliance and good repair.

123. As a direct and proximate result of the negligent, reckless, willful, wanton and grossly negligent conduct of these Defendants, Plaintiffs have and will continue to be required to expend substantial sums of money in order to investigate, design, repair and implement the necessary repairs and alterations to bring the Project to a condition which is consistent with the representations made by the Developer Defendants in property condition disclosures made during the construction and sale process for units at the Project, and Plaintiffs will suffer other and further injuries, damages, and losses as a direct and proximate result of the acts and omissions of these Defendants.

124. As a direct and proximate result of their breaches of their fiduciary duties to the Plaintiffs, these Defendants are liable to the Plaintiffs for the actual, direct, consequential, incidental, special, and punitive damages to the Plaintiffs as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A ELEVENTH CAUSE OF ACTION
(Against the Developer Defendants)
(Breach of Contract)

125. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

126. These Defendants entered into oral and/or written contractual arrangements with Plaintiffs relating to the representation in a purchase and sale transaction, as well as the purchase of units and other property within the Project, and the right to beneficial use of common elements and amenities to be established, coordinated, and managed by these Defendants, and

these Defendants received consideration which was adequate and accepted pursuant to the terms of the Defendants' offer of ownership, goods, and/or services which were accepted by the Plaintiff.

127. Based upon the terms of their contractual agreements, along with the duties which flowed from these Defendants by virtue of the Master Deed and By-laws, real estate agency or other agreements for representation by these Defendants, and the purchase agreements for individual townhome units and other property interests at the Project, these Defendants owed a contractual obligation to Plaintiffs which required that these Defendants ensure that the Project was safe, habitable, code-compliant, and in a condition consistent with these Defendants' representations prior to turning over control of the Project to the unit owners or, in the alternative, these Defendants had a duty to establish and fund sufficient capital reserves which could be used by the Plaintiffs to repair any of these deficient and defective conditions at the Project.

128. In breach of these contractual obligations and in breach of the Master Deed, By-laws, and real estate agency and other agreements, these Defendants failed to make a full investigation of conditions at the Project, and failed to disclose the existence of the known defects at the Project, which constitutes a breach of contract and violation of the terms of the Master Deed and By-laws by these Defendants as described above.

129. In addition to and accompanying this breach of these contractual and other obligations, these Defendants made material representations which were false as more fully described in this Complaint which the Plaintiffs relied upon to the Plaintiffs detriment.

130. As a direct and proximate result thereof, Plaintiff have and will continue to suffer, and the actual, incidental, special, and consequential damages and other injuries including, but not limited to, the damages and injuries associated with the acts and omissions which constituted the breach of contract by these Defendants as aforesaid, all in an amount to be determined by the trier of fact.

131. These Defendants are therefore liable to the Plaintiffs for the actual, incidental, special, and consequential damages and other injuries as aforesaid in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A TWELFTH CAUSE OF ACTION
(Against the Developer Defendants)
(Violation of the Residential Property Condition Disclosure Act)

132. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

133. These Defendants were engaged in a joint venture, partnership, or some other form of business venture or association including, but not limited to, the formation of a Limited Liability Company, in connection with the development and construction of the Waverly at Hamlin Plantation Townhomes.

134. The Developer Defendants did so place the townhome units into the stream of commerce for sale to the general public and to the members of the Waverly Association in particular.

135. At all times relevant to this cause of action the Developer Defendants were "owners" as that term is used within S.C. Code Ann. § 27-50-10 *et seq.*, referred to as the "South Carolina Residential Property Condition Disclosure Act" (referred to in the remainder of this cause of action as the "Act").

136. The Developer Defendants failed to furnish to the purchasers of the townhome units a written disclosure statement in conformity and compliance with S.C. Code Ann. § 27-50-40.

137. These Defendants failed to inform the sellers of the units of their obligations under the Act and had reasonable cause to suspect that the information, if any, supplied by the sellers to the individual purchasers was inherently false, incomplete, and misleading.

138. Upon information and belief, notwithstanding the above-described failures of these Defendants, and each of them, knowingly violated and/or failed to perform the duties described in § 27-50-40.

139. The nature of the defects that were undisclosed in violation of § 27-50-40, prevented and/or limited any inspection performed by the Plaintiff to uncover or discover the said defects.

140. As a direct and proximate result of these Defendants' violations of their respective and collective duty to furnish written disclosure to the purchasers as required by § 27-50-10, *et seq.*, the Plaintiff has suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, along with costs, interest, and attorney's fees pursuant to the remedies set forth in the Act, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of

warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A THIRTEENTH CAUSE OF ACTION
(Against the Developer Defendants)
(Strict Liability)

141. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

142. Each and every townhome unit sold by these Defendants was a product within the meaning of S.C. Code Section 15-73-10, *et seq.*

143. These Defendants are and were engaged in the business of selling the aforesaid townhome units which are within the meaning of S.C. Code Section 15-73-10, *et seq.*

144. The aforesaid townhome units/products were expected to, and in fact did, reach the Plaintiffs herein as Users or Consumers without substantial change in condition in which it was sold within the meaning of Section B of S.C. Code 15-73-10, *et seq.*

145. The townhome units/products which were sold by these Defendants were at the time of sale in a defective condition, unreasonably dangerous to Plaintiff as a User or Consumer or to the Plaintiffs property and, as such, these Defendants are strictly liable to Plaintiff as Users or Consumers herein for the physical harm and damage proximately caused thereby.

146. As a direct and proximate result thereof, Plaintiffs as Users or Consumers have suffered, and these Defendants are liable to the Plaintiffs for, actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other

waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTEENTH CAUSE OF ACTION
(Against Developer Defendants)
(Alter Ego Liability and Piercing the Corporate Veil)

147. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein verbatim.

148. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project, and the Developer Defendants combined and joined together through various instrumentalities and alter egos to facilitate to process of building the townhome units in or about 2006-2007.

149. The Developer Defendants created and controlled numerous and various entities including, but not limited to, the Wieland Defendants, Builder Support Services, Inc. and Wheelock, set forth hereinabove, for the sole purpose of the construction, development, purchase of property, sale of property, leasing of townhomes, and other activities solely relating to development and sale of the townhomes that are known as the Waverly at Hamlin Plantation Townhomes. The Developer Defendants created and controlled numerous and various entities including, but not limited to, Wieland, for the sole purpose of the building and sale of the townhomes at the Project. These Defendants created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of these Defendants to achieve their financial goals and to perpetrate the activities more particularly described herein. The subservient entities in fact manifested no

separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between these Defendants and the sham corporations, shareholders, officers, agents, partners, employees, assets, and each of them.

150. These Defendants created entities which were created to perform single purpose functions in order to effectuate the sole will of these Defendants in purchasing, developing, leasing, and/or selling the units. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, these Defendants actively and directly participated in the development, purchase, sale, management, leasing, and/or operations of the Project, and in fact put the same into the stream of commerce.

151. These Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of units, and other activities solely relating to the Project which is the subject of this action.

152. The sham entities established by these Defendants were and are characterized by one or more of the following: (1) being undercapitalized; (2) failing to observe corporate formalities; (3) failing to pay dividends; (4) Insolvency; (5) lack(ed) proper records; (6) siphoning of funds by its members and/or affiliates; and (7) was used as a mere facade for the operation of the dominant shareholders, members, associates, and affiliates. Upon information and belief, each shared the same mailing address, their business was conducted on the letter head of these Defendants, these Defendants directly received payment and disbursed payment for obligations relating to the sham entities, the sham entities had no shareholders and/or officers of their own,

no separation of accounting and bookkeeping functions, and/or these Defendants directly contracted for the sham entities in the name of these Defendants.

153. These Defendants directed and oversaw the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

154. There would exist a broad element of injustice and fundamental unfairness if the acts of these Defendants, and each of them individually, were not regarded as the acts of one another.

155. At the time the units were offered for sale and placed into the stream of commerce by these Defendants, the units contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of these Defendants.

156. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

157. These latent building defects have, unbeknownst to Plaintiffs, regularly resulted in water intrusion into the buildings and property damage and continue to do so through the date of this filing.

158. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

159. The Plaintiffs suffered damages and injuries when these Defendants put these units into the stream of commerce and continue to be damaged and injured through the date of this filing.

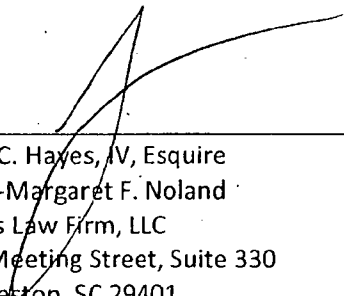
160. As a direct and proximate result thereof, these Defendants are liable to the Plaintiffs for actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- a) Enter judgment in favor of the Plaintiffs and against all Defendants, jointly and severally, in an amount to be determined for actual, incidental, consequential, special, and punitive damages;
- b) Find that the Defendants have engaged in unfair trade practices and knowingly did so thereby entitling Plaintiffs to treble damages;
- c) Award attorneys' fees and costs to the Plaintiffs; and
- d) Award such other and further relief as the Court may deem just and proper.

[Signature Page to Follow]

Respectfully Submitted,



John C. Hayes, IV, Esquire
Mary-Margaret F. Noland
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: 843-805-7003
Fax: 843-573-7388
jhayes@hayeslaw.org
mnoland@hayeslaw.org

and

I. Keith McCarty, Esquire
MCCARTY LAW FIRM, PC
1212 Wappoo Road
Charleston, SC 29407
Phone: 843-793-1272
ikeithmccarty@gmail.com

ATTORNEYS FOR PLAINTIFFS

March 4, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-10-4335

Jeffrey Sills as Class Representative,)
Marie Labarowski, Edward and Nancy)
Peyser, Francis Sills, Daniel and Suzanne)
Ruth, Stephani Adili, Marc and Brandy)
Lynn, Russell Robinson, George)
Busnach, Helen Furtado, Jessica)
Baucom, Nancy S. Coleman, Linda Glitz,)
Peggy Gerou, Shannon Bebout,)
Maryann Walsh, Patty Whitmire,)
Donald L. Tomasello and Patricia Kelly,)
Chris Leigh-Jones, Edward Ray and)
Kathy Jo Feagins, Cindy Hunt for)
Bentgrass Limited, LLC, Adam A. and)
Susan A. Sokoloski, William and Carolyn)
Barone, Michelle Ray, Eugene and)
Cynthia Ray, William Abel, Dean and)
Conny Mason, David McCartney, Paul)
and Patricia Watters, James and Andrea)
Lowry, R. Robinson, Jr., Thaddeus R. &)
Barbara A. Kuczynski, Beverly Sanders)
Carlson, Lisa Roeck, Elizabeth Jackson,)
Charles and Mary Kathleen Jenkins,)
Linda M. and Earl K. Rigler, Jr., John)
Twomey, Joe and Anita Brittain, Gilbert)
J. Hager & Kelly Hager Holmes, Carol &)
Chris Gillespie, Jarred D. Overcash,)
James & Susie Lesesne, Jessica)
Shipman, Arlene Conte, Carol Ann)
Dumond, Lawrence Murray, Yvonne)
Walker, Darlene and Richard Gleeson,)
Robert and Michelle Bagrie, Russell)
Johnston, Kathryn Howle, Dorthy)
Newman, Nicholas and Debora Yost,)
Stephen Denby, Colin and Phyllis)
Braybrooks, Helen and Bob Harman,)
Rose Minton, Stephen and Merifaith)
Perdue, and John and Jane Does (1-48))
Plaintiff,)

CERTIFICATION OF SERVICE

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2015 MAR -4 PM 2:58

FILED

vs.)
)
 John Wieland Homes and)
 Neighborhoods of the Carolinas, Inc. as)
 successor by statutory merger to John)
 Wieland Homes and Neighborhoods of)
 South Carolina, Inc.; John Wieland)
 Homes of Charleston, Inc., John)
 Wieland Homes, Inc., Builder Support)
 Services of the Carolinas, Inc.,)
 Wheelock Street Capital, LLC d/b/a John)
 Wieland Homes and Neighborhoods,)
 Inc., Barr Construction, Inc., Benjamin)
 Mora d/b/a Mora Construction, a/k/a)
 Benjamin Mora Construction, LLC,)
 Builder's Firstsource, Inc. a/k/a Builders)
 Firstsource-Southeast Group, LLC, a/k/a)
 Builders Firstsource –Atlantic Group,)
 LLC, DBC Construction Services, LLC,)
 Gerardo Rosette Sanchez a/k/a GR)
 Painting, Jeorge Medina a/k/a JMC)
 Construction, LLC a/k/a JMC)
 Construction, Inc.; Jesus Mora ak/a J.)
 Mora Brick & Block Mason, LLC; Juan)
 Luis Sanchez, Juan Luis Sanchez a/k/a)
 Sanchez Brothers Painting; Latitude)
 Construction Services, LLC, The Muhler)
 Company, Inc., Paul M. Vasquez,)
 Richard Ditullio, Richard Ditullio a/k/a)
 ROT Contracting, LLC,)
)
 Defendants.)

The undersigned hereby certifies that on the 4 day of March 2015, a true and correct copy of the forgoing *Plaintiffs' Amended Summons and Complaint* was served upon all parties and/or their respective counsel of record by placing the same in the U.S. Mail and/or email with sufficient postage affixed and addressed as follows:

Thomas C. Hildebrand, Jr., Esq. Kristina Y. Baxley, Esq. Elliott E. Quinn, Esq. Parker Poe Adams & Bernstein, LLP 200 Meeting Street, Suite 301 Charleston, SC 29401	Erin D. Dean, Esq. Tupper, Grimsley & Dean, P.A. PO Box 2055 Beaufort, SC 29901-2055 erindean@tgdpa.com Attorney for Barr Construction, Inc.

tomhildebrand@parkerpoe.com kristinabaxley@parkerpoe.com elliotttequinn@parkerpoe.com Attorneys for John Wieland Homes and Neighborhoods of the Carolinas, Inc., as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., and Builder Support Services of the Carolinas, Inc.	
Andrew N. Cole Collins & Lacy, P.C. 1330 Lady St., 6th Floor (29201) Post Office Box 12487 Columbia, SC 29211 acole@collinsandlacy.com Attorney for JMC Construction, LLC a/k/a JMC Construction, Inc.	Laura E. Paton, Esq. Carlock Copeland & Stair, LLP 40 Calhoun St., Suite 400 Charleston, SC 29401 lpaton@carlockcopeland.com and David D. Ashley Watson Law Group 26 Pitt Street Charleston, SC 29401 dashley@watsonlawgroup.com Attorneys for Latitude Construction Services, LLC
Curt Martin, Esq. Jonathan J. Anderson, Esq. Anderson Reynolds & Stephens, LLC 37 ½ Broad Street Charleston, SC 29401 cmartin@arslawsc.com janderson@arslawsc.com and E. Glenn Elliott Aiken, Bridges, Elliott, Tyler & Saleeby, P.A. 181 East Evans St., Suite 409 Florence, SC 29506 ege@aikenbridges.com Attorneys for Benjamin Mora d/b/a Mora Construction and Benjamin Mora Construction, LLC	Peter Gunnar Nistad McAngus Goudelock & Courie, LLC Post Office Box 650007 735 Johnnie Dodds Blvd., Suite 200 (29464) Mt. Pleasant, SC 29465 gunnar.nistad@mgclaw.com Attorney for The Muhler Company, Inc. Stephen P. Hughes, Esq. Kimberly Hopkinson, Esq. Andrew Yoho, Esq. Howell Gibson & Hughes, P.A. P.O. Box 40 Beaufort, SC 29901 sphughes@hghpa.com khopkinson@hghpa.com ayoho@hghpa.com Attorneys for Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource –Atlantic Group, LLC

Patrick T. Morrissey
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
pmorrissey@clawsonandstaubes.com
Counsel for Eli, Inc.

Thomas B. Pritchard
Elizabeth F. Fulton
Pritchard Law Group, LLC
Charleston, SC 29401
P.O. Box 630
Charleston, SC 29402
tpritchard@pritchardlawgroup.com
liz@pritchardlawgroup.com
and

C. Reed Teague
John E. Rogers, II
The Ward Law Firm, P.A.
233 South Pine Street
Spartanburg, SC 29302
jrogers@wardfirm.com
rteague@wardfirm.com
**Counsel for Jesus Mora a/k/a J. Mora Brick &
Block Mason, LLC**

HAYES LAW FIRM



Jena M. Lingle
Paralegal to John C. Hayes, IV and
Mary-Margaret F. Noland

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Watters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. and Barbara A. Kuczynski, Beverly Sanders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gillespie, Jared D. Overcash, and James and Susie Lesesne, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne Walker, Darlene and Richard Gleeson, Robert and Michelle Bagrie, Russell Johnston, Kathryn Howle, Dorothy Newman, Nicholas and Debora Yost, Stephen Denby, Colin and Phyllis Braybrooks, Helen and Bob Harman, Rose Minton, and Stephen and Merifaith Perdue and John and Jane Does (1-48),

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods
of the Carolinas, Inc. as successor by

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-10-4335

DEFENDANTS JOHN WIELAND HOMES
AND NEIGHBORHOODS OF THE
CAROLINAS, INC. AS SUCCESSOR BY
STATUTORY MERGER TO JOHN
WIELAND HOMES AND
NEIGHBORHOODS OF SOUTH
CAROLINA, INC., JOHN WIELAND
HOMES OF CHARLESTON, INC., JOHN
WIELAND HOMES, INC., AND BUILDER
SUPPORT SERVICES OF THE
CAROLINAS, INC.'S ANSWER TO
AMENDED COMPLAINT AND
CROSS CLAIMS

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2015 MAR -6 PM 3:15

FILED

statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc., Gerardo Rosette Sanchez a/k/a GR Painting, George Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC; Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC,

Defendants.

The Defendants identified as John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., and Builders Support Services of the Carolinas, Inc. (hereinafter collectively referred to as "Wieland"), through their below-signed attorneys, answering the Amended Complaint of the Plaintiffs above-named, and by way of cross claims, allege as follows:

1. They are without information sufficient to form a belief as to the allegations of Paragraph 1, including subparts, and therefore deny the same and demand strict

proof thereof.

2. They are without information sufficient to form a belief as to the allegations of Paragraph 2, and therefore deny the same and demand strict proof thereof.

3. They deny the allegations of Paragraph 3 as stated but admit only that Wieland was the developer and general contractor for the townhomes; however, actual construction was performed by others.

4. Answering the allegations of Paragraph 4, they crave reference to the applicable corporate and business filings and documents for their exact terms and contents and deny any allegations inconsistent therewith.

5. They deny the allegations of Paragraphs 5 through 7.

6. The allegations of Paragraph 8 state legal conclusions which require no responsive pleading from Wieland. To the extent, however, that any of those allegations require a response, they are denied.

7. They deny the allegations of Paragraphs 9 through 10, including subparts.

8. Answering the allegations of Paragraphs 11 through 14, the Wieland Defendants crave reference to the applicable corporate and business filings and documents for their exact terms and contents and deny any allegations inconsistent therewith. As to these structures, they admit that John Wieland Homes and Neighborhoods of South Carolina, Inc. developed and sold the residences in question.

9. The allegations of Paragraphs 15 through 28 relate to defendants other than the Wieland Defendants and therefore require no responsive pleading from these Defendants. To the extent, however, that any of those allegations require a response, they are denied.

10. They deny the allegations of Paragraphs 29 through 38. They specifically deny any and all joint venture and amalgamation allegations.

11. Answering the allegations of Paragraph 39, they deny the characterization of the work of the named entities as being "deficient and defective", and they are otherwise without information sufficient to form a belief as to the remaining allegations of that Paragraph.

12. They deny the allegations of Paragraphs 40.

13. The allegations of Paragraph 41 state legal conclusions which require no responsive pleading from Wieland. To the extent, however, that any of those allegations require a response, they are denied.

14. Answering the allegations of Paragraph 42, they reallege the responses to the above paragraphs as if repeated herein verbatim.

15. They deny the allegations of Paragraphs 43 through 65.

AS TO THE FIRST CAUSE OF ACTION

16. Answering the allegations of Paragraph 66, they reallege the responses to the above paragraphs as if repeated herein verbatim.

17. They deny the allegations of Paragraphs 67 through 68, including subparts.

AS TO THE SECOND CAUSE OF ACTION

18. Answering the allegations of Paragraph 69, they reallege the responses to the above paragraphs as if repeated herein verbatim.

19. They deny the allegations of Paragraphs 70 through 73.

AS TO THE THIRD CAUSE OF ACTION

20. Answering the allegations of Paragraph 74, they reallege the responses to the above paragraphs as if repeated herein verbatim.

21. They deny the allegations of Paragraphs 75 through 77.

AS TO THE FOURTH CAUSE OF ACTION

22. Answering the allegations of Paragraph 78, they reallege the responses to the above paragraphs as if repeated herein verbatim.

23. They deny the allegations of Paragraphs 79 through 80.

AS TO THE FIFTH CAUSE OF ACTION

24. Answering the allegations of Paragraph 81, they reallege the responses to the above paragraphs as if repeated herein verbatim.

25. They deny the allegations of Paragraphs 82 through 86.

AS TO THE SIXTH CAUSE OF ACTION

26. Answering the allegations of Paragraph 87, they reallege the responses to the above paragraphs as if repeated herein verbatim.

27. They deny the allegations of Paragraphs 88 through 91.

AS TO THE SEVENTH CAUSE OF ACTION

28. Answering the allegations of Paragraph 92, they reallege the responses to the above paragraphs as if repeated herein verbatim.

29. They deny the allegations of Paragraph 93.

AS TO THE EIGHTH CAUSE OF ACTION

30. Answering the allegations of Paragraph 94, they reallege the responses to the above paragraphs as if repeated herein verbatim.

31. They deny the allegations of Paragraphs 95 through 101, including subparts.

AS TO THE NINTH CAUSE OF ACTION

32. Answering the allegations of Paragraph 102, they reallege the responses to the above paragraphs as if repeated herein verbatim.

33. They deny the allegations of Paragraphs 103 through 114, including subparts.

AS TO THE TENTH CAUSE OF ACTION

34. Answering the allegations of Paragraph 115, they reallege the responses to the above paragraphs as if repeated herein verbatim.

35. They deny the allegations of Paragraphs 116 through 124.

AS TO THE ELEVENTH CAUSE OF ACTION

36. Answering the allegations of Paragraph 125, they reallege the responses to the above paragraphs as if repeated herein verbatim.

37. They deny the allegations of Paragraphs 126 through 131.

AS TO THE TWELFTH CAUSE OF ACTION

38. Answering the allegations of Paragraph 132, they reallege the responses to the above paragraphs as if repeated herein verbatim.

39. They deny the allegations of Paragraphs 133 through 140.

AS TO THE THIRTEENTH CAUSE OF ACTION

40. Answering the allegations of Paragraph 141, they reallege the responses to the above paragraphs as if repeated herein verbatim.

41. They deny the allegations of Paragraphs 142 through 146.

AS TO THE FOURTEENTH CAUSE OF ACTION

42. Answering the allegations of Paragraph 147, they reallege the responses to the above paragraphs as if repeated herein verbatim.

43. They deny the allegations of Paragraphs 148 through 160, being all the remaining allegations of the Plaintiffs' Amended Complaint.

44. They deny each and every allegation of the Plaintiffs' Amended Complaint not specifically admitted above.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

45. Plaintiffs lack standing and otherwise have improperly attempted to make the claims asserted against Wieland in this action. Plaintiffs lack of standing and improprieties include, but are not limited to, the fact that Plaintiffs have improperly attempted to file a derivative action and Plaintiffs' filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiffs' claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

46. That all claims asserted against Wieland are barred by the applicable statute of limitations and/or the applicable statute of repose.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

47. Plaintiffs' claims, if any, are barred, or should be reduced, by Plaintiffs' own comparative negligence and recklessness by Plaintiffs' failure to properly maintain the property and to mitigate their damages.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

48. Plaintiffs' claims, if any, are the result of acts and omissions of other entities over whom Wieland has no control, barring Plaintiffs' claims against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

49. That all claims are barred by the doctrines of laches, waiver and estoppel.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

50. That the final completion and acceptance of the work undertaken by Wieland pursuant to the original contract and all modifications thereto constitutes a complete defense to all claims asserted by Plaintiffs.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

51. That all claims asserted by Plaintiffs are barred by the doctrine of unclean hands.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

52. That Plaintiffs failed to give Wieland reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide Wieland a reasonable opportunity to correct any such alleged defects.

53. That Plaintiffs' failure to give Wieland notice of and an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims of breach of warranty.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

54. Upon information and belief, any express or implied warranties were limited in duration from the date of completion and acceptance of the project by the Owner.

55. That the failure of Plaintiffs within the warranty period from the date of the completion and acceptance of the project by the Plaintiffs, to give notice of or make any claim for alleged deficiencies in the workmanship and/or materials provided by Wieland constitutes a complete defense to all claims asserted by Plaintiffs.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

56. Plaintiffs' Amended Complaint is barred by payment and/or release.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

57. Plaintiffs have waived and/or are estopped from asserting the claims set forth in their Amended Complaint.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

58. If Plaintiffs sustained injuries and damages in the manner alleged in the Amended Complaint, which injuries and damages are specifically denied by Wieland, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of Wieland nor of anyone for whose conduct Wieland are anyway responsible, but solely through the fault, neglect, breach of warranty (express or implied) and want of due care on the part of Plaintiffs, all of which will be shown at the trial of this case, and for which

Plaintiffs can have no recovery against Wieland or, in the alternative, for which Plaintiffs' recovery should be appropriately reduced. Plaintiffs' comparative negligence includes, but is not limited, the following particulars:

- a. In failing to exercise reasonable care in maintaining the structures.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

59. Plaintiffs' claims are barred as the court lacks jurisdiction over the subject matter of the case.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

60. Plaintiffs' claims fail to state facts sufficient to constitute causes of action against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

61. Wieland has contractually limited its warranty and non-warranty obligations and exposure to the Plaintiffs, excluding liability for many claims the Plaintiffs are making, barring Plaintiffs' claims and/or Plaintiffs' claimed damages, including Plaintiffs' claim for consequential damages, in whole or in part, against Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

62. Plaintiffs' claims are barred, or should be stayed, pending arbitration as there exists a valid arbitration provision in the contract between the Plaintiffs and Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

63. Plaintiffs' claims should be dismissed as the Plaintiffs failed to effect proper service of process on Wieland.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

64. Plaintiffs' claims should be dismissed as there is a lack of appropriate personal jurisdiction against one or all of the Wieland Defendants in this action.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

65. Plaintiffs' claims are barred by the doctrine of corporate immunity.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

66. Plaintiffs' claim are barred or would be reduced as Wieland provided a limited warranty to Plaintiffs which was in lieu of all other warranties or obligations, express or implied, including the warranty of habitability, warranty of suitability for residential purposes, any warranties of marketability or fitness for particular purposes. Plaintiffs' claims and remedies are limited to claims and remedies under the limited warranty that was provided, and any other claims are barred.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

67. The Plaintiffs' claims are barred or should be dismissed by virtue of the doctrine of spoliation of evidence, as the Plaintiffs spoiled evidence and repaired alleged deficiencies without notice to Wieland and without giving Wieland opportunity to observe the alleged deficiencies.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

68. Plaintiff's claims are barred and/or should be stayed or dismissed by virtue of Plaintiff's failure to comply with the South Carolina Notice and Opportunity to Cure Non-Residential Construction Defects Act, South Carolina Code §40-11-510, et. seq.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

69. Plaintiffs' claims are barred and/or should be stayed or dismissed by virtue of the Plaintiffs' failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, South Carolina Code §40-59-810-860 (1976 as amended).

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

70. Plaintiff's claims are barred by the economic loss rule.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

71. Plaintiffs' claims should be dismissed or stayed as Plaintiffs have failed, prior to filing suit, to comply with valid, applicable and mutually enforceable conditions precedent contained in the applicable purchase and sales documents and applicable corporate/legal documents (to include, but not limited to, the regime documents, Master Deed and Bylaws, deeds, sales contracts and Townhouse Association documents), including any and all alternative dispute provisions and provisions related to the number of owner/members who must agree to file a claim or suit. Plaintiffs lack of standing and improprieties include, but are not limited to, the fact that Plaintiffs have improperly attempted to file a derivative action and Plaintiffs' filing is contrary to the applicable corporate/legal requirements (including the Master Deed and By-Laws), including the

requirements relating to the number of owners who must approve any claims or litigation; therefore, Plaintiffs' claims are ultra vires, void and/or voidable ab initio.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

72. Plaintiffs' Amended Complaint should be dismissed for failure to join necessary persons, parties and/or entities pursuant to SCRCP 19.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

73. Plaintiffs' claims for the unfair trade practices act should be dismissed as the alleged actions of Wieland do not have an impact on the public interest.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE

74. Plaintiffs' claims for breach of South Carolina's unfair trade practices act are barred pursuant to South Carolina Code §39-5-40.

FURTHER ANSWERING AND BY WAY OF CROSSCLAIMS AGAINST THE
SUBCONTRACTOR DEFENDANTS BELOW, WIELAND ALLEGES AS FOLLOWS

75. Wieland realleges the Paragraphs above as if repeated herein verbatim.

76. Plaintiffs have sued Wieland claiming damages caused by alleged deficient materials, design, engineering and/or construction services provided by Subcontractor Defendants on the Project. See Amended Complaint attached as Exhibit "A".

77. Wieland contracted with the following persons and entities (herein collectively referred to as "Subcontractor Defendants") to perform work and provide materials as subcontractors and materialmen for the Project. The written contracts, as amended, between Wieland and the Subcontractor Defendants are incorporated herein by reference, to include any and all arbitration provisions that are applicable and that

would apply in this matter. The Subcontractor Defendants are as follows:

- a. framing, to include but not limited to installation of the water management system and installation of doors and windows, together with all associated waterproofings and flashings
 - i. Builder's FirstSource, Inc., a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource-Atlantic Group, LLC
- b. roofing, together with all associated and related waterproofings and flashings
 - i. Richard Ditullio, Richard Ditullio d/b/a RDT Contracting, LLC
 - ii. DBC Construction Services, LLC
 - iii. George Medina, George Medina a/k/a JMC Construction, LLC, a/k/a JMC Construction, Inc.
- c. window and door manufacturer, supplier, retailer, and installer, together with all associated and related waterproofings and flashings
 - i. The Muhler Company, Inc.
 - ii. Paul M. Vasquez
- d. railing suppliers and installers for balconies, porches and stairs, together with all associated and related waterproofings and flashings
 - i. George Medina, George Medina a/k/a JMC Construction, LLC, a/k/a JMC Construction, Inc.
- e. waterproofing supplier and installer for balconies and porches, together with all associated and related waterproofings and flashings
 - i. Latitude Construction Services, LLC

- f. hardiplank/cement board siding supplier and installer, together with all associated and related waterproofings and flashings
 - i. George Medina, George Medina a/k/a JMC Construction, LLC, a/k/a JMC Construction, Inc.
- g. hurricane strap installer, together with all associated and related waterproofings and flashings
 - i. Builders Firstsource, Inc., a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource-Atlantic Group, LLC
- h. masonry supplier and installer to include brick entryway steps, together with all associated and related waterproofings and flashings
 - i. Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC
- i. exterior painter/caulker, together with all associated and related waterproofings and flashings
 - i. Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting
 - ii. Gerardo Rosette Sanchez, a/k/a GR Painting
- j. foundation connections, supplier and installer, together with all associated and related waterproofings and flashings
 - i. Benjamin Mora, a/k/a Mora Construction, a/k/a Benjamin Mora Construction, LLC
 - ii. Jesus Mora, a/k/a J. Mora Brick and Block Mason, LLC
- k. sidewalk, walkway, and driveway paving
 - i. Eli, Inc.

I. sitework/drainage supplier and installer

i. Barr Construction, Inc.

78. Wieland has denied all of the substantive allegations against it that were made by the Plaintiffs.

FURTHER ANSWERING AND AS A FIRST CROSSCLAIM, WIELAND ALLEGES AS
FOLLOWS:
(Indemnity)

79. To the extent, if any, that Wieland is held liable to the Plaintiffs in this action, such liability would be a direct and proximate result of the wrongful acts, errors, omissions, breaches, negligence, gross negligence, recklessness and/or representations of Subcontractor Defendants, which has damaged Wieland as Wieland has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

80. To the extent, if any, that the construction was defective or deficient in workmanship, installation, materials, and/or were not merchantable or fit for their particular purposes, such defects and deficiencies would be the result of the breach of the express and implied contractual obligations and warranties that Subcontractor Defendants provided, damaging Wieland as Wieland has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending this action.

81. Wieland is entitled to full indemnification from Subcontractor Defendants for any liability Wieland is found to have to the Plaintiffs in this action, and Wieland would be entitled to damages for Subcontractor Defendants' negligence, gross negligence, and recklessness as aforescribed and for Subcontractor Defendants' breach of implied and express warranties, entitling Wieland to recover from

Subcontractor Defendants its attorney's fees, costs, and other expenses incurred in defending this action, and entitling Wieland to recover from Subcontractor Defendants any sums for which it may be held liable to Plaintiffs.

82. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged fault construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

FURTHER ANSWERING AND AS A SECOND CROSSCLAIM, WIELAND ALLEGES
AS FOLLOWS:
(Negligence)

83. Wieland realleges the Paragraphs above and as if repeated herein verbatim.

84. The Subcontractor Defendants were negligent, grossly negligent, reckless and careless in the construction, supervision, inspection and/or supplying of the work or materials outlined above and incorporated into the project.

85. As a direct and proximate result of such negligence, gross negligence, recklessness and carelessness, Wieland has been damaged in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

86. Upon information and belief, Wieland is entitled to judgment for actual damages collectively or individually against the Subcontractor Defendants in the amount

of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as fees and costs incurred in the investigation, defense and settlement of this claim.

87. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

88. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' negligence, gross negligence and recklessness and for which the Subcontractor Defendants are also liable to Wieland.

FURTHER ANSWERING AND AS A THIRD CROSSCLAIM, WIELAND ALLEGES AS
FOLLOWS:

(Breach of Warranty)

89. Wieland realleges the Paragraphs above as if repeated herein verbatim.

90. The Subcontractor Defendants expressly or impliedly warranted to Wieland that all work performed by them would be performed in a careful, diligent and workmanlike manner, and that any materials and/or services designed, supplied or sold by them for use on the project would be merchantable and fit for their intended or

specific purpose. Subcontractor Defendants breached their implied and/or express warranties of merchantability, workmanlike service, and/or fitness for a particular or intended purpose in the construction of the project.

91. As a result of the breaches of warranties, Wieland has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

92. Upon information and belief, Wieland is entitled to judgment against the Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

93. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged fault construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

94. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' breach of warranty and for which the

Subcontractor Defendants are also liable to Wieland.

FURTHER ANSWERING AND AS A THIRD CROSSCLAIM, WIELAND ALLEGES AS
FOLLOWS:

(Breach of Contract)

95. Wieland realleges the Paragraphs above as if repeated herein verbatim.

96. Wieland entered into contracts with the Subcontractor Defendants who were to provide work and materials to the Project in question as described above.

97. The terms of the contracts required Subcontractor Defendants to provide construction goods and services for the Project that, among other things, would produce a quality building free from defects and otherwise in conformance of all contract documents, including all building codes and industry standards. The contract further required Subcontractor Defendants to supervise and direct its work, using the best skill and attention.

98. Subcontractor Defendants breached their contract by failing to provide appropriate construction goods and services to the Project, by failing to perform their work in a careful, diligent and workmanlike manner, by failing to provide goods and services that resulted in a quality building free from defects and otherwise in conformance with all contract documents, and failing to provide good and services that were in conformity with all appropriate building codes and industry standards.

99. As a result of these breaches of contract, Wieland has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it paid Plaintiffs in settlement of Plaintiffs' claims, plus the costs of investigating and defending this claim.

100. Upon information and belief, Wieland is entitled to judgment against the Subcontractor Defendants in the amount of any monies it is adjudge to owe Plaintiffs, or which it paid Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees

incurred in the investigation, defense and settlement of this claim.

101. The Project has allegedly sustained actual property damage caused by continuous exposure to the improper and negligent, grossly negligent and reckless design and construction and faulty work of the Subcontractor Defendants resulting in property damage which is not the work product of each of these Subcontractor Defendants. In addition, the alleged fault construction, breaches, errors, omissions, negligence, gross negligence, recklessness and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous and/or injurious events that caused property damage.

102. Further, Wieland has been exposed to special damages recoverable at law in that its professional reputation has been harmed, and it has incurred and continues to incur costs reasonably necessary to defend its interests including fees and costs which are associated with its investigation of this matter which are the legal consequences of the Subcontractor Defendants' breach of contract and for which the Subcontractor Defendants are also liable to Wieland.

FURTHER ANSWERING AND AS A FOURTH CROSSCLAIM, WIELAND ALLEGES
AS FOLLOWS:
(Strict Liability/Products Liability)

103. Wieland realleges the Paragraphs above as if repeated herein verbatim.

104. The products supplied, sold, and/or distributed by the Subcontractor Defendants were defective in the design/and or manufacture, and the Subcontractor Defendants failed to warn Wieland of the dangers and problems inherent with the products.

105. By virtue of the defects in the products and the failure to warn by the Subcontractor Defendants, the products used on the Project are claimed by Plaintiffs to

have failed, causing consequential damages to the residences, and causing damage to Wieland in that Wieland has incurred damage in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

106. Plaintiffs' residences have allegedly sustained actual damage by exposure to the defective products manufactured, supplied, and sold by the Subcontractor Defendants. Plaintiffs' residences have sustained property damage caused by continuous exposure to the defective products manufactured, supplied, and sold by the Subcontractor Defendants and not merely negligent construction damaging only the work product of each of the separate Subcontractor Defendants. In addition, the faulty workmanship, breaches, errors, omissions, and wrongful acts of the Subcontractor Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous, and/or injurious events that caused property damage.

WHEREFORE, Wieland prays that the claims of the Plaintiffs be dismissed, and that Wieland be given judgment against the Subcontractor Defendants in the amount of any liability Wieland is found to have to Plaintiffs in this action, and Wieland demands judgment requiring the Subcontractor Defendants to defend and indemnify Wieland against any liability which Wieland may suffer to Plaintiffs in this action, to include Wieland's attorney's fees, costs and other expenses incurred in defending this action. Wieland further demands judgment for actual and punitive damages against the Subcontractor Defendants and to reimburse it fully for all costs, expenses, and attorney's fees associated with the deficiencies described herein, in an amount to be determined by the trier of fact, and for such other and further relief as this Court may

deem just and proper.

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

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

Kristina Y. Baxley
kristinabaxley@parkerpoe.com

F. Elliotte Quinn IV
elliottquinn@parkerpoe.com

Attorneys for John Wieland Homes and
Neighborhoods of the Carolinas, Inc. as
successor by statutory merger to John
Wieland Homes and Neighborhoods of South
Carolina, Inc., John Wieland Homes of
Charleston, Inc., John Wieland Homes, Inc.,
Builders Support Services of the Carolinas,
Inc.

March 6, 2015

14-4335

CERTIFICATE OF SERVICE

This is to certify that a copy of Defendants John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builder Support Services of the Carolinas, Inc.'s Answer to Amended Complaint and Cross Claims has been served upon the following counsel of record by electronic mail addressed to the following as shown below this 6th day of March, 2015.

John C. Hayes, IV, Esq.
Mary-Margaret S. Fitzhenry, Esq.
Hayes Law Firm
180 Meeting Street, Suite 330
Charleston, SC 29401
Email: jhayes@hayeslaw.org

Marvin D. Infinger, Esq.
Nexsen Pruet, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Email: Minfinger@nexsenpruet.com

Laura Paton, Esq.
R. Michael Ethridge, Esq.
Carlock, Copeland & Stair, LLP
40 Calhoun St., Suite 400
Charleston, SC 29401
Email: lpatis@carlockcopeland.com

Stephen P. Hughes, Esq.
J. Andrew Yoho, Esq.
Howell, Gibson and Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901
Phone: 843-522-2400
Email: shughes@hgpha.com
Email: ayoho@hgpha.com

I. Keith McCarty, Esq.
1212 Wappoo Road
Charleston, SC 29407
Email: ikeithmccarty@gmail.com

Andrew Cole, Esq.
Collins & Lacey
1330 Lady Street, 6th Floor
Columbia, SC 29201
Email: acole@collinsandlacy.com

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JULIE J. ARMSTRONG
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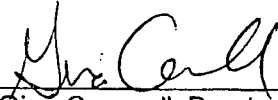
Erin D. Dean, Esq.
Tupper, Grimsley & Dean, P.A.
Post Office Box 2055
611 Bay Street
Beaufort, SC 29901-2055
Email: erindean@tgdpa.com

Jonathan J. Anderson, Esq.
Curt Martin, Esq.
Anderson Reynolds & Stephens, LLC
37 1/2 Broad Street
P.O. Box 87
Charleston, SC 29402
Email: janderson@arslawsc.com
Email: cmartin@arslawsc.com

Patrick T. Morrissey, Esq.
Clawson Staubes, LLC
126 Seven Farms Dr., Suite 200
Charleston, SC 29492
Email:
pmorrissey@clawsonandstaubes.com

Julian K. Allen, Esq.
Turner Padget Graham & Laney P.A.
40 Calhoun Street, Suite 200
Charleston SC 29401
Email: jallen@turnerpadget.com

E. Glenn Elliott, Esq.
Aiken Bridges
181 E. Evans Street, Suite 409
P.O. Drawer 1931
Florence, SC 29503
Email: ege@aikenbridges.com


Gina Cornwell, Paralegal
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
WAVERLY AT HAMLIN PLANTATION	)	<u>TRANSCRIPT OF RECORD</u>
TOWNHOME ASSOCIATION, INC.,	)	
	)	
PLAINTIFF,	)	CASE NO. 2013-CP-10-03326
	)	
VS.	)	
	)	
JOHN WIELAND HOMES AND	)	
NEIGHBORHOODS OF THE	)	
CAROLINAS, INC., et al.,	)	
	)	
DEFENDANTS.	)	

AND

JEFFREY SILLS, et al.,	)	CASE NO. 2014-CP-10-04335
	)	
PLAINTIFFS,	)	
	)	
VS.	)	
	)	
JOHN WIELAND HOMES AND	)	
NEIGHBORHOODS OF THE	)	
CAROLINAS, INC., et al.	)	
	)	
DEFENDANTS.	)	

January 17 and January 19, 2017

Charleston, South Carolina

B E F O R E:

The Honorable Deadra Jefferson

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
 636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
 PNorton@sccourts.org

A P P E A R A N C E S:

For Plaintiffs:

John Calvin Hayes, Esquire
I. Keith McCarty, Esquire
Mary-Margaret F. Noland, Esquire
Jesse Sanchez, Esquire

For Defendants:

Theodore Luke Manos, Esquire
Andrew N. Cole, Esquire
Christopher Adams, Esquire
Andrew Elliott Haselden, Esquire
Peter G. Nistad, Esquire
Sarah Fragale, Esquire
Justin Novak, Esquire
Cheryl D. Shoun, Esquire

I N D E X

MOTIONS HEARING

-- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT

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1 MR. HAYES: Your Honor, John Hayes on behalf of the
2 plaintiffs along with Mary-Margaret Fitzhenry Noland and
3 also Keith McCarty. And Jesse Sanchez will be making a
4 notice of appearance and also here with the plaintiffs.

5 THE COURT: I'm sorry, say that one more time.

6 MR. HAYES: Jesse Sanchez ---

7 THE COURT: And who -- he is representing ...?

8 MR. HAYES: He is going to make a notice of
9 appearance with us.

10 THE COURT: So he is representing the plaintiffs?

11 MR. HAYES: Yes.

12 THE COURT: Okay. Who is appearing -- well, I guess
13 I need to figure out --

14 (WHEREUPON, pause to retrieve court documents.)

15 THE COURT: Who is appearing on behalf of John
16 Wieland Homes?

17 MR. HASELDEN: Your Honor, Andy Haselden and Teddy
18 Manos as well as Justin Novak.

19 THE COURT: I need you to speak up, please.

20 MR. HASELDEN: As well as Justin Novak.

21 THE COURT: I need you to start all over again.
22 Spell your last name, Mr. Haselden.

23 MR. HASELDEN: Haselden, H-A-S-E-L-D-E-N.

24 THE COURT: Okay. And Mr. Manos.

25 MR. MANOS: Yes, Your Honor.

1 THE COURT: First name?
2 MR. MANOS: Teddy Manos. And it is M-A-N-O-S.
3 THE COURT: And who else?
4 MR. NOVAK: Justin Novak, Your Honor. N-O-V-A-K.
5 THE COURT: Thank you. Who is appearing on behalf
6 of Medina and JMC Construction?
7 MR. COLE: Your Honor, Andrew Cole, C-O-L-E, and
8 Chris Adams.
9 THE COURT: Who is appearing on behalf of Sanchez?
10 MS. FRAGALE: Your Honor, Sarah Fragale for Juan
11 Luis Sanchez.
12 THE COURT: Tell me your first name again. I'm
13 sorry.
14 MS. FRAGALE: Sarah, S-A-R-A-H. Last name Fragale,
15 F-R-A-G-A-L-E.
16 THE COURT: Thank you. And who is -- who is
17 appearing on behalf of the Muhler Company?
18 MR. NISTAD: Gunnar Nistad. Gunnar is G-U-N-N-A-R.
19 Nistad is "N" as in Nancy, I-S-T-A-D.
20 THE COURT: And on behalf of RET Contracting?
21 MR. COLE: Your Honor, if I may, it is my
22 understanding that RET Contracting we settled with them
23 and they dropped their ---
24 THE COURT: They did the relief ---
25 MR. COLE: --- claim so they are out.

1 THE COURT: Okay. Because that was unsettled as of
2 Friday. So they are now released and they are no longer
3 in it. All right, I will take them out.

4 Now it was my understanding that the Muhler Company
5 has settled with the plaintiffs, correct?

6 MR. NISTAD: Correct, Your Honor.

7 THE COURT: And so has JMC? Or is that inaccurate?

8 MR. COLE: We have settled, but it is contingent on
9 us not ---

10 THE COURT: I understand that part. But ya'll have
11 settled with ---

12 MR. COLE: Correct, we have reached ---

13 THE COURT: I am just trying to get myself updated
14 from our last conversation.

15 MR. COLE: Okay.

16 THE COURT: I am just trying to figure out whether
17 we are at status quo or something has changed. Did y'all
18 settle with the painting contractor, Mr. Hayes?

19 MR. HAYES: We did settle with the painting
20 contractor, Your Honor.

21 THE COURT: And that is?

22 MR. HAYES: Sanchez.

23 THE COURT: Sanchez. Was the cross -- was the
24 cross-claim against them released?

25 MR. COLE: Not to my knowledge, Your Honor.

1 MS. FRAGALE: No, Your Honor.

2 THE COURT: Okay. Was that settlement contingent on
3 that happening?

4 MS. FRAGALE: Yes, Your Honor.

5 THE COURT: But as I understand it Muhler's was not;
6 is that correct, Mr. Nistad?

7 MR. NISTAD: That is correct, Your Honor.

8 THE COURT: So JMC and Sanchez have settled with the
9 plaintiffs but not with the cross-claims?

10 MR. COLE: Contingent. But yes, Your Honor.

11 THE COURT: I think I said that. Yeah. So what is
12 the hang-up in releasing them as defendants on the
13 cross-claim?

14 MR. HASELDEN: Your Honor ---

15 THE COURT: If you claim you have an equitable
16 indemnity or an indemnity claim through contract how are
17 you prejudiced?

18 MR. HASELDEN: We have a contract claim with -- Your
19 Honor, for the record, there is also a Paul Vasquez who
20 was a defendant in a third ---

21 THE COURT: They said he is in default?

22 MR. HASELDEN: He filed an answer was my
23 understanding.

24 THE COURT: But he hasn't appeared in the past
25 throughout the case was my understanding, so I had him as

1 a nonentity that was going to be referred to the Master
2 at some point I would assume.

3 MR. HASELDEN: Okay. Your Honor, we have a
4 contractual indemnification agreement in our general
5 services agreement with each of the subcontractors in
6 question.

7 I have submitted -- sent to your law clerk an
8 affidavit of one of my clients Rob Parker who is in the
9 courtroom who says this contract is the contract that was
10 applicable to Waverly; it is the contract that was
11 binding on these subs for the work ---

12 THE COURT: I am not asking for argument at this
13 point. I am going to hear all of the motions. I just
14 asked a real simple question ---

15 MR. HASELDEN: Okay.

16 THE COURT: --- which is how are you prejudiced by
17 just letting them out and dealing with them on a
18 different date if you claim they owe you money because
19 they were negligent?

20 MR. HASELDEN: Actually, Your Honor, it is just
21 strictly judicial economy because we have to go try the
22 case twice.

23 THE COURT: Not necessarily. Because if you don't
24 get a judgment against you it is a mute issue, right?

25 MR. HASELDEN: Absolutely. But we are entitled to

1 attorney's fees that we have incurred to date and
2 costs ---

3 THE COURT: Under the contract?

4 MR. HASELDEN: Yes, ma'am.

5 THE COURT: Okay. Okay. Let's see where we are
6 then.

7 You can take your seat, Mr. Haselden.

8 MR. HASELDEN: Thank you, Your Honor.

9 (WHEREUPON, break for court to confer with law clerk.)

10 THE COURT: I am going to hear the motions for
11 summary judgment first. And I am going to start with the
12 Muhler Company. Mr. Nistad.

13 MR. NISTAD: Your Honor, may I approach? I have a
14 memo.

15 THE COURT: I have got it.

16 MR. NISTAD: Okay.

17 THE COURT: Did you file something different than
18 what you filed already?

19 MR. NISTAD: No.

20 THE COURT: This was filed on January 17th, correct?

21 MR. NISTAD: Yes, ma'am.

22 THE COURT: I have it. Did you actually file a
23 motion?

24 MR. NISTAD: Filed a motion last week.

25 THE COURT: Do you know what date that -- was it

1 just in two -- was it specific or was it just a general
2 motion?

3 MR. NISTAD: It was a specific motion. Like five or
4 six points. There's only three we really need to argue.

5 THE COURT: Okay. Give us a moment so I can
6 track ---

7 MR. NISTAD: The first ---

8 THE COURT: Do you have a copy of that motion?

9 MR. NISTAD: I do.

10 THE COURT: I mean do you have -- I don't want to
11 disadvantage you. You don't have an extra copy? How
12 long is it?

13 MR. NISTAD: It is like two pages.

14 THE COURT: Did they scan it already?

15 (WHEREUPON, the Court confers with law clerk.)

16 MR. NISTAD: I have a copy. My only copy.

17 THE COURT: I will give it back to you.

18 (WHEREUPON, document provided to the Court.)

19 THE COURT: Okay. Mr. Nistad, you may proceed.

20 MR. NISTAD: Thank you, Your Honor.

21 THE COURT: You are welcome.

22 MR. NISTAD: The Muhler Company filed a motion for
23 summary judgment addressing -- initially the motion
24 addresses all of the causes of action filed by Wieland
25 and their cross-claims against Muhler.

1 The motion does include summary judgments for
2 equitable indemnity claim, but I don't think that is ripe
3 at this point so I am not going to argue that at this
4 point.

5 THE COURT: I'm sorry, I didn't hear what you said.

6 MR. NISTAD: My motion includes summary judgment for
7 the equitable indemnity which I don't think is ripe yet.

8 THE COURT: So you want to ---

9 MR. NISTAD: And so ---

10 THE COURT: --- withdraw that portion of it?

11 MR. NISTAD: Or just leave it in abeyance until when
12 it becomes ripe.

13 THE COURT: Well, I think you would still have to
14 re-file a motion, wouldn't you?

15 MR. NISTAD: Okay.

16 THE COURT: Because I don't think I can sort of just
17 leave it hanging out there in the system.

18 MR. NISTAD: All right. That is fine. Whatever
19 works for the court.

20 THE COURT: Here you go. You can have this back. I
21 have got one now.

22 (WHEREUPON, document returned to Mr. Nistad.)

23 THE COURT: Go ahead, Mr. Nistad.

24 MR. NISTAD: Wieland has also filed cause of action
25 for breach of contract, breach of warranty, and

1 negligence.

2 And if you look at the pleadings that would be in
3 the file all three of those causes of actions invoked the
4 Waverly cause -- the Waverly action and the Sills action
5 include paragraphs -- and they are all specifically
6 identified in my memo, and basically they say Wieland has
7 had to incur damages as a result of having to pay the
8 plaintiffs either in a verdict or a settlement.

9 And from the Stoneledge case we know that the true
10 nature of those claims as they are plead is indemnity and
11 that summary judgment would be appropriate for those
12 causes of action.

13 THE COURT: Would it be appropriate for summary
14 judgment or would it be appropriate to bifurcate it as
15 the other parties have asked, until such time as it is
16 ripe?

17 MR. NISTAD: Well, I think for those causes of
18 action summary judgment basically -- those -- those --

19 THE COURT: Oh, I see what you are saying. Never
20 mind. Go ahead.

21 MR. NISTAD: They survive equitable indemnity; but
22 the negligence, breach of contract, breach of warranty,
23 are not the right causes of action to state that.

24 Those might be the basis for an equitable indemnity
25 in some point, but it is exhumed by the equitable

1 indemnity.

2 THE COURT: Okay. I understand what you are saying
3 now.

4 MR. NISTAD: So summary judgment would be
5 appropriate in that.

6 And what is left then is contractual indemnity. And
7 basically there are two arguments for contractual
8 indemnity.

9 First is that the purported contract is not a valid
10 contract. So it is Exhibit A in my memo. It is entitled
11 a trade contractor application agreement form, dated
12 March 12th, 2002, the work --- and Muhler is identified
13 on it and it is signed by the Muhler representative. The
14 work at Waverly did not commence until 2005, three years
15 later.

16 I think it has a space upon the form that asks the
17 trade contractor to identify what trade. And so it says
18 home improvement there. Muhler is a window distributor
19 and installer. It is -- part of its work -- part of its
20 work is new construction. Part of its work is
21 renovations which is what is implied by home improvement.

22 Muhler never performed any home improvement for
23 Wieland. It was all new construction. So what you have
24 here is the beginning of an argument that the contract
25 itself fails to identify all of the important material

1 aspects of an agreement between Muhler and Wieland for
2 work at Waverly. So what you have here this
3 identification of home improvement is not what is being
4 performed by Muhler at Waverly.

5 And then there is right below that on the form there
6 is a space to identify the neighborhood. And that is
7 blank.

8 What you have here is Wieland is a large general
9 contractor with projects throughout the Charleston area.
10 And they have projects on Dunes West in Mt. Pleasant; in
11 Hamlin Plantation, a subdivision which includes several
12 different projects. They do stuff on Daniel Island and
13 in other places in the Charleston area.

14 And so you don't have ---
15 (WHEREUPON, phone chime was heard.)

16 THE COURT: Let me just say if anybody has their
17 phones on, turn them off. If they go off the deputies
18 will take it. It will not be returned to you. That does
19 not mean silent. That does not mean vibrate. It means
20 off.

21 (WHEREUPON, pause for phones to be turned off.)

22 THE COURT: All right.

23 MR. NISTAD: So as I was saying, this neighborhood
24 section on the Wieland form is not -- does not identify
25 which project Muhler will be working on.

1 And that is significant because there are lots of
2 different projects that Wieland is working on. So one of
3 those contentions is that that is a significant,
4 indispensable, material part of a contract to make this
5 document a valid contract.

6 THE COURT: Let's say that I believe that argument,
7 that there is not a valid contract; would you -- would
8 you admit then that they still would have a claim
9 potentially for equitable indemnity?

10 MR. NISTAD: Yes.

11 THE COURT: So you don't contest that?

12 MR. NISTAD: At this point there is argument that
13 equitable indemnity fails later. But it is not ripe yet.

14 THE COURT: Well, I mean you understand ---

15 MR. NISTAD: Yes.

16 THE COURT: --- what I ---

17 MR. NISTAD: Yes. Their equitable indemnity
18 survives this argument.

19 THE COURT: Okay. You may continue.

20 MR. NISTAD: The trade agreement identifies John
21 Wieland Homes and Neighborhood, Inc., as the Wieland
22 entity; and it references affiliated entities. John
23 Wieland Homes and Neighborhood, Inc., is not a party to
24 this lawsuit.

25 There are John Wieland entities involved, but what

1 you have is a history of Wieland changing names and using
2 different entities to perform their work in Charleston.

3 And what Muhler doesn't know is which John Wieland
4 entity is it working with. And so Muhler is kind of left
5 in the dark about who it would have to indemnify later
6 on.

7 An interesting thing in what Wieland has submitted
8 as far as their affidavits of Mr. Parker and the other
9 trade agreements that are -- that have been reviewed with
10 other subcontractors with Paul Vasquez trade agreement
11 Wieland has changed their form and all of a sudden they
12 identify additional Wieland entities and the trade
13 contractor chooses which one they are working with.

14 So Wieland obviously as going forward from 2002 they
15 realized okay this agreement we are using these
16 subcontractors are in the dark; they don't know who
17 exactly they are working.

18 And so it is, you know, under the Claire versus
19 Chandler case you have a situation where Muhler doesn't
20 know everything it needs to know. It doesn't know
21 everything it is entitled to know.

22 And so that is an additional point where you have a
23 failure of the parties to have a meeting of the minds on
24 all the essential terms of the contract.

25 And one point -- one other additional point on that

1 identification of an entities is that if there are new
2 entities or if it is one entity and not another you have
3 got a situation where it is literally a modification of a
4 contract would require a whole new contract to be signed.

5 So, you know, and this trade contract doesn't
6 identify prices. It doesn't identify time where Muhler
7 would be required to perform. It doesn't identify where
8 they are going to perform. So it lacks all of those true
9 necessary elements for a valid contract.

10 So then moving on to the last part of the
11 contractual argument we have a situation here even if the
12 contract is valid it would be like Wieland admitting that
13 Muhler didn't do anything wrong. If you look at the
14 indemnity language it says ---

15 THE COURT: What paragraph are you referring to?

16 MR. NISTAD: --- trade contractor shall be
17 responsible for its own work.

18 THE COURT: What paragraph are you referring to?

19 MR. NISTAD: It is paragraph 4. And it is payment
20 and -- payment and pricing. It would be on the last
21 page. That is the wrong -- that is the second part of
22 this argument. It is indemnification paragraph which is
23 six.

24 The very first sentence of that paragraph states
25 that the trade contractor shall be responsible to Wieland

1 for the acts and omissions of the trade contractor's
2 employees, of subcontractors and their agents and
3 employees, and of other persons performing portions of
4 any of the trade contractor's work for Wieland.

5 Generally what that says is Muhler would be
6 responsible for Muhler's own work and not any of
7 Wieland's work or Sanchez' work or JMC's work. And it
8 fits in with South Carolina law that generally does not
9 approve of a party getting indemnification for their own
10 negligence.

11 So what we have is that contract limits the scope of
12 what Muhler would be responsible for in contractual
13 liability.

14 So throughout this litigation the parties require
15 experts. And Wieland went and hired Skip Lewis who is an
16 engineer from the Upstate. Skip developed a scope of
17 repair that is attached as Exhibit B. And the work that
18 is implicated that Muhler did relates to flashing of the
19 sill of the window.

20 These are the windows that have nailing fins. So
21 that at the bottom of the window there is a thin piece of
22 metal that extends below the window and it goes on the
23 outside of the framing and you fasten the window to the
24 framing through that nailing fin or the thin piece of
25 metal.

1 And what the plaintiff is saying is that you
2 shouldn't put flashing over the top of that. That's
3 something that would be a reverse flap.

4 And Mr. Lewis in his scope of repair on Exhibit B
5 which is on Page 2 in Item Number 9 you go to the end of
6 that row under H2L scope of repair. Near the bottom it
7 says no repair required of window sill. So he is
8 admitting that Muhler did nothing wrong and there is no
9 repair required for anything that Muhler did.

10 And so and then he was asked about that same topic
11 in his deposition. And on Page 69 between Lines 5 and 14
12 he agrees with that, there is nothing that needs to be
13 done at the sill. Because the way it was done at the
14 time by Muhler putting the tape over the top of the
15 window flange it was correct at that time. So he says
16 there is no repair and nothing done wrong at the time by
17 Muhler.

18 So and that -- you know, and that result is not
19 really surprising. Because if you go back to that trade
20 agreement Wieland says before you get paid we are going
21 to inspect your work and we are going to make sure that
22 it complies with the code and building standards and all
23 the things that we think are necessary.

24 And so Wieland did their inspections of the Muhler
25 work and they accepted it is as code compliant at the

1 time. So that, Your Honor, in a nutshell is our
2 argument. If you have any questions I would be happy to
3 answer them.

4 THE COURT: Okay, who would like to respond? I
5 assume, Mr. Hayes, y'all don't have a dog in the fight?
6 Or do y'all want to be heard on the motion?

7 MR. HAYES: Not at this time, Your Honor.

8 THE COURT: Okay. All right. Then I will hear
9 from is it going to be Mr. Haselden?

10 MR. HASELDEN: That is correct, Your Honor.

11 THE COURT: You may proceed.

12 MR. HASELDEN: Thank you, Your Honor.

13 THE COURT: You are welcome.

14 MR. HASELDEN: As I understand this Mr. Nistad's
15 argument is that you don't have a ripe contractual
16 indemnification when you don't have a valid contract is
17 the first complaint. And the second one is there is no
18 issue regarding Muhler's work because our expert said
19 there was no problem with it.

20 All right. I will address the first one. Until
21 Friday I never heard from any of these subs that they
22 didn't have a valid contract with Wieland.

23 They did the work at Waverly. They got paid. They
24 have been defending these cases for three now going on
25 four years. Never took a deposition. Never inquired of

1 anybody whether this was a valid contract or not. Never
2 tried to get out of the case until Friday on the basis of
3 summary judgment on the basis of there not being any
4 contract.

5 Now I love Mr. Nistad like a brother. He is a good
6 friend of mine. What he just stood up and said about
7 this contract is a great argument, but that is all it is
8 is it is argument.

9 THE COURT: What proof do y'all have that there was
10 ever a contract that was consummated?

11 MR. HASELDEN: We offered up the affidavit of Mr.
12 Parker.

13 THE COURT: Can't take parole evidence on a written
14 contract. Either it was signed or it wasn't. Either
15 there was offer and acceptance -- either there was --
16 there has to be some element of the contract being met.
17 Somebody telling me they had a contract, that is not
18 enough. I think you know what the elements -- you ---

19 MR. HASELDEN: Certainly, Your Honor.

20 THE COURT: --- contend there was a written
21 contract. And I would assume as a part of that written
22 contract goes part and parcel with your comment that you
23 would be entitled to attorney's fees and I asked the
24 original question how would you be prejudiced by letting
25 these people out.

1 The only way you would be entitled to attorney's
2 fees as I understand is if a contract provides for it.

3 I have read this contract. I don't see anything in
4 here about attorney's fees unless I have missed a
5 paragraph. But I would assume it is a standard provision
6 that says if I have to enforce this contract I get fees.

7 But I am a little at a loss as to how enforcement
8 would fall into equitable indemnity.

9 MR. HASELDEN: Your Honor, I am still arguing that
10 we are entitled to contractual indemnification ---

11 THE COURT: I'm sorry?

12 MR. HASELDEN: I am still arguing that we are
13 entitled to contractual indemnification before we ever
14 drop down to equitable.

15 THE COURT: I understand, but I am dealing with your
16 written document and I don't see anything here that says
17 anything about attorney's fees which goes back to my
18 original question.

19 MR. HASELDEN: Yes, ma'am. Paragraph 6, including
20 but not limited to court costs and attorney's fees.

21 THE COURT: It is so tiny. I tell you the truth.
22 Let's see here. It says to the fullest extent permitted
23 by law trade contractor hereby releases covenants not - I
24 guess sue ---

25 MR. HASELDEN: Uh-huh.

1 THE COURT: --- and indemnifies and holds harmless
2 Wieland and its affiliates, related companies -- and I
3 can skip over all the rest of that. There is agents
4 against -- and are due to any and all claims, charges,
5 including without limitation damages and expenses of any
6 kind in nature including but not limited to court costs
7 and attorney's fees -- what is that next word?

8 MR. HASELDEN: Asserted.

9 THE COURT: ... by any person or persons including
10 trade contractor and trade contractor's employees arising
11 out of, resulting from, or relating directly or -- what
12 is that next word?

13 MR. HASELDEN: Indirectly.

14 THE COURT: ... indirectly to his performance of any
15 trade contractor's work for Wieland regardless of whether
16 or not such claims, charges and damages, losses, or
17 expenses are caused in part by a partly indemnified or
18 released hereunder -- I'm sorry, that sentence is a
19 little unclear.

20 (WHEREUPON, pause for court's review of document.)

21 I mean it is a standard paragraph which means you
22 are entitled to fees if somebody gets a judgment against
23 you. It doesn't says you get fees just because you get
24 sued. I have never had a paragraph like that read any
25 other way or interpreted any other way.

1 MR. HASELDEN: Well, Your Honor we have pled ---

2 THE COURT: I think if you lose you get to come back
3 against them and say we incurred this judgment and we
4 incurred fees to have to defend against that portion of
5 your work that was defective. But I don't think you get
6 to get fees against them if you don't get a judgment
7 against you. It is the nature of litigation.

8 There is no way to separate out -- because the jury
9 may well find that you are the problem, not them, that
10 somehow you were deficient in your duty to have
11 supervised them and to have certified this work, which is
12 your job as a general contractor.

13 Because these people didn't hire the subs
14 individually therefore it is their argument I assume they
15 had no responsibility to any of them, that you hired them
16 and that you had a responsibility to make sure that their
17 work was up to code because you took on the
18 responsibility of having them come in and do the
19 subcontracting work.

20 But I have never known a contractor or other
21 indemnity claim to say that just because I get sued you
22 have to pay my attorney's fees even if I don't get a
23 judgment against me.

24 So you are telling me that if all of y'all stay in
25 this case and it goes to a verdict and you get no

1 judgment against you then you get to come back against
2 these other people for your attorney's fees?

3 MR. HASELDEN: Yes, ma'am.

4 THE COURT: I have never seen a paragraph like that
5 interpreted that way. If you have got a case that tells
6 me that I would be glad to look at it. But I have never
7 seen it interpreted that way.

8 But of more import is you have a contract, unless
9 you have something different than what Mr. Nistad has
10 given me, that has one party's signature on it and
11 doesn't have the other party's signature on it.

12 So I need to know how you get over the hurdle that
13 y'all had a written contract that was consummated and
14 they you performed -- that they performed pursuant to
15 that contract.

16 Because without it the real argument if they were to
17 sue you is that we never really had a written contract
18 but we operated in good faith and therefore they owe us
19 our money under the quantum meruit theory which is the
20 reasonable cost for our services. But you don't have to
21 have somebody say that I was in the room and they agreed
22 and somebody forgot to sign it. That is parole evidence
23 on a contract.

24 And either the contract exists or it doesn't. When
25 it is in writing especially when it deals with land and

1 when it deals with performing service on land that
2 potentially could take -- I don't know how long this
3 contract was supposed to exist.

4 But the other thing that concerns me is -- and this
5 thing is so small I am probably going to have to get a
6 magnifying glass and look at it again or have it enlarged
7 on my printer. But the other thing -- but it would
8 probably get so blurry.

9 But the other thing that concerns me is Mr. Nistad's
10 argument that there were essential terms that were
11 missing from the contract such as the place that it was
12 to be performed and all those other things that he has
13 already enumerated. Because you would think that those
14 things would be specified in a contract.

15 Now what concerns me less is when he says that the
16 specific John Wieland entity was not specified. Because
17 it says at the top John Wieland Homes and Neighborhoods,
18 Inc., and affiliated companies. So that could be read
19 literally.

20 But what concerns me more is the missing terms in
21 the contract and the fact that it is void of a signature
22 by one of your representatives.

23 MR. HASELDEN: Your Honor, it is my understanding
24 that the way the case law reads is that you only need one
25 signature of a company that performance can qualify as a

1 contract.

2 THE COURT: What case is that?

3 MR. MANOS: I do not have it in front of me, Your
4 Honor. But there is ---

5 THE COURT: Yeah, I have done a lot of these cases.
6 I am not aware of one that says that. And I have never
7 had anybody assert that.

8 MR. MANOS: I would be happy to ---

9 THE COURT: Usually they just go on quantum meruit
10 where the contract ---

11 MR. MANOS: If Your Honor ---

12 THE COURT: --- had ---

13 MR. MANOS: If Your Honor will allow me, there is at
14 least a number of cases in many different fields in the
15 employment ---

16 THE COURT: Well ---

17 MR. MANOS: --- context end and commercial
18 litigation where the party to be charged if they sign and
19 there is performance it absolutely is a contract.

20 THE COURT: Yeah, well, I will do some research and
21 we will see. I think they will say there is a contract
22 in quantum meruit. I don't think you can hold them to
23 the terms of the written document.

24 And I may have missed something, because I am not
25 infallible. But my memory once I read something it

1 pretty much sticks with me. It might be vague in the
2 back somewhere back there until I read it, but I haven't
3 read any cases that support that proposition. But we
4 will do some research and see where it lands.

5 MR. MANOS: Thank you.

6 THE COURT: You may continue, Mr. Haselden.

7 You are welcome.

8 MR. HASELDEN: Thank you, Your Honor.

9 As to Mr. Nistad's second point that his client
10 didn't do anything; well, he just paid a bunch of money -
11 - or has just paid a bunch of money to the plaintiffs and
12 the plaintiffs aren't dismissing -- aren't releasing all
13 of their claims as to what Mr. Nistad's client did which
14 was selection of windows and installation of windows.
15 They are still holding us to the fire for that.

16 So to say that we didn't do anything wrong because
17 our expert says that -- or the plaintiffs are saying they
18 didn't (couch in audience) do anything wrong.

19 THE COURT: I'm sorry, say that one more time. I
20 didn't hear you.

21 MR. HASELDEN: The plaintiffs are saying that Mr.
22 Muhler's client -- I mean that Mr. Nistad's client did
23 something wrong.

24 And on top of that, Your Honor ---

25 THE COURT: But how does that form the basis of a

1 cross-claim?

2 MR. HASELDEN: Mr. Vasquez who is being sort of not
3 talked about here was an employee of Mr. -- of Mr.
4 Nistad's client. He was a subcontractor.

5 We are just kind of ignoring him because he is not
6 here. But the bottom line is we are being held for
7 something that Mr. Vazquez did when he was in fact an
8 employee of Mr. Nistad's client.

9 THE COURT: But you didn't file a cross-claim
10 against him?

11 MR. HASELDEN: Yes, we did, Your Honor.

12 THE COURT: You did? But he hasn't appeared; all he
13 did was file an answer and he hasn't appeared during the
14 course of -- is that correct, Mr. Hayes; is that what you
15 told me?

16 MR. HAYES: Your Honor, he hired a lawyer, answered
17 a complaint, then fired the lawyer and never heard from
18 him since then.

19 MR. HASELDEN: And we took his deposition.

20 THE COURT: I am just hard pressed to see how any of
21 this sounds out of anything other than indemnity and how
22 you are prejudiced by -- your indemnity claim is
23 preserved, so I am trying to figure out how you are
24 prejudiced.

25 If you get a judgment against you you still get to

1 come back against them and say we have got this judgment
2 against us because of your faulty work and we want our
3 money back and not only do we want our money back we want
4 our attorney's fees for having to prosecute you.

5 MR. HASELDEN: Your Honor, I think the prejudice is
6 the fact that we have to basically try the case twice.
7 It ---

8 THE COURT: You don't have to charge -- you don't
9 have to play -- you don't have to do it twice because if
10 there is no judgment against you that is the end of it.

11 MR. HASELDEN: But in the event there is, we would
12 have to try it again to go after them for ---

13 THE COURT: In indemnity which is very streamlined.
14 So I don't see a judicial economy argument in what you
15 are saying. To me that is really a waste of time.

16 And the other part of it that you are going to have
17 to struggle with is the jury would have to find that you
18 are not -- you have no fault in this really to proceed
19 against them on indemnity.

20 MR. HASELDEN: Not on a contractual indemnification
21 cause of action, Your Honor.

22 THE COURT: To some extent you are correct. But you
23 still would have to prove they did something wrong for
24 which they have to compensate you for.

25 MR. HASELDEN: That is correct.

1 THE COURT: Yeah. So again I am just trying to
2 figure out how it benefits you keeping these folk in.
3 Because the main -- Mr. Hayes, tell me the heart of the
4 argument against Waverly.

5 MR. HAYES: The heart of the argument ---

6 THE COURT: And I am talking about the John Wieland
7 defendants. In a nutshell.

8 MR. HAYES: John Wieland defendant. The heart of
9 the argument, Your Honor, is they were the developing
10 general contractor and as thus had a duty to make sure
11 that these homes that were built and sold to the general
12 public were built according to the building code and
13 safe -- safe for the inhabitants.

14 Our allegations are that they weren't built to the
15 building code, that John Wieland sold these, they didn't
16 supervise them correctly, and there were ripe with
17 construction defects that violate the building code.
18 John Wieland Homes is who we are targeting.

19 THE COURT: I'm sorry, say your last sentence again.

20 MR. HAYES: John Wieland is who we are focused on I
21 guess, Your Honor, as far as their -- their obligations
22 and duties as the developer and general contractor.

23 THE COURT: And then in contrast your argument is it
24 really isn't our fault, they failed to do what they were
25 supposed to do according to the building code?

1 MR. HAZELDEN: Yes, Your Honor. And until last week
2 that wasn't Mr. Hayes' argument. Last week it was all
3 those people is a problem.

4 THE COURT: He is entitled to change his theory.

5 MR. HASELDEN: That is fine.

6 THE COURT: Nothing precludes him from doing that.
7 Things change. I mean, you know, so everybody shake it
8 out, sort it out, sift it out, settle them out. I mean
9 that is the way this works. So at least in all the
10 construction defect cases that I have tried.

11 But we are still back to the indemnity argument
12 whether it be contractual or equitable ---

13 MR. HASELDEN: Yes, ma'am.

14 THE COURT: That basically you are entitled to go
15 back after these people if there is a judgment against
16 you.

17 So what is the point of having them around if they
18 have settled with the plaintiffs and really the only
19 claim that is left is if anything is wrong and if I get
20 held responsible for this - and there is a way to deal
21 with that on a verdict form as to how much responsibility
22 a jury feels that you have for it - then I am entitled to
23 get repaid for that.

24 To me in some aspect it really muddles all of the
25 issues when there really should be -- they could be done

1 separately.

2 Because it is mute if you don't get a verdict
3 against you. It is possible that a jury could have a
4 defense verdict. In which case why does the jury need to
5 hear about all of this other stuff? Why is it relevant?

6 Because even if they did something wrong it doesn't
7 absolve you of your oversight responsibility. The Hayes
8 could come in -- and I mean -- I when I say Mr. Hayes I
9 mean the plaintiffs. He could come in and say, guess
10 what, all of the subs screwed up royally, but you still
11 fell short of your responsibility to supervise their work
12 and to make sure it was up to code because as a general
13 contractor and developer overall that is your
14 responsibility.

15 MR. HASELDEN: Yes, ma'am. And I fully expect that
16 is what he is going to say.

17 THE COURT: You may continue your argument as
18 regards to the contract and whatever arguments you want
19 to make.

20 MR. HASELDEN: Your Honor, I think it is fairly
21 simple. We have contractual indemnification right now.
22 And Your Honor hasn't asked me this, but you asked me
23 last week whether or not we could maintain a contractual
24 indemnification cause of action in this forum. And I can
25 address that if you would like to. Otherwise I am

1 through ---

2 THE COURT: I don't remember. It was a status
3 conference. I don't remember what I said. I don't know
4 that it is germane at this point. Because I don't know
5 what the context of the conversation was that we were
6 having.

7 MR. HASELDEN: That's fine.

8 THE COURT: Yeah.

9 MR. HASELDEN: That is -- do you have anything else
10 you would add?

11 MR. MANOS: (Shakes head.)

12 THE COURT: All right. Does anybody else, Mr. Cole
13 or Ms. Fragle, have any -- I assume y'all don't have a
14 dog in this fight either?

15 MR. NISTAD: Your Honor, if I could make just a
16 couple of quick comments.

17 THE COURT: Well, I am going to let you respond.

18 MR. NISTAD: Okay.

19 THE COURT: But I need to make sure none of them
20 have anything to tell me.

21 MR. COLE: Do you want us to talk about Mr.
22 Nistad's ---

23 THE COURT: I am going to argue all of your motions
24 separately. I need to know if you have anything to say
25 about this particular motion.

1 MR. COLE: No. No. We will talk when we are on our
2 motion. Thank you.

3 THE COURT: Okay. Mr. Nistad, I will be glad to
4 hear from you.

5 MR. NISTAD: I just wrote down a few things. As far
6 as the timing when this motion came up I don't think that
7 is relevant to whether or not there is a contract or not.

8 THE COURT: You don't have to address that. It
9 doesn't matter. It is an affirmative defense. You can
10 raise it whenever.

11 MR. NISTAD: And you know, the fact that Muhler
12 eventually did work for Waverly after this application
13 that has been out 2002 but they did work three years
14 later that doesn't mean that the two are connected.

15 You know, work is done all the time without a
16 written contract. We have quantum meruit arguments. You
17 have different methods of getting paid -- or getting work
18 done that don't rely on contractual written contracts.

19 So the fact that we did the work isn't determinative
20 that there was a -- that this written contract applies to
21 this work. You know, and what really matters is that
22 there are essential indispensable terms of this contract,
23 this purported contract, that aren't there.

24 And while Wieland has submitted this affidavit of
25 Mr. Parker and he said there is a contract and that we

1 worked under that contract, he had -- that affidavit,
2 nothing Mr. Haselden or Wieland has offered here today
3 fills in the blanks of time, place, price.

4 It doesn't -- this document doesn't say we are going
5 to go work where. It doesn't say the windows are going
6 to sell us -- going to cost "X" amount. It doesn't say
7 they have to be installed in December of 2005. There's
8 all blanks, and there is no information by Wieland here
9 today that fills in those blanks.

10 And so to have this contract, this -- the purported
11 contract, that is basically an application that is filled
12 out in 2002 apply to work that is done in between 2005
13 and 2010 is a stretch. That's -- that's all I have to
14 say.

15 THE COURT: Thank you very much.

16 Would you like to address his argument that even if
17 they didn't sign it that once they underwent to do work
18 that somehow that consummated the contract other than
19 under a quantum meruit theory?

20 MR. NISTAD: I think the time period between this
21 purported contract and the time we did the work is so
22 great is -- and there is nothing that connects this
23 purported contract with the work he actually did three
24 years later and beyond, that it is just what happens is
25 there is a void. There is a disconnect. You can't --

1 this document to the work that was actually performed
2 three years later because South Carolina case law says
3 that time, place, and price are essential elements.
4 THE COURT: Okay. All right. And we will move on
5 to the next motion which is JMC Construction. And who is
6 going to argue that motion?
7 MR. COLE: I will, Your Honor. Andrew Cole.
8 THE COURT: Yes, sir. You may proceed, Mr. Cole.
9 MR. COLE: I filed this morning the memo that we
10 have got in support of the motion. Did that get to ---
11 THE COURT: I have your memo. I have JMC's memo
12 filed January 17th.
13 MR. COLE: Yes, at like nine something a.m.?
14 THE COURT: 9:12 a.m.
15 MR. COLE: That is the only one we have got, Your
16 Honor.
17 THE COURT: On the 17th.
18 MR. COLE: And if it will help I have got a map of
19 the project if you want ---
20 THE COURT: Was that attached to your memo?
21 MR. COLE: It was not. But this is ---
22 THE COURT: That is fine.
23 MR. COLE: In case you need the -- I find it helpful
24 when we are talking about buildings in here. In case we
25 address -- hear some cases that are referenced in our ---

1 THE COURT: Yeah, you don't have to kill any trees
2 in the future. Yeah. We just -- we just recycle it.

3 MR. COLE: They were already printed when we picked
4 them up so might as well bring them here, Your Honor.

5 The arguments that we have for JMC are not that much
6 different from Mr. Nistad's argument that he had for
7 Muhler. Although we do have a couple more elements to
8 show where we believe that this is not a valid written
9 contract between Muhler and JMC that would allow them to
10 assert a contractual indemnity claim.

11 We do not deny that JMC or Jorge Medina in his
12 several different companies that he has worked at that
13 worked for Muhler -- or excuse me, worked for Wieland.
14 He worked for Wieland for a long time. For I think he
15 said in his affidavit 18 years or so that he worked with
16 them for some Wieland type entity. That is not the
17 issue.

18 The issue is not that we went out there and did some
19 work; but the issue is that the Wieland entities cannot
20 enforce a written contract that when you read it has
21 basically just benefits for Wieland and the only benefit
22 if you were going to say that for the trade subcontractor
23 is they agree to pay us. And that gets to sort of the
24 quantum meruit that they agree to pay us for the work
25 that they we're going to do.

1 But we have some additional arguments with us here.
2 First I will point out that back in January of 2015 the
3 HOA actually was amended and that is when we got the
4 cross-claims from Wieland and the class action, the Sills
5 action, was amended in March 2015.

6 And in both of those when they have the indemnity
7 language, when they have their indemnity cross-claims, it
8 just says indemnity; it does not say contractual
9 indemnity.

10 They referenced that there was a contract; but as
11 Your Honor knows, a contract can be something that is
12 oral or a contract can be if you put up this light bulb
13 for me I will pay you ten bucks and I send you an invoice
14 after I do the work. That was a contract under Contracts
15 101 that we all learned in law school that counts.

16 But in that particular example you can't have if you
17 put this light bulb up for me and I pay you a hundred
18 bucks and then by the fact -- by the way when you -- when
19 I get this before I am going to pay you you have to sign
20 this other document that is all of a sudden going to have
21 indemnity provisions and choice of law provisions and
22 things like that. That doesn't work.

23 We have in our case actually, and if you look at
24 Exhibit D to the memorandum that we handed up, there was
25 no prior consideration when this document that we believe

1 was entered.

2 Because the date isn't actually filled in all the
3 way. It is not signed by John Wieland Homes. But in the
4 I think it is May 30th, twenty -- 2006 is probably when
5 this was entered. And by that time there were already 21
6 units or I think it was five or four buildings that had
7 certificates of occupancy.

8 And so as was explained in part in Mr. Medina's
9 affidavit, he had been working for Wieland for a long
10 time and when they asked him to sign this his
11 understanding what they need this because they will give
12 me a new ID number so that they can pay me.

13 He didn't know that all of a sudden I am agreeing to
14 additional terms and additional aspects that are included
15 in this trade contract agreement including the indemnity
16 language. And there is no new consideration when that
17 was executed.

18 I point that out in part because of on our drive to
19 Charleston this morning my partner Chris was able to pull
20 up the affidavits from Mr. Parker this morning and he
21 read through the affidavit, and the affidavit from
22 Wieland in this case says that this was all executed
23 before we did our work.

24 That is patently wrong. It can't be right because
25 there were 21 certificates of occupancy before this thing

1 could have been signed. And so that just doesn't jive.

2 In addition I will just point out that, Your Honor,
3 you made the comment while you were trying to read
4 through that indemnity language that, you know, on paper
5 is really small, hard to read.

6 Mr. Medina grew up in Mexico. Came -- immigrated
7 here and now lives in South Carolina. But English is not
8 his first language.

9 And I will submit to you that if Your Honor had
10 trouble understanding what this meant in reading it, that
11 putting this in front of somebody that English was not
12 his first language he is -- there is something that goes
13 towards the contract itself.

14 And I also point out if you look at the first
15 numbered paragraph where it talks about the documents and
16 the governing law in there, they specifically say that
17 they have a Spanish version of this contract. And Mr.
18 Medina said in his affidavit I never saw a Spanish
19 version of this contract. So assuming that -- yeah, the
20 alleged contract that we have here.

21 So I will just point out the sort of the similar
22 arguments that we had before that we believe that this is
23 not a valid written contract between Wieland and JMC
24 because of similar deficiencies that were brought up by
25 Mr. Nistad.

1 There is no listing of the trade on this. Mr.
2 Medina is alleged on this job to have installed siding
3 and trim and flashing and columns and roofs, and none of
4 those are listed here. And those are all very different
5 types and claims and causes of actions out there.

6 The neighborhood is not listed. And so we don't
7 know if this goes to Waverly. There is no price. There
8 is no timing of it.

9 Again, we said that the timing that this appears to
10 have been entered is suspect because 20 percent of the
11 job has already been completed by the time they have
12 this.

13 So, you know, we don't think that it is valid. And
14 I just point out that there is a difference between
15 having an agreement to do work and the parties have
16 basically an oral agreement to do work that then is
17 conferred when invoices and purchase orders and things
18 like that are submitted which is a way that a lot of
19 construction jobs are done.

20 I have been involved in cases before where there was
21 absolutely no written contract whatsoever and there was a
22 two million dollar repair and a two million dollar job.

23 But in this there is a difference between that and a
24 difference between trying to enforce a document and
25 enforcing contract terms that don't apply to this

1 particular job.

2 That brings us to the Stoneledge case or the two
3 Stoneledge cases that are interesting. And I think Your
4 Honor doesn't need the discussion about whether or not if
5 these things look like a rose and smell like a rose then
6 it must be -- all equitable claims we have already kind
7 of -- we have already kind of addressed that.

8 But the Stoneledge case the first one that was
9 entered that were built as first floors as the defendant
10 in that one, one of the questions was was this a valid
11 written contract between the general contractor and the
12 subcontractor in that case. And in that one the court
13 pointed out there was no proof in the record that this
14 was the contract that actually applied.

15 I take that if we look at it at the evidentiary
16 standpoint that there is no, you know, best evidence
17 rule.

18 It isn't satisfied in that because they can't prove
19 that, yes, that this piece of paper applied to this
20 particular contract. And that is a big problem that
21 Wieland has in this case because of all the deficiencies
22 we have talked about.

23 I think -- I noticed this when I was reading through
24 when Mr. Nistad was talking. One of your questions about
25 whether or not it matters if it is signed, I think if you

1 look at the face of this document that if you look in the
2 pricing and payment, Paragraph Number 4, Wieland says we
3 are not going to pay you unless you sign -- unless both
4 parties sign the purchase orders and then something they
5 call variance purchase order which is just another type
6 of purchase order.

7 So if we are going to say that whether or not
8 signatures matter, if we have got a purchase order that
9 is going to be entered after this document is executed,
10 they say, and they say we are not going to pay you unless
11 everybody signs it, well, you can't have the document
12 that sets that up have a less threshold than you have for
13 the purchase orders.

14 So I will submit to you that by their own document
15 if you look at it on the face of it since they didn't
16 sign it, like in our case we have got a signature on
17 behalf of Jorge Medina but nothing from Wieland, Wieland
18 didn't even take the time to sign this particular
19 document to say yes it makes a difference that we've got
20 a line there for us to sign it to say that yes we agree
21 that this is the terms. So that is just another part to
22 say that this is not a valid document.

23 And then if this is considered to be a valid
24 contract - which, again, we don't believe it is - then we
25 believe that this document on its face is unconscionable

1 and unenforceable based off of again the Stoneledge case.

2 We have got the DR Horton case that came down
3 recently where they said that DR Horton was not allowed
4 to enforce an arbitration clause.

5 And the way I read those recent cases essentially is
6 that if you have such a one-sided document that just
7 starts as an adhesion contract where it is a take it or
8 leave it and the affidavit from Jorge says they put this
9 in front of me and they said sign it and on the face of
10 the document it says if you don't sign this document we
11 have here then we are not going to pay you, well that is
12 not a negotiated contract. That is a take it or leave
13 it. That is an adhesion contract.

14 So once you have an adhesion contract you look and
15 see is this so overreaching, is this so overbearing.

16 We go into longer analysis via the memo we have got.
17 But basically the terms in this document all favor
18 Wieland.

19 Wieland gets to claim that there is indemnity.
20 Wieland gets to choose the choice of law. Wieland gets
21 to say whether or not they have attorney's fees or costs
22 or those types of damages in this. There is nothing in
23 there for the benefit of the subcontractor, that Your
24 Honor already recognized, is somebody that is being
25 supervised and being essentially controlled by Wieland

1 during the construction process..

2 We submit that we think that we can win, eventually
3 that this is not a contractual indemnity clause that
4 flies because it is not a good contract. That means
5 everything then is just an indemnity claim. Stoneledge
6 says that.

7 We believe that we can win in the future on that,
8 but we recognize that that may not be ripe at this point.
9 That is our basic argument, Your Honor.

10 THE COURT: And what is your argument that you said
11 in the alternative you are asking that it be bifurcated?
12 You need to address that as well.

13 MR. COLE: That is if -- that is to add to -- I
14 think Mr. Fragale filed a motion for bifurcation that
15 if ---

16 THE COURT: Yours did too. It says or in the
17 alternative for a motion ---

18 MR. COLE: Okay.

19 THE COURT: --- to bifurcate.

20 MR. COLE: Yes, ma'am. And that is if we are to
21 prevail -- or we have this contract we don't need to be
22 there at trial if the only claim left is an equitable
23 indemnity claim.

24 And so there is a recognition that we don't need to
25 be there for trial because if it is just an equitable

1 claim we can deal with that later on in subsequent
2 proceedings.

3 I am just trying to make sure the kitchen sink at
4 ten o'clock last night everything was in there.

5 THE COURT: Okay. Mr. Haselden, are going to
6 respond?

7 MR. MANOS: May I, Your Honor?

8 THE COURT: Mr. Manos, you may proceed.

9 MR. MANOS: Thank you, Your Honor.

10 THE COURT: You are welcome.

11 MR. MANOS: Just a couple of things, not to repeat
12 all of the things that Mr. Haselden said. As I think
13 Your Honor full well knows, in the construction industry
14 master agreements like this are signed by subcontractors
15 with general contractors throughout this country.

16 And the reason they do it, which is of no surprise
17 to you, is because general contractors use the same subs
18 on numerous projects and rather than resigning contract
19 after contract after contract after contract they signed
20 a master agreement, trade contract or application and
21 agreement form, and they include all of the terms and
22 then they basically ratified everything in there by
23 purchase orders and invoices and payment through
24 performance. Now Mr. Cole ---

25 THE COURT: You are saying they have one master

1 contract that might -- that you sign in 2002 to do
2 projects for ten years and you just deal with that
3 through purchase orders?

4 MR. MANOS: Happens every day, Your Honor, in the
5 construction industry all over the state and all over the
6 country and all of the world.

7 THE COURT: But is that a good way to do business?

8 MR. MANOS: It may not be a great way to do
9 business, Your Honor; but we see it in all of these
10 cases. All of the big builders from Centex, Ryland,
11 Wieland, and everybody in between, this is how they do
12 it. And I think Mr. Cole, Mr. Nistad, Mr. (sic) Fragale,
13 Mr. Hayes would not dispute that that is what happens in
14 these cases.

15 Mr. Cole brought up that this contract somehow is of
16 adhesion and that Mr. Medina -- with is actually it is
17 not Mr. Medina. We contracted with a legal corporate
18 entity, an LLC. He didn't have to sign this agreement,
19 Your Honor. He signed it, because as you know, he wanted
20 the work and he wanted to get paid. He got the work. He
21 got paid.

22 This is what all of these contracts look like, Your
23 Honor. I will pass up to Your Honor also there are
24 multiple cases under South Carolina law and various
25 contacts where the party to be charged if they sign, it

1 is a valid contract.

2 And I will pass that up to Your Honor before -- in
3 the next 30 minutes hopefully. Whenever you allow us to
4 take a break.

5 I think South Carolina law is very clear on it that
6 the fact that Wieland's signature is not on here has no
7 effect as a matter of law. And I think that is from
8 South Carolina Supreme Court cases and many other.

9 The other thing I wanted to ---

10 THE COURT: But is it appropriate for me to litigate
11 that?

12 MR. MANOS: I'm sorry, Your Honor?

13 THE COURT: See, it just gets so complicated.
14 Why -- why not just -- because if that is the case then a
15 jury is going to have to decide whether y'all had a
16 contract or not and then what theory you get to proceed
17 under.

18 It just seems to me it makes something that should
19 be cut and dry very complex when it doesn't needs to be.
20 You are asking a lot of a jury.

21 MR. MANOS: I understand that, Your Honor. If I
22 may, you have obviously been on the bench hearing cases
23 after cases for many years now. Much more experience in
24 that than I do in trying them.

25 But one thing that I would suggest to you is by

1 having two trials if we are going to argue these things,
2 all of the same witnesses and experts are going to have
3 to be called because if there is a judgment against us
4 and we go after Muhler and we go after Sanchez and we go
5 after JMC and says -- and say that we supervised y'all's
6 work properly, y'all did your work wrong and we are
7 entitled to our attorney's fees and we are entitled to
8 these judgments, they are going to have to cross-examine
9 those experts and show no that didn't occur.

10 That is what needs to happen in this trial so we
11 don't have the risk of inconsistent verdicts, we don't
12 basically have to try these two cases twice.

13 THE COURT: How is it a risk of inconsistent
14 verdicts?

15 MR. MANOS: Because you could have one jury say that
16 Wieland and who it is charged for, although they are
17 charged for everything that their subs did, there could
18 be a judgment against us.

19 THE COURT: Yeah, and how ---

20 MR. MANOS: And then have another ---

21 THE COURT: How is that inconsistent; because then
22 the jury would then say to the extent that these other
23 people are responsible this is what they owe you for
24 their portion of what they didn't do correctly?

25 MR. MANOS: But I don't -- and I could be wrong, but

1 I don't think any of the lawyers in this room are going
2 to agree that they don't have an opportunity to come up
3 in another forum and say we didn't do anything wrong.
4 They won't have a chance to defend themselves.

5 THE COURT: Yeah they would. You lost me. How
6 would they lose their right to defend themselves?

7 MR. MANOS: Well, and that is what I am saying. If
8 they are going to have a chance to defend themselves in
9 another forum you are going to have to have all of
10 experts, all the fact witnesses ---

11 THE COURT: Yeah, but that is a lot easier for a
12 jury. See, just because we do this all the time we can
13 sort through all of this. It is not the same for
14 laypeople. And it becomes incredibly complex and then
15 you really don't know what they meant and you -- and then
16 we end up reinventing the wheel.

17 So I am trying to figure out how you are at a
18 deficit in doing it the way really the law anticipates
19 which is if you get a verdict against you then you go
20 against the folk in indemnity that you say are
21 responsible for this portion of what you have been held
22 responsible and then you get reimbursed so to speak if in
23 fact the jury believes they did something wrong.

24 MR. MANOS: Can I preface a comment to Your Honor,
25 please?

1 THE COURT: Sure.

2 MR. MANOS: And I get a little excited sometimes, so
3 don't -- please don't take it this way.

4 THE COURT: Well, you might want to take a deep
5 breath before you say what you are going to say.

6 MR. MANOS: No, no ---

7 THE COURT: Because I find that when lawyers do that
8 they know what is about to roll off of their tongue ---

9 MR. MANOS: No, no ---

10 THE COURT: --- is not appropriate.

11 MR. MANOS: I am not starting some ---

12 THE COURT: So take a deep -- yeah, so take a deep
13 breath.

14 MR. MANOS: I am not starting -- yes, ma'am. I am
15 not starting something with respectfully and then saying
16 something disrespectful.

17 THE COURT: Yeah, but lately that -- you know, for
18 the last ten years when lawyers say respectfully, I know
19 what is about to come out of their mouth is not
20 respectful.

21 MR. MANOS: Right.

22 THE COURT: So I -- just take a breath.

23 MR. MANOS: Yes, Your Honor.

24 THE COURT: Yeah, so y'all know this case a whole
25 lot better than I do.

1 MR. MANOS: Right.

2 THE COURT: But I have a very practical outlook on
3 it, because I do this every day and I deal with juries
4 every day and I get to see another part of it that you
5 don't get to see. I get to hear what they tell me on the
6 other side of this door.

7 MR. MANOS: Yes, Your Honor.

8 THE COURT: And I get to read their faces while the
9 case is going on. And because we have a point of
10 reference and because we talk in a certain language and
11 we understand it and digest it, we think they do. But
12 they don't.

13 Even though in Charleston we are very fortunate
14 because we have a very educated jury pool.
15 Disproportionately so in other places that I have
16 traveled in this state.

17 Disproportionately we have people with college
18 degrees and advanced degrees, who own businesses and
19 other things who are in a profession versus other parts
20 of the state.

21 Which they are catching up. But our jury pool is
22 really very different. We are very fortunate because we
23 have folk that generally can sort of catch on a lot
24 quicker.

25 But at the same time they still are at a deficit

1 because they have never heard any of this. All of this
2 stuff is new to them.

3 So go ahead. I am listening.

4 MR. MANOS: What I was just going to say, Your
5 Honor -- thank you.

6 THE COURT: You are welcome.

7 MR. MANOS: Is practically, when you talk about
8 things being practical, over my 20 years of experience of
9 practicing if we are now at a point in construction law
10 that when contractual indemnity claims are always going
11 to be heard after the underlying case and ---

12 THE COURT: It is not ripe. You don't have a claim
13 until there is a judgment against you.

14 MR. MANOS: And I understand. Our position is that
15 we think the law says right when we start incurring
16 attorney's fees we do have a claim. I under- -- that
17 is ---

18 THE COURT: You find me a case that says that. I
19 will be glad to look at. But you don't have a claim
20 until you get a judgment against you. Contractually.

21 You don't have a claim until somebody says you did
22 something wrong. Then that language kicks in that says
23 the fact that I have been sued and I have gotten a
24 judgment against me that says I fell short, to that
25 extent that they say we fell short, no, you fell short

1 and you indemnified me to pay me back for whatever you
2 didn't do that fell below the standard.

3 Whether it be the building code, whether it be, you
4 know, something else. I -- you know, I mean there are
5 other ways people can be deficient in fixing -- in doing
6 their work other than not following the building code.
7 Although I guess it would be hard pressed to figure out
8 what else that could be. But just as a catchall.

9 But I guess I am just sort of -- I just think it is
10 more complex than it needs to be. But, again, you know,
11 I have an objective view of it. You may continue.

12 MR. MANOS: Okay. The only thing I wanted to add,
13 Your Honor, is that all of these cases in my limited 20
14 years of experience have always been claims against the
15 GC and all of the subs and suppliers and manufacturers;
16 and moving forward under this theory in my mind we should
17 be going forward where plaintiffs only sue the GC and
18 then if they get a judgment then the GC goes against the
19 subs.

20 And that is just -- that hasn't been our practice.
21 And when I -- when you hear me say that that is why I
22 think there is judicial efficiency involved that's --
23 that is where I am coming from. That is my perspective.
24 That is just what I wanted to point out, Your Honor.

25 THE COURT: Okay. Anything further, Mr. Cole?

1 MR. COLE: I will just mention a couple of things,
2 Your Honor. Mr. Manos mentioned that, you know, there
3 are these agreements that are out there where there are
4 large -- you know, master agreements.

5 I don't disagree that I have seen those out there.
6 But just because you have got a master agreement and
7 everybody doesn't, doesn't mean that that is the right
8 way to do it or that somebody calls on it.

9 Everybody used to put asbestos in buildings until
10 they found out it wasn't good for you. So that doesn't
11 mean that it is something that should be going on.

12 Also I will point out that at the -- really one of
13 the only sections in this document that we have been
14 talking about that has all caps was at the top where we
15 know that at John Wieland Homes and Neighborhoods, Inc.,
16 affiliated companies; and that is a trade contractor
17 application. It doesn't say master agreement. It
18 doesn't say master contract. It doesn't say anything
19 like to give a clue that this is supposed to be bound by
20 you in perpetuity.

21 If it was that much of a concern for John Wieland
22 Homes or whichever affiliate was on this then they still
23 need to get the specific portions of a contract that
24 Contracts 101 requires. You have got to know what it is
25 about, when you do it, who is supposed to be involved,

1 where you do it. You need to know what the terms are for
2 the pricing and that type of thing.

3 And on this document we don't have the trade. We
4 don't have the neighborhood. If it was that important
5 then John Wieland could have easily had a document that
6 they signed that says before you start this work here is
7 the supplement to the master deed. Which I have seen an
8 awful lot as well. We don't have that in this case. We
9 don't have that.

10 Also I would submit to you that it is the
11 plaintiff's burden to prove that they are going to say
12 that if the person against whom they are trying to get
13 this contract enforced, i.e., Jorge Medina, JMC
14 Construction, I think they need to come in here and be
15 able to prove that that is Jorge's signature.

16 We don't have during his deposition -- they didn't
17 show this document to Jorge and say is this your
18 signature, did you put this up here. We don't have a
19 request to admit that said that is this your signature,
20 do you agree that you wrote on this.

21 But we don't have any affidavit from their witness
22 today to say I know Jorge Medina, he is a good friend of
23 mine and this is his signature.

24 So I think the plaintiffs have failed on that to get
25 to the case law that says that you can bind somebody.

1 Again, we don't think you get there because you
2 don't have the essential parts of the contract. This is
3 just as Mr. Medina believed, an application.

4 That is still an adhesion contract that fails. That
5 if you get to that part it is still an adhesion contract
6 that we think has failed, unenforceable, and should not
7 be enforced in this case for the various reasons we
8 discussed.

9 THE COURT: Okay. That then takes us to Sanchez.
10 Ms. Fragale.

11 MS. FRAGALE: Yes, Your Honor.

12 THE COURT: You may proceed when you are ready.

13 MS. FRAGALE: Essentially our arguments are the same
14 as Mr. Nistad and Mr. Cole in regards to the contract not
15 being valid.

16 The contract -- or the alleged contract trade
17 contractor application agreement form in the case of
18 Sanchez is not dated. It does not state his scope of
19 work. It does not state the neighborhood. It doesn't
20 state the price of the work. And those are essential
21 material terms to make the contract valid.

22 Mr. Parker in his affidavit states that the
23 execution of the agreement predated any work. But no
24 evidence has been presented that this contract actually
25 predated since the contract has no date on it.

1 And if you look at Paragraph 6 of the -- or the
2 alleged contract regarding the release and
3 indemnification this indemnification clause violates
4 South Carolina Code Section 32-2-10 because it is asking
5 Sanchez or any of the subcontractors to indemnify Wieland
6 regardless of whether or not such claims, damages,
7 losses, or expenses are caused in part by a party
8 indemnified or released hereunder.

9 And so since that violates the statute and against
10 public policy we would argue that this -- that is another
11 example of why this agreement is not enforceable.

12 In terms of the last of the -- where neighborhood
13 where it is filled out blank on the first page of the
14 alleged contract it does not say that this agreement
15 applies to the Waverly project.

16 This issue was addressed by the Court of Appeals in
17 the Stoneledge cases. And in that case the court found
18 that the purported contract did not apply between the
19 parties in the lawsuit since the evidence demonstrated
20 that the contract was signed after the underlying work
21 had been completed.

22 The court also pointed out that there was no
23 evidence that the contract in the case applied to the
24 particular property. And they found that that contract
25 was not applicable.

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2 the pricing and that type of thing.

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19 parties in the lawsuit since the evidence demonstrated
20 that the contract was signed after the underlying work
21 had been completed.

22 The court also pointed out that there was no
23 evidence that the contract in the case applied to the
24 particular property. And they found that that contract
25 was not applicable.

1 Again, it is up to Wieland must prove and
2 demonstrate that this contract applied to the Waverly
3 project. Again, the central terms of the contract
4 regarding time, place, and price are lacking in this
5 alleged agreement with Sanchez; and we would argue that
6 it is not valid and that contractual indemnity as far as
7 in Wieland's claims fails.

8 THE COURT: Okay. Who would like to respond?

9 MR. MANOS: Your Honor, just a few points that I
10 would like to respond to Ms. Fragale. She pointed out
11 that in her argument that the indemnification is against
12 the statute in South Carolina.

13 I think what that statute says is that a party can't
14 be indemnity; it is fully and whole negligent, not in
15 part, which the contract says. I think South Carolina
16 law is pretty clear on that statute as to that.

17 As to the Stoneledge case what was important about
18 that ruling is that the contract in that case was
19 actually signed after the work was done.

20 As to the point and brought up by Ms. Fragale and
21 also brought out by other counsel, we continue to talk
22 about there not being a price.

23 And again, Your Honor, I would just reiterate the
24 reason there is not a price is because in these master
25 agreements you have subcontractors that are working for

1 GC's on multiple projects and they get called out to do
2 various things and if you put a price in the contract
3 every time you would be changing the contract every week,
4 every two weeks..

5 You don't know in these twenty-two building condo
6 projects whether Sanchez Painting is going to do six
7 buildings out there, eighteen buildings or all
8 twenty-two.

9 And as your -- as I will tell Your Honor, there were
10 multiple painters on this job. So all of those painters
11 signed master trade agreements. And depending on their
12 schedules, their availability, and numerous other
13 factors, they get called to come out there.

14 And what I would direct Your Honor to is in this
15 trade contract or application an agreement form which is
16 in the heading it specifically notes that Wieland and
17 trade contractor -- I need somebody's glasses. Trying to
18 read that right there.

19 MR. HASELDEN: Desire.

20 MR. MANOS: Keep going. Read that.

21 MR. HASELDEN: Wieland and trade contractor desire
22 to set forth the terms and conditions governing any and
23 all work performed by trade contractor ---

24 MR. MANOS: For Wieland.

25 MR. HASELDEN: --- for Wieland.

1 MS. MANOS: Just was having a hard time reading it,
2 Your Honor. That is the whole point of these master
3 trade agreements.

4 THE COURT: Yeah, but it is problematic.

5 MR. MANOS: I hear you, Your Honor; but I ---

6 THE COURT: It is problematic. And just because you
7 do -- that is like when my daddy used to say if your
8 friend is going to jump off of the Cooper River Bridge
9 are you going to follow them. I mean just because you --
10 they have been doing it doesn't make it the right way to
11 do it.

12 You know, we have contractor rules for a reason.
13 And I understand that it might be easier for them to do
14 it that. And it may never be a problem. It may never
15 come up. But where somebody asserts that there has been
16 no contract I don't think you can say, well, you know,
17 this is the way we have always been doing it.

18 MR. MANOS: Okay. I guess I would say two things.
19 There's two sophisticated parties signing these contracts
20 here doing all of this work on multiple projects for each
21 other. That is one.

22 And the second is we are on -- we are at summary
23 judgment dealing with a scintilla standard for ---

24 THE COURT: Yeah, I still -- really, to tell you the
25 truth, it may be that it is a jury issue whether there is

1 a contract. I'm just not of -- I am not persuaded at
2 this point that the jury needs to hear it all at one
3 time.

4 MR. MANOS: I understand, Your Honor.

5 THE COURT: I think -- I really am becoming more and
6 more -- but I need your -- you know, I just got all of
7 this stuff this morning so I really haven't had a chance
8 to read it and digest like I would want to. And I am
9 going to take the time to read it and to do my own
10 research and see where it goes.

11 But generally when a claim arises in indemnity you
12 don't deal with it until after there is a verdict against
13 the primary party and then you generally proceed in
14 indemnity. And usually the parties agree to that.

15 I am becoming persuaded the more I do this job that
16 we should make cases more and more clear to juries so
17 that we are clear as to exactly what it is they are
18 deciding and they are clear as to what they are deciding.

19 I don't see a downside to letting the primary case
20 go forward and being decided. I don't see any -- I
21 really don't see any chance of inconsistency in a
22 verdict.

23 And whether it be that you proceed against these
24 parties in your counterclaim found in a contract,
25 negligence, or indemnity, I just don't see a downside

1 potentially to bifurcating it. But I have got to study
2 it a little bit.

3 And I haven't -- the other thing I have learned
4 after now I think now starting my 21st year is I have the
5 luxury to think about things. And I never used to think
6 I had that luxury. But I am now becoming persuaded that
7 I do. And that some -- some things require more thought
8 than others and that you just shouldn't, you know, rush.

9 And so I need some time to read what you have --
10 what everybody has given to me and to look at the cases
11 and also to look at -- because what I am hearing in all
12 of the arguments, some of the things I think are still
13 factually issues. Unless -- unless of case -- unless of
14 course you all agree that the only claim that would
15 survive would be equitable indemnity.

16 And the other thing -- so it may well be a jury
17 issue or issue for a fact finder as to whether in fact a
18 contract existed, whether these were adhesion contracts,
19 you know, whether there was valid offer and
20 consideration, etc.; whether, you know, this practice of
21 doing what you all refer as master contracts and then you
22 deal with invoices to pay individuals, you know, whether
23 that would constitute some form of a valid contract.

24 I understand the ease of doing it that way. But I
25 don't know that that is a particularly good way to do

1 business. Because you should always look forward to
2 litigation when you are in business, as unfortunate as
3 that is. Because people are going to fall out and they
4 are just not going to agree all the time.

5 But what I hear is the parties saying that even if
6 these things exist and they are not dismissed that they
7 want it bifurcated because if you all don't, a verdict
8 against you it is moot and there is no point in them
9 going to all of this work if they don't have to. I am
10 not sure I am not persuaded of that as well.

11 But that deals with all the motion for summary
12 judgment that have been filed, correct; which was
13 Wieland, Sanchez, and JM -- JM -- I am leaving out an
14 initial.

15 MR. HASELDEN: JMC, Your Honor?

16 THE COURT: JMC.

17 Yes, sir?

18 MR. HASELDEN: Technically, Your Honor, Wieland
19 still has pending motions for summary judgment on some
20 causes of action against Waverly that we think ---

21 THE COURT: I am not ---

22 MR. HASELDEN: --- would clear up ---

23 THE COURT: Wait a minute. Say that one more time.

24 MR. HASELDEN: We still have pending motions against
25 Waverly ---

1 THE COURT: Against the plaintiff.

2 MR. HASELDEN: --- for summary judgment as to some
3 of the causes of action. But we think if Your Honor
4 would take the time to listen to them it might streamline
5 things.

6 THE COURT: Yeah, I am not dealing with that just
7 yet. It is almost -- it is close to one o'clock. It is
8 two minutes or a minute till.

9 So I wanted to deal with this in layers. I am going
10 to deal with the subs first and then I am going to be
11 move on and deal with the rest of it.

12 But I told you on the phone conference that once we
13 start dealing with summary judgments with primary parties
14 I am going to deal with that at directed verdict because
15 I feel it is better to deal with it with a developed
16 record. Because then an appellate court knows exactly
17 what was proven and wasn't proven by a preponderance of
18 the evidence.

19 I think it is premature -- it is unlikely probably
20 that you are going to persuade me that I should be the
21 finder of facts and sift through it. Unless y'all
22 completely agree on the legal theory applicable to it and
23 you completely agree that there is distinction in the
24 facts. Otherwise I am going to have to -- I am probably
25 inclined to hear -- hear it and dispose of it at the

1 directed verdict stage of the case.

2 But I do not know -- when did you file those
3 motions? Because I don't have -- as you can tell -- one,
4 two, three, four five -- there are six volumes to this
5 file. And we have been going through it, and after a
6 while it all starts looking the same. So I need to know
7 on what dates you filed your motions for summary
8 judgment.

9 MR. HASELDEN: They were filed in December. And I
10 don't know the exact date, but we will find ---

11 THE COURT: Do you know what date it was so that we
12 can --

13 (WHEREUPON, the court confers with law clerk.)

14 MR. HASELDEN: Your Honor, it appears we filed one
15 and two Unfair Trade Claims Practices Act on January 3rd.
16 And then we filed another one the next day as to the
17 remaining causes of action. I have ---

18 THE COURT: So you filed a motion for motion for
19 summary judgment on the 3rd of January?

20 MR. HASELDEN: Yes, ma'am.

21 THE COURT: And then you filed another one on what
22 date?

23 MR. HASELDEN: I think the next day. And that was
24 to the remaining -- there were several causes of action
25 we didn't think could be maintained based on the

1 evidence ---

2 THE COURT: What causes of action are you claiming
3 could not be maintained other than the Unfair Trade
4 Practices?

5 MR. HASELDEN: I am trying to lay my hands on that
6 motion right now, Your Honor. They are -- in the Waverly
7 action six, which is breach of fiduciary duty. And then
8 the Sills action the second -- would it be better if I
9 just hand this up, Your Honor?

10 THE COURT: Just if you could just hit the
11 highlights for me.

12 MR. HASELDEN: Okay.

13 THE COURT: I have my clerk looking it up right now.

14 MR. HASELDEN: That's fine. And the Sills --

15 THE COURT: There is an Unfair Trade Practices,
16 breach of fiduciary -- I just need to know the cause of
17 action you filed for summary judgment on.

18 MR. HASELDEN: In Waverly it is Unfair Trade and
19 breach of fiduciary duty. And Sills it is Unfair
20 Trade ---

21 THE COURT: You said Sills. What do you mean?

22 MR. HASLEDEN: There is a class-action component of
23 this. Waverly is one and then Sills class-action ---

24 THE COURT: Sills individually. Okay.

25 MR. HASELDEN: Yes.

1 THE COURT: And then Sills ---

2 MR. HASELDEN: As to the Sills complaint we filed a
3 motion for summary judgment as to the Unfair Trade
4 Practices Act. We also filed one as to negligent
5 misrepresentation, breach of warranty of habitability,
6 breach -- some cause of action called individual
7 liability. I have no idea what that is. Breach of
8 fiduciary duty there is actually two of them.

9 THE COURT: Two causes of action for breach of
10 fiduciary duty?

11 MR. HASELDEN: Yep. Yes, ma'am. The 9th and the
12 10th.

13 THE COURT: Okay.

14 MR. HASELDEN: The 11th is breach of contracts. The
15 12th is Residential Property Condition Disclosure Act.
16 The 13th is strict liability. And the 14th is alter ego
17 piercing the corporate veil.

18 THE COURT: Well, now some of that has been
19 bifurcated; has it not? Y'all did an order of
20 bifurcation that dealt with -- it is a very convoluted
21 order. I tell you the truth. And I attribute it being
22 signed to the fact that we sign about a thousand pieces
23 of paper one day and just don't ---

24 MR. HASELDEN: Your Honor ---

25 THE COURT: Because I -- that is so convoluted I

1 can't figure out what it was y'all were trying to achieve
2 by doing that.

3 MR. HASELDEN: Your Honor?

4 THE COURT: Uh-huh.

5 MR. HASELDEN: Based on their expert John Freeman's
6 testimony and the exhibit list we were presented with
7 yesterday, I am not convinced that they are not going to
8 try and trounce on the bifurcation order.

9 THE COURT: Well, I am just trying to figure out
10 what exactly it was that y'all were bifurcating. Because
11 I am not clear from that order. And I am not really
12 clear what y'all were trying to accomplish from that
13 order. It is very hard to understand.

14 Yeah, piercing the corporate veil, alter ego,
15 instrumentality, amalgamation, fraudulent conveyance,
16 successor liability, de facto merger, aiding and
17 abetting, breaches of duty.

18 So I don't know that that would need to -- a summary
19 judgment would need to be heard on that, right, because
20 it is bifurcated?

21 MR. HASELDEN: That is our ---

22 THE COURT: Do I understand this correctly?

23 MR. HASELDEN: That is our position, Your Honor.

24 MR. HAYES: Your Honor?

25 THE COURT: Yes, sir.

1 MR. HAYES: John Hayes on behalf of the plaintiff.
2 That was dealing with defendant Wheelock, and we agreed
3 that that is to be bifurcated.

4 Defendant Wheelock's boss, John Wieland, or a John
5 Wieland back in like 2012, for I think it was 120
6 million. I might be off by a million or two here. And
7 if there is a judgment in this case then we will argue
8 that Wheelock has successful liability, amalgamation,
9 everything along those lines.

10 As far as breach of fiduciary duty we still do have
11 a claim against John Wieland and the fact of ---

12 THE COURT: So you are saying this bifurcation order
13 only deals with Wheelock?

14 MR. HAYES: That is right, Your Honor. And ---
15 (WHEREUPON, court confers with law clerk.)

16 THE COURT: Okay. Now let me ask what may seem like
17 a really basic question. Are you all going to concede
18 that any of these things should be subject to dismissal?

19 Because I am trying to figure out what special duty
20 you are going to be able to establish on a breach of
21 fiduciary duty outside of the contract.

22 MR. HAYES: Yes, Your Honor; the developers - and we
23 want to proffer testimony at some point - have a -- to
24 show developer had a fiduciary duty to the purchasers of
25 these homes.

1 And twofold, not only its just sellers to purchasers
2 but on a second way because during the sale of these
3 homes the Wieland entity were in charge of the HOA. So
4 they were in complete control of HOA until they handed it
5 over back in 2000 time, 2009.

6 So while they are running and in charge of the HOA
7 and when they hand the HOA over to these homeowners
8 during this whole course they had a fiduciary duty to the
9 homeowners.

10 THE COURT: Yeah, but what does the HOA do?

11 MR. HAYES: The HOA does a couple of things. They
12 make sure that the homes are repaired ---

13 THE COURT: Yeah.

14 MR. HAYES: --- as they should be. The developer
15 has a duty when they hand it over to the homeowners to
16 make sure that there is enough money in reserves to make
17 either -- that either that the property is in good
18 condition or there is enough money in reserves in there
19 to fix the problems. Which John Wieland did neither of
20 those.

21 THE COURT: So you are only claiming a breach of
22 fiduciary duty as it involves the HOA's duties?

23 MR. HAYES: The HOA as the -- that John Wieland had
24 to -- during control of the HOA but also as to the
25 builder and seller of these homes.

1 THE COURT: But isn't there an HOA agreement that
2 specifies what the HOA's responsibility is to the
3 homeowners?

4 MR. HAYES: Yes.

5 THE COURT: So how do you have then a separate
6 fiduciary duty? You have to prove something apart from a
7 contract. A contract cannot be used as a basis to
8 establish breach of fiduciary duty. You have to ---

9 MR. HAYES: Right.

10 THE COURT: It is a very high burden to prove a
11 breach of fiduciary duty.

12 MR. HAYES: Right, Your Honor.

13 THE COURT: You have to establish apart from the
14 contract they had some special duty ---

15 MR. HAYES: Right, Your Honor.

16 THE COURT: --- to these individuals. And I am
17 just -- after reading your pleadings -- which of course
18 that is limited. I am just trying to figure out how you
19 are going to get over that hurdle.

20 MR. HAYES: It is two-fold. As I said about the
21 HOA. We talked about that. But Professor Freeman will
22 testify as to a number -- a number of things. One is
23 that there was a duty that the John Wieland owned -- owed
24 to these homeowners by developing and selling these
25 property to the public at large.

1 THE COURT: That all sounds in contract though,
2 doesn't it?

3 MR. HAYES: Your Honor, I don't -- well ---

4 THE COURT: And negligence.

5 MR. HAYES: It is negligence. And it is based on a
6 contract. If Your Honor would like I can give some
7 additional information in regards to more focused about
8 what Mr. Freeman is going to testify to in regards to
9 that. If the court would like.

10 THE COURT: I am just saying you might want to
11 really have a heart to heart with yourself about what is
12 really valid and what you need to spend your time going
13 forward on and what you don't need to waste time on.

14 MR. HAYES: We will do that, Your Honor.

15 THE COURT: Yeah. All right. We are going to
16 adjourn until about -- I need to eat. It is 1:10, and
17 I -- you know, I am getting old.

18 MR. MANOS: Your Honor, may I hand up ---

19 THE COURT: I need to eat lunch.

20 Yes, sir?

21 MR. MANOS: Hand up the case that we were referring
22 to about ---

23 THE COURT: Which one is that?

24 MR. MANOS: Not requiring two signatures ---

25 THE COURT: Sure if you have got it. Be glad to

1 look it.

2 MR. MANOS: This is Wilson vs. Willis.

3 (WHEREUPON, document provided to the court.)

4 THE COURT: Thank you, sir. All right. Is there
5 anything else before we break for lunch from the
6 plaintiffs or the defendants?

7 MR. COLE: I'm sorry, Your Honor, I couldn't hear.

8 THE COURT: I said is there --- it is hard. This
9 room is like a huge -- like I don't know how to describe
10 it. It is just one of those things, uh-huh. So we have
11 to all talk loud.

12 I said is there anything before we adjourn for lunch
13 from the plaintiffs or the defendants.

14 MR. COLE: Since you said a jury I just want to know
15 what time do you want us back, Your Honor.

16 THE COURT: I need an hour to eat. So I have 1:09.
17 So let's just round it out at 2:15.

18 MR. COLE: Thank you, Your Honor.

19 THE COURT: Thank you. Y'all have a good lunch.
20 You can leave your stuff in here if you want. The doors
21 will be locked.

22 (WHEREUPON, adjourned for lunch 1/17/17, 1:12 p.m.)

23 (WHEREUPON, resume 1/17/17, 2:44 p.m.)

24 THE COURT: I apologize for the delay. I am chief
25 judge for civil and I am duty judge this week. I had

1 several motions for ex-parte issues that had nothing to
2 do with y'all that I needed to deal with before we got
3 restarted. So I appreciate your patience to allow me the
4 opportunity to give attention to those matters.

5 (WHEREUPON, resume hearing January 17, 2017, 2:44 p.m.)

6 THE COURT: Okay. Let's see here. I wanted to go
7 through the list of the other motions that have been
8 filed in limine to see if there were any we could dispose
9 of.

10 There is a motion for a jury view. I think I told
11 you all during the status conference that I would not be
12 inclined to decide that until the end of the case so that
13 I could have a total view of the case to determine if it
14 was necessary. So I would not hear that in limine nor do
15 I think it is appropriate for that to be disposed of in
16 limine.

17 We have already heard the Muhler's motion for
18 summary judgment. We have already heard Sanchez motion
19 for summary judgment.

20 (WHEREUPON, pause to retrieve documents.)

21 THE COURT: The motion in limine that was filed on
22 1/13 that is entitled motions in limine on behalf of
23 defendants John Wieland Homes and Neighborhoods as
24 successor by merger, does anybody have a copy of that?
25 Because it is not anymore specific than that.

1 MR. COLE: I have them, Your Honor, if you would
2 like copies. I have got that one and I have got Ms.
3 Fragale's one as well.

4 THE COURT: Okay. I think we were waiting to gather
5 all of these things from downstairs, and they are still
6 being scanned onto the system and we couldn't take the
7 originals.

8 Okay. I have them, Mr. Sanchez'. You can have your
9 copy back.

10 MR. COLE: Okay. Thank you.

11 THE COURT: Yeah, I just -- we tried to get as many
12 things as we could copied on Friday, but a lot of the
13 things were being readied to be scanned and we couldn't
14 take the originals.

15 Okay. There is a plaintiff's request for a motion,
16 a request for judicial notice of the building codes. I
17 don't know that that is necessarial -- that that is
18 necessary or appropriate at this juncture.

19 I think you would have to propose using them as the
20 basis of the breach of the standard of care and they
21 would have to either accept that that is in fact the
22 standard of care or pose some objection and then I would
23 have to -- I would have to rule on it contemporaneously.
24 Is there any exception to that from the plaintiff?

25 MR. HAYES: No, Your Honor.

1 THE COURT: From the defense?

2 MR. HASELDEN: No, ma'am.

3 THE COURT: So than that just really leaves us the
4 motions in limine for defendant Juan Luis Sanchez also
5 know as Sanchez Brothers Painting and the motions on
6 behalf of John Wieland Homes.

7 And I guess preliminarily I need to ask have you all
8 been agree -- been able to agree on any of these matters,
9 Mr. Hayes and Mr. McCarty?

10 MR. MCCARTY: Not at this -- not at this juncture,
11 Your Honor. Although I admit we haven't -- we haven't
12 discussed it with the defendants at any length.

13 THE COURT: I can't hear you. Say that one more
14 time.

15 MR. MCCARTY: I'm sorry. We have not agreed on them
16 at this point. But we haven't discussed it with the
17 defendants at any length. But we don't agree with their
18 motions.

19 THE COURT: That is my question ---

20 MR. MCCARTY: Yes.

21 THE COURT: --- is have y'all been able to resolve
22 any of them.

23 MR. MCCARTY: No.

24 THE COURT: Are there any other motions that have
25 been filed that I have not -- that we have not heard or I

1 have not gone over just now?

2 MS. SHOUN: Your Honor, ---

3 THE COURT: Yes, ma'am.

4 MS. SHOUN: --- if I may.

5 THE COURT: Yes, ma'am.

6 MS. SHOUN: I am Cheryl Shoun.

7 THE COURT: Yes, ma'am.

8 MS. SHOUN: I am here on behalf of Wheelock. Marvin
9 Infinger and I represent Wheelock. And actually I did
10 file a motion that we had prepared late yesterday based
11 on the plaintiff's exhibit list. That was addressed very
12 briefly with the court this morning. And frankly, as I
13 sat here and listened to the court address the issues of
14 trying to simplify this and keeping the issues straight
15 for the jury, we decided to go ahead and file this
16 motion; and that is simply the motion to enforce the
17 bifurcation order or however the court may wish to
18 address it.

19 THE COURT: Well, it sounds like everything that
20 involves Wheelock has been bifurcated. Is that -- is
21 that like an oversimplification of what ---

22 MS. SHOUN: No, ma'am.

23 THE COURT: --- the order says?

24 MS. SHOUN: That is exactly our position. However,
25 given what appeared on the plaintiff's witness list

1 yesterday which is attached to our motion - if I may
2 approach I would be happy to give the court a copy.

3 THE COURT: Sure. Oh, do you mean the witness list?
4 I have that.

5 MS. SHOUN: No, ma'am, the motion that was filed.

6 THE COURT: Yeah, I need a copy of your motion ---

7 MS. SHOUN: Yes, ma'am.

8 THE COURT: --- because I don't have that.

9 MS. SHOUN: And I have got copies for all of the
10 other parties too.

11 (WHEREUPON, document provided.)

12 THE COURT: Thank you, ma'am. Okay.

13 MS. SHOUN: On that list, Your Honor, were a number
14 of documents that dealt with the asset transfer from
15 Wieland to our client.

16 And, frankly, Your Honor, I can appreciate the
17 court's frustration. I have not been involved in this
18 case since the origin of it either. However, knowing the
19 case as well as I do know the case I cannot fathom any
20 reason that those particular documents would appear on
21 the plaintiff's exhibit list but for to address that
22 asset transfer. Because they are not relevant to any
23 other causes of action which are against the Wieland
24 entities only. So I guess, Your Honor, in summary
25 this ---

1 THE COURT: You are just trying to make sure they
2 are not going to try this case without y'all being
3 present and that everybody is going to abide by the
4 bifurcation order?

5 MS. SHOUN: That is -- thank you, Your Honor. You
6 said it far better than I could. Thank you.

7 THE COURT: Well, no, I just I read it again and now
8 having heard some of the arguments I guess now the
9 language is making a little more sense to me and what was
10 contemplated I guess or intended by the language.

11 So I guess, Mr. Hayes, I need you all to address
12 that and how would any of those documents be relevant
13 because she has the right to sort of be concerned. She
14 doesn't want to have y'all sort of try a case without her
15 being here ---

16 MR. HAYES: Right.

17 THE COURT: --- to assert her client's rights. But
18 as I read that bifurcation order it says nothing that
19 deals with Wheelock is going to be tried.

20 MR. HAYES: There is nothing that Wheelock is going
21 to be tried, Your Honor. The only thing ---

22 THE COURT: So why would you ---

23 MR. HAYES: That has to do -- the only thing that
24 has to do with if anything would be I believe the sale,
25 the fact that they sold ---

1 THE COURT: Why would it be germane? If you -- if
2 you have severed them and you are only going to try
3 there -- why does the jury even need to know who -- I
4 mean it is sort of a legal condition ---

5 MR. HAYES: We are just simply ---

6 THE COURT: --- you have created by bifurcating it,
7 so why ---

8 MR. HAYES: Just that ---

9 THE COURT: --- is it relevant?

10 MR. HAYES: Just that Wieland sold the company to
11 this ---

12 THE COURT: Why is it relevant?

13 MR. HAYES: Because they didn't leave -- well,
14 because they left these people with buildings that had
15 latent defects, not enough money for repairs ---

16 THE COURT: So it doesn't matter whether it was sold
17 or not. What you do is you say it was sold and they
18 didn't leave enough money to do what needed to be done or
19 they didn't have enough reserves on hand.

20 You are either bifurcating it or you are not. You
21 don't get to have it both ways. So I am trying to figure
22 out how it is relevant to any issue and why then it
23 doesn't leave some -- see what happens when you try a
24 case is while you try the fact legally I am left with
25 having to deal with the facts and how the jury deals with

1 the facts. So when you sort of leave something hanging
2 in the air like that I have to deal with it. Because the
3 next question is going to be, well, where is Wheelock and
4 why haven't we heard anything about Wheelock and why --
5 we have a very -- very astute jurors in Charleston.

6 MR. HAYES: Right.

7 THE COURT: And a lot of them own property. A lot
8 of them are involved in development. And when you don't
9 answer questions factually for them and it doesn't make
10 sense in a logical sequence and you put something out
11 there, that is going to be their next question.

12 And I can't answer factual questions, and neither
13 can you. So it is best to leave stuff out that isn't
14 relevant that can't be answered.

15 MR. HAYES: We can just do it like Your Honor said,
16 they left -- well, go ahead, Keith.

17 MR. MCCARTY: I had just one point, Your Honor.
18 Once the -- once that our clients approached Wieland and
19 said, look, we have got these claims out here, we have
20 got these problems and here is our warranty, they said,
21 no, the warranties are no good anymore because we sold
22 the company.

23 THE COURT: So what ---

24 MR. HAYES: We don't have to say Wheelock. We can
25 just say they sold it.

1 MR. MCCARTY: Yeah, we don't -- I am not pointing to
2 Wheelock. I am just pointing that they sold ---

3 THE COURT: Why does their name have to be mentioned
4 at all. Because I am going to tell you just like -- it
5 is no different ---

6 MR. MCCARTY: And then it doesn't.

7 THE COURT: It is no different than when I have a
8 murder case and there were three people in the car and
9 one person shot the gun. The first thing the jury asks
10 me is where are those other two people at.

11 MR. MCCARTY: I agree.

12 THE COURT: And that what ends up happening in a
13 case like this when you mention other folk they say where
14 are those people at, why haven't we heard anything from
15 them.

16 MR. HAYES: We won't mention Wheelock, Your Honor.

17 MR. MCCARTY: Yeah.

18 THE COURT: Yeah, you either have a bifurcation or
19 you don't.

20 MR. MCCARTY: Yeah, we are not going ---

21 THE COURT: You bifurcated it. You said all the
22 claims as to non-Wheelock defendants. And I am
23 paraphrasing what it says from my memory.

24 It says in that first paragraph: In the first phase
25 the fact finder will consider the issues arising as

1 alleged against the non-Wheelock defendants. And then
2 the second phase deals with Wheelock.

3 MR. HAYES: Right. So we won't mention Wheelock,
4 Your Honor.

5 THE COURT: I think that is best to keep it cut and
6 dry. And then I think it will alleviate Ms. Shoun's
7 concerns which I think are rationally based. Because she
8 don't want to have to be here if she doesn't need to be.
9 But she can't leave her client's interest's unprotected.

10 MR. HAYES: We won't mention Wheelock.

11 THE COURT: Yeah. Is that satisfactory?

12 MS. SHOUN: Thank you, very much, Your Honor. The
13 motion is out there should anything occur. Just out of
14 an abundance of caution. So I think the court ---

15 THE COURT: Well, I think the --- well, I think it
16 has been -- yeah, I think it has been resolved.

17 MS. SHOUN: Yes, ma'am. Thank you very much.

18 THE COURT: You are welcome. So I am going to do a
19 Form 4 indicating that motion has been resolved.

20 MS. SHOUN: Thank you, Your Honor.

21 THE COURT: You are welcome. Have a great day.
22 Sorry you had to hang around with us all this time.

23 MS. SHOUN: No, Your Honor, I think I may just be an
24 observer.

25 THE COURT: That's fine. Happy to have you.

1 MS. SHOUN: Thank you.

2 THE COURT: More the merrier. Let's see here.

3 Let's see, that then leaves us with John Wieland's
4 motions in limine. And I am not going to deal with
5 Sanchez because I have all of those motions under
6 advisement. So that really would be sort of a waste of
7 energy at this moment.

8 Does -- do the plaintiffs have any motions in limine
9 that were filed that I don't have?

10 MR. MCCARTY: No, Your Honor.

11 THE COURT: Okay.

12 MR. HAYES: We were under -- well, when we had the
13 conversation with you last week you said that you like to
14 deal with these issues as they come about. And so ---

15 THE COURT: Well, I don't decide evidentiary issues
16 before they are heard. Because it is not final. And
17 people rarely testify the same way twice. And I have no
18 point of reference -- how do I know it is relevant until
19 I start hearing the case. I just think it is usually a
20 waste of time when you could create a proffer if
21 necessary and preserve the record. If it comes in, no
22 harm, no foul. If it doesn't come in, you have a proffer
23 and it is contemporaneously preserved within the context
24 of the case itself.

25 That is why I asked did y'all resolve any of these

1 or if y'all had any agreement on any of these. Their
2 first one is motion to exclude or in the alternative to
3 limit any testimony or evidence proffered by the witness
4 Gary Moore. Which I wouldn't do in advance.

5 If there is any testimony that you all -- now who is
6 Mr. Moore? Let me ask that question preliminarily.

7 MR. HAYES: Your Honor, he is the expert that has
8 been retained to give an estimate in regards to the cost
9 of repairs needed at Waverly.

10 THE COURT: Mr. Cole, did you give this to me to
11 have or was this your only copy?

12 MR. COLE: That was my only copy. But I generally
13 know what they are. You are welcome to use it or ---

14 THE COURT: No, I am going to make a copy while we
15 are going along. Because I don't want to write on your
16 copy. And I don't want to keep ---

17 MR. COLE: Your Honor ---

18 THE COURT: In deficit without having yours. So I
19 will get -- I will get another one.

20 MR. COLE: Okay.

21 THE COURT: But I will use this as my template until
22 my clerk gets me one.

23 MR. COLE: Okay.

24 THE COURT: Okay. Motion to exclude in the
25 alternative to limit. Okay, you said Gary Moore is your

1 expert?

2 MR. HAYES: Yes, Your Honor, in regards the cost
3 of -- the cost estimate.

4 THE COURT: The cost of repairs?

5 MR. HAYES: Yes, Your Honor.

6 THE COURT: What are his qualifications; what is his
7 area of expertise?

8 MR. MCCARTY: Your Honor, Keith McCarty. He is a
9 licensed general contractor in South Carolina and North
10 Carolina. He has been qualified at least three times as
11 an expert in South Carolina courts in the area of general
12 contracting, construction, and cost estimation.

13 THE COURT: General contracting. What else?

14 MR. MCCARTY: General contracting, construction ---

15 THE COURT: And cost estimating; is that what you
16 said?

17 MR. MCCARTY: Yes, construction cost estimation.

18 THE COURT: Okay. Yeah, I would have to take that
19 up at the time he testifies. If he testifies to some
20 areas the defendants believe is objectionable you need to
21 make a contemporaneous objection. If I need argument I
22 will ask for argument. If not, I will rule on the
23 motion. If I feel I need to hear it in camera, I will do
24 that and then we will go from there.

25 . Number two is about the same thing, isn't it?

1 MR. MCCARTY: It seems to be. It seems to me like
2 it is the same motion, Your Honor.

3 MR. MANOS: It is a little bit different, Your
4 Honor.

5 THE COURT: How is it different?

6 MR. MANOS: But I will let you look at it. The
7 first one actually doesn't go to his qualifications. It
8 actually goes to his estimate which ---

9 THE COURT: Yes, I understood that.

10 MR. MANOS: Okay. And the second one ---

11 THE COURT: But it wasn't clear to me what his area
12 of expertise was, so I needed to know that.

13 MR. MANOS: I understand, Your Honor. And the
14 second one would be kind of a sub parcel of the first
15 one, again as he has got things in there that are
16 better -- betterment that shouldn't come in.

17 THE COURT: When you say betterment tell me -- be
18 more specific than that.

19 MR. MANOS: If somebody has got a Ford and they go
20 back with a Cadillac.

21 THE COURT: I gotcha. Okay. Okay. You will need
22 to make a contemporaneous objection regarding that as
23 well. And actually -- well, yeah, make a contemporaneous
24 objection.

25 Why wouldn't they be entitled to have -- to have

1 testimony on diminution in value and that would be a
2 measure of damages?

3 MR. HASELDEN: Your Honor, if I could. Andy
4 Haselden.

5 THE COURT: Yes, sir.

6 MR. HASELDEN: We have taken depositions. Mr. Pizer
7 who is here in the courtroom and their expert supposedly
8 on this issue Mr. DeSantos. The law says you can't get
9 repair costs and stigma. And what they have testified to
10 is I don't think this property is worth as much because
11 of the lawsuit.

12 THE COURT: Is that going to be the testimony ---

13 MR. HASELDEN: Yes, ma'am.

14 THE COURT: Or is it going to be some of the people
15 who sold those already that say they -- they had a loss
16 because the ---

17 MR. HASELDEN: Mr. Pizer had -- had a profit. But
18 he is going to testify that he thinks -- his deposition
19 testimony was he thinks he could have sold it for more
20 but for the litigation.

21 THE COURT: But they would have to have a realtor or
22 somebody say that, wouldn't they?

23 MR. HASELDEN: They are attempting to put up their
24 expert Mr. DeSantos who testified in his deposition last
25 week I can't say to a reasonable degree of certainty

1 whether this litigation actually affected anybody's
2 ability to lose money -- now I mean their ability to make
3 money off of these sales or if there was diminution in
4 value.

5 But the law is clear. You can't get both. You have
6 got to either get repair cost or stigma. And the fact
7 that Mr. Pizer sold his unit doesn't matter under the
8 case, under the Adman (ph) brick case because they say
9 the damage doesn't go with the seller, it goes with the
10 property. So as far as those two witnesses are concerned
11 unless they've changed their testimony in a week or
12 two ---

13 THE COURT: It is possible.

14 MR. HASELDEN: Yeah, it is possible ---

15 THE COURT: Yeah.

16 MR. HASELDEN: --- but.

17 THE COURT: Stuff happens. I don't -- you know, I
18 don't know what they are going to testify to until they
19 testify. Is that going to be a part of their testimony,
20 Mr. Hayes?

21 MR. HAYES: Your Honor -- Your Honor, they are going
22 to testify about the fact that they had trouble selling
23 their homes and that they -- that they believe they sold
24 it for less than they would have if not for these
25 construction defects.

1 THE COURT: But don't they need somebody else to say
2 that? Don't you need somebody that says what the market
3 was, what the fair market value was, what the diminution
4 in value was? That is beyond the capacity of a lay
5 person.

6 It is like I think my house is worth a million
7 dollars to me, but if I put it on the market right now I
8 probably would be offended as to what somebody would
9 offer for me because they would walk through my house and
10 probably say we need to fix this, we need to fix that -
11 which I think is beautiful but they don't. And so what I
12 think my house is worth -- people always think their
13 house is worth more than it actually is.

14 So you need a realtor or you need an expert to
15 say -- or who has some foundational knowledge about how
16 you value real estate to say that as a result of this
17 there was a diminution in the value and they sold their
18 units at a loss.

19 MR. HAYES: Right, and ---

20 THE COURT: Because that is the only way you can fix
21 whether there was a profit or a loss.

22 MR. HAYES: Right. Your Honor, we did have
23 somebody, Bud Sanders, who was going to speak to that.
24 But if the court will indulge me for one moment.

25 THE COURT: Sure.

1 MR. HAYES: I don't foresee us putting that forward
2 as damages at this point.

3 THE COURT: Oh, so it is a non issue?

4 MR. HAYES: I believe it is going to be a non issue
5 except for the fact I want to make clear we still want
6 them to testify to that in requests to the fact that they
7 have had during their time they had construction defects
8 and it affected their ability to sell the home especially
9 if -- especially if the defendants make an issue in court
10 of the fact that these homes are selling for more than
11 they originally purchased for. I believe that opens the
12 door, Your Honor.

13 THE COURT: You still need a realtor. Because, you
14 know, markets are funny. Like for a long time nothing
15 was selling. It was a buyer's market and you could
16 pretty much get anything almost on a buyer's sale.

17 But now according to the paper the market has
18 bounced back. The average price in Charleston County for
19 a house is \$385,000. And I don't know. I would think it
20 is neighborhood by neighborhood. Who knows. I don't --
21 there are many things that can affect a house selling
22 quickly or not selling quickly.

23 MR. HAYES: Your Honor, I agree. And Bud Sanders
24 could speak to that. But what I am trying to say is I am
25 not going to ask these witnesses to put a dollar amount

1 on that.

2 THE COURT: Yeah, but you have got to put some value
3 on it. You can't just -- that is speculative otherwise.

4 MR. HAYES: I am talking about their testimony that
5 of the difficulties they had in selling their home due to
6 the construction defects.

7 THE COURT: Yeah, but you would need to have a
8 realtor that they have listed it with that can say you
9 know we are having this problem selling it, couldn't get
10 it sold because of these problems.

11 I don't think your client can just come in and say
12 you know, I couldn't sell my house and I feel that it was
13 because of this. You have to have something tangible
14 that ties it to that.

15 MR. HAYES: Right. Your Honor, and then will
16 testify that people had contracts on the home and walked
17 away from the contract because of the construction
18 defects.

19 THE COURT: Definitely because of that or because
20 they couldn't get financing or because of something else?

21 MR. HAYES: Because of construction defects, Your
22 Honor.

23 MR. MANOS: That's hearsay, Your Honor.

24 MR. HASELDEN: That is hearsay, Your Honor. And
25 that is one witness that is going to say that. And she

1 can't testify as to that.

2 THE COURT: Tell me why -- which is the one witness
3 we are talking about?

4 MR. HASELDEN: Her name is Poe Minton. And she ---

5 THE COURT: Poe ---

6 MR. HASELDEN: Minton.

7 THE COURT: P-O-E?

8 MR. HASELDEN: Uh-huh.

9 THE COURT: M-I-N-T-O-N?

10 MR. HASELDEN: Yes, ma'am.

11 THE COURT: Okay.

12 MR. HASELDEN: The house that she is purportedly
13 going to say we couldn't sell, she has no interest in
14 whatsoever.

15 THE COURT: I mean who is she; she was a buyer of
16 that property?

17 MR. HASELDEN: She is the wife of the personal
18 representative of the estate of his parents. The home is
19 in probate. She is not authorized to speak by the
20 probate court about that issue. She is not a proper
21 person to even be there to testify as to any problems
22 they are having with the sale of the house. She has no
23 connection to it whatsoever. Tangentially my mother-
24 and father-in-law lived there until they died. She
25 doesn't have any legal standing to testify as to any

1 problems with that unit.

2 THE COURT: Was she involved in selling it at all?

3 MR. HASELDEN: She has been trying. But she has no
4 ownership interest. I can try and sell Mr. Cole's house
5 all I want and say, you know, I am having trouble
6 selling ---

7 THE COURT: Yeah, but if you are a realtor you have
8 no ownership interest but you can still sell it if you --
9 if he is contracted with you to sell it.

10 MR. HASELDEN: But they are your agent.

11 THE COURT: Yeah, I understand that. But how do we
12 know she is not their agent to sell the house. If they
13 are elderly. My parents would not be trying to sell
14 anything by owner.

15 MR. HASELDEN: No, ma'am.

16 THE COURT: They would want one of us to do it.

17 MR. HASELDEN: They are deceased.

18 THE COURT: Yeah, I have got that.

19 MR. HASELDEN: Her husband -- the house is tied up
20 in probate. I have got -- the house is tied up in
21 probate right now.

22 THE COURT: Got that part. Who is the personal
23 representative?

24 MR. HASELDEN: Her husband.

25 THE COURT: Okay. They are still married?

1 MR. HASELDEN: Yes, ma'am.

2 THE COURT: You think a husband doesn't ask a wife
3 to do things because he doesn't feel like being involved?

4 MR. HASELDEN: Sure can. But, Your Honor, if
5 that -- if that ---

6 THE COURT: I don't know what she is going to
7 testify to. She may say my husband asked me to try to
8 unload this condo because he doesn't feel like being
9 involved with it or I am better at selling things. I
10 mean I don't know.

11 MR. MANOS: Your Honor, may I real quickly?

12 THE COURT: Yes, sure.

13 MR. MANOS: I mean unless the buyers come in and
14 testify that I did not buy this, I put -- the potential
15 buyers come in and say I didn't buy this because of a
16 construction defect it is hearsay. She can't ---

17 THE COURT: Oh, I agree she can't testify to
18 hearsay. But I don't know what she is going to testify
19 to. I don't have a clue. What is she going to testify
20 to?

21 MR. HAYES: She is going to testify to the fact that
22 she had her house under contract and they were buying a
23 house and that the house got off of the contract because
24 they found -- they found ---

25 THE COURT: How is she going to testify to that

1 without it being hearsay that they are entitled ---

2 MR. HAYES: She can testify that she had it under
3 contract and then the contract ---

4 THE COURT: She can testify she had it under
5 contract. She can testify it wasn't ever consummated.
6 She can't say why.

7 MR. HAYES: Your Honor, she can testify that they
8 were given a copy of Mr. Westendorf's report which will
9 be testified ---

10 THE COURT: Not unless she is the one that gave it
11 to him.

12 MR. HAYES: And then ---

13 THE COURT: Did she give it to them?

14 MR. HAYES: Give it to who?

15 THE COURT: The report you are talking about.

16 MR. HAYES: Did she give the report to the
17 prospective owner, no.

18 THE COURT: Then she can't testify to it. Because
19 unless she was there and she physically saw it or she was
20 the one that physically transmitted it, it is hearsay.

21 And they are entitled to cross-examine the person.
22 Because we don't know whether it took place or not. Only
23 the people who were there know whether it took place or
24 not.

25 MR. HAYES: Right. And, Your Honor, we did take --

1 they did take the deposition of the person who did
2 testify that they walked away from the sale because of
3 the problems with the home.

4 THE COURT: Yeah, but you can call another witness;
5 can't you?

6 MR. HAYES: Okay. I can? All right. Your Honor,
7 also I would -- want to point out one quick thing is that
8 under the case of -- if I say the right name. Wisnant
9 (ph) versus James Island Corporation our courts have said
10 that the property owner who is familiar with the
11 property's value may get his estimate as to its value or
12 the damage inflicted upon it even though he is not
13 otherwise an expert.

14 THE COURT: I understand that. But when you start
15 talking about market values, market shares, how the
16 market is moving, he is not qualified to testify to that.

17 I can say what I think my property is worth. That
18 is a weight issue. Everybody thinks their property is
19 worth more than it is worth. But you are going to have
20 to prove beyond speculation that there was a loss. Which
21 means -- you know, you can figure out how you are going
22 to do that. But don't leave it to speculation because I
23 am not letting speculation go to the jury.

24 MR. HAYES: Yes, Your Honor.

25 THE COURT: A person can always say what they think

1 their property is worth. Somebody can come in and say
2 what they think their car is worth. But if it isn't
3 supported by the facts All right. So you will
4 need to make a contemporaneous objection as regard to Ms.
5 Minton as well as -- you need to address however, Mr.
6 Hayes, whether -- their argument that you are either
7 entitled to the repair cost or stigma value and whether
8 you concede that.

9 MR. HAYES: I'm sorry, Your Honor, I am having a
10 hard time hearing; and that is my fault but ---

11 THE COURT: No, that is okay. And I know -- like I
12 said, it is like a vacuum in here. It is like a cave. I
13 apologize.

14 Their argument is that you are entitled -- that the
15 measure of damages is either the repair cost or stigma
16 but you don't get both.

17 MR. HAYES: Yes, Your Honor.

18 THE COURT: So which is it that your clients are
19 going to be trying to recoup, the repair costs or -- what
20 is their theory on their damages?

21 MR. HAYES: Repair cost, Your Honor.

22 THE COURT: Okay. And then to some extent that is a
23 non issue then, correct?

24 MR. HAYES: Yes, Your Honor.

25 THE COURT: Okay. But that still doesn't eliminate

1 your responsibility to make a contemporaneous objection,
2 Mr. Haselden or Mr. Manos.

3 MR. HASELDEN: Thank you, Your Honor.

4 THE COURT: You are welcome. Motion to exclude any
5 testimony, evidence addressing claims for damages
6 asserted by former owners or non class members. Is that
7 going to be an issue, or is that a non issue?

8 MR. HAYES: Your Honor, I think the former board
9 members and home owners can testify.

10 THE COURT: As to damages?

11 MR. HAYES: No, not as to the -- not as to the ---

12 THE COURT: The way I read this is they are talking
13 about people testifying as to their own personal
14 damages ---

15 MR. HAYES: No.

16 MR. HAYES: --- who are no longer -- am I reading
17 that correctly?

18 MR. HAYES: That is correct, Your Honor.

19 THE COURT: That is ---

20 MR. HAYES: That is not a problem.

21 THE COURT: --- what the nature of Number 4 is that
22 they are asking that you be precluded from asking for
23 damages for a former owner or non class member. Not
24 about them testifying about facts but about them saying I
25 was damaged and I am entitled to damages.

1 MR. HAYES: We are not going to have them do that.

2 THE COURT: So that is a mute issue then, correct?

3 MR. HAYES: Exactly.

4 THE COURT: All right. Number 4 is mute.

5 MR. HAYES: As far as requesting damages, no, we are
6 not.

7 THE COURT: Yes. Okay. John Freeman, what is he
8 going to be testifying to?

9 MR. HAYES: Your Honor ---

10 THE COURT: Well, I guess we need to start with the
11 basics. Who is Mr. Freeman?

12 MR. HAYES: Mr. Freeman is a former professor at the
13 University of South Carolina School of Law and also has
14 been qualified numerous times.

15 THE COURT: Well, I am -- you are talking about
16 Professor Freeman?

17 MR. HAYES: Yes.

18 THE COURT: Yes.

19 MR. HAYES: Yes, ma'am.

20 THE COURT: What is he going to testify to?

21 MR. HAYES: He is going to testify that Wieland owed
22 a fiduciary duty when they established Waverly. He is
23 going to rely on the Goddard case which also is
24 questioned in the restatement that says developer owe a
25 duty to use good judgment and act in good faith when they

1 complete formation of the organization, property owners,
2 and that it would be unfair for the developer to burden
3 the owners with substandard or deteriorated common areas
4 regarding expenditure of funds and it is impossible to
5 turn over properties in good repair when they are built
6 with latent defects.

7 It is really about Wieland's failure to use good
8 judgments and its failure to act in good faith ---

9 THE COURT: Well, what they are -- basis of their
10 objection is that he should not be allowed to rely on a
11 provision of the restatement that has not been adopted by
12 South Carolina in formulating his opinion. So I guess
13 the more pointed question is the scope of his testimony
14 is it going to deal with any of the restatement which has
15 not been adopted.

16 MR. HAYES: It has not been adopted. But he looks
17 at it as the industry standard, but also he also he bases
18 his opinions off of the Goddard case which is a South
19 Carolina case.

20 THE COURT: All right. You all would have to make a
21 contemporaneous objection regarding Professor Freeman's
22 testimony. I think it would be inappropriate to exclude
23 it before I have heard any of the testimony. I have no
24 way of knowing whether it is relevant on the standard of
25 care.

1 In addition to that they have a duty to prove by a
2 preponderance of the evidence their case. And I am not
3 going to eclipse that before they have the opportunity to
4 present their evidence.

5 Number six. Is that -- or do you all plan to
6 present any testimony in that regard, Mr. Hayes?

7 MR. HAYES: I'm sorry, I am just catching up, Your
8 Honor.

9 THE COURT: Number six.

10 MR. HAYES: Okay.

11 THE COURT: It says motion to exclude any testimony
12 evidence or argument addressing any temporary structures
13 built during the course of the construction of the
14 subject townhomes.

15 MR. HAYES: Your Honor, there is a -- there was a
16 Wieland sales center right of Waverly. And it suffered
17 the same type of damages in construction defects as our
18 client's homes. Our -- it is -- our expert will testify
19 to that. He documented that.

20 THE COURT: Tell me why that would be relevant.

21 MR. HAYES: It is relevant for a number of reasons,
22 Your Honor. It shows habit and routine for one thing.
23 And the second, it also shows that these problems were
24 widespread. It also shows under Skufta (ph) of -- under
25 our Skufta claim of past problems.

1 THE COURT: Yeah, but who was inhabiting that
2 trailer; them, correct?

3 MR. HAYES: Wieland was -- I mean I am assuming it
4 was the people from Wieland were inhabiting ---

5 THE COURT: Yeah, so how can they have an unfair
6 trade practices against themselves?

7 MR. HAYES: No, no, no. We are not representing the
8 people. We are just showing it as evidence of failure of
9 not only of the Waverly townhomes but Wieland's own
10 building that it had that it used ---

11 THE COURT: Yeah, but you have got to have more than
12 that. I mean that -- on an unfair trade practices claim.
13 That is like saying if they were happy with the way their
14 building was built you can't later come and say they were
15 unhappy with it and therefore they should be held
16 accountable to themselves.

17 MR. HAYES: Well, what we are showing ---

18 THE COURT: That is like circular logic. That is
19 not making sense to me.

20 MR. HAYES: But what we are showing, Your Honor, is
21 that it failed the building code also and that -- and
22 there -- and under the building code as our expert ---

23 THE COURT: Yeah, but it is a different kind of a
24 building I would assume.

25 MR. HAYES: It is not, Your Honor.

1 THE COURT: What is it; you are saying that it was a
2 townhome as well that they used as an office?

3 MR. HAYES: I am saying that it is a -- it is the
4 same under the building code. Our expert will testify
5 that ---

6 THE COURT: This says sales office trailers and
7 other temporary structures.

8 MR. HAYES: Your Honor, if we could show you photos;
9 it is not temporary; it is not a trailer.

10 THE COURT: What is it?

11 MR. HAYES: It was a building. I mean it was a
12 building like any other building. And there's no
13 exception for that under the building code. And I
14 think ---

15 THE COURT: Yeah, I am going -- they are going to
16 have to make a contemporaneous objection. But I can tell
17 you I am going to -- I am not a particularly persuaded
18 about that, how it is going to be relevant and how it
19 would show habit. I would have to hear it in its
20 context. But I am not particularly -- I don't -- I am
21 not sure that is going to pass the muster.

22 Motion to exclude from opening statements any
23 testimony or evidence proffered during any deposition.
24 Is that going to be an issue?

25 MR. MCCARTY: Your Honor, I am not -- I am not

1 planning on -- I am not planning on introducing evidence
2 in my opening statement. I am planning on showing some
3 pictures that our expert ---

4 THE COURT: How are you going to show anything that
5 is not in evidence?

6 MR. MCCARTY: Well, these are contemporaneous
7 pictures. They have already had it. I am going to ---

8 THE COURT: That is not the issue. How are you
9 going to show something that is not in evidence?

10 MR. MCCARTY: I mean if you don't want me to
11 show ---

12 THE COURT: It is not up to me. They are going to
13 make an objection. I have to rule on the objection. I
14 don't have a position. The only position I have is what
15 is in them two books over there; the rules of procedure,
16 the rules evidence.

17 MR. MCCARTY: Here is what -- here is what I suggest
18 we do. I suggest that I will put it up there and let
19 them object to it and let you rule on it at the time.

20 THE COURT: No, because once the rule is -- once the
21 bell is rung -- I am going to deal with opening arguments
22 now. Because I can tell you I am not really particularly
23 inclined to entertain any lengthy opening arguments that
24 are really closing arguments.

25 MR. MCCARTY: Right.

1 THE COURT: That is not what the rules are intended
2 for. You are supposed to basically lay out for the jury
3 what your evidence is going to show. And unless it is in
4 evidence you don't get to show it to the jury, right?

5 Now if you all pre-mark exhibits and you agree on
6 those exhibits before we get started, then that is fair
7 game. Because then it is already in evidence.

8 So I guess do y'all have any objection to them -- I
9 would assume maybe y'all would want to show a picture of
10 it too in your opening arguments. But I am not sure.
11 Are you talking about a picture of the development itself
12 what the townhomes look like?

13 MR. MCCARTY: There are a series of pictures, Your
14 Honor.

15 THE COURT: What are they?

16 MR. MCCARTY: They are picture of what the -- what
17 the -- what the area is, what the townhomes look like,
18 what the general -- what the general damages that we are
19 claiming at the -- at the ---

20 THE COURT: I mean but what do the pictures purport
21 to show?

22 MR. MCCARTY: They purport to show they are an
23 overhead view of the area. They are ---

24 THE COURT: Who took the picture?

25 MR. MCCARTY: Our expert Miles Glick. Yeah, and

1 some of them we took off the website too.

2 THE COURT: What website?

3 MR. HAYES: Google maps.

4 MR. MCCARTY: Google maps.

5 THE COURT: So how many pictures in total are we
6 talking about?

7 MR. MCCARTY: Ten.

8 THE COURT: Have y'all shown them to the opposing
9 party?

10 MR. MCCARTY: Not yet, but we will. Yeah, if they
11 will show us theirs.

12 THE COURT: Are y'all going to have any objection to
13 that?

14 MR. MANOS: From the descriptions Mr. McCarty gave I
15 doubt very seriously we would have any objection. I
16 haven't seen the photos.

17 THE COURT: So maybe y'all need to spend some time
18 -- because ya'll probably plan to use the same pictures?

19 MR. MANOS: We have a couple of photos that their
20 expert took that I had blown up that they have seen that
21 we showed them yesterday at the 3:30 exhibit conference
22 we had. And we have a couple of video clips that Mr.
23 Hayes was expressing ---

24 THE COURT: So did y'all -- were y'all able to come
25 to any agreement during this exhibit conference as to

1 what exhibits y'all were going to be able to agree on
2 without objection?

3 MR. MANOS: Some of them, Your Honor. Not all of
4 them.

5 THE COURT: How many did y'all agree on?

6 MR. MANOS: I don't want to ---

7 MR. MCCARTY: I don't have a list in front of me.
8 But what I think what we need to do is we need to get
9 together again, Your Honor.

10 THE COURT: Okay.

11 MR. MCCARTY: Because we just had our list at the
12 time. We didn't have all of our ---

13 THE COURT: You didn't have the actual pic- ---

14 MR. MCCARTY: That's correct.

15 THE COURT: Evidence there with you is what you are
16 saying. But it sounds like that is not going to really
17 be an issue, picture.

18 MR. MANOS: Yeah, that motion really was ---

19 THE COURT: You are talking about deposition
20 testimony.

21 MR. MANOS: Was really a concern that they were
22 going to put up a video clip of a deposition witness.
23 But if that is not happening then that motion ---

24 THE COURT: So is that my understanding, there will
25 not be any excerpts from deposition testimony; correct?

1 MR. HAYES: During the opening.

2 MR. MCCARTY: During the opening, Your Honor; that
3 is correct.

4 THE COURT: So then that is a moot issue as well.

5 That then takes us to Number 8, motion to exclude
6 any testimony evidence or argument addressing Sofa
7 Superstore.

8 MR. HAYES: Your Honor, we are not going -- we are
9 not going to bring up anything about the Sofa Superstore.

10 THE COURT: Why would -- yeah, I am just trying to
11 figure out why that would even enter anybody's mind.

12 MR. HAYES: There was an issue with firewalls out
13 here, Your Honor. And I think during the deposition I
14 asked an expert wasn't that similar to what -- defective
15 firewalls, wasn't that a factor in the Sofa Superstore
16 tragedy.

17 THE COURT: Oh, I gotcha.

18 MR. HAYES: And I am assuming that because I asked
19 that in a deposition they -- but, you know.

20 THE COURT: But you are telling me you are not going
21 to raise that. So it is a moot issue?

22 MR. HAYES: I am not, Your Honor.

23 THE COURT: Okay. Number 9, Madison neighborhood or
24 Madison at Hamlin Plantation Townhouse Association. I
25 assume this is another case?

1 MR. MANOS: Your Honor, that is a case that is
2 currently active in Charleston County. Mr. Lucey is
3 plaintiff's counsel. There has been no adjudication of
4 anything in that case and we think that is completely
5 irrelevant, confusing, and ---

6 THE COURT: Well, I am just trying to figure how it
7 would even come up.

8 MR. HASELDEN: So are we.

9 THE COURT: So is that a non issue as well?

10 MR. HAYES: No, Your Honor. We believe it has -- it
11 goes to the Unfair Deceptive Trade Practices Act, has an
12 impact on the public interest, and it shows the same kind
13 of actions have occurred in the past making it likely the
14 actions will continue, Addison and Terrance. And it is
15 showing the company procedures create a potential for
16 repetition of the unfair and deceptive acts.

17 MR. MANOS: Your Honor, of course going with what I
18 started with, that is an active lawsuit. No jury, no
19 judge has said Wieland is liable of anything. There ---

20 THE COURT: Well, do you plan to say this is a
21 pending case and that that is ---

22 MR. HAYES: We are trying to show examples the day
23 this -- that John Wieland has had this happen repeatedly
24 in other neighborhoods, Your Honor. And it is with the
25 Madison.

1 And in that regard, you know, the South Carolina
2 Fair Trade Practices Act doesn't say it has to be -- that
3 these practices have to be based off of somebody who has
4 gone through trial and is found guilty or had a judgment
5 against them. It is evidence ---

6 THE COURT: Yeah, they are going to have to make a
7 contemporaneous objection. But I am real iffy about that
8 one too. Yeah.

9 Motion to exclude any testified evidence or argument
10 addressing any transaction involving Wieland, Wheelock --
11 well, Wheelock is a nonissue.

12 Residential partners and/or Palty Group. Who are
13 all of these other people?

14 MR. HASELDEN: Your Honor, Residential Partners was
15 a subsidiary of Wheelock and ---

16 THE COURT: This deals with a bifurcation, so it is
17 moot; isn't it?

18 MR. HASELDEN: That is correct, Your Honor.

19 THE COURT: All right. Motion to exclude any
20 testimony or evidence proffered by Bert Snyder and/or
21 Palmetto Exterminators. Who is Bert Snyder? I assume he
22 owns Palmetto Exterminators?

23 MR. HAYES: Your Honor.

24 THE COURT: Yes, sir.

25 MR. HAYES: Bert Snyder owned Palmetto Exterminator.

1 Palmetto Exterminators had been taking care of Waverly
2 since it started. And November of last year they stated
3 that they would not -- would not give a bond to our
4 property anymore because of the rampant construction
5 defects and they therefore could no longer -- they
6 said -- I mean they basically said we feel sorry for you
7 but we can't continue to give you a bond because of all
8 of the construction defects that we have noticed over the
9 years and can't prevent the moisture.

10 So my clients can't -- can't get a bond on -- a
11 termite bond on any other homes right now.

12 THE COURT: Are you saying that is an element of
13 damages?

14 MR. HAYES: No, Your Honor; but it is ---

15 THE COURT: So what is it going to show? He can
16 say -- he is not an expert. It is just like my termite
17 man might come out and say your fascia is peeling. He is
18 not qualified to say if my fascia is peeling because he
19 doesn't know. It might be the paint peeling. He is not
20 a contractor. Most of them are not. They go based on
21 what they think.

22 Now he is qualified to tell me how much moisture is
23 up under my house. He is qualified to tell me if my
24 gutters are full. But beyond that he really isn't
25 qualified to say much more. Although they do attempt to

1 do that. And that is an attempt to insulate themselves
2 from liability in the event the termites come and
3 demolish your house. But that doesn't mean they are
4 qualified to say what they think is wrong.

5 MR. HAYES: But they are qualified to say that there
6 was moisture under the house, correct, Your Honor?

7 THE COURT: Yeah, they are qualified to do that.
8 They are qualified to say what the moisture levels were.

9 MR. HAYES: Okay.

10 THE COURT: And they to some extent if you can
11 establish the appropriate foundation can say where they
12 think the moisture is coming from and what the source of
13 it is.

14 MR. HAYES: Right.

15 THE COURT: But you are going to have to establish
16 that they have the foundational knowledge to do that.
17 Otherwise the only thing they are qualified to do is with
18 that instrument to measure how much moisture was under
19 the house, that these are -- that this is the acceptable
20 range of what moisture is for this area and this is what
21 it was or wasn't on this particular case.

22 MR. HAYES: Yes, ma'am.

23 THE COURT: So unless you can establish that they
24 have the requisite knowledge to establish how it
25 happened, they can't testify to that. But they can

1 testify as to what the moisture levels were. And I think
2 anybody that lives in Charleston knows about moisture
3 levels and termites.

4 MR. HAYES: Right.

5 THE COURT: And anybody that doesn't has learned the
6 hard way.

7 MR. HAYES: And, Your Honor, also has used it
8 stating that it is something that he regularly uses in
9 his -- in his formation of opinions.

10 THE COURT: Yeah, I would imagine you will establish
11 foundationally ---

12 MR. HAYES: Yes, Your Honor.

13 THE COURT: --- the foundation for that knowledge.
14 But in advance of hearing their testimony I have no way
15 of knowing whether they are qualified.

16 But you would have to establish that he -- first of
17 all, that it doesn't require specialized knowledge and
18 that it is something that he would be able in the scope
19 of his employment to rationally perceive. As an
20 exterminator he can testify as to moisture levels.

21 MR. HAYES: Yes, ma'am.

22 THE COURT: That is one of the things they do. I
23 mean that is why you employ them.

24 MR. HAYES: Right.

25 THE COURT: But in terms of him saying the fascia on

1 the house is defective ---

2 MR. HAYES: Understood, Your Honor.

3 THE COURT: That is a little stretch. Although they
4 try to do that. They will go around your house and try
5 to -- because of course their job is they are trying to
6 minimize any liability they might have too in the event
7 that your house -- like you get up one day and walk --
8 you know, your foot goes through the floor and they
9 didn't catch it.

10 MR. HAYES: Yes, Your Honor.

11 THE COURT: Yes, sir?

12 MR. MANOS: Your Honor, if I may, the problem we had
13 with Mr. Snyder's testified in addition to many of the
14 factors you just brought up is that we just received
15 notice that he would be called by the plaintiff on
16 January 9th of 2017; less than a week ago. Didn't have a
17 chance to depose him. There are various ---

18 THE COURT: Well, the remedy is to give you time to
19 depose him. It is not to exclude him. So if you want to
20 depose him you need to let them know and y'all need to
21 work out a time to do it. And you need to get with Mr.
22 Snyder to see what his schedule is. I can't imagine it
23 would be a particularly long deposition. It is very
24 limited in scope.

25 Yes, sir?

1 MR. HAYES: We will work with him. We will work
2 with him on setting it up, Your Honor.

3 THE COURT: So why don't y'all after today figure
4 out like when Mr. Snyder might be available and when
5 y'all can depose him. And then keep me posted.

6 Let's see. Number 12, motion to -- now, and then
7 anything beyond what we have already -- well, nothing
8 that we talk about today relieves you of your
9 responsibility to make a contemporaneous objection
10 because none of these rulings or observations are final.

11 Any site inspection -- okay, who is Myles Glick; and
12 what did he do?

13 MR. HAYES: Your Honor, Myles Glick is our -- is an
14 architect. And he is he our expert. And one of our
15 questions in regards to his investigation and opinions in
16 regards to construction defects out at Waverly.

17 And I believe, Your Honor, their objection is he
18 went out there and there was a window that had some
19 leaking. We previously produced this window before
20 Hurricane Matthew to the defendants. And then after
21 Hurricane Matthew I guess along about January 6 he came
22 out there and looked at it. He took some photos and we
23 produced it and gave it to him.

24 THE COURT: How much time do y'all need to explore
25 that? It says defendants will not have a fair

1 opportunity to examine, address, or conduct discovery
2 regarding any proffered testimony or other evidence
3 addressing the issues raised in this documentation prior
4 to trial which you say was provided to you on January 6
5 of 2017.

6 MR. MANOS: I would say probably at least an hour
7 and a half, Your Honor. Because Mr. Glick did more than
8 just go out and look at a window, not invite any of the
9 defendant experts to watch him do it. He actually took
10 another test cut and opened up caulking. And they
11 actually did it twice. They sent him back out there on
12 the 14th. And we got a video last night of him tearing
13 off some pickets in the railing.

14 THE COURT: So how much time do you need to
15 investigate?

16 MR. MANOS: About probably two hours to talk to Mr.
17 Glick if I could, Your Honor.

18 THE COURT: So you are saying do you need to talk to
19 him or do you need to depose him?

20 MR. MANOS: Well, I am sure he is not going to talk
21 to me -- I would rather depose him. I would rather him
22 be under oath.

23 THE COURT: Can y'all work that out?

24 MR. HAYES: Yes, ma'am, we will work that out.

25 MR. HASELDEN: Your Honor?

1 THE COURT: Yes, sir.

2 MR. HASELDEN: Can I raise one problem that
3 presents?

4 THE COURT: Yeah, I am listening.

5 MR. HASELDEN: Mr. Glick traditionally says you have
6 to pay me \$3,000 a day; it doesn't matter if you depose
7 me for an hour or the entire day. I don't think we
8 should have to pay that under the circumstances.

9 THE COURT: You want to depose him?

10 MR. HASELDEN: For an entire day? I think Your
11 Honor ---

12 THE COURT: I don't know. Y'all need to work it out
13 with him. But I mean if -- where is he coming from?

14 MR. HASELDEN: He is here.

15 THE COURT: So if it is not going to take a whole
16 day -- he doesn't prorate what he charges?

17 MR. HAYES: Yes, Your Honor, we will work with Mr.
18 Glick ---

19 THE COURT: I can't imagine that somebody would tell
20 you I am charging you \$3,000 and I am only going to talk
21 to you for an hour.

22 MR. HASELDEN: Your Honor, I will sit back down.

23 THE COURT: That would create a horrible problem on
24 cross-examination. You say didn't you charge me three
25 thousand -- I mean how much do you charge. I mean that

1 would look horrible. Well, I charge -- well, you know,
2 some experts are just that unapologetic; well, yes, that
3 is what I charge.

4 But I would imagine that that -- that would just not
5 look very well. So I would imagine Mr. Hayes would work
6 with you on that. Because that just seems a little
7 excessive, you know, for an hour and a half of his time.
8 I think y'all should be able to work that out.

9 Okay. So how much time do y'all -- that is the last
10 one as I can tell. How much time -- well, I guess a
11 better way to couch this is how long is it going to take
12 you all to arrange these depositions? Because you have
13 got two by my count. One of Mr. Snyder and one of Mr.
14 Glick. Did I miss anybody else's that needed to be
15 taken?

16 MR. HAYES: Your Honor, I feel fairly confident -- I
17 have no control over Mr. Snyder, but I will give him a
18 call. But if -- and I don't know what Your Honor's plans
19 are. But if you ---

20 THE COURT: I haven't made any plans until I get
21 done with all of this.

22 MR. HAYES: Okay. Well, what I was saying is I
23 think it would only take us very shortly. We can do it
24 after hours. We could do it early in the morning.

25 THE COURT: Well, you have got to get it done and

1 you have got to give the court reporter time to do your
2 transcript.

3 MR. HAYES: Right. I mean they can usually turn
4 around a transcript in one day.

5 THE COURT: Are you telling me y'all can do these
6 depositions this evening; is that what you are telling
7 me?

8 MR. HAYES: I can probably do them tomorrow, Your
9 Honor. I can try to get Mr. Glick this evening.

10 THE COURT: But you are assuming they don't have a
11 life.

12 MR. HAYES: That's right.

13 THE COURT: And no responsibilities.

14 MR. HAYES: I am just ---

15 THE COURT: They don't -- you know. I think
16 tomorrow is optimistic, frankly. Maybe? What do y'all
17 think?

18 MR. HAYES: We can probably get it by tomorrow or
19 Thursday. I don't see it pushing back. I don't have any
20 control over Mr. Snyder, but I will give him a call. I
21 think he would probably make himself available.

22 THE COURT: Okay. So that is what y'all need to do.
23 I need you to deter- -- get with these witnesses and see
24 when they are available and see when they can be deposed.
25 Preferably tomorrow sometime. At the latest on Thursday.

1 Is there anything else we need to take up pre-trial that
2 we haven't already covered? Are there any other
3 outstanding motions that we haven't already heard
4 argument on or dealt with? From Mr. Hayes?

5 MR. HAYES: No, Your Honor.

6 THE COURT: From Mr. Haselden?

7 MR. HASELDEN: No, Your Honor.

8 THE COURT: Mr. Cole?

9 MR. COLE: No, Your Honor.

10 THE COURT: Mr. Nistad or Ms. Fragale?

11 MR. NISTAD: No, Your Honor.

12 MS. FRAGALE? No, Your Honor.

13 THE COURT: Did I leave anybody out? Alrighty. I
14 am taking the motions for summary judgment and the
15 motions alternatively to bifurcate under advisement.

16 And I am not ready to make a decision about
17 selecting a jury until I decide those motions. Because
18 that is going to determine how we move forward.

19 And it is now, what, 3:35. What I think is best --
20 oh, tomorrow is Wednesday. That is what happens when you
21 lose a day. Why don't we take a little recess and y'all
22 try to get in touch with Mr. Snyder and Mr. Glick and see
23 what we can find out about scheduling these depositions.
24 And then we will move from there. We will be at ease for
25 a few moments.

1 (WHEREUPON, break was had 1/17/17, 3:36 p.m.)

2 (WHEREUPON, resume 1/17/17, 3:52 p.m.)

3 THE COURT: And I have already done orders on Ms.
4 Shoun's motion and we have already given it to Ms.
5 Caroline to get filed. So if you give it a couple of
6 days you can get it off line.

7 MS. SHOUN: Thank you, Your Honor.

8 THE COURT: You are welcome.

9 Okay, so you are going to do Mr. Glick?

10 MR. HAYES: Three o'clock, Your Honor.

11 THE COURT: Three o'clock tomorrow. And then you
12 are going to do Mr. Snyder at what time?

13 MR. HAYES: Noon if that is possible.

14 THE COURT: At noon.

15 MR. MANOS: Your Honor, I do have a question about
16 Mr. Snyder.

17 THE COURT: Sure.

18 MR. MANOS: And I don't have it in front of me. So
19 if plaintiff's counsel can refresh my recollection. Did
20 y'all name him as a fact witness or an expert witness?

21 MR. HAYES: I believe he was a --- I can't
22 remember ---

23 THE COURT: Well, it says here that on January 9th,
24 2017, plaintiff served plaintiffs 27 supplemental
25 discovery response to all which for the first time

1 identified as a witness Bert I. Synder and included
2 correspondence. From the way I read this paragraph he is
3 a fact witness.

4 Is that how y'all intended to call him?

5 MR. HAYES: Well, I was just going -- and, you know,
6 I guess that depends on -- I was going to just call and
7 ask them what they do. And, you know, as you said -- you
8 know, basically say why did y'all cancel the termite
9 bond.

10 If he says based on moisture readings and the fact
11 that we didn't like moisture readings then that is what
12 his testimony will be.

13 THE COURT: That is what he does for a living.

14 MR. HAYES: What he does for a living.

15 MR. MANOS: I mean if he is actually is canceling
16 something I need to ask him questions. That is fine.
17 What I don't want to get into obviously unless I have an
18 opportunity to name a counter expert is if he is going to
19 give opinion testimony.

20 THE COURT: Well, I guess y'all have to figure that
21 out when you -- when the ---

22 MR. MANOS: Well, I just wanted to ---

23 THE COURT: I think he can opine within his field.
24 He doesn't have to be an expert to do that. The Supreme
25 Court has been very clear that when you do something for

1 a living that you can provide opinions about that and you
2 don't have to be an expert to do that as long as it is
3 based on your rational perception and it is what you do
4 every day.

5 MR. MANOS: And, Your Honor, I just want to preserve
6 our right to the extent you allow me to ---

7 THE COURT: If you need --- well, I am never going
8 to preclude you from trying your case. If you need a
9 counter -- a counter witness then you just need to give
10 me a heads up so that I can give you the time to do that.
11 You only get to do this one time.

12 MR. MANOS: And I -- thank you. I appreciate that.
13 I will certainly know that after talking to him tomorrow.

14 THE COURT: Okay. At one o'clock or noon?

15 MR. HAYES: Noon if that is okay with everybody
16 else.

17 THE COURT: So you are doing Snyder at noon and
18 Glick at 3:00. And so what time do y'all think y'all are
19 going to be done with all of this?

20 MR. MANOS: 5:30 at the latest.

21 MR. HAYES: 5:00, 5:30.

22 THE COURT: So okay. Here is my thinking, and
23 y'all -- I am just trying to think through. Just trying
24 to anticipate for myself how long it is going to take me
25 to research this stuff, how long it is going to take me

1 to read it. And I think it is ambitious to think I will
2 get that done by 5:00 when it is about 3:58.

3 I would like to think I am Super Woman, but that
4 is -- I dispelled all myths of that a long time ago. I
5 am only human.

6 So it is going to take me some time tomorrow to read
7 through all of this stuff. I was trying to think -- and
8 if y'all are going to start at noon that really leaves us
9 no time to do anything tomorrow. And I need y'all to
10 devote time to doing that.

11 Then Thursday I have a meeting in Greenville that
12 starts at 2:00 which means I am going to have to leave
13 here -- depending on weather and all that stuff. I
14 always give myself an hour window. So that kind of kills
15 the morning basically. And then Friday we have a
16 mandatory seminar at the bar meeting. So that of course
17 eliminates Friday.

18 So my thought process is to give time to deal with
19 the motions, give you all time to deal with your
20 exhibits, do the deposition, get your transcripts back,
21 and then pick a jury on Monday morning.

22 Is there any exception to that from the plaintiff?

23 MR. HAYES: No, Your Honor, we are fine with that.

24 THE COURT: From the defense, Mr. Haselden?

25 MR. HASELDEN: No, Your Honor.

1 THE COURT: From the defense, Mr. Nistad?

2 MR. NISTAD: No, Your Honor.

3 THE COURT: Mr. -- Ms. Fragale. I'm sorry. About
4 to call you Mister.

5 MS. FRAGALE: No, Your Honor.

6 THE COURT: People do it to me all the time. And I
7 apologize.

8 And Mr. Cole?

9 MR. COLE: No, Your Honor.

10 THE COURT: And in the meantime I would suggest that
11 y'all really think about whether you want these
12 counterclaims to go forward until they are really ripe.

13 And see if y'all can't work out some of this. But I
14 think y'all are past that point, so it really -- I don't
15 know that it really matters at this point.

16 So what we will do is in the meantime if Mr. Manos
17 y'all decide y'all need a counter witness to Mr. Snyder
18 you need to let me know. You need to let Mr. Hayes know
19 first. And you need to let me know because if that is
20 going to affect our scheduling. Which I don't anticipate
21 it will.

22 But you will need to get with them so that they can
23 know who that person is in the event they want to depose
24 him or her.

25 MR. MANOS: Certainly, Your Honor.

1 THE COURT: But other than that I don't see you all
2 needing any additional witnesses. I mean having to
3 procure any additional witnesses.

4 Can you think of any other situation that might come
5 up that might necessitate that?

6 MR. MANOS: Not that I am aware of, Your Honor.

7 THE COURT: Okay. And Mr. Hayes, can you think of
8 any other circumstances that that might come up ---

9 MR. HAYES: No, Your Honor.

10 THE COURT: --- where y'all would need to -- okay.

11 All right. So what we will do then is after y'all
12 have done the depositions Mr. Manos will let me know
13 whether he is going to need somebody else, and then if I
14 have to do another conference call we will do that.
15 Because I can do that from the road if I need to.

16 Okay. All right, guys. Y'all have a great
17 afternoon. And again -- I don't know -- my court
18 reporter -- I don't want to tell you who my court
19 reporter is because that is always subject to change. We
20 have a shortage and things get switched around.

21 But I am going to let you have a decision probably
22 before -- I don't know. I don't want to make any
23 promises.

24 MR. HAYES: And that was really all I was trying ---

25 THE COURT: Yeah.

1 MR. HAYES: --- to get clarification is our firm ---

2 THE COURT: I mean if I come to some decision
3 tomorrow afternoon I am going to call y'all as soon as I
4 can and have a court reporter here with me. But if not I
5 don't want to make you any promises.

6 MR. HAYES: Right. And I am not trying ---

7 THE COURT: I don't want to have to fall on my
8 sword ---

9 MR. HAYES: Right.

10 THE COURT: --- and say I, you know, thought I did
11 but I didn't.

12 MR. HAYES: Yeah. We just -- not that it matters to
13 the court, but we have our annual ---

14 THE COURT: Oh, no ---

15 MR. HAYES: --- firm retreats this weekend. And I
16 just need to know either can I go to my retreat or do I
17 need to be prepared for trial.

18 THE COURT: Exactly. And I think that -- I will do
19 my best. I am going to be working on it this afternoon
20 and tomorrow. And as soon as I have a decision I will
21 let you know.

22 Because it really isn't fair to you to have to
23 prepare for a trial if you don't need to. So I will do
24 my best to try to come to some conclusion or consensus
25 with myself by tomorrow.