

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Diane Goodstein, Circuit Court Judge

Case No. 2012-CP-10-7594
Appellate Case No. 2018-001230

RECEIVED

AUG 15 2019

SC Court of Appeals

One Belle Hall Property Owners Association, Inc., and
Marvin T. Meek and Francis E. Hill, individually and
on behalf of all others similarly situated,.....

Respondents,

v.

Builders FirstSource-Southeast Group, LLC, ...

Appellant.

RECORD ON APPEAL
VOLUME I

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Marvin T. Meek and Francis E. Hill,
Individually and on behalf of all others
similarly situated

**RECORD ON APPEAL
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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and MARVIN T.)
MEEK and FRANCIS E. HILL, individually,)
and on behalf of all others similarly situated,)

Plaintiffs,)

vs.)

Trammell Crow Residential Company; TCR)
NC Construction I, LP; Belle Hall Direct 101,)
LP; TCR RLD Condominiums, Inc.; CS 101)
Belle Hall, LP; TCR Southeast, Inc.; TCR)
Carolina Properties, Inc.; TCR SE)
Construction, Inc.; TCR SE Construction II,)
Inc.; TCR Construction, a division of)
Trammell Crow Residential; TCR)
Development, a division of Trammell Crow)
Residential; Trammell Crow Residential)
Carolina, a division of Trammell Crow)
Residential; and Tauer Consulting Company,)
Inc., a division of Trammell Crow Residential,)
each individually, and collectively d/b/a)
"Trammell Crow Residential," "Trammell)
Crow" or "TCR"; Halter Properties; LLC; and)
Halter Realty Group, LLC, each individually,)
and collectively d/b/a "Halter Companies";)
ABG Caulking & Waterproofing of)
Morristown, Inc; Advanced Building Products)
& Services, LLC; BASF Corporation; Billy)
Gray d/b/a United Builders, LLC; Budget)
Mechanical Plumbing, Inc.; Builders First)
Source - Southeast Group, LLC; Builders)
Services Group, Inc., individually, and d/b/a)
Gale Contractor Services, Inc.; Century Fire)
Protection, LLC; Cline Design Associates,)
P.A. and Gary D. Cline; Coastal Lumber &)
Framing, LLC; Dodson Brothers)
Exterminating Co., Inc. a/k/a Dodson Pest)
Control; First Exteriors, LLC; Flooring)
Services, Inc.; General Heating & Air)
Conditioning Company of Greenville, Inc.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-7594

**ORDER OF DISMISSAL WITH
PREJUDICE AS TO SETTLING
DEFENDANTS**

2016 APR 19 PM 2:15
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Defendants.

Page 2 of 16



Exteriors, LLC; Flooring Services, Inc.; General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; IES Residential f/k/a Houston Stafford Electrical Contractors, LP; J. Correa Electrical Company, LLC; Jimmy Warner, individually, and d/b/a Warner Heating and Air; KMAC of the Carolinas, Inc.; P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; RS General Contracting, LLC f/k/a/ RS Custom Homes, LLC; Southern Specialties, Inc.; and Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited (hereinafter collectively referred to as "Settling Defendants"), pursuant to Rule 41(a)(2), SCRCF.

WHEREAS, Plaintiffs have settled with the undersigned Settling Defendants for good, valuable, fair, and adequate consideration;

IT IS HEREBY ORDERED that Plaintiffs' claims be dismissed and ended with prejudice as to Settling Defendants only;

IT IS FURTHER ORDERED that all Cross-Claims by and against Settling Defendants are also dismissed with prejudice, except for TCR NC Construction I, LP and Belle Hall Direct 101, LP's claims against Defendants, Builders First Source – Southeast Group, LLC and TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc., which have been assigned to Plaintiffs;

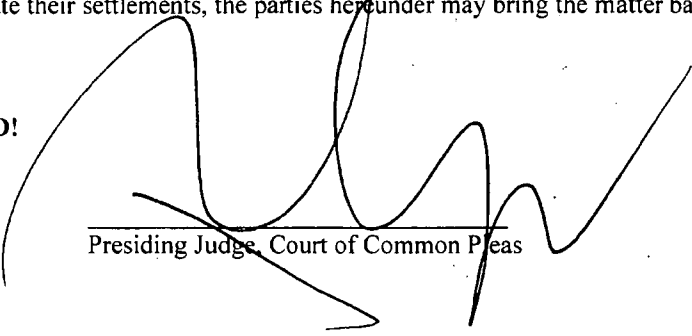
IT IS FURTHER ORDERED that as these settlements were negotiated voluntarily and in good faith, and in consideration of this good faith, the settlements were negotiated contributions to the global damages set forth by Plaintiffs, and as the record is devoid of any cross-claims and/or devoid of any grounds for recovery by any other defendants or at fault party (and the deadline for the amendment of pleadings has long past), this order of dismissal, in conjunction



with the release being given by Plaintiffs and Settling Defendants shall bar any further action of any kind by any non-settling party against the Settling Defendants being dismissed hereunder relating in any way to the One Belle Hall condominiums; and

IT IS FURTHER ORDERED that if there is any reason the Plaintiffs and Settling Defendants fail to consummate their settlements, the parties hereunder may bring the matter back to this Court's attention.

IT IS SO ORDERED!



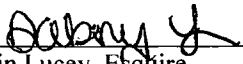
Presiding Judge, Court of Common Pleas

Charleston, South Carolina
March 4/18/2016

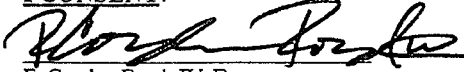
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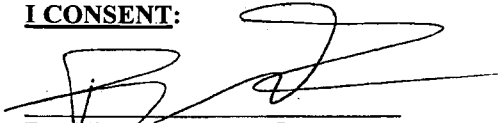
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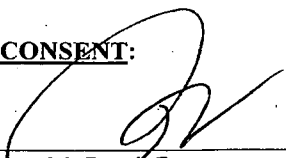
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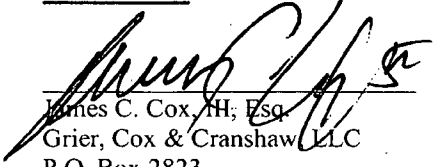
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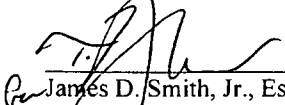
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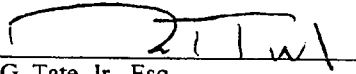
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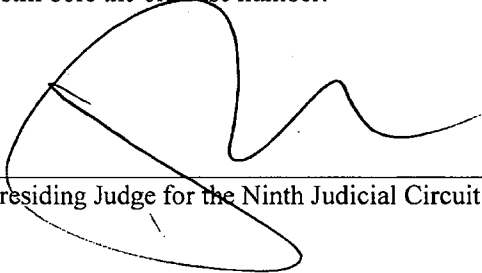
WHEREAS, the severance of Plaintiffs' claims against TAMKO aids judicial economy by permitting Plaintiffs and BFS to proceed to trial without further delay and, also, will not result in any prejudice given Plaintiffs' claims against TAMKO are already stayed pending the appeal; and thus,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Plaintiffs' claims against TAMKO are severed from this action and all claims against TAMKO will be tried, pending the result of the appeal, in a separate proceeding.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs' claims against BFS will proceed separately to trial at a date to be set by this Court.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that should the Clerk of Court assign a new case number to the severed claims for administrative purposes, the severed claims shall still receive trial schedule priority as if it still bore the old case number.

AND IT IS SO ORDERED.



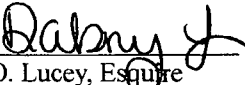
Presiding Judge for the Ninth Judicial Circuit

Charleston, South Carolina

7/18, 2016

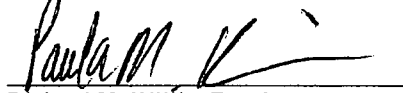
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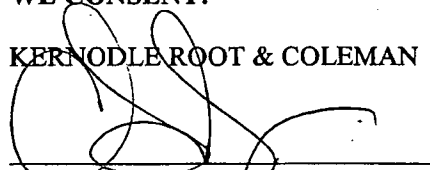
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WE CONSENT:

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Attorneys for Builders FirstSource

Southeast Group, LLC

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-07594

One Belle Hall Property Owners Association, Inc. and

Marvin T. Meeks and Francis E. Hill, individually, and
on behalf of all others similarly situated
PLAINTIFF(S)

Builders First Source- Southeast Group-LLC

DEFENDANT(S)

Submitted by: Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: "We the jury find for the Plaintiffs on the following causes of action: Strick Liability and Breach of Warranty. And we award the Plaintiffs Two Million One Hundred Sixty-Three Thousand Four Hundred Ninety-Three Dollars (\$2,163,493.00) in actual and compensatory damages." The forgoing was the verdict.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
One Belle Hall Property Owners Association, Inc. and Marvin T. Meeks and Francis E. Hill, individually, and on behalf of all others similarly situated	Builders First Source- Southeast Group-LLC	\$2,163,493.00
		\$
		\$

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

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.

Deane L. Goo
Circuit Court Judge

2112
Judge Code

9-1-2016
Date *none pro
tune*

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:

Justin Lucey
ATTORNEY(S) FOR THE PLAINTIFF(S)

Catherine Dyer
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Joyce Rueger

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-7594

ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and MARVIN T.)
MEEK and FRANCIS E. HILL, individually,)
and on behalf of all others similarly situated,)

Plaintiffs,)

vs.)

Builders First Source – Southeast Group,)
LLC;)

Defendant.)

VERDICT FORM

We the jury find for the Plaintiffs on the following causes of action:

NO Negligence
YES Strict Liability
YES Breach of Warranty

And we award the Plaintiffs Two Million One Hundred Sixty-Three Thousand
(\$2,163,493) in actual and compensatory damages. Four Hundred Ninety-Three

OR

_____ We the jury find for the Defendant.

Natalie D. Wilson

Presiding Juror

Date: Sept. 01, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ONE BELLE HALL PROPERTY OWNERS
ASSOCIATION, INC. and MARVIN T.
MEEK and FRANCIS E. HILL, individually,
and on behalf of all others similarly situated,

Plaintiffs,

vs.

Builders FirstSource – Southeast Group, LLC;

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2012-CP-10-7594

**ORDER DENYING DEFENDANT
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC'S
SEPTEMBER 8, 2016 MOTION**

FILED
2017 NOV 16 PM 3:16
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant, Builders FirstSource-Southeast Group, LLC's, ("BFS"), "Notice of Motion and Motion to Compel and Motion for Determination of Setoff", filed September 8, 2016 (hereinafter "Motion") was heard by the Court at two separate hearings which occurred on November 18, 2016 and April 20, 2017.

Having reviewed the submissions of the parties and heard oral arguments, this Court finds BFS's Motion is procedurally precluded and substantively unsupported because 1) BFS never moved for a reconsideration, alteration or amendment of the Final Order entered by the Court on September 22, 2016, and this Court no longer has jurisdiction of this case; 2) BFS is not entitled to a statutory mandated setoff on the express warranty verdict, which moots other setoff issues under the two-issue rule; 3) BFS has already received a reduction in damages as contemplated both by the Act and in equity and is therefore not entitled to a double setoff; 4) BFS did not move for equitable setoff and, based on fair nature of the proceedings, BFS is not entitled to an equitable remedy; 5) BFS cannot carry its burden of showing that prior settlements were for the same cause of action and injury; 6) Plaintiffs' prior settlements were for different causes of action and injuries than those awarded by the jury; 7) BFS contractually waived its right to a setoff and, in fact,

assumed sole responsibility for damages awarded; and 8) the case was tried by the consent of the parties as a window only case so the damages are clearly divisible and there is nothing to setoff. Thus, BFS's Motion is DENIED.

BACKGROUND

This case was tried to a jury for four days between August 29 and September 1, 2016. The relevant facts for the Court's purposes are these:

1. During trial, Plaintiffs presented evidence that BFS provided an express warranty that the windows they supplied to One Belle Hall were a "quality" product and were "free from defect," and provided other contractual assurances and obligations as to the performance of the windows.
2. On September 1, 2016, the jury returned a general verdict in favor of Plaintiffs in the amount of \$2,163,493 on both Plaintiffs' Breach of Warranty and Strict Liability causes of action.
3. Before excusing the jury, the Court asked the Parties whether there was any matters that needed to be taken up before the jury was excused; both parties answered in the negative. (Tr. Trans 744:13-22).
4. Following the jury being excused, BFS made a Motion for Judgment Notwithstanding the Verdict. (Tr. Trans. 748:2-5). The Court denied the Motion. (Tr. Trans. 748:6-12). BFS presented no other post-trial motions at the conclusion of trial, nor did BFS request leave of Court to file post-trial motions.

5. At the conclusion of the arguments, the Court and counsel discussed that as the jury had found against the Plaintiffs on the negligence cause of action, there would not be a need to consider setoff.
6. On September 8, 2016, BFS filed a Notice of Motion and Motion to Compel and Motion for Determination of Setoff wherein it requested the Court “to compel the production of various releases or covenants not to execute granted by Plaintiff.” (BFS’s Motion, Sep. 8, 2016, at 2). Notwithstanding the title of the motion, the substance of the motion did not request a setoff; rather, BFS informed the Court that *following* the production of the requested documents, “BFS will move to seek a determination by the Court of the amount of setoff to be taken against the judgment awarded by the jury.” (*Id.*)
7. As evidenced by the letter transmitting the Sept. 8, 2016 Motion, a courtesy copy of the Motion was not transmitted to the undersigned trial Judge.
8. On September 22, 2016, this Court issued a Form 4 Order signed by the undersigned ending the case and entering judgment against BFS in the same amount the jury generally awarded (\$2,163,493) on Plaintiffs’ Breach of Warranty and Strict Liability claims. The Form 4 Order indicated by its terms that it was the *Final Order* as it indicated “This order ends the case.” No Rule 59(e) motion was subsequently filed after the Form 4 Order was issued.
9. This Court scheduled oral arguments on the Motion for November 18, 2016.

10. On November 18, 2016, the day of the hearing, BFS served its "Memorandum in Support of its Motion to Compel Production of Settlement Agreements and Motion for Setoff."
 11. The forthcoming motion for setoff referenced in the Motion to Compel has not been filed.
 12. This Court again heard oral arguments on the Motion on April 20, 2017. BFS's post-trial counsel argued that they were statutorily entitled to setoff. Plaintiffs reiterated their position that BFS was not entitled to setoff in any form.
 13. On April 20, 2017, this Court orally ordered Plaintiffs to produce the Settlement Agreements, regardless of the eventual ruling on the Motion, so that there would be an adequate record. Plaintiffs complied shortly thereafter.
 14. Although Defendant has possessed the settlement agreements for some time, the indicated subsequent setoff motion has not been filed and no further briefing has been received from the Defendant as to its entitlement to a setoff.
- I. BFS's Motion is Procedurally Precluded Because This Court Filed A Final Order Ending the Case and BFS Did Not Move to Alter, Amend or Reconsider that Order**

After the jury was excused, this Court considered the applicability of setoff. For the substantive reasons discussed below, this Court eventually entered a Form 4 Order enrolling the full verdict of the jury as judgment in this case and ending the matter. As BFS never filed a motion

to alter, amend or reconsider this Court's Final Order ending this case, this Court has lost jurisdiction of this case.¹

A. This Court's Form 4 Order Ended the Case

An Order that indicates that no further action is contemplated is a Final Order that ends the case. *Cheap-O's Truck Stop v. Cloyd*, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002) (A Form 4 Order where a diagonal line was penned through the area for additional writing by the trial judge indicated no further action was contemplated and was a final order ending the case.).

This Court's Form 4 Order, issued on September 22, 2016, was the final order ending the case and enrolling the jury's verdict.² The Form 4 Order expressly recites "This order ends the case"—an even clearer indication of finality than the Form 4 Order considered by the court in the *Cheap-O's Truck Stop* decision. This Court's judgment enrolling the jury verdict in favor of the Plaintiffs is the Final Order in this matter.

B. BFS Never Requested This Court Alter, Amend, or Reconsider its Order

BFS had ten days from receipt of the September 22, 2016 Order to request this Court alter, amend, or reconsider its judgment. SCRCP, Rule 59(e) ("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."). Notice of entry of the Form 4 Order was served by the Clerk of Court on all Counsel of Record on September 27, 2016. BFS never filed a Rule 59(e) motion requesting this Court alter, amend or reconsider its September 22, 2016 Form 4 Order ending this matter. This Court has lost jurisdiction

¹ While this analysis may or may not be different if BFS was entitled to a statutorily mandated verdict reduction, the Court need not reach this issue since the breach of express warranty verdict takes this verdict out of the ambit of the joint tortfeasor statute. *See infra*.

² This Court's Form 4 Order was entered *nunc pro tunc*. The sole purpose of *nunc pro tunc* is "to place in the record evidence of judicial action that has actually taken place." *Ex parte Strom*, 343 S.C. 527, 539 S.E.2d 699 (2000). Here, the application of *nunc pro tunc* has no effect on BFS's obligation to file a motion to alter, amend or reconsider judgment within ten days of written notice of entry of judgment.

over this case. *Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 432 (Ct. App. 2004) (“The established case law is that the trial judge loses jurisdiction over a case when the time to file post-trial motions has expired.”).³

II. Breach of Express Warranty Sounds in Contract and Cannot Be Setoff Under the Joint Tortfeasor Statute

The jury’s general verdict on Breach of Warranty includes a general verdict on breach of express warranty and breach of implied warranty. The language of the South Carolina Contribution Among Tortfeasors Act expressly limits the Act’s applicability to “two or more persons liable *in tort* for the same injury.” S.C. Code Ann. § 15-38-50 (emphasis added).⁴ Because breach of express warranty sounds in contract,⁵ it is not subject to the joint *tortfeasor* setoff statute. *Atkinson v. Orkin Exterminating Co.*, 97-CP-10-775 (S.C. Ct. Com. Pl. June 7, 2007) (holding the defendant was not entitled to setoff on an action sounding in contract) *aff’d*, 361 S.C. 156, 604 S.E.2d 385 (2004) (finding the defendant was not entitled to a setoff because the case involved duties arising out of two independent contracts); *See also Hartford Ins. Co. of Midwest v. Phillip Ins. Agency Inc.*, No. CIV06CV00043-REB-MEH, 2007 WL 601974, at *2 (D. Colo. Feb. 22, 2007) (a party found liable for breach of contract is not a joint tortfeasor); *Sterbenz v. Anderson*, No. 8:11-CV-1159-T-33TBM, 2013 WL 1278160, at *7–8 (M.D. Fla. Mar. 28, 2013) (Florida’s contribution among joint tortfeasors setoff statute does not apply to contract based actions); *Guang Dong Light*

³ Further, the filing of the JNOV motion on September 12, 2016 by new, post-trial counsel, as a successive JNOV motion, is a nullity in the eyes of the law and did not suspend the time for appeal or preserve the jurisdiction of this Court. *Elam v. S.C. Dept. of Trans.*, 361 S.C. 9, 16, 602 S.E.2d 772, 776 (Successive post-trial motions do not stay the time for serving notice of appeal.)

⁴ These terms are clear and should be applied using their literal meanings. *Ellis v. Oliver*, 335 S.C. 106, 110, 515 S.E.2d 268, 270 (Ct. App. 1999) (“Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.”).

⁵ A seller’s express warranty sounds in contract. S.C. Code Ann. § 36-2-313 (1976) (“Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.”); *Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002) (In a products defect case, “[b]reach of warranty is an action affirming the contract.”).

Headgear Factory Co. v. ACI Int'l, Inc., No. 03-4165-JAR, 2008 WL 1924948, at *5 (D. Kan. Apr. 28, 2008) (the one satisfaction (setoff) rule does not apply to claims brought in contract).

Even if one was permitted to look behind the jury verdict, which one cannot do, the jury's express warranty verdict (and the Court's denial of JNOV) is supported by the evidence adduced at trial. At trial, Plaintiffs presented evidence that would allow the jury to determine BFS breached the express warranty it provided in the window purchase contract (Jt. Ex. 44A, para. 4(c)) (BFS expressly warranted and promised that the windows would be "free from defect in material, design and workmanship."). This warranty was transferred to the Plaintiffs both via contract and by operation of law. S.C. Code Ann. § 36-2-318 (A seller's express warranty extends to any natural person who may be expected to use, consume or be affected by the goods and whose persons or property is damaged by breach of the warranty); (Jt. Ex. 214, para. 16(d)) (Terradista sales contract containing an assignment of all warranties). The Court charged the jury with the law of both express and implied warranties.⁶ The jury returned a general verdict awarding damages for Breach of Warranty, which included the contract-based breach of express warranty. Therefore, the jury's general verdict for Breach of Warranty cannot be setoff under the joint tortfeasor statute.

Under the two-issue rule, when there is a general verdict on two or more causes of action and setoff is not applicable to at least one of the causes of action, the total damages stand. *See Gold Kist, Inc. v. C & S Nat'l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985) (under the two-issue rule, when a jury returns a general verdict in a case involving two or more issues, and the verdict is supported as to at least one issue, the verdict stands). Therefore, it is of no moment whether the strict liability or implied warranty verdicts might be subject to set off; it would not

⁶ Neither party objected to any of the jury charges as presented by this Court after the clarification of several charges at Plaintiffs' request.

affect the amount of the written warranty verdict, which is two million one hundred sixty-three thousand four hundred ninety-three dollars and zero cents (\$2,163,493.00).

III. BFS Already Received a Reduction in Damages As Contemplated by the Statute and Common Law

Even if this Court were to agree with BFS's proposition that the general verdict rendered by the jury on Plaintiffs' strict liability and breach of warranty causes of action is subject to setoff either under the Act or at common law, BFS already received the benefit of the pre-trial settlements: first, by virtue of Plaintiffs' reduced claim for damages at trial, and again by the jury's further reduction reflected in the verdict amount. The relief BFS now seeks would result in a *double*, or even *triple*, setoff, which is not contemplated either by the Act or principles of equity.

Our Court of Appeals very recently issued an opinion addressing setoff in the context of a multi-defendant, construction defect case that gives guidance in this arena where there was previously very little, as the lion's share of setoff precedent in South Carolina comes from cases involving medical malpractice and automobile accidents. In *The Oaks at Rivers Edge Property Owners Ass'n, Inc. v. Daniel Island Riverside Developers, LLC*, the plaintiffs filed suit against the developer, general contractor and subcontractors involved in the construction of a thirty-six (36) unit condominium complex alleging a wide range of defects that resulted in widespread water intrusion and damages.⁷ ---S.E. 2d---, No. 2014-002390, 2017 WL 3272138, at *1 (S.C. Ct. App. Aug. 2, 2017). Prior to trial, the plaintiffs settled with a number of defendants, including the window manufacturer, window installer, caulking subcontractor and framer. *Id.* at *2. The remaining defendants proceeded to a bench trial and were found jointly and severally liable for

⁷ Plaintiffs alleged negligence, *inter alia*, against all defendants. See Complaint, *The Oaks at Rivers Edge Property Owners Ass'n, Inc., et. al v. Daniel Island Riverside Developers, LLC, et. al*, C/A No. 2009-CP-08-3916, Dec. 3, 2009, at 10.

negligence, gross negligence, and negligent misrepresentation,⁸ as well separately liable for various other causes of action. The court awarded the plaintiffs \$7,934,704.06 in damages for the cost of repair. *Id.* Thereafter, defendants moved for setoff. *Id.* The trial court denied the motion, and an appeal followed.

Both at the trial court level and on appeal, the defendants argued the evidence presented at trial established the damages were for items that were the responsibility of the defendants who settled before trial, and the trial court's failure to setoff the verdict by the prior settlement amounts resulted in a double recovery for the plaintiffs. *Id.* at 2-3. The plaintiffs countered, arguing principally that the defendants were not so entitled because the plaintiffs removed from their claimed damages those amounts received from the settling defendants, and thus the defendants had already received a reduction in damages as contemplated by the Act. *Id.* at *6.

In reaching its decision to affirm the trial court's denial of the motion for setoff, the Court of Appeals engaged in a comprehensive recitation of relevant setoff precedent, both in relation to common law setoff as well as that encompassed by the Act. *See id.* at 3-4.⁹ Turning to the facts of the case, the Court of Appeals first noted that the trial court's order levying damages against the

⁸ Therein lies a distinction between *The Oaks at Rivers Edge* and this case: unlike the defendants in *The Oaks*, here BFS was *not* found liable by the jury for negligence or gross negligence. In that regard, the plaintiffs in *The Oaks* did not argue that the Act did not apply, as Plaintiffs do here.

⁹ Like our state's supreme court did in *Riley v. Ford Motor Co.*, the Court of Appeals cited with favor the following language from the Illinois Court of Appeals:

A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

The Oaks at Rivers Edge, 2017 WL 3272138, at *4 (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1019 (Ill. App. Ct. 2009)).

non-settling defendants included repairs for damages “independent of those addressed by the settlement[s] [...]” *Id.* at 4. For example, while the settling subcontractors’ defective products and work likely contributed to the need to remove certain portions of exterior cladding at the property, testimony at trial evidenced that the entirety of the brick and stucco, as well as compromised wood sheathing and framing, had to be repaired anyway to remedy water-related deterioration and/or building code violations. *Id.* at 4-5. This discussion highlights the unique task of distinguishing injuries in the context of a construction defect case involving water intrusion and the damages resulting therefrom; more importantly, however, the opinion in *The Oaks at Rivers Edge* removes the notion that such a task is impossible and therefore automatically requires a setoff.

Subsequently, the Court of Appeals zeroed-in on the *self-imposed*, pre-trial reduction in damages claimed by the plaintiffs to reflect those amounts already paid out by the settling subcontractors; for example, the plaintiffs “removed from their claim the repairs necessitated by the damage caused by the window installation.” *The Oaks at Rivers Edge*, 2017 WL 3272138, at *6. Put differently, the plaintiffs recognized that the work of the window manufacturer, window installer, caulking subcontractor and framer contributed to the water intrusion at the property; accordingly, the plaintiffs reduced their cost of repair estimate at trial by \$4,260,497.93, a sum which exceeded the amount paid by the aforementioned subcontractors in pre-trial settlements. *Id.* By virtue of this reduction, the Court of Appeals held that defendants “already received the benefit of the settlements,” rejected the notion that failing to further reduce the verdict would constitute a double recovery for the plaintiffs, and affirmed the trial court’s denial of the motion for setoff. *Id.* In essence, the Court of Appeals refused to grant the defendants a second “bite” at setoff: a reduction in damages, however achieved, satisfies the principles underlying the Act as well as those underlying the common law.

In this case, Plaintiffs' repair cost estimate, totaling \$14,451,023.34, was admitted into evidence and published to the jury. (Ct. Ex. 48). Plaintiffs' reduced the repair estimate by \$9,751,023.00,¹⁰ and presented the jury with a number that was associated with the defective windows alone. Plaintiffs' counsel did not conceal this reduction, or its purpose, from the jury:

Well, you heard from [Watkins] and you heard from him. . .its 12,000 dollars. . .This is in contrast to Gary Moore, plaintiffs' damage estimator. . .[who] got up there and he told you about his experience and he showed you his detailed estimate. Now at the time he prepared that estimate the entire buildings were an issue. . .so it contained lots of things that don't apply to a case just about windows. So what he did was he backed out the components that related to windows into a smaller number. He testified that repairing the windows by themselves [would be] 3.5 million. Repairing the damage associated with the windows [would be] 5 to 5.2 million. And if you took off the cladding work that needs to be done to repair a window because you've got to replace your stucco anyway then it would be reduced down to 4.7 million dollars.

. . .[P]laintiffs ask that you award them the full amount of damages they have put on at trial. They're okay with the reduction for the stucco that has to be replaced anyways. We do understand it's going to be an overlap on the repair job. . .But the full amount of damages even with that portion removed is 4.7 million dollars and that is what the plaintiffs are asking you to award them.

(Tr. Transcr. 91:5-94:12; 97:5-12) (emphasis added). Plaintiffs' expert, Gary Moore, testified that repairing all damages associated with the defective windows would cost approximately \$5,200,000.00. Plaintiffs reduced that number by \$500,000.00 to account for any "overlap on the repair job," and asked the jury to award \$4,700,000.00 in damages. The jury further reduced this number and returned a verdict for \$2,163,493.00. Like the defendants in *The Oaks at Rivers Edge*, BFS received the benefit of the pre-trial settlements when Plaintiffs reduced their claim for damages, and again when the jury reduced it further. These reductions remove any concern of a double recovery for the same injuries;¹¹ rather, any further reduction by this Court would constitute a double setoff for BFS, which is not contemplated by the Act or in equity.

¹⁰ This voluntary reduction by Plaintiffs exceeds the amounts recovered through settlements with others.

¹¹ BFS argues that the verdict should be setoff by the amounts received by Plaintiffs from *each* of the settling co-defendants, including, for example, the stucco manufacturer (BASF), the shingle manufacturer (TAMKO), the brick

IV. Equitable Setoff is Not Necessary or Appropriate to Provide Justice Between the Parties.

Since it is clear that BFS is not entitled to a statutory setoff on the express warranty verdict, the only avenue left for BFS would be an equitable setoff. However, even if the Motion to Compel can be construed as a Motion for a Setoff,¹² despite the fact that its content and relief request otherwise, the Motion specifically limits itself to statutory setoff, not equitable. In addition to not requesting equitable setoff as relief in its motion, BFS never plead equitable setoff in any of its three Answers.

Even if BFS had moved for an equitable setoff, this Court believes the jury's verdict to be fair and just and finds no reason to apply an equitable setoff to the jury's verdict. *Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 82-83, 700 S.E.2d 451, 453-54 (2010) ("The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties."). The undersigned studiously observed the trial of this case; and believes the verdict is fair and equitable as it stands for a number of reasons, and sets forth several examples below:

First, and as explained in Section III above, Plaintiffs reduced their total estimate and presented the jury with a number that was associated with the windows alone. Further, ultimately, the jury awarded Plaintiffs approximately two million less than the already reduced amount put

veneer subcontractor (Superior), and even the electrical wiring installer (J. Correa). Even before the decision in *The Oaks at Rivers Edge*, such a position was untenable; now, it is clear that BFS is unable to show, via testimony elicited at trial or otherwise, that the jury's verdict against BFS included compensation for injuries that overlapped with the damages addressed by Plaintiffs' settlements with each of BFS's co-defendants.

¹² BFS has never actually moved for a setoff. In its Motion to Compel production of Plaintiffs' settlement agreements, the relief BFS requests concludes as follows: "Thereafter . . . BFS *will move* to seek a determination by the Court of the amount of setoff to be taken against the judgment awarded by the jury." (Motion at 2) (emphasis added). This never happened; this subsequent application for setoff by BFS never occurred. S.C. R. Civ. P. 7(b)(1) ("An application to the court for an order shall be by motion which . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought.").

into evidence by Plaintiffs. It certainly appears that the jury may have considered the contribution of other parties in reaching its ultimate verdict amount.¹³ Therefore, Plaintiffs' recovery is not duplicative of any settlement funds received by other parties. The jury's verdict was fair and just, and this Court refuses to further reduce the jury's award. There has been no double recovery.

Additionally, BFS made it clear to the jury its position that other prior defendants 1) were partially responsible for the damages asserted against BFS; and 2) that Plaintiffs had already received payment from other responsible parties. As such, BFS already submitted the issue of allocating damages amongst the defendants to the jury; and is not entitled to a second bite at that apple with the Court. *McCurry v. Keith*, 352 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997) (setoff deemed tried by consent based upon how the case was ultimately presented at trial).

Notably, in its Motion in *Limine*, BFS indicates to this Court there is no joint liability for any damages for which it could be found liable because any damages applicable to BFS are clearly divisible from all other damages at the project. (Def. Mot. In Lim. at 5) ("Should it be found that BFS is liable in this case . . . damages applicable to [BFS] are clearly divisible from all other damages at the project . . . BFS cannot be held jointly and severally liable for any all-encompassing damages awarded to Plaintiff."). This statement by BFS to the Court is BFS's concession that the window only case tried by the parties resulted in damages clearly divisible from all other damages that occurred at One Belle Hall. BFS is not entitled to setoff for damages attributable to its sole conduct.

V. Even if There Was a Plausible Avenue for BFS to Seek Set Off, BFS Cannot Meet its Burden of Proof that the Verdict is for the Same Cause

¹³ While the jury may have reached the reduced award due to a decision by them to adjust the repair scope or cost of repair, this is less likely as the Defendant did not submit a comparative competing scope of window repair by replacement or repair of compromised sheathing; Defendant simply proposed to add some caulk. However, all this speculation illustrates why a Court will not attempt to "look behind" a jury verdict. *See infra*. Special interrogatories should have been proposed by the Defendant if it felt this information was necessary.

**of Action and Injury for which Plaintiffs have been Previously
Compensated**

Any reduction in the judgment must be from a settlement for the same cause of action. *Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015) (citing *Hawkins v. Pathology Assocs. Of Greenville, P.A.* 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998); *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset). To determine setoff, the Court must be able to ascertain the jury's allocation of damages. *Hawkins v. Pathology Assocs. Of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (lack of special interrogatories prevented the court from determining what damages had been included in the jury's South Carolina wrongful death verdict (as opposed to prior recovery under Georgia wrongful death statute with different injury components) and caused a failure of evidence to justify setoff). Without a special verdict form, the moving party's burden to determine the jury's allocation between multiple injuries cannot be met. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011) (The court cannot determine an allocation of damages when there is a failure to request special interrogatories); *see also Zivitz v. Greenberg*, 279 F.3d 536, 540 (7th Cir. 2002) (The defendant bears the burden of proving he is entitled to setoff on grounds that damages awarded were for the same injury for which settling defendants had already compensated plaintiff and cannot do so without special interrogatories.). This Court cannot speculate as to how a jury allocated damages when a general verdict is returned. *Armstrong v. Collins*, 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005) ("The appellate courts of this State exercise every reasonable presumption in favor of the validity of a general verdict.") (*internal citation omitted*).

The general verdict form utilized by the Court, to which BFS consented, did not ask the jury to specify the injury or allocate the damages for which it is was compensating the Plaintiffs. BFS's failure to request a special verdict form precludes it from ascertaining the jury's allocation of damages between Strict Liability and Breach of Warranty, and/or between window related damages and non-window related damages. Additionally, BFS did not request a special interrogatory that would allocate the jury's finding on Breach of Warranty between express and implied warranties. Without this information, this Court cannot and will not speculate as to the jury's allocations.¹⁴

Further, the Court will not allow BFS to use Plaintiffs' Settlement Agreements to backfill the evidentiary void left by BFS's failure to request a special verdict form. An attempt to do so would undermine the jury verdict and could not be done with any accuracy, reliability or efficiency. As Plaintiffs noted, a large portion of its settlement recovery came from a single insurer who paid on behalf of over twenty (20) parties. It would be impossible to properly allocate this settlement between the numerous causes of action, damages, and/or parties, and any attempt to do so would result in an additional full-blown allocation trial and potentially an unjust windfall to BFS. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 219 (1994) (Discussing the one satisfaction rule: "The law contains no rigid rule against overcompensation [of the plaintiff]. Several doctrines . . . recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation."); *Pustaver*, 350 S.C. 409, 566 S.E.2d 199, (Public policy is to prevent a benefit directed to the injured party from resulting in a windfall for the tortfeasor). The burden is on BFS to prove its entitlement to a setoff, and with the information available to it, it cannot do so.

¹⁴ South Carolina's default rule of one recovery gives way when trumped by other policy considerations. *Cf. Atkinson*, 361 S.C. at 171-72 (one recovery rule gives way to collateral source rule).

Finally, even if it was assumed the Court could allow BFS to use Plaintiffs' Settlement Agreements to backfill the evidentiary void, the only settlement this Court believes may have any applicability is the settlement by the window manufacturer, Raymond Building Supply. However, as discussed below, setoff requires the same cause of action. Here, because the settlement funds were paid by Raymond's insurance carriers, the Court can reason that the Raymond payment was for negligence, and BFS cannot prove otherwise. Plaintiffs were not awarded a verdict on negligence; therefore, the Raymond recovery cannot be shown to have occurred on the same cause of action as the verdict against BFS.¹⁵

VI. Plaintiffs' Prior Settlements were for Different Injuries than the Damages Awarded by the Jury.

There is no setoff as a matter of law when a prior settlement involves compensation for a different claim than the one for which the jury awarded damages. *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). If, however, the settlement was arguably for two claims, one of which the settling defendant has in common with the non-settling defendant, "the circuit court must make the factual determination of how to allocate the settlement between the two claims." *Id.* However, "the judgment can only be reduced to the extent that the settlement was for the same cause of action." *Uhlig LLC v. Shirley*, No. 6:08-CV-01208-JMC, 2012 WL 12898405, at *2 (D.S.C. July 23, 2012) (applying South Carolina law).

As indicated above, the case was tried as a window damage case; and that was the only basis upon which the general verdict could have been rendered. Even otherwise, this Court cannot now speculate as to the jury's determination of damages. *Armstrong v. Collins*, 366 S.C. 204, 227,

¹⁵ Furthermore, and as explained in greater detail in Section III above, a reduction in damages, however achieved, satisfies the principles underlying the Act as well as those underlying the common law on setoff. See *The Oaks at Rivers Edge*, 2017 WL 3272138, at *6. Here, the jury ultimately awarded Plaintiffs approximately \$2.5 million less than the already reduced amount put into evidence at trial, which further negates the need for additional setoff.

621 S.E.2d 368, 379 (Ct. App. 2005) (The court will not speculate as to how the jury allocated damages when a general verdict is returned). In addition, to attempt to retroactively allocate damages at this point would be a re-trial of the case—something that cannot be intended by the joint tortfeasor statute or the common law.

VII. BFS Contractually Waived Its Right to Setoff and Assumed Sole Responsibility for All Damages Awarded that are Attributable to its Conduct.

BFS is also not entitled to setoff because it contractually waived its right to setoff by agreeing to replace the defective windows and cover any costs or expense that are attributable to the defective windows. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) (holding the substantial right to a jury trial may be waived and that there is an obligation on the party signing a document, even when that party is an unsophisticated homeowner, to read and understand the contents prior to signing); (Jt. Ex. 44(a), para. 4(c)) (“[BFS] shall replace at its own cost and expense defective items, articles, services, etc. furnished hereunder and indemnify Vendee from any costs or expense attributable to errors in [BFS’s] performance.”). In addition to this obligation, BFS also promised to make good any defects that developed in the product during the warranty period at its own expense. (Jt. Ex. 188, para. 4(c)) (Should *any defects* develop during the warranty period due to improper workmanship and/or arrangement, the same shall, upon notice, be made good by this Subcontractor *at no expense* to the Contractor, Owner or Owner’s Representative.”) (emphasis added).

BFS is a national building supply company, a sophisticated party, and bears an even greater obligation than did the homeowners in *Wachovia Bank, N.A.*, to review and understand the terms of any agreement it enters. By entering this transaction, BFS voluntarily, intentionally and knowingly agreed to accept the conditions and obligations of the purchase and warranty

agreements and must comply with the terms. The executed purchase and warranty agreements expressly indicate BFS will, at its own cost, be responsible for the replacement of any defective windows supplied under the agreement. Further, the indemnification term (para. 4(c) above) in effect make BFS solely responsible for costs or expenses attributable to errors caused by the goods. A jury determined the amount of those errors for which BFS is solely responsible, and BFS contractually waived any ability to seek a setoff against that amount.

VIII. Defendants Arguments are Unpersuasive

BFS's arguments for setoff are unpersuasive. For starters, BFS conflates the breach of an express warranty, with the breach of an implied warranty. By further conflating breach of implied warranty with negligence and strict liability, BFS asserts that the breach of an express written warranty is a tort. Now that BFS has converted a contract action to a tort, it asserts that contract actions are subject to joint tortfeasor setoff. This analysis and conclusion does not hold water and fails overtly.

Moreover, the implicit suggestion by BFS that the joint tortfeasor setoff statute somehow supersedes the common law of this state regarding general verdicts cannot be sustained.

Another one of BFS's main assertions is that the pleadings control this analysis; they do not. The pleadings set forth what a party thinks it might prove; the trial transcript and ensuing verdict are the ultimate evidence of what actually occurred. Whether two parties are joint tortfeasors does not turn on the allegations made in the operative complaint, and instead, turns on the evidence presented in the record. *See Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990) ("The Complaint serves merely as a background to this [indemnification] litigation. Allegations in a Complaint denied in answer are evidence of nothing.").

An example of this is BFS's argument that since the shingle manufacturer, Tamko, was also sued in strict liability, BFS therefore is entitled to a setoff for any amounts paid by Tamko. Unfortunately for BFS, there was not a shred of evidence in the trial against BFS that the shingles (1) permitted any water intrusion, let alone (2) permitted any water intrusion which contributed to the damage for which Plaintiffs sued BFS. BFS's whole argument in this regard is a non sequitur, and the Court of Appeals' recent decision in *The Oaks at Rivers Edge* further underscores Plaintiffs' position in this regard.

Ultimately, BFS exemplified the unsupportable nature of its position at the last hearing. According to BFS, by example, if a door manufacturer paid damages for leaky doors, the electrician who mis-wired the stove that caught fire would be entitled to a credit. This Court does not believe the joint tortfeasor statute or the common law of this state contemplates, let alone mandates, such a result, as it would run contrary to the long-standing public policy of this state and its courts to encourage negotiated resolution of disputes. Adopting BFS's interpretation would inevitably create a chilling effect on future partial settlements, if not completely render them futile, leading to longer, extended litigation and a clogging of our courts. Certainly, this is not what the legislature has intended.

CONCLUSION

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED that BFS's September 8, 2016 Motion for Setoff is DENIED.

IT IS SO ORDERED!

11-13, 2017
SC Gray, SC


Honorable Diane Schafer Goodstein

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

One Belle Hall Property Owners
Association Inc. and Marvin T. Meek
And Frances E. Hill, individually, and on
Behalf of all others similarly situated,

Plaintiffs,

vs.

Builders FirstSource Southeast Group
LLC, et al.,

Defendant.

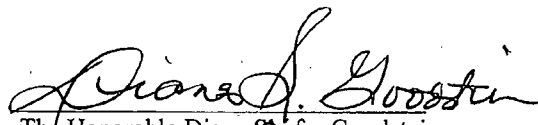
COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2012-CP-10-07594

FILED
2018 JUN 27 AM 11:43
JULIE S. CHENEY
CLERK OF COURT

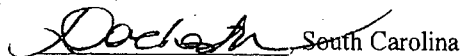
~~ORDER GRANTING~~
~~DEFENDANT'S DISCOVERY~~
~~RESPONSES~~

THIS COURT has considered Builder's FirstSource Southeast Group LLC's Motion to Alter or Amend filed pursuant to Rule 59. The Court finds there is no material issue raised by Defendant that has not been previously raised and decided and the arguments made are consistent with those ruled upon by the Court. The Court, having considered the motion and having reviewed its Order filed November 27, 2017 denies Defendant Builders FirstSource motion filed pursuant to Rule 59.

BE IT SO ORDERED!


The Honorable Diane Schaffer Goodstein

This 22 day of June 2018.

 South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2012-CP-10-7594

ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and MARVIN T.)
MEEK and FRANCIS E. HILL, individually,)
and on behalf of all others similarly situated,)

Plaintiffs,

vs.

Builders First Source – Southeast Group,)
LLC;)

Defendant.

VERDICT FORM

We the jury find for the Plaintiffs on the following causes of action:

NO Negligence
YES Strict Liability
YES Breach of Warranty

And we award the Plaintiffs Two Million One Hundred Sixty-Three Thousand
(\$2,163,493) in actual and compensatory damages. Four Hundred Ninety-Three

OR

_____ We the jury find for the Defendant.

Natalie D. Wilson

Presiding Juror

Date: Sept. 01, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	CASE NO. 2012-CP-10- <u>7594</u>
ONE BELLE HALL PROPERTY OWNERS	)	
ASSOCIATION, INC. and BRANDY RAMEY,	)	
individually, and on behalf of all others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
TRAMMELL CROW RESIDENTIAL; TCR	)	
NC CONSTRUCTION I, LP; BELLE HALL	)	
DIRECT 101, LP; TCR RLD	)	
CONDOMINIUMS, INC.; CS 101 BELLE	)	
HALL, LP; JANE DOE 1-5; FIRST	)	
EXTERIORS, LLC; AND JOHN DOE 1-60,	)	
	)	
Defendants.	)	

COMPLAINT
(Defective Construction)
(Jury Trial Demand)

FILED
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JUDGE J. ARMSTRONG
CLERK OF COURT

The Plaintiffs, One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually and on behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff One Belle Hall Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.
2. The POA is the property owners association for the One Belle Hall Horizontal Property Regime.
3. The One Belle Hall Horizontal Property Regime is a Horizontal Property Regime ("One Belle Hall") which exists by virtue of a Master Deed dated December 11, 2006 and recorded December 12, 2006 in the RMC Office of Charleston County, SC in Book K608, Page 211.

4. One Belle Hall consists of fifty-nine (59) condominiums located in four (4) buildings and related common elements, which are located behind the Belle Hall shopping center in Mount Pleasant, South Carolina.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with One Belle Hall.

6. The POA is charged with, *inter alia*, the management and administration of One Belle Hall, the investigation, maintenance and repair of One Belle Hall's Common Elements and Areas of Responsibility, and has the right and obligation to bring this action on behalf of One Belle Hall, the POA, and the respective owners and members.

7. Plaintiff Ramey (hereinafter "Plaintiff Ramey") is a citizen of Charleston County, South Carolina and is an owner of a condominium within One Belle Hall more particularly described as 2100 Belle Isle Avenue, Unit 101, Mount Pleasant, South Carolina, 29464.

8. Plaintiff Ramey entered into a contract to purchase the above-described real property on or about October 2, 2009.

9. By virtue of property ownership in One Belle Hall, Plaintiff Ramey is a member of the POA, has been a member of the POA at all times relevant hereto, and has ownership and membership rights relating thereto.

10. Defendant Trammell Crow Residential ("Trammell Crow") is a company organized and existing under the laws of the State of Texas. At all times relevant to this action, Trammell Crow was engaged in the business of designing, developing, marketing, constructing, repairing and/or selling condominiums in Charleston County, South Carolina.

11. Defendant Belle Hall Direct 101, LP (hereinafter "Belle Hall Direct") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to

this action, Belle Hall Direct was engaged in the business of designing, developing, marketing, constructing, repairing and/or selling condominiums in Charleston County, South Carolina.

12. Defendant TCR NC Construction I, LP (hereinafter "TCR Construction") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, TCR Construction was engaged in the business of designing, constructing and/or repairing condominiums in Charleston County, South Carolina.

13. Defendant TCR RLD Condominiums, Inc. (hereinafter "TCR Condominiums") is a corporation organized and existing under the laws of the State of Texas. At all times relevant hereto, TCR Condominiums was engaged in the business of designing, developing, marketing constructing, repairing and/or selling condominiums in Charleston County.

14. Defendant CS 101 Belle Hall, LP (hereinafter "CS 101") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, CS 101 was engaged in the business of designing, developing, marketing, constructing repairing and/or selling condominiums in Charleston County, South Carolina.

15. Defendants Trammel Crow, TCR Construction, TCR Condominiums and CS 101, were actual or *de facto* joint ventures, partners, contractors, members, managers, control persons, and/or agents of Belle Hall Direct and participated in the design, development, construction, repair, marketing and/or sale of One Belle Hall condominiums.

16. The address and identity of all Jane Doe Defendants are unknown at this time.

17. Defendants Jane Doe #1-5 (hereinafter "Jane Doe Defendants") are other TCR affiliates which were actual or *de facto* joint ventures, partners, managers, members, contractors, control persons, and/or agents of Belle Hall Direct and participated in the design, development, construction, repair, marketing and/or sale of One Belle Hall condominiums.

18. Defendants Belle Hall Direct, Trammell Crow, TCR Construction, TCR Condominiums, CS 101, and Jane Doe #1-5 (hereinafter collectively referred to as "TCR Defendants") comingled and combined their resources to develop, repair, market, sell, and place the One Belle Hall condominiums into the stream of commerce.

19. The TCR Defendants all use certain trade names interchangeably.

20. The TCR Defendants have been formed and operate so their legal distinction is blurred and they are amalgamated with each other and their principals.

21. Defendant First Exterior, LLC (hereinafter "First Exteriors") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, First Exteriors supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

22. The address and identity of all John Doe Defendants are unknown at this time.

23. Defendants John Doe #1-60 (hereinafter "John Doe Defendants") are subcontractors and/or other entities involved in the design, development, marketing, construction, material manufacturing and/or supplying, repair, and/or sale of One Belle Hall.

24. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto and venue is proper in this forum.

FACTUAL ALLEGATIONS

25. This matter arises out of the design, development, construction, repair and sale of One Belle Hall.

26. At the time the Certificates of Occupancy were issued, One Belle Hall contained latent building defects.

27. Plaintiffs and class members have previously put the TCR Defendants on notice of some or many of the deficiencies. However, the TCR Defendants' repair attempts have failed.

28. The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property.

29. A preliminary inspection of One Belle Hall evidences failure of one or more components the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components, structural members, and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

30. Defendants had a duty to design, develop, construct, and repair One Belle Hall in a workmanlike manner with suitable materials and free from all defects.

31. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

32. The Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

33. Remedying the above-wrongs will result in additional consequential damages and loss of use.

34. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur a reasonable attorney's fees and costs for the retention of experts to determine the damage and the scope of work for repair.

35. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical general liability policies.

CLASS ACTION ALLEGATIONS

36. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Ramey brings this action both individually and as a proposed class action against Defendants on behalf of herself and all other similarly situated persons and entities, who own, per the class definition, a condominium within One Belle Hall (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a condominium within One Belle Hall located in the Town of Mt. Pleasant, Charleston County, South Carolina.

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.

37. *Numerosity:* The Class is composed of in excess of fifty persons geographically dispersed throughout the State of South Carolina and the United States, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of seventy members.

38. *Commonality:* Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- (a) Whether the construction and/or repair of One Belle Hall was defective;
- (b) Whether Defendants knew or should have known of the defects;
- (c) Whether Defendants successfully repaired building defects;
- (d) Whether Defendants know or should have known their repairs were unsuccessful;

- (e) Whether Defendants failed to disclose to purchasers and/or homeowners the defects and/or unsuccessful repairs;
- (f) Whether Defendants have acted or refused to act on grounds generally applicable to the Class;
- (g) Whether Defendants are financially responsible to pay the full costs and expenses of repair of said defective conditions;
- (h) Whether Defendants' expertise and superiority and financial interest in sales transactions gave rise to a duty to disclose the material facts which were concealed; thereby, giving rise to a claim for fraudulent concealment;
- (i) Whether Plaintiffs and the Class are entitled to compensatory damages, including, among other things: (i) compensation for all out-of-pocket monies expended by other members of the Class for repair of their condominiums as well as repair/replacement of other property damage; (ii) temporary repairs and (iii) compensation for loss of use.
- (j) Whether Defendants negligently designed, developed constructed and/or repaired One Belle Hall;
- (k) Whether the Plaintiffs are entitled to prejudgment interest, attorneys' fees and costs from Defendants.

39. *Typicality*: Plaintiff's claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in designing, developing, constructing, repairing, and selling One Belle Hall, Ply Gem's conduct in concealing the defective condition of One Belle Hall, and Plaintiff's and Class Members' purchasing homes containing building defects.

40. *Adequate Representation*: Plaintiff Ramey will fairly and adequately protect the

interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiff Ramey has retained counsel experienced in the prosecution of construction defect claims and complex litigation, including consumer class actions involving product liability and product design defects.

41. *Predominance and Superiority:* This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

42. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class Members have the same legal right to and interest in redress for damages associated with the defective conditions existing within One Belle Hall.

43. Plaintiff Ramey and the Class envision no unusual difficulty in the management of this action as a class action.

44. Each Class Member has an interest of more than \$100.00.

45. The amount of money at stake for each Class Member is not sufficient for each member to hire their own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

46. Defendants are estopped from relying on any statutes of limitation or repose by virtue of its acts. Upon information and belief, Defendants should have known One Belle Hall was defectively constructed and failed to alert the Plaintiffs of One Belle Hall's defective condition.

47. Defendants had a duty to inform Plaintiffs of the defects described herein, which it should have known. Notwithstanding its duty, Defendants never disclosed the defects to Plaintiffs.

48. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of One Belle Hall.

49. Given Defendants' failure to disclose this non-public information about the defective nature of One Belle Hall – information over which it had exclusive control – and because Plaintiffs could not reasonably have known of One Belle Hall's defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

50. Defendants are further estopped from relying upon any statute of limitations as they have repeatedly represented to Plaintiffs that they are only responsible for correcting work for a period of one year after sale.

**ESTOPPEL FROM PLEADING ANY ANTI-SUIT PROVISIONS
CONTAINED IN ONE BELLE HALL'S MASTER DEED AND BY-LAWS**

51. The TCR Defendants are estopped from relying on any anti-suit provisions contained in One Belle Hall's Master Deed and By-Laws because said provisions are void pursuant to public policy and the Horizontal Property Regime Act and/or voidable as such constitutes a breach of the TCR Defendants' fiduciary duty to Plaintiffs.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to All Defendants)

52. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

53. At all times relevant hereto, the Defendants, its agents, servants, employees, and subcontractors undertook and had a duty to Plaintiffs to exercise and use due care in the design, construction and repair of One Belle Hall in a good workmanlike manner and with suitable materials, in accordance with the applicable building codes, state law, good design, and in conformance with the prevailing industry standards.

54. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, careless, reckless, willful, and wanton in the following particulars:

- (a) In designing, developing, constructing, repairing and selling, One Belle Hall with construction deficiencies including those previously identified;
- (b) In failing to construct One Belle Hall in accordance with due care and in accordance with standard building practices;
- (c) In failing to construct One Belle Hall in accordance with building code;
- (d) In failing to properly supervise the work and construction of One Belle Hall;
- (e) In failing to properly coordinate the subcontractors;
- (f) In failing to construct with an adequate exterior building envelope;
- (g) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (h) In covering up their own defective work and the defective work of others;
- (i) In failing to make proper repairs; and

(j) Such other failures to be proven at trial.

55. The violations of applicable building codes constitutes negligence *per se*.

56. Plaintiffs have been damaged as a direct and proximate result if the negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants.

57. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, and/or constituted negligence *per se*, Plaintiffs are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to all Defendants)

58. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

59. The design, construction, sale, and repair of One Belle Hall came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that One Belle Hall would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

60. The design, construction, sale and/or repair of One Belle Hall, and the components used therein, came with implied warranties of fitness, merchantability, workmanship, and habitability.

61. Defendants have breached their warranties by constructing and/or repairing One Belle Hall in a defective manner as set forth above.

62. As a direct and proximate result of the Defendants' breach of the implied warranty, Plaintiff's have suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Strict Liability in Tort: *S.C. Code Ann. § 15-73-10 et seq.* as to First Exteriors and John Doe Defendants)

63. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

64. In manufacturing and supplying products for the construction of One Belle Hall, First Exteriors and the manufacturer and supplier John Doe Defendants placed products into the stream of commerce.

65. By introducing their products into the stream of commerce, First Exteriors and the manufacturer and supplier John Doe Defendants represented said products were safe and suitable for their foreseeable use.

66. In the manufacture and supply of products to One Belle Hall, First Exteriors and the manufacturer and supplier John Doe Defendants anticipate and expect that their products will reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

67. The John Doe Defendants have manufactured their products in a defective manner which has resulted in repeated water intrusion into and damage to One Belle Hall and other building deficiencies.

68. Plaintiffs could not have discovered the product defects through the exercise of reasonable care.

69. The cost of altering the design, construction, and/or repair of the products supplied to One Belle Hall was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

70. The design and manufacture of the products supplied to One Belle Hall was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

71. First Exteriors and the manufacturer and supplier John Doe Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to TCR Defendants)

72. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

73. The TCR Defendants have a fiduciary relationship to the Plaintiff's by virtue of their capacity as the developer and steward of One Belle Hall and their former capacity controlling the POA.

74. The TCR Defendants promoted, created and maintained control of the POA and One Belle Hall for several years, and thus, had fiduciary duties they owed to the POA, its members and individual homeowners.

75. The TCR Defendants breached the fiduciary duties they owed to the Plaintiffs by:

- (a) failing to investigate defective conditions prior to handing over the property to the POA and the homeowners;
- (b) failing to disclose said defective conditions;
- (c) failing to properly repair said defective conditions prior to handing over the property to the POA and the homeowners; and

(d) turning over the property to the POA in said defective condition without depositing sufficient funds to the account of the POA to bring the elements up to a reasonable standard.

76. As a direct and proximate result of the TCR Defendants' breach of fiduciary duty, Plaintiffs have been damaged as hereinabove set forth and as to be further proven at trial.

FOR A FIFTH CAUSE OF ACTION
(Veil Piercing/Alter Ego/Amalgamation as to TCR Defendants)

77. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

78. The TCR Defendants are alter egos of each other, and therefore, liable for the actions of each other at One Belle Hall and any damages resulting from said actions.

79. The TCR Defendants operated together as joint venturers, partners, members, contractors and/or agents in the development, marketing, construction, repair and sale of One Belle Hall. As such, the TCR Defendant business entities are amalgamated in a manner in which they were all operating as one in the same.

80. The TCR Defendants were owned and operated by substantially the same principals and/or used the same trade names at all times relevant to the development, marketing, construction, repair and sale of One Belle Hall. Hence, the TCR Defendant business entities are amalgamated so as to blur the legal distinctions of said entities.

81. The corporate shield and identities of the TCR Defendants should be disregarded and personal liability imposed on the TCR Defendants' principals because no TCR Defendant is a bona fide business entity, but each exists merely as a shell to provide a personal shield to its principals.

82. The TCR Defendants failed to observe necessary corporate formalities, were undercapitalized, and/or were otherwise so intermingled that each has become and the alter ego of the other; that the corporations have never had nor do they now have any genuine or separate corporate existence, but have been used and exist for the primary purpose of permitting their principals to transact individual business under a corporate guise.

83. The TCR Defendants' conduct and abuse of the corporate form has resulted in fundamental unfairness to Plaintiffs.

84. As a result, the TCR Defendants' abuse of the corporate form makes it appropriate and just that any liability imposed on one TCR Defendant, be imposed upon the other Defendants and their principals.

FOR A SIXTH CAUSE OF ACTION
(Unfair Trade Practices as to TCR Defendants)

85. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

86. At all times relevant herein, the TCR Defendants engaged in the business of developing, designing, constructing, repairing and selling One Belle Hall into the stream of commerce.

87. The TCR Defendants were engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

88. The TCR Defendants' above-described activities, including placing One Belle with defective design and construction into the stream of commerce, failing to properly repair defective conditions, failing to comply with the building code, and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices in the conduct of the TCR Defendants' trade.

89. The TCR Defendants' above-described acts are capable of repetition and adversely affect the public interest.

90. The TCR Defendants knew or should have known that their conduct was in violation of the S.C. Code Ann. § 39-5-20.

91. As a direct, foreseeable, and proximate result of the TCR Defendants' unfair trade practices in South Carolina, Plaintiffs have suffered significant damage.

FOR A SEVENTH CAUSE OF ACTION
(Declaratory Action/Reformation as to TCR Defendants)

82. Plaintiffs reallege the allegations, which are not inconsistent with this cause of action and are, contained in the above paragraphs as if fully set forth herein.

83. The anti-suit provisions of the One Belle Hall Master Deed are in violation of public policy, statutory law and/or provisions of the Constitution, and the TCR Defendants' fiduciary duties.

84. Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions included within the Master Deed by the TCR Defendants are in violation of statutory law and/or provisions in the Constitution and are therefore void and/or require reformation to eliminate the subject provisions.

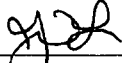
85. As the provisions in the Master Deed are severable, the Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions are severable from the other terms of the Master Deed.

86. Plaintiffs are also entitled to have ambiguous and contradictory provisions in the Master Deed construed against the TCR Defendants and/or reformed by the Court to more accurately reflect the reasonable expectations of the POA and Homeowners.

WHEREFORE, Plaintiffs demand a trial by jury and pray actual and consequential damages; statutory or punitive damages expected to exceed ten million dollars; reasonable attorneys' fees; costs of suit; and prejudgment interest; declaration/reformation of the Master Deed; and granting such further relief as the Court deems just and proper.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By: 

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Dabny Lynn
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Post Office Box 806
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November 19, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and BRANDY)
RAMEY, individually, and on behalf of all)
others similarly situated,)

Plaintiffs,)

vs.)

Trammell Crow Residential Company; TCR)
NC Construction I, LP; Belle Hall Direct 101,)
LP; TCR RLD Condominiums, Inc.; CS 101)
Belle Hall, LP; TCR Southeast, Inc.; TCR)
Carolina Properties, Inc.; TCR SE)
Construction, Inc.; TCR SE Construction II,)
Inc.; TCR Construction, a division of)
Trammell Crow Residential; TCR)
Development, a division of Trammell Crow)
Residential; Trammell Crow Residential)
Carolina, a division of Trammell Crow)
Residential; and Tauer Consulting Company,)
Inc., a division of Trammell Crow Residential,)
each individually, and collectively d/b/a)
"Trammell Crow Residential," "Trammell)
Crow" or "TCR"; Halter Properties, LLC;)
Halter Realty, LLC; and Halter Realty Group,)
LLC, each individually, and collectively d/b/a)
"Halter Companies"; Jane Doe 1-5; ABG)
Caulking & Waterproofing of Morristown, Inc.)
a/k/a ABG Caulking Contractors; Advanced)
Building Products & Services, LLC; BASF)
Corporation; Budget Mechanical Plumbing,)
Inc.; Builders First Source – Southeast Group,)
LLC; Builders Services Group, Inc.,)
individually, and d/b/a Gale Contractor)
Services, Inc.; Century Fire Protection, LLC;)
Cline Design Associates, P.A. and Gary D.)
Cline; Coastal Lumber & Framing, LLC;)
Dodson Brothers Exterminating Co., Inc. a/k/a)
Dodson Pest Control; First Exteriors, LLC;)
Flooring Services, Inc.; General Heating & Air)
Conditioning Company of Greenville, Inc.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-7594

AMENDED COMPLAINT
(Defective Construction)

(Jury Trial Demanded)

FILED
2013 DEC 31 PM 4:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

d/b/a General Heating and Air; Jimmy Warner,)
 individually, and d/b/a Warner Heating & Air;)
 Glazing Consultants, Inc.; GWC Roofing, Inc.,)
 individually, and d/b/a Southcoast Exteriors,)
 Inc.; Houston Stafford Electrical Contractors,)
 LP a/k/a IES Residential, Inc. d/b/a Houston)
 Stafford Electric; KMAC of the Carolinas,)
 Inc.; P&P Metal Sales Co., Inc. a/k/a P&P)
 Metal Sales, LLC a/k/a P&P Metal Sales, Inc.)
 a/k/a Carolina Metals; Pleasant Places, Inc.;)
 Raymond Building Supply Corporation d/b/a)
 Energy Saving Products of Florida, Inc. a/k/a)
 Energy Saving Products of Florida; Southern)
 Specialties, Inc.; Structural Contractors South,)
 Inc.; Superior Construction Services, Inc.,)
 individually, and d/b/a Superior Masonry)
 Unlimited, Inc.; TAMKO Building Products,)
 Inc. f/k/a TAMKO Roofing Products, Inc.;)
 VNS Corporation, individually, and d/b/a)
 Wholesale Building Products f/k/a Wholesale)
 Building Materials, Inc.; What Don't We Do;)
 and John Doe 1-25,)
)
 Defendants.)
)
)

The Plaintiffs, One Belle Hall Property Owners Association, Inc., and Brandy Ramey,
 individually, and on behalf of all others similarly situated, complaining of the Defendants named
 herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff One Belle Hall Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.
2. The POA is the property owners association for the One Belle Hall Horizontal Property Regime.

3. The One Belle Hall Horizontal Property Regime is a Horizontal Property Regime ("One Belle Hall") which exists by virtue of a Master Deed dated December 11, 2006 and recorded December 12, 2006 in the RMC Office of Charleston County, SC in Book K608, Page 211.

4. One Belle Hall consists of fifty-nine (59) condominiums located in four (4) buildings and related common elements, which are located behind the Belle Hall shopping center in Mount Pleasant, South Carolina.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with One Belle Hall.

6. The POA is charged with, *inter alia*, the management and administration of One Belle Hall, the investigation, maintenance and repair of One Belle Hall's Common Elements and Areas of Responsibility, and has the right and obligation to bring this action on behalf of One Belle Hall, the POA, and the respective owners and members.

7. Plaintiff Ramey (hereinafter "Plaintiff Ramey") is a citizen of Charleston County, South Carolina and is an owner of a condominium within One Belle Hall more particularly described as 2100 Belle Isle Avenue, Unit 101, Mount Pleasant, South Carolina, 29464.

8. By virtue of property ownership in One Belle Hall, Plaintiff Ramey and the Class (hereinafter collectively referred to as "Plaintiffs") are members of the POA, have been members of the POA at all times relevant hereto, and have ownership and membership rights relating thereto.

9. Defendant Trammell Crow Residential Company is a company organized and existing under the laws of the State of Delaware.

10. Defendant TCR Carolina Properties, Inc. is a corporation organized under the laws of the State of Texas, and represented that it was an owner of the One Belle Hall project.

11. Defendant Belle Hall Direct 101, LP is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, Belle Hall Direct 101, LP was a single purpose entity through which the TCR Defendants' attempted to coordinate their development efforts and was the named seller of One Belle Hall condominiums.

12. Defendant CS 101 Belle Hall, LP is a limited partnership organized and existing under the laws of the State of Texas, and is/was represented as a general partner of Belle Hall Direct 101, LP.

13. Defendant TCR RLD Condominiums, Inc. is a corporation organized and existing under the laws of the State of Texas, and is/was represented as a general partner of CS 101 Belle Hall, LP.

14. Defendant TCR SE Construction, Inc. is a company organized under the laws of the State of Texas, and is/was represented as a general partner of Belle Hall Direct 101, LP.

15. Defendant TCR NC Construction I, LP is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, TCR NC Construction I, LP was the entity through which the TCR Defendants' attempted to effect their construction efforts and was the named general contractor for One Belle Hall.

16. Defendant TCR SE Construction II, Inc. is a company organized under the laws of the State of Texas, and is/was represented as a partner and/or agent of TCR NC Construction I, LP.

17. Defendant TCR Southeast, Inc. is a company organized under the laws of the State of Texas.

18. Defendant Tauer Consulting Company, Inc., a division of Trammell Crow Residential, is a corporation organized under the laws of the State of Georgia. At all times relevant to this action, Tauer Consulting Company, Inc. served as the punch supervisor and sales coordinator, among providing other services, for One Belle Hall.

19. Defendant Trammell Crow Residential Carolina is a division of Trammell Crow Residential and/or is an entity compromised of "TCR" employees, agents and/or affiliates.

20. Defendant TCR Construction is a division of Trammell Crow Residential and/or is an entity compromised of "TCR" employees, agents and/or affiliates.

21. Defendant TCR Development is a division of Trammell Crow Residential and/or is an entity compromised of "TCR" employees, agents and/or affiliates.

22. The foregoing Defendants, and their divisions and affiliates, operated under the trade names "Trammell Crow Residential," "Trammell Crow," "TCR," and similar names (herein collectively referred to as the "TCR Defendants"), and at all times relevant to this action, the TCR Defendants coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale and/or repair of One Belle Hall.

23. The TCR Defendants operated together as actual or *defacto* joint venturers, partners, and agents of each other in the design, development, marketing, construction, sale and/or repair of One Belle Hall (the design, development, marketing, construction, sale and/or repair of One Belle Hall hereinafter collectively referred to as the "One Belle Hall Project").

24. At all times material hereto, the TCR Defendants operated a joint enterprise for the common, for-profit purpose of the One Belle Hall Project.

25. The TCR Defendants acted as agents of each other in connection with the One Belle Hall Project.

26. The TCR Defendants have acted collectively and in such manner that the distinction between the TCR Defendants has been blurred and the TCR Defendants should be amalgamated as a single entity.

26. The TCR Defendants have failed to observe corporate formalities and their corporate shells should be disregarded and all TCR Defendants should be held liable for Plaintiffs' damage.

27. Defendant Halter Properties, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

28. Defendant Halter Realty, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

29. Defendant Halter Realty Group, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

30. The foregoing Halter Defendants, their divisions and affiliates, operated under the trade name "Halter Companies" and similar names (herein collectively referred to as the "Halter Defendants"), and at all times relevant to this action, the Halter Defendants coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the development and construction of One Belle Hall.

31. The Halter Defendants operated together as actual or *defacto* joint venturers, partners and agents of each other in the One Belle Hall Project.

32. At all times material hereto, the Halter Defendants operated a joint enterprise for the common, for-profit purpose of the One Belle Hall Project.

33. The Halter Defendants acted as agents of each other in connection with the One Belle Hall Project.

34. The Halter Defendants have acted collectively and in such manner that the distinction between the Halter Defendants has been blurred and the Halter Defendants should be amalgamated as a single entity.

35. The Halter Defendants have failed to observe corporate formalities and their corporate shells should be disregarded and all Halter Defendants should be held liable for Plaintiffs' damage.

36. The TCR Defendants and the Halter Defendants were actual or *de facto* joint ventures and/or partners, control persons, and/or agents of each other in the One Belle Hall Project.

37. Defendants Jane Doe #1-5 (hereinafter "Jane Doe Defendants") are other TCR and/or Halter affiliates which were actual or *de facto* joint venturers and/or partners, control persons, and/or agents of each other in the One Belle Hall Project, whose addresses and identities are unknown at this time.

38. The TCR Defendants, the Halter Defendants and Jane Doe #1-5 comingled and combined their resources to develop, repair, market, sell, and place the One Belle Hall condominiums into the stream of commerce.

39. Defendant Cline Design Associates, P.A. (hereinafter "Cline Design") is a professional corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Cline Design served as the architect for the construction of One Belle Hall.

40. Defendant Gary D. Cline (hereinafter "Gary Cline") is a registered architect in the State of South Carolina who executed and sealed the plans for the construction of One Belle Hall.

41. Defendant Glazing Consultants, Inc. (hereinafter "GCI") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, GCI provided consulting services and quality assurance inspections, among other work, at One Belle Hall.

42. Defendant ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors (hereinafter "ABG") is a corporation organized and existing under the laws of the State of Tennessee. At all times relevant to this action, ABG supplied materials, installed caulking and/or performed repairs, among other work, at One Belle Hall.

43. Defendant BASF Corporation (hereinafter "BASF") is a corporation organized and existing under the State of Delaware. At all times relevant to this action, BASF supplied stucco, among other building components, at One Belle Hall.

44. Defendant Builders First Source – Southeast Group, LLC (hereinafter "BFS") is a limited liability company organized and existing under the laws of the State of Delaware. At all times relevant to this action, BFS supplied windows, among other building components, at One Belle Hall.

45. Defendant Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc. (hereinafter "Gale") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, Gale supplied materials, installed garage doors and/or performed repairs, among other work, at One Belle Hall.

46. Defendant Budget Mechanical Plumbing, Inc. (hereinafter "Budget Plumbing") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Budget Plumbing supplied materials, installed plumbing, condensate lines and/or performed repairs, among other work, at One Belle Hall.

47. Defendant Century Fire Protection, LLC (hereinafter "Century Fire") is a limited liability corporation organized and existing under the laws of the State of Delaware. At all times relevant to this action, Century Fire provided and/or installed fire protection and firestopping, among other work, at One Belle Hall.

48. Defendant Coastal Lumber and Framing, LLC (hereinafter "Coastal Framing") is a limited liability company organized under the laws of the State of Florida. At all times relevant to this action, Coastal Framing supplied materials, framed structures and/or performed repairs, among other work, at One Belle Hall.

49. Defendant Advanced Building Products & Services, LLC (hereinafter "ABP&S") is a limited liability company organized under the laws of the State of Florida. At all times relevant to this action, ABP&S operated under a profit sharing agreement with Coastal Framing by which ABP&S was an actual or *de facto* joint venturer, partner, manager, and/or agent of Coastal Framing in the supply of materials, among other work, at One Belle Hall.

50. Defendant Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control ("Dodson") is a corporation organized and existing under the laws of the State of Virginia. At all times relevant to this action, Dodson provided termite treatment, among other work, at One Belle Hall.

51. Defendant First Exterior, LLC (hereinafter "First Exteriors") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times

relevant to this action, First Exteriors supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

52. Defendant Flooring Services, Inc. (hereinafter "Flooring Services") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Flooring Services supplied materials, installed flooring and/or performed repairs, among other work, at One Belle Hall.

53. Defendant General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air (hereinafter "General Heating") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, General Heating supplied materials, installed heating and air conditioning ("HVAC") and/or performed repairs, among other work, at One Belle Hall.

54. Defendant Jimmy Warner d/b/a Warner Heating & Air (hereinafter "Jimmy Warner") is a business entity with its principal place of business located in Rockhill County, South Carolina. At all times relevant to this action, Jimmy Warner was a subcontractor of General Heating and supplied materials, installed heating and air conditioning ("HVAC") and/or performed repairs, among other work, at One Belle Hall.

55. Defendant GWC Roofing Company, Inc., individually, and d/b/a Southcoast Exteriors, Inc. (hereinafter "GWC") is a corporation organized under the laws of the State of North Carolina. At all times relevant to this action, GWC supplied materials, installed roofing and/or performed repairs, among other work, at One Belle Hall.

56. Defendant Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric (hereinafter "Houston Stafford") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action,

Houston Stafford supplied materials, installed electrical systems and/or performed repairs, among other work, at One Belle Hall.

57. Defendant KMAC of the Carolinas, Inc. (hereinafter "KMAC") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, KMAC supplied materials, installed gypcrete and waterproofing and/or performed repairs, among other work, at One Belle Hall.

58. Defendant P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales a/k/a P&P Metal Sales, Inc. d/b/a Carolina Metals, Inc. (hereinafter "P&P Metal") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, P&P Metal supplied materials, installed aluminum porch railings and/or performed repairs, among other work, at One Belle Hall.

59. Defendant Pleasant Places, Inc. (hereinafter "Pleasant Places") is a corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Pleasant Places supplied materials, installed irrigation and landscaping and/or performed repairs, among other work, at One Belle Hall.

60. Defendant Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida, a division of Raymond Building Supply Corporation (hereinafter "ESP") is a corporation organized under the State of Florida. At all times relevant to this action, ESP supplied windows, among other building components, at One Belle Hall.

61. Defendant RS Custom Homes, LLC (hereinafter "RS Custom") is a limited liability company organized and existing under the laws of the State of South Carolina. At all

times relevant to this action, RS Custom supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

62. Defendant Southern Specialties, Inc. (hereinafter "Southern Specialties") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Southern Specialties supplied materials, installed insulation, gutters and downspouts and/or performed repairs, among other work, at One Belle Hall.

63. Defendant Structural Contractors South, Inc. (hereinafter "Structural Contractors") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, Structural Contractors supplied materials, performed punch labor and/or performed repairs, among other work, at One Belle Hall.

64. Defendant Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc. (hereinafter "Superior") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Superior supplied materials, installed brick veneer and/or performed repairs, among other work, at One Belle Hall.

65. Defendant TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc. (hereinafter "TAMKO") is a corporation organized and existing under the State of Missouri. At all times relevant to this action, TAMKO supplied shingles, among other building components, at One Belle Hall.

66. Defendant VNS Corporation, individually, and d/b/a Wholesale Business Products f/k/a Wholesale Building Materials, Inc. (hereinafter "VNS") is a corporation organized and existing under the laws of the State of Georgia. At all times relevant to this action, VNS supplied materials and installed interior finishes, accessories and/or bath fixtures, among other work, at One Belle Hall.

67. Defendant What Don't We Do (hereinafter "WDWD") is business entity with its principal place of business located in Horry County, South Carolina. At all times relevant to this action, WDWD supplied materials and/or performed window repairs, among other work, at One Belle Hall.

68. Defendants John Doe #1-25 (hereinafter "John Doe Defendants") are other subcontractors, professionals and/or other entities involved in the design, development, marketing, construction, material manufacturing and/or supplying, repair, and/or sale of One Belle Hall, whose addresses and identities are unknown at this time.

FACTUAL ALLEGATIONS

69. This matter arises out of the design, development, construction, repair and sale of One Belle Hall.

70. At the time the Certificates of Occupancy were issued, One Belle Hall contained latent building defects.

71. Plaintiffs and class members have previously put the TCR Defendants on notice of some or many of the deficiencies:

72. The TCR Defendants attempted to repair One Belle Hall's defective condition, but said attempts have failed and/or were otherwise negligently performed.

73. The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property.

74. A preliminary inspection of One Belle Hall evidences failure of one or more components of the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components,

structural members, and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

75. Defendants had a duty to design, develop, construct, and repair One Belle Hall in a workmanlike manner with suitable materials and free from all defects.

76. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

77. The Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

78. Remedying the above-wrongs will result in additional consequential damages and loss of use.

79. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur a reasonable attorney's fees and costs for the retention of experts to determine the deficiencies, damage and the scope of work for repair.

80. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical general liability policies.

CLASS ACTION ALLEGATIONS

81. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Ramey brings this action both individually and as a proposed class action against Defendants on behalf of themselves and all other similarly situated persons and entities, who own, per the class definition, a condominium within One Belle

Hall (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a condominium within One Belle Hall located in the Town of Mt. Pleasant, Charleston County, South Carolina.

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.

82. *Numerosity*: The Class is composed of in excess of sixty persons geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of seventy-five members.

83. *Commonality*: Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- (a) Whether the construction of One Belle Hall was defective;
- (b) Whether Defendants negligently designed, developed constructed and/or repaired One Belle Hall;
- (c) Whether Defendants knew or should have known of the defects;
- (d) Whether the Defendants' repair of One Belle Hall was defective;
- (e) Whether Defendants failed to disclose to purchasers and/or homeowners the defects and/or unsuccessful repairs;
- (f) Whether Defendants are financially responsible to pay the full costs and expenses of

repair of said defective conditions;

(g) Whether Defendants' expertise and superiority and financial interest in sales transactions gave rise to a duty to disclose the material facts which were negligently concealed;

(h) Whether Plaintiff and the Class are entitled to compensatory damages, including, among other things: (i) compensation for all out-of-pocket monies expended by members of the Class for repair/replacement of other property damage; (ii) temporary repairs and (iii) compensation for loss of use; and

(i) Whether the Plaintiff and the Class are entitled to prejudgment interest, attorneys' fees and costs from Defendants.

84. *Typicality*: Plaintiff's claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in designing, developing, constructing, repairing, and selling One Belle Hall, Defendants' conduct in concealing the defective condition of One Belle Hall, and Plaintiff's and Class Members' purchasing homes containing building defects.

85. *Adequate Representation*: Plaintiff will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiff has retained counsel experienced in the prosecution of construction defect claims and complex litigation, including consumer class actions involving product liability and product design defects.

86. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available

methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

87. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class Members have the same legal right to and interest in redress for damages associated with the defective conditions existing within One Belle Hall.

88. Plaintiff and the Class envision no unusual difficulty in the management of this action as a class action.

89. Each Class Member has an interest of more than \$100.00.

90. The amount of money at stake for each Class Member may not be sufficient for each member to hire their own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

91. Defendants are estopped from relying on any statutes of limitation or repose by virtue of its acts. Defendants, in the exercise of required diligence, which negligently failed to occur, should have known One Belle Hall was negligently constructed and/or repaired and failed to alert the Plaintiffs of One Belle Hall's defective condition.

92. Defendants had a duty to inform Plaintiffs of the defects described herein, which

it should have known. Notwithstanding its duty, Defendants never disclosed the defects to Plaintiffs.

93. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of One Belle Hall.

94. Given Defendants' failure to disclose this non-public information about the defective nature of One Belle Hall – information over which it had exclusive control – and because Plaintiffs could not reasonably have known of One Belle Hall's defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

95. Defendants are further estopped from relying upon any statute of limitations as they have repeatedly represented to Plaintiffs that they are only responsible for correcting work for a period of one year after sale.

ESTOPPEL FROM PLEADING WARRANTY OBLIGATION

96. Defendants are also estopped from relying on any warranty obligation as a defense to Plaintiffs' claims.

97. By virtue of Defendants' acts, the work performed and/or materials supplied at One Belle Hall have not lived up to Defendants' warranties and representations, and given the defective condition of One Belle Hall and the premature deterioration of the life expectancy of One Belle Hall's building components that require unexpected maintenance, wear and/or replacement, the building components have not proven to be of value when compared to other building components.

98. Defendants in the exercise of required diligence, which negligently failed to occur, should have known that One Belle Hall was defective in design, construction and/or

repair, and its building components were not fit for their ordinary and intended use, were not merchantable, and failed to perform in accordance with the advertisements, marketing materials and warranties disseminated by Defendants or with the reasonable expectations of ordinary consumers such as Plaintiffs and the Class.

99. Accordingly, any warranty provided by Defendants fails its essential purpose because its purports to warrant that One Belle Hall and/or its building components will be free from defects for a limited period of time when in fact One Belle and/or its building components fail far short of the expected life cycle of the condominium buildings.

100. Moreover, Defendants' warranties are woefully inadequate to repair and replace failed building components, let alone reimburse for any damage suffered to the underlying structure due to the inadequate protection provided by the product. The remedies available Defendants' warranties are limited to such an extent that they do not provide a minimum adequate remedy.

101. As a result, any time limitations on the remedies encompassed within Defendants' warranties are unconscionable and unenforceable, and therefore, Defendants are estopped from relying on the same.

ESTOPPEL FOR PLEADING NOTICE OF OPPORUNITY TO CURE

106. The TCR Defendants are further estopped from relying on the Notice of Opportunity to Cure Act to stay the progression of Plaintiffs' claims.

107. The TCR Defendants were put on sufficient notice of One Belle Hall's defective condition within any statutory period prescribed by the Act.

108. In addition, the TCR Defendants were provided an opportunity to cure One Belle Hall's defective condition previously, but failed to adequately perform.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to All Defendants)

109. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

110. At all times relevant hereto, the Defendants, its agents, servants, employees, and subcontractors undertook and had a duty to Plaintiffs to exercise and use due care in the design, construction and repair of One Belle Hall in a good workmanlike manner and with suitable materials, in accordance with the applicable building codes, state law, good design, and in conformance with the prevailing industry standards.

111. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, careless, reckless, and wanton in the following particulars:

- (a) In designing, developing, constructing, repairing and selling, One Belle Hall with construction deficiencies including those previously identified;
- (b) In failing to construct One Belle Hall in accordance with due care and in accordance with standard building practices;
- (c) In failing to construct One Belle Hall in accordance with building code;
- (d) In failing to properly supervise the work and construction of One Belle Hall;
- (e) In failing to properly coordinate the subcontractors;
- (f) In failing to construct with an adequate exterior building envelope;
- (g) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (h) In negligently covering up their own defective work and the defective work of others;

- (i) In failing to make proper repairs; and
- (j) Such other failures to be proven at trial.

112. Plaintiffs have been damaged as a direct and proximate result of the negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants.

113. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, and/or constituted negligence per se, Plaintiffs are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to All Defendants)

114. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

115. The design, construction, sale, and repair of One Belle Hall came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that One Belle Hall would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

116. The design, construction, sale and/or repair of One Belle Hall, and the components used therein, came with implied warranties of fitness, merchantability, workmanship, and habitability.

117. Defendants have breached their warranties by designing, constructing, and/or repairing One Belle Hall in a defective manner as set forth above.

118. As a direct and proximate result of the Defendants' breach of the implied warranty, Plaintiffs have suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION

(Strict Liability in Tort: *S.C. Code Ann. § 15-73-10 et seq.* as to BAFS, BFS, ESP and TAMKO)

116. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

117. Defendant ESP manufactured the windows installed during the construction and/or repair of One Belle Hall.

118. Defendant BFS supplied the ESP windows installed during the construction and/or repair of One Belle Hall.

119. Defendant TAMKO manufactured and/or supplied the shingles installed during the construction and/or repair of One Belle Hall.

120. Defendant BASF manufactured and/or supplied the stucco installed during the construction and/or repair of One Belle Hall.

121. In manufacturing and/or supplying products for the construction and/or repair of One Belle Hall, the aforementioned Defendants placed products into the stream of commerce.

122. By introducing their products into the stream of commerce, the aforementioned Defendants represented said products were safe and suitable for their foreseeable use.

123. In the manufacture and/or supply of products to One Belle Hall, the aforementioned Defendants anticipate and expect that their products will reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

124. The aforementioned Defendants have manufactured and/or sold products in a defective manner which has resulted in repeated water intrusion into and damage to One Belle Hall and other building deficiencies.

125. Plaintiffs could not have discovered the product defects through the exercise of reasonable care.

126. The cost of altering the design, construction, and/or repair of the products supplied to One Belle Hall was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

127. The design and manufacture of the products supplied to One Belle Hall was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

128. The aforementioned Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to the TCR Defendants)

129. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

130. The TCR Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of One Belle Hall and their former capacity controlling the POA.

131. The TCR Defendants promoted, created and maintained control of the POA and One Belle Hall for several years, and thus, had fiduciary duties they owed to the POA, its members and individual homeowners.

132. The TCR Defendants breached the fiduciary duties they owed to the Plaintiffs by:

- (a) failing to investigate defective conditions prior to handing over the property to the POA and the homeowners;
- (b) failing to disclose said defective conditions;

- (c) failing to properly repair said defective conditions prior to handing over the property to the POA and the homeowners; and
- (d) permitting TCR to turn over the property to the POA in said defective condition without depositing sufficient funds to the account of the POA to bring the elements up to a reasonable standard.

133. As a direct and proximate result of the TCR Defendants' breach of fiduciary duty, Plaintiffs have been damaged as hereinabove set forth and as to be further proven at trial.

FOR A FIFTH CAUSE OF ACTION

(Veil Piercing/Joint Venture/Agent/Alter Ego/Amalgamation as to the TCR Defendants)

134. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

135. The TCR Defendants are alter egos of each other, and therefore, the actions of one constitute the actions of all, and each is liable for the entirety of Plaintiffs' damages.

136. The TCR Defendants operated together as actual or *defacto* joint venturers and partners in the development, marketing, construction, repair and sale of One Belle Hall and each are liable for the entirety of Plaintiffs' damages.

137. The TCR Defendants have acted as agents for one another, and each is liable for as a principal for the acts of the agents; and each agent is additionally liable for its misfeasance, malfeasance, and nonfeasance occurring during the performance of its principal's business.

138. The TCR Defendants operated in such a manner as the distinction between them is blurred, and they are/should be amalgamated as a single entity.

139. The TCR Defendants were owned and operated by substantially the same principals, used the same trade name, failed to observe necessary corporate formalities, were undercapitalized, and/or were otherwise so intermingled that they do not have any genuine or

separate corporate existence, such that all corporate veils should be pierced and each held liable for the whole of Plaintiffs' damages.

140. The TCR Defendants' conduct and abuse of the corporate form has resulted in fundamental unfairness to Plaintiffs.

141. As a result, the TCR Defendants' abuse of the corporate form makes it appropriate and just that any liability imposed on one TCR Defendant, be imposed upon the other TCR Defendants and their principals.

FOR A SIXTH CAUSE OF ACTION
(Veil Piercing/Joint Venture/Agent/Alter Ego/Amalgamation as to the Halter Defendants)

142. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

143. The Halter Defendants are alter egos of each other, and therefore, the actions of one constitute the actions of all, and each is liable for the entirety of Plaintiffs' damages.

144. The Halter Defendants operated together as actual or *defacto* joint venturers and partners in the development, marketing, construction, repair and sale of One Belle Hall and each are liable for the entirety of Plaintiffs' damages.

145. The Halter Defendants have acted as agents for one another, and each is liable for as a principal for the acts of the agents; and each agent is additionally liable for its misfeasance, malfeasance, and nonfeasance occurring during the performance of its principal's business.

146. The Halter Defendants operated in such a manner as the distinction between them is blurred, and they are/should be amalgamated as a single entity.

147. The Halter Defendants were owned and operated by substantially the same principals, used the same trade name, failed to observe necessary corporate formalities, were undercapitalized, and/or were otherwise so intermingled that they do not have any genuine or

separate corporate existence, such that all corporate veils should be pierced and each held liable for the whole of Plaintiffs' damages.

148. The Halter Defendants' conduct and abuse of the corporate form has resulted in fundamental unfairness to Plaintiffs.

149. As a result, the Halter Defendants' abuse of the corporate form makes it appropriate and just that any liability imposed on one Halter Defendant, be imposed upon the other Halter Defendants and their principals.

FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices as to TCR Defendants)

150. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

151. At all times relevant herein, the TCR Defendants engaged in the business of developing, designing, constructing, repairing and selling One Belle Hall into the stream of commerce.

152. The TCR Defendants were engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

153. The TCR Defendants' above-described activities, including placing One Belle with defective design and construction into the stream of commerce, failing to properly repair defective conditions, failing to comply with the building code, and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices in the conduct of the TCR Defendants' and the Halter Defendants' trade.

154. The TCR Defendants' above-described acts are capable of repetition and adversely affect the public interest.

155. The TCR Defendants knew or should have known that their conduct was in violation of the S.C. Code Ann. § 39-5-20.

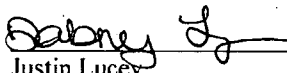
156. As a direct, foreseeable, and proximate result of the TCR Defendants' unfair trade practices in South Carolina, Plaintiffs have suffered significant damage.

WHEREFORE, Plaintiffs demand a trial by jury and pray for judgment, joint and several, against the Defendants; actual and consequential damages; statutory or punitive damages expected to exceed twelve million dollars; reasonable attorneys' fees; costs of suit; and prejudgment interest; and granting such further relief as the Court deems just and proper.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By:


Justin Lucey
Dabny Lynn
415 Mill Street
Post Office Box 806
Mount Pleasant, SC 29465-0806
(843) 849-8400 phone
(843) 849-8406 fax

December 23, 2013
Charleston, South Carolina

d/b/a General Heating and Air; Jimmy Warner,)
 individually, and d/b/a Warner Heating & Air;)
 Glazing Consultants, Inc.; GWC Roofing, Inc.,)
 individually, and d/b/a Southcoast Exteriors,)
 Inc.; Houston Stafford Electrical Contractors,)
 LP a/k/a IES Residential, Inc. d/b/a Houston)
 Stafford Electric; KMAC of the Carolinas,)
 Inc.; P&P Metal Sales Co., Inc. a/k/a P&P)
 Metal Sales, LLC a/k/a P&P Metal Sales, Inc.)
 a/k/a Carolina Metals; Pleasant Places, Inc.;)
 Raymond Building Supply Corporation d/b/a)
 Energy Saving Products of Florida, Inc. a/k/a)
 Energy Saving Products of Florida; Southern)
 Specialties, Inc.; Structural Contractors South,)
 Inc.; Superior Construction Services, Inc.,)
 individually, and d/b/a Superior Masonry)
 Unlimited, Inc.; TAMKO Building Products,)
 Inc. f/k/a TAMKO Roofing Products, Inc.;)
 VNS Corporation, individually, and d/b/a)
 Wholesale Building Products f/k/a Wholesale)
 Building Materials, Inc.; What Don't We Do;)
 and John Doe 1-25,)

Defendants.)

PERSONALLY APPEARED BEFORE ME the undersigned, A. Rhett Whitlock, Ph.D.,

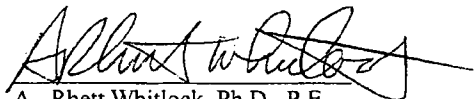
P.E., who first being duly sworn, deposes and states as follows:

1. That I am over the age of eighteen (18) years and am competent to make this Affidavit.
2. That I am a licensed professional engineer in the State of South Carolina and have been
 licensed in South Carolina approximately twenty-one (21) years.
3. That I am a principal at Whitlock Dalrymple Poston & Associates, Inc.
4. That I have performed various site inspections of the project known as One Belle Hall
 condominiums ("One Belle Hall") located in Mt. Pleasant, South Carolina and have

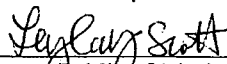
reviewed various design documents regarding same provided by Cline Design Associates, P.A. ("Cline Design") and Gary D. Cline ("Gary Cline") (hereinafter collectively referred to as the "Design Professionals").

5. That the Design Professionals' employees and/or agents provided architectural and/or engineering services and/or construction administration services at One Belle Hall.
6. That the Design Professionals' employees and/or agents provided site inspections, field reports, and design/construction meeting minutes to ensure proper and adequate construction was performed at One Belle Hall.
7. That the Design Professionals prepared and/or approved inadequate and/or defective plans and/or specifications that lack sufficient detail (including inadequate waterproofing, roofing, and stucco installation details), lack material components (including inadequate kick-out flashing and masonry expansion joints) and are in error regarding certain details provided (i.e., erroneous height provided for brick veneer cladding and erroneous ventilation provided for roof systems).
8. That the foregoing inadequacies and deficiencies have caused, and continue to cause, damage to One Belle Hall.
9. That this is my opinion to a reasonable degree of engineering certainty.

FURTHER AFFIANT SAYETH NOT.


A. Rhett Whitlock, Ph.D., P.E.

Sworn to and subscribed before me this
23rd day of December, 2013.


_____(SEAL)
Notary Public of Virginia
My Commission Expire: 10/31/2015



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

One Bell Hall Property Owners Association, Inc.
and Brady Ramey, individually, and on behalf
of all others similarly situated,

Plaintiffs,

vs.

Trammell Crow Residential Company; TCR NC
Construction, I, LP; Belle Hall Direct 101, LP;
TCR RLD Condominiums, Inc., CS 101 Belle Hall,
LP; TCR Southeast, Inc., TCR Carolina Properties,
Inc., TCR SE Construction, Inc., TCR SE
Construction, II, Inc., TCR Construction, a division
of Trammell Crow Residential; TCR Development,
a division of Trammell Crow Residential;
Trammell Crow Residential Carolina, a division
of Trammell Crow Residential; and Tauer
Consulting Company, Inc., a division of Trammell
Crow Residential, each individually, and
collectively d/b/a "Trammell Crow Residential,"
"Trammell Crow" or "TCR"; Halter Properties,
LLC, Halter Realty, LLC, and Halter Realty
Group, LLC each individually, and collectively
d/b/a "Halter Companies"; Jane Doe 1-5; ABG
Caulking & Waterproofing of Morristown, Inc.
a/k/a ABG Caulking Contractors; Advanced
Building Products & Services, LLC, BASF
Corporation; Budget Mechanical Plumbing, Inc.,
Builders FirstSource - Southeast Group, LLC,
Builders Services Group, Inc., individually, and
d/b/a Gal Contractor Services, Inc.; Century Fire
Protection, LLC; Cline Design Associates, P.A.
and Gary D. Cline; Coastal Lumber & Framing,
LLC; Dodson Brothers Exterminating Co., Inc.
a/k/a Dodson Pest Control, First Exteriors, LLC;
Flooring Services, Inc., General Heating & Air
Conditioning Company of Greenville, Inc. d/b/a
General Heating and Air; Jimmy Warner,
individually, and d/b/a Warner Heating & Air;

IN THE COURT OF COMMON
PLEAS
FOR THE NINTH JUDICIAL
CIRCUIT
CASE NO.: 2012-CP-10-7594

**DEFENDANT BUILDERS
FIRSTSOURCE-SOUTHEAST
GROUP, LLC'S ANSWER TO
PLAINTIFFS' AMENDED
COMPLAINT**

2014 JAN 31 PM 1:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY *[Signature]*

FILED

Glazing Consultants, Inc., GWC Roofing, Inc.,)
 individually, and d/b/a Southcoast Exteriors, Inc.;)
 Houston Stafford Electrical Contractors, LP a/k/a)
 IES Residential, Inc. d/b/a Houston Stafford Electric)
 KMAC of the Carolinas, Inc.; P&P Metal Sales)
 Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a)
 P&P Metal Sales, Inc. a/k/a Carolina Metals;)
 Pleasant Places, Inc.; Raymond Building Supply)
 Corporation d/b/a Energy Saving Products of)
 Florida, Inc. a/k/a Energy Saving Products of)
 Florida; Southern Specialties, Inc.; Structural)
 Contractors South, Inc.; Superior Construction)
 Services, Inc., individually and d/b/a Superior)
 Masonry Unlimited, Inc.; TAMKO Building)
 Products, Inc. f/k/a TAMKO Roofing Products,)
 Inc.; VNS Corporation, individually, d/b/a)
 Wholesale Building Products f/k/a Wholesale)
 Building Materials, Inc.; What Don't we Do; and)
 John Doe 1-25,)
)
 Defendants.)
)

TO: JUSTIN LUCEY, ESQUIRE, AND DABNY LYNN, ESQUIRE, ATTORNEYS FOR PLAINTIFFS

Defendant Builders FirstSource-Southeast Group, LLC ("BFS") responds to Plaintiffs'

Amended Complaint as follows:

1. Every allegation of the Amended Complaint not specifically admitted below is denied.

FOR A FIRST DEFENSE

2. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 1 through 43 and, therefore, denies those allegations.
3. BFS admits the allegations of Paragraph 44 to the extent that it is a limited liability corporation organized and existing under the laws of the State of Delaware. BFS denies the remaining allegations of Paragraph 3.

4. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 45 through 68 and, therefore, denies those allegations.
5. Upon information and belief, BFS admits the allegations of Paragraph 69.
6. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 70 through 74 and, therefore, denies those allegations.
7. BFS denies the allegations of Paragraphs 75 through 80, as to it.
8. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 81 through 90 and, therefore, denies those allegations.
9. BFS denies the allegations of Paragraphs 91 through 95 as to it.
10. BFS denies the allegations of Paragraphs 96 through 101 as to it.
11. There are no paragraphs contained in the Amended Complaint that are numbered 102, 103, 104, or 105. The allegations of Paragraphs 106, 107 and 108 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION**

12. In response to Paragraph 109, BFS repeats its responses above.
13. BFS denies the allegations of Paragraphs 110, 111, 112 and 113.

**FOR A FIRST DEFENSE
TO THE SECOND CAUSE OF ACTION**

14. In response to Paragraph 114, BFS repeats its responses above.
15. BFS denies the allegations of Paragraphs 115, 116, 117 and 118.

**FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION**

16. In response to Paragraph 116 (second), BFS repeats its responses above.
17. The allegations of Paragraph 117 (second) are directed toward another defendant and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.
18. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 118 (second) and, therefore, denies those allegations.
19. The allegations of Paragraphs 119 and 120 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.
20. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 121 and 122 and, therefore, denies those allegations.
21. BFS admits the allegations of Paragraph 123 in so far as the allegations apply to product supply.
22. BFS denies the allegations of Paragraph 124.
23. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 125 and 126 and, therefore, denies those allegations.
24. BFS denies the allegations of Paragraph 127 as to it.
25. The allegations of Paragraph 128 constitute conclusions of law, which require no response. To the extent that a response from BFS is deemed necessary, it denies the allegations.

**FOR A FIRST DEFENSE
TO THE FOURTH CAUSE OF ACTION**

26. In response to Paragraph 129, BFS repeats its responses above.

27. The allegations of Paragraphs 130 through 133 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE FIFTH CAUSE OF ACTION**

28. In response to Paragraph 134, BFS repeats its responses above.

29. The allegations of Paragraphs 135 through 141 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE SIXTH CAUSE OF ACTION**

30. In response to Paragraph 142, BFS repeats its responses above.

31. The allegations of Paragraphs 143 through 149 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE SEVENTH CAUSE OF ACTION**

32. In response to Paragraph 150, BFS repeats its responses above.

33. The allegations of Paragraphs 151 through 156 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

FOR A SECOND DEFENSE

34. Plaintiffs have failed to state facts sufficient to constitute a cause of action against BFS upon which relief can be granted. Thus, each of Plaintiffs' causes of action against BFS should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

35. The Plaintiffs' claims are barred by the applicable statutes of limitation and/or statutes of repose. Thus, Plaintiffs' causes of action against BFS should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE

36. The Plaintiffs' claims are barred by the equitable doctrines of waiver and/or estoppel and/or laches. Thus the Plaintiffs' causes of action should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE

37. Plaintiffs' damages, if any, were caused by the acts or omissions of third parties over whom this defendant had no control.

FOR A SIXTH DEFENSE

38. To the extent Plaintiffs have breached their duty to mitigate their damages, they are barred from recovery against BFS.

FOR A SEVENTH DEFENSE

39. To the extent Plaintiffs assert warranty liability against BFS, upon information and belief, BFS or its predecessors-in-interest had no direct contact with Plaintiffs and made no representations, written or oral, upon which Plaintiffs relied. Notwithstanding this fact, any claim or allegation advanced as a warranty claim against BFS for which Plaintiffs failed to give BFS reasonable timely notice to cure is barred by law.

FOR AN EIGHTH DEFENSE

40. The damages Plaintiffs allege were caused by BFS or BFS's product(s), upon information and belief, were caused by misuse and/or abuse of BFS's work or work product, and were not reasonably foreseeable by BFS; therefore, Plaintiffs are barred from recovery against BFS.

FOR A NINTH DEFENSE

41. Plaintiffs' claims against BFS are barred and/or limited by the doctrines of comparative negligence, carelessness, fault, breach of duty and/or assumption of risk of the Plaintiffs.

FOR A TENTH DEFENSE

42. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because any award of punitive damages under South Carolina law without bifurcating the trial of all punitive damages issues would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR AN ELEVENTH DEFENSE

43. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law subject to no predetermined limit, such as a maximum multiple of compensatory damages or a maximum amount on the amount of punitive damages that a jury may impose would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR A TWELFTH DEFENSE

44. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law by a jury that (1) is not provided a standard of sufficient clarity for determining the appropriateness, or the appropriate size, of a punitive damages award, (2) is not instructed on the limits on punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages or determining the amount of an award of punitive damages, in whole or in part, on the basis of this Defendant, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (5) is not subject to judicial review on the basis of objective standards, would violate this Defendant's due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment and by the South Carolina Constitution's provisions providing due process, equal protection, and a guaranty against double jeopardy.

FOR A THIRTEENTH DEFENSE

45. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law for the purpose of compensating Plaintiffs for elements of damage not otherwise recognized by South Carolina law would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR A FOURTEENTH DEFENSE

46. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law without proof of every element beyond a reasonable doubt would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR A FIFTEENTH DEFENSE

47. The claim of Plaintiffs for punitive damages cannot be sustained, because an award of punitive damages under state law without the same protections that are accorded to all criminal defendants, including protection against unreasonable searches and seizures, double jeopardy and self-incrimination and the rights to confront adverse witnesses, a speedy trial and the effective assistance of counsel would violate this Defendant's rights under the Fourteenth Amendment to the United States Constitution and the Fourth, Fifth, and Sixth Amendments as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and the rights to confront witnesses, a speedy trial and effective assistance of counsel and protection against unreasonable searches and seizures, double jeopardy and compelled self-incrimination.

FOR A SIXTEENTH DEFENSE

48. Any award of punitive damages based on anything other than this Defendant's conduct in connection with the specific incident that is the subject of this lawsuit would violate the due process clause of the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and a guaranty against

double jeopardy, because any other judgment for punitive damages in this case cannot protect this Defendant against impermissible multiple punishment for the same wrong.

FOR A SEVENTEENTH DEFENSE

49. If windows that may have been sold BFS are found to be the cause of damages suffered by Plaintiffs, which BFS denies, Plaintiffs cannot recover against BFS if the condition of the windows as installed in the subject building was substantially changed and materially altered from the condition in which they were sold, as provided in S.C. Code § 15-73-10.

If windows that may have been sold by BFS were defective, which is denied, Plaintiffs discovered such defect and were aware of the danger and nevertheless proceeded to make use of the product, such that Plaintiffs' recovery is barred or limited from BFS, as provided in S.C. Code §15-73-20.

FOR A EIGHTEENTH DEFENSE

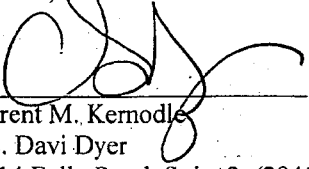
50. If windows and/or doors that may have been sold by BFS were defective, which is denied, failure to give reasonable notice is pled in bar of any recovery under a warranty claim and otherwise.

FOR A NINETEENTH DEFENSE

51. Defendant would show that the Plaintiff had constructive knowledge and/or actual knowledge of those conditions referred to in the Complaint, nonetheless proceeded to purchase the subject property. Such circumstances constitute a complete bar to the Plaintiff's claims.

WHEREFORE, having fully answered the Amended Complaint of the Plaintiffs, BFS demands a trial by jury and prays that the Amended Complaint be dismissed, with costs, and for such other relief as the Court may grant

KERNODLE, ROOT & COLEMAN

By: 

Trent M. Kernodle
C. Davi Dyer
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422
(843) 795-7800
(843) 795-3032 Fax
tkernodle@kernodlslaw.com
ddyer@kernodlslaw.com

ATTORNEY FOR DEFENDANT BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP, LLC

January 20, 2014

Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, ***Defendant Builders FirstSource-Southeast Group, LLC's Answer to Plaintiffs' Amended Complaint*** was sent as noted below to:

Justin O'Toole Lucey, Esquire
Dabny Lynn, Esquire
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mt. Pleasant, Sc 29464
Attorneys for Plaintiffs

F. Cordes Ford, IV, Esquire
C. Allen Gibson, Esquire
Harrison M. Trammell, Esquire
Womble Carlyle Sandridge & Rice
P. O. Box 999
5 Exchange Street (29401)
Charleston, Sc 29402
***Attorneys for Defendants Trammell Crow Residential,
TCR NC Construction, I, LP, Bell Hall Direct 101, LP,
TCR RLD Condominiums, Inc. and
CS 101 Belle Hall, LP***

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and MARVIN T.)
MEEK and FRANCIS E. HILL,)
individually, and on behalf of all others)
similarly situated,)

Plaintiffs,)

vs.)

Trammell Crow Residential Company; TCR)
NC Construction I, LP; Belle Hall Direct 101,)
LP; TCR RLD Condominiums, Inc.; CS 101)
Belle Hall, LP; TCR Southeast, Inc.; TCR)
Carolina Properties, Inc.; TCR SE)
Construction, Inc.; TCR SE Construction II,)
Inc.; TCR Construction, a division of,)
Trammell Crow Residential; TCR)
Development, a division of Trammell Crow)
Residential; Trammell Crow Residential)
Carolina, a division of Trammell Crow)
Residential; and Tauer Consulting Company,)
Inc., a division of Trammell Crow Residential,)
each individually, and collectively d/b/a)
"Trammell Crow Residential," "Trammell)
Crow" or "TCR"; Halter Properties, LLC; and)
Halter Realty Group, LLC, each individually,)
and collectively d/b/a "Halter Companies";)
ABG Caulking & Waterproofing of)
Morristown, Inc; Advanced Building Products)
& Services, LLC; BASF Corporation; Billy)
Gray d/b/a United Builders, LLC; Budget)
Mechanical Plumbing, Inc.; Builders First)
Source - Southeast Group, LLC; Builders)
Services Group, Inc., individually, and d/b/a)
Gale Contractor Services, Inc.; Century Fire)
Protection, LLC; Cline Design Associates,)
P.A. and Gary D. Cline; Coastal Lumber &)
Framing, LLC; Dodson Brothers)
Exterminating Co., Inc. a/k/a Dodson Pest)
Control; First Exteriors, LLC; Flooring)
Services, Inc.; General Heating & Air)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-7594

SECOND AMENDED COMPLAINT
(Defective Construction)

(Jury Trial Demanded)

FILED
2015 JAN -8 PM 1:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Conditioning Company of Greenville, Inc.)
d/b/a General Heating and Air; **GCI**)
Consultants, LLC f/k/a Glazing)
Consultants, Inc.; GWC Roofing, Inc.,)
individually, and d/b/a Southcoast Exteriors,)
Inc.; **IES Residential Inc. f/k/a Houston**)
Stafford Electrical Contractors, LP; J.)
Correa Electrical Company, LLC; Jimmy)
Warner, individually, and d/b/a Warner)
Heating & Air; KMAC of the Carolinas, Inc.;)
P&P Metal Sales Co., Inc. a/k/a P&P Metal)
Sales, Inc. a/k/a Carolina Metals; Pleasant)
Places, Inc.; Raymond Building Supply)
Corporation d/b/a Energy Saving Products of)
Florida, Inc. a/k/a Energy Saving Products of)
Florida; **RS General Contracting, LLC f/k/a/**)
RS Custom Homes, LLC; Southern)
Specialties, Inc.; Structural Contractors South,)
Inc.; Superior Construction Services, Inc.,)
individually, and d/b/a Superior Masonry)
Unlimited, Inc.; TAMKO Building Products,)
Inc. f/k/a TAMKO Roofing Products, Inc.;)
VNS Corporation, individually, and d/b/a)
Wholesale Building Products; and What)
Don't We Do;)

Defendants.)

The Plaintiffs, One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually, and on behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff One Belle Hall Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.
2. The POA is the property owners association for the One Belle Hall Horizontal Property Regime.

3. The One Belle Hall Horizontal Property Regime is a Horizontal Property Regime ("One Belle Hall") which exists by virtue of a Master Deed dated December 11, 2006 and recorded December 12, 2006 in the RMC Office of Charleston County, SC in Book K608, Page 211.

4. One Belle Hall consists of fifty-nine (59) condominiums located in four (4) buildings and related common elements, which are located behind the Belle Hall shopping center in Mount Pleasant, South Carolina.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with One Belle Hall.

6. The POA is charged with, *inter alia*, the management and administration of One Belle Hall, the investigation, maintenance and repair of One Belle Hall's Common Elements and Areas of Responsibility, and has the right and obligation to bring this action on behalf of One Belle Hall, the POA, and the respective owners and members.

7. Plaintiff Marvin T. Meek (hereinafter "Plaintiff Meek") is a citizen of Charleston County, South Carolina and is an owner of a condominium within One Belle Hall more particularly described as 2100 Belle Isle Avenue, Unit 201, Mount Pleasant, South Carolina, 29464.

8. Plaintiff Francis E. Hill (hereinafter "Plaintiff Hill") is a citizen of Charleston County, South Carolina and is an owner of a condominium within One Belle Hall more particularly described as 2100 Belle Isle Avenue, Unit 104, Mount Pleasant, South Carolina, 29464.

9. By virtue of property ownership in One Belle Hall, Plaintiff Meek, Plaintiff Hill and the Class (hereinafter collectively referred to as "Plaintiffs") are members of the POA, have been members of the POA at all times relevant hereto, and have ownership and membership rights relating thereto.

10. Defendant Trammell Crow Residential Company is a company organized and existing under the laws of the State of Delaware.

11. Defendant TCR Carolina Properties, Inc. is a corporation organized under the laws of the State of Texas, and represented that it was an owner of the One Belle Hall project.

12. Defendant Belle Hall Direct 101, LP is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, Belle Hall Direct 101, LP was a single purpose entity through which the TCR Defendants' attempted to coordinate their development efforts and was the named seller of One Belle Hall condominiums.

13. Defendant CS 101 Belle Hall, LP is a limited partnership organized and existing under the laws of the State of Texas, and is/was represented as a general partner of Belle Hall Direct 101, LP.

14. Defendant TCR RLD Condominiums, Inc. is a corporation organized and existing under the laws of the State of Texas, and is/was represented as a general partner of CS 101 Belle Hall, LP.

15. Defendant TCR SE Construction, Inc. is a company organized under the laws of the State of Texas, and is/was represented as a general partner of Belle Hall Direct 101, LP.

16. Defendant TCR NC Construction I, LP is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, TCR NC

Construction I, LP was the entity through which the TCR Defendants' attempted to effect their construction efforts and was the named general contractor for One Belle Hall.

17. Defendant TCR SE Construction II, Inc. is a company organized under the laws of the State of Texas, and is/was represented as a partner and/or agent of TCR NC Construction I, LP.

18. Defendant TCR Southeast, Inc. is a company organized under the laws of the State of Texas.

19. Defendant Tauer Consulting Company, Inc., a division of Trammell Crow Residential, is a corporation organized under the laws of the State of Georgia. At all times relevant to this action, Tauer Consulting Company, Inc. served as the punch supervisor and sales coordinator, among providing other services, for One Belle Hall.

20. Defendant Trammell Crow Residential Carolina is a division of Trammell Crow Residential and/or is an entity comprised of "TCR" employees, agents and/or affiliates.

21. Defendant TCR Construction is a division of Trammell Crow Residential and/or is an entity comprised of "TCR" employees, agents and/or affiliates.

22. Defendant TCR Development is a division of Trammell Crow Residential and/or is an entity comprised of "TCR" employees, agents and/or affiliates.

23. The foregoing Defendants, and their divisions and affiliates, operated under the trade names "Trammell Crow Residential," "Trammell Crow," "TCR," and similar names (herein collectively referred to as the "TCR Defendants"), and at all times relevant to this action, the TCR Defendants coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale and/or repair of One Belle Hall.

24. The TCR Defendants operated together as actual or *defacto* joint venturers, partners, and agents of each other in the design, development, marketing, construction, sale and/or repair of One Belle Hall (the design, development, marketing, construction, sale and/or repair of One Belle Hall hereinafter collectively referred to as the "One Belle Hall Project").

25. At all times material hereto, the TCR Defendants operated a joint enterprise for the common, for-profit purpose of the One Belle Hall Project.

26. The TCR Defendants acted as agents of each other in connection with the One Belle Hall Project.

27. The TCR Defendants have acted collectively and in such manner that the distinction between the TCR Defendants has been blurred and the TCR Defendants should be amalgamated as a single entity.

28. The TCR Defendants have failed to observe corporate formalities and their corporate shells should be disregarded and all TCR Defendants should be held liable for Plaintiffs' damage.

29. Defendant Halter Properties, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

30. Defendant Halter Realty Group, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

31. The foregoing Halter Defendants, their divisions and affiliates, operated under the trade name "Halter Companies" and similar names (herein collectively referred to as the "Halter Defendants"), and at all times relevant to this action, the Halter Defendants coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the development and construction of One Belle Hall.

32. The Halter Defendants operated together as actual or *de facto* joint venturers, partners and agents of each other in the One Belle Hall Project.

33. At all times material hereto, the Halter Defendants operated a joint enterprise for the common, for-profit purpose of the One Belle Hall Project.

34. The Halter Defendants acted as agents of each other in connection with the One Belle Hall Project.

35. The Halter Defendants have acted collectively and in such manner that the distinction between the Halter Defendants has been blurred and the Halter Defendants should be amalgamated as a single entity.

36. The Halter Defendants have failed to observe corporate formalities and their corporate shells should be disregarded and all Halter Defendants should be held liable for Plaintiffs' damage.

37. The TCR Defendants and the Halter Defendants were actual or *de facto* joint ventures and/or partners, control persons, and/or agents of each other in the One Belle Hall Project.

38. The TCR Defendants and the Halter Defendants comingled and combined their resources to develop, repair, market, sell, and place the One Belle Hall condominiums into the stream of commerce.

39. Defendant Cline Design Associates, P.A. (hereinafter "Cline Design") is a professional corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Cline Design served as the architect for the construction of One Belle Hall.

40. Defendant Gary D. Cline (hereinafter "Gary Cline") is a registered architect in the State of South Carolina who executed and sealed the plans for the construction of One Belle Hall.

41. Defendant GCI Consultants, LLC f/k/a Glazing Consultants, Inc. (hereinafter "GCI") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, GCI provided consulting services and quality assurance inspections, among other work, at One Belle Hall.

42. Defendant ABG Caulking & Waterproofing of Morristown, Inc. (hereinafter "ABG") is a corporation organized and existing under the laws of the State of Tennessee. At all times relevant to this action, ABG supplied materials, installed caulking and/or performed repairs, among other work, at One Belle Hall.

43. Defendant BASF Corporation (hereinafter "BASF") is a corporation organized and existing under the State of Delaware. At all times relevant to this action, BASF supplied stucco, among other building components, at One Belle Hall.

44. Defendant Builders First Source – Southeast Group, LLC (hereinafter "BFS") is a limited liability company organized and existing under the laws of the State of Delaware. At all times relevant to this action, BFS supplied windows, among other building components, at One Belle Hall.

45. Defendants Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc. (hereinafter "Gale") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, Gale supplied materials, installed garage doors and/or performed repairs, among other work, at One Belle Hall.

46. Defendant Budget Mechanical Plumbing, Inc. (hereinafter "Budget Plumbing") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Budget Plumbing supplied materials, installed plumbing, plumbing fixtures, water heaters, condensate lines and/or performed repairs, among other work, at One Belle Hall.

47. Defendant Century Fire Protection, LLC (hereinafter "Century Fire") is a limited liability corporation organized and existing under the laws of the State of Delaware. At all times relevant to this action, Century Fire provided and/or installed fire protection and fire stopping, among other work, at One Belle Hall.

48. Defendant Coastal Lumber and Framing, LLC (hereinafter "Coastal Framing") is a limited liability company organized under the laws of the State of Florida. At all times relevant to this action, Coastal Framing supplied materials, framed structures and/or performed repairs, among other work, at One Belle Hall.

49. Defendant Advanced Building Products & Services, LLC (hereinafter "ABP&S") is a limited liability company organized under the laws of the State of Florida. At all times relevant to this action, ABP&S operated under a profit sharing agreement with Coastal Framing by which ABP&S was an actual or *de facto* joint venturer, partner, manager, and/or agent of Coastal Framing in the supply of materials, among other work, at One Belle Hall.

50. Defendant Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control ("Dodson") is a corporation organized and existing under the laws of the State of Virginia. At all times relevant to this action, Dodson provided termite treatment, among other work, at One Belle Hall.

51. Defendant First Exterior, LLC (hereinafter "First Exteriors") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, First Exteriors supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

52. Defendant Flooring Services, Inc. (hereinafter "Flooring Services") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Flooring Services supplied materials, installed flooring and/or performed repairs, among other work, at One Belle Hall.

53. Defendant General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air (hereinafter "General Heating") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, General Heating supplied materials, installed heating and air conditioning ("HVAC") and/or performed repairs, among other work, at One Belle Hall.

54. Defendant Jimmy Warner (hereinafter "Jimmy Warner") is a resident of Paulding County, Georgia and the owner of Warner Heating & Air. At all times relevant to this action, Jimmy Warner was a subcontractor of General Heating and supplied materials, installed HVAC and/or performed repairs, among other work, at One Belle Hall.

55. Defendant Warner Heating & Air (hereinafter "Warner") is a business entity with its principal place of business located in Paulding County, Georgia. At all times relevant to this action, Warner was a subcontractor of General Heating and supplied materials, installed HVAC and/or performed repairs, among other work, at One Belle Hall.

56. Defendant GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc. (hereinafter "GWC") is a corporation organized under the laws of the State of North Carolina. At

all times relevant to this action, GWC supplied materials, installed roofing and/or performed repairs, among other work, at One Belle Hall.

57. Defendant Southcoast Exteriors, Inc. (hereinafter "Southcoast") is a corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Southcoast controlled, directed, managed, supervised and/or carried out the business of GWC and supplied materials, installed roofing and/or performed repairs, among other work, at One Belle Hall.

58. Defendant IES Residential, Inc. f/k/a Houston Stafford Electrical Contractors, LP (hereinafter "Houston Stafford") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, Houston Stafford supplied materials, installed electrical systems and/or performed repairs, among other work, at One Belle Hall.

59. Defendant J. Correa Electrical Company, LLC (hereinafter "JCEC") is a limited liability organized under the laws of the State of South Carolina. At all times relevant to this action, JCEC was a subcontractor of Houston Stafford and supplied materials, installed electrical systems and/or performed repairs, among other work, at One Belle Hall.

60. Defendant KMAC of the Carolinas, Inc. (hereinafter "KMAC") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, KMAC supplied materials, installed gypcrete and waterproofing and/or performed repairs, among other work, at One Belle Hall.

61. Defendant P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales, Inc. d/b/a Carolina Metals, Inc. (hereinafter "P&P Metal") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, P&P Metal supplied materials,

installed aluminum porch railings and/or performed repairs, among other work, at One Belle Hall.

62. Defendant Pleasant Places, Inc. (hereinafter "Pleasant Places") is a corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Pleasant Places supplied materials, installed irrigation and landscaping and/or performed repairs, among other work, at One Belle Hall.

63. Defendant Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida, a division of Raymond Building Supply Corporation (hereinafter "ESP") is a corporation organized under the State of Florida. At all times relevant to this action, ESP supplied windows, among other building components, at One Belle Hall.

64. Defendant RS General Contracting, LLC f/k/a RS Custom Homes, LLC (hereinafter "RS Custom") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, RS Custom supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

65. Defendant Southern Specialties, Inc. (hereinafter "Southern Specialties") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Southern Specialties supplied materials, installed insulation, gutters and downspouts and/or performed repairs, among other work, at One Belle Hall.

66. Defendant Structural Contractors South, Inc. (hereinafter "Structural Contractors") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, Structural Contractors supplied materials, performed punch labor and/or performed repairs, among other work, at One Belle Hall.

67. Defendant Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc. (hereinafter "Superior") are corporations organized under the laws of the State of South Carolina. At all times relevant to this action, Superior supplied materials, installed brick veneer and/or performed repairs, among other work, at One Belle Hall.

68. Defendant TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc. (hereinafter "TAMKO") is a corporation organized and existing under the State of Missouri. At all times relevant to this action, TAMKO supplied shingles, among other building components, at One Belle Hall.

69. Defendant VNS Corporation, individually, and d/b/a Wholesale Building Products (hereinafter "VNS") is a corporation organized and existing under the laws of the State of Georgia. At all times relevant to this action, VNS supplied materials and installed interior finishes, accessories and/or bath fixtures, among other work, at One Belle Hall.

70. Defendant Billy Gray d/b/a United Builders, LLC (hereinafter "United") is a limited liability company organized and existing under the laws of the State of Tennessee. At all times relevant to this action, United was a subcontractor of VNS Corporation d/b/a Wholesale Building Products, and supplied materials, installed interior trim, door units, hardware, attic access doors, and bath accessories, among other work, at One Belle Hall.

71. Defendant What Don't We Do (hereinafter "WDWD") is business entity with its principal place of business located in Horry County, South Carolina. At all times relevant to this action, WDWD supplied materials and/or performed window repairs, among other work, at One Belle Hall.

FACTUAL ALLEGATIONS

72. This matter arises out of the design, development, construction, repair and sale of One Belle Hall.

73. At the time the Certificates of Occupancy were issued, One Belle Hall contained latent building defects.

74. Plaintiffs and class members have previously put the TCR Defendants on notice of some or many of the deficiencies.

75. The TCR Defendants attempted to repair One Belle Hall's defective condition, but said attempts have failed and/or were otherwise negligently performed.

76. The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property.

77. A preliminary inspection of One Belle Hall evidences failure of one or more components of the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components, structural members, and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

78. Defendants had a duty to design, develop, construct, and repair One Belle Hall in a workmanlike manner with suitable materials and free from all defects.

79. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

80. The Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

81. Remedying the above-wrongs will result in additional consequential damages and loss of use.

82. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur a reasonable attorney's fees and costs for the retention of experts to determine the deficiencies, damage and the scope of work for repair.

83. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since shortly after the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical general liability policies.

CLASS ACTION ALLEGATIONS

84. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Meek and Plaintiff Hill bring this action both individually and as a proposed class action against Defendants on behalf of themselves and all other similarly situated persons and entities, who own, per the class definition, a condominium within One Belle Hall (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a condominium within One Belle Hall located in the Town of Mt. Pleasant, Charleston County, South Carolina.

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.

85. *Numerosity:* The Class is composed of in excess of sixty persons geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of seventy-five members.

86. *Commonality:* Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- (a) Whether the construction of One Belle Hall was defective;
- (b) Whether Defendants negligently designed, developed constructed and/or repaired One Belle Hall;
- (c) Whether Defendants knew or should have known of the defects;
- (d) Whether the Defendants' repair of One Belle Hall was defective;
- (e) Whether Defendants failed to disclose to purchasers and/or homeowners the defects and/or unsuccessful repairs;
- (f) Whether Defendants are financially responsible to pay the full costs and expenses of repair of said defective conditions;
- (g) Whether Defendants' expertise and superiority and financial interest in sales transactions gave rise to a duty to disclose the material facts which were negligently concealed;
- (h) Whether Plaintiffs and the Class are entitled to compensatory damages, including, among other things: (i) compensation for all out-of-pocket monies expended by members of the Class for repair/replacement of other property damage; (ii) temporary repairs and (iii) compensation for loss of use; and

- (i) Whether the Plaintiffs and the Class are entitled to prejudgment interest, attorneys' fees and costs from Defendants.

87. *Typicality*: Plaintiffs' claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in designing, developing, constructing, repairing, and selling One Belle Hall, Defendants' conduct in concealing the defective condition of One Belle Hall, and Plaintiffs' and Class Members' purchasing homes containing building defects.

88. *Adequate Representation*: Plaintiffs will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiffs have retained counsel experienced in the prosecution of construction defect claims and complex litigation, including consumer class actions involving product liability and product design defects.

89. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

90. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class Members have the same legal right to and interest in redress for damages associated with the defective conditions existing within One Belle Hall.

91. Plaintiffs and the Class envision no unusual difficulty in the management of this action as a class action.

92. Each Class Member has an interest of more than \$100.00.

93. The amount of money at stake for each Class Member may not be sufficient for each member to hire their own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

94. Defendants are estopped from relying on any statutes of limitation or repose by virtue of its acts. Defendants, in the exercise of required diligence, which negligently failed to occur, should have known One Belle Hall was negligently constructed and/or repaired and failed to alert the Plaintiffs of One Belle Hall's defective condition.

95. Defendants had a duty to inform Plaintiffs of the defects described herein, which it should have known. Notwithstanding its duty, Defendants never disclosed the defects to Plaintiffs.

96. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of One Belle Hall.

97. Given Defendants' failure to disclose this non-public information about the defective nature of One Belle Hall – information over which it had exclusive control – and because Plaintiffs could not reasonably have known of One Belle Hall's defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might

otherwise be applicable to the claims asserted herein.

98. Defendants are further estopped from relying upon any statute of limitations as they have repeatedly represented to Plaintiffs that they are only responsible for correcting work for a period of one year after sale.

ESTOPPEL FROM PLEADING WARRANTY OBLIGATION

99. Defendants are also estopped from relying on any warranty obligation as a defense to Plaintiffs' claims.

100. By virtue of Defendants' acts, the work performed and/or materials supplied at One Belle Hall have not lived up to Defendants' warranties and representations, and given the defective condition of One Belle Hall and the premature deterioration of the life expectancy of One Belle Hall's building components that require unexpected maintenance, wear and/or replacement, the building components have not proven to be of value when compared to other building components.

101. Defendants in the exercise of required diligence, which negligently failed to occur, should have known that One Belle Hall was defective in design, construction and/or repair, and its building components were not fit for their ordinary and intended use, were not merchantable, and failed to perform in accordance with the advertisements, marketing materials and warranties disseminated by Defendants or with the reasonable expectations of ordinary consumers such as Plaintiffs and the Class.

102. Accordingly, any warranty provided by Defendants fails its essential purpose because its purports to warrant that One Belle Hall and/or its building components will be free from defects for a limited period of time when in fact One Belle and/or its building components fail far short of the expected life cycle of the condominium buildings.

103. Moreover, Defendants' warranties are woefully inadequate to repair and replace failed building components, let alone reimburse for any damage suffered to the underlying structure due to the inadequate protection provided by the product. The remedies available Defendants' warranties are limited to such an extent that they do not provide a minimum adequate remedy.

104. As a result, any time limitations on the remedies encompassed within Defendants' warranties are unconscionable and unenforceable; and therefore, Defendants are estopped from relying on the same.

ESTOPPEL FOR PLEADING NOTICE OF OPPORUNITY TO CURE

105. The TCR Defendants are further estopped from relying on the Notice of Opportunity to Cure Act to stay the progression of Plaintiffs' claims.

106. The TCR Defendants were put on sufficient notice of One Belle Hall's defective condition within any statutory period prescribed by the Act.

107. In addition, the TCR Defendants were provided an opportunity to cure One Belle Hall's defective condition previously, but failed to adequately perform.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to All Defendants)

108. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

109. At all times relevant hereto, the Defendants, its agents, servants, employees, and subcontractors undertook and had a duty to Plaintiffs to exercise and use due care in the design, construction and repair of One Belle Hall in a good workmanlike manner and with suitable materials, in accordance with the applicable building codes, state law, good design, and in conformance with the prevailing industry standards.

110. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, careless, reckless, and wanton in the following particulars:

- (a) In designing, developing, constructing, repairing and selling, One Belle Hall with construction deficiencies including those previously identified;
- (b) In failing to construct One Belle Hall in accordance with due care and in accordance with standard building practices;
- (c) In failing to construct One Belle Hall in accordance with building code;
- (d) In failing to properly supervise the work and construction of One Belle Hall;
- (e) In failing to properly coordinate the subcontractors and with other subcontractors;
- (f) In failing to construct with an adequate exterior building envelope;
- (g) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (h) In negligently covering up their own defective work and the defective work of others;
- (i) In failing to make proper repairs; and
- (j) Such other failures to be proven at trial.

111. Plaintiffs have been damaged as a direct and proximate result if the negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants.

112. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, and/or constituted negligence per se, Plaintiffs are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to All Defendants)

113. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

114. The design, construction, sale, and repair of One Belle Hall came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that One Belle Hall would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

115. The design, construction, sale and/or repair of One Belle Hall, and the components used therein, came with implied warranties of fitness, merchantability and workmanship. Additionally, the TCR Defendants owed Plaintiffs a warranty of habitability.

116. Defendants have breached their warranties by designing, constructing, and/or repairing One Belle Hall in a defective manner as set forth above.

117. As a direct and proximate result of the Defendants' breach of the implied warranty, Plaintiffs have suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Strict Liability in Tort: S.C. Code Ann. § 15-73-10 et seq. as to BASF, BFS, ESP, and TAMKO)

118. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

119. Defendant BASF manufactured and/or supplied the stucco installed during the construction and/or repair of One Belle Hall.

120. Defendant BFS supplied the ESP windows installed during the construction and/or repair of One Belle Hall.

121. Defendant ESP manufactured the windows installed during the construction and/or repair of One Belle Hall.

122. Defendant TAMKO manufactured and/or supplied the shingles installed during the construction and/or repair of One Belle Hall.

123. In manufacturing and/or supplying products for the construction and/or repair of One Belle Hall, the aforementioned Defendants placed products into the stream of commerce.

124. By introducing their products into the stream of commerce, the aforementioned Defendants represented said products were safe and suitable for their foreseeable use.

125. In the manufacture and/or supply of products to One Belle Hall, the aforementioned Defendants anticipate and expect that their products will reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

126. The aforementioned Defendants have manufactured and/or sold products in a defective manner which has resulted in repeated water intrusion into and damage to One Belle Hall and other building deficiencies.

127. Plaintiffs could not have discovered the product defects through the exercise of reasonable care.

128. The cost of altering the design, construction, and/or repair of the products supplied to One Belle Hall was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

129. The design and manufacture of the products supplied to One Belle Hall was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

130. The aforementioned Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to the TCR Defendants)

131. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

132. The TCR Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of One Belle Hall and their former capacity controlling the POA.

133. The TCR Defendants promoted, created and maintained control of the POA and One Belle Hall for several years, and thus, had fiduciary duties they owed to the POA, its members and individual homeowners.

134. The TCR Defendants breached the fiduciary duties they owed to the Plaintiffs by:

- (a) failing to investigate defective conditions prior to handing over the property to the POA and the homeowners;
- (b) failing to disclose said defective conditions;
- (c) failing to properly repair said defective conditions prior to handing over the property to the POA and the homeowners; and
- (d) permitting TCR to turn over the property to the POA in said defective condition without depositing sufficient funds to the account of the POA to bring the elements up to a reasonable standard.

135. As a direct and proximate result of the TCR Defendants' breach of fiduciary duty, Plaintiffs have been damaged as hereinabove set forth and as to be further proven at trial.

FOR A FIFTH CAUSE OF ACTION

(Veil Piercing/Joint Venture/Agent/Alter Ego/Amalgamation as to the TCR Defendants)

136. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

137. The TCR Defendants are alter egos of each other, and therefore, the actions of one constitute the actions of all, and each is liable for the entirety of Plaintiffs' damages.

138. The TCR Defendants operated together as actual or *defacto* joint venturers and partners in the development, marketing, construction, repair and sale of One Belle Hall and each are liable for the entirety of Plaintiffs' damages.

139. The TCR Defendants have acted as agents for one another, and each is liable for as a principal for the acts of the agents; and each agent is additionally liable for its misfeasance, malfeasance, and nonfeasance occurring during the performance of its principal's business.

140. The TCR Defendants operated in such a manner as the distinction between them is blurred, and they are/should be amalgamated as a single entity.

141. The TCR Defendants were owned and operated by substantially the same principals, used the same trade name, failed to observe necessary corporate formalities, were undercapitalized, and/or were otherwise so intermingled that they do not have any genuine or separate corporate existence, such that all corporate veils should be pierced and each held liable for the whole of Plaintiffs' damages.

142. The TCR Defendants' conduct and abuse of the corporate form has resulted in fundamental unfairness to Plaintiffs.

143. As a result, the TCR Defendants' abuse of the corporate form makes it appropriate and just that any liability imposed on one TCR Defendant, be imposed upon the other TCR Defendants and their principals.

FOR A SIXTH CAUSE OF ACTION

(Veil Piercing/Joint Venture/Agent/Alter Ego/Amalgamationas to the Halter Defendants)

144. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

145. The Halter Defendants are alter egos of each other, and therefore, the actions of one constitute the actions of all, and each is liable for the entirety of Plaintiffs' damages.

146. The Halter Defendants operated together as actual or *defacto* joint venturers and partners in the development, marketing, construction, repair and sale of One Belle Hall and each are liable for the entirety of Plaintiffs' damages.

147. The Halter Defendants have acted as agents for one another, and each is liable for as a principal for the acts of the agents; and each agent is additionally liable for its misfeasance, malfeasance, and nonfeasance occurring during the performance of its principal's business.

148. The Halter Defendants operated in such a manner as the distinction between them is blurred, and they are/should be amalgamated as a single entity.

149. The Halter Defendants were owned and operated by substantially the same principals, used the same trade name, failed to observe necessary corporate formalities, were undercapitalized, and/or were otherwise so intermingled that they do not have any genuine or separate corporate existence, such that all corporate veils should be pierced and each held liable for the whole of Plaintiffs' damages.

150. The Halter Defendants' conduct and abuse of the corporate form has resulted in fundamental unfairness to Plaintiffs.

151. As a result, the Halter Defendants' abuse of the corporate form makes it appropriate and just that any liability imposed on one Halter Defendant, be imposed upon the other Halter Defendants and their principals.

FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices as to TCR Defendants)

152. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

153. At all times relevant herein, the TCR Defendants engaged in the business of developing, designing, constructing, repairing and selling One Belle Hall into the stream of commerce.

154. The TCR Defendants were engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

155. The TCR Defendants' above-described activities, including placing One Belle with defective design and construction into the stream of commerce, failing to properly repair defective conditions, failing to comply with the building code, and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices in the conduct of the TCR Defendants' and the Halter Defendants' trade.

156. The TCR Defendants' above-described acts are capable of repetition and adversely affect the public interest.

157. The TCR Defendants knew or should have known that their conduct was in violation of the S.C. Code Ann. § 39-5-20.

158. As a direct, foreseeable, and proximate result of the TCR Defendants' unfair trade practices in South Carolina, Plaintiffs have suffered significant damage.

WHEREFORE, Plaintiffs demand a trial by jury and pray for judgment, joint and several, against the Defendants; actual and consequential damages; statutory or punitive damages expected to exceed twelve million dollars; reasonable attorneys' fees; costs of suit; and prejudgment interest; and granting such further relief as the Court deems just and proper.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By:

Dabny Lynn

Justin Lucey

Dabny Lynn

415 Mill Street

Post Office Box 806

Mount Pleasant, SC 29465-0806

(843) 849-8400 phone

(843) 849-8406 fax

January 5, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ONE BELLE HALL PROPERTY OWNERS
ASSOCIATION, INC. and BRANDY
RAMEY, individually, and on behalf of all
others similarly situated,

Plaintiffs,

vs.

Trammell Crow Residential Company; TCR
NC Construction I, LP; Belle Hall Direct 101,
LP; TCR RLD Condominiums, Inc.; CS 101
Belle Hall, LP; TCR Southeast, Inc.; TCR
Carolina Properties, Inc.; TCR SE
Construction, Inc.; TCR SE Construction II,
Inc.; TCR Construction, a division of
Trammell Crow Residential; TCR
Development, a division of Trammell Crow
Residential; Trammell Crow Residential
Carolina, a division of Trammell Crow
Residential; and Tauer Consulting Company,
Inc., a division of Trammell Crow Residential,
each individually, and collectively d/b/a
"Trammell Crow Residential," "Trammell
Crow" or "TCR"; Halter Properties, LLC;
Halter Realty, LLC; and Halter Realty Group,
LLC, each individually, and collectively d/b/a
"Halter Companies"; Jane Doe 1-5; ABG
Caulking & Waterproofing of Morristown, Inc.;
a/k/a ABG Caulking Contractors; Advanced
Building Products & Services, LLC; BASF
Corporation; Budget Mechanical Plumbing,
Inc.; Builders First Source – Southeast Group,
LLC; Builders Services Group, Inc.,
individually, and d/b/a Gale Contractor
Services, Inc.; Century Fire Protection, LLC;
Cline Design Associates; P.A. and Gary D.
Cline; Coastal Lumber & Framing, LLC;
Dodson Brothers Exterminating Co., Inc. a/k/a
Dodson Pest Control; First Exteriors, LLC;
Flooring Services, Inc.; General Heating & Air
Conditioning Company of Greenville, Inc.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO 2012-CP-10-7594

AFFIDAVIT OF A. RHETT
WHITLOCK, PH.D., P.E. AS TO
DESIGN PROFESSIONALS

Defendants.

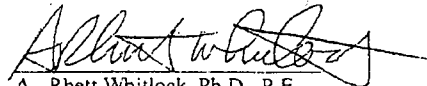
P.E., who first being duly sworn, deposes and states as follows:

- 2

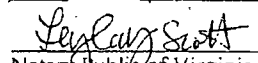
reviewed various design documents regarding same provided by Cline Design Associates, P.A. ("Cline Design") and Gary D. Cline ("Gary Cline") (hereinafter collectively referred to as the "Design Professionals").

5. That the Design Professionals' employees and/or agents provided architectural and/or engineering services and/or construction administration services at One Belle Hall.
6. That the Design Professionals' employees and/or agents provided site inspections, field reports, and design/construction meeting minutes to ensure proper and adequate construction was performed at One Belle Hall.
7. That the Design Professionals prepared and/or approved inadequate and/or defective plans and/or specifications that lack sufficient detail (including inadequate waterproofing, roofing, and stucco installation details), lack material components (including inadequate kick-out flashing and masonry expansion joints) and are in error regarding certain details provided (i.e., erroneous height provided for brick veneer cladding and erroneous ventilation provided for roof systems).
8. That the foregoing inadequacies and deficiencies have caused, and continue to cause, damage to One Belle Hall.
9. That this is my opinion to a reasonable degree of engineering certainty.

FURTHER AFFIANT SAYETH NOT.


A. Rhett Whitlock, Ph.D., P.E.

Sworn to and subscribed before me this
23rd day of December, 2013.

 (SEAL)
Notary Public of Virginia
My Commission Expire: 10/31/2015



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-10-7594

One Bell Hall Property Owners Association, Inc.
and Marvin T. Meek and, Francis E. Hill,
individually, and on behalf of all others similarly
situated,

Plaintiffs,

vs.

Trammell Crow Residential Company; TCR NC
Construction, I, LP; Belle Hall Direct 101, LP;
TCR RLD Condominiums, Inc.; CS 101 Belle Hall,
LP; TCR Southeast, Inc.; TCR Carolina Properties,
Inc.; TCR SE Construction, Inc.; TCR SE
Construction, II, Inc.; TCR Construction, a division
of Trammell Crow Residential; TCR Development,
a division of Trammell Crow Residential;
Trammell Crow Residential Carolina, a division
of Trammell Crow Residential; and Tauer
Consulting Company, Inc., a division of Trammell
Crow Residential, each individually, and
collectively d/b/a "Trammell Crow Residential,"
"Trammell Crow" or "TCR"; Halter Properties,
LLC and Halter Realty Group, LLC, each
individually, and collectively d/b/a "Halter
Companies"; ABG Caulking & Waterproofing of
Morristown, Inc.; Advanced Building Products &
Services, LLC; BASF Corporation; Billy Gray
d/b/a United Builders, LLC; Budget Mechanical
Plumbing, Inc.; Builders FirstSource - Southeast
Group, LLC; Builders Services Group, Inc.,
individually, and d/b/a Gal Contractor Services,
Inc.; Century Fire Protection, LLC; Cline Design
Associates, P.A. and Gary D. Cline; Coastal Lumber
& Framing, LLC; Dodson Brothers Exterminating
Co., Inc. a/k/a Dodson Pest Control; First Exteriors,
LLC; Flooring Services, Inc.; General Heating &
Air Conditioning Company of Greenville, Inc. d/b/a
General Heating and Air; GCI Consultants, LLC

**DEFENDANT BUILDERS
FIRSTSOURCE-SOUTHEAST
GROUP, LLC'S ANSWER TO
PLAINTIFFS' SECOND
AMENDED COMPLAINT**

FILED
2015 JAN 21 PM 2:24
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

f/k/a Glazing Consultants, Inc.; GWC Roofing,)
 Inc., individually, and d/b/a Southcoast Exteriors,)
 Inc.; IES Residential Inc. f/k/a Houston Stafford)
 Electrical Contractors, LP; J. Correa Electrical)
 Company, LLC; Jimmy Warner, individually, and)
 d/b/a Warner Heating & Air; KMAC of the)
 Carolinas, Inc.; P&P Metal Sales Co., Inc. a/k/a)
 P&P Metal Sales, Inc. a/k/a Carolina Metals;)
 Pleasant Places, Inc.; Raymond Building Supply)
 Corporation d/b/a Energy Saving Products of)
 Florida, Inc. a/k/a Energy Saving Products of)
 Florida; RS General Contracting, LLC f/k/a RS)
 Custom Homes, LLC; Southern Specialties, Inc.;)
 Structural Contractors South, Inc.; Superior)
 Construction Services, Inc., individually and d/b/a)
 Superior Masonry Unlimited, Inc.; TAMKO)
 Building Products, Inc. f/k/a TAMKO Roofing)
 Products, Inc.; VNS Corporation, individually, d/b/a)
 Wholesale Building Products; and What Don't We)
 Do;)

Defendants.)

TO: JUSTIN LUCEY, ESQUIRE, AND DABNY LYNN, ESQUIRE, ATTORNEYS FOR
 PLAINTIFFS

Defendant Builders FirstSource-Southeast Group, LLC ("BFS") responds to Plaintiffs'

Second Amended Complaint as follows:

1. Every allegation of the Amended Complaint not specifically admitted below is denied.

FOR A FIRST DEFENSE

2. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 1 through 43 and, therefore, denies those allegations.
3. BFS admits the allegations of Paragraph 44 to the extent that it is a limited liability corporation organized and existing under the laws of the State of Delaware. BFS denies the

remaining allegations of Paragraph 44.

4. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 45 through 71 and, therefore, denies those allegations.

5. Upon information and belief, BFS admits the allegations of Paragraph 72.

6. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 73 through 77 and, therefore, denies those allegations.

7. BFS denies the allegations of Paragraphs 78 through 83, as to it.

8. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 84 through 93 and, therefore, denies those allegations.

9. BFS denies the allegations of Paragraphs 94 through 98 as to it.

10. BFS denies the allegations of Paragraphs 99 through 104 as to it.

11. There is no paragraph contained in the Second Amended Complaint that is numbered 105. The allegations of Paragraphs 106, 107 and 108 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION**

12. In response to Paragraph 109, BFS repeats its responses above.

13. BFS denies the allegations of Paragraphs 110, 111, 112 and 113.

**FOR A FIRST DEFENSE
TO THE SECOND CAUSE OF ACTION**

14. In response to Paragraph 114, BFS repeats its responses above.

15. BFS denies the allegations of Paragraphs 115, 116, 117 and 118.

**FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION**

16. In response to Paragraph 119, BFS repeats its responses above.

17. The allegations of Paragraph 120 are directed toward another defendant and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

18. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 121 and, therefore, denies those allegations.

19. The allegations of Paragraphs 122 and 123 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

20. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 124 and 125 and, therefore, denies those allegations.

21. BFS admits the allegations of Paragraph 126 in so far as the allegations apply to product supply.

22. BFS denies the allegations of Paragraph 127.

23. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 128 and 129 and, therefore, denies those allegations.

24. BFS denies the allegations of Paragraph 130 as to it.

25. The allegations of Paragraph 131 constitute conclusions of law, which require no response. To the extent that a response from BFS is deemed necessary, it denies the allegations.

**FOR A FIRST DEFENSE
TO THE FOURTH CAUSE OF ACTION**

26. In response to Paragraph 132, BFS repeats its responses above.
27. The allegations of Paragraphs 133 through 136 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE FIFTH CAUSE OF ACTION**

28. In response to Paragraph 137, BFS repeats its responses above.
29. The allegations of Paragraphs 138 through 144 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE SIXTH CAUSE OF ACTION**

30. In response to Paragraph 145, BFS repeats its responses above.
31. The allegations of Paragraphs 146 through 152 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE SEVENTH CAUSE OF ACTION**

32. In response to Paragraph 153, BFS repeats its responses above.
33. The allegations of Paragraphs 154 through 159 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent that paragraph implies or

infers liability or fault on the part of BFS, it denies those allegations.

FOR A SECOND DEFENSE

34. Plaintiffs have failed to state facts sufficient to constitute a cause of action against BFS upon which relief can be granted. Thus, each of Plaintiffs' causes of action against BFS should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

35. The Plaintiffs' claims are barred by the applicable statutes of limitation and/or statutes of repose. Thus, Plaintiffs' causes of action against BFS should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE

36. The Plaintiffs' claims are barred by the equitable doctrines of waiver and/or estoppel and/or laches. Thus the Plaintiffs' causes of action should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE

37. Plaintiffs' damages, if any, were caused by the acts or omissions of third parties over whom this defendant had no control.

FOR A SIXTH DEFENSE

38. To the extent Plaintiffs have breached their duty to mitigate their damages, they are barred from recovery against BFS.

FOR A SEVENTH DEFENSE

39. To the extent Plaintiffs assert warranty liability against BFS, upon information and belief, BFS or its predecessors-in-interest had no direct contact with Plaintiffs and made no representations, written or oral, upon which Plaintiffs relied. Notwithstanding this fact, any claim or allegation advanced as a warranty claim against BFS for which Plaintiffs failed to give BFS reasonable timely notice to cure is barred by law.

FOR AN EIGHTH DEFENSE

40. The damages Plaintiffs allege were caused by BFS or BFS's product(s), upon information and belief, were caused by misuse and/or abuse of BFS's work or work product, and were not reasonably foreseeable by BFS; therefore, Plaintiffs are barred from recovery against BFS.

FOR A NINTH DEFENSE

41. Plaintiffs' claims against BFS are barred and/or limited by the doctrines of comparative negligence, carelessness, fault, breach of duty and/or assumption of risk of the Plaintiffs.

FOR A TENTH DEFENSE

42. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because any award of punitive damages under South Carolina law without bifurcating the trial of all punitive damages issues would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR AN ELEVENTH DEFENSE

43. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law subject to no predetermined limit, such as a

maximum multiple of compensatory damages or a maximum amount on the amount of punitive damages that a jury may impose would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR A TWELFTH DEFENSE

44. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law by a jury that (1) is not provided a standard of sufficient clarity for determining the appropriateness, or the appropriate size, of a punitive damages award, (2) is not instructed on the limits on punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages or determining the amount of an award of punitive damages, in whole or in part, on the basis of this Defendant, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (5) is not subject to judicial review on the basis of objective standards, would violate this Defendant's due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment and by the South Carolina Constitution's provisions providing due process, equal protection, and a guaranty against double jeopardy.

FOR A THIRTEENTH DEFENSE

45. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law for the purpose of compensating Plaintiffs for elements of damage not otherwise recognized by South Carolina law would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR A FOURTEENTH DEFENSE

46. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law without proof of every element beyond a reasonable doubt would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR A FIFTEENTH DEFENSE

47. The claim of Plaintiffs for punitive damages cannot be sustained, because an award of punitive damages under state law without the same protections that are accorded to all criminal defendants, including protection against unreasonable searches and seizures, double jeopardy and self-incrimination and the rights to confront adverse witnesses, a speedy trial and the effective assistance of counsel would violate this Defendant's rights under the Fourteenth Amendment to the United States Constitution and the Fourth, Fifth, and Sixth Amendments as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and the rights to confront witnesses, a speedy trial and effective assistance of counsel and

protection against unreasonable searches and seizures, double jeopardy and compelled self-incrimination.

FOR A SIXTEENTH DEFENSE

48. Any award of punitive damages based on anything other than this Defendant's conduct in connection with the specific incident that is the subject of this lawsuit would violate the due process clause of the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and a guaranty against double jeopardy, because any other judgment for punitive damages in this case cannot protect this Defendant against impermissible multiple punishment for the same wrong.

FOR A SEVENTEENTH DEFENSE

49. If windows that may have been sold BFS are found to be the cause of damages suffered by Plaintiffs, which BFS denies, Plaintiffs cannot recover against BFS if the condition of the windows as installed in the subject building was substantially changed and materially altered from the condition in which they were sold, as provided in S.C. Code § 15-73-10.

If windows that may have been sold by BFS were defective, which is denied, Plaintiffs discovered such defect and were aware of the danger and nevertheless proceeded to make use of the product, such that Plaintiffs' recovery is barred or limited from BFS, as provided in S.C. Code §15-73-20.

FOR A EIGHTEENTH DEFENSE

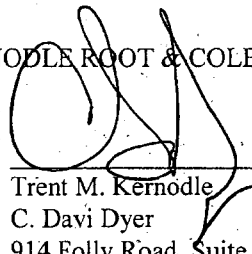
50. If windows and/or doors that may have been sold by BFS were defective, which is denied, failure to give reasonable notice is pled in bar of any recovery under a warranty claim and otherwise.

FOR A NINETEENTH DEFENSE

51. Defendant would show that the Plaintiff had constructive knowledge and/or actual knowledge of those conditions referred to in the Complaint, nonetheless proceeded to purchase the subject property. Such circumstances constitute a complete bar to the Plaintiff's claims.

WHEREFORE, having fully answered the Amended Complaint of the Plaintiffs, BFS demands a trial by jury and prays that the Amended Complaint be dismissed, with costs, and for such other relief as the Court may grant.

KERNODLE ROOT & COLEMAN

By: 

Trent M. Kernodle
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914 Folly Road, Suite 2 (29412)
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ddyer@kernodlelaw.com

ATTORNEYS FOR DEFENDANT BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP, LLC

January 20, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ONE BELLE HALL PROPERTY OWNERS)
ASSOCIATION, INC. and MARVIN T.)
MEEK and FRANCIS E. HILL, individually,)
and on behalf of all others similarly situated,)

Plaintiffs,)

vs.)

Trammell Crow Residential Company; TCR)
NC Construction I, LP; Belle Hall Direct 101,)
LP; TCR RLD Condominiums, Inc.; CS 101)
Belle Hall, LP; TCR Southeast, Inc.; TCR)
Carolina Properties, Inc.; TCR SE)
Construction, Inc.; TCR SE Construction II,)
Inc.; TCR Construction, a division of)
Trammell Crow Residential; TCR)
Development, a division of Trammell Crow)
Residential; Trammell Crow Residential)
Carolina, a division of Trammell Crow)
Residential; and Tauer Consulting Company,)
Inc., a division of Trammell Crow Residential,)
each individually, and collectively d/b/a)
"Trammell Crow Residential," "Trammell)
Crow" or "TCR"; Halter Properties, LLC; and)
Halter Realty Group, LLC, each individually,)
and collectively d/b/a "Halter Companies";)
ABG Caulking & Waterproofing of)
Morristown, Inc; Advanced Building Products)
& Services, LLC; BASF Corporation; Billy)
Gray d/b/a United Builders, LLC; Budget)
Mechanical Plumbing, Inc.; Builders First)
Source - Southeast Group, LLC; Builders)
Services Group, Inc., individually, and d/b/a)
Gale Contractor Services, Inc.; Century Fire)
Protection, LLC; Cline Design Associates,)
P.A. and Gary D. Cline; Coastal Lumber &)
Framing, LLC; Dodson Brothers)
Exterminating Co., Inc. a/k/a Dodson Pest)
Control; First Exteriors, LLC; Flooring)
Services, Inc.; General Heating & Air)
Conditioning Company of Greenville, Inc.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-7594

THIRD AMENDED COMPLAINT
(Defective Construction)

(Jury Trial Demanded)

FILED
2015 FEB - 9 PM 2:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

d/b/a. General Heating and Air; GCI)
 Consultants, LLC f/k/a Glazing Consultants,)
 Inc.; GWC Roofing, Inc., individually, and)
 d/b/a Southcoast Exteriors, Inc.; IES)
 Residential Inc. f/k/a Houston Stafford)
 Electrical Contractors, LP; J. Correa Electrical)
 Company, LLC; Jimmy Warner, individually,)
 and d/b/a Warner Heating & Air; KMAC of)
 the Carolinas, Inc.; P&P Metal Sales Co., Inc.)
 a/k/a P&P Metal Sales, Inc. a/k/a Carolina)
 Metals; Pleasant Places, Inc.; Raymond)
 Building Supply Corporation d/b/a Energy)
 Saving Products of Florida, Inc. a/k/a Energy)
 Saving Products of Florida; RS General)
 Contracting, LLC f/k/a/ RS Custom Homes,)
 LLC; Southern Specialties, Inc.; Stewart)
 Engineering, Inc.; Structural Contractors)
 South, Inc.; Superior Construction Services,)
 Inc., individually, and d/b/a Superior Masonry)
 Unlimited, Inc.; TAMKO Building Products,)
 Inc. f/k/a TAMKO Roofing Products, Inc.;)
 VNS Corporation, individually, and d/b/a)
 Wholesale Building Products; and What Don't)
 We Do;)

Defendants.)

The Plaintiffs, One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill, individually, and on behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiffs file this Third Amended Complaint pursuant to Rule 15 of the South Carolina Rules of Civil Procedure which allows Plaintiffs to freely amend their complaint one time as a matter of right.

2. Plaintiff One Belle Hall Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

3. The POA is the property owners association for the One Belle Hall Horizontal Property Regime.

4. The One Belle Hall Horizontal Property Regime is a Horizontal Property Regime ("One Belle Hall") which exists by virtue of a Master Deed dated December 11, 2006 and recorded December 12, 2006 in the RMC Office of Charleston County, SC in Book K608, Page 211.

5. One Belle Hall consists of fifty-nine (59) condominiums located in four (4) buildings and related common elements, which are located behind the Belle Hall shopping center in Mount Pleasant, South Carolina.

6. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with One Belle Hall.

7. The POA is charged with, *inter alia*, the management and administration of One Belle Hall, the investigation, maintenance and repair of One Belle Hall's Common Elements and Areas of Responsibility, and has the right and obligation to bring this action on behalf of One Belle Hall, the POA, and the respective owners and members.

8. Plaintiff Marvin T. Meek (hereinafter "Plaintiff Meek") is a citizen of Charleston County, South Carolina and is an owner of a condominium within One Belle Hall more particularly described as 2100 Belle Isle Avenue, Unit 201, Mount Pleasant, South Carolina, 29464.

9. Plaintiff Francis E. Hill (hereinafter "Plaintiff Hill") is a citizen of Charleston County, South Carolina and is an owner of a condominium within One Belle Hall more particularly described as 2100 Belle Isle Avenue, Unit 104, Mount Pleasant, South Carolina, 29464.

10. By virtue of property ownership in One Belle Hall, Plaintiff Meek, Plaintiff Hill and the Class (hereinafter collectively referred to as "Plaintiffs") are members of the POA, have been members of the POA at all times relevant hereto, and have ownership and membership rights relating thereto.

11. Defendant Trammell Crow Residential Company is a company organized and existing under the laws of the State of Delaware.

12. Defendant TCR Carolina Properties, Inc. is a corporation organized under the laws of the State of Texas, and represented that it was an owner of the One Belle Hall project.

13. Defendant Belle Hall Direct 101, LP is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, Belle Hall Direct 101, LP was a single purpose entity through which the TCR Defendants' attempted to coordinate their development efforts and was the named seller of One Belle Hall condominiums.

14. Defendant CS 101 Belle Hall, LP is a limited partnership organized and existing under the laws of the State of Texas, and is/was represented as a general partner of Belle Hall Direct 101, LP.

15. Defendant TCR RLD Condominiums, Inc. is a corporation organized and existing under the laws of the State of Texas, and is/was represented as a general partner of CS 101 Belle Hall, LP.

16. Defendant TCR SE Construction, Inc. is a company organized under the laws of the State of Texas, and is/was represented as a general partner of Belle Hall Direct 101, LP.

17. Defendant TCR NC Construction I, LP is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, TCR NC Construction I, LP was the entity through which the TCR Defendants' attempted to effect their construction efforts and was the named general contractor for One Belle Hall.

18. Defendant TCR SE Construction II, Inc. is a company organized under the laws of the State of Texas, and is/was represented as a partner and/or agent of TCR NC Construction I, LP.

19. Defendant TCR Southeast, Inc. is a company organized under the laws of the State of Texas.

20. Defendant Tauer Consulting Company, Inc., a division of Trammell Crow Residential, is a corporation organized under the laws of the State of Georgia. At all times relevant to this action, Tauer Consulting Company, Inc. served as the punch supervisor and sales coordinator, among providing other services, for One Belle Hall.

21. Defendant Trammell Crow Residential Carolina is a division of Trammell Crow Residential and/or is an entity comprised of "TCR" employees, agents and/or affiliates.

22. Defendant TCR Construction is a division of Trammell Crow Residential and/or is an entity comprised of "TCR" employees, agents and/or affiliates.

23. Defendant TCR Development is a division of Trammell Crow Residential and/or is an entity comprised of "TCR" employees, agents and/or affiliates.

24. The foregoing Defendants, and their divisions and affiliates, operated under the trade names "Trammell Crow Residential," "Trammell Crow," "TCR," and similar names

(herein collectively referred to as the "TCR Defendants"), and at all times relevant to this action, the TCR Defendants coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale and/or repair of One Belle Hall.

25. The TCR Defendants operated together as actual or *defacto* joint venturers, partners, and agents of each other in the design, development, marketing, construction, sale and/or repair of One Belle Hall (the design, development, marketing, construction, sale and/or repair of One Belle Hall hereinafter collectively referred to as the "One Belle Hall Project").

26. At all times material hereto, the TCR Defendants operated a joint enterprise for the common, for-profit purpose of the One Belle Hall Project.

27. The TCR Defendants acted as agents of each other in connection with the One Belle Hall Project.

28. The TCR Defendants have acted collectively and in such manner that the distinction between the TCR Defendants has been blurred and the TCR Defendants should be amalgamated as a single entity.

28. The TCR Defendants have failed to observe corporate formalities and their corporate shells should be disregarded and all TCR Defendants should be held liable for Plaintiffs' damage.

29. Defendant Halter Properties, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

30. Defendant Halter Realty Group, LLC is a limited liability company organized and existing under the laws of the State of Georgia.

31. The foregoing Halter Defendants, their divisions and affiliates, operated under the trade name "Halter Companies" and similar names (herein collectively referred to as the "Halter Defendants"), and at all times relevant to this action, the Halter Defendants coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the development and construction of One Belle Hall.

32. The Halter Defendants operated together as actual or *defacto* joint venturers, partners and agents of each other in the One Belle Hall Project.

33. At all times material hereto, the Halter Defendants operated a joint enterprise for the common, for-profit purpose of the One Belle Hall Project.

34. The Halter Defendants acted as agents of each other in connection with the One Belle Hall Project.

35. The Halter Defendants have acted collectively and in such manner that the distinction between the Halter Defendants has been blurred and the Halter Defendants should be amalgamated as a single entity.

36. The Halter Defendants have failed to observe corporate formalities and their corporate shells should be disregarded and all Halter Defendants should be held liable for Plaintiffs' damage.

37. The TCR Defendants and the Halter Defendants were actual or *de facto* joint ventures and/or partners, control persons, and/or agents of each other in the One Belle Hall Project.

38. The TCR Defendants and the Halter Defendants comingled and combined their resources to develop, repair, market, sell, and place the One Belle Hall condominiums into the stream of commerce.

39. Defendant Cline Design Associates, P.A. (hereinafter "Cline Design") is a professional corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Cline Design served as the architect for the construction of One Belle Hall.

40. Defendant Gary D. Cline (hereinafter "Gary Cline") is a registered architect in the State of South Carolina who executed and sealed the plans for the construction of One Belle Hall.

41. Defendant GCI Consultants, LLC f/k/a Glazing Consultants, Inc. (hereinafter "GCI") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, GCI provided consulting services and quality assurance inspections, among other work, at One Belle Hall.

42. Defendant Stewart Engineering, Inc. (hereinafter "Stewart") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, Stewart served as the structural engineer for the construction of One Belle Hall.

43. Defendant ABG Caulking & Waterproofing of Morristown, Inc. (hereinafter "ABG") is a corporation organized and existing under the laws of the State of Tennessee. At all times relevant to this action, ABG supplied materials, installed caulking and/or performed repairs, among other work, at One Belle Hall.

44. Defendant BASF Corporation (hereinafter "BASF") is a corporation organized and existing under the State of Delaware. At all times relevant to this action, BASF supplied stucco, among other building components, at One Belle Hall.

45. Defendant Builders First Source – Southeast Group, LLC (hereinafter "BFS") is a limited liability company organized and existing under the laws of the State of Delaware. At all

times relevant to this action, BFS supplied windows, among other building components, at One Belle Hall.

46. Defendants Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc. (hereinafter "Gale") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, Gale supplied materials, installed garage doors and/or performed repairs, among other work, at One Belle Hall.

47. Defendant Budget Mechanical Plumbing, Inc. (hereinafter "Budget Plumbing") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Budget Plumbing supplied materials, installed plumbing, plumbing fixtures, water heaters, condensate lines and/or performed repairs, among other work, at One Belle Hall.

48. Defendant Century Fire Protection, LLC (hereinafter "Century Fire") is a limited liability corporation organized and existing under the laws of the State of Delaware. At all times relevant to this action, Century Fire provided and/or installed fire protection and fire stopping, among other work, at One Belle Hall.

49. Defendant Coastal Lumber and Framing, LLC (hereinafter "Coastal Framing") is a limited liability company organized under the laws of the State of Florida. At all times relevant to this action, Coastal Framing supplied materials, framed structures and/or performed repairs, among other work, at One Belle Hall.

50. Defendant Advanced Building Products & Services, LLC (hereinafter "ABP&S") is a limited liability company organized under the laws of the State of Florida. At all times relevant to this action, ABP&S operated under a profit sharing agreement with Coastal Framing

by which ABP&S was an actual or *de facto* joint venturer, partner, manager, and/or agent of Coastal Framing in the supply of materials, among other work, at One Belle Hall.

51. Defendant Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control ("Dodson") is a corporation organized and existing under the laws of the State of Virginia. At all times relevant to this action, Dodson provided termite treatment, among other work, at One Belle Hall.

52. Defendant First Exterior, LLC (hereinafter "First Exteriors") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, First Exteriors supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

53. Defendant Flooring Services, Inc. (hereinafter "Flooring Services") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Flooring Services supplied materials, installed flooring and/or performed repairs, among other work, at One Belle Hall.

54. Defendant General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air (hereinafter "General Heating") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, General Heating supplied materials, installed heating and air conditioning ("HVAC") and/or performed repairs, among other work, at One Belle Hall.

55. Defendant Jimmy Warner (hereinafter "Jimmy Warner") is a resident of Paulding County, Georgia and the owner of Warner Heating & Air. At all times relevant to this action, Jimmy Warner was a subcontractor of General Heating and supplied materials, installed HVAC and/or performed repairs, among other work, at One Belle Hall.

56. Defendant Warner Heating & Air (hereinafter "Warner") is a business entity with its principal place of business located in Paulding County, Georgia. At all times relevant to this action, Warner was a subcontractor of General Heating and supplied materials, installed HVAC and/or performed repairs, among other work, at One Belle Hall.

57. Defendant GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc. (hereinafter "GWC") is a corporation organized under the laws of the State of North Carolina. At all times relevant to this action, GWC supplied materials, installed roofing and/or performed repairs, among other work, at One Belle Hall.

58. Defendant Southcoast Exteriors, Inc. (hereinafter "Southcoast") is a corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Southcoast controlled, directed, managed, supervised and/or carried out the business of GWC and supplied materials, installed roofing and/or performed repairs, among other work, at One Belle Hall.

59. Defendant IES Residential, Inc. f/k/a Houston Stafford Electrical Contractors, LP (hereinafter "Houston Stafford") is a limited partnership organized and existing under the laws of the State of Texas. At all times relevant to this action, Houston Stafford supplied materials, installed electrical systems and/or performed repairs, among other work, at One Belle Hall.

60. Defendant J. Correa Electrical Company, LLC (hereinafter "JCEC") is a limited liability organized under the laws of the State of South Carolina. At all times relevant to this action, JCEC was a subcontractor of Houston Stafford and supplied materials, installed electrical systems and/or performed repairs, among other work, at One Belle Hall.

61. Defendant KMAC of the Carolinas, Inc. (hereinafter "KMAC") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this

action, KMAC supplied materials, installed gypcrete and waterproofing and/or performed repairs, among other work, at One Belle Hall.

62. Defendant P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales, Inc. d/b/a Carolina Metals, Inc. (hereinafter "P&P Metal") is a corporation organized and existing under the laws of the State of North Carolina. At all times relevant to this action, P&P Metal supplied materials, installed aluminum porch railings and/or performed repairs, among other work, at One Belle Hall.

63. Defendant Pleasant Places, Inc. (hereinafter "Pleasant Places") is a corporation organized under the laws of the State of South Carolina. At all times relevant to this action, Pleasant Places supplied materials, installed irrigation and landscaping and/or performed repairs, among other work, at One Belle Hall.

64. Defendant Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida, a division of Raymond Building Supply Corporation (hereinafter "ESP") is a corporation organized under the State of Florida. At all times relevant to this action, ESP supplied windows, among other building components, at One Belle Hall.

65. Defendant RS General Contracting, LLC f/k/a RS Custom Homes, LLC (hereinafter "RS Custom") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, RS Custom supplied materials, installed stucco and/or performed repairs, among other work, at One Belle Hall.

66. Defendant Southern Specialties, Inc. (hereinafter "Southern Specialties") is a corporation organized and existing under the laws of the State of South Carolina. At all times

relevant to this action, Southern Specialties supplied materials, installed insulation, gutters and downspouts and/or performed repairs, among other work, at One Belle Hall.

67. Defendant Structural Contractors South, Inc. (hereinafter "Structural Contractors") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, Structural Contractors supplied materials, performed punch labor and/or performed repairs, among other work, at One Belle Hall.

68. Defendant Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc. (hereinafter "Superior") are corporations organized under the laws of the State of South Carolina. At all times relevant to this action, Superior supplied materials, installed brick veneer and/or performed repairs, among other work, at One Belle Hall.

69. Defendant TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc. (hereinafter "TAMKO") is a corporation organized and existing under the State of Missouri. At all times relevant to this action, TAMKO supplied shingles, among other building components, at One Belle Hall.

70. Defendant VNS Corporation, individually, and d/b/a Wholesale Building Products (hereinafter "VNS") is a corporation organized and existing under the laws of the State of Georgia. At all times relevant to this action, VNS supplied materials and installed interior finishes, accessories and/or bath fixtures, among other work, at One Belle Hall.

71. Defendant Billy Gray d/b/a United Builders, LLC (hereinafter "United") is a limited liability company organized and existing under the laws of the State of Tennessee. At all times relevant to this action, United was a subcontractor of VNS Corporation d/b/a Wholesale Building Products, and supplied materials, installed interior trim, door units, hardware, attic access doors, and bath accessories, among other work, at One Belle Hall.

72. Defendant What Don't We Do (hereinafter "WDWD") is business entity with its principal place of business located in Horry County, South Carolina. At all times relevant to this action, WDWD supplied materials and/or performed window repairs, among other work, at One Belle Hall.

FACTUAL ALLEGATIONS

73. This matter arises out of the design, development, construction, repair and sale of One Belle Hall.

74. At the time the Certificates of Occupancy were issued, One Belle Hall contained latent building defects.

75. Plaintiffs and class members have previously put the TCR Defendants on notice of some or many of the deficiencies.

76. The TCR Defendants attempted to repair One Belle Hall's defective condition, but said attempts have failed and/or were otherwise negligently performed.

77. The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property.

78. A preliminary inspection of One Belle Hall evidences failure of one or more components of the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components, structural members, and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

79. Defendants had a duty to design, develop, construct, and repair One Belle Hall in a workmanlike manner with suitable materials and free from all defects.

80. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

81. The Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

82. Remedying the above-wrongs will result in additional consequential damages and loss of use.

83. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur a reasonable attorney's fees and costs for the retention of experts to determine the deficiencies, damage and the scope of work for repair.

84. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since shortly after the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical general liability policies.

CLASS ACTION ALLEGATIONS

85. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Meek and Plaintiff Hill bring this action both individually and as a proposed class action against Defendants on behalf of themselves and all other similarly situated persons and entities, who own, per the class definition, a condominium within One Belle Hall (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a condominium within One Belle Hall located in the Town of Mt. Pleasant, Charleston County, South Carolina.

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.

86. *Numerosity:* The Class is composed of in excess of sixty persons geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of seventy-five members.

87. *Commonality:* Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- (a) Whether the construction of One Belle Hall was defective;
- (b) Whether Defendants negligently designed, developed constructed and/or repaired One Belle Hall;
- (c) Whether Defendants knew or should have known of the defects;
- (d) Whether the Defendants' repair of One Belle Hall was defective;
- (e) Whether Defendants failed to disclose to purchasers and/or homeowners the defects and/or unsuccessful repairs;
- (f) Whether Defendants are financially responsible to pay the full costs and expenses of repair of said defective conditions;
- (g) Whether Defendants' expertise and superiority and financial interest in sales transactions gave rise to a duty to disclose the material facts which were negligently concealed;

- (h) Whether Plaintiffs and the Class are entitled to compensatory damages, including, among other things: (i) compensation for all out-of-pocket monies expended by members of the Class for repair/replacement of other property damage; (ii) temporary repairs and (iii) compensation for loss of use; and
- (i) Whether the Plaintiffs and the Class are entitled to prejudgment interest, attorneys' fees and costs from Defendants.

88. *Typicality*: Plaintiffs' claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in designing, developing, constructing, repairing, and selling One Belle Hall, Defendants' conduct in concealing the defective condition of One Belle Hall, and Plaintiffs' and Class Members' purchasing homes containing building defects.

89. *Adequate Representation*: Plaintiffs will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiffs have retained counsel experienced in the prosecution of construction defect claims and complex litigation, including consumer class actions involving product liability and product design defects.

90. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In

contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

91. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class Members have the same legal right to and interest in redress for damages associated with the defective conditions existing within One Belle Hall.

92. Plaintiffs and the Class envision no unusual difficulty in the management of this action as a class action.

93. Each Class Member has an interest of more than \$100.00.

94. The amount of money at stake for each Class Member may not be sufficient for each member to hire their own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

95. Defendants are estopped from relying on any statutes of limitation or repose by virtue of its acts. Defendants, in the exercise of required diligence, which negligently failed to occur, should have known One Belle Hall was negligently constructed and/or repaired and failed to alert the Plaintiffs of One Belle Hall's defective condition.

96. Defendants had a duty to inform Plaintiffs of the defects described herein, which it should have known. Notwithstanding its duty, Defendants never disclosed the defects to Plaintiffs.

97. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of One Belle Hall.

98. Given Defendants' failure to disclose this non-public information about the defective nature of One Belle Hall – information over which it had exclusive control – and because Plaintiffs could not reasonably have known of One Belle Hall's defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

99. Defendants are further estopped from relying upon any statute of limitations as they have repeatedly represented to Plaintiffs that they are only responsible for correcting work for a period of one year after sale.

ESTOPPEL FROM PLEADING WARRANTY OBLIGATION

100. Defendants are also estopped from relying on any warranty obligation as a defense to Plaintiffs' claims.

101. By virtue of Defendants' acts, the work performed and/or materials supplied at One Belle Hall have not lived up to Defendants' warranties and representations, and given the defective condition of One Belle Hall and the premature deterioration of the life expectancy of One Belle Hall's building components that require unexpected maintenance, wear and/or replacement, the building components have not proven to be of value when compared to other building components.

102. Defendants in the exercise of required diligence, which negligently failed to occur, should have known that One Belle Hall was defective in design, construction and/or repair, and its building components were not fit for their ordinary and intended use, were not merchantable, and failed to perform in accordance with the advertisements, marketing materials and warranties disseminated by Defendants or with the reasonable expectations of ordinary consumers such as Plaintiffs and the Class.

103. Accordingly, any warranty provided by Defendants fails its essential purpose because its purports to warrant that One Belle Hall and/or its building components will be free from defects for a limited period of time when in fact One Belle and/or its building components fail far short of the expected life cycle of the condominium buildings.

104. Moreover, Defendants' warranties are woefully inadequate to repair and replace failed building components, let alone reimburse for any damage suffered to the underlying structure due to the inadequate protection provided by the product. The remedies available Defendants' warranties are limited to such an extent that they do not provide a minimum adequate remedy.

105. As a result, any time limitations on the remedies encompassed within Defendants' warranties are unconscionable and unenforceable, and therefore, Defendants are estopped from relying on the same.

ESTOPPEL FOR PLEADING NOTICE OF OPPORTUNITY TO CURE

106. The TCR Defendants are further estopped from relying on the Notice of Opportunity to Cure Act to stay the progression of Plaintiffs' claims.

107. The TCR Defendants were put on sufficient notice of One Belle Hall's defective condition within any statutory period prescribed by the Act.

108. In addition, the TCR Defendants were provided an opportunity to cure One Belle Hall's defective condition previously, but failed to adequately perform.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to All Defendants)

109. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

110. At all times relevant hereto, the Defendants, its agents, servants, employees, and subcontractors undertook and had a duty to Plaintiffs to exercise and use due care in the design, construction and repair of One Belle Hall in a good workmanlike manner and with suitable materials, in accordance with the applicable building codes, state law, good design, and in conformance with the prevailing industry standards.

111. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, careless, reckless, and wanton in the following particulars:

- (a) In designing, developing, constructing, repairing and selling, One Belle Hall with construction deficiencies including those previously identified;
- (b) In failing to construct One Belle Hall in accordance with due care and in accordance with standard building practices;
- (c) In failing to construct One Belle Hall in accordance with building code;
- (d) In failing to properly supervise the work and construction of One Belle Hall;
- (e) In failing to properly coordinate the subcontractors and with other subcontractors;
- (f) In failing to construct with an adequate exterior building envelope;
- (g) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (h) In negligently covering up their own defective work and the defective work of others;
- (i) In failing to make proper repairs; and
- (j) Such other failures to be proven at trial.

112. Plaintiffs have been damaged as a direct and proximate result if the negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants.

113. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, and/or constituted negligence per se, Plaintiffs are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to All Defendants)

114. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

115. The design, construction, sale, and repair of One Belle Hall came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that One Belle Hall would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

116. The design, construction, sale and/or repair of One Belle Hall, and the components used therein, came with implied warranties of fitness, merchantability and workmanship. Additionally, the TCR Defendants owed Plaintiffs a warranty of habitability.

117. Defendants have breached their warranties by designing, constructing, and/or repairing One Belle Hall in a defective manner as set forth above.

118. As a direct and proximate result of the Defendants' breach of the implied warranty, Plaintiffs have suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Strict Liability in Tort: *S.C. Code Ann. § 15-73-10 et seq.* as to BASF, BFS, ESP, and TAMKO)

119. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

120. Defendant BASF manufactured and/or supplied the stucco installed during the construction and/or repair of One Belle Hall.

121. Defendant BFS supplied the ESP windows installed during the construction and/or repair of One Belle Hall.

122. Defendant ESP manufactured the windows installed during the construction and/or repair of One Belle Hall.

123. Defendant TAMKO manufactured and/or supplied the shingles installed during the construction and/or repair of One Belle Hall.

124. In manufacturing and/or supplying products for the construction and/or repair of One Belle Hall, the aforementioned Defendants placed products into the stream of commerce.

125. By introducing their products into the stream of commerce, the aforementioned Defendants represented said products were safe and suitable for their foreseeable use.

126. In the manufacture and/or supply of products to One Belle Hall, the aforementioned Defendants anticipate and expect that their products will reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

127. The aforementioned Defendants have manufactured and/or sold products in a defective manner which has resulted in repeated water intrusion into and damage to One Belle Hall and other building deficiencies.

128. Plaintiffs could not have discovered the product defects through the exercise of reasonable care.

129. The cost of altering the design, construction, and/or repair of the products supplied to One Belle Hall was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

130. The design and manufacture of the products supplied to One Belle Hall was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

131. The aforementioned Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to the TCR Defendants)

132. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

133. The TCR Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of One Belle Hall and their former capacity controlling the POA.

134. The TCR Defendants promoted, created and maintained control of the POA and One Belle Hall for several years, and thus, had fiduciary duties they owed to the POA, its members and individual homeowners.

135. The TCR Defendants breached the fiduciary duties they owed to the Plaintiffs by:

- (a) failing to investigate defective conditions prior to handing over the property to the POA and the homeowners;
- (b) failing to disclose said defective conditions;

(c) failing to properly repair said defective conditions prior to handing over the property to the POA and the homeowners; and

(d) permitting TCR to turn over the property to the POA in said defective condition without depositing sufficient funds to the account of the POA to bring the elements up to a reasonable standard.

136. As a direct and proximate result of the TCR Defendants' breach of fiduciary duty, Plaintiffs have been damaged as hereinabove set forth and as to be further proven at trial.

FOR A FIFTH CAUSE OF ACTION
(Veil Piercing/Joint Venture/Agent/Alter Ego/Amalgamation as to the TCR Defendants)

137. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

138. The TCR Defendants are alter egos of each other, and therefore, the actions of one constitute the actions of all, and each is liable for the entirety of Plaintiffs' damages.

139. The TCR Defendants operated together as actual or *defacto* joint venturers and partners in the development, marketing, construction, repair and sale of One Belle Hall and each are liable for the entirety of Plaintiffs' damages.

140. The TCR Defendants have acted as agents for one another, and each is liable for as a principal for the acts of the agents; and each agent is additionally liable for its misfeasance, malfeasance, and nonfeasance occurring during the performance of its principal's business.

141. The TCR Defendants operated in such a manner as the distinction between them is blurred, and they are/should be amalgamated as a single entity.

142. The TCR Defendants were owned and operated by substantially the same principals, used the same trade name, failed to observe necessary corporate formalities, were undercapitalized, and/or were otherwise so intermingled that they do not have any genuine or

separate corporate existence, such that all corporate veils should be pierced and each held liable for the whole of Plaintiffs' damages.

143. The TCR Defendants' conduct and abuse of the corporate form has resulted in fundamental unfairness to Plaintiffs.

144. As a result, the TCR Defendants' abuse of the corporate form makes it appropriate and just that any liability imposed on one TCR Defendant, be imposed upon the other TCR Defendants and their principals.

FOR A SIXTH CAUSE OF ACTION
(Veil Piercing/Joint Venture/Agent/Alter Ego/Amalgamation as to the Halter Defendants)

145. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

146. The Halter Defendants are alter egos of each other, and therefore, the actions of one constitute the actions of all, and each is liable for the entirety of Plaintiffs' damages.

147. The Halter Defendants operated together as actual or *defacto* joint venturers and partners in the development, marketing, construction, repair and sale of One Belle Hall and each are liable for the entirety of Plaintiffs' damages.

148. The Halter Defendants have acted as agents for one another, and each is liable for as a principal for the acts of the agents; and each agent is additionally liable for its misfeasance, malfeasance, and nonfeasance occurring during the performance of its principal's business.

149. The Halter Defendants operated in such a manner as the distinction between them is blurred, and they are/should be amalgamated as a single entity.

150. The Halter Defendants were owned and operated by substantially the same principals, used the same trade name, failed to observe necessary corporate formalities, were undercapitalized, and/or were otherwise so intermingled that they do not have any genuine or

separate corporate existence, such that all corporate veils should be pierced and each held liable for the whole of Plaintiffs' damages.

151. The Halter Defendants' conduct and abuse of the corporate form has resulted in fundamental unfairness to Plaintiffs.

152. As a result, the Halter Defendants' abuse of the corporate form makes it appropriate and just that any liability imposed on one Halter Defendant, be imposed upon the other Halter Defendants and their principals.

FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices as to TCR Defendants)

153. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

154. At all times relevant herein, the TCR Defendants engaged in the business of developing, designing, constructing, repairing and selling One Belle Hall into the stream of commerce.

155. The TCR Defendants were engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

156. The TCR Defendants' above-described activities, including placing One Belle with defective design and construction into the stream of commerce, failing to properly repair defective conditions, failing to comply with the building code, and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices in the conduct of the TCR Defendants' and the Halter Defendants' trade.

157. The TCR Defendants' above-described acts are capable of repetition and adversely affect the public interest.

158. The TCR Defendants knew or should have known that their conduct was in violation of the S.C. Code Ann. § 39-5-20.

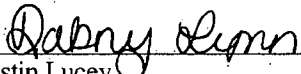
159. As a direct, foreseeable, and proximate result of the TCR Defendants' unfair trade practices in South Carolina, Plaintiffs have suffered significant damage.

WHEREFORE, Plaintiffs demand a trial by jury and pray for judgment, joint and several, against the Defendants; actual and consequential damages; statutory or punitive damages expected to exceed thirteen million dollars; reasonable attorneys' fees; costs of suit; and prejudgment interest; and granting such further relief as the Court deems just and proper.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By:


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February 9, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

One Bell Hall Property Owners Association, Inc.)
and Marvin T. Meek and, Francis E. Hill,)
individually, and on behalf of all others similarly)
situated,)

Plaintiffs,)

vs.)

Trammell Crow Residential Company; TCR NC)
Construction, I, LP; Belle Hall Direct 101, LP;)
TCR RLD Condominiums, Inc.; CS 101 Belle Hall,)
LP; TCR Southeast, Inc.; TCR Carolina Properties,)
Inc.; TCR SE Construction, Inc.; TCR SE)
Construction, II, Inc.; TCR Construction, a division)
of Trammell Crow Residential; TCR Development,)
a division of Trammell Crow Residential;)
Trammell Crow Residential Carolina, a division)
of Trammell Crow Residential; and Tauer)
Consulting Company, Inc., a division of Trammell)
Crow Residential, each individually, and)
collectively d/b/a "Trammell Crow Residential,")
"Trammell Crow" or "TCR"; Halter Properties,)
LLC; and Halter Realty Group, LLC, each)
individually, and collectively d/b/a "Halter)
Companies"; ABG Caulking & Waterproofing of)
Morristown, Inc.; Advanced Building Products &)
Services, LLC; BASF Corporation; Billy Gray)
d/b/a United Builders, LLC; Budget Mechanical)
Plumbing, Inc.; Builders FirstSource - Southeast)
Group, LLC; Builders Services Group, Inc.,)
individually, and d/b/a Gale Contractor Services,)
Inc.; Century Fire Protection, LLC; Cline Design)
Associates, P.A. and Gary D. Cline; Coastal Lumber)
& Framing, LLC; Dodson Brothers Exterminating)
Co., Inc. a/k/a Dodson Pest Control; First Exteriors,)
LLC; Flooring Services, Inc.; General Heating &)
Air Conditioning Company of Greenville, Inc. d/b/a)
General Heating and Air; GCI Consultants, LLC)

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-107594

JULIE J. ARMSTRONG
CLERK OF COURT

2015 MAR -6 PM 3:05

FILED

**DEFENDANT BUILDERS
FIRSTSOURCE-SOUTHEAST
GROUP, LLC'S ANSWER TO
PLAINTIFFS' THIRD
AMENDED COMPLAINT**

f/k/a Glazing Consultants, Inc.; GWC Roofing,)
 Inc., individually, and d/b/a Southcoast Exteriors,)
 Inc.; IES Residential Inc. f/k/a Houston Stafford)
 Electrical Contractors, LP; J. Correa Electrical)
 Company, LLC; Jimmy Warner, individually, and)
 d/b/a Warner Heating & Air; KMAC of the)
 Carolinas, Inc.; P&P Metal Sales Co., Inc. a/k/a)
 P&P Metal Sales, Inc. a/k/a Carolina Metals;)
 Pleasant Places, Inc.; Raymond Building Supply)
 Corporation d/b/a Energy Saving Products of)
 Florida, Inc. a/k/a Energy Saving Products of)
 Florida; RS General Contracting, LLC f/k/a RS)
 Custom Homes, LLC; Southern Specialties, Inc.;)
 Stewart Engineering, Inc.; Structural Contractors)
 South, Inc.; Superior Construction Services, Inc.,)
 individually and d/b/a Superior Masonry Unlimited,)
 Inc.; TAMKO Building Products, Inc. f/k/a)
 TAMKO Roofing Products, Inc.; VNS Corporation,)
 individually, and d/b/a Wholesale Building)
 Products; and What Don't We Do;)

Defendants.)

TO: JUSTIN LUCEY, ESQUIRE, AND DABNY LYNN, ESQUIRE, ATTORNEYS FOR
 PLAINTIFFS

Defendant Builders FirstSource-Southeast Group, LLC ("BFS") responds to Plaintiffs'

Third Amended Complaint as follows:

1. Every allegation of the Amended Complaint not specifically admitted below is denied.

FOR A FIRST DEFENSE

2. The allegations of Paragraph 1 constitute conclusions of law, which require no response.

To the extent that a response from BFS is deemed necessary, it denies the allegations

3. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 2 through 44 and, therefore, denies those allegations.

4. BFS admits the allegations of Paragraph 45 to the extent that it is a limited liability corporation organized and existing under the laws of the State of Delaware. BFS denies the remaining allegations of Paragraph 45.

5. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 46 through 72 and, therefore, denies those allegations.

6. Upon information and belief, BFS admits the allegations of Paragraph 73.

7. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 74 through 78 and, therefore, denies those allegations.

8. BFS denies the allegations of Paragraphs 79 through 84, as to it.

9. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 85 through 94 and, therefore, denies those allegations.

10. BFS denies the allegations of Paragraphs 95 through 99 as to it.

11. BFS denies the allegations of Paragraphs 100 through 105 as to it.

12. The allegations of Paragraphs 106 through 108 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent those Paragraphs imply or infer liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION**

13. In response to Paragraph 109, BFS repeats its responses above.

14. BFS denies the allegations of Paragraphs 110, 111, 112 and 113.

**FOR A FIRST DEFENSE
TO THE SECOND CAUSE OF ACTION**

15. In response to Paragraph 114, BFS repeats its responses above.
16. BFS denies the allegations of Paragraphs 115, 116, 117 and 118.

**FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION**

17. In response to Paragraph 119, BFS repeats its responses above.
18. The allegations of Paragraph 120 are directed toward another defendant and, therefore, require no response from BFS. However, to the extent that Paragraph implies or infers liability or fault on the part of BFS, it denies those allegations.
19. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 121 and, therefore, denies those allegations.
20. The allegations of Paragraphs 122 and 123 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent those Paragraphs imply or infer liability or fault on the part of BFS, it denies those allegations.
21. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 124 and 125 and, therefore, denies those allegations.
22. BFS admits the allegations of Paragraph 126 in so far as the allegations apply to product supply.
23. BFS denies the allegations of Paragraph 127.
24. BFS lacks knowledge or information sufficient to form a belief as to the allegations of Paragraphs 128 and 129 and, therefore, denies those allegations.
25. BFS denies the allegations of Paragraph 130 as to it.
26. The allegations of Paragraph 131 constitute conclusions of law, which require no

response. To the extent that a response from BFS is deemed necessary, it denies the allegations.

**FOR A FIRST DEFENSE
TO THE FOURTH CAUSE OF ACTION**

27. In response to Paragraph 132, BFS repeats its responses above.

28. The allegations of Paragraphs 133 through 136 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent those Paragraphs imply or infer liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE FIFTH CAUSE OF ACTION**

29. In response to Paragraph 137, BFS repeats its responses above.

30. The allegations of Paragraphs 138 through 144 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent those Paragraphs imply or infer liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE SIXTH CAUSE OF ACTION**

31. In response to Paragraph 145, BFS repeats its responses above.

32. The allegations of Paragraphs 146 through 152 are directed toward other defendants and, therefore, require no response from BFS. However, to the extent those Paragraphs imply or infer liability or fault on the part of BFS, it denies those allegations.

**FOR A FIRST DEFENSE
TO THE SEVENTH CAUSE OF ACTION**

33. In response to Paragraph 153, BFS repeats its responses above.

34. The allegations of Paragraphs 154 through 159 are directed toward other defendants and,

therefore, require no response from BFS. However, to the extent those Paragraphs imply or infer liability or fault on the part of BFS, it denies those allegations.

FOR A SECOND DEFENSE

35. Plaintiffs have failed to state facts sufficient to constitute a cause of action against BFS upon which relief can be granted. Thus, each of Plaintiffs' causes of action against BFS should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

36. The Plaintiffs' claims are barred by the applicable statutes of limitation and/or statutes of repose. Thus, Plaintiffs' causes of action against BFS should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE

37. The Plaintiffs' claims are barred by the equitable doctrines of waiver and/or estoppel and/or laches. Thus the Plaintiffs' causes of action should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE

38. Plaintiffs' damages, if any, were caused by the acts or omissions of third parties over whom this defendant had no control.

FOR A SIXTH DEFENSE

39. To the extent Plaintiffs have breached their duty to mitigate their damages, they are barred from recovery against BFS.

FOR A SEVENTH DEFENSE

40. To the extent Plaintiffs assert warranty liability against BFS, upon information and belief, BFS or its predecessors-in-interest had no direct contact with Plaintiffs and made no representations, written or oral, upon which Plaintiffs relied. Notwithstanding this fact, any claim or allegation advanced as a warranty claim against BFS for which Plaintiffs failed to give BFS reasonable timely notice to cure is barred by law.

FOR AN EIGHTH DEFENSE

41. The damages Plaintiffs allege were caused by BFS or BFS's product(s), upon information and belief, were caused by misuse and/or abuse of BFS's work or work product, and were not reasonably foreseeable by BFS; therefore, Plaintiffs are barred from recovery against BFS.

FOR A NINTH DEFENSE

42. Plaintiffs' claims against BFS are barred and/or limited by the doctrines of comparative negligence, carelessness, fault, breach of duty and/or assumption of risk of the Plaintiffs.

FOR A TENTH DEFENSE

43. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because any award of punitive damages under South Carolina law without bifurcating the trial of all punitive damages issues would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR AN ELEVENTH DEFENSE

44. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law subject to no predetermined limit, such as a

maximum multiple of compensatory damages or a maximum amount on the amount of punitive damages that a jury may impose would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR A TWELFTH DEFENSE

45. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law by a jury that (1) is not provided a standard of sufficient clarity for determining the appropriateness, or the appropriate size, of a punitive damages award, (2) is not instructed on the limits on punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages or determining the amount of an award of punitive damages, in whole or in part, on the basis of this Defendant, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (5) is not subject to judicial review on the basis of objective standards, would violate this Defendant's due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment and by the South Carolina Constitution's provisions providing due process, equal protection, and a guaranty against double jeopardy.

FOR A THIRTEENTH DEFENSE

46. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law for the purpose of compensating Plaintiffs for elements of damage not otherwise recognized by South Carolina law would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR A FOURTEENTH DEFENSE

47. The claim of Plaintiffs for punitive damages against BFS cannot be sustained, because an award of punitive damages under South Carolina law without proof of every element beyond a reasonable doubt would violate this Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and by the due process provisions of the South Carolina Constitution.

FOR A FIFTEENTH DEFENSE

48. The claim of Plaintiffs for punitive damages cannot be sustained, because an award of punitive damages under state law without the same protections that are accorded to all criminal defendants, including protection against unreasonable searches and seizures, double jeopardy and self-incrimination and the rights to confront adverse witnesses, a speedy trial and the effective assistance of counsel would violate this Defendant's rights under the Fourteenth Amendment to the United States Constitution and the Fourth, Fifth, and Sixth Amendments as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and the rights to confront witnesses, a speedy trial and effective assistance of counsel and

protection against unreasonable searches and seizures, double jeopardy and compelled self-incrimination.

FOR A SIXTEENTH DEFENSE

49. Any award of punitive damages based on anything other than this Defendant's conduct in connection with the specific incident that is the subject of this lawsuit would violate the due process clause of the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment as incorporated into the Fourteenth Amendment and the South Carolina Constitution's provisions providing for due process and a guaranty against double jeopardy, because any other judgment for punitive damages in this case cannot protect this Defendant against impermissible multiple punishment for the same wrong.

FOR A SEVENTEENTH DEFENSE

50. If windows that may have been sold BFS are found to be the cause of damages suffered by Plaintiffs, which BFS denies, Plaintiffs cannot recover against BFS if the condition of the windows as installed in the subject building was substantially changed and materially altered from the condition in which they were sold, as provided in S.C. Code § 15-73-10.

If windows that may have been sold by BFS were defective, which is denied, Plaintiffs discovered such defect and were aware of the danger and nevertheless proceeded to make use of the product, such that Plaintiffs' recovery is barred or limited from BFS, as provided in S.C. Code §15-73-20.

FOR A EIGHTEENTH DEFENSE

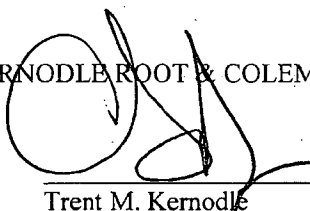
51. If windows and/or doors that may have been sold by BFS were defective, which is denied, failure to give reasonable notice is pled in bar of any recovery under a warranty claim and otherwise.

FOR A NINETEENTH DEFENSE

52. Defendant would show that the Plaintiff had constructive knowledge and/or actual knowledge of those conditions referred to in the Complaint, nonetheless proceeded to purchase the subject property. Such circumstances constitute a complete bar to the Plaintiff's claims.

WHEREFORE, having fully answered the Amended Complaint of the Plaintiffs, BFS demands a trial by jury and prays that the Amended Complaint be dismissed, with costs, and for such other relief as the Court may grant.

KERNODLE ROOT & COLEMAN

By: 

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ATTORNEYS FOR DEFENDANT BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP, LLC

March 4, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ONE BELLE HALL POA, et al

Plaintiffs

vs.

BUILDERS FIRST SOURCE
SOUTHEAST GROUP, LLC

Defendant

THE COURT OF COMMON PLEAS

DOCKET NO. 2012-CP-10-7594

TRANSCRIPT OF RECORD

August 30, 2016
Charleston, South Carolina

VOLUME 2 (OF 4)

B E F O R E:

THE HONORABLE DIANE S. GOODSTEIN, JUDGE

A P P E A R A N C E S:

JUSTIN O. LUCEY, ESQ.
DABNY LYNN, ESQ.
Attorneys for the Plaintiff

CATHERINE D. DYER, ESQ.
Attorney for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

ROA_00187

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3	OBH purchase order w/April K	
4	OBH purchase order w. May K	
6	Post & Courier Ad	
7	One Belle Hall master deed	
8	Certificates of occupancy	
9	ESP install instructions	
10	ESP 2031 install instructions	
11	ESP 2041 install instructions	
12	NCTL ESP 2031/2041 test rept.	
13	Keystone certifications	
14	ESP 2031/2041 window label	
15	One Belle Hall site plan	
16	Building 2000 general photos	
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41	WDP sill dam test result	
43	WDP window testing photos	
44	WDP final rept. append. 2	
45	WDP appendix C water test reports	
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50	Watkins estimate (Rodgers)	
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One Belle Hall POA v Builders First Source Southeast Group, LLC
Motions in Limine-Remarks by Ms. Dyer
August 30, 2016

1 THE COURT: Ms. Dyer, you had several. Insurance;
2 don't talk about insurance.

3 MS. DYER: Yes, Your Honor, that was one ---

4 THE COURT: --- unless it meets one of the
5 exceptions right?

6 MR. LUCEY: We have no plans to talk about
7 insurance, Your Honor.

8 MS. DYER: The plaintiffs -- asked for the jurors
9 to place themselves in the position of the plaintiffs or
10 a homeowner ---

11 MR. LUCEY: --- we don't intend to do so, Your
12 Honor.

13 THE COURT: That's called the golden rule.

14 MS. DYER: Again, I doubt that Mr. Lucey or Ms.
15 Lynn have any plans to but to exclude settlement demands,
16 offers, and negotiations between the parties.

17 THE COURT: Yes.

18 MS. DYER: And to exclude any evidence of prior
19 wrongful acts or admissions by Builders First Source.

20 MR. LUCEY: Would you like to hear offers or you
21 want us to respond to that one before we go forward?
22 That is one we want to take up with the court.

23 THE COURT: Well, that one is one that I can't
24 again assuming arguendo they make a case for negligence;
25 just assume for the moment. And assume for the moment

One Belle Hall POA v Builders First Source Southeast Group, LLC
Motions in Limine-Remarks by Ms. Dyer
August 30, 2016

1 because I know from our conversation back there yesterday
2 that you're about to move to sever for the punitive
3 damages and so repetitive conduct can be relevant with
4 regards to punitive damages. So on that one I'll just
5 tell you I got to handle that one -- I can't handle that
6 in a motion in limine. I'm going to have to do that when
7 it arises.

8 MS. DYER: Yes, Your Honor.

9 THE COURT: If you're going to get into prior bad
10 acts you let me know.

11 MR. LUCEY: It's not bad acts, Your Honor, but the
12 way she has worded her motion is very broad and I want to
13 be clear. The issue is not as to punitives in this
14 instance.

15 THE COURT: Okay.

16 MR. LUCEY: The issue is that the court hasn't
17 heard about yet is that to this day Builders First Source
18 has yet to concede that it sold the windows to this
19 jobsite notwithstanding the invoices, notwithstanding the
20 purchase orders ---

21 THE COURT: --- I did it for you. I did it in the
22 statement of the case. I told the jury.

23 MR. LUCEY: We believe they have actually conceded
24 publically many times. But when the issues comes up they
25 were using this broker and sales person that they are

One Belle Hall POA v Builders First Source Southeast Group, LLC
Motions in Limine-Remarks by Ms. Dyer
August 30, 2016

1 kind of claiming like we have no record of this
2 transaction in our computer so it never existed. This
3 brokered sales person, Larry Bratten is now deceased so
4 we don't -- we'll actually hear a transcript but he
5 actually sold these windows for Builders First Source on
6 the job. So it's not bad acts it's simply to show the
7 relationship between the parties if they continue to
8 dispute that they sold the windows --

9 THE COURT: I told the jury that they did. Didn't
10 I tell them that yesterday?

11 MR. LUCEY: It's pretty clear they did. But in an
12 effort to clean up the exhibit list last week we asked
13 Builders First Source are you conceding you sold the
14 windows, can we stipulate to that? And we weren't able
15 to get an affirmative response to that.

16 THE COURT: I think you did because you agreed to
17 the non-argumentative statement of the fact; the facts
18 not in dispute. Didn't I just tell the jury that
19 yesterday, yes?

20 MS. DYER: You did. And the whole issue as far as
21 Builders First Source our position has been that we
22 haven't ever said that we didn't sell the windows. It
23 certainly wasn't -- Mr. Woodward was our 30(b)(6)
24 witness. He did some exhaustive internal research, went
25 through all his computer systems, tried to find record of

One Belle Hall POA v Builders First Source Southeast Group, LLC
Motions in Limine-Remarks by Ms. Dyer
August 30, 2016

1 payment record or order record; you know any direction
2 that he could go at electronically because we couldn't
3 find any hardcopies from 2006 for this job. So the lack
4 of evidence on our side is the only reason that we
5 haven't been able to stipulate. It certainly appeared
6 that those documents are in order. We've got the lien
7 waivers but we really just can't say yes, we did it
8 because we haven't been able to find it internally in our
9 system.

10 THE COURT: I'm with you but I think ---

11 MS. DYER: --- that's just part of the burden of
12 proof really. That's the reason we couldn't stipulate.

13 THE COURT: Okay. I think I told them that
14 though. I think I told the jury that. I actually really
15 think I told them that in the non-disputed statement of
16 the facts. Okay, great.

17 MS. DYER: The next issue, Your Honor, motion in
18 limine would be evidence of punitive damages be allowed
19 before there is a finding or verdict against Builders
20 First Source would like to exclude that evidence and
21 further move to bifurcate the trial on punitives.

22 THE COURT: Let me tell you about that. Bifurcate
23 yes, it shall is what it says in the statute so when you
24 request it is a shall so shall is in effect so it would
25 be bifurcated. Now with regard to evidence which would

One Belle Hall POA v Builders First Source Southeast Group, LLC
Motions in Limine-Remarks by Ms. Dyer
August 30, 2016

1 be applicable to the punitive damage I'm just going to
2 have to handle that as it comes up. And I apologize a
3 little bit to counsel because again I tend to be very
4 conservative and very careful about ruling on evidentiary
5 matters at this juncture. When it comes up I'm usually
6 on it but at this point I'm so careful not to mess with
7 your case, either one of you, until I'm in it.

8 But you're so right; I would exclude evidence which
9 is evidence that only is applicable to a case, a punitive
10 case in the event that that becomes appropriate. So I'm
11 with you completely. I just can't rule in a vacuum so
12 I'm with your 100 percent.

13 MS. DYER: Understand. And the last one, Your
14 Honor, I've got copies of documents to hand up.

15 THE COURT: Sure.

16 [Whereupon, Ms. Dyer provides documents to the
17 court]

18 MS. DYER: The large sack, Your Honor, is exhibit
19 710 and this is exhibit 711. Those documents were
20 included in some requests to admit the authenticity under
21 section 19-1-60 and they were served upon me on August
22 24th, 710, exhibit 710 of those documents and August 25th
23 for the smaller stack 711. As you'll see 710 is a 230
24 page collection of documents related to a condominium
25 project. As far as I can tell and this is just my

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1 interpretation of the documents, Your Honor, related to a
2 Parkside condominium complex, which I understand there is
3 ongoing litigation concerning it. Those documents again
4 purport to associate Builders First Source and identify
5 them as having a role in the construction of the Parkside
6 side community.

7 Then moving forward to exhibit 711, the smaller
8 stack, is again a different condominium complex called I
9 think it's Pier view [phonetic]. Again, as I understand
10 there is ongoing litigation related to that condominium
11 complex. So those were served on me last week. The
12 statute allows for four days for you to research and turn
13 that around either authenticating or dying the documents.

14 And even as we sit here today Builders First Source
15 turned over those documents, I sent them to their legal
16 department. They undertook to try to go through and
17 figure out what they were and how they belonged in their
18 system. I believe that they are still working on trying
19 to authenticate or figure out what those have to do with
20 anything.

21 Builders First Source may be a defendant in those
22 lawsuits in the future. I'm really not certain how that
23 is all going to play out. I don't think they've been
24 served at this point. But I would just ask that the
25 court exclude the evidence first of all I don't have any

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1 contacts for it. My client hasn't been able to
2 authenticate it. Requiring authentication in this
3 circumstance these documents haven't been produced until
4 they were served along with these requests to admit. So
5 again we haven't been able to authenticate them and we
6 really don't know what they mean and it appears that
7 maybe this is an effort to use this statute to kind of
8 circumvent discovery in another litigation.

9 THE COURT: Got you.

10 MS. DYER: I don't think that it is relevant for
11 this case but even if it was I think it would be terribly
12 confusing for the jury. And it looks like some of those
13 documents are very similar to what we're going to see
14 that has already been stipulated here. I just think that
15 it is going to be a real element of confusion for the
16 jurors to try to figure out what is Parkside, what is
17 Pier View [phonetic], what does it have to do with One
18 Belle Hall, what do they mean? So I would ask that those
19 be excluded.
20
21
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23
24
25

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1 MR. LUCEY: Your Honor, we did just receive those
2 documents ourselves; that's why they were only served
3 recently. We did receive them in the other litigation
4 from other parties. All this goes back in part to what
5 the court just heard about Builders First Source refusing
6 to concede that they sold the windows.

7 These sales were being handled by the same person
8 Bratton on their behalf. And he's at Builders First
9 Source with Bob Lanier and everybody is present and he
10 gave a deposition in this matter as he authorizes Bratton
11 to sign change orders on behalf of Builders First Source
12 clearly shows the authority.

13 It actually goes to an additional issue in the case
14 which is this; a partial defense that Builders First
15 Source seems to be articulating now and then is that this
16 one a one-off transaction. We didn't really do these
17 types of sales and it's only because the architect
18 expected it. Well here they are Larry Bratton open sales
19 in that Builders First Source selling the same or similar
20 windows at two other condominium complexes in Charleston.

21 It's not -- One Belle Hall is not a one off
22 transaction. So it's relevant to the issues they have
23 raised. That said I don't anticipate going there without
24 giving the court an opportunity to address the issue
25 further if it comes up. And in part it's in response to

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1 their reported factual position.

2 THE COURT: Okay.

3 MR. LUCEY: And the statute clearly says they got
4 four days and then after four days if I have to call a
5 witness to prove the authenticity of those documents then
6 it is at their expense. But that's all and the statute
7 is also four days.

8 THE COURT: Okay, got it.

9 [Whereupon, the court reviews documents].

10 THE COURT: Again in terms of the evidentiary part
11 of it I'm not going to exclude it at this point. And
12 again because I don't know; I just don't know. I just
13 got here yesterday so I've got to have a little time to
14 get up to speed. And I appreciate you letting me know
15 because it could become relevant and it may not be
16 relevant.

17 And with regards to the authenticity, the admission
18 of authenticity what I would urge Builders First Source
19 to just keep somebody at it and I'll take a look at the
20 statute but just keep somebody at it at this point. And
21 if it becomes an issue I'll handle it at that point.

22 MR. LUCEY: That four days would have expired
23 yesterday. Right now we'll give them an automatic two
24 day extension through the close of business tomorrow
25 without the statute taking effect.

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1 THE COURT: And then there is the timing that says
2 when it is five days or less you don't count weekends.
3 So let's just see where we are. Just hang tight and keep
4 somebody at it.

5 MR. LUCEY: And my understanding would be that the
6 five days unless you don't count weekends would be
7 applicable to a court rule and necessarily to an
8 independent statute. That's just my understanding that
9 it is four days. But I certainly could be wrong, Your
10 Honor. I've not researched that.

11 THE COURT: Me either; but I like the point. And I
12 have a law clerk and we'll all know the answer shortly.
13 But anyway just stay at it because we're going to be
14 together so I don't know that effectively it's really
15 going to matter because we are going to be here for a
16 little bit. Other motions?

17 MS. DYER: Not at this time, Your Honor.

18 MR. LUCEY: We did handle briefly yesterday her
19 ground number 6, which we withdrew our Lanier designation
20 but we do have a Lanier trial subpoena pending that we
21 have not withdrawn and do not intend to withdraw.

22 MS. DYER: Understood.

23 MR. LUCEY: Thank you.
24
25

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1 OPENING STATEMENT

2 BY MR. LUCEY:

3 For those that are fortunate enough to own a home it
4 is often their most precious asset. Not just financially
5 but personally; it's your space. But as you'll see this
6 week that is not how it turned out for the 59 homeowners
7 at One Belle Hall. I'm going to introduce you to One
8 Belle Hall. It's off of Long Point Road behind the Belle
9 Hall Shopping Center. It's four buildings and I'm going
10 to pace through them real quickly.

11 [Whereupon, Mr. Lucey shows photographs]

12 MR. LUCEY: You'll see that they are brick and they
13 are arranged around this parking lot courtyard. They are
14 partially stucco. They have siding, and they have
15 balconies. And throughout all those elevations you just
16 saw you see a single type of window. It's a vinyl
17 window. It's a window called the model 2031 and it's
18 made by a company named ESP; Energy Savings Products.

19 It was sold to the developer of this complex by an
20 entity known as Builder's First Source, BFS. And this
21 all occurred back in the 2006 construction timeframe and
22 the certificates of occupancies were issued in late 2006
23 and early 2007. But by the summer of 2009 cracks started
24 showing up in the stucco. Homeowners went back to the
25 developer who was still in control of the complex; still

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1 in control of what's called the association which we'll
2 talk about in a moment, went back to the developer
3 regarding those cracks and some other matters. And
4 you'll see from late 2009 through 2010 the developer
5 redid the stucco, new stucco all around the windows and
6 the balconies, and fixed a couple of other problems that
7 had come to the association board's attention in the
8 interim; miscellaneous paint problem here and broken this
9 and that and a few other problems. And by the end of
10 2010, December 2010 and again in March of 2011 the
11 developer would write the homeowners, the association,
12 and tell them everything is completed; you're good to go.
13 But it didn't last long. Within another year in mid
14 2012 there were cracks in the stucco. The water was
15 still getting into the building somehow. The water was
16 getting in the stucco and cracks were occurring. And
17 we've referred to the association so let me just pause
18 for a second. The association, this is a condominium
19 complex. In other words this is 59 residential units and
20 four buildings and you can't have one person owning the
21 wall and the next person not owning the wall so you've
22 got to share the walls, you share the structure, and you
23 share the buildings. They're called common elements so
24 the 59 homeowners collectively as a group and through
25 their regime, their association, they collectively own

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1 the buildings and they own what is called the interior
2 condominium themselves each individually. And the
3 association -- the condominium needs some sort of
4 administration so usually and in this case there is a
5 non-profit entity that is created and it's called a
6 homeowners association or the property owners
7 association. And that association will manage these
8 buildings on behalf of all the homeowners.

9 And of course an entity can't manage itself; it
10 needs human beings right? So what you have is you have a
11 board of directors and you have some homeowners who get
12 elected to a board for periods of a year or two and
13 they'll serve on this board of directors and they'll run
14 the association on behalf of all the homeowners. And
15 because these homeowners typically either have other jobs
16 or are not property management professionals themselves
17 or accountants they typically will hire a management
18 company, a property management company that will handle
19 the day to day affairs for them.

20 And that's what occurred in this case. And in the
21 summer of 2012 Marvin Meek who you met during jury
22 selection yesterday Marvin Meek was the president of the
23 association and they had a property manager. And so once
24 again when the cracks appeared in 2012 the property
25 manager hired an engineering firm that you'll hear about

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1 named ABS, Applied Building Sciences, to investigate the
2 cracks in the stucco. Well it turns out the summer of
3 2012 test cuts resulted in an October 2012 report
4 documenting degradation of the wood structure below the
5 stucco. And the homeowners learned that that engineering
6 firm had actually previously worked with the developer,
7 TCR.

8 So rather than go further down that road the
9 homeowners sought legal counsel, myself and Ms. Lynn
10 trying this case with me on behalf of the homeowners.
11 And an engineering firm was hired on their behalf named
12 WDP and the engineer, the lead engineer, is a Doctor
13 Rhett Whitlock. When I say doctor because he not only
14 has his Bachelors and Masters from Clemson in engineering
15 but he also has his Ph.D from Clemson. And he began a
16 comprehensive investigation of these buildings for the
17 homeowners.

18 And he did some walk-throughs, some preliminary walk
19 throughs to develop a hypothesis of where this water was
20 coming from that was getting into the buildings. And
21 through his walkthrough he began seeing initial signs of
22 staining, really light staining in some places; something
23 you might not even notice if you weren't an engineer but
24 staining in some of the condominium units such as what
25 you see on the screen now, which is one of Doctor

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1 Whitlock's photographs which is already in evidence. And
2 what you're seeing it's very small and its blown up for
3 you to see but you're seeing a very small corner of a
4 vinyl window where two pieces of vinyl are coming
5 together. And you see black marks there and a brown mark
6 off to the left. The black mark that is vertical is in
7 the joint, a vinyl to vinyl joint, and the horizontal
8 line is a horizontal vinyl to vinyl joint. They began
9 seeing similar right here [indicates] on the other side
10 of the mullion the other side of the piece of wood here
11 [indicates].

12 And they even found one bad stool, this stain you
13 see on the screen now with the left hand stain on what is
14 called the wood stool. In window parlance the sill,
15 everybody refers to the sill but really the wood stool,
16 the wood trim in front of the window is called a stool.
17 It's part of the sill really but the actual sill is the
18 vinyl plastic piece you will see underneath the sash in
19 there. So what you're seeing is a stain on wood.

20 Doctor Whitlock founds these signs inside the
21 condominiums that he attributed to window leaking. So he
22 adopted a testing protocol to either verify or refute his
23 hypothesis that the windows were in fact leaking. And
24 you'll hear him tell you about it. He used a protocol
25 referred to as ASTM, the American Society of Testing

1 Materials; it's an independent standard. He used a
2 protocol called ASTM 2128 for the forensic investigation
3 of water leakage in buildings and their components. And
4 within that protocol he used there is several additional
5 protocols referenced and one is called and you will hear
6 about this week is ASTM E 1105. It's a water test
7 apparatus, a spray rack if you will that is used to
8 simulate wind driven rain. And an engineer will use that
9 to apply a specified level of water to the exterior of
10 windows and a vacuum on the interior of the windows to
11 simulate wind driven rain; all pursuant to these various
12 ASTM specifications to see if the windows leaked.

13 And although leak is a common-sense term leak under
14 these protocols is defined as water proceeding either
15 into the interior of the structure or into the wall. He
16 used a second test too; a second ASTM test, a simpler
17 test called a sill dam test, which is simply to treat the
18 bottom of the window frame. It's shaped almost like a U
19 that they call a shape, its vinyl, they tape the vinyl
20 and of window frame treat it like a bathtub fill it full
21 of water and see if the water stays in or leaks out.
22 It's a simple test but it is an ASTM test. And if we can
23 go to the next screen please -- there are signs of
24 interior water intrusion -- go to two more screens please
25 to these spray rack tests. This first photograph up here

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1 now in window testing shows you a calibrated test rack on
2 the exterior of the building spraying the water. On the
3 inside you would have the vacuum that I've talked to you
4 about. In this photograph here [indicates] it's showing
5 you what a sill dam test looks like. Again, you're
6 looking at the rear of the bottom of a window and water
7 has been brought up to a certain level that you'll hear
8 about during trial and it has leaked out of the joints
9 into the house. The stool has been removed so you don't
10 see the stool yet and you can see the water coming in.

11 These are photos of water leaking in during these
12 various tests. And for those of you who couldn't see the
13 computer screen very well here are several posters blown
14 up photographs that are in evidence actually showing the
15 water coming out onto what is called the window stool
16 during testing.

17 Now that may not look like a lot of water but you're
18 only seeing the water coming out the front. Those bath
19 tubs are completely empty. Some of that water Doctor
20 Whitlock will show you actually comes out below the wood
21 stool so you don't see it; it goes into your wall
22 especially if there is a joint between your wood stool
23 and your wall that has been caused by the repeated
24 wetting and drying of that stool. And he'll testify that
25 it doesn't take a lot of water in various rain storms to

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1 cause the kind of damage that we're going to see in this
2 case. In fact he's going to show you this chart that is
3 on the screen now plaintiff's exhibit 305-A. This chart
4 documents 14 spray rack tests performed in a dozen or so
5 different units, different residences at One Belle Hall.

6 I've told you earlier this is an ASTM E 1105 test,
7 to simulate wind driven rain correct? All of these
8 windows, the 14 set of windows failed before any pressure
9 was applied, before any vacuum was drawn on the inside of
10 the structure. Some of those windows up there are twins
11 and some of those windows up there are single windows.
12 And he'll show that they failed in a number of ways.
13 They leak out that horizontal and vertical joint that I
14 pointed out to you previously. And they also leak at the
15 meeting rail where the upper and lower sashes meet in the
16 middle of the window. Water will spray in at the meeting
17 rail during a wind driven rain.

18 After all 14 windows failed initially at zero
19 pressure he went on and tested several more of them at a
20 low pressure to see what other leaks would occur and in
21 fact that's predominantly when the meeting rail leaks
22 occurred. And he's going to correlate for you the
23 leakage that occurred with the signs of water damage that
24 had been seen prior to the tests being applied and he's
25 going to show you the damage in the wall. And he'll show

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1 you the very right hand column of the same chart is the
2 column documenting the eight different windows that had a
3 sill dam test. Every one of them leaked. Five of the
4 eight leaked immediately. The sixth one was emptying or
5 leaked in 30 seconds and the seventh and eighth were
6 empty in two minutes.

7 This [indicates] is the staining below these
8 windows. When they would do the tests they would cut out
9 the drywall on the inside of the residence below the sill
10 so they could see if water got down in there. So they're
11 watching on top for water and they're looking to see if
12 there are signs of prior water intrusion down below.

13 This [indicates] is actually another aspect of the
14 damage; termites. Termites are living in these wet walls
15 below these windows and eating up the structure. And
16 you'll hear testimony that that has happened at a number
17 of locations below the windows. This [indicates] is a
18 set of termite colonies living between the wood apron
19 trim that is immediately under a stool, a window stool on
20 the drywall.

21 The apron has been removed, this is interior trim,
22 and those are the colonies underneath. Another colony
23 down below the window [indicates] and then you're looking
24 at the back of the exterior sheathing now with the wet.
25 And this yellow thing of a gig up here [indicates] they

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1 call that a moisture meter. It has two metal prongs and
2 you stick it in the wood and it measures the electrical
3 resistance between the two metal prongs and that tells
4 you how much moisture is in the wall. This is upside
5 down right now but as you can see the meter, the needle
6 is all the way to the right. Doctor Whitlock will tell
7 you that that is called pegging out; there is too much
8 moisture to get a reading and it's exceeding all the
9 moisture levels.

10 The wood, the OSB sheathing you can just peel it
11 down from within as you see in that photograph. More of
12 the same down further in the cavity and you can actually
13 see where water is sitting down there. That is a tool
14 that has been stuck into the wood. There is actually no
15 integrity to the wood; the tool goes right in all the way
16 down to the handle.

17 This [indicates] is the labeling on the windows.
18 You will see up there it has FMA Keystone Certification
19 program; those are the windows that are the subject
20 matter of this litigation that will be in anywhere you
21 find a window with labels, sometimes the labels are
22 removed, but that's the label you will find in them.
23 It's in the head of the window.

24 The homeowner's association has brought three causes
25 of action in this case. And the Judge has already told

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1 you that she will explain to you what the law is at the
2 end of the case. We'll just give you a brief overview of
3 the claims that plaintiff is making. One cause of action
4 is called negligence. It means that somebody didn't do
5 what they were supposed to do; that they had a duty to do
6 something and they breached it.

7 The second cause of action -- and the three causes
8 of action they're all about the same thing; they're about
9 the windows and the windows leaking and it's causing
10 damage. But it is three different legal theories which
11 plaintiff will proceed on; the association will proceed
12 on in your behalf.

13 The second one is called warranty and there are two
14 types of warranty there is one that is written and you
15 can read it like you get it with your purchase and there
16 is one that is implied and the Judge will tell you about
17 implied warranties but basically it means that there is
18 an implication that it is supposed to be suitable, it's
19 supposed to be suitable for the purpose for which they
20 were intended. And plaintiff will show that the windows
21 are not suitable; windows are not supposed to leak.

22 The third cause of action that the plaintiffs are
23 pursuing today is called strict liability and tort. It
24 means that a vendor should be held liable for putting an
25 unreasonably dangerous product in the stream of commerce

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1 if it causes damage. And it is plaintiffs allegation
2 that these windows which are causing or contributing to
3 the damage that you've seen in some and you'll more this
4 week, but these windows which are causing wood
5 degradation, termite infestation and the like that they
6 are unreasonably dangerous to their property.

7 And as part of presenting you with their case
8 plaintiffs will show you various pieces of evidence that
9 lend themselves to these causes of action that they rely
10 on as part of their proof. And one of them will be a
11 purchase order, actually two purchase orders, two, the
12 same one got resigned for a reason we'll talk about, but
13 two purchase orders from 2006. And the purchase orders
14 were for a 2031 model window and they had a set of terms
15 on the back of them and these are in evidence.

16 This is plaintiff's exhibit 44-A and I will have it
17 on screen in a second but there is also plaintiff's
18 exhibit 44. And on that let me pause and tell you from
19 time to time you might see an exhibit with a label on it
20 that the number will end up getting changed here in
21 court. That's because some exhibits get labeled one way
22 when you are in a deposition and another way when you are
23 actually in court. So I will try and make it a habit of
24 simply referring to exhibits by an appropriate title such
25 as the first purchase order or the second purchase order

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1 to avoid any confusion. But this is 44-A on the screen
2 with an addendum that has been resigned and we'll get
3 back to that in just a second. But on the back of this
4 purchase order as between Builder's First Source and the
5 original developer it says quote articles furnished
6 hereunder shall be of a new material of the most suitable
7 grade of their respective kind for the purposes intended
8 and vendor warrants all to be free from defect in
9 materials, design, and workmanship. And there are other
10 provisions that we will bring to your attention during
11 the trial.

12 Now during a lawsuit parties get a chance to ask the
13 other side questions so you can anticipate what the
14 issues are that you need to address at trial. It's
15 called the discovery process. And we have engaged in
16 that process, plaintiffs have engaged in that process
17 with Builder's First Source. And through that we were
18 able to ascertain what we need to show you to defeat
19 whatever their defenses are that they intend to offer at
20 trial.

21 And one of those defenses is that we simply supplied
22 what was ordered; model 2031. Plaintiffs will show --
23 excuse me what was specified by the architect on the
24 jobsite. Plaintiffs will show you that the 2031 is not
25 what was specified by the architect that the 2041 is what

1 was specified by the architect. A change order was
2 prepared by a Larry Bratten an outside sales person for
3 Builder's First Source with this different model 2031.
4 And that is what was actually shipped to this jobsite.

5 Specifications also required that the windows be of
6 a certain performance grade. It's called DP 50. The
7 plaintiffs will show you that the performance grade of
8 these windows was not DP-50 that the performance report
9 does not support that claim in this particular case.
10 Doctor Whitlock will explain that to you.

11 Defendants are also going to attempt to show that
12 the windows don't leak. But that will be difficult
13 because the engineer that they are going to have testify
14 here this week didn't perform one water test; not one,
15 and did not cut away the drywall under any of the windows
16 to see if there are any windows in this complex that
17 aren't damaged in this structure below the windows.

18 The other defense we've seen is that if the windows
19 leak it's the homeowners fault. They haven't cleaned
20 them adequately. The windows have in their bottom
21 underneath the bottom that you see if you look down into
22 the window the first bottom you see is effectively a fake
23 bottom. Below that bottom is another bottom. It's a
24 reservoir that collects water and discharges it out the
25 face of the windows through what are called weeps; little

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1 holes that are intended to collect any water that gets
2 past the sash and then discharge it back out. And there
3 apparently has been found some dirt in a few of these and
4 it's their position that the plaintiff's homeowners
5 failure to clean these out is what if they leak is what
6 is causing the leak.

7 But you won't see a single water test where they
8 poured water in that weep to see if it was blocked or
9 not. And you won't actually be able to see if the weep
10 is blocked because as I said the window has a fake
11 bottom. You can't see the real bottom. You can see one
12 quarter inch, one half inch on each side. You cannot see
13 what is in the middle and you cannot see what is near
14 those weeps.

15 The weeps are working fine. The windows are leaking
16 through to the interior on the horizontal and vertical
17 sill insert joints. We've talked about those joints
18 briefly. That fake bottom I told you about it's a piece
19 called a sill insert. It snaps into the bottom of the
20 window; of the frame. And so when I use the analogy of a
21 bathtub filling a bathtub up earlier it wasn't quite a
22 perfect analogy because this bathtub has one part that
23 comes out and so it has joints. Bathtubs don't have
24 joints but this bathtub has a joint. The plaintiffs will
25 show through Doctor Whitlock that that is where this

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1 leaking is taking place. The association has a
2 contractor named Gary Moore that has given an estimate to
3 repair the complex. His estimate to repair the complex
4 is 14.5 million dollars. That's everything. But as we
5 discussed when the Judge gave you a background on this
6 matter Builder's First Source is the only defendant left
7 in this case. So it's just the window damage portion of
8 that 14.5 million dollars that we will be addressing this
9 week.

10 Mr. Moore will testify that the window portion of
11 those damages are five million dollars. That's three and
12 half million just for the replacement of the windows.
13 There are 59 condominiums with I don't know the exact
14 number but say a dozen windows a piece. The total number
15 of windows is approximately 330 odd windows keeping in
16 mind that some of those are twins; in other words two
17 windows that have been attached together to make them one
18 large window.

19 So if you actually consider the fact that the
20 majority of the windows on this job site are twins there
21 are actually way more than 330 windows. But at any rate
22 back to Mr. Moore that the replacement of the windows is
23 three and half million dollars of that five million
24 dollars. And the repair of the consequential damage, the
25 wood damage, the structural damage, the trim, the drywall

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1 that's another million and a half of that five million
2 dollars. And he'll further tell you that if you want to
3 subtract out the stucco that needs to be cut around the
4 windows during this job because that work needs to be
5 done anyway because the stucco has gone bad again. The
6 homeowners are up for their third stucco job now. If you
7 want to deduct that portion out of the repair estimate
8 the net repair estimate would be 4.7 million dollars.

9 As mentioned at the beginning of this case during
10 jury selection and as I've explained to you that I'm
11 trying to provide you with some background about how this
12 issue came to be. This has been a long segue for the
13 homeowners. This is the last defendant left in the case.
14 And Marvin and Len and the other homeowners here have
15 asked me to thank you in advance for your time this week.
16 Thank you.

17 THE COURT: Thank you. Yes ma'am, Ms. Dyer?
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One Belle Hall POA v Builders First Source Southeast Group, LLC
Opening Statements-Remarks by Ms. Dyer
August 30, 2016

OPENING STATEMENT

BY MS. DYER:

Good morning ladies and gentlemen. My name is David Dyer and I work in a law firm over on James Island called Kernodle Coleman. My client is Builder's First Source Southeast Group, LLC, which we refer to as BFS for short. You've heard a little bit about them. Here with me and you met yesterday is Darryl Ward and he is a representative of the company.

We're here today because I can't come to an agreement with Mr. Lucey and our clients thereby can't come to any agreement as well; it's all kind of part and parcel. So we've spent several years trying to work through this process and come to a conclusion that we might be able to live with and unfortunately we haven't been able to do so, so that's why you're here.

We are going to show you over the next few days' evidence and you're going to hear from different witnesses. And we need you to just decide what's fair, what's the right thing to do in this situation. This is kind of a search for justice at its core so we need your help. Now a lot of that and some of what you've already heard is technical. There is some standards and you're going to hear from engineers and you're going to see a whole bunch of pictures. That can be boring. We live it

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1 and breathe it because we've been dealing with this case
2 for a number of years like I said but this is all new to
3 you. You might not be familiar with how windows are
4 built. Some of the words that Mr. Lucey used might have
5 already confused you. What is a stool and what is a
6 meeting rail and how does all that fit in?

7 I'd ask for you again as the Judge indicated earlier
8 to please be patient with us. Please try to focus and
9 understand but I'll give it to you that it might be a
10 struggle this week. So I'm going to try to make it easy
11 for you. I'm going to try to give you three questions
12 and if you can listen as we go through all this testimony
13 for answers to those three questions I feel like you're
14 going to be well equipped to make a decision at the end
15 of the day.

16 So let me back up and let's get into the background.
17 You've obviously heard the homeowner's side of the story
18 and as you all know there are two sides so it's my turn.
19 Let me tell you a little bit about Builder's First
20 Source. Builder's First Source is a building material
21 supply company. So they sell to home builders and they
22 sell everything from nails and tile to lumber and of
23 course windows, roof shingles. You name it; if you need
24 it to build a structure they can sell it. They employ
25 over 500 people in South Carolina. They have a number of

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1 stores around the area. You might be familiar with some
2 of them depending on your hobbies usually since none of
3 you I don't believe are actually in construction trade.
4 You might happen to go in there if you're close by to buy
5 something. They sell to people off the street just like
6 a Lowe's or Home Depot.

7 But their primary target customer is these larger
8 home builders. Not necessarily national or anything;
9 some guy that might be your neighbor that builds a few
10 homes or does some handyman work or renovations. But on
11 occasion they do sell to some of these big national home
12 builders and that's what happened in this case.

13 So Builder's First Source in this instance had a
14 customer named Trammell Crow Residential. Now Trammell
15 Crow and I don't know if you're familiar with them and
16 frankly I wasn't before I got involved in this case but
17 just if you were to go to their website they've been
18 around since 1977. They specialize in developing and
19 building multi-family residential complexes; so like a
20 condominium or an apartment basically.

21 And astoundingly since 1977 they've built 225,000
22 such units around the country so a pretty big operation.
23 Now in this particular matter they built I think there
24 are several of them around the Charleston area; several
25 complexes but the one we're going to talk about today is

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1 One Belle Hall and you saw some pictures of it. It's off
2 of Long Point Road and there are four buildings. They
3 are all three stories and they contain 59 condominium
4 units. You've heard that the homeowners after moving in
5 sometime in 2007 and beyond began to experience some
6 problems.

7 So in doing their due diligence they hired Mr.
8 Lucey's firm who then hires some engineers and experts to
9 come in and really drill down and figure out what is
10 wrong with those buildings. So what did they find? Well
11 the expert, you're going to hear from him this week, his
12 name is Doctor Rhett Whitlock. Mr. Lucey kind of
13 introduced him already. And he found that of the four
14 buildings they have problems from the tippy top all the
15 way down to the ground. We're talking about roof
16 problems, problems with the stucco installation, problems
17 with the cement siding; they have like a hearty plank
18 material, some walls have that material and it wasn't
19 installed right.

20 We've got brick veneer on some of them. The brick
21 wasn't installed right. Behind any of those; the stucco,
22 the brick or the siding there is like a waterproofing
23 like a house wrap that goes into to act as a barrier
24 between whatever you see on the outside and the wood
25 framing and the sheathing that is the actual structure.

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1 Well that wasn't installed right; the water proofing --
2 The windows which of course we're going to talk a lot
3 about windows, but one of the big problems is that the
4 windows weren't installed right. So there is supposed to
5 be some flashing and some material installed around the
6 wood framing; the hole where the window goes, and that
7 either wasn't there as it was drawn or it wasn't put in
8 there right. You put the window in and then you have to
9 seal the window to make sure that it's all one in the
10 same. And you've got stucco or siding, you've got a
11 window, there is a joint there so there has to be some
12 sealant applied.

13 And Mr. Whitlock admitted that the sealants were bad
14 or they've since failed. So there is all sorts of
15 components down to the grading. Doctor Whitlock has
16 opined that the actual level of the ground as it comes
17 into contact with the building is too high. Maybe that's
18 where some of the termite problems come from. But we've
19 got a myriad of problems with the buildings and Mr. Lucey
20 has already told you that to fix all those problems is a
21 14 million dollars fix. In fact more than 14 million;
22 that's a really big number.

23 So what does that have to do with Builder's First
24 Source? Well as a result of all these findings and
25 figuring out exactly how much it was going to cost to fix

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1 these four buildings they bring a lawsuit. Now Builder's
2 First Source is the last defendant left but there were
3 over 40; over 40 people that they have blamed for the
4 problems out there. And today my client is the only one
5 left to point the finger to. But how much of that damage
6 can possibly be related to the windows? We know that
7 there are all these other sources of water intrusion.
8 That's one of the things that I'm going to ask you to
9 listen for.

10 But let's get a little bit further into what
11 Builder's First Source did with respect to the project.
12 You're going to hear about this guy named Larry Bratten.
13 Now Larry was an independent sales agent. He was kind of
14 an outside consultant and he had a number of customers.
15 He wasn't actually a Builder's First Source employee but
16 he brought business to them and was able to kind of
17 broker deals through his customers and Builder's First
18 Sources and one of those customers was Trammell Crow
19 Residential.

20 So Trammell Crow in this case in 2006 comes to Larry
21 in some way shape or form by calling him, email,
22 conversation and says we're building a project. The
23 architect has told us that we need 324 vinyl ESP so the
24 manufacturer the brand is ESP the model number 2031
25 windows for this project. And what we need you to do

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1 Larry is contact the manufacturer and tell them we need
2 them and we need them sent to this address period; just
3 the middle man. The sophisticated national home builder
4 comes in and says I need 324 of these specific windows
5 and these sizes and I want them for this guy, the
6 manufacturer and I need them on my job site. Can you get
7 them there? And that's exactly what Builder's First
8 Source did. So we don't happen to hear anything else
9 from 2006 basically until 2014 when low and behold they
10 get served with a lawsuit; the first notice that there is
11 a problem with these windows.

12 Now there are three things, again questions that I
13 think you should listen for answers to it that might
14 instruct you at the end of the week or whenever we get
15 done as to what the right thing to do is. You heard Mr.
16 Lucey say that they have alleged Builder's First Source
17 was negligent in some way. Well the question you have to
18 ask yourself in order to find negligence is really did
19 Builder's First Source do anything unreasonable that led
20 to damage to the plaintiffs and if so what was that.

21 The next cause of action is breach of warranty. So
22 that is did Builder's First Source make a promise that
23 they didn't keep. And the last question is related to
24 the strict liability and that question is were the
25 windows unreasonably dangerous to the buildings. And

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1 the legal standard is exactly that; unreasonably
2 dangerous. Now as far as the evidence that you are going
3 to see, the certification of the windows, so before a
4 window can be sold it has to be certified. And there is
5 a battery of tests that it undergoes by a third party as
6 the window manufacturer doesn't do its own tests. They
7 go to a certified lab and have those tests done.

8 And there is another third party independent guy who
9 says this is the way the tests should be done and yay or
10 nay it was done correctly. And if it passes all that
11 then it gets in this case a gold sticker from the
12 industry leader AAMA, which you'll hear all kinds of
13 stuck about them, but there is a sticker on the window.
14 You saw pictures of it; it's a gold sticker. So in order
15 to certify a window you have to pass this battery of
16 tests. This independent person has to say yes the test
17 was done properly before you get that label.

18 So while you're watching and listening to evidence
19 the question I'd like for you to ask yourself is is there
20 any indication truly that the window didn't earn that
21 gold sticker. The gold sticker is clearly on. There
22 were two independent agencies involved in the testing and
23 the approval of the testing. They aren't here today.
24 They haven't been brought in to testify or to tell you
25 that they did something right or wrong. This is a theory

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1 now and has the theory been proven. And if it has been
2 proven still what does that have to do with Builder's
3 First Source. All we did was place an order. We didn't
4 have anything to do with certifying the window to be able
5 to sell it in the first place. Again looking at that
6 window label the architect in this case said this is the
7 window you want to use. It's the 2031; it's a DP-50 and
8 you'll hear about that. It's an impact rated window and
9 you'll hear about that.

10 Well that label that anybody who is looking at it
11 from the delivery guy to the general contractor to a
12 supplier such as ourselves could look at that window and
13 see it's exactly what it was purporting to be on the
14 label; it's a 2031 model which the architect asked for,
15 it's a DP-50, which the architect asked for, and it's an
16 impact rated window which the architect asked for.

17 Now again Builder's First Source never saw those
18 windows though. They placed an order with the
19 manufacturer and the manufacturer sent them directly to
20 the site so they never saw the windows. And even if they
21 did the windows are labeled what they were supposed to
22 be. Is there any extra stuff that a reasonable sales
23 building supplier seller should go to to make sure that
24 the label is correct? Or can they take it on its face
25 that it is what it purports itself to be. And as far as

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1 the tests go these are eight year old windows then Doctor
2 Whitlock is doing his testing on. Can you adequately
3 test an eight year old window? What does the standard
4 say about that? The damage that you saw on the windows
5 that actually looked to be leaking during the middle of
6 the testing now is that window leakage that is happening
7 as a result of the window itself or is that leakage that
8 could be coming from that outside sealant that is bad or
9 the existence or bad flashing; maybe there is no
10 flashing.

11 What else is around the window that hasn't been
12 excluded from those tests that could be allowing water to
13 get in that we could take a picture of in the middle of
14 the test? Again, eight years and none of those pictures
15 of the inside that Mr. Lucey called the stool; that's
16 just the piece of window trim the ledge of a window or
17 sill that we usually call it in layman's terms. So there
18 might be some staining there.

19 Well, do we know if that is dirt from just wiping
20 the window off but not wiping it very well or cat hair or
21 dander or whatever accumulates on all of our windows. I
22 don't clean mine enough. I mean is this evidence of
23 water intrusion first of all or could it be dirt or some
24 other substance. Is it evidence that the water intrusion
25 is coming from the window itself or could it be something

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1 else around it? And was the test that was performed
2 performed correctly and is it fair to test an eight year
3 old window? So all those are kinds of questions that you
4 should be asking yourself while you're seeing the test
5 results how it was performed and those kinds of things.

6 And then damage. Okay, so it's my belief that there
7 is not going to be anybody that is going to be able to
8 come in here, anybody that I can provide ---

9 MR. LUCEY: --- objection, Your Honor.

10 [Whereupon, an off the record bench conference is
11 held]

12 MS. DYER: You're not going to be able to hear from
13 anybody during this trial who can tell you exactly how
14 much of the damage regardless of all the pictures,
15 regardless of what is out there on site you're not going
16 to be able to hear from anybody who can definitively say
17 this much damage was caused by this window unit or all of
18 the window units. There is too much else going on out
19 there. These windows don't exist in isolation. These
20 windows exist in buildings that are bad from top to
21 bottom. So if the windows contributed at all to the
22 damage no one is ever going to be able to tell you jurors
23 this is how much damage they caused.

24 So to recap Builder's First Source they sell the
25 building materials. In this particular instance they

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1 sold a window package of 324 vinyl ESP windows to a
2 sophisticated national builder Trammell Crow. Trammell
3 Crow comes in and says I need this particular window,
4 this many, this many in this size and I want you to ship
5 it to my job site. That's exactly what Builder's First
6 Source does.

7 What don't they do? You're going to hear that those
8 windows were direct shipped. Builder's First Source
9 didn't load them up, they didn't ship them, they didn't
10 deliver them, they didn't unload them. They certainly
11 didn't manufacture them; Energy Saving Projects did. And
12 they certainly didn't install them. There was a framing
13 contractor on the job who installed them. So they are
14 just the middle man. They're just placing an order.

15 We'd ask for you to give us as much of your
16 attention as you can this week. And at the end of it
17 we're trusting you to tell us what's fair. Thank you.

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1 THE COURT: Very well. All right ladies and
2 gentlemen we are going to take our morning break. We're
3 going to take 15 minutes. Please be mindful do not
4 discuss this matter. Do not allow anyone to discuss it
5 with you. We're going to take 15 minutes. Leave your
6 notepads in your seat and enjoy your break. Go with your
7 bailiffs please.

8 [Whereupon, the jury exits at 11:46 a.m.]

9 THE COURT: All right, 15. Please be at ease.

10 [Whereupon, court is in recess from 11:47 a.m. until
11 12:06 p.m.]

12 THE COURT: Thank you. Anything before we bring
13 the jury out from the plaintiffs?

14 MR. LUCEY: Nothing, Your Honor.

15 MS. DYER: No, Your Honor.

16 [Whereupon, the jury enters at 12:07 a.m.]

17 THE COURT: Thank you so much. Ladies and
18 gentlemen at this time we will turn to the plaintiff.
19 Call your first witness please?

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One Belle Hall POA v Builders First Source Southeast Group, LLC
Len Terradista-Direct Examination by Ms. Lynn
August 30, 2016

1 MS. LYNN: Len Terradista on behalf of the One Belle
2 Hall Property Owners Association.

3 [Whereupon, Mr. Terradista comes forward]

4 [Whereupon, the witness is duly sworn by the Clerk
5 of Court]

6 CLERK OF COURT: For the record if you could state
7 your first and last name and spell out your last name,
8 please.

9 THE WITNESS: My first name is Leonard, my last
10 name is Terradista and that's T-E-R-R-A-D-I-S-T-A.

11 THE COURT: Your witness.

12 - - - - -

13 LEN TERRADISTA,

14 Having been first duly sworn,

15 Was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MS. LYNN:

18 Q. Len, where do you live?

19 A. I live at One Belle Hall building number 2100 in the
20 203 unit.

21 Q. And how long have you lived at One Belle Hall?

22 A. We've lived full time since September of 2013.

23 We've owned the unit since October of 2008.

24 Q. Let's turn to your background. Could you please
25 elaborate on where you're from, your professional

1 experience leading up to this day for the jury?

2 A. I was born in Queens, New York right across the
3 river from Manhattan. I grew up there and went to school
4 -- went to St. Bernard's[phonetic] Grammar school and
5 Holy Cross High School in Queens. I obtained a Bachelor
6 of Arts in history with a minor in Education at
7 Southampton College of Long Island University.

8 After that I went to work for three or four years at
9 Glen and Durkee [phonetic] that followed with working 11
10 years at the Plaza Hotel in New York which was a great
11 learning experience. It was a spectacular facility and I
12 was very fortunate to work there for 11 years. And I
13 also met my wife 40 years ago at the Plaza Hotel.

14 After that I moved to the New York Athletic Club.
15 New York Athletic Club is a private club that is
16 committed to the promotion of amateur athletics. It has
17 a tremendous involvement in the Olympic Games. So that's
18 me.

19 Q. Let's turn now to when you decided to purchase a
20 home in Mount Pleasant. What attracted you to the area?

21 A. Our middle daughter Erica was ready to go to
22 college. And like all parents we go on a big college
23 tour. Our first stop was Appalachian State in North
24 Carolina where our older daughter went to and graduated
25 from. We went there, we drove down to Clemson and as we

1 were making the turn back to go to New York we said let's
2 try Charleston; let's see what the College of Charleston
3 is like. So we went there, toured the school, walked
4 around and we fell in love with it.

5 Our daughter fell in love with Charleston and the
6 College of Charleston. She hadn't come back to New York;
7 she never went back. But we fell in love with the area.
8 All that Charleston offers; the history. I was a history
9 major so that was a large part of it.

10 The fact that it is situated to the water and the
11 beach, 20 minutes to downtown; it's just a great city to
12 move to. Plus we knew that I was getting older and we
13 were going to retire soon and there is no better place to
14 retire than down here.

15 Q. And what attracted you to the One Belle Hall
16 condominium?

17 A. Location. As they say in real estate location is
18 important. Ten minutes to the beach, 15 minutes to
19 downtown Charleston, highways nearby, weather; all the
20 things that make -- shopping right across -- two steps
21 out the door you can do all your shopping, accomplish all
22 your chores for the day. So it's just the ideal
23 location. The size is perfect, it's not too big and not
24 too small and it's a pretty place.

25 Q. What else, if anything, other than location and the

1 sense of community attracted you to One Belle Hall?

2 A. Of all the places we had seen that our realtor took
3 us to what really appealed to us was the fact that not
4 only did it look good but it appeared good.

5 It looked like it was high quality product, high
6 ceilings, crown molding and that was the intent was to
7 buy a good place, quality that we can enjoy and not worry
8 about repairing, fixing, or taking care of. So this was
9 going to be our retirement home.

10 Q. Let's turn now to the purchase of your unit. What
11 documents did you receive in connection with that
12 purchase?

13 A. We received a purchase agreement as is common with
14 most transactions. And its transferred to us; as we
15 purchased the unit it transferred to us all the
16 warranties and guarantees that the owner had that the
17 builder had was transferred to us.

18 Q. And why is the transfer of that warranty important
19 to you?

20 A. Warranty is important because it's the quality
21 building. If the quality building there wouldn't be a
22 need to rely upon the warranty but we had it and it was
23 something that we could trust.

24 It was a promise made by the transfer of the rights
25 that everything would be defect free and we wouldn't have

1 a problem. There should be no issues and if there were
2 they would be protected by that warranty. It was a
3 promise they made to us.

4 Q. You also referenced a warranty manual. Would you
5 please elaborate on the warranty manual for the jury?

6 A. We received a manual that illustrated the various
7 appliances that came with the purchase and it also
8 included a number of warranties.

9 And it included in the warranties was the warranty
10 from BFS stating that the product was transferred from
11 Trammell Crow to us because again it was that promise
12 that they made that they would be free from defect.
13 There would be no problems with the product that they
14 supplied us.

15 Q. Let's turn now to after you purchased your unit.
16 Can you give the jury a brief overview of how your
17 understanding changed in connection with the products?

18 A. As I said we were very fortunate we purchased the
19 unit in October of 2008. We did not move in full time
20 until September of 2013; that's when I retired. We were
21 going to sell our home up in New York and move down here
22 in September.

23 And prior to that between 2008 and 2013 we'd come
24 down for that weekend that we could get away or for a
25 week or two in the summer and everything was wonderful.

1 It was very nice, comfortable, the location proved out
2 right and the city of Charleston met our idea of what it
3 should be so that was good. Full time in September of
4 2013 things changed. When you're there full time you
5 realize things that you overlooked or didn't have a
6 chance to experience.

7 So we noticed that we would get this howling sound
8 and just sort of put it off but it was just strange. But
9 if you recall back in 2013 we had an ice storm and a
10 freezing storm and the Ravenel Bridge closed for a day
11 and 526 closed and Atlanta was shut down.

12 Well, that's when we saw the icicles in the corner
13 of the window, that's when the howling really took place.
14 The water was just really obvious on the windows. So
15 that was the real moment of truth that we had that we
16 definitely had a problem.

17 Q. How many windows did you experience this with?

18 A. We have ten windows in our unit and we have ten
19 experiences, ten bad experiences with those windows. We
20 came across a solution where we were able to pretend so
21 we had a roll of frog tape; if you know what frog tape is
22 it is painters tape.

23 And so what we did was we taped the sash of the
24 windows and that was our way of sealing off the windows
25 and stopping the howling of the wind through the windows.

1 Q. Let's turn now to the association and your role as
2 president. Will you first explain to the jury what the
3 association is?

4 A. The association is a not for profit entity where all
5 the homeowners are represented by. The homeowners can
6 trust the HOA or the POA and the board of directors to
7 maintain the facility, the common areas such as
8 landscaping, tree trimming, things of that -- and the
9 windows.

10 And that is one of my responsibilities as president
11 is to make sure we address this issue with the windows.
12 How do we correct the problems we're having, all the
13 defects that are inherited in those windows and the
14 problems we're experiencing we have to find a way to
15 correct it.

16 And the homeowners assigned all the rights to the
17 POA and the board resolved to take this lawsuit up. It's
18 our responsibility and our duty to make sure that the
19 homeowners and the issues that all homeowners are
20 experiencing are corrected and this is the first step in
21 doing that.

22 Q. And where can the jury find these homeowner
23 assignments and the resolution?

24 A. Those are exhibits 121 and 122.

25 Q. And how did you check these assignments to make sure

1 that the one we received for all the homeowners?

2 A. I checked them off. I verified the homeowner versus
3 the unit versus the list of homeowners and units.

4 Q. Can you please explain to the jury exactly why
5 you're here today on behalf of One Belle Hall Property
6 Owners Association representing these 59 homeowners?

7 A. The homeowner's assignment and resolution have given
8 us, the board of directors, the authority to proceed with
9 this lawsuit and to correct the issues that will be
10 corrected.

11 Q. Let's turn now to the windows. How are the windows
12 contrary to what was promised?

13 A. They're defective. They don't deliver -- in all my
14 years -- we had a house in New York for 30 years.
15 Halfway through, ten years through the ownership we
16 changed the windows. We made improvements to vinyl
17 replacement windows.

18 And in those 15, 20 years that we lived there before
19 we sold the home we never had a problem. This was
20 something I had never experienced. The winters in New
21 York are a bit tougher than down here and I never had a
22 problem, never had to tape my sashes, never had to do
23 anything else with the windows.

24 And I think that's what one expects when one has a
25 window is to keep the elements out, allow the light to

1 come in. We don't have that luxury.

2 Q. Can you please elaborate on the window problems that
3 you have learned through your involvement as president of
4 the POA?

5 A. They are extensive. We have besides just the
6 howling in windows. Residents have experienced water
7 damage ---

8 MS. DYER: --- objection.

9 THE COURT: Sustained.

10 A. There is water damage. There is damage to the
11 structural members under the windows and termites. There
12 are termites which is alarming both because who wants
13 bugs in their house number one and number two just the
14 structural damage that is caused by the infestation of
15 termites.

16 It's to the point where owners have during dinner
17 the termites ate through the sheetrock and have swarmed
18 their apartment; the one they are living in. That's
19 something that shouldn't happen.

20 Q. [Ms. Lynn] And how did you receive this information
21 from the homeowners regarding the damage ---

22 A. --- well, observation is number one. I've spoken to
23 the homeowners and I've seen pictures. There is that
24 much you have to see. You just have to see this
25 infestation; it's alarming.

1 Q. And how many buildings is that infestation
2 occurring?

3 A. There are four buildings in One Belle Hall and there
4 are four buildings with infestation.

5 Q. And how many windows are you aware that have issues?

6 A. I believe there are 324 windows in the units and
7 there are 324 issues. I think it is a typical problem
8 that runs throughout the whole facility.

9 Q. And what is the association seeking in compensation
10 for these issues?

11 A. Well, we are seeking replacement. We need the
12 windows to be replaced. We need the structural members
13 to be repaired, all the damage that these problems have
14 caused and the potential loss of use.

15 If they are going to take all the windows and rip
16 apart sheetrock and whatever else many of the residents
17 won't be able to live there so they will have to move out
18 and store furniture and all those things will have to be
19 compensated.

20 Q. And what will the association do with this
21 compensation if awarded?

22 A. We will go out and make sure that all the repairs
23 that are necessary to bring One Belle Hall to the place
24 it is supposed to be will be done. That's our
25 commitment; the board's commitment to the ownership is to

1 repair it.

2 Q. Len, in front of you is a collection of exhibits.

3 I'd ask you to turn to exhibit 162 which is in evidence,
4 a copy of your purchase agreement.

5 [Whereupon, the witness reviews document]

6 Q. Do you recognize this document?

7 A. Yes.

8 Q. Let's turn to page 7 in paragraph 16 entitled
9 warranty.

10 A. Yes.

11 Q. Could you please elaborate on your understanding of
12 that paragraph?

13 A. This is my purchase agreement and it initialed all
14 the aspects. Those are my initials, those are my wife's
15 initials and it states that the warranties, that they
16 warranty all the products to be free of problems.

17 This is their promise to us when we bought the unit
18 that it would function as one would expect a home to
19 function.

20 Q. And when you closed on your unit after executing
21 this purchase agreement were these warranties transferred
22 to you?

23 A. Yes, they were.

24 Q. If you'll look at the next exhibit, which is joint
25 exhibit 31, the warranty manual, do you recognize this

1 document?

2 [Whereupon, the witness reviews document]

3 A. Yes. It's the warranty that BFS has given to -- was
4 passed to the owners also upon the purchase of the units.
5 That's from Builders First Source promising and
6 warranting the windows.

7 Q. And how does BFS's warranty relate to why you're
8 here today?

9 A. Because the promise that was made to us that the
10 windows that would be supplied would be defect free
11 wasn't given to us.

12 And as such we have to take this in as I said
13 earlier the board's responsibility is to protect the
14 interest of the homeowners and this lawsuit is the step
15 necessary to take to protect the homeowners.

16 Q. And Len if you will turn to your exhibit 123, which
17 is a collection of photos. Do you recognize those
18 photos?

19 [Whereupon, the witness views documents]

20 Q. Its exhibit 701 because it's formerly defendant's
21 exhibit 701 now joint exhibit 123.

22 [Whereupon, the witness views photographs]

23 Q. Do you recognize the photos that are in joint
24 exhibit 123 plaintiff's exhibit 701?

25 A. Yes, I do.

1 Q. What are those photos?

2 A. These are photos that we took of our window. This
3 first photo is our TV room. You can see the water
4 running down the windows.

5 And another photo that we've taken that's from our
6 dining room onto the terrace is back there [indicates].
7 You can see the water accumulating on the sash. This is
8 our kitchen window with the water cascading down the
9 windows.

10 Q. Please explain to the jury where you frog taped these
11 windows.

12 A. It's on the top of the sash where the two windows
13 meet. There is a space and that's where the water and
14 wind would be howling through and that's what we taped
15 and that was a stop gap solution to this water intrusion
16 and wind intrusion. It seems so far to have worked to
17 some degree.

18 Q. And how many windows in your unit are frog taped
19 today?

20 A. We have ten windows and ten are taped. And we keep
21 them taped year round for the water and we figure that if
22 it is howling through the windows in the winter there has
23 to be something in the summer so to keep the dirt out --
24 it might not be water but we figure dirt is coming in so
25 we keep it taped pretty much the entire year.

1 Q. And how does that relate to why you're sitting here
2 today.

3 A. I just think its further proof that we and not only
4 us as unit two or three but all the homeowners are having
5 a problem with these windows and we're just seeking
6 remedy to this whole thing.

7 We just want this -- no one purchased these units to
8 be confronted with this problem. We were hoping to have
9 a nice -- there are normal things that you have to take
10 care of but never to the extent that this has been.

11 Q. Len, if you will look at next exhibits; joint
12 exhibit 27 and 28 I'd like to start with exhibit 28. Do
13 you recognize that exhibit?

14 [Whereupon witness reviews exhibits].

15 A. I'm sorry I'm just not following the numbering
16 system.

17 Q. It was formerly plaintiff's exhibit 130.

18 [Whereupon, the witness views photographs]

19 A. How easy it is when you tell me but I can see it.
20 Yes, these are photos of a unit in One Belle Hall and it
21 shows the accumulation of cockroaches on -- that's unit
22 301.

23 And as you can see this is the window sill or stool
24 and you can see the accumulation of termites. It's not
25 something that one anticipates to have. The additional

1 photograph of termites that were there. This [indicates]
2 is the floor and this is the baseboard over here
3 [indicates] is the baseboard and the flooring is here
4 [indicates] and those are termites that have swarmed in.

5 Another picture of termites in the corner of the
6 sill and the damage over here [indicates]. More pictures
7 of what we at One Belle Hall are confronted with;
8 additional areas of rot and just things that one should
9 not have to experience in a relatively new building.

10 Q. Let's turn now to plaintiff's exhibit 129 joint
11 exhibit 27 and would you please elaborate on those
12 photograph for the jury?

13 [Whereupon, the witness views photographs]

14 A. Again, these are further evidence of termites. You
15 see them. This [indicates] is again the floor and the
16 wall [indicates].

17 This is the area [indicates] beneath the window,
18 this is a double window and you can see the sheetrock has
19 been taken away. This is the 1900 building it's unit 201
20 and you can see the damage, the moisture and
21 discoloration of the underlayment.

22 Further damage indicate the extent of damage that
23 has been caused by water infiltration. Further evidence
24 of termites and water. I think this says enough of what
25 we're confronted; more of the same, more damage areas in

1 the unit.

2 Q. And how do these photos relate to why you're sitting
3 here today?

4 A. Because I think these photos speak volumes as I said
5 earlier the problems that the owners of One Belle Hall
6 collectively are going through. Every unit is -- we're
7 all tied together in this one community.

8 No one is free from the impact that this has on all
9 the units. We're all affected by this and one unit may
10 have less damage than the other but every unit is
11 impacted. These are our homes. This is not something
12 easy.

13 This is where we live, this is where other people
14 live and they put their hard earned money into purchasing
15 this and they're looking for the perfect world, the new
16 place, the new facility and they are confronted with
17 this.

18 And it is going to be a major challenge for the
19 residents of One Belle Hall as we go forward to correct
20 these things. I think the impact is tremendous.

21 Q. Thank you Mr. Terradista. No further questions.

22 THE COURT: Cross-Examination?
23
24
25

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1 CROSS-EXAMINATION

2 BY MS. DYER:

3 Q. Mr. Terradista, Davi Dyer; I have a few questions
4 for you sir. The board didn't make any attempt at a
5 warranty claim on the windows to the manufacturer, has it?

6 A. I am not aware of that; not since I've been
7 president.

8 Q. The warranty manual that you have been referencing
9 earlier ESP Windows also provided a warranty on their
10 window product. There is a copy in that manual correct?

11 A. I don't have it here so I'm not sure.

12 Q. Okay. Would you expect it to be all of the
13 warranties transferred to the homeowners?

14 A. All I know is that my concern right now at this
15 moment is BFS. I don't know about any of the window
16 manufacturer. My concern is the warranty and the
17 promises that BFS made.

18 Q. Understood. But BFS didn't manufacture the windows
19 as far as you know correct?

20 A. As far as I know they did not.

21 Q. The HOA is relying on its experts to provide the
22 jury with a testimony about what the cause of the damage
23 that the building has sustained was correct?

24 A. Yes.

25 Q. Okay. And you don't hold yourself out as an expert

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1 in window manufacturer.

2 A. By no means.

3 Q. Design or engineering correct?

4 A. By no means.

5 Q. Okay. Fair enough. The manual that the homeowners
6 received all of them when they purchased also had a list
7 of contacts in it. If you have a problem with your
8 refrigerator or appliances, call this person. If you
9 have a problem with your windows call this person. Have
10 you seen that list?

11 A. Yes.

12 Q. Have you ever utilized it for any reason?

13 A. No.

14 Q. Okay. Do you know if anybody on behalf of the
15 board used that list to contact the person identified as
16 the window point of reference?

17 A. I do not.

18 Q. And as you understand the problems that your expert
19 has identified at the buildings is termite treatment one
20 of those concerns?

21 A. Well I think termite treatment is a concern for any
22 homeowners anywhere whether in New York where you have
23 termites or here I think we're always concerned with
24 termite treatment.

25 Q. Do you know more specifically though whether Doctor

1 Whitlock has opined that the termite treatment failed in
2 this case?

3 A. I don't know that.

4 Q. Do you know just as a layperson sir whether or not
5 termites traditionally come from the ground?

6 A. Some do. I believe there are others that don't come
7 from the ground.

8 Q. And where else on the buildings if you have
9 knowledge was termite damage found other than at windows.

10 A. I believe some of the structural members on the
11 ground floor I believe there was some damage.

12 Q. Okay. And just for clarification purposes sir if
13 you were looking at one of your windows -- first of all
14 are any of them covered by your balcony or patio?

15 A. Yes, yes.

16 Q. And have you had water intrusion that you've
17 observed at the windows that are covered underneath the
18 balcony?

19 A. All the windows as I said earlier. We have ten
20 windows in the unit and all ten windows have experienced
21 the same water situation.

22 Q. Okay. Do you have any idea if the front of this
23 podium is the doorway from your condominium out onto the
24 balcony if we're starting there walking out on the
25 balcony do you know just by rough estimate how far out

1 the balcony extends?

2 A. As a guess I'm going to say seven feet.

3 Q. Okay. And so the windows that are under cover of
4 the balcony have also had water intrusion?

5 A. Yes, we've suffered the same as I've said the same
6 water situation -- I think there was a photo that
7 indicates that was on the balcony that had the same water
8 problems.

9 Q. And that would be with condensation?

10 A. It's water coming in, yes.

11 Q. You're not proffering where the water is coming from
12 right?

13 A. As I said earlier I'm certainly not an expert or an
14 engineer.

15 Q. Understood. Now revisiting the tape the tape if you
16 can explain to us so we're all familiar with the same
17 thing instead of using technical terms so there is glass
18 in the window right?

19 A. Yes.

20 Q. And then there is a frame in this case made out of
21 vinyl around the window?

22 A. Right.

23 Q. And then it abuts to drywall correct at the top?

24 A. On the inside.

25 Q. On the inside; that's what I'm talking about.

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1 A. Right.

2 Q. Now did you tape on the inside?

3 A. No, we just taped the sash, the part where the two
4 windows come together and there is a gap so we sealed
5 that with the tape.

6 Q. On the inside or the outside?

7 A. Inside.

8 Q. Okay. So there is two pieces of glass right?

9 A. Yes.

10 Q. And then -- they are referred to as sashes is
11 that...

12 A. I believe so.

13 Q. And then one of them moves up and down?

14 A. Yes.

15 Q. Which one in your case the bottom or top ---

16 A. --- the bottom.

17 Q. So when you put the tape up you put it inbetween
18 those two panes of glass?

19 A. Where they meet, yes.

20 Q. And they are encased in frames right?

21 A. Well, it's right on top of vinyl the two windows and
22 we put tape on top of that.

23 Q. Got it. I just want to make sure we're all on the
24 same page. Now have you replaced the weather stripping
25 at any point in the windows?

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1 A. No.

2 Q. Do you know if there is any weather-stripping
3 between those two sashes as you're describing?

4 A. I don't know.

5 Q. Okay. And the windows is it fair to say are
6 approximately ten years old at this point?

7 A. Approximately, yes.

8 Q. Okay. One more thing sir. You indicated that
9 there might be some loss of use. What does that mean?

10 A. Well if they are going to have to take out ten
11 windows from my unit to be replaced and they have to take
12 away the sheetrock and repair the wood underneath and
13 whatever damages the windows have caused we might not be
14 able to live there.

15 If there are no windows I'm sure they have to close
16 the windows, board them up for a period of time, move all
17 our furniture away and also make sure the dust and grime
18 and dirt that is going to be caused by that repair or
19 replacement will be a problem.

20 And I don't know if the residents would be able to
21 live in their units so they should be compensated for
22 that because they still have to pay the regime fees and
23 utilities and all the other expenses that would go with
24 it. It's just not moving out and nothing there.

25 Q. Fair enough. I understand and can appreciate that.

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1 Has the board itself through the three board members or
2 through a committee that might have been appointed have
3 you done any research to figure out what those costs
4 associated with that loss of use might be?

5 A. Not at this point.

6 Q. Thank you, sir.

7 THE COURT: Redirect?

8 MS. LYNN: No, Your Honor.

9 THE COURT: You may come down.

10 [Whereupon, the witness is excused and exits the
11 witness stand]

12 THE COURT: Call your next witness please.

13 MR. LUCEY: The plaintiff calls Doctor Whitlock.

14 THE COURT: If that's your next witness that's
15 going to be a little more lengthy I think we'll do that
16 after lunch.

17 MR. LUCEY: Yes, ma'am.

18

19

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1 THE COURT: We'll go ahead and take lunch now.
2 Ladies and gentlemen I'm about to send you to lunch. By
3 the time you leave it will be about a quarter to one.
4 I'm going to ask you to please be back in your jury room
5 ready to continue with this matter at 2 o'clock. Please
6 be mindful over the course of your lunch do not discuss
7 this matter or allow anyone to discuss it with you.
8 Please remember the admonition about cell phones and
9 social media and leave your notebooks in your seat. We
10 will secure them over the lunch break. Have a good
11 lunch. See you at 2 o'clock.

12 [Whereupon, the jury exits at 12:42 p.m.]

13 THE COURT: All right, thank you. Now we've got
14 the excerpts that we need to go over. So let's go ahead
15 and do that now and y'all should be ready to break about
16 one o'clock or did you want to go over with each other
17 and y'all come back a little bit earlier from lunch.
18 Your choice because I know you were going to look at some
19 and y'all were ---

20 MS. DYER: --- I'm okay ---

21 THE COURT: --- have you met and conferred over the
22 latest?

23 MS. DYER: No.

24 THE COURT: You have not? Okay. Why don't I do
25 this? Why don't I let you guys -- let you all do that.

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1 saw. I think the email speaks for itself so I sustain
2 the objection on that. Next?

3 MR. LUCEY: I understand that is counsel's last
4 objection.

5 THE COURT: Very well. I am not excluding the
6 email. Is everybody clear about that? There is no
7 exclusion of the email, okay. Everybody ready,
8 plaintiff? Defense?

9 MS. DYER: Yes.

10 THE COURT: So you moved?

11 MS. DYER: Yes. I couldn't see the witness because
12 of the podium so I'm on this side so I can at least watch
13 the witness.

14 THE COURT: That's all I needed to know.

15 MS. DYER: I didn't find that out until Mr.
16 Terradista was on the stand and I was like where is he?

17 THE COURT: Let's have the jury. So you are ready
18 to call your next witness and that person is in the room?
19 Yes?

20 MR. LUCEY: Yes.

21 THE COURT: And maybe that person will stand up and
22 get a little closer to the gate so we're ready to go.

23 [Whereupon, the jury enters at 2:24 p.m.]

24 THE COURT: Ladies and gentlemen at this time we
25 will continue the plaintiff's case.

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1 THE COURT: Call your next witness please?

2 MR. LUCEY: The plaintiff calls Doctor Rhett
3 Whitlock, Your Honor.

4 [Whereupon, Doctor Whitlock comes forward]

5 [Whereupon, the witness is duly sworn by the Clerk
6 of Court]

7 CLERK OF COURT: For the record if you could just
8 state your first and last name and spell out your last
9 name please?

10 THE WITNESS: My name is Allen Rhett Whitlock and
11 my last name is spelled W-H-I-T-L-O-C-K.

12 - - - - -

13 RHETT WHITLOCK,

14 Having been first duly sworn,

15 Was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. LUCEY:

18 Q. Doctor Whitlock, tell the jury where you reside
19 please?

20 A. I live in Murrells Inlet.

21 Q. And who do you live there with please?

22 A. My wife and kids.

23 Q. And what is your occupation?

24 A. I'm an engineer.

25 Q. What type of engineer?

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1 A. I'm a structural engineer and I specialize in
2 buildings and bridges and other structures that have
3 problems.

4 Q. And roughly how long have you been doing that sir?

5 A. Over 30 years.

6 Q. Let's go backwards a bit in time. Let's give the
7 jury just a little bit of personal background and then go
8 to your professional background. Personal background
9 first tell us if you would please where you grew up and
10 where you went to school?

11 A. I was born in Lake City, South Carolina and spent
12 most of my time in Murrells Inlet. I went to high school
13 at Socastee, which is where Murrells Inlet kids went back
14 then.

15 I graduated from Socastee in 1975 and then went to
16 Florence Darlington Technical College and got an
17 Associate's Degree in Engineering Technology.

18 Q. And after you got your Associate's Degree in
19 Engineering Technology what program did you go to next?

20 A. I then went Clemson. I went to Clemson and received
21 a Bachelor's Degree in 1979.

22 Q. And that degree was in what please?

23 A. Civil Engineering.

24 Q. And after that please?

25 A. I stayed on for my Master's degree and Ph.D. and

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1 graduated with my Ph.D. in 1983.

2 Q. And where are you currently employed?

3 A. WDP and Associates.

4 Q. And are you a principal in that firm?

5 A. Yes, I am.

6 Q. And roughly how long have you had that firm?

7 A. We started WDP in 1995.

8 Q. And describe for the jury of WDP currently if you
9 would please engineering wise and locations?

10 A. Well, we have about 50 employees mostly engineers;
11 one architect I believe or maybe two. We have offices in
12 Virginia, three in Virginia.

13 One is Charlottesville, one is Blacksburg, Virginia
14 and one in Manassas, Virginia and that's the main office.
15 We also have an office in New York City and one in
16 Murrells Inlet.

17 Q. And tell the jury if you would please what forensic
18 engineering is?

19 A. It's the study of defects or problems with buildings
20 or other structures to investigate what caused those
21 problems and how to if possible fix them.

22 Q. Does that include water intrusion?

23 A. Yes, it does.

24 Q. Does that include windows?

25 A. Yes, it does.

1 Q. And is that what you do?

2 A. Yes.

3 Q. Let's tell the jury about that a little bit please.
4 Let's start with some of your work for some of the
5 universities. Give us some examples of what you've done
6 for some of the universities.

7 A. Well we work a great deal with UVA, the University
8 of Virginia. We worked on the law library, which had
9 some post tension problems and the concrete slabs where
10 the steel strands were popping and failing and causing
11 some scared people when they popped and made a loud
12 noise. We've been monitoring that for years.

13 We worked on a collapse at UVA during commencement
14 ceremonies. Unfortunately a lady was killed during the
15 collapse. They hired us to come in and investigate the
16 building that Thomas Jefferson designed and built. But
17 it was old and the steel rod was hidden and nobody knew
18 it was there and it ruptured and caused a collapse.

19 After that they hired us to look at every building
20 on campus and we're still today with about six or seven
21 people full time working for the university on new
22 construction and their older buildings.

23 Q. And that was UVA?

24 A. UVA.

25 Q. Tell us about William and Mary please?

1 A. We also do work for William and Mary and for
2 Virginia Tech and other universities. At William and
3 Mary we investigated problems with building leakage on a
4 number of buildings and came up with methods for
5 repairing those buildings.

6 Q. Let's come closer to home. Have you performed a
7 forensic investigation at Clemson.

8 A. Yes, I have.

9 Q. Tell us about that.

10 A. That was the Strom Thurmond Institute. It's on
11 campus. It has a plaza as its roof and the plaza by
12 design was supposed to have roof drains. They were value
13 engineered out of the design and that caused some major
14 problems with water intrusion and flooding, actual
15 flooding of the building through the perimeter walls and
16 the windows.

17 Q. And I don't want to leave the Gamecocks out have you
18 performed forensic investigations at USC?

19 A. Yes, I have.

20 Q. Tell us about that briefly.

21 A. There used to be some dormitories there called
22 loosely the six packs. They were clad with what is
23 called a masonry screen wall that had come loose and kids
24 were trying to climb up these screen walls and they were
25 rocking back and forth and they decided to do something

1 about it. So we were called in to see if there was a way
2 to stabilize the screen walls without having to tear them
3 down but I think ultimately the university decided to
4 tear all the buildings down in addition to those screen
5 walls.

6 Q. And sir have you been hired on behalf of the state
7 of South Carolina to investigate moisture intrusion and
8 window leakage at the Medical University of South
9 Carolina?

10 A. Yes, I was.

11 Q. Tell us briefly about that please?

12 A. That's the Thurmond Gates building here in town. I
13 think if you go by it now you will see a lot of
14 scaffolding around it; they are doing repairs now.

15 But I was retained several years ago to investigate
16 problems there which related to air infiltration and
17 water penetration of windows and masonry.

18 Q. And did you determine the cause of the water
19 penetration there at the windows sir?

20 A. Yes.

21 Q. And did you advise a remedy for that?

22 A. Yes, I did.

23 Q. And have you investigated structures previously such
24 as what we find at One Belle Hall?

25 A. I have.

1 Q. Give us some exemplars of that please.

2 A. I've worked on a lot of condominium buildings from
3 Maine to Florida. Many of these were similar to this
4 building Belle Hall, that is some were stucco. Some
5 weren't but a lot were. Some had severe window problems,
6 some didn't.

7 Some had just stucco problems but I've seen this
8 type of construction in many places and worked on many
9 buildings very similar to this. And I have investigated
10 this building and am confident with my findings.

11 Q. And have you been engaged by the federal government
12 to investigate buildings in Washington, D.C. sir?

13 A. Yes.

14 Q. Tell us about that.

15 A. There was an earthquake about four years ago I
16 think, four or five years ago which caused some cracking
17 and damage to some of the buildings in downtown D.C., the
18 capital building and the building that houses the
19 representatives, and others, the White House, the
20 Treasury Building.

21 A lot of those buildings are old, they are masonry,
22 and they have terracotta surfaces that are very fragile.
23 They noticed cracking and they asked us to come in and
24 investigate quite a few of these buildings and we did in
25 a very rapid fashion to get people back into the

1 buildings.

2 Q. Including the U.S. capital buildings?

3 A. Yes.

4 Q. And sir have you had engagements that relate solely
5 to windows?

6 A. Yes, I have.

7 Q. Tell us -- give us some examples of those please.

8 A. I worked on buildings that had just window problems.
9 I've worked on class action lawsuits where windows were
10 defective and were being introduced into the market and
11 needed to be taken off the market. I did a lot of
12 testing on those windows and testified in trial about the
13 findings.

14 Q. Sir, have you been certified as an expert to testify
15 in courtrooms regarding exterior envelopes and windows?

16 A. Yes.

17 Q. And in those class actions was one of those class
18 actions similar to the vinyl windows at issue here?

19 A. Yes.

20 Q. Vinyl single home windows?

21 A. Yes, they were.

22 Q. And your reports were filed in multinational excuse
23 me, multi-district litigation?

24 A. Yes.

25 Q. And you also testified in window cases in Boston?

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1 A. I have.

2 Q. And sir, when you do these forensic analyses be they
3 a university building or government building or even
4 residential buildings are there various standards that
5 you typically employ or guidelines during your
6 investigation?

7 A. Yes.

8 Q. Is one such standard ASTM 2128?

9 A. That's a guideline for doing investigations of
10 building leakage?

11 Q. First tell the jury if you would please what does
12 ASTM stand for?

13 A. ASTM is a large organization and it stands for the
14 American Society for Testing and Materials and they
15 produce standards for different products, all kinds of
16 products; household products, automobile parts and
17 pieces, construction materials and windows and they
18 provide for performance and testing criteria for those
19 things.

20 Q. And how widely recognized are the ASTM standards in
21 the industry sir?

22 A. Well recognized throughout the United States and
23 throughout the world in fact.

24 Q. And does the ASTM standard 2128 refer to or
25 incorporate further standards in its guidelines for the

1 investigation of leaky structures?

2 A. Yes. It references other standards that it
3 recommends can be adapted to aid an investigator in
4 finding out what the problems are.

5 Q. And why do you use the word adapted sir?

6 A. Because there is certain test methods that you may
7 want to use part of in your diagnosis but not all of that
8 test method. And it's recognized in the forensic
9 industry that that is an acceptable thing to do and ASTM
10 2128 says so.

11 Q. And sir is another one of the standards referred to
12 in 2128 the ASTM E-1105?

13 A. Yes, it is.

14 Q. It's a procedure?

15 A. It's a test procedure for spray testing windows and
16 doors.

17 Q. Describe for the jury if you would please how that
18 test procedure works?

19 A. Well, the E-1105 test is performed by creating a
20 spray rack test bars, vertical bars that have nozzles
21 attached to them.

22 Water goes through this rack and sprays water onto
23 the surface of the window. Simultaneously you can pull a
24 vacuum on the interior or apply pressure to the exterior
25 to simulate a wind-driven rain.

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1 Q. And is another standard or guideline referred to in
2 ASTM 2128 the AAMA 511?

3 A. Yes, it is.

4 THE COURT REPORTER: Give me the name again,
5 please?

6 MR. LUCEY: AAMA, A-A-M-A, am I correct sir?

7 THE WITNESS: Yes.

8 MR. LUCEY: AAMA 511.

9 Q. [Mr. Lucey] And before we discuss that standard
10 briefly sir tell the jury what the difference is between
11 an AAMA standard or guideline and an ASTM standard or
12 guideline?

13 A. There are two different organizations. AAMA is the
14 Architectural Manufacturer's Association which is
15 comprised largely of window manufacturers who get
16 together and write procedures for doing testing; similar
17 to ASTM but the makeup of the committees are different.

18 Q. And what does AAMA 511 provide for sir in the
19 general sense?

20 A. It provides for procedures and guidelines for
21 forensic testing of windows.

22 Q. Water testing?

23 A. Water testing, yes.

24 Q. And let's turn to One Belle Hall. Did you employ
25 any of these procedures at One Belle Hall?

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1 A. Yes.

2 Q. Did you employ them in a similar manner as you've
3 employed hundreds of other investigations you've
4 performed?

5 A. Yes.

6 Q. And specifically in many of the investigations
7 you've already told the jury about?

8 A. Correct, I have.

9 Q. And let's just give a general overview of what work
10 you have performed at One Belle Hall without going into a
11 lot of substance first. Have you performed inspections
12 there?

13 A. I have, many.

14 Q. Approximately how many days please?

15 A. In total more than 10, maybe 15 days on site
16 personally.

17 Q. And the initial inspections, the 10 to 15 days of
18 inspections did that take place over the first year or so
19 of your engagement?

20 A. Yes, in 2012 I made two site visits to observe
21 visual conditions. In 2013 I came back and did testing
22 on two different occasions.

23 Q. In January and March?

24 A. Yes.

25 Q. And have there been various follow up visits since

1 then?

2 A. Yes, there have.

3 Q. For a total of 14 days on site?

4 A. Ballpark yes about that.

5 Q. And did you write a report for your clients in this
6 matter?

7 A. Yes, I did.

8 Q. Did you detail all of your findings in the report?

9 A. Yes.

10 Q. Did you write individual test reports on the various
11 water tests you performed?

12 A. Yes, we did.

13 Q. And did you document your observations with
14 photographs?

15 A. Yes.

16 Q. And I am going to place in front of you some of the
17 photographs that are in the joint exhibit 43 previously
18 marked 301. And I think we've got two four or five inch
19 binders here for a total of nine or ten inches with the
20 photographs pretty much two to a page. These are you and
21 your firm's photographs?

22 [Whereupon, the witness is shown photographs]

23 A. Yes.

24 Q. And these are a number of site visits?

25 A. Yes.

1 Q. And each different site visit it appears you've got
2 a photo log?

3 A. That's right.

4 Q. Tell the jury what that photo log does?

5 A. It indicates the location where the photograph was
6 taken and maybe some commentary on what it shows.

7 Q. Does it allow anybody else to follow everything you
8 did on site?

9 A. Yes.

10 Q. Is there an engineering principle regarding
11 recording your material in such a way that it can be
12 replicated?

13 A. That should be fully documented either in writing or
14 photography or preferably both.

15 Q. And why should it be fully recorded as much as
16 reasonably possible keeping in mind financial constraints
17 why should it be reasonably recorded so that it can be
18 replicated?

19 A. So someone else could go out and see where we did
20 our work and if they so desired could do the same type of
21 testing to see if they got the same results.

22 Q. And in addition to writing a report -- well first
23 off that report that was some 100 or 200 pages?

24 A. Yes.

25 Q. Of your findings?

1 A. It was a very long report.

2 Q. With the appendixes of all supporting documentation?

3 A. Yes.

4 Q. In addition to that did you write a scope of repair?

5 A. I did.

6 Q. And you provided it to your clients?

7 A. I did.

8 MR. LUCEY: Your Honor, at this time plaintiffs
9 would tender the witness as an expert in forensic
10 engineering and the investigation of building envelopes
11 and their components specifically including the
12 performance and failure of windows.

13 THE COURT: Is there any voir dire?

14 MS. DYER: No objection, Your Honor.

15 THE COURT: No objection. All right, he is so
16 qualified. Ladies and gentlemen let me share with you
17 what has just occurred. Normally under our rules of
18 evidence individuals are not allowed to testify regarding
19 their opinions or the reasons for those opinions.

20 There is an exception and that is when by virtue of
21 someone's knowledge, training, experience, and education
22 have become an expert in some field particularly art or
23 science then those individuals are allowed to testify
24 regarding their opinions within their expertise and the
25 reasons for those opinions. I will give you additional

1 instruction when I give you the concluding instruction
2 but at this juncture I will tell you that the purpose of
3 expert testimony is to help you understand the evidence
4 but certainly not for the purpose of controlling your
5 judgment. You may continue.

6 MR. LUCEY: Thank you, ma'am.

7 Q. [Mr. Lucey] Sir, have you formed an opinion to a
8 reasonable degree of expertise, in your field of
9 expertise; excuse me to a reasonable degree of certainty
10 in your field of expertise as to whether or not the
11 windows at One Belle Hall are leaking and causing damage?

12 A. Yes, I have.

13 Q. And sir, tell the jury what that opinion is please.

14 A. The windows Belle Hall leak. They leak during rains
15 and they leaked when we tested them. In fact every
16 window we tested leaked at what we call zero air pressure
17 no simulated wind; just a basic spray test.

18 THE COURT: I'm having trouble hearing you. More
19 cow bell.

20 THE WITNESS: I'll be a little louder. How about
21 that and get closer to this.

22 A. So the windows at Belle Hall leak. And they leak
23 into the sills and have caused rot, staining, and
24 deterioration of the frame.

25 Q. [Mr. Lucey] And sir is it causing both patent and

1 latent damage?

2 A. Yes.

3 Q. And tell the jury if you would please what you mean
4 when you -- how you differentiate between the two.

5 A. Well it's causing damage that you can see on the
6 surface in some situations like water over the window
7 stools. But there are other situations where the water
8 runs between the stool and the window and you can't
9 easily see it. It's there, it's causing damage but it's
10 not as noticeable.

11 Q. And what is occurring at One Belle Hall please sir?

12 A. Both.

13 Q. What is contributing to the latent damage? How is
14 that occurring?

15 A. It's water underneath the finishes and surfaces that
16 is causing damage that is not easily seen.

17 Q. The water is inside the wall?

18 A. Yes.

19 Q. Are the walls rotting from the inside out?

20 A. There were quite a few that we found that were
21 severely deteriorated but you couldn't tell it from
22 looking at the surface either from termites and or rot.

23 Q. Now sir before you did any testing did you do an
24 initial visual awning inspection to form a hypothesis as
25 to what was likely causing leaking at the property?

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1 A. Yes.

2 Q. And how did you do that please?

3 A. I walked around the site and I looked at cracks.

4 That was one thing I was told was a complaint from

5 homeowners that cracks were coming back after some

6 repairs were done.

7 And it was the type of construction cracks

8 frequently is caused by wood that is beneath the stucco

9 that swells. As it swells it causes the stucco to crack.

10 Then more water gets in because of the crack and it just

11 keeps compounding.

12 When I was on site I saw cracks beneath windows. I

13 saw cracks in columns. I saw signs of water penetration

14 below windows on the interior. And it was my thought

15 that there were multiple locations of water leakage.

16 Q. And give the jury a little bit more of an idea of

17 what other water leakage you saw besides matters

18 pertaining to windows before we go purely into the

19 windows?

20 A. Well, there were some balcony issues as well. There

21 were concrete balconies that were supported by wood

22 framing and you could see from beneath these balconies

23 the stains on ceilings. That was a pretty clear

24 indication that probably there was some leakage through

25 the balconies that could be causing damage. We later

1 found yes, that damage was occurring in the form of
2 structural rot and sheeting rot below the concrete deck.
3 Other damage was below vertical control joints. That's
4 the joint that is in the stucco wall that is supposed to
5 allow for some contraction of the stucco.

6 Some of those joints look like they had split and
7 opened up and potentially letting water in and causing
8 damage. And we did find that that was occurring.

9 Q. And some of that had nothing to do with windows
10 correct?

11 A. That's correct.

12 Q. Now give the jury a brief overview of what you saw
13 inside residences when you toured prior to implementing
14 any testing with regards to windows?

15 A. What I saw before we did any testing on the interior
16 windows were stains at window sills and sometimes stains
17 above the window sills within a window unit.

18 Q. Let's go to joint exhibit 43 and show some
19 photographs. This is from your November 2012 collection
20 of building 2100 unit 101. Next photo please.

21 [Whereupon, the witness is shown photograph]

22 Q. Do you recall seeing this particular staining, sir?

23 A. Yes.

24 Q. And when you refer to a sill is that what you're
25 referring to right there [indicates]?

1 A. Right. There are two sills that you see. One is
2 the wooden sill. That [indicates] is the wooden sill.
3 That is a wooden sill that is built in by the carpenter
4 after the window is installed.

5 But this [indicates] is the window sill. So I may
6 need to be careful when I talk about a sill on what I saw
7 damage on or not damage on. What I saw in this case was
8 water damage on this wooden sill just inside the window.

9 Q. And some people refer to that as the stool?

10 A. Yes.

11 Q. And in this particular picture sir there appears to
12 be some horizontal black in the middle of the picture on
13 the window. Can you point it out to the jury and tell
14 them what is going on there please?

15 A. Along this line [indicates] there is frequently
16 discolorations and sometimes like a salt material that
17 comes through with water evaporates and leaves these
18 deposits.

19 And along that line that's a seam in the window.
20 This piece of material will pop and can be removed and
21 it's a horizontal seam. And that frequently allowed
22 water to come through the window leaving stains like
23 that.

24 Q. Make sure they are aware of what component is the
25 sash in that picture please.

1 A. This [indicates] is the window sill and this
2 [indicates] is the sash. That is the part of the window
3 that goes up and down.

4 Q. And the joint you're telling the jury about the
5 horizontal joint is that a vinyl to vinyl joint?

6 A. Yes. The window frame is made out of vinyl. The
7 bottom, sides and top are one continuous piece that are
8 heat welded at the corners. There is an additional piece
9 at the bottom that is a snap in insert that goes in the
10 bottom of the window. That forms this upturned leg on
11 the back surface.

12 Q. And let's use another picture on that. It's still
13 in November of 2012 let's go to unit 101 in building
14 2000.

15 [Whereupon, the witness is shown photograph]

16 Q. Can you tell the jury what this photograph shows
17 please?

18 A. It's similar to the other one. It doesn't appear to
19 be as advanced in terms of moisture staining but you can
20 see a stain here [indicates], also a stain in this
21 [indicates] location.

22 And then this horizontal joint has debris in it and
23 is a byproduct of water that has evaporated and left soil
24 or some type of salt and minerals.

25 Q. Tell the jury if you will please what a sill insert

1 is.

2 A. It's this [indicates] plastic device that goes into
3 the sill and snaps in and forms a vertical back dam so
4 that when water collects, rainwater collects in this area
5 [indicates] it is to be contained by that vertical ledge.

6 Q. And why -- did you determine why there was what you
7 called a salt like residue of some sort on that vinyl to
8 vinyl joint.

9 A. Because water was accumulating in the sill and
10 seeping out of that horizontal joint in addition to the
11 vertical joints on each end.

12 And in some cases miter joints at the corners that
13 you can't see in this photograph because it is covered by
14 drywall and a wooden stool.

15 Q. Have you had another occasion previously where you
16 have documented the existence of salt and other
17 byproducts, enzymes being left behind by water migrating
18 between a vinyl to vinyl joint in windows such as these?

19 A. Yes.

20 Q. So it's a phenomenon you are familiar with?

21 A. Yes.

22 Q. And as long as you have already spent some time
23 let's just stay right here with this picture. What is in
24 that vinyl to vinyl joint that is supposed to be keeping
25 water from coming from within the frame, the window frame

1 to the wooden sill?

2 A. The manufacturers installed a sealant along that
3 joint. You can't see it because it's inside the joint
4 but there is a sealant along there that isn't effective.
5 It's not keeping water out -- it's not keeping water in;
6 water is bypassing it.

7 Q. Why not?

8 A. Well in one instance I saw water was running off of
9 the end of the insert and dropping down to the ledge
10 created by the window frame just below the insert. This
11 [indicates] is the insert, right at this point water
12 could come of the end of the sill insert and drop down to
13 this corner [indicates] and then flow along this point
14 [indicates].

15 In some of the testing we saw it do that. It would
16 start here [indicates] and then migrate longitudinally.
17 Another situation is there may be places where the
18 sealants aren't continuous allowing water to come
19 through.

20 Q. And what condition did you observe of the sealant at
21 the end of those horizontal joints?

22 A. This vertical portion here [indicates] this upturned
23 leg there is a joint right there where this piece
24 [indicates] which is hollow, these two twin pieces of
25 material that form this it looks like a relatively thick

1 product but it's two thin pieces. It's hollow. It abuts
2 this vertical section [indicates], this jam creating a
3 joint.

4 Some of those had no sealant; some had sealant that
5 had failed. Some had sealant that had partially failed
6 thus water was coming through those joints as well either
7 at the top, middle or bottom or all places.

8 Q. And what do you attribute the failure for the joints
9 that actually did get sealant when they were
10 manufactured, the vertical joints, to what do you
11 attribute the failure of that adhesion?

12 A. To movement of that joint and the inability for a
13 sealant to sufficiently bond between those two surfaces.

14 Q. What is it about the dimensions of those surfaces
15 that affect the bonding ability of the sealant in that
16 joint?

17 A. They are very thin; very thin pieces that don't give
18 it enough adhesion area or what is called bite for the
19 sealant to stick well. And the pieces are flexible.
20 They move easily so if it moves too much it is going to
21 cause the sealant to break.

22 Q. Can movement be caused simply by the operation of
23 the sash?

24 A. It could be by closing the sash, locking it. It
25 could be caused by thermal expansion and contraction

1 combined with movement and other types of movement.

2 Q. You've already told the jury that there were voids
3 in the horizontal sealant between the sill insert and the
4 sill frame. Where there were not voids, where there was
5 actually sealant what, if anything, did you observe about
6 the adhesion of that sealant?

7 A. When I removed the sill inserts it appeared to be no
8 adhesion. The sealant was there but it didn't bond or
9 bond well to the sill insert. The sill insert popped
10 right out.

11 Q. Next photo at the same residence at unit 101 in
12 building 2000.

13 [Whereupon, the witness is shown photograph]

14 Q. Sir, describe for the jury what we are seeing in
15 this photograph please.

16 A. This is a close up of a window sill at what is
17 called the mull, the mullion. It's a twin window it's
18 basically two windows that are combined into a single
19 unit at the factory.

20 And this portion right here [indicates] is the mull
21 where it is mulled together this window and the next
22 window fasten together here [indicates]. And what we are
23 seeing is signs of leakage and separation along the sill
24 to window stool or window sill intersection.

25 Q. Next photograph please.

1 [Whereupon, the witness is shown photograph]

2 Q. The same thing different angle, sir?

3 A. Yes. That's either the same photograph or a
4 different angle or a similar condition. And what you see
5 there [indicates] is a place where the sealant is missing
6 or failed and then signs of leakage in these areas
7 [indicates].

8 Q. Next photograph please.

9 [Whereupon, the witness is shown photograph]

10 Q. Now sir this photograph has that black at the
11 intersection of the sill insert and the frame correct?

12 A. Yes.

13 Q. And what is that again please?

14 A. That's debris left there by water that has come
15 through and evaporated, dirt or organic growth or both.

16 Q. Let's go to unit 106 in building 2000.

17 [Whereupon, the witness is shown photograph]

18 Q. That's the back corner of building 2000?

19 A. Yes.

20 Q. And you can see underneath that window a test cut
21 correct?

22 A. Yes.

23 Q. Were those made by you or were those on site when
24 you came?

25 A. Those had already been made by someone else upon my

1 first arrival there.
2 Q. By ABS?
3 A. By a company called ABS, yes.
4 MS. DYER: Your Honor?
5 THE COURT: Yes, ma'am? Objection?
6 MS. DYER: Leading questions.
7 THE COURT: Be careful. Don't lead.
8 MR. LUCEY: Yes, ma'am.
9 Q. [Mr. Lucey] And did you open those up sir?
10 A. I did, yes.
11 Q. Describe to the jury what you found when you opened
12 those two test cuts up in 2012?
13 A. I found that these areas displayed deteriorated
14 sheathing and framing below the window and further down
15 from that location.
16 [Whereupon, the witness is shown photograph]
17 Q. There is a close up in there. Tell the jury what
18 this is please.
19 A. This is a photograph taken just below the window
20 corner. You can see what is called the window weep.
21 It's a drain in the bottom of a window.
22 That is supposed to allow water that accumulates in
23 the window sill to drain out. Just as reference I'm
24 pointing it out. It's just a few inches away from the
25 window corner which is here [indicates]. And this

1 [indicates] is a deteriorated section of the sheathing
2 below the window that I was able to push through with my
3 finger.

4 [Whereupon, the witness is shown photograph]

5 Q. And this shows the same hole from a further
6 distance?

7 A. Yes.

8 Q. Sir, let's go to building 1900 in December of 2012.

9 [Whereupon, the witness is shown photograph]

10 Q. Is this another location under a window?

11 A. Yes. It was a location that had been previously
12 removed by ABS.

13 Q. And did you reopen that test cut?

14 A. Yes.

15 Q. Is this an in process photo?

16 A. Yes. The person assisting me was removing the
17 plywood covering going from the bottom up.

18 Q. Is this the same location?

19 [Whereupon, the witness is shown photograph]

20 A. Yes.

21 Q. Is this the same location?

22 [Whereupon, the witness is shown photograph]

23 A. Yes.

24 Q. Can you tell the jury what they are seeing in the
25 bottom right hand corner of this test cut?

1 A. That's a termite nest; an infestation of termites
2 and the debris that they leave behind when they do
3 damage.

4 [Whereupon, the witness is shown photograph]

5 Q. More of the same sir?

6 A. A close up of the same area, yes.

7 [Whereupon, the witness is shown photograph]

8 Q. Tell the jury what it is looking at in this
9 photograph. First of all is this the same test cut?

10 A. Yes. It is a close up of the structural framing
11 just below the window. What you see on the left is a
12 stud that is deteriorated and then the sill, the wooden
13 sub sill that is ---

14 Q. --- would you step up and point out to them?

15 A. This [indicates] is the stud framing, the vertical
16 stud that is deteriorated by termites. And that's
17 [indicates] the horizontal piece beneath the window.

18 Q. How close to the window is it?

19 A. I can't tell from this photograph but it might show
20 it in the next one but it's very close to the corner.

21 Q. Sir, let's go to building 2000 in December of 2012.

22 [Whereupon, the witness is shown photograph]

23 Q. Do you recognize this building?

24 A. Yes.

25 Q. Was this test cut performed by you or others?

1 A. This appears to be one we performed.

2 Q. I'm going to ask him to page through the pictures of
3 this cut and have you describe for the jury what we're
4 seeing please.

5 [Whereupon, the witness is shown photographs]

6 A. Well, the first one is just an overall view of a
7 section of stucco below the window sill had been removed.
8 This shows a close-up of the OSB sheathing that is just
9 behind the weather barrier and this meter shows the
10 amount of relative moisture that is in that wood. It's
11 in that red area almost 30 percent meaning that it was a
12 fairly high moisture content. It was wet.

13 Q. And what is immediately above this test cut sir?

14 A. Above the test cut is the window, the twin window,
15 the weep above that window and the mullion between the
16 windows.

17 [Whereupon, the photograph is shown]

18 Q. Okay. Sir, tell us what we're looking at here.
19 The same cut?

20 A. This [indicates] is the wooden horizontal piece
21 underneath the window sill and this is the vertical stud
22 below the window. And you can see that it is discolored
23 and damaged from the outside of the stud toward the
24 interior.

25 Q. Let's go to building 2100.

1 [Whereupon, the witness is shown photograph]

2 Q. Did you perform a test cut at this location, sir?

3 A. Yes.

4 Q. And what did you find under that window?

5 A. A similar condition; deteriorated sheathing and
6 studs, sand, high moisture. That's showing really the
7 same thing. That probe on the right has pins on it that
8 are about six inches long and I was able to push it
9 through the sheathing and into the installation.

10 Q. Let's go to building 2100.

11 [Whereupon, the witness is shown photograph]

12 A. This is the interior of that window area.

13 Q. The one you pointed out in unit 101?

14 A. Yes.

15 [Whereupon, the witness is shown photograph]

16 Q. What is this please?

17 A. This is an area below that same window where the
18 interior drywall was removed. It shows that the
19 sheathing is wet and damaged in the center of the
20 photograph.

21 Q. Were you water testing this unit in January of 2013?

22 A. Not at the time this drywall was removed. We did
23 after the removal.

24 [Whereupon, the witness is shown photograph]

25 Q. Is this just a close up of the prior?

1 A. A different angle going down into the stud area a
2 little bit further.

3 [Whereupon, the witness is shown photograph]

4 Q. Tell the jury what they are seeing here please.

5 A. What you're seeing here is the wet area below the
6 window stool. The window trim has been removed. This
7 [indicates] is that jamb, that's the vertical section of
8 the window frame, the horizontal part of the window
9 frame, water penetration in this [indicates] area.

10 This [indicates] is the upturned leg of the sill
11 insert, and this [indicates] is the horizontal seam, the
12 vertical joint. This [indicates] is a heat welding miter
13 and then there is a crack that extends from the beginning
14 of that miter down into the frame.

15 Q. Why are you pointing out the cracks sir?

16 A. It's something that I saw in many places in almost
17 identical fashion a crack that appeared to originate from
18 the top of the miter and then either go downward or in
19 some cases it would come this direction [indicates].

20 Q. And were you able to observe any cracks during water
21 testing sir?

22 A. We could see cracks on these vertical faces but if
23 there were any cracks below the window or on the end of
24 the window they weren't observable because of the
25 materials that were surrounding the window.

1 Q. Did you see any signs of abuse or damage from
2 dropping during transportation or anything like that in
3 conjunction with or immediately near any of the cracks
4 you saw in the corners?

5 A. There was no obvious impact damage or crushing of
6 any of these areas.

7 Q. So why are you pointing out that the cracks
8 generally originated near the top of the miter joint
9 regardless of whether they traveled down the miter joint
10 or went off to the side as this one did?

11 A. That could be a stress concentration at the
12 beginning of the joint, the miter joint which would cause
13 a small crack to propagate. And that could occur from
14 any number of reasons; during cutting of the sections
15 with a saw blade. These miters are saw cut in the
16 factory.

17 If the blade hangs up on the edge of the vinyl it
18 could cause it to begin a crack that could propagate. It
19 could also be from freezing water. I think the testimony
20 earlier today was that there were icicles noted coming
21 through the windows. This sill could also fill up with
22 ice, expand and cause it to fracture.

23 Q. And just so the jury is clear tell the jury what a
24 miter joint is in the frame, please?

25 A. These [indicates] are two different pieces of vinyl.

1 They look identical if you saw them unconnected. They
2 are cut on a 45 degree angle in the factory and then a
3 machine melts those corners and pushes them together to
4 form a heat weld.

5 [Whereupon, the witness is shown photograph]

6 Q. What is in this photo please sir?

7 A. This shows water leaking onto the sill area or below
8 the sill area from the intersection of the vertical, this
9 vertical joint [indicates] and the horizontal joint water
10 is streaming down at this point.

11 Q. What was the source of that water please?

12 A. Water that was ponded into the sill.

13 Q. Was that natural rainwater or was that testing
14 water?

15 A. That was a test.

16 [Whereupon, the witness is shown photograph]

17 Q. Is this just a close-up of the same?

18 A. Yes.

19 [Whereupon, the witness is shown photograph]

20 Q. What's being captured in this photograph on the
21 other side please?

22 A. That is the -- that's the opposite end that has this
23 crack [indicates]. I don't know if this is the same
24 window or not. I'd have to go back and look at the
25 previous one but it's either the same window and a

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1 different photograph of that crack or a different window
2 that has the same type of crack.

3 [Whereupon, the witness is shown photographs]

4 Q. Does this help you to see sir? We've put both
5 cracks you testified about side by side. Does it help
6 you see whether this is the same corner or a different
7 corner?

8 A. Can you zoom out a little bit on each one?

9 [Whereupon, Mr. Lucey complies]

10 A. It looks different. It looks like a different one.
11 If you go back to the original source of the photographs
12 and it should say where it was taken.

13 Q. Let's move on, sir. Let's go to unit 201 in
14 building 2000 in January.

15 [Whereupon, the witness is shown photograph]

16 Q. Is the second floor window in this photograph in
17 unit 201?

18 A. That's what it appears to be.

19 [Whereupon, the witness is shown photograph]

20 Q. Is this the same window?

21 A. Yes.

22 [Whereupon, the witness is shown photograph]

23 Q. And is this the same window?

24 A. Yes.

25 Q. From the inside?

1 A. Yes.

2 [Whereupon, the witness is shown photograph]

3 Q. What is that worker doing down below the window in
4 this photograph?

5 A. He's removing the wood stool and the apron below it;
6 the trim.

7 Q. For viewing?

8 A. Yes.

9 [Whereupon, the witness is shown photograph]

10 Q. What does this photo show occurring underneath that
11 second floor window in unit 201 in building 2000?

12 A. This [indicates] is the rough opening sill, a stud
13 and then damage at this point [indicates]. The corner of
14 the window would be just above that.

15 [Whereupon, the witness is shown photograph]

16 Q. What is this photograph showing us please sir?

17 A. It's showing leakage coming from these joints
18 [indicates] at the end of the window during a spray test.

19 Q. And what is collecting on the black surface below
20 the corner of the sill?

21 A. That's the puddled water.

22 Q. It's natural water or was this testing?

23 A. From a spray test, E-1105 test; the ASTM E-1105.

24 Q. What do you call the black substance up there
25 [indicates] so that I can refer to it properly?

1 A. This material [indicates] is a self adhering
2 flashing material that is in the windows.
3 Q. In this photograph is the rough opening flashed?
4 A. There is flashing there, yes.
5 [Whereupon, the witness is shown photograph]
6 Q. And this picture please; anything further?
7 A. A similar condition. You can see water that is now
8 in this joint here [indicates]. You see the flashing
9 extends to this point [indicates] and then it stops.
10 So if this water puddles up enough it can come to
11 this point [indicates] and get back underneath the
12 flashing or into the stud area.
13 Q. Sir, in this photograph there is a horizontal
14 yellowish or discolored line above the horizontal joint.
15 A. This?
16 Q. Yes, sir. What is that substance please?
17 A. That's remnants of sealant that was placed between
18 the wooden stool or wooden sill that was here and this
19 point [indicates]. In other words that sealant was over
20 the top of that joint [indicates] so that joint would not
21 be visible.
22 Q. So tell the jury what the significance of that is.
23 A. That's a place where water could have been draining
24 down into these areas below the wood sill and not wet the
25 top surface of the sill. It would get below it without

1 it being easily seen.

2 Q. How would a homeowner know they had a leak taking
3 place at their window if the condition is such that
4 you've just described it in this photograph sir?

5 A. They would not notice it until the sill started
6 deteriorating, the stool; the wooden stool.

7 Q. And did you observe whether these stools were wood
8 or MDF, medium density fiberboard?

9 A. I believe they were wood or at least some were wood.

10 Q. And by its nature compare if you would please how
11 fast you would see the manifestation of damage from the
12 bottom up in wood as opposed to in MDF.

13 A. Well the MDF is a composite material. It's
14 basically paper that has been pressed together and it
15 swells when it gets wet.

16 So it had been the MDF type material I probably
17 would have noticed some swelling. I believe these were
18 made of pine or poplar, which are more resistant to water
19 and they're painted also.

20 Q. Let's go to unit 301 in building 2000.

21 [Whereupon, the witness is shown photograph]

22 Q. It's still January. Did you test this location sir?

23 A. I believe that is unit 301 building 2100.

24 Q. 2100? I stand corrected; thank you. And did you
25 test this location, sir?

1 A. Yes.

2 Q. Is this one window on each side of the structure
3 inbetween or is it a window that has been mulled
4 together?

5 A. Well its one single unit sold as a unit. Its two
6 windows mulled together in the factory.

7 Q. And referred to as a twin?

8 A. Yes.

9 [Whereupon, the witness is shown photograph]

10 Q. What did you find under this twin when you cut a
11 view port in the drywall on the inside sir?

12 A. Signs of prior damage.

13 [Whereupon, the witness is shown photograph]

14 Q. Tell the jury if you would please what they are
15 seeing in this photograph?

16 A. This is a bottom left corner of the window sill with
17 damage to this [indicates] perimeter framing, signs of
18 moisture along the horizontal joint [indicates], and
19 another example of a crack that starts at the top of the
20 miter and extends to the bottom.

21 Q. Is that a similar location as the other cracks that
22 you showed the jury?

23 A. Yes.

24 Q. And again did you see any signs of trauma at this
25 corner as if the window had been dropped during transit?

1 A. No.

2 [Whereupon, the witness is shown photograph]

3 Q. Tell the jury what's going on in unit 301 in
4 building 2100 in this photograph with the drops on it.

5 A. That's water coming into the window at what is
6 called the meeting rail. That's the horizontal rail
7 where the latches are.

8 And during this test water is being pulled up into
9 an open joint between the bottom sash and the top sash
10 and it's percolating. It's like spitting water up
11 through that joint due to air movement through the joint.

12 Q. Is the backing being applied during this test, sir?

13 A. Yes, on the interior surface a vacuum was applied to
14 simulate a wind-driven rain.

15 Q. And then you're seeing the drops on the plastic?

16 A. Yes. The drops you see on the foreground are drops
17 of water that are on the clear vinyl plastic.

18 [Whereupon, the witness is shown photograph]

19 Q. Anything notable on this photo on the other side,
20 sir?

21 A. Just water that has accumulated at the same type of
22 location on the opposite side of the window.

23 Q. Can you point it out, turn around and point out
24 where the water is?

25 A. Here [indicates]. Drops here [indicates] and then

1 here [indicates] and on these [indicates] surfaces. And
2 you can see some drops that are not in focus but they are
3 on the plastic vinyl covering that is used to contain the
4 vacuum.

5 Q. And the source of those drops on the vinyl chamber
6 is what please?

7 A. Well air comes through here that causes the water to
8 sputter; just water droplets flying out of the corner.

9 [Whereupon, the witness is shown photograph]

10 Q. And what are we seeing here sir on the right hand
11 side of this stool on the jamb?

12 A. That's the miter that appears not to be cracked in
13 this location, horizontal joint which was covered up by
14 the window stool, and then the vertical joint and water
15 and some deterioration at the corner.

16 [Whereupon, the witness is shown photograph]

17 Q. This might be a better photograph for you to show
18 the jury the sealant bead that you're talking about above
19 the horizontal joint please?

20 A. Yes. There used to be a board here [indicates] that
21 was up to about this [indicates] point with this sealant
22 bead over the top of it.

23 This [indicates] is the horizontal joint below the
24 sealant, and then water was running through this
25 [indicates] vertical joint and tracking along that

1 sealant and dropping down here [indicates].

2 Q. And are there signs of water intrusion at the
3 horizontal line below the sealant?

4 A. Over here [indicates] there's water and there is
5 water all along the sill.

6 Q. Will the homeowner be able to see any of the water
7 coming through the horizontal joint in this window?

8 A. Not through this [indicates] joint and perhaps
9 through this [indicates] joint.

10 Q. Let's go to building 2000 unit 101 in January of
11 2013, sir.

12 [Whereupon, the witness is shown photograph]

13 Q. Do you recognize this window?

14 A. You'd have to repeat the building number. I don't
15 remember which one this is.

16 Q. 2000, unit 101.

17 A. Okay.

18 Q. And let me do this. Let me give you a copy of your
19 test chart, which is in evidence in case you want to
20 refer to it at any time.

21 [Whereupon, the witness is shown document]

22 Q. You've got the sill dam test chart and the -- can
23 you see your copy? Is unit 101 building 2000 on your
24 window test chart, sir?

25 A. Yes. Two windows in that unit; a south window and a

1 west window and this is probably the south window.

2 [Whereupon, the witness is shown photograph]

3 Q. And what did you find cutting below this window
4 please?

5 A. Again, there was damage to OSB at the right corner
6 and damaged framing.

7 Q. Immediately below, is that immediately below the
8 vertical joint?

9 A. It's just below the window corner at the right hand
10 side of the window as viewed from the interior.

11 [Whereupon, the witness is shown photograph]

12 Q. What is being shown by this photo of that window?

13 A. This shows water migrating through the horizontal
14 joint, water droplet at this point [indicates], and then
15 sealant along this [indicates] location below the
16 horizontal joint.

17 [Whereupon, the witness is shown photograph]

18 Q. And this photograph please?

19 A. This shows water at what is called the meeting rail
20 at this [indicates] location. Water droplets in here
21 [indicates], and here [indicates], and then it had
22 sputtered also over onto the clear vinyl covering.

23 [Whereupon, the witness is shown photograph]

24 Q. What is your flashlight on in this photo please?

25 A. Water droplets below the window.

1 Q. Is there any water on the black flashlight?

2 A. Yes, this is all wet in here [indicates].

3 [Whereupon, the witness is shown photograph]

4 Q. Anything different in this photo?

5 A. No, it's basically the same location.

6 Q. Let's go to unit 101 in building 2000. What did we
7 see through the window here?

8 A. That's the west window of 101. It's a twin window,
9 which most of the windows are in these buildings. Most
10 of them are twin windows as seen here.

11 [Whereupon, the witness is shown photograph]

12 Q. What did you find below that twin window in unit 101
13 building 2000 please?

14 A. There was dampness or wet areas on the right hand
15 side. The previous photograph there was a wet area
16 towards the middle.

17 [Whereupon, the witness is shown photograph]

18 Q. That's the opposite side. That's the left end with
19 wet sheeting below it.

20 [Whereupon, the witness is shown photograph]

21 Q. What are we seeing in this photograph please?

22 A. This [indicates] is the right corner of the window,
23 this [indicates] is the horizontal joint, the vertical
24 joint [indicates] you can see it is opened. If you look
25 closely you can see that the miter here [indicates] is

1 cracked. It's cracked in this point [indicates] and
2 extends down to here [indicates] and then it comes into
3 the material away from the miter at this point
4 [indicates].

5 Q. And what is the material between the vinyl when it
6 gets heat, welded, or mitered?

7 A. Melted vinyl.

8 [Whereupon, the witness is shown photograph]

9 Q. And at the other end of the window sill please?

10 A. It's a similar condition. I don't see a crack here.
11 I do see an opening in the vertical joint.

12 [Whereupon, the witness is shown photograph]

13 Q. This would be now we're at the right hand side of
14 the left window?

15 A. Yes. This is the mullion between the two windows
16 and this [indicates] is the joint between the jamb and
17 the sill and the cracked miter.

18 Q. Is that the same or different cracked miter as we
19 just saw?

20 A. You might have to go back.

21 [Whereupon, the witness is shown photographs]

22 A. That's the same one.

23 Q. Let's go to unit 2100 unit 204 from January.

24 [Whereupon, the witness is shown photograph]

25 Q. Tell the jury first if you would what the apparatus

1 is that is in the foreground of the picture slightly to
2 the left?

3 A. The foreground shows a wood frame that we had built,
4 we built it or had it built and it is covered with a
5 clear vinyl. And that is mounted on the wall around the
6 window and sealed to the drywall.

7 And then we connect into this area a vacuum like a
8 vacuum cleaner but it's a high tech vacuum cleaner with
9 gauges on it that tell us what the pressure is. That way
10 we can pull a vacuum on the window which simulates a
11 wind-driven rain from the outside.

12 [Whereupon, the witness is shown photograph]

13 Q. What is being shown in this photograph sir?

14 A. This shows the results after a test where water
15 stains occurring in this [indicates] corner and it
16 migrated over and underneath the stool and drained down
17 the surface of the drywall.

18 Q. Is this fresh test water or is this prior stain,
19 sir?

20 A. That was from our test.

21 Q. And how did the water get to the homeowners drywall
22 during your test?

23 A. It flowed beneath the wooden sill. We didn't remove
24 the wooden sill in this test. We left it in place and
25 water flowed beneath it and then down the surface of the

1 drywall.

2 Q. And the damage we see to the right on the jamb where
3 the drywall has been removed is that something to do with
4 your test or was that preexisting?

5 A. It was preexisting staining and damage but during
6 our test it became wet or wetter.

7 Q. Let's go to unit 301 in building 2100 please. Is
8 that unit on your test list?

9 A. Yes.

10 [Whereupon, the witness is shown photograph]

11 Q. And what are we seeing regarding the stool in this
12 photo in 301 please?

13 A. It's moisture staining at the left corner of the
14 right side window. This block [indicates] is the mull
15 between the two windows. The window on the right and the
16 window on the left this is between the two and this
17 [indicates] is water staining along the sill.

18 [Whereupon, the witness is shown photograph]

19 Q. Tell us what we are seeing here please?

20 A. This is the window to the left of the mull and
21 another example of cracking that begins at the top of the
22 miter and this case it migrated to the right.

23 Q. And this is a different crack from the ones we've
24 previously shown the jury?

25 A. Yes.

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1 [Whereupon, the witness is shown photograph]
2 Q. What are we seeing in this photograph please sir?
3 A. That's puddled water from the spray test.
4 Q. On the sill?
5 A. Yes.
6 Q. Is the test in process or is it completed?
7 A. The test is in process but with no pressure applied.
8 Q. And how do you know there is no pressure being
9 applied there?
10 A. You would see it with the frame around the
11 perimeter.
12 Q. There is no chamber?
13 A. No.
14 [Whereupon, the witness is shown photograph]
15 Q. And what is this please sir?
16 A. This is a photograph taken after a test.
17 Q. And what is on the sill please?
18 A. It's flooded with water.
19 Q. Let's go to building 1900 unit 201 please.
20 [Whereupon, the witness is shown photograph]
21 Q. Did you water test this unit, sir?
22 A. Yes.
23 Q. And what did you find when you cut out the drywall
24 below this twin window?
25 A. This area was badly deteriorated and had signs of

1 termite damage.

2 [Whereupon, the witness is shown photograph]

3 Q. What's in this close up please, sir?

4 A. That's deteriorated stud framing and OSB sheathing.

5 [Whereupon, the witness is shown photograph]

6 Q. Let's skip forward to -- tell us what is in this
7 photograph, sir?

8 A. That's leakage at the right hand corner of a left
9 window of a twin window system.

10 Q. Is this before or after testing?

11 A. This was during the sill dam test.

12 Q. Explain to the jury for a moment how you performed
13 the sill dam test where we have the results here.

14 A. On the exterior you may recall I said there were two
15 little drains; they are called weeps. They are about an
16 inch long and 3/16ths of an inch high. And their intent
17 is for water that collects here [indicates] for it to go
18 down in this hole [indicates] on each side and then drain
19 out to the exterior through the weeps.

20 But in the process of the water getting there well
21 imagine the window is closed with the sash, the bottom
22 sash down into this pocket [indicates]. The bottom sash
23 is occupying most of the volume of that pocket of the
24 window that is inside that pocket. Water can get into
25 that pocket still because there is two joints outside.

1 The joint between the sash and the frame, the sash would
2 be in here [indicates]. There is a joint between this
3 part [indicates] and the sash. And then the sash itself
4 has a vinyl part that snaps in; it's not sealed so water
5 can get into the sash itself and then accumulate into the
6 sash pocket. And in doing so water flows along this
7 [indicates] surface and then down into this hole
8 [indicates] at the end and out the weeps.

9 But in doing that it can get to these points
10 [indicates] as well and leak out here and that's what the
11 test simulates is that water in the test. It used to be
12 the standard said to fill the sill up all the way to the
13 top but that was revised in more recent versions of AAMA
14 511 to make sure you cover all horizontal surfaces where
15 water collects.

16 So we filled it up just to above this top horizontal
17 surface [indicates]. It was less than a quarter inch of
18 water here [indicates]. From the bottom to the top of
19 the water was about one point two inches.

20 Q. The bottom being the bottom of what please?

21 A. The bottom of the sill where -- beneath this
22 [indicates] surface there is a hollow area down inside
23 here [indicates]. So the top of the water was about up
24 to this level about one point two inches above the bottom
25 which is down here [indicates] on the inside and just

1 covered this horizontal surface by less than a quarter of
2 an inch.

3 Q. Okay. And looking at it from a different angle if
4 you go on the inside of the chart or the -- for a moment
5 tell the jury how much higher than the horizontal sill
6 insert joint the water was filled when you eliminated the
7 reservoir?

8 A. About to this [indicates] point, about a quarter
9 inch up from that joint [indicates] on the inside.

10 Q. And if the water is that level are you actually
11 testing the top two thirds of the vertical joints?

12 A. No, just testing the bottom portion of this vertical
13 joint right here [indicates].

14 Q. And sir you brought in a new concept in an answer
15 several sentences ago so let me ask you to go ahead and
16 explain to the jury if you would please the second source
17 of water that is depositing water into the bottom of this
18 frame. You told us that the first source is between the
19 sash and the frame's exterior.

20 A. Yes.

21 Q. And then you identified the second source being a
22 joint in the sash.

23 A. Right.

24 Q. Explain first how the sash construction works and
25 why water is getting through the sash into that cavity?

1 A. Okay. The sash is the part of the window that goes
2 up and down, the bottom sash. And it has a vinyl frame
3 around the glass.

4 When it is constructed the frame has no glass in it
5 it's just a frame. And they put the glass in from the
6 outside towards the inside, seal around the inside part
7 of the perimeter toward the inside, push the glass into
8 that frame and then clip with glazing stops on the
9 outside, it's a piece of vinyl that snaps in to secure
10 that glass against the sealant from the outside.

11 Well that piece of plastic around the perimeter
12 isn't sealed; it's just snapped in. Water can get in
13 between that piece of plastic in the glass along its
14 length and at corners and collect in the bottom of the
15 frame that comprises the sash.

16 The manufacturer recognizes that and puts holes in
17 the bottom of the sash so that the water that collects in
18 there can drain out of the window sash. And where it
19 drains is about right here [indicates]. So water from
20 the sash would drain into this [indicates] horizontal
21 surface in this location [indicates] on both ends.

22 In addition there is a joint between the sash and
23 this [indicates] vertical piece and it's fairly wide,
24 about an eighth of an inch wide and water can accumulate
25 in it and drain down to this same space. So water comes

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1 into this space from at least two points and it has to
2 drain along this surface to this [indicates] point before
3 it drops down to the weeps.

4 Q. Thank you, sir. Let's jump forward please to unit
5 101 in building 2100.

6 [Whereupon, the witness is shown photograph]

7 Q. That is the window from the exterior?

8 A. Yes.

9 [Whereupon, the witness is shown photograph]

10 Q. Is this unit on your test chart?

11 [Whereupon, the witness reviews document]

12 A. 2100, 101?

13 Q. Yes, sir.

14 A. Yes, I see it.

15 Q. And is this the first set of pictures that we've
16 looked at where you are testing a window in a brick
17 façade?

18 A. I think so.

19 Q. And tell the jury what occurred during testing of
20 this picture as shown on -- excuse me, this window as
21 shown on the picture on screen please.

22 A. Water penetration occurred through similar locations
23 as in other tests.

24 [Whereupon, the witness is shown photograph]

25 Q. What are we seeing in this photograph please?

1 A. Just migration of the water along the sill and to
2 the right.

3 Q. Is there a chamber in this photograph?

4 A. I can't tell from that photograph. Can you back up
5 one maybe I could tell.

6 [Whereupon, the witness is shown photograph]

7 Q. What are we seeing in this photograph please, sir?

8 A. Water penetration along the bottom of the sill and a
9 gap in the horizontal seam.

10 Q. And explain that. You referenced that before
11 earlier when you were telling them about the sealant in
12 that seam underneath the sill riser. If you would please
13 point out to them what is going on in that vinyl joint in
14 this window?

15 A. It appears that the joint has separated and it
16 separated before the sealant was applied to the stool.
17 The stool is put in, there is sealant applied around the
18 perimeter of the stool basically for cosmetic purposes
19 before it is painted or right after it's painted. And
20 that sealant oozed into that joint.

21 [Whereupon, the witness is shown photograph]

22 Q. Anything different here, sir -- no, let's move on.
23 Let's go to building 2200.

24 [Whereupon, the witness is shown photograph]

25 Q. Sir, use this photograph if you would please to

1 explain to the jury the exterior apparatus you were using
2 in the ASTM E-1105 testing?

3 A. This is what is called a spray rack. It has nozzles
4 at each one of these verticals. And depending on the
5 spray rack those nozzles are anywhere from 18 to 20
6 inches on center in each direction.

7 And it is calibrated to deliver a certain quantity
8 of water. And that quantity is five gallons per square
9 foot per hour.

10 Q. And is the pressure regulated also?

11 A. There is a pressure gauge on the rack that is used
12 to calibrate the rack. For example in the calibration
13 process you monitor the pressure and the flow rate of
14 water coming out of the rack.

15 If it's not enough we increase the flow rate which
16 increases the pressure until we achieve what is required
17 as the minimum. The standard says a minimum of five
18 gallons per square foot per hour. Depending on the rack
19 the calibration is anywhere from around seven psi until
20 around 12 psi.

21 [Whereupon, the witness is shown photograph]

22 Q. What did you find on the inside of this window, sir?

23 A. This is another case where the crack emanated from
24 the top of the miter downward. Water was coming out of
25 this joint in this [indicates] location. But water is

1 coming out of this joint which indicated to me there may
2 have been a crack in the miter in board that we couldn't
3 see.

4 [Whereupon, the witness is shown photograph]

5 Q. And again in this photo, sir did you see any signs
6 of impact damage anywhere near the miter joint that might
7 have indicated it had been dropped during transportation
8 or anything?

9 A. No.

10 Q. Let's go to the March work at building 1900 unit
11 204.

12 [Whereupon, the witness is shown photograph]

13 Q. What roof are we seeing underneath this window on
14 the screen please, sir?

15 A. That's the roof for the garage.

16 Q. So we are on the back of the residences?

17 A. Yes.

18 [Whereupon, the witness is shown photograph]

19 Q. What is the jury seeing in this photograph please?

20 A. Staining and paint blistering due to water leakage
21 along those joints.

22 Q. Let's go to the -- unit 206 of building 2000.

23 [Whereupon, the witness is shown photograph]

24 Q. What are we seeing on these blinds, these window
25 blinds, please?

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1 A. Water stains that came from the head of the window
2 dripping down.

3 [Whereupon, the witness is shown photograph]

4 Q. What are we seeing here please, sir?

5 A. Standing at the baseboard just below the corner of
6 the window.

7 [Whereupon, the witness is shown photograph]

8 A. That's a close up of the same area. You can see
9 stains on the baseboard as well.

10 Q. Does the stain emanate from between the apron, the
11 wood apron and the drywall or does it start further up?

12 A. It appears it is coming from this location here and
13 plumbing down and accumulating here [indicates].

14 [Whereupon, the witness is shown photograph]

15 Q. And this photograph please?

16 A. More stains along the window sill, along the window
17 parts and then some stains on the stool or the wooden
18 sill.

19 Q. How many unit residences did you see with the
20 brownish stain that we are seeing in the Val [phonetic]
21 unit in building 2000?

22 A. At least two locations.

23 Q. And what did you perceive as the cause of the
24 different color on the stain?

25 A. Water that came from above and meandered down

1 through the wall and dripped out of the window head.

2 Q. Did you ever see brown staining in a third story
3 residence to the best of your knowledge?

4 A. No.

5 Q. And what does that indicate to you?

6 A. There is no windows above the third story.

7 Q. What's above the third story?

8 A. Wall.

9 Q. So do you have an opinion as to whether or not any
10 water at One Belle Hall getting into the structure
11 through a window on one floor is travelling down through
12 the wall to the top of the window on the next floor?

13 A. That would definitely happen if water comes through
14 the window as we witnessed it, it will accumulate in
15 these stucco walls. There is drying mechanism, there is
16 air space for the water to dry out so it just accumulates
17 and builds up and drains down through.

18 Q. Let's go to building 1900 unit 301.

19 [Whereupon, the witness is shown photograph]

20 Q. What are we seeing in this photograph please, sir?

21 A. That's an area of drywall that had been patched up
22 by someone. I don't know who did that.

23 Q. Did you end up cutting it open?

24 A. Did you say this was 1900, 301?

25 Q. Yes, sir.

1 A. Yes, we did.

2 [Whereupon, the witness is shown photograph]

3 Q. Sir, what are we seeing in the left hand corner of
4 this window?

5 A. A lot of staining, some dead termites.

6 Q. What is the black line between the wood and the
7 window product can you tell?

8 A. That's where the wood has warped and pulled away
9 from the window.

10 Q. What caused those wood stools to do that?

11 A. They get very wet.

12 Q. And sir, explain to the jury the difference between
13 water that gets into a structure through a window,
14 through the window product itself as opposed to water
15 getting in around a window.

16 A. There are two places where water can get in a wall.
17 You've seen many examples of water penetration through
18 the window. The perimeter of the window and the joints
19 above and below the windows could also have cracks that
20 would allow water to get into that plane.

21 The theory is there is a weather proof barrier at
22 that point or flashing that was intended to keep that
23 water from getting through to the studs.

24 Q. And sir is there a mechanism by which water can
25 easily get around a window instead of through it and

1 still end up on the wood stool?

2 A. Not easily. Water that ends up on top of these
3 stools comes through the window itself. The joint
4 outboard the window has two barriers. It has a perimeter
5 fin around the window, a vinyl fin around the window that
6 is used to secure a window into the opening.

7 And then over the top of that it has membrane
8 flashing. So it doesn't have a direct path then it would
9 have to go horizontally through the wall, gravity would
10 tend to take it straight down.

11 THE COURT: We have a juror that needs to a break
12 so we're going to take a break. Hold that thought.
13 We'll take 15; we'll take our afternoon break. Do not
14 discuss this matter or allow anyone to discuss it with
15 you and please leave your notebooks in your seat. We'll
16 take 15.

17 [Whereupon, the jury exits at 3:46 p.m.]

18 THE COURT: We'll take 15. Be at ease everyone.

19 [Whereupon, court is in recess from 3:47 until 4:05
20 p.m.]

21 THE COURT: Thank you. Plaintiff ready?

22 MR. LUCEY: Yes, ma'am.

23 THE COURT: Yes, yes?

24 [Whereupon, the jury enters at 4:06 p.m.]

25 THE COURT: Thank you so much. Ladies and

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1 gentlemen at this time we will continue with the
2 plaintiff's case and the direct examination of Doctor
3 Whitlock. Your witness.

4 DIRECT EXAMINATION (resumes)

5 BY MR. LUCEY:

6 Q. Doctor Whitlock did you take several videos of the
7 window testing, short videos during the testing?

8 A. Yes, we did.

9 Q. Let me show you what has been marked for
10 identification purposes as plaintiff's exhibit 703
11 remarked as joint exhibit 125.

12 [Whereupon, the witness is shown exhibit]

13 Q. Is this one location?

14 A. Yes.

15 MR. LUCEY: Would you play the video please?

16 [Whereupon, the video plays]

17 Q. [Mr. Lucey] What is transpiring in this video?

18 A. This is showing water that is coming out of the left
19 hand window corner and flowing over the surface and down
20 the face of the drywall.

21 Q. Let's play it one more time.

22 [Whereupon, the video plays]

23 A. You can see streams here [indicates] and a puddle
24 here [indicates] and then down the face.

25 Q. And why type of testing was occurring now; a spray

1 rack or sill dam?

2 A. At this time I believe it was just the sill dam
3 test. No, it was the spray rack test I believe.

4 Q. With no pressure?

5 A. That was with no pressure, the spray rack test.

6 MR. LUCEY: The second video, same exhibit please.

7 [Whereupon, the video plays]

8 Q. [Mr. Lucey] What is the jury seeing in this video?

9 A. The dripping of water down this surface [indicates].

10 Q. During testing?

11 A. Yes.

12 Q. And it's dripping down what please?

13 A. Dripping down the wall and collecting on the
14 baseboard and drywall down toward the bottom.

15 Q. And where to next?

16 A. Onto the floor.

17 [Whereupon, the video plays]

18 Q. Tell the jury what we're seeing please?

19 A. You can see water streaming from this [indicates]

20 horizontal joint collecting on the sill. This

21 [indicates] is a video taken during the pressure test.

22 There is a frame right here [indicates] and you can see

23 water dripping from that point fairly rapidly and from

24 the right hand side.

25 Q. And circle where the water is dripping rapidly in

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1 this photograph please.

2 A. Here [indicates].

3 Q. And that's immediately under the what; the vertical
4 joint or horizontal?

5 A. Right at the corner of the vertical and horizontal.
6 It appears to be coming out of the horizontal portion as
7 well as over here [indicates] to the right water coming
8 out that dark point [indicates].

9 [Whereupon, video plays]

10 MR. LUCEY: Plaintiffs move to enter 703,
11 previously 703 and now joint 125 into evidence Your
12 Honor.

13 THE COURT: Okay. These exhibits are in evidence
14 already by stipulation correct?

15 MR. LUCEY: The videos were for I.D. only.

16 THE COURT: Very well.

17 MR. LUCEY: All the photos were in evidence but the
18 videos were I.D. and I'm moving them into evidence. They
19 have been authenticated by the witness.

20 MS. DYER: I think we've already stipulated the
21 videos would be.

22 MR. LUCEY: Thank you.

23 THE COURT: Thank you. In other words the videos
24 have been stipulated also?

25 MS. DYER: Yes, Your Honor.

1 THE COURT: Thank you very much.

2 [Whereupon, joint exhibit number 125 is entered into
3 evidence by the court]

4 [Whereupon, joint exhibit number 40 is shown]

5 Q. [Mr. Lucey] This is the chart we were referring to
6 earlier. We're done looking at photographs. Can you
7 summarize what this chart reflects for the jury? They
8 heard it from me in opening but they need to hear it from
9 you, sir.

10 A. What this shows are the results of tests that we
11 did. Across the top it gives the window number, our test
12 number, the building number, then the unit within that
13 building and the elevation or the direction that the
14 window faces.

15 The next column is single or twin; it's the type of
16 window that was tested whether it was two windows
17 together, which are twins or a single window, then the
18 materials surrounding the window and then a series of
19 moisture readings that we took during the test, a
20 description of the condition of the framing and the
21 sheathing.

22 And then over on the far right it gives the results
23 at zero pressure and then at what we call one third or 33
24 percent pressure and at two thirds pressure and then 100
25 percent pressure which was not performed I don't believe

1 in any of these cases.

2 Q. And why are very few of the specimens tested at one
3 third pressure or two thirds pressure?

4 A. Well they all failed at zero pressure; just the
5 spray of water caused leakage. And then just to see if
6 we got additional types of leakage we did a few tests at
7 elevated pressure that confirmed that yes it leaked more
8 rapidly and at other locations with pressure.

9 Q. And is the location of the leak that occurred during
10 testing coded onto your chart?

11 A. Yes.

12 Q. And what was the predominant location for leaks?

13 A. Horizontal and vertical joints at the sill insert.

14 Q. And what were the other locations?

15 A. Through cracks and through the miters that were
16 cracked.

17 Q. And tell the jury; please what is on the far right
18 hand column of this chart?

19 A. That far right hand column says 100 percent
20 pressure. That would be where we test it to what the
21 window was supposed to be rated to in a laboratory
22 situation but we didn't take the pressure that high.

23 Q. Joint exhibit 41 please will be on the screen sir.

24 [Whereupon, the witness is shown photograph]

25 Q. Tell the jury what this chart is?

1 A. This is a chart of windows, the same windows that
2 were tested in the first nine instances on the previous
3 chart where we followed the spray test with what is
4 called the sill dam test by putting water into the sill
5 just above that first horizontal surface and noted what
6 happened. And in each case water came through the sill.

7 Q. And sir, are you familiar with the project
8 specifications on this job?

9 A. Yes.

10 Q. Tell the jury what project specifications are
11 please.

12 A. It's a set of documents prepared by the architect
13 and or engineers involved in the construction that
14 specify what types of materials are to be used and what
15 their characteristics should be.

16 Q. And you've reviewed them?

17 A. Yes, I have.

18 Q. Do they specify what materials the windows are
19 supposed to be?

20 A. It specified the windows, yes.

21 Q. And I'm showing you what has been marked for
22 purposes of identification as plaintiff's exhibit 28 and
23 ask you to identify this excerpt.

24 [Whereupon, the witness is shown exhibit]

25 A. This is a portion of a project manual which contains

1 the specifications. This particular specification is
2 number zero 8565 vinyl windows.

3 Q. And there is -- which floors are those specified
4 for?

5 A. The vinyl windows are specified for each -- each
6 window in the building is a vinyl window.

7 Q. Okay. And the number you just gave me was that a
8 section number?

9 A. 08565 is the section number for vinyl windows.

10 Q. And what model of windows did the project manual
11 specify for this project?

12 A. It indicated that the vinyl fin frame single hung
13 windows from Energy Saving Products of Florida 2041
14 series vinyl impact window.

15 Q. Repeat that four digit number again, please?

16 A. 2041 vinyl impact window.

17 Q. And sir, were the windows supplied by Builders First
18 Source to this project that model?

19 A. No, they were model 2031.

20 Q. And sir, are you familiar with the submittal that
21 occurred on this project?

22 A. Yes.

23 Q. Tell the jury what a submittal is please?

24 A. A submittal is information that the builder gathers
25 about the products, provides it to the architect and the

1 architects review so that they can get reasonable
2 assurance that what is being purchased and delivered to
3 the site meets the specifications.

4 Q. And was there any information in this submittal
5 regarding the ESP windows that would have indicated
6 whether the supplier intended to supply 2041 in the specs
7 or the 2031 that was actually delivered?

8 A. My recollection of the submittal is it was silent on
9 what series.

10 Q. And the submittal did it have attached to it a test
11 report that we've marked as plaintiff's exhibit 82.3 now
12 joint exhibit number 12.

13 [Whereupon, the witness is shown exhibit]

14 A. Yes.

15 Q. And tell the jury what that test report is please?

16 A. This is a test report by or on the letterhead of an
17 organization or a company called National Certified
18 Testing Laboratories and it contains a summary of results
19 from tests that were performed at a laboratory or some
20 facility.

21 Q. And what does that test report -- what models does
22 it purport to report on?

23 A. Well it says test specimen Energy Saving Products
24 series 2031 slash 2041.

25 Q. And if the architect had read that report would he

1 know which model was intended for this project?

2 A. His specifications said 2041 but there is nothing in
3 this test report that indicates which of those two were
4 tested.

5 Q. Which of the two models were tested is that correct?

6 A. That's correct.

7 Q. And what is the difference between the models 2031
8 and 2041 please sir?

9 A. 2041 is a flanged window --

10 THE COURT REPORTER: --- what type of window?

11 A. A flanged F-L-A-N-G-E-D. It has a vinyl flange
12 around the outboard perimeter of the window. The 2031 is
13 a fin window which has a similar piece of vinyl that is
14 inboard of the outside face and goes around the perimeter
15 of the window for attachment purposes.

16 Q. [Mr. Lucey] And let's back up for a second. Let's
17 talk about the building code that was in effect in Mount
18 Pleasant at the time these buildings were constructed.
19 Can you tell us what that was please?

20 A. The International Building Code year 2003.

21 Q. Sometimes referred to as IBC 2003?

22 A. Yes.

23 Q. And what did the building code require regarding
24 windows to make windows legal for use in the construction
25 of the structure here in Mount Pleasant?

1 A. It required the windows be tested by a certified
2 testing laboratory or witnessed by a certified testing
3 laboratory to test it in accordance with certain
4 standards particularly A-A-M-A 101 is the standing
5 standard for windows.

6 Q. And tell the jury, please what A-A-M-A, AAMA 101
7 testing requires for a product to be certified and then
8 utilized in this jurisdiction.

9 A. It requires the window to be subjected to a series
10 of different types of tests and that the window have a
11 certain size during that test in order for it to be
12 classified as a certain class of window.

13 Once that window is established to meet that
14 classification at the manufacturer's option they could
15 have smaller windows or even the same size window
16 retested to achieve higher performance values.

17 Q. And did the architect in the specifications also set
18 forth performance values for the windows on this project?

19 A. Yes.

20 Q. And what did he set forth for the design pressure or
21 D-P performance value?

22 A. It required a performance grade of 50 which means
23 able to withstand safely during these tests 50 pounds per
24 square foot.

25 Q. And was there an additional performance requirement

1 related to hurricanes?

2 A. Well there is impact resistance that is required to
3 be tested.

4 Q. So those two things were required by the architect?

5 A. Yes and some other associated tests that come along
6 with the normal testing that is specified in the AAMA
7 standard.

8 Q. And you've already told us that the building code
9 required the AAMA 101 certification just like the
10 architect. Did the building code also have a requirement
11 for the impact resistance?

12 A. I believe so, yes.

13 Q. Now does joint exhibit 12, the 2003 test report,
14 bear out or substantiate the required performance for
15 these windows under either the architect's specifications
16 or under the building code?

17 A. Are you referring to the test report 82.3?

18 Q. Yes, sir.

19 A. No. That test report has nothing to do with the
20 windows that were sold to this project.

21 Q. Okay. Let's talk first about the twin windows; the
22 ones that are molded together. You told the jury earlier
23 today that they are factory molded to become one window?

24 A. Yes.

25 Q. If you have a factory mold window what are you

1 required to do for third party certification?

2 A. It is required to be tested.

3 Q. Is there any evidence in the ESP test report that
4 twins were ever tested or certified?

5 A. No.

6 Q. And what percentage of the windows out at One Belle
7 Hall are the twins?

8 A. I haven't calculated percentages but most of them
9 are by a great number; probably 75 percent or more.

10 Q. And if they have no test report or no certification
11 are they permissible for use in constructing buildings
12 such as One Belle Hall in Mount Pleasant?

13 A. No, in fact they were labeled with an inappropriate
14 label. The label doesn't match the window; the
15 certification label.

16 Q. Let me come back to the label. The last question I
17 just asked you about was Mount Pleasant. Could the
18 windows even be used in the state of South Carolina?

19 A. No.

20 Q. Why?

21 A. They weren't certified as required by the code.

22 Q. The twins?

23 A. That's correct.

24 Q. And with regards to label tell the jury what label
25 that you are referring to.

1 A. There is a label in the heads of most windows that
2 is supposed to be affixed to every window and it provides
3 the performance grade that window was tested to.

4 And the label that was applied to the head of these
5 windows refers to the test report that we were discussing
6 82.3, exhibit 82.3.

7 Q. And why is that inappropriate?

8 A. Because the test report from which that label was
9 developed was for a window that wasn't a twin window nor
10 was it the same size as this window; it was smaller. And
11 it's inappropriate to label a larger window based on a
12 test from a smaller window.

13 Q. Well assume for the sake of discussion that there
14 had been a valid report on either of the single windows
15 before they were mulled together into a single larger
16 window.

17 Explain to the jury please if you can the authority
18 or the reason why the AAMA 101 or the building code
19 requires the mulled windows to have a different test?

20 A. It states that right in the AAMA standard that the
21 mulled tradition has to be tested.

22 Q. And as a practical matter as an engineering matter
23 explain why to the jury it would make a difference if
24 you're just putting together two of the windows.

25 A. A much larger window receives more wind pressure

1 because it's two windows and that load is transferred to
2 the mull between the windows. And in some cases those
3 mulls are required to be reinforced quite heavily to
4 support the wind pressures. I see no indication what the
5 mulling requirements were for these windows in any
6 document.

7 Q. And then focusing for a moment on the minority of
8 the windows there that are the single windows by
9 themselves what is it about the sealants utilized in the
10 test report you are looking at, joint exhibit 12, that
11 makes the certification problematic at all?

12 A. Well their goal was to achieve what they called
13 structural tests performance which is wind resistance,
14 air resistance and water resistance. In addition to that
15 they seek to achieve impact missile resistance; the
16 missile test.

17 So for the first test, the structural test, wind air
18 and water the windows were glazed with what they referred
19 to as GE 2800 structural silicone. But, for the impact
20 test we used different specimens and they glazed them
21 with Sika 552 adhesive back betting a different material.

22 But with that different material for the impact test
23 they didn't test it to see if it was water resistant or
24 structurally resistant other than the impact test. To
25 combine two tests to come up with one certification which

1 is not appropriate.

2 Q. Is there anything else about that test that is in
3 front of you, joint exhibit 12 that makes it
4 inappropriate for use to certify these windows for use in
5 South Carolina where the IBC was in effect, sir?

6 A. Well, there were a number of other issues with this
7 test that compares it to the windows that are there. For
8 example it says in the glazing section all sashes were
9 interior glazed.

10 That means that the glass went in from the interior
11 toward the outside, sealed at the outside and then
12 retained with the glazing bead on the inside. The fact
13 is the top sashes were interior glazed but the bottom
14 sashes were exterior glazed. They had the sealant on the
15 interior side and the glazing bead, which is water
16 permeable, on the exterior side.

17 So the windows that were supplied don't match the
18 test report in that respect. Further, it says that the
19 window size and the window classification says H which
20 means hung which is our hung windows; they have a bottom
21 sash that goes up and down, dash C-50 which means
22 commercial 50 and then 54 by 78.

23 That means the size of the window was 54 inches wide
24 and 78 inches tall. But the certification that was
25 provided was for LC-50 not C-50 so there is a discrepancy

1 in what they tested and what they certified versus what
2 the end labeling and end certification became. I believe
3 they thought they were testing a C-50 window because if
4 you look at the pressures they used for a water test it
5 would appear they were trying to use the commercial 50
6 designation.

7 Also the size, 54 by 78 there is a discrepancy here
8 as well. If you read in the text it gives the sizes of
9 the sashes and if you add those numbers up they don't
10 equal 54 wide and 78 tall; they are off by about nine
11 inches. So there is a discrepancy in the description of
12 the specimen and its size so it's really not clear what
13 they tested.

14 Q. And does it indicate whether the fin 2031 was tested
15 as opposed to the flange 2041?

16 A. It doesn't indicate that.

17 Q. And tell the jury if you would please why a fin
18 product, a fin window product would more likely than not
19 perform differently than a flange window product. And
20 start please by telling them what the differences.

21 A. Okay. Well, the flange product has the flange on
22 the outboard surface of the window jamb around the
23 outside perimeter whereas the fin has that piece of vinyl
24 around the perimeter of the window towards the center of
25 the jamb and sill head. And just from a structural

1 standpoint putting that material at the extremities of
2 the jamb or window section improves its structural
3 performance by being outboard not toward the center of
4 the section.

5 Q. And sir several minutes ago when you were explaining
6 to the jury the deviations between the test report and
7 the windows that are actually at One Belle Hall you
8 mentioned about the bottom sashes and the test report
9 being interior glazed; in fact all the sashes were
10 interior glazed.

11 But the bottom sashes at One Belle Hall being
12 exterior glazed does that relate back in any way to the
13 testimony you gave to the jury before the break about how
14 water and what water is flowing down into the bottom of a
15 window frame through the bottom sash?

16 A. Yes.

17 Q. Tell them.

18 A. An interior glazed type of unit -- interior glazed
19 type of sash whether it's upper or lower is more water
20 resistant because the sealant is on the outside where the
21 rain would hit it whereas as built the bottom sashes were
22 exterior glazed which means the sealant on the inside of
23 the glass and on the outside is a snapped in piece of
24 plastic, four of them, in the sides and top that secures
25 the glass in place until the sealant sets. And those

1 pieces of plastic aren't waterproof. Water will get into
2 that sash and then drain out the bottom of the sash
3 adding more water to the equation.

4 Q. And sir you mentioned a discrepancy in the sizing of
5 the window testing versus the sizing of the windows at
6 One Belle Hall. I'm speaking of the singles now; not the
7 twins. Tell the jury what a gateway or gateway size
8 specimen is under AAMA 101.

9 A. Well, to achieve what is called a commercial
10 classification for a type of window the AAMA standard
11 says that window has to be a certain size.

12 In this case it would have to be 54 inches wide by
13 90 inches tall and that's not what they tested. So this
14 test report although they apparently wanted to classify
15 it as a C-50 did not provide the size window required.

16 Q. And are these single hung windows, excuse me the
17 single windows at One Belle Hall taller or shorter than
18 the ones in that test report?

19 A. They are shorter than the ones in this test report.
20 Well, shorter than what the top line says 54 by 78 but if
21 you add up the dimensions that are in the description
22 they are probably about the same size.

23 Q. Sir, do you have an opinion to a reasonable degree
24 of certainty in your field of expertise as to whether the
25 twins at One Belle Hall are permissible for use under the

1 building code in effect in this state and in this town at
2 the time that they were installed in these buildings?

3 A. They were not.

4 Q. Do you have an opinion to a reasonable degree of
5 certainty in your field of expertise as to whether or not
6 the single windows at the time they were installed were
7 permitted for use in a building such as One Belle Hall in
8 this town and this state?

9 A. They were not.

10 Q. Sir, the issue of protective windows came up earlier
11 today windows that are in or under balconies that are
12 seven feet or so deep do those windows leak?

13 A. Yes, they will leak.

14 Q. Will they leak as often as the other ones?

15 A. No.

16 Q. Under what circumstances will those windows leak?

17 A. In a wind driven rain that is strong enough to push
18 water into the balcony area and cause the windows to be
19 wet.

20 Q. Sir, have you made a recommendation for the
21 resolution of the window leak and damage issues at One
22 Belle Hall?

23 A. Yes, I have.

24 Q. And what is that recommendation?

25 A. To remove the finishes around the windows, remove

1 the windows, fix the damaged materials, put in new
2 windows that meet current code, and then reconstruct the
3 perimeters; interior and exterior.
4 Q. If those windows are removed for any reason during
5 repair would they be permissible for reuse under the
6 building code in effect today in Charleston County, South
7 Carolina?
8 A. No.
9 Q. Why not?
10 A. Windows that are taken out and then put back in are
11 required to meet current code. Those windows don't meet
12 code.
13 Q. Have they ever?
14 A. No.
15 Q. And sir, why are you recommending replacement of the
16 windows in lieu of for instance putting some more
17 sealants around there?
18 A. I don't think it would be effective. That was the
19 way they were manufactured, the sealants, at certain
20 places that didn't work. There are other places that
21 leaked under very low pressure. One third pressure is
22 equivalent to about a 30 mile per hour wind storm which
23 happens frequently in this area.
24 Q. And sir do you attribute any of the window condition
25 at One Belle Hall or the leaks to anything that the

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- 1 homeowners have done or failed to do?
- 2 A. No.
- 3 Q. Has -- do you attribute any of leaks at One Belle
- 4 Hall to clogged weep systems or clogged reservoirs?
- 5 A. No.
- 6 Q. Can you actually see 95 percent of the reservoir --
- 7 can a homeowner see 95 percent of the reservoir?
- 8 A. No, if they even knew it was there it's only a small
- 9 part they can see on each end.
- 10 Q. Is it in a location in the window that the homeowner
- 11 can get into and clean?
- 12 A. No.
- 13 Q. Are the sill inserts homeowner removable?
- 14 A. No.
- 15 Q. Sir, are you aware of an entity known as Builders
- 16 First Source?
- 17 A. Yes, I am aware of them.
- 18 Q. Have you worked -- have you come across Builders
- 19 First Source in any of your investigations or any
- 20 investigations we have discussed?
- 21 A. Yes, they've been suppliers of different products on
- 22 different projects that I've been involved with.
- 23 Q. Given your 30 year background in this industry are
- 24 you aware of what the business of Builders First Source
- 25 is?

1 A. Yes, I am.

2 Q. And what is it please?

3 A. They are a building supply and manufacturing
4 company. They cater to builders. They manufacture
5 certain products I believe roof trusses and windows; they
6 make vinyl windows.

7 Q. Do you consider them a leader in the industry?

8 A. They hold themselves out to be and I believe that
9 they are a large, relatively large, building materials
10 and supply company which sells primarily to builders as
11 opposed to like Home Depot and Lowes.

12 Q. Let me hand you what is in evidence as joint exhibit
13 number 4.

14 [Whereupon, the witness is shown document]

15 Q. Have you seen this purchase order previously?

16 A. Yes.

17 Q. If you'll turn to the general conditions on the
18 second page paragraph 4 and tell me when you are there
19 please?

20 A. Yes.

21 Q. It says quote articles furnished hereunder shall be
22 of new material of the most suitable grade of their
23 respective kind for the purposes intended. And vendor
24 warrants all to be free from defect in material, design,
25 and workmanship. Did I read that correctly?

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1 A. Yes.

2 Q. Did vendor do that? Did Builders First Source do
3 that from what you saw at One Belle Hall?

4 A. No.

5 Q. Paragraph 4(c) reads quote vendor shall verify and
6 be responsible for all measurements, dimensions, layouts,
7 colors, qualities, quantities etcetera insofar as the
8 same are pertinent to the articles or services furnished
9 hereunder. Did I read that correctly?

10 A. Yes.

11 Q. Did you see any evidence that the vendor, Builders
12 First Source, verified their qualities of the windows
13 that were supplied to One Belle Hall?

14 A. I've seen nothing in the file that I've been through
15 that indicates that they did that.

16 Q. And the building code is enacted by whom, please?

17 A. The state of South Carolina.

18 Q. The state of South Carolina propagated as the law
19 regulation?

20 A. Yes.

21 Q. And item 9 of the conditions in joint exhibit 4
22 reads quote vendor shall comply with all applicable
23 federal, state, and local laws and regulations end quote.
24 Did I read that correctly?

25 A. Yes.

1 Q. Did that occur with these windows?

2 A. No, because it didn't meet the building code
3 requirements.

4 Q. Sir, are these windows -- will they pass without
5 objection in what is called the trade, the window trade
6 and construction trade?

7 A. By carpenters selling these windows? I don't know
8 if they would recognize the shortcomings of the
9 certification.

10 Q. What about for a homeowner experiencing the windows?

11 A. I don't think they would see that or recognize that
12 until they saw that the windows were leaking. They would
13 know something was wrong.

14 Q. Do you consider these windows to be merchantable?

15 A. They shouldn't be.

16 Q. And did these windows in your opinion cause or
17 substantially contribute to damage under the windows, in
18 the walls that I showed the jury?

19 A. Yes.

20 Q. And did you see any evidence that the homeowners or
21 the installers had altered this product in any way since
22 it was delivered?

23 A. No.

24 Q. And what is the ordinary and specific purpose of a
25 window please?

1 A. To maintain the weather ability of a home or
2 structure to keep out the elements, to allow light in, to
3 keep noise out, to minimize or eliminate condensation
4 that might be on the window, to limit the amount of air
5 that comes through, and to provide ventilation if needed.

6 Q. And do these windows provide or satisfy that general
7 or specific performance?

8 A. No.

9 Q. Thank you, sir.

10 THE COURT: Very well. We'll begin cross-
11 examination.

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1 CROSS-EXAMINATION

2 BY MS. DYER:

3 Q. Doctor Whitlock, I'm Davi Dyer. You conducted a
4 number of site inspections and destructive testing on
5 these four buildings on behalf of the HOA correct?

6 A. Yes.

7 Q. And is there anything that you were prevented from
8 investigating in the course of your work?

9 A. I don't recall anything that I needed to investigate
10 that I was told not to.

11 Q. Okay. So you would agree that your client gave you
12 as much access as you required to conduct a thorough
13 investigation?

14 A. As much access as was needed. Of course there were
15 some homeowners who didn't want work done in their units
16 but we had enough. We had enough to test and discover
17 what we needed to discover.

18 Q. Okay. Product testing of windows, doors, and
19 skylights for certification purposes through the AAMA
20 that we talked about; the American Architectural
21 Manufacturers Association must be conducted at an AAMA
22 certified testing facility is that right?

23 A. That's correct.

24 Q. Okay. Your firm is not an AAMA certified testing
25 facility or doesn't have a laboratory certified thereby?

- 1 A. We don't do that type of work, no.
- 2 Q. Have you ever gone through the process of submitting
3 a new window product to that certification process for
4 testing?
- 5 A. No.
- 6 Q. Would you agree with me that generally speaking
7 before a window can be sold on the open market or
8 merchantable it needs to go through that certification
9 process?
- 10 A. That's the requirement, yes.
- 11 Q. Okay. And in this case the certifier, the
12 laboratory that tested the ESP window at least according
13 to documents that we have reviewed in this case was NCTL
14 is that right?
- 15 A. Not necessarily. It's on their letterhead but it
16 doesn't say anywhere that they did the testing and it
17 doesn't say they witnessed the testing and probably they
18 didn't do the testing. The manufacturer probably did the
19 testing and sent the results to NCTL and they wrote this
20 report.
- 21 Q. And is that permitted under the AAMA certification
22 standard?
- 23 A. No.
- 24 Q. What do you base that on?
- 25 A. I've seen that happen in other cases where I have

1 been to NCTL's laboratory to review the specimens. I've
2 quizzed them and they admitted to me that they just wrote
3 the report; they didn't do the testing.

4 Q. Do you know with certainty that that occurred in
5 this circumstance?

6 A. No, but it lacks any affirmative certification in
7 this report that they did it. And I think if they did it
8 they would have said so.

9 In fact the last sentence in the report says NCTL
10 assumes that all information provided by the client is
11 accurate and that the physical and chemical properties of
12 the components are as stated by the manufacturer.

13 I interpret that to mean that the manufacturer who
14 is their client gave them a lot of information and they
15 wrote that report on that.

16 Q. Well ---

17 A. --- and that's against what the code says. The code
18 says they either have to do it themselves or witness it.

19 Q. Well certainly the manufacturer provided the test
20 specimens correct, a window already assembled?

21 A. Not necessarily. They probably tested the specimen
22 in their own facility.

23 Q. But you don't know that with certainty?

24 A. No.

25 Q. There is about 60 give or take labs that are AAMA

1 certified. That is according to their website; does that
2 sound about right to you?

3 A. Yes, but most of them are the same company.

4 Q. And those laboratory tests are actually checked or
5 validated by a whole different category of third party
6 people sometimes known as a validator?

7 A. That's the theory but I think something breaks down
8 along the way based on my experience in reviewing what
9 happened in other cases.

10 Q. Okay. In this case Keystone Certification was the
11 validator according to documents correct?

12 A. Yes. Do you have a copy of that so I could look at
13 it? I don't think I have it here.

14 MS. DYER: Your Honor? If I could -- I don't know
15 if this is a good time to take a break. These are all
16 out of order so I can't easily reach exhibits to provide
17 to Doctor Whitlock. I just don't want to take up too
18 much of the court's time while I'm trying to figure out -
19 - the binders seem to have been rearranged.

20 THE COURT: I'm with you. In other words you would
21 like to have a little bit of time to get ready for your
22 cross-examination so it would proceed a little more
23 smoothly?

24 MS. DYER: That would be wonderful.

25